# Uniform Jury Instructions — Criminal

## FOREWORD

**Committee commentary.** — At the direction of the supreme court, the court's committee on criminal procedure began a consideration of uniform jury instructions for criminal cases in 1972. According to the American Judicature Society, New Mexico has the distinction of being among the first to adopt mandatory, uniform jury instructions for criminal cases.

The staff work for the committee was handled by the institute of public law and services of the University of New Mexico School of Law. Helene Simson, deceased, served as the first reporter. Mark B. Thompson III succeeded her as reporter in 1973. Gary O'Dowd, director of the institute and Charles Daniels of the law faculty served as consultants. Justice LaFel E. Oman acted as liaison between the committee and the supreme court.

These rules could not have been completed without the financial assistance of the governor's council on criminal justice planning; the production assistance of Tina Peterson and Judy Jones; and the general assistance of members of the institute's secretarial staff and several students of the University of New Mexico School of Law.

Our sincere appreciation to perhaps the most forward-looking appellate court in the country for its support in the drafting of these instructions and its confidence in us by approving these instructions.



## General Use Note

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.

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.

The printed version of these instructions varies the use of pronouns in referring to the defendant, witnesses and victims. The masculine singular has generally been used throughout these instructions. Pronouns should be changed in the instructions read to the jury as the situation requires.

Many of the instructions contain alternative provisions. When the instructions are prepared for use, only the alternative supported by the evidence in the case may be used. The word "or" should be used to connect alternatives, regardless of whether the word is bracketed in the printed version of the instruction.

**Committee commentary.** — The organization of UJI Criminal attempts to follow the major chapter headings of the Criminal Code.

Use of UJI Criminal is required for all criminal prosecutions filed in the district court on or after its effective date, including prosecutions for crimes which do not yet have UJI essential elements instructions. The UJI general, defense, evidence and concluding instructions must be used even if no essential elements instruction is provided. For the essential elements of crimes not contained in UJI, instructions which substantially follow the language of the statute or use equivalent language are normally sufficient. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973).

**Venue.** — The elements instructions in UJI Criminal do not require the jury to find that the crime occurred within the county of venue. See Section 30-1-14 NMSA 1978. It has been a common practice to instruct the jury on venue in New Mexico. *See, e.g., Nelson v. Cox*, 66 N.M. 397, 349 P.2d 118 (1960). However, any question of venue may be waived by proceeding to trial. *State v. Shroyer*, 49 N.M. 196, 160 P.2d 444 (1945). Consequently, the committee believed that requiring the jury to find venue facts was not necessary to a valid conviction and the prior practice was not continued.

The committee anticipates that in multiple defendant cases, it may be necessary to personalize the essential elements instructions to maintain correct identity of defendants and defenses.

## ANNOTATIONS

**Cross references.** — For the Criminal Code, *see* Section 30-1-1 NMSA 1978 et seq. and notes thereto.

## I. GENERAL CONSIDERATION.

**Test for determining when a jury instruction is appropriate.** — Appellate courts will not use the term "slight evidence" when discussing the appropriate test for sufficiency of evidence to support the giving of jury instructions, but will consider whether there is evidence sufficient to justify a reasonable jury determination as to whatever element is under consideration. *State v. Rudolfo*, 2008-NMSC-036, 144 N.M. 305, 187 P.3d 170.

**Instruction on viewing of scene.** — Where the jury viewed defendant's residence where sexual abuse of minor victim had occurred, the court did not err in refusing to instruct the jury about alterations to the arrangement of furnishings in the residence. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

**Purpose of instruction is to enlighten jury,** and an instruction which is confusing, rather than enlightening, is properly refused. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The purpose of an instruction is to enlighten a jury. It should call to the jury's attention specific issues which must be determined and should contain only statements of law to be applied in the determination of such issues. *State v. Selgado*, 76 N.M. 187, 413 P.2d 469 (1966).

**Court of appeals not to abolish instruction.** — The court of appeals is to follow precedents of the supreme court; it is not free to abolish instructions approved by the supreme court, although in appropriate situations it may consider whether the supreme court precedent is applicable. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Party entitled to instruction where evidence supports theory of case.** — A party is entitled to an instruction on his theory of the case only when there is evidence which will reasonably tend to support his theory. *State v. Rodriguez*, 84 N.M. 60, 499 P.2d 378 (Ct. App. 1972); *State v. Armstrong*, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973).

A jury may not be permitted to return a verdict of guilty for the commission of a particular crime when there is no evidence that such a crime was committed, and, thus,

the only instructions which should be submitted to the jury are those that are based on legitimate evidence. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

Instructions should be confined to issues upon which testimony was given at trial. *State v. Hollowell*, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

The defendant is entitled to an instruction on his theory of the case if the evidence reasonably supports his theory. *State v. Selgado*, 76 N.M. 187, 413 P.2d 469 (1966); *State v. Parker*, 80 N.M. 551, 458 P.2d 803 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969); *State v. Sweat*, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972); *State v. Mireles*, 84 N.M. 146, 500 P.2d 431 (Ct. App. 1972).

The court is not required to charge the jury on the defendant's theory of the case unless it is supported by substantial evidence. *State v. Mosley*, 75 N.M. 348, 404 P.2d 304 (1965).

Where there is evidence presented which supports 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, 419 P.2d 219 (1966).

**Court must instruct jury in degrees of crime charged when there is evidence** in the case tending to sustain such degrees. *State v. Ulibarri*, 67 N.M. 336, 355 P.2d 275 (1960).

**Instruction which assumes that offense charged has been committed is erroneous.** The same is true of an instruction which assumes issues for the jury such as the accused's guilt or that he committed the act charged in the indictment. *State v. Hatley*, 72 N.M. 280, 383 P.2d 247 (1963).

**Instructions should be read as a whole** and where other instructions adequately cover the law, refusal to give a separate instruction is not error. *State v. Beal*, 86 N.M. 335, 524 P.2d 198 (Ct. App. 1974).

Instructions are to be considered as a whole and, applying this rule, particular expressions should be treated as qualified by the context of other instructions. *McBee v. Atchison, T. & S.F. Ry.*, 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969).

**Instruction must be considered in light of all other instructions** given to see whether the vice of the erroneous instruction is perhaps tempered or modified. *State v. Hatley*, 72 N.M. 280, 383 P.2d 247 (1963).

**It is error to single out one instruction for undue emphasis.** *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

**Handwritten part of instruction valid. —** The defendant's objection to the handwritten part of the instruction for the reason that it calls attention to the fact that he is charged

with other sales or other crimes in the same information, and because the handwritten part calls attention to the fact that there are other counts in the information, was held invalid, as the handwritten portion was added to make the record clear as to which count had been tried. *State v. Herrera*, 82 N.M. 432, 483 P.2d 313 (Ct. App.), cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971).

**Instruction to be proper statement of law. —** If error is to be claimed concerning a court's failure to give a requested instruction to a jury, such an instruction must be proper statement of the law. *State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973).

**Instructions which substantially follow language of statute are sufficient.** *State v. Lopez*, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), and; 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970); *State v. Baca*, 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973).

**It is not error to refuse requested instruction which is misstatement of law.** *State v. Dutchover*, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973); *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Instructing jury by reference to indictment is improper.** *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

It would have been improper to instruct the jury by a reference to the indictment. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

**Instructions are sufficient if,** considered as a whole, they fairly present the issues and the applicable law. *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Where the instructions, when read and considered as a whole, fairly and correctly state the law applicable to the facts in this case, nothing more is required. *State v. Weber*, 76 N.M. 636, 417 P.2d 444 (1966); *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969); *State v. Rushing*, 85 N.M. 540, 514 P.2d 297 (1973).

**Instructions given out of sequence proper under certain circumstances. —** Although the rule provides the judge shall charge the jury before argument of counsel, this rule is not without exception. It is well recognized in New Mexico that instructions may properly be given out of sequence under certain circumstances. For example a so-called "shotgun" or supplemental instruction given after the jury had retired to their deliberations was approved in *Garcia v. Sanchez*, 68 N.M. 394, 362 P.2d 779 (1961), and instructions in response to jury questions have likewise been approved. *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

Adoption of the rule providing for the instruction of the jury prior to the argument of counsel was not intended as an invariable rule to be administered in such a manner as to deprive the trial judge of his right to give additional instructions where the situation warrants such action. *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

**And does not, of itself, establish prejudice.** — The appellant has the burden of demonstrating that he was prejudiced by the claimed error, and the mere fact that an instruction is given out of the ordinary sequence, even in plain contravention of the statute, does not of itself establish prejudice. *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

**Proper jury instruction prevents mistrial because of prejudicial juror response.** — The denial of a mistrial was not error where the prejudicial response of a prospective juror to the questions posed by the court on voir dire was unexpended and unsolicited, the court promptly offer to admonish the jury panel to disregard the remark, the juror's statement was susceptible to being cured by an admonition or cautionary instruction, each juror was initially instructed, pursuant to this jury instruction, to exercise his judgment "without regard to any bias or prejudice that you may have," and the jury returned verdicts acquitting the defendant of two charges, evidencing the fact that they acted conscientiously and impartially. *State v. Gardner*, 103 N.M. 320, 706 P.2d 862 (Ct. App.), cert. denied, 103 N.M. 287, 705 P.2d 1138 (1985).

**Principal object of requiring judge to mark on instructions "given" or "refused"** was to avoid any subsequent dispute or doubt as to what instructions were given, and where the instructions were refused and so marked by the judge with the statement of the grounds for refusal, there was a substantial compliance with the section. *Territory v. Baker*, 4 N.M. 236, 13 P. 30 (1887).

## II. ELEMENTS OF CRIME.

**Failure to instruct on essential crime elements is jurisdictional.** *State v. Montoya*, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

A jury must be instructed on the essential elements of the crime charged, and failure so to do is fundamental error because the error is jurisdictional and thus not harmless. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**All elements need not be in same instruction.** — Instructions are to be considered as a whole, and all elements of the offense need not be contained in one instruction. *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

**Instruction to be used without substantive modification.** — When a uniform jury instruction is provided for the elements of a crime, generally that instruction must be used without substantive modification. *Jackson v. State*, 100 N.M. 487, 672 P.2d 660 (1983).

**Error to alter uniform jury instruction on crime's elements.** — When a uniform jury instruction is provided for the elements of a crime, it is error to alter the instruction. *State v. Jackson*, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983).

**Time limitation instruction generally required.** — Generally, the time limitation instruction is a necessary part of the instructions; however, where the uncontradicted evidence shows the offenses were committed within the time limitation, the instruction stating the time limitation is not a required instruction, but giving it is not error. *State v. Salazar*, 86 N.M. 172, 521 P.2d 134 (Ct. App. 1974).

**Jury's consideration limited to date charged.** — Although it is not error to instruct the jury that it must find that the crime occurred within the applicable statute of limitations, it is error not to limit the jury's consideration to the date charged in the information. *State v. Foster*, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

## III. FAILURE TO INSTRUCT.

**In the case of failure to instruct, correct written instruction must be tendered.** *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 413 P.2d 469 (1966); *State v. Ramirez*, 79 N.M. 475, 444 P.2d 986 (1968).

**Oral request for written instruction avoids injustice.** — While there was a failure to comply with the provisions requiring requested instructions to be in writing, an oral request served the purpose of the rule, where it served to alert the mind of the judge that he was about to fall into error and afford him an opportunity if necessary to correct it, to avoid the injustice which might otherwise result. *State v. Reed*, 62 N.M. 147, 306 P.2d 640 (1957).

**Requested instruction refused where covered by others.** — A refusal by the trial court to give requested instructions on matters adequately covered by those given is not error. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Where the court's instructions fully covered the law of the case and the requested instructions tended to unduly emphasize the defendant's theory of the case, the court does not err in refusing the defendant's instructions. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

The instructions are to be considered as a whole and it is not error to refuse a requested instruction, even though it states a correct principal applicable to the case, if

it has been covered by other instructions given. *State v. Ramirez*, 79 N.M. 475, 444 P.2d 986 (1968).

Where every element of the defendant's requested instruction was covered in the instruction given by the court, it was not error to refuse the requested instruction. *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969); *State v. Coulter*, 84 N.M. 647, 506 P.2d 804 (Ct. App. 1973); *State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

**Misleading instruction properly refused.** — Where the defendant's requested instruction concerning the inherent improbability of evidence was not clear and did not make plain to the jury how it could apply because it did not define the terms used in the instruction, the requested instruction was misleading and the trial court properly refused. *State v. Soliz*, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

The introduction of extraneous matter into instructions which may mislead the jury or divert its mind from a consideration of the evidence pertinent to the real issues tends to mislead the jury into the belief that these other issues are before it and may cause it to bring in an improper verdict. In such cases, the instructions are erroneous and prejudicial. *State v. Salazar*, 58 N.M. 489, 272 P.2d 688 (1954).

## IV. APPEALS.

**Tender of instructions required.** — Where the defendant had no objection to jury instructions given, and did not tender an instruction, he did not preserve the error for review. *State v. McAfee*, 78 N.M. 108, 428 P.2d 647 (1967); *State v. Rodriquez*, 81 N.M. 503, 469 P.2d 148 (1970); *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

Where no instructions were tendered by the appellant, those points relied upon for reversal for failure to instruct are not properly preserved for review. *State v. Gutierrez*, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

Where the defendant did not object to a faulty instruction, nor tender a correct written instruction, such error was not preserved for review and does not constitute fundamental error. *State v. Jaramillo*, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, and cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Where a defendant fails to comply with the rule that he point out the errors committed or fails to tender a proper instruction, he is precluded from contending that the court fell into error in making the instruction given. *State v. Smith*, 51 N.M. 328, 184 P.2d 301 (1947); *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

Where the trial court fails to instruct on a certain subject, the tendering of a correct instruction is sufficient to preserve error; but to preserve error where the court has given

an erroneous instruction, the specific vice must be pointed out to the trial court by a proper objection thereto and a correct instruction tendered. *Beal v. Southern Union Gas Co.*, 66 N.M. 424, 349 P.2d 337 (1960).

Where the defendant did not submit a cautionary instruction in compliance with former Rule 51, N.M.R. Civ. P., the issue cannot be first raised on appeal. *State v. Paul*, 83 N.M. 619, 495 P.2d 797 (Ct. App. 1972).

**Objection required. —** Where no objection was made by the defendant to the giving of any certain instructions, he could not be heard to complain on appeal, even if the appellate court were to concede there was error in the instructions as claimed. *State v. Lujan*, 82 N.M. 95, 476 P.2d 65 (Ct. App. 1970); *State v. Tucker*, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

The question of an alleged error in the instructions cannot be raised in the supreme court if the trial court's attention was not called thereto. *State v. Lopez*, 46 N.M. 463, 131 P.2d 273 (1942).

Where there was neither a jurisdictional defect nor fundamental error in the instructions, nor was the asserted inadequacy called to the attention of the trial court, the asserted error was not preserved for review. *State v. Moraga*, 82 N.M. 750, 487 P.2d 178 (Ct. App. 1971); *State v. Urban*, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Where the defendant's complaint concerning the wording which submitted an issue was not raised in the trial court, no issue as to the awkward wording was presented to the trial court as required under former Rule 41, N.M.R. Crim. P. *State v. Whiteshield*, 91 N.M. 96, 570 P.2d 927 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

The failure to object to instruction waives any errors or defects in the instructions. *State v. Hatley*, 72 N.M. 280, 383 P.2d 247 (1963); *State v. Minor*, 78 N.M. 680, 437 P.2d 141 (1968); *State v. Lopez*, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969); 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

A litigant may not sit by and see the trial court about to give an erroneous instruction and one that is contrary to his theory of the case without objecting and pointing out the vice thereof, and then claim error for failing to adopt his contrary instruction. This rule is the same in civil and criminal cases. *State ex rel. State Hwy. Comm'n v. Weatherly*, 67 N.M. 97, 352 P.2d 1010 (1960).

Where the defendant failed to request in the trial court that the instructions be amplified or further define "intent" and "knowledge," he may not raise the issue as to additional instructions in the appellate court. *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974).

The defendant's contention that a handwritten notation violates that portion of former Rule 51(2)(g), N.M.R. Civ. P., which stated "no instruction which goes to the jury room

shall contain any notation" was not presented to the trial court for its ruling and therefore was not before the appellate court for review. *State v. Herrera*, 82 N.M. 432, 483 P.2d 313 (Ct. App.); 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971).

**Motion for new trial.** — Alleged errors in the trial court's instructions, not called to that court's attention by a motion for new trial, will not be considered on appeal. *Territory v. Harwood*, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

**Requested instructions part of bill of exceptions.** — Requested instructions which were refused in a criminal case should have been made a part of the record by the bill of exceptions. *United States v. Sena*, 15 N.M. 187, 106 P. 383 (1909).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1242.

Duty in instructing jury in criminal prosecution to explain and define offense charged, 169 A.L.R. 315.

Propriety and effect, in criminal case, of use of alias of accused in instructions to jury, 87 A.L.R.2d 1217.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Additional instruction to jury after submission of felony case in accused's absence, 94 A.L.R.2d 270.

Propriety and effect of juror's discussion of evidence among themselves before final submission of criminal case, 21 A.L.R.4th 444.

Propriety of juror's tests or experiments in jury room, 31 A.L.R.4th 566.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal - post-Parker cases, 35 A.L.R.4th 890.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A.L.R.4th 11.

23A C.J.S. Criminal Law § 1194.

# CHAPTER 1
# General Instructions

## Part A
## General Explanatory Matters Before and During Trial

# 14-101. Explanation of trial procedure.1

## Introduction of staff

I am Judge _____ (*name of trial judge*). My bailiff, who will escort you and assist in communicating with the court, is _____. My administrative assistant is _____. If you need anything during the trial [the bailiff] [or] the administrative assistant would be happy to help. The court [reporter] [monitor] is _____. The court [reporter] [monitor] makes a record of everything said in court.[2]

This is a criminal case commenced by the state against the defendant _____ (*name of defendant*). The defendant is charged with _____ (*common name of crime*) [in Count 1] [and _____ (*common name of crime*) in Count 2, etc.] of _____. [Each count is a separate crime.] The defendant is presumed to be innocent. The state has the burden to prove beyond a reasonable doubt that the defendant is guilty. What I will say now is an introduction to the trial of this case.

## Introduction to preliminary instructions

As the trial begins, I have some instructions for you. These instructions, along with those previously given, are preliminary only and may be changed during or at the end of the trial. All of you must pay attention to the evidence. After you have heard all of the evidence I will read the final instructions of law to you. You will also receive a written copy of all instructions. You must follow the final instructions in deciding the case.[2]

## Scheduling during trial

This trial is expected to last [until _____] [_____ days]. The usual hours of trial will be from _____ (a.m.) to _____ (p.m.) with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by _____ (a.m.). Please do not come back into the courtroom until you are called by the bailiff.[2]

## Note taking permitted

You are allowed, but not required, to take notes during trial. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the trial. Listening and watching witnesses during their testimony will help you assess their appearance, behavior, memory and whatever else bears on their credibility. At each recess you must either leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your notes and return them to you when the trial resumes. When deliberations commence you will take

your notes with you to the jury room. Ordinarily at the end of the case the notes will be collected and destroyed.[3]

**Order of trial**

A criminal trial generally begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during the course of the trial can be of considerable assistance to you in understanding the evidence as it is presented at trial. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a verdict.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this case, which you must do solely upon the evidence received in court.

It is the duty of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper, and you must not hold such objection against the objecting party. I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account, among other things, the witness's ability and opportunities to observe, memory, manner or any bias or prejudice that the witness may have and the reasonableness of the testimony considered in light of all of the evidence of the case.

No ruling, gesture or comment I make during the course of the trial should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

**Questions by jurors**

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have an unanswered question after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write it down on a piece of your note paper and give it to the bailiff before the witness leaves the stand. I will decide whether or when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may

prevent the question from being asked. If the question is not asked, please do not give it any further consideration, do not discuss it with the other jurors and please do not hold it against either side that you did not get an answer.

**Conduct of jurors**

There are a number of important rules governing your conduct as jurors during the trial. You must decide the case solely upon the evidence received in court. You must not consider anything you may have read or heard about the case outside the courtroom. During the trial and your deliberations, you must avoid news accounts of the trial, whether they be on radio, television, the internet or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the case.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I know that many of you use cell phones, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone or any other device that can access the internet through email, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, or YouTube*).

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, computer, or any other device that can access the internet; the internet, any internet service, or any text or instant messaging service; or any internet chat room, or by way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, YouTube, or Twitter*), to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

Until you retire to deliberate the case, you must not discuss this case or the evidence with anyone, even with each other, because you have not heard all the evidence, you have not been instructed on the law, and you have not heard the final arguments of the lawyers. If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to any sympathy, bias or prejudice.

To minimize the risk of accidentally overhearing something that is not evidence in this case, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Although it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

[**Exclusion of witnesses**

Witnesses, other than the parties, representatives of the state and expert witnesses will wait outside the courtroom until they are called to testify. Witnesses may not talk to other witnesses while waiting to testify. The lawyers are responsible for monitoring their own witnesses to assure that they do not enter the courtroom.][4]

The prosecuting attorney may now make an opening statement. The defendant's attorney may make an opening statement or may wait until later in the trial to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what the lawyer expects the evidence to show.

USE NOTE

1. For use after the jury is sworn and before opening statements. This instruction does not go to the jury room.

2. This section serves as a suggested guideline to the judge.

3. The court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the

conclusion of all jury deliberations. The court must instruct court personnel not to read juror notes.

4. This paragraph is given if the rule was invoked in the presence of the jury. *See* Rule 11-615 NMRA of the Rules of Evidence for witnesses who may be excluded for the courtroom.

[As amended, effective January 1, 1994; July 1, 1998; August 1, 2001; January 20, 2005; as amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011.]

**Committee commentary.** — Absent a requirement that instructions must be given prior to the introduction of evidence, the court has discretion to refuse to give any instructions until the traditional point in the trial. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972). *See* Rules of Criminal Procedure, Rule 5-607 NMRA - Order of trial. The adoption of these instructions and the amendment to Rule 5-607 NMRA of the Rules of Criminal Procedure provides the mandatory requirement for some instructions at the start of the trial.

The adoption of preliminary instructions in New Mexico Uniform Jury Instructions-Civil provides the New Mexico precedent for these instructions. Giving the jury a legal and procedural framework prior to the presentation of the evidence has been suggested by various experts on criminal jury trials. *See, e.g.*, Prettyman, Jury Instructions - First or Last?, 46 A.B.A.J. 1066 (1960); *cf.* American Bar Association, Standards Relating to Trial by Jury, §§ 3.1 and 4.6(d) (1968).

UJI 14-101 NMRA was amended in 1982 to include a general instruction to the jurors relating to the avoidance of news accounts of the trial during its progress. *See State v. Perea*, 95 N.M. 777, 626 P.2d 851 (Ct. App.), *cert. denied*, 96 N.M. 17, 627 P.2d 412 (1981).

[As amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011.]

## ANNOTATIONS

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in the ninth paragraph, deleted "representing the various parties in the lawsuit" following "Ordinarily the attorneys" in the first sentence, substituted "hand it to me" for "hand it to the court" in the second sentence, "I must" for "the court must" in the next-to-last sentence, and "if I deem" for "if the court deems" in the last sentence; and, in the last paragraph, substituted "what he expects the evidence to show" for "what he intends to prove".

**The 1994 amendment,** effective January 1, 1994, inserted the last sentence in the second paragraph, deleted "The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the lawyers" from the end of the third paragraph, deleted

"You must rely upon your individual memories of the evidence in the case" from the end of the eighth paragraph, added the ninth paragraph which leaves it to the discretion of the trial judge as to whether or not jurors will be permitted to take notes, and inserted "[she]" following "[he]" in the thirteenth and fourteenth paragraphs.

**The 1998 amendment,** effective for criminal cases filed on and after July 1, 1998, in the first paragraph, substituted "is" for "has been" in the first sentence, deleted "charge of a" in the second sentence, deleted "has pleaded 'not guilty' and" in the third sentence, and substituted "to prove" for "of proving the guilt of the defendant" and added "that the defendant is guilty" in the fourth sentence; in the second paragraph, substituted "Next" for "Then" in the second sentence; in the third paragraph, substituted "you may consider" for "will be admitted for your consideration"; in the fourth paragraph, substituted "hold such objection" for "be prejudiced" and deleted "because of such objections" in the first sentence, and substituted "it is" for "I conclude that it would be legally" and "the" for "such" in the second sentence; added the second sentence in the eighth paragraph; and in the ninth paragraph, inserted "and the court will provide you with note taking material if you wish to take them" in the first sentence, substituted "note taking" for "taking of notes" in the second sentence, and rewrote the third sentence.

**The 2001 amendment,** effective August 1, 2001, in Use Note 3, added the proviso concerning good cause not to destroy jury notes, and added the instruction to court personnel not to read jury notes.

**The 2004 amendment,** effective for cases filed on and after January 20, 2005, rewrote this jury instruction.

**The 2011 amendment,** approved by Supreme Court Order No. 11-8300-005, effective March 25, 2011, added the second, third, and fourth paragraphs to the instructions on the conduct of jurors to admonish jurors to decide the case based only on the evidence presented at trial, not to conduct any independent research about the case or consult outside sources, not to talk about the case to fellow jurors until jury deliberations begin, and not to communicate with anyone about the case by any electronic device during trial or during jury deliberations and in the fifth paragraph, admonishes the jury not to discuss the case with any one until jury deliberations begin because until deliberations begin, the jury has not heard all the evidence, the court’s instructions, and the argument of counsel for the parties.

## I. GENERAL CONSIDERATION.

**Mid-trial publicity.** — When the trial court is alerted to mid-trial publicity, the court should conduct a three-step procedure. (1) The court should determine whether the publicity is inherently prejudicial by considering whether the publicity goes beyond the record or contains information that would be inadmissible at trial, how closely related the material is to matters at issue in the case, the timing of the publication during trial, and whether the material speculates on the guilt or innocence of the accused. The court should also consider the likelihood of juror exposure by looking at the prominence of the

publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside material, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material. Any question as to the existence of prejudice should be resolved in favor of the accused. (2) If the publicity is inherently prejudicial, the court should, either on its own motion or on the motion of either party, canvass the jury as a whole to assess whether any of the jurors were actually exposed to the publicity. (3) If any of the jurors were actually exposed to the publicity, the court must conduct an individual voir dire of the juror to ensure that the fairness of the trial has not been compromised. *State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

**Failure to canvass jury about mid-trial publicity was harmless error.** — Where, on the second day of the defendants' trial for first degree murder, a small-town newspaper published an article that featured a banner headline that stated the defendant had plead guilty to racketeering and tampering with evidence charges arising from the same series of events as those involved in the defendant's murder trial, included information about the shooting and the victims the defendant was alleged to have shot, and contained statements from the prosecuting attorney implicating the defendant; the trial court frequently cautioned the jury to avoid news accounts of the trial, including a caution on the day before the article appeared; the trial court was not consulted about the article by defense counsel until two days after the article appeared; the trial court rejected defense counsel's request to voir dire the jury about their exposure to the article; defense counsel did not request that the jury be polled after the verdict to determine whether any juror was actually exposed to the article; most of the information in the article was placed before the jury during the trial; and the evidence of the defendant's guilt was overwhelming, any error that the trial court committed by rejecting the defendant's request to voir dire the jury was harmless. *State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

**Jurors are to be informed** as to the position occupied by the district attorney, as well as that occupied by defense counsel, and they are instructed as to the presumption of innocence with which the accused is clothed, the burden which the state must bear in securing a conviction, that a verdict of conviction must find support in the facts as found by them from the evidence and that statements of counsel are not evidence. *State v. Polsky*, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), and cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

**Court of appeals will assume the jury followed the court's instruction based on this section.** *State v. Stallings*, 104 N.M. 660, 725 P.2d 1228 (Ct. App. 1986).

## II. EVIDENCE FOR CONSIDERATION.

**Court cannot take judicial notice of facts.** — Where the defendant cites neither medical nor legal authority to support a requested instruction, and further, a medical

witness refuses to substantiate the defendant's theory proposed by the instruction, the court cannot take judicial notice of the fact and properly refuses the instruction. *State v. Lucero*, 82 N.M. 367, 482 P.2d 70 (Ct. App. 1971).

**Magnifying glass in jury room proper.** — Enhancement of the jury's visual acuity through use of a magnifying glass is not experimentation unless there is some indication that the magnification produced additional evidence. *State v. Griffin*, 116 N.M. 689, 866 P.2d 1156 (1993).

## III. CONDUCT OF JURY.

**Violation of court's admonition not to discuss case not assumed.** — The appellate court will not assume that the jury has violated the trial court's admonition not to discuss the case, absent proof or allegation of a violation. *State v. Doe*, 99 N.M. 456, 659 P.2d 908 (Ct. App. 1983).

**Instruction against jurors visiting crime scene.** — Trial court did not abuse its discretion in holding trial in courtroom of building where crime scene was located; any possible prejudice to defendant was cured by instructions to jury that they were not to visit the crime scene on their own. *State v. Hernandez*, 1998-NMCA-167, 126 N.M. 377, 970 P.2d 149, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

## IV. STATEMENTS BY COURT.

**Statements about facts not in evidence.** — Where defendant was convicted of first degree criminal sexual penetration of a minor and third degree criminal sexual contact of a minor; prior to trial defendant sought a psychological evaluation of the victim; at trial, defendant presented expert testimony about false reporting of child sexual abuse and the need to psychologically evaluate a child who makes a claim of abuse to minimize the possibility of false reporting; a juror asked the court whether the victim had been psychologically evaluated; the court informed the jury that issues related to testing and evaluations were subject to the jurisdiction of the court; and the court instructed the jury not to speculate regarding the existence or nonexistence of testing and evaluations, the court’s instruction to the jury was not erroneous. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92.

**Court not to comment on evidence.** — In a jury trial, the court must not in any manner comment upon the weight to be given certain evidence or indicate an opinion as to the credibility of a witness, but it is not error to advise a witness outside the presence of the jury of the consequences of perjury or to caution him about testifying truthfully, when the need arises because of some statement or action of the witness. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

**Instruction may avoid prejudicial, evidentiary error.** — The trial court can properly instruct or admonish the jury concerning an evidentiary matter in an effort to avoid

prejudice. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

**Admonition to jury generally cures prejudicial question.** — There are instances where the asking of a question is so prejudicial that an admonition to the jury to disregard the question is insufficient to cure the prejudicial effect. Generally, however, when the question is not answered and the jury is admonished to disregard the question, any prejudicial effect is cured. *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

**Instruction that defendant on his own request may testify in his own behalf,** but his failure to testify shall create no presumption against him, although it may be the subject of comment or argument, is not error. *State v. Sandoval*, 76 N.M. 570, 417 P.2d 56 (1966).

**Court statements during trial may be insufficient to rectify possible error.** — The provision of this instruction concerning statements made by the court during trial is not sufficient to rectify the possibility of error resulting from irrelevant questions by the court that might influence the jury's verdict. *State v. Caputo*, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980).

**Curative instruction held to have eradicated any prejudice which may have existed.** *State v. Shoemaker*, 97 N.M. 253, 638 P.2d 1098 (Ct. App. 1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995.

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

## 14-102. Explanation; presentation of evidence.

The state will now present its evidence.

After the state has presented its evidence, the defendant may present evidence but is not required to do so because the burden is always on the state to prove the defendant's guilt beyond a reasonable doubt.

USE NOTE

For use before the introduction of any evidence. This instruction does not go to the jury room.

**Committee commentary.** — *See* committee commentary under UJI 14-101 NMRA.

**ANNOTATIONS**

**Instructions need not be given before introduction of evidence.** — This provision does not mean that instructions must be given in a criminal case before the introduction of evidence or at any time prior to completion of the evidence. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75 Am. Jur. 2d Trial § 321 et seq.

23A C.J.S. Criminal Law §§ 1087, 1088.

## 14-103. Explanation; instructions.

You have heard all the evidence. It is now my duty to tell you the law that you must follow in this case.

USE NOTE

For use after the close of the evidence. This instruction does not go to the jury room.

**Committee commentary.** — *See* committee commentary under UJI 14-101 NMRA.

**ANNOTATIONS**

**Both the defendant and the state have a duty to tender correct instructions** to the trial court. *Jackson v. State*, 100 N.M. 487, 672 P.2d 660 (1983).

**Duty to instruct on all essential questions.** — The trial court has a duty to instruct the jury on all questions of law essential for a conviction of the crime with which the defendant is charged. *Jackson v. State*, 100 N.M. 487, 672 P.2d 660 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial §§ 1077, 1079.

23A C.J.S. Criminal Law § 1186.

## 14-104. Explanation; closing argument.

Now the lawyers will argue the case. What is said in the arguments is not evidence. It is an opportunity for the lawyers to discuss the evidence and the law as I have instructed you. The state has the right to argue first; the defense may then argue; the state may then reply.

USE NOTE

For use before closing argument. This instruction does not go to the jury room. In a capital case it is proper for the state in its closing remarks to tell the jury that the state will not seek the death penalty.

**Committee commentary.** — *See* committee commentary under UJI 14-101 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial §§ 495, 496, 535 to 538, 540.

Right of accused to additional argument on matters covered by amended or additional instructions, 15 A.L.R.2d 490.

23A C.J.S. Criminal Law § 1089.

## 14-105. Explanation; exhibit admitted.[1]

I have admitted _____ *(name of exhibit)* into evidence as an exhibit [and you may examine it].[2]

With regard to this _____ *(name of exhibit)* and any other exhibits that may be admitted into evidence during the trial, you should consider it in determining the facts.

Just as with oral testimony, you may give any exhibit such weight and value as you think it deserves in helping you to decide what happened in this case.

USE NOTE

1. If requested, this instruction should be given at least once at the appropriate time. Otherwise, it may be used at the court's discretion. This instruction does not go to the jury room.

2. Use only if the exhibit is such that it can be passed to the jury.

**Committee commentary.** — *See* committee commentary under UJI 14-101 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1666.

23A C.J.S. Criminal Law § 1243.

## 14-106. Explanation; conference at bench.[1]

The lawyers will approach the bench so that we may discuss some matters out of your hearing.

It is the lawyers' duty to offer evidence they believe proper and to object to evidence they believe improper. It is my duty to decide what evidence finally will be admitted for your consideration.

It may be necessary for us to confer about this or other matters from time to time during the trial. You must not speculate about what we are discussing.

[You may talk among yourselves, but please do not discuss the case.] [2]

USE NOTE

1. If requested, this instruction should be given at least once at the appropriate time. Otherwise, it may be used at the court's discretion. This instruction does not go to the jury room.

2. This bracketed sentence may be given solely at the discretion of the court.

**Committee commentary.** — *See* committee commentary under UJI 14-101 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75 Am. Jur. 2d Trial § 184.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 A.L.R.5th 704.

## 14-107. Explanation; jury excused.1

It is [again] [2] necessary to excuse you from the courtroom for a short while so that the lawyers and I can discuss some matters out of your hearing.

You must not speculate about what we are saying. It is the lawyers' duty to offer evidence they believe proper and to object to evidence they believe improper. You may be sure that all the evidence that is proper for you to hear in this case will be presented to you. Our conference now is to insure that no errors are made in the conduct of this trial.

Please do not discuss the case.

USE NOTE

1. If requested, this instruction should be given at least once at the appropriate time. Otherwise, it may be used at the court's discretion. This instruction does not go to the jury room.

2. For use for subsequent excusals. It is not necessary to read the instruction verbatim every time the jury is excused.

**Committee commentary.** — *See* committee commentary under UJI 14-101 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23A C.J.S. Criminal Law § 1351.

## 14-108. Explanation; closing argument; improper argument on meaning of words contained in instructions but not defined.1

The [word] [language] _____[2] is not defined in the instruction because a definition was not considered to be necessary.

During your deliberation, if you have a question as to the meaning of the [word] [language], you may make a written request for a definition and I will give you one.[3]

USE NOTE

1. For use during closing argument when counsel misstates the law concerning the meaning of a word or words not defined in the instructions. It may be given orally during closing argument or in writing after closing arguments. It may be given at the request of a party objecting to the argument, and may be given on the court's own motion.

2. Indicate the word or language, the meaning of which is in dispute.

3. Upon receipt of a request from the jury, use a UJI definition instruction if one is appropriate. If there is no appropriate UJI definition, use a dictionary definition if it correctly states the law and resolves the dispute. Otherwise, draft an instruction.

**Committee commentary.** — This instruction is designed to correct erroneous or improper jury argument involving a misstatement of the law. The UJI avoids definitions of words or terms which have an ordinary or common meaning. The UJI style may result in erroneous or misleading argument, because counsel may vary the law of the case simply by arguing that a word or phrase has a different meaning.

The General Use Note prohibits the alteration of an essential elements instruction, but the giving of a definition upon request of the jury does not constitute such an alteration.

If the jury is not given a definition, it is liable to accept erroneous arguments of counsel as to the meaning of disputed words or phrases. This instruction in effect tells the jury that counsel is misstating the law, and invites a request for a definition. Postponing the definition until it is requested will give the court ample time to select the correct definition, and will result in less interruption of the argument.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23A C.J.S. Criminal Law § 1116.

## 14-109. Explanation; cameras in courtroom.

Cameras are allowed in the courts of this state under certain guidelines. In order not to distract you, they will be located in designated areas of this courtroom. In the event any member of the jury is distracted by any member of the news media, you should immediately advise this court.

The news media has been instructed not to film this jury or any member of this jury whether in the courtroom or outside the courtroom.

The cameras may be allowed to photograph the testimony of certain witnesses and not others or only portions of the testimony of some witnesses. You are not to draw any inferences or conclusions whatsoever from this fact.

USE NOTE

If requested, this instruction may be given at least once at the appropriate time whenever cameras are present in the courtroom. Otherwise, it may be used in the court's discretion. This instruction does not go to the jury room.

**Committee commentary.** — *See* Canon 21-800 of the Code of Judicial Conduct for the guidelines for broadcasting, televising, photographing and recording of court proceedings.

In *Chandler v. Florida*, 449 U.S. 560, 574-5 (1981), the U.S. supreme court stated:

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter.

The justices concentrated much discussion on the psychological impact on the defendant, witness, attorneys and judges of having cameras in the courtroom. However, they concluded that this impact cannot be, in all cases, said to be strong enough to violate due process. There must be a specific showing that "the media's coverage of [the] case - printed or broadcast - compromised the ability of the jury to judge [the defendant] fairly." Id. at 581.

**ANNOTATIONS**

**Cross references. —** For disqualification of judge in proceedings where his impartiality might be questioned, *see* Code of Judicial Conduct, Rule 21-400 NMRA.

## 14-110. Recompiled.

**ANNOTATIONS**

**Recompilations.** — Pursuant to Supreme Court Order No. 13-8300-042, former UJI 14-110 NMRA was recompiled and amended as 4-602 and 9-513 NMRA, effective for all cases pending or filed on or after December 31, 2013.

## 14-111. Supplemental jury questionnaire.

The court, in its discretion, may allow a case-specific juror questionnaire to be distributed to the jury panel to supplement the general questionnaire originally given to the panel. This procedure is not mandatory but may be helpful. A sample questionnaire is provided below, which must be altered to fit the individual case. Questionnaires are not to be used as a substitute for voir dire questioning. The questionnaires have several purposes:

1. They allow the jurors to provide some information privately in a less intimidating atmosphere.

2. The questionnaires give the court and the parties useful information about some mundane yet important topics (for example, the jurors' knowledge of witnesses) in an efficient manner. They thus free the attorneys to question about more substantive and interesting issues and to follow up on specific topics which are highlighted by the questionnaires.

3. Questionnaires help to detect some excuses for cause earlier in the process so that the court's time is used questioning those jurors who are more likely to sit in the case, rather than those who will ultimately be excused.

4. Supplemental questionnaires give the court and parties more specific information about question areas addressed in the general questionnaire which are of particular relevance to this case.

**SAMPLE SUPPLEMENTAL JUROR QUESTIONNAIRE**

To Prospective Jurors:

Please answer each of the following questions as fully and accurately as possible. There are no right or wrong answers. You should simply answer the questions honestly and conscientiously. You must not discuss the questionnaire or the answers with anyone else.

Your answers will be given to the parties or their attorneys in the case for which you are being considered as a juror. If you do not understand a question or do not have enough room to give adequate explanation to your answer, please use the last page for

additional information. This questionnaire is to be answered as though you were in court answering questions.

The case for which you are being questioned is entitled *State of New Mexico v. John Jones* in which the State alleges that Mr. Jones committed the crimes of (1) driving while under the influence of intoxicating liquor and (2) vehicular homicide. This is a brief statement of the charges against Mr. Jones but this and the following statements are not evidence. Mr. Jones is presumed innocent and the truth, if any, of the charges against him must be proved by the prosecution beyond a reasonable doubt.

The incidents which are relevant to the case occurred on or about June 1, 1991 on the 100 block of Central Avenue in Albuquerque. At that time Wanda Smith, 25, from Albuquerque, was a passenger in Mr. Jones' car and was killed as a result of a one vehicle accident. Also riding in the automobile were Sandra Johnson and Jose Garcia. All of the passengers in the car were students at the University of New Mexico.

Your candor in answering these questions is appreciated.

Thank you for your cooperation.

NAME:

1. The possible witnesses in this case include:

*(See attached list)*

Do you know or have you heard of any of these prospective witnesses? Yes No

If yes,

which witnesses do you know?

_____

what is your relationship to the witness?

or what have you heard?

_____

2. Have you heard of the incidents or persons involved in this case in any way, including through radio, television, newspapers, the internet, discussion with friends or otherwise? Yes No

If yes,

what have you heard?

_____

what is the source of your information?

_____

3. Mr. Jones is represented by (attorneys for defendant). Do you know or have you heard of the attorneys in this case? Yes No

If yes,

which do you know? _____

how do you know? _____

what have you heard? _____

What is your feeling about sitting on a case in

which these attorneys are involved?

_____

4. The State of New Mexico is represented by

_____

(names of prosecuting attorneys). Do you know or

have you heard of these attorneys? Yes No

If yes,

which do you know? _____

how do you know? _____

what have you heard? _____

What is your feeling about sitting on a case in

which these attorneys are involved?

_____

Have you had any contact whatsoever with the Bernalillo County District Attorney's office? Yes No

If yes, explain _____

5. Have you had any contact whatsoever with the Albuquerque Police Department? Yes No

If yes,

what has been your contact?

_____

what is your feeling about the members of

the Albuquerque Police Department?

_____

6. Do you, your relatives or close associates belong to any organizations which take an official position on the use of alcohol? (MADD, SADD, certain churches, etc.) Yes No

_____

7. Do you drink alcohol? Yes No

How often? _____ What are your

feelings about the use of alcohol?

_____

8. Have you ever known anyone who was arrested for driving while intoxicated (DWI)? Yes No

Explain: _____

9. Have you, your relatives, or close associates

become familiar, through work, training, or study, with the effects of alcohol? Yes No

If so, please explain:

_____

10. Have you ever taken any courses which addressed the effects of alcohol? Yes No

Explain: _____

11. What is your knowledge, education, or training about blood alcohol levels as shown by a blood test or breath test? Please explain:

_____

12. Do you drive an automobile regularly? Yes No

What kind of car(s) do you drive?

_____

13. Have you ever been in an automobile accident? Yes No

Was anyone injured or killed? Please explain:

_____

14. How well do you feel the court system deals with crime?

_____

How well do you feel the court system deals with alcohol related crimes?

_____

15. What are your favorite movies that you've seen

within the last few years?

_____

16. From what brief description you've been given, is this a case in which you would like to serve as a juror? Yes No

Why or why not? _____

17. Please list any other information you think would be important for the court to know. Also, list here any information which you did not have room to give earlier.

If you do not understand particular questions, please list those questions.

_____

**I SWEAR OR AFFIRM THAT THE ABOVE INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF**

_____
Signature Date

[Adopted, effective January 1, 1995; as amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

**ANNOTATIONS**

**The 2008 amendment,** as approved by Supreme Court Order 08-8300-060, effective February 2, 2009, in the third sentence of the first paragraph changed "A sample questionnaire is provided below, which would be altered to fit an individual case" to "A sample questionnaire is provided below, which must be altered to fit the individual case"; and in numbered item 2 of the "SAMPLE SUPPLEMENTAL JUROR QUESTIONNAIRE", added "the internet".

## 14-112. Stipulation of fact.

The state and the defense have stipulated that _____ *(set forth stipulated fact)*. A stipulation is an agreement that a certain fact is true. You should regard such agreed facts as true.

USE NOTE

This instruction should be given at the time the stipulated fact is admitted into evidence. This instruction does not go to the jury room.

[Approved, effective January 1, 1999.]

## 14-113. Stipulation of testimony.

The parties have agreed that if called as a witness, _____ *(name of witness)* would have given the following testimony: _____ *(set forth stipulated testimony)*. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect or weight to be given that testimony.

USE NOTE

This instruction should be given at the time the stipulated testimony is admitted into evidence. This instruction does not go to the jury room.

[Approved, effective January 1, 1999.]

## 14-114. Recess instruction.

During recess, do not discuss this case with other jurors or with any other person, or allow anyone to discuss the case with you or in your presence.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I know that many of you use cell phones, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This

includes your family and friends. You may not communicate with anyone about the case on your cell phone or any other device that can access the internet, through email, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, and YouTube*).

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, or any device that can access the internet; the internet, any internet service, or any text or instant messaging service; or any internet chat room, or by way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, YouTube, or Twitter*), to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

Avoid any publicity this case may receive. Do not read, listen to or watch any news accounts of this trial.

Do not express any opinion about the case or form any fixed opinion until the case is finally submitted to you for your decision.

USE NOTE

This instruction may be given at recesses and at the end of each day of the trial. After the initial reading, the court may abbreviate the instruction as necessary.

[Approved, effective October 15, 2002; as amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011.]

**Committee commentary.** — This instruction is not mandatory. It is a summary of several admonitions contained in the explanation of trial procedure, UJI 14-101 NMRA.

**ANNOTATIONS**

**The 2011 amendment,** approved by Supreme Court Order No. 11-8300-005, effective March 25, 2011, added the second, third, and fourth paragraphs to admonish jurors to decide the case based only on the evidence presented at trial, not to conduct any independent research about the case or consult outside sources, not to talk about the case to fellow jurors until jury deliberations begin, and not to communicate with anyone about the case by any electronic device during trial or during jury deliberations.

## 14-118. Expert witnesses.

An expert witness is a witness who, by knowledge, skill, experience, training or education, has become expert in any subject. An expert witness may be permitted to state an opinion as to that subject.

You should consider each expert opinion and the reasons stated for the opinion, giving them such weight as you think they deserve. You may reject an opinion entirely if you conclude that it is unsound.

USE NOTE

This instruction may be given at the time the expert testifies or it may be given with the closing instructions or it may be used both times. UJI Criminal 14-5050 NMRA may be given when a lay witness gives an opinion.

[Approved, effective November 1, 2003.]

**Committee commentary.** — *See* the committee commentary to UJI Criminal 14-5050 NMRA.

# Part B
# Voir Dire; Oath

## 14-120. *Voir dire* of jurors by court.

**LADIES AND GENTLEMEN:**

This is a criminal case in which the defendant(s) _____ [is] [are][2] charged with _____[3] *(offense charged)*. If chosen as jurors, you will decide whether _____ *(name of defendant)* is not guilty or guilty. _____ *(name of defendant)* is presumed innocent. The burden is on the state to prove guilt beyond a reasonable doubt.

At this time you will be asked some questions. You should remember that there are no right or wrong answers to these questions. The best answer is the most honest answer. If you would prefer not to answer any question in front of other people, please tell us and we will address your concern privately.

You have previously given answers on a questionnaire given you by the court clerk. You may also add to your answers to those questions if your memory is refreshed about those questions here in open court.[4]

[Though not required, before the attorneys ask questions, the court might ask preliminary questions. For example:

1. The state is represented by _____ *(name of attorney)*. How many of you are familiar with _____ *(name of attorney)*? [What is your attitude about sitting on the case in which _____ *(name of attorney)* is representing one of the parties?[5]]

2. The defendant is represented by _____ *(name of attorney)*. How many of you are familiar with _____ *(name of attorney)*? [What is your attitude about sitting on the case in which _____ *(name of attorney)* is representing one of the parties?][5]

3. The defendant is _____ *(name of defendant)*. How many of you are familiar with _____ *(name of defendant)*? What is your attitude about sitting on this case given your familiarity with _____ *(name of defendant)?*[5]

4. Without saying what you have seen or heard, how many of you have seen or heard anything about this case from any source whatsoever, including news media, radio, television, internet, or from any other person? *(Those jurors who have received information should be questioned privately.)*[5]

5. It is estimated that this case will last _____ *(length of trial)*. Do any of you feel that you would be caused an undue hardship by sitting in this case for that time? [What is your hardship? What would be your attitude if chosen to sit in the case?][6]

6. Is there any other reason that any of you feel you should not sit on this case?

The attorneys may question the jurors.][7]

USE NOTE

1. For use before jury selection. The court may wish to address a group of prospective jurors about preliminary issues such as hardship excuses before the parties address the jurors. The parties might address the jurors in smaller groups or individually as to more sensitive issues. Sample questions have been provided above. This instruction does not go to the jury room.

2. Use only the applicable bracketed alternative.

3. Fill in the charge as stated on the charging document.

4. There are three basic sources of information used by the court in jury selection:

a. the standard jury questionnaires given to all prospective jurors which contain basic demographic information;

b. case specific supplemental questionnaires which are given to the prospective jurors in the case in question;

c. *voir dire* questioning. The questioning by the attorneys is generally used for inquiry concerning the jurors' attitudes and opinions about case-related issues *(for example, burden of proof, self defense, alcohol use, etc.)* and as follow-up to specific information highlighted by the questionnaires *(for example, a juror's knowledge of a witness)*.

5. It will sometimes be necessary to ask follow-up questions outside the hearing of the other prospective jurors. This is to avoid giving factual information to other jurors that they would not otherwise know and which might affect their view of the case.

6. If the answer to the question is yes, the bracketed additional questions may be given.

7. This instruction is an example of *voir dire* introduction, but the *voir dire* examination should be tailored to the particular needs of a specific case. The court should be sensitive to several factors about *voir dire*:

a. the size of group questioned as to a particular topic;

b. which party proceeds first;

c. the types of questions asked;

d. the length of time required for particular question areas.

These factors will depend on a number of considerations:

a. the type of case tried;

b. the sensitivity of issues. For example sexual matters, publicity or knowledge of parties might give reason for individual *voir dire*;

c. the age, experience, intelligence, education, ability to articulate or timidity of a particular juror;

d. the degree of seriousness of the case;

e. the information gathered in juror questionnaires;

f. the party seeking to exclude a juror.

[As amended, effective January 1, 1995; October 15, 2002; as amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

**Committee commentary.** — This instruction is based on the voir dire used in federal courts and is included for guidance in conducting the voir dire in criminal cases. These questions may be asked of the jurors as a group in order to save time.

**ANNOTATIONS**

**The 1995 amendment,** effective January 1, 1995, rewrote the instruction, rewrote Use Note 1, substituted "charging document" for "indictment or information" in Use Note 3, and added Use Notes 4, 5, 6, and 7.

**The 2002 amendment,** effective October 15, 2002, substituted "us" for "me and the parties" following "please tell" in the second sentence of the second paragraph.

**The 2008 amendment,** as approved by Supreme Court Order 08-8300-060, effective February 2, 2009, in the first word of Subparagraphs a, b and c of Paragraph 4 of the "USE NOTE", changed capital letters to lower-case letters.

## 14-121. Individual voir dire; death penalty cases; single jury used.1

In New Mexico there are two possible penalties for a person who has been convicted of [an intentional deliberate first degree][2] murder. Those penalties are life imprisonment or death. New Mexico has a two-phase trial in those cases in which the death penalty may be imposed. The same jury is used for both phases.

The first phase is called the innocence-guilt phase. In this phase the jury decides whether the state has proven the defendant guilty beyond a reasonable doubt. In making this decision the jury cannot consider the consequences of its verdict or any possible sentence. If the accused is found not guilty of first degree murder, the proceedings are ended for the jury. But if the defendant is found guilty of [an intentional deliberate first degree][2] murder, the same jury is brought back for a second phase of the trial called the sentencing phase. At that time the jury may hear more evidence and will hear legal instructions and arguments of counsel. The jury then decides the penalty of life in prison or death.

In this case, _____ (name of defendant), has pleaded not guilty and is presumed to be innocent. The state has the burden of proving _____ (name of defendant) guilty beyond a reasonable doubt. I am going to ask you some questions concerning your views about possible penalties for someone convicted of [an intentional deliberate first degree][2] murder. When I speak of murder, I mean a killing of a human being which is intentional, not justifiable and not legally excusable. Murder does not include killings of people which are accidental, which are committed in self-defense or for which there is some other legal defense. In other words, these questions refer only to persons who have intentionally and illegally killed another human being.

Asking these questions is a procedural requirement and the fact that you are asked questions about possible penalties does not reflect on _____'s (name of defendant) innocence or guilt in any way because _____ (name of defendant) is presumed to be innocent. In fact, these questions do not refer to this case specifically, but to your views in general. If you do not understand a question, please let me know and we will clarify the question.

1. What is your attitude about penalties for persons convicted of [an intentional premeditated first degree][2] murder?

2. Do you feel that the death penalty is the appropriate penalty for all persons convicted of [an intentional deliberate first degree][2] murder?

3. Do you feel that the death penalty is appropriate for some, but not all, persons convicted of [an intentional deliberate first degree][2] murder?

4. Do you feel that the death penalty is never an appropriate penalty for people convicted of [an intentional deliberate first degree][2] murder?

5. After answering the above questions, please tell us more about your views and why you answered as you did.[3]

USE NOTE

1. For use only in cases where the death penalty may be imposed. This instruction may be used when the same jury is used for the innocence-guilt and sentencing phases of the trial. When the defendant has exercised the option to have two separate juries, one for the innocence-guilt phase and an independent jury for the sentencing phase, UJI 14-121A NMRA shall be used. These questions are not mandatory.

2. Set forth or describe the type of murder charged which may result in the imposition of the death penalty.

3. The attorneys may now question the juror. If the answer to question 2 is yes, the defendant's attorney may question first as to the juror's attitudes. If the juror's answer to question 3 is yes, the court may alternate between the prosecuting attorney and the defendant's attorney as to who questions the prospective juror first. If the answer to question 4 is yes, the prosecuting attorney may question first about the juror's attitudes.

[As amended, effective January 1, 1995; as amended by Supreme Court Order 09-8300-043, effective November 30, 2009, for all new and pending cases.]

**Committee commentary.** — The questions included for use in cases where the death penalty may be imposed are based on requirements set forth in *Witherspoon v. Illinois*, 391 U.S. 510, rehearing denied, 393 U.S. 898 (1968). *Witherspoon* specifies that a

venireperson cannot be excluded from serving on a jury in a case where the death penalty may possibly be imposed unless the venireperson is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. 510 at 522. Both questions need not be asked. If the venireperson answers the first question in the negative, it is not necessary to ask the second question, and the venireperson may be excused. If the answer is in the affirmative, the second question must be asked. The venireperson may then be excused only if the second question is answered in the affirmative.

**ANNOTATIONS**

**The 1995 amendment,** effective January 1, 1995, inserted "Individual" in the instruction heading, rewrote the instruction, rewrote Use Notes 2 and 3, and deleted former Use Note 4, relating to further voir dire held outside the presence of the panel.

**The 2009 amendment,** approved by Supreme Court Order No. 09-8300-043, effective November 30, 2009, in the title, added "single jury used" and in the second paragraph, at the end of the fifth sentence, added "called the sentencing phase".

**Alternative sentencing procedure in death penalty cases.** — The Supreme Court amended UJI 14-121 NMRA, effective November 30, 2009, to provide the option of using two separate juries, one to determine innocence or guilt and one to determine sentencing, for all new and pending death penalty cases in district court alleging crimes committed before July 1, 2009, in order to address concerns regarding the death penalty system in New Mexico in the remaining death penalty cases. *In re Death Penalty Sentencing Jury Instructions*, 2009-NMSC-053, 147 N.M. 301, 222 P.3d 674.

**Exclusion of jurors.** — The trial court does not err in excusing jurors for cause when their beliefs on capital punishment could lead them to ignore their oath as jurors. *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983).

**Qualifying jurors for possible death penalty at beginning of trial not reversible error.** — Qualifying the jurors for a possible death penalty at the beginning of trial rather than waiting until after a determination of guilt is not reversible error. In fact, this is the only reasonable manner in which voir dire can be conducted. *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983).

**The trial court complied with this instruction** by prohibiting defense counsel from referring prospective jurors specifically to "the case we are dealing with now" and, at the same time, allowing counsel for both sides considerable latitude in asking generalized, hypothetical questions. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

## 14-121A. Individual voir dire; death penalty cases; two juries used.1

In New Mexico there are two possible penalties for a person who has been convicted of [an intentional deliberate first degree][2] murder. Those penalties are life imprisonment or death. New Mexico has a two-phase trial in those cases in which the death penalty may be imposed.

The first phase is called the innocence-guilt phase. In this phase the jury decides whether the state has proven the defendant guilty beyond a reasonable doubt. In making this decision the jury cannot consider the consequences of its verdict or any possible sentence. If the defendant is found guilty of [an intentional deliberate first degree][2] murder, a second jury is selected for a second phase of the trial called the sentencing phase. At that time the sentencing jury may hear more evidence and will hear legal instructions and arguments of counsel. The sentencing jury then decides the penalty of life in prison or death.

I am going to ask you some questions concerning your views about possible penalties for someone convicted of [an intentional deliberate first degree][2] murder. When I speak of murder, I mean a killing of a human being which is intentional, not justifiable and not legally excusable. Murder does not include killings of people which are accidental, which are committed in self-defense or for which there is some other legal defense. In other words, these questions refer only to persons who have intentionally and illegally killed another human being.

Asking these questions is a procedural requirement and the fact that you are asked questions about possible penalties does not reflect on whether _____ (name of defendant) should be sentenced to death or life in prison. In fact, these questions do not refer to this case specifically, but to your views in general. If you do not understand a question, please let me know and we will clarify the question.

1. What is your attitude about penalties for persons convicted of [an intentional premeditated first degree][2] murder?

2. Do you feel that the death penalty is the appropriate penalty for all persons convicted of [an intentional deliberate first degree][2] murder?

3. Do you feel that the death penalty is appropriate for some, but not all, persons convicted of [an intentional deliberate first degree][2] murder?

4. Do you feel that the death penalty is never an appropriate penalty for people convicted of [an intentional deliberate first degree][2] murder?

5. After answering the above questions, please tell us more about your views and why you answered as you did.[3]

USE NOTE

1. For use only in cases where the death penalty may be imposed. This instruction may be used when two separate juries are used for the innocence-guilt and sentencing phases of the trial. This instruction may be used for the sentencing jury but shall not be used for the trial jury. When one jury is used for both the innocence-guilt phase and the sentencing phase, UJI 14-121 NMRA shall be used. These questions are not mandatory.

2. Set forth or describe the type of murder charged which may result in the imposition of the death penalty.

3. The attorneys may now question the juror. If the answer to question 2 is yes, the defendant's attorney may question first as to the juror's attitudes. If the juror's answer to question 3 is yes, the court may alternate between the prosecuting attorney and the defendant's attorney as to who questions the prospective juror first. If the answer to question 4 is yes, the prosecuting attorney may question first about the juror's attitudes.

[Adopted by Supreme Court Order 09-8300-043, effective November 30, 2009, for all new and pending cases.]

**Committee commentary.** — The questions included for use in cases where the death penalty may be imposed are based on requirements set forth in *Witherspoon v. Illinois*, 391 U.S. 510, rehearing denied, 393 U.S. 898 (1968). *Witherspoon* specifies that a venireperson cannot be excluded from serving on a jury in a case where the death penalty may possibly be imposed unless the venireperson is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. 510 at 522. Both questions need not be asked. If the venireperson answers the first question in the negative, it is not necessary to ask the second question, and the venireperson may be excused. If the answer is in the affirmative, the second question must be asked. The venireperson may then be excused only if the second question is answered in the affirmative.

## 14-122. Oath to jurors on qualification and voir dire examination.

Do you swear or affirm to answer truthfully the questions asked by the judge or the attorneys concerning your qualifications to serve as a juror in this case, under penalty of law?

**Committee commentary.** — This oath or affirmation or any other oath or affirmation which generally complies with the requirements of Rule 11-603 NMRA of the Rules of Evidence must be administered prior to qualification of jurors and voir dire examination.

**ANNOTATIONS**

**Cross references.** — For Uniform Law on Notarial Acts, *see* Sections 14-14-1 to 14-14-11 NMSA 1978.

## 14-123. Oath to impaneled jury.

Do you swear or affirm that you will arrive at a verdict according to the evidence and the law as contained in the instructions of the court?

**Committee commentary.** — This oath or affirmation or any other oath or affirmation which generally complies with the requirements of Rule 11-603 of the Rules of Evidence must be administered with other pretrial instructions.

**ANNOTATIONS**

**Cross references.** — For Uniform Law on Notarial Acts, *see* Sections 14-14-1 to 14-14-11 NMSA 1978.

**Time at which to administer.** — Although jury was not sworn until after they rendered the verdict, and although the exact words of this Uniform Jury Instruction were not followed, the jury clearly understood its responsibility because of the voir dire procedures and jury instructions. *State v. Arellano*, 1998-NMSC-026, 125 N.M. 709, 965 P.2d 293.

**Purposeful failure to inform court of absence of oath.** — Failure to swear the jury could not be grounds for a reversal of defendant's conviction, where defendant's counsel knew of the failure to swear the jury but, as a tactical maneuver, purposely did not bring it to the court's attention. *State v. Arellano*, 1998-NMSC-026, 125 N.M. 709, 965 P.2d 293.

**Law reviews.** — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

# Part C
# Definitions

## 14-130. "Possession" defined.1

A person is in possession of _____ *(name of object)* when, on the occasion in question, he knows what it is, he knows it is on his person or in his presence and he exercises control over it.

[2][Even if the object is not in his physical presence, he is in possession if he knows what it is and where it is and he exercises control over it.]

[Two or more people can have possession of an object at the same time.]

[A person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession.]

USE NOTE

1. This instruction is designed to be used in any case where "possession" is an element of the crime and is in issue.

2. One or more of the following bracketed sentences may be used depending on the evidence.

**Committee commentary - Definitions in general.** — The committee worked on the premise that part of the "overkill" syndrome in New Mexico jury instruction practice was the use of numerous legal terms which required additional instructions to explain the terms. These uniform instructions, to the extent possible, avoid using terms which have to be defined. Some terms had to be defined; if the definition applies only to a specific crime or within a category of crimes, the definition is found in the elements chapter. Where a term has an ordinary or common meaning, a definition need not be given. *See State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971). If the jury asks for a definition and no definition is provided in UJI, a dictionary definition may be given.

This part of Chapter One will contain the definitions of words which are used in more than one category of instructions. The committee recognizes that experience under the UJI Criminal may indicate that additional definitions should be included and this section will be expanded accordingly.

**Possession defined.** — This instruction will probably be used most often in property and drug cases. The basic possession definition was derived from the following New Mexico decisions: *State v. Mosier*, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971); *State v. Maes*, 81 N.M. 550, 469, P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970); *State v. Romero*, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968); *State v. Favela*, 79 N.M. 490, 444 P.2d 1001 (Ct. App. 1968); *State v. Giddings*, 67 N.M. 87, 352 P.2d 1003 (1960).

The bracketed paragraphs all deal in some way with the problem of constructive possession. The definitive decision relied on by the committee for the concept of constructive possession was that of *Amaya v. United States*, 373 F.2d 197 (10th Cir. 1967). *Amaya* was cited with approval in State v. Montoya, 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973). *See also State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972). For recent compilations of cases dealing with possession of narcotics where the defendant did not have exclusive possession of the premises or vehicle, see Annot., 57 A.L.R.3d 1319 (1974) and Annot., 56 A.L.R.3d 948 (1974). *See also State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974); *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974); *State v. Bidegain*, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975).

Unless the statute requires possession of a certain amount of a prohibited substance, [e.g. Section 30-31-23 B(2) & (3) NMSA 1978] possession of any amount is prohibited. *See State v. Grijalva*, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973).

## ANNOTATIONS

**Insufficient evidence.** — The state's evidence that the defendant had an ongoing connection with the house where methamphetamine residue was seized and that clothing appropriate to the defendant's gender was present in a bedroom in which the methamphetamine residue was discovered did not give rise to reasonable inferences that defendant knew of the presence of the methamphetamine residue and exercised control over it in order to establish that the defendant had constructive possession of the methamphetamine residue where the evidence also established that the defendant's access to the house was not exclusive, other individuals had access to the areas of the house where the methamphetamine residue was discovered, and the methamphetamine was present in trace amounts and concealed from view in a private area of the house. *State v. Maes*, 2007-NMCA-089, 142 N.M. 276, 164 P.3d 975.

**Proximity to gun present in car alone** does not constitute possession. *State v. Garcia*, 2005-NMSC-017, 138 N.M 1, 116 P.3d 72.

**Sufficient evidence to support inference of knowledge.** — Where defendant placed his beer bottle under the seat of the car in a position right next to the gun, such that it would be hard for anyone not to be aware of the gun, and upon getting out of the car, he acted in a manner that arguably showed a consciousness of guilt, and finally, defendant was sitting on the ammunition clip that matched the gun, there was sufficient evidence to support an inference of knowledge of the gun. *State v. Garcia*, 2005-NMSC-017, 138 N.M 1, 116 P.3d 72.

**Definitions not given when word has ordinary meaning.** The instructions are drafted using words with ordinary meanings to avoid the "overkill" syndrome of previous practice. *State v. Torres*, 99 N.M. 345, 657 P.2d 1194 (Ct. App. 1983).

**Ingestion not possession.** — The definition of possession found in this rule specifically provides that possession occurs when the thing possessed is "on" the person not "in" the person. Accordingly, in a prosecution for possession of cocaine, the only way that a positive drug test was relevant was as circumstantial evidence that the defendant possessed the drug at the time of the ingestion. *State v. McCoy*, 116 N.M. 491, 864 P.2d 307 (Ct. App. 1993), rev'd in part on other grounds sub nom., *State v. Hodge*, 118 N.M. 410, 882 P.2d 1 (1994).

**Waiver of failure to give instruction.** — The defendant waives any claim of error predicated upon the court's failure to give this instruction where he initially tenders an instruction defining "possession," then later withdraws it. In order to assert error based on the denial of an instruction for a definition, the defendant must make a clear and unequivocal request therefor. *State v. Aragon*, 99 N.M. 190, 656 P.2d 240 (Ct. App. 1982).

## 14-131. "Great bodily harm" defined.

Great bodily harm means an injury to a person which [creates a high probability of death][1] [or] [results in serious disfigurement] [or] [results in loss of any member or organ of the body] [or] [results in permanent or prolonged impairment of the use of any member or organ of the body].

USE NOTE

1. Use only the applicable bracketed elements established by the evidence.

**Committee commentary.** — This instruction was derived from the statutory definition of great bodily harm. *See* Section 30-1-12A NMSA 1978. In *State v. Hollowell*, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969), the court held that choking the victim created a "high probability of death." In *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966), forcibly tattooing the victim with India ink was held to involve great bodily harm; presumably this constitutes "serious disfigurement," although it was not so characterized by the court. In *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971), the court held that evidence that the victim was hit in the eye with a fist by the defendant and never regained sight showed a "permanent or protracted loss or impairment of the function of a member or organ of the body."

**ANNOTATIONS**

**Cross references.** — For definition of "great bodily harm", *see* Section 30-1-12A NMSA 1978.

**No great bodily harm found.** — A defendant's requested instruction that "the force used by the defendant would not ordinarily create a substantial risk of death or great bodily harm," was inappropriate where there was no evidence that the victim suffered great bodily harm. *State v. Lara*, 110 N.M. 507, 797 P.2d 296 (Ct. App. 1990).

**Law reviews.** — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

## 14-132. Unlawfulness as an element.1

In addition to the other elements of _____ (*name of offense*) [as charged in Count _____][2], 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[3]][4]:

[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][5] [penetration] [confinement] [_____ (*relevant act*)] for purposes of [reasonable medical treatment][5] [nonabusive (parental care) (or) (custodial care)] [lawful arrest, search or confinement] [_____ (*other lawful purpose*)].

USE NOTE

1. This instruction is intended to aid the court and the parties in preparing an instruction when the statutory definition of the offense includes the term "unlawful" and an issue is raised as to the lawfulness of the defendant's act. The examples in the second and third paragraphs address offenses that include the term "unlawful" as part of the definition of the offense. These offenses include certain assault and battery offenses, sex offenses and false imprisonment or kidnapping offenses. The examples suggested in the bracketed language have been taken from controlling cases addressing particular offenses and are not applicable to every case.

If the defendant is a psychotherapist who is accused of unlawfully touching a patient, *see* Subsection B of Section 30-9-12 NMSA 1978 for lawful touchings by a psychotherapist. *See* Section 30-9-10 NMSA 1978 for the definitions of patient and psychotherapist.

This instruction is not intended to be all inclusive. Appropriate language should be tailored in specific cases.

If this instruction is given, add to the essential elements instruction of the offense charged, "The defendant's act was unlawful".

This instruction need not be given if the unlawfulness element is included in another instruction such as self-defense or defense of another. *See* UJI 14-5181 to 14-5184 NMRA if the issue of "lawfulness" involves self-defense or defense of another.

2. Insert count number if more than one count is charged.

3. If the bracketed "without consent and" is given, one of the three alternatives that follows must be given. One or more of the three alternatives may be given without the bracketed "without consent and".

4. Use only applicable bracketed alternative or alternatives. If the evidence raises a particular issue of lawfulness that is not addressed in these alternatives, supply appropriate descriptive language in the blanks provided.

5. Use only applicable bracketed alternative or alternatives.

[As amended, effective January 20, 2005.]

**Committee commentary.** — A number of New Mexico statutes, primarily those involved with various kinds of touchings of others, include as an element of the offense the term "unlawful", in recognition of the fact that it is difficult to define in each criminal statute the exact line in every case between the kinds of conduct that may be considered societally acceptable and even necessary, such as parental care, medical procedures, law enforcement activities, etc., and those which are punishable. *See, e.g., Territory v. Miera*, 1 N.M. 387 (1866); *State v. Osborne*, 111 N.M. 654, 808 P.2d 624 (1991). If the defendant "introduces some evidence of lawfulness, the court is under a duty to instruct on the state's burden to provide unlawfulness beyond a reasonable doubt". *State v. Johnson*, 1996 NMSC-075, 122 N.M. 696, 930 P.2d 1148 (1996) (following *State v. Parish*, 118 N.M. 39, 42, 878 P.2d 988, 991 (1994) and reversing conviction for aggravated assault for failure to instruct the jury on the defense of citizen's arrest.)

As *Miera*, 1 N.M. 387 pointed out, the term "unlawful" was an essential element of the offense of aggravated assault. The indictment was dismissed for failure to contain the allegation.

“There are many strikings which are not unlawful, and so are not offenses which the law has punished; such as parents correcting their children, or an executive officer executing the sentence of a court upon a person convicted of a crime. So, too, one man may lawfully beat, bruise and wound another in the necessary defense of himself, wife or child. By using the word 'unlawfully' in the statute, the legislature intended to discriminate between acts of violence which may be lawful and those which are not.”

1 N.M. at 388.

In *Osborne*, the Supreme Court held that it was an error to fail to instruct the jury on the definition of "unlawful" as a distinct element of the offense of criminal sexual contact of a minor. As the court noted, "the legislature set out unlawfulness as a distinct component of the offenses described in the CSCM and CSPM statutes." 111 N.M. at 659.

“There are any number of circumstances where such a touching [of the intimate parts] is not merely 'excusable or justifiable' but entirely innocent, such as a touching for the purposes of providing reasonable medical treatment, nonabusive parental or custodial care, or, in some circumstances, parental or custodial affection. The necessity of establishing an excuse or justification for an act should not be imposed upon a

defendant until the state has established that conduct has occurred which, under common standards of law and morality, may be presumed criminal."

111 N.M. at 660.

Even where a touching has been done in a rude, insolent or angry manner, as with the simple battery statute, Section 30-3-4 NMSA 1978, the legislature has required unlawfulness as a separate element before the touching is a criminal offense. This would avoid the unfair imposition of criminal liability on an insolent hairdresser, a rude doctor or an angry police officer whose touchings are for noncriminal purposes. If the battery is of a peace officer, the Supreme Court has held that to prove that the conduct was "unlawful" the state must prove that the officer was injured, that the conduct threatened the officer's safety or that the conduct meaningfully challenges the officer's authority. *See State v. Padilla*, 122 N.M. 92, 920 P.2d 1046 (1997).

Former UJI 14-984 NMRA, defining "unlawful" for the crime of criminal sexual penetration or contact has been merged into this instruction and 14-984 NMRA has been withdrawn. There is no current instruction explicitly applicable to the various offenses in which unlawfulness is a separate and distinct element. The committee concluded that the best way to address this problem was to promulgate a general definitional instruction which should be used for appropriate offenses and tailored to the appropriate factual issues in each case. This will avoid having to create separate definitions of unlawfulness for each offense in which it is an element.

## ANNOTATIONS

**Cross references.—** For lawful touching of a patient by a psychotherapist, *see* Subsection B of Section 30-9-12 NMSA 1978

For the definitions of "patient" and "psychotherapist", *see* Section 30-9-10 NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, inserted the bracketed "[without consent]" at the beginning of the second paragraph, and inserted "search" after "arrest," and before "or confinement" at the end of the essential elements. The 2004 amendment also added the second paragraph of Use Note 1 and Use Note 3 providing when "without consent" is to be given.

**When parent's behavior in discipling child** falls within the parental privilege, the act is not unlawful. *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174, 117 P.3d 980.

**Consent is not a defense when the victim is a statutorily defined child. —** The consent of a statutorily defined child is legally irrelevant to the unlawfulness element of criminal sexual penetration. *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where the victim was fourteen years of age; defendant was forty-six years of age; the victim voluntarily agreed to have sex with defendant; and defendant was charged with criminal sexual penetration in the second degree and criminal sexual penetration in the fourth degree, the state did not improperly instruct the grand jury on the unlawfulness element for the charges when the state omitted language that the act must have been done "without consent" of the victim, because the consent of a statutorily defined child is legally irrelevant to the unlawfulness element of both charges. *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Consent defense in criminal sexual penetration cases.** — Effective 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, 138 N.M. 254, 118 P.3d 762, cert. granted, 2005-NMCERT-008.

## 14-133. "Negligence" and "recklessness"; defined.[1]

For you to find that the defendant [acted][2] [recklessly] [with reckless disregard] [negligently] [was negligent] [_____][3] in this case, you must find that the defendant acted with willful disregard of the rights or safety of others and in a manner which endangered any person or property[4].

USE NOTE

1. For use when "negligence", "reckless", "recklessly", "knew or should have known" or similar term or phrase is an element of the crime charged. This instruction should not be given with any elements instruction which already adequately defines the concept of a defendant's criminal negligence set forth by the Supreme Court. *See for example State v. Yarborough,* 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131 and *Santillanes v. State,* 115 N.M. 215, 849 P.2d 358 (1993).

2. Use only applicable alternative.

3. Set forth the term or terms used in the elements instruction (or statute if no elements instruction exists) for criminal negligence if the previous alternatives are not used in the essential elements instruction of a "criminal negligence" offense.

4. If the statutory offense identifies some injury other than to a person or the property of others, set forth statutory language.

[Adopted, effective January 1, 1999.]

**Committee commentary.** — This instruction was taken from the definition set forth in *State v. Yarborough,* 1996-NMSC-068, P20, 122 N.M. 596, 930 P.2d 131 and predecessor cases. This instruction should be used when the offense involves criminal

negligence and the essential elements instruction, or other instruction to be used with the essential elements instruction, does not define the term "reckless", "negligence" or similar term. See *Santillanes v. State,* 115 N.M. 215, 220, 849 P.2d 358, 363 (1993) citing with approval *Raton v. Rice,* 52 N.M. 326, 365, 199 P.2d 986, 987 (1949) (involuntary manslaughter) as follows:

When a crime is punishable as a felony, civil negligence ordinarily is an inappropriate predicate by which to define such criminal conduct.

Various courts have defined criminal negligence in slightly different ways. This instruction simplifies and standardizes the definition of criminal negligence.

## 14-134. "Proximate cause"; defined.1

In addition to the other elements of the crime of _____ *(name of crime)* as set forth in instruction number _____[2], the state must also prove to your satisfaction beyond a reasonable doubt that:

1. _____ *(name of victim)* was _____ *(describe injury or harm)*;

2. The injury or harm was the foreseeable result of the defendant's act; and

3. The act of the defendant was a significant cause of the injury or harm.

The defendant's act was a significant cause of the injury or harm if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the injury or harm and without which the injury or harm would not have occurred.

[There may be more than one significant cause of the injury or harm. If the acts of two or more persons significantly contribute to the cause of the injury or harm, each act is a significant cause of the injury or harm.][3]

USE NOTE

1. This instruction should be used in cases in which causation is an issue. It is not to be used in homicide cases. *See* Instructions 14-251 and 14-252.

2. Insert here the number assigned by the court to the elements instruction for the named offense.

3. Use the bracketed language if there is evidence that the acts of more than one person contributed to the injury or harm to the victim.

[Approved, effective January 1, 2000.]

**Committee commentary.** — In response to the Supreme Court's decision in *State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143, the committee fashioned an instruction to be given when causation is a question of fact to be resolved by the jury. In *Munoz*, the Court set out the two elements for finding that the defendant's act was the proximate cause of a harm or injury: (1) that the defendant's act was a significant cause of the harm; and (2) that the harm or injury was a foreseeable result of the defendant's act. In addition, the instruction explains the concept of independent, intervening cause as suggested in the Munoz opinion.

# Part D
# General Instructions

## 14-140. Underlying felony offense; sample instruction.1

In New Mexico, the elements of the crime of _____ are as follows: _____ *(summarize elements of offense)*[2].

USE NOTE

1. For use in any case in which an underlying felony offense is not charged, but is an element of an offense charged. For example, see UJI 14-202, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-601, 14-954, 14-971, 14-1630, 14-1632, 14-1697, 14-2204, 14-2205, 14-2206, 14-2801, 14-2820, 14-2821, 14-2822, and 14-7015.

2. Summarize the essential elements instruction, omitting venue and date.

## 14-141. General criminal intent.1

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].[2] 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].[2]

USE NOTE

1. This 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.

2. Use bracketed portion only if applicable.

**Committee commentary.** — The adoption of this mandatory instruction for all nonhomicide crimes requiring criminal intent supersedes cases holding that a general intent instruction is not required if the crime includes a specific intent. *See, e.g.*, *State v. Dosier*, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975); *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974). The adoption of the instruction also supersedes dicta in *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), that a general criminal intent instruction is inconsistent with an instruction which contains the element of intent to do a further act or achieve a further consequence, the so-called specific intent element. Compare, *State v. Gunzelman*, supra, with *State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975). For a further discussion on the law of criminal intent, see the reporter's addendum to this commentary, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

## ANNOTATIONS

**Applicability of instruction.** — This instruction is a mandatory instruction adopted by the supreme court for use in all cases except crimes without the element of intent, first and second degree murder and voluntary manslaughter. *State v. Sheets*, 94 N.M. 356, 610 P.2d 760 (Ct. App. 1980) (decided prior to 1981 amendment).

**Failure to give this instruction amounts to jurisdictional error** which can be raised for the first time on appeal. *State v. Otto*, 98 N.M. 734, 652 P.2d 756 (Ct. App. 1982).

**General intent instruction is not inconsistent** with a specific intent instruction. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003.

**Instruction not necessary for specific intent crime.** — Trial court did not err in refusing to give this general intent instruction, where the crime with which defendant was charged, escape from inmate-release program, was a specific intent crime. *State v. Tarango*, 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987), overruled on other grounds, *Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990).

**General intent instruction.** — Court did not err in giving general intent instruction in trial of defendant for conspiracy to commit trafficking by manufacture and possession of drug paraphernalia, which require specific intent. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006.

**Failure to follow the Use Note for a uniform jury instruction is not jurisdictional error** which automatically requires reversal. *State v. Doe*, 100 N.M. 481, 672 P.2d 654 (1983).

The failure to give this instruction does not automatically require reversal solely because the Use Note provides that it must be given, when there was no tender of the proper instruction or objection to not giving the instruction. *State v. Doe*, 100 N.M. 481, 672 P.2d 654 (1983).

A failure to follow a Use Note does not require automatic reversal. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003.

**Jurisdictional error for a failure to instruct upon criminal intent can be avoided** in two ways: (1) by defining criminal intent in terms of "conscious wrongdoing" or its equivalent; or (2) by instructing the jury substantially in terms of the section if it defines the requisite intent. *State v. Montoya*, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

**Instruction sufficiently covers conscious wrongdoing** in the words "purposely does an act which the law declares to be a crime"; a separate reference to conscious wrongdoing is not required. *State v. Sheets*, 94 N.M. 356, 610 P.2d 760 (Ct. App. 1980).

**Existence or nonexistence of general criminal intent is a question of fact** for the jury, and the general intent instruction submitted the issue to the jury as a question of fact; no presumption was involved in the instruction given. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**Intent is subjective and is almost always inferred from other facts in case,** as it is rarely established by direct evidence. *State v. Frank*, 92 N.M. 456, 589 P.2d 1047 (1979).

**Intent to commit felony includes general criminal intent of purposeful act. —** When one intends to commit a felony or theft under the burglary statute, one also has the general criminal intent of purposely doing an act, even though he may not know the act is unlawful. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

**Jury must have more than the suggestion of necessity of criminal intent.** It must be instructed on the essential element of a "conscious wrongdoing." *State v. Bachicha*, 84 N.M. 397, 503 P.2d 1175 (Ct. App. 1972).

Where intent is an essential element of the crime charged, the jury must be instructed on the intent involved. The instruction need not use the word "intent," but the words used must inform the jury of any intent which is an element of the crime charged. *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

**Mere mention of "intent" somewhere in instructions is not sufficient** to avoid jurisdictional error for the failure to instruct on criminal intent. *State v. Montoya*, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

**Omission of words "when he purposely does an act which the law declares to be a crime"** is not harmless and is reversible error. *State v. Curlee*, 98 N.M. 576, 651 P.2d 111 (Ct. App. 1982).

**Ignorance of law no defense. —** The bracketed language at the end of the second sentence of this instruction embodies the general rule that, for a general intent crime,

ignorance of the law is no defense. *State v. McCormack*, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).

**Giving this instruction in tax fraud case is not per se reversible error.** *State v. Martin*, 90 N.M. 524, 565 P.2d 1041 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977), overruled on other grounds, *State v. Wilson*, 116 N.M. 793, 867 P.2d 1175 (1994).

**This instruction is required in prosecutions for false statements on tax returns.** *State v. Sparks*, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985).

If UJI 14-141 is given in a prosecution for making false statements on tax returns, there is no need for a separate instruction of willfulness. *State v. Sparks*, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985).

**This instruction and UJI 14-601 correctly state law applicable to larceny.** *Lopez v. State*, 94 N.M. 341, 610 P.2d 745 (1980).

**Where defendant claims absence of intent due to intoxication, issue is for jury.** *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

**But refusal of instructions on effect of intoxication does not deny defense. —** The defendant's argument that since voluntary intoxication is not a defense to the existence of a general criminal intent, a general criminal intent is always conclusively presumed from the doing of the prohibited act and that conclusive presumptions are unconstitutional, thus, the refusal of requested instructions on the effect of intoxication on the defendant's ability to form a general criminal intent denied the defendant the right to put on a defense, was patently meritless. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**Matter of concerning the requisite intent is one of substantial public interest** that should be decided by the New Mexico Supreme Court instructions. *State v. Puga*, 84 N.M. 756, 508 P.2d 26 (Ct. App.), aff'd, 85 N.M. 204, 510 P.2d 1075 (1973); *State v. Fuentes*, 84 N.M. 757, 508 P.2d 27 (Ct. App.), aff'd, 85 N.M. 274, 511 P.2d 760 (1973); *State v. Vickery*, 84 N.M. 758, 508 P.2d 28 (Ct. App.), aff'd, 85 N.M. 389, 512 P.2d 962 (1973); *State v. Boyer*, 84 N.M. 759, 508 P.2d 29 (Ct. App. 1973).

**Instruction properly given for violation of Imitation Controlled Substances Act, 30-31A-1 NMSA 1978.** *State v. Castleman*, 116 N.M. 467, 863 P.2d 1088 (Ct. App. 1993).

**Law reviews. —** For article, "New Mexico Mens Rea Doctrines and the Uniform Criminal Jury Instructions," see 8 N.M.L. Rev. 127 (1978).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

For note, "Criminal - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1251, 1256, 1325, 1416.

23A C.J.S. Criminal Law § 1198.

# CHAPTER 2
# Homicide

# Part A
# First Degree Murder

## 14-201. Willful and deliberate murder; essential elements.

For you to find the defendant guilty of first degree murder by a deliberate killing [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ *(name of victim);*

2. The killing was with the deliberate intention to take away the life of _____ *(name of victim)* [or any other human being][2];

3. This happened in New Mexico on or about the _____ day of _____, _____.

A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.[3]

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use the bracketed phrase if the evidence shows that the defendant had a deliberate design to kill someone but not necessarily the victim.

3. If the jury is to be instructed on more than one degree of homicide, UJI 14-250 must also be given.

**Committee commentary.** — *See* Section 30-2-1A NMSA 1978.

In New Mexico, evidence that the person killed is the same as the person named or indicated in the charge as having been killed is part of the proof of the corpus delicti. *State v. Vallo*, 81 N.M. 148, 464 P.2d 567 (Ct. App. 1970).

The instruction does not use the words "malice aforethought," "deliberation" or "premeditation" (previously defined as "express malice") because those concepts are included within the deliberate intention to take the life of a fellow creature. In *State v. Smith*, 26 N.M. 482, 194 P. 869 (1921), the supreme court held that the malice required for a willful and deliberate murder was something more than the ordinary, premeditated malice aforethought. A willful and deliberate murder requires express malice, the deliberate intention to unlawfully take away the life of a fellow creature, also known as intensified or first degree malice. See former Section 30-2-2A NMSA 1978; *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975); *State v. Smith*, supra, 26 N.M. at 491. *Smith* also makes it clear that express malice or deliberate intention is the specific intent required for first degree murder and is not required for common-law or second degree murder. Id. at 492.

Former Section 30-2-2A NMSA 1978 stated that express malice may be manifested by external circumstances capable of proof. *Smith* also noted that malice is normally inferred from the facts. *State v. Smith*, supra, 26 N.M. at 491-492. *See also, State v. Garcia*, 61 N.M. 291, 299 P.2d 467 (1956). Numerous New Mexico cases, *see, e.g.*, *State v. Duran*, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972), have stated that malice may be "implied." It is believed that the courts mean that malice is inferred and not implied. *See* Perkins, "A Reexamination of Malice Aforethought," 43 Yale L.J. 537, 549 (1934); Oberer, "The Deadly Weapon Doctrine - Common Law Origin," 75 Harv. L. Rev. 1565, 1575 (1962).

The New Mexico Supreme Court in *State v. Smith*, supra, indicated that former 30-2-2B NMSA 1978 did not actually define implied malice but provided rules of evidence for implying malice as a matter of law. *State v. Smith*, supra, 26 N.M. at 492; *see also, Perkins*, supra, 43 Yale L.J. at 547; LaFave and Scott, Criminal Law 529-30 (1972). Malice may not be "implied," in the sense used in the statute, in a first degree murder case. *State v. Smith*, supra, 26 N.M. at 492; *State v. Ulibarri*, 67 N.M. 336, 339, 355 P.2d 275 (1960). "Express malice" is adequately covered by "deliberate intention." "Implied malice" is limited to second degree murder. It was previously defined by 30-2-2B NMSA 1978 to mean a "wicked and malignant heart" murder. This is now defined as

second degree murder, acts creating a strong probability of death or great bodily harm. This legislative definition of second degree murder is the same as a "wicked and malignant heart" murder. *See Perkins*, supra at 769-770 and LaFave and Scott, supra at 529. Therefore, the 1980 amendments of the legislature did not change the intent required for either first degree or second degree murder.

If the state charges the special "transferred intent" first degree murder under Section 30-2-1A NMSA 1978 and there is evidence to submit that theory to the jury, then the bracketed provision explained in Use Note No. 2 should be given. It is not necessary to give any other transferred intent instruction.

Section 30-2-1 NMSA 1978 states second degree murder is a lesser included offense of first degree murder. In cases where the death penalty is a possibility, *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), requires that the jury be instructed on all lesser included offenses. In cases where there is evidence of what was formerly defined as "implied malice," UJI 14-210 must also be given. It should not be given when the only evidence presented is that the killing was willful, deliberate and premeditated. *See State v. Garcia* and *State v. Duran*, supra, for cases involving "implied" or "inferred" malice. Malice may be implied when the defendant used a gun or other deadly weapon and inferred when the defendant used excessive force or extreme brutality.

Murders by poison, torture or lying in wait are no longer included in the definition of first degree murder in Section 30-2-1A NMSA 1978, as amended by Laws 1980, Chapter 21, Section 1. The instructions for these offenses have been withdrawn and are not to be used for any such murders committed after May 14, 1980. It is still possible to prosecute for first degree murder for such murders if the malice and deliberation required to prove first degree murder, previously supplied by the means, is found.

## ANNOTATIONS

**Compiler's notes.** — Former UJI Crim. 2.01, Murder by poison; essential elements, UJI Crim. 2.02, Murder by means of lying in wait; essential elements, and UJI Crim. 2.03, Murder by torture; essential elements, were withdrawn effective May 14, 1980, and are not applicable to murders committed after that date.

***Corpus delicti* rule.** — A defendant’s extrajudicial statements may be used to establish the *corpus delicti* when the prosecution is able to demonstrate the trustworthiness of the confession and introduce some independent evidence of a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

**Proof of *corpus delicti*.** — Where defendant was charged with first-degree abuse of a child resulting in death; the child died without any physical signs of trauma; defendant confessed to suffocating the child with a blanket; the evidence confirmed the statements made by defendant in the confession; the evidence also showed that the child was in normal respiratory and cardiovascular health on the day prior to the child’s death, the

child had not been breathing before the child was taken to an emergency room even though there was no underlying medical condition that would kill the child, defendant made false statements to police and medical personnel about the child's medical record suggesting that defendant portrayed the child as chronically sick to cover up a crime, and the cause of death was consistent with a blockage to the mouth and nose, the *corpus delicti* of the crime was established because the evidence corroborated the trustworthiness of defendant's confession and independently showed that the child died from a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

**Instruction does not change elements of first-degree murder.** — This instruction does not change the necessary elements to be proven for a conviction of first-degree murder, and it was not error to use it in advance of the effective date. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

**Implied malice.** — While malice may be implied, it is to be borne in mind that implied malice does not suffice to constitute murder in the first degree in this jurisdiction. *State v. Ulibarri*, 67 N.M. 336, 355 P.2d 275 (1960).

**Failure to refer to malice in homicide instructions was deliberate** and not an inadvertent omission. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Not error to use instructions before effective date.** — It was not error for the trial court to use UJI Crim. before the effective date for their use, if the instructions used fairly and correctly stated the applicable law for the jury to follow in arriving at its verdict. *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976).

Although UJI Crim. were to be used in criminal cases filed in the district court after September 1, 1975, there is nothing that precludes the use of such instructions prior to that date. *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976).

**Omission of element of unlawfulness.** — Trial court did not commit fundamental error by omitting the element of unlawfulness from the elements instruction on deliberate-intent first-degree murder when the jury also received a separate proper instruction on self-defense. *State v. Cunningham*, 2000-NMSC-009, 128 N.M. 711, 998 P.2d 176.

**And not error to refuse instructions which were cumulative.** — Where the trial court instructed the jury as to the statutory definition of "murder in the first degree," in another instruction listed the essential elements thereof and instructed the jury that each of these elements must be proven to the jury's satisfaction beyond a reasonable doubt, defined each of the essential terms, such as "willfully," "express malice," "deliberation," etc.; and gave an instruction concerning the effect on the defendant's state of mind from intoxication, it was not error to refuse the defendant's requested instructions, which were merely cumulative of the court's instruction. *State v. Rushing*, 85 N.M. 540, 514 P.2d 297 (1973).

**Instruction on all offenses required prior to deliberation.** — Even though the jury may be instructed to consider first-degree murder and make a determination before moving on to any lesser offenses, the jury must also be instructed on each of the crimes charged, and the elements of each, before deliberation ever begins. *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

**Deliberate intent required for attempted first-degree murder.** — Where defendant shot at officers to escape apprehension during prison break, there was insufficient evidence that defendant had formed a deliberate intent to kill as opposed to mere impulsive reactions; therefore, there was insufficient evidence to convict him for attempted first-degree murder. *State v. Hernandez*, 1998-NMCA-167, 126 N.M. 377, 970 P.2d 149, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

**Where requisite deliberate intention jury issue.** — Where a defendant relies upon the testimony of experts to support his defense that he was insane and that he had not formed the requisite deliberate intention, and where the trial judge determines that the question of the defendant's sanity is a jury issue, the court does not err in refusing to direct a verdict to the effect that the defendant could not have formed a deliberate intention. *State v. Dorsey*, 93 N.M. 607, 603 P.2d 717 (1979).

**Where evidence did not support instruction.** — A defendant convicted of first-degree murder for killing the victim by striking her with a cinder block after allegedly raping her was entitled to a reversal of his conviction, even in the absence of objection by the defendant at trial, where the evidence supported the judge's instruction on willful, deliberate or premeditated killing, but did not support instructions on the theories of felony murder, murder by act dangerous to others, indicating depraved mind, or murder from deliberate and premeditated design unlawfully and maliciously to effect death of any human being (transferred intent). Such error was fundamental, since an intolerable amount of confusion was introduced into the case, and the defendant could have been convicted without proof of all the necessary elements. *State v. DeSantos*, 89 N.M. 458, 553 P.2d 1265 (1976).

**Prosecutor's misstatement of instruction not fundamental error.** — The prosecutor's comment to the jury that if they found the murder was done "consciously, knowingly, intentionally, deliberately, with premeditation, however you want to call it" then they could find defendant guilty of first-degree murder did not amount to fundamental error. *State v. Armendarez*, 113 N.M. 335, 825 P.2d 1245 (1992).

**"Deliberate intention" subsumes concept of premeditation.** — The word "deliberation" as used in the trial court's response to the jury's question regarding premeditation, and the phrase "deliberate intention" as defined in this instruction subsumed the statutory concept of premeditation. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Sufficient evidence of deliberate murder.** — Where an altercation occurred between defendant and the victim; the victim was kneeling on the ground as defendant stood

over the victim pointing a rifle at the victim's head; the victim attempted to push the rifle away from the victim's head twice and defendant repositioned the rifle so the rifle it pointed directly at the victim's face; as defendant pointed the rifle at the victim, the victim was pleading with defendant; a witness testified that defendant fired four close range shots directly at the victim; there were five wounds in the victim's body, four of which had penetrated the victim's body; and within an hour after the shooting, defendant interacted with a witness who testified that defendant did not appear to be intoxicated and that defendant made a telephone call to tell someone that defendant would not be at work for a week because defendant was in a "heap of trouble", there was sufficient evidence for a jury to find that defendant acted with deliberate intent when defendant killed the victim. *State v. Largo,* 2012-NMSC-015, 278 P.3d 532.

Jury could reasonably find that defendant acted with deliberate intent because the physical evidence of the stabbing of the victim showed that the attack was part of a prolonged struggle and that the victim was stabbed multiple times as she tried to escape and because defendant later made statements that he had hurt, stabbed and murdered a woman. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

**Insufficient evidence of deliberate murder. —** Where defendant and the victims had been drinking and taking drugs earlier in the day; while defendant and the victims were aimlessly driving around, drinking and taking more drugs, defendant, without any evidence of motive, shot and killed the driver; and when the passenger, who was sitting in the front seat, screamed and turned around to look at defendant, defendant shot and wounded the passenger; and although multiple shots were fired in quick succession, each victim was shot only once, there was insufficient evidence of deliberation to support defendant's conviction for attempted first degree murder of the passenger. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

**Law reviews. —** For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 40 Am. Jur. 2d Homicide §§ 439, 501, 529, 534.

41 C.J.S. Homicide §§ 38, 337.

## 14-202. Felony murder; essential elements.

For you to find the defendant _____ *(name of defendant)* guilty of felony murder, which is first degree murder, [as charged in Count _____, ][1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(name of defendant)* [committed][2] [attempted to commit] the crime of

_____[3] *(name of felony)* [under circumstances or in a manner dangerous to human life][4];

2. _____ *(name of defendant)* caused[5] the death of _____ *(name of deceased)* during [the commission of][2] [the attempt to commit] _____ *(name of felony)*;

3. _____ *(name of defendant)* intended to kill or knew that [his] [her] acts created a strong probability of death or great bodily harm;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable alternative or alternatives.

3. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction, generally worded as follows: "For you to find that the defendant committed or attempted to commit _____, the state must prove to your satisfaction beyond a reasonable doubt that _____" (add elements of the felony or attempt unless they are set out in another essential elements instruction).

4. Use bracketed phrase unless the felony is a first degree felony.

5. UJI 14-251 must also be used if causation is in issue.

[As amended, effective March 15, 1995.]

**Committee commentary.** — *See* Section 30-2-1A(2) NMSA 1978. Proof of malice aforethought or deliberate intention is not required as an element of felony murder. *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933). At common law, malice was implied as a matter of law if the murder occurred during the perpetration of a felony. See generally, LaFave & Scott, Criminal Law 529 & 545 (1972). See also, Perkins, A Reexamination of Malice Aforethought, 43 Yale L.J. 537, 547 (1934).

Felony murder may be charged as part of an open count of murder by also charging the underlying felony, *State v. Stephens*, 93 N.M. 458, 601 P.2d 428 (1979) and consecutive sentences may be imposed for the felony murder and the underlying felony as the two offenses do not merge. *State v. Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981); *State v. Stephens*, supra.

New Mexico is one of the few states having a statute which purports to make all murder perpetrated in the commission of or attempt to commit any felony first degree murder. *See* Perkins, Criminal Law, 89 n.30 (2d ed. 1969). *See State v. Hines*, 78 N.M. 471, 432 P.2d 827 (1967) and *Hines v. Baker*, 422 F.2d 1002 (10th Cir. 1970). *See generally*, Annot., 50 A.L.R.3d 397 (1973). However, the breadth of the statute has been limited by *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977). The court held that ". . . in a felony murder charge . . . [the] felony must be inherently dangerous or committed under circumstances that are inherently dangerous." The first issue is a question of law to be determined by the court; the second is a jury issue.

Under the general rule, the felony murder doctrine does not apply to a murder when the felony is a possible lesser included offense to homicide, generally aggravated or "felonious" assaults. *See* Annot., 40 A.L.R.3d 1341 (1971). In *State v. Smith*, 51 N.M. 184, 181 P.2d 800 (1947), the supreme court upheld a case going to the jury with both a willful and deliberate murder instruction and a felony murder instruction, although the facts indicate that the felony was an assault with a deadly weapon. However, in *State v. Harrison*, supra, the court made it clear that New Mexico follows the general rule that the felony must be independent of or collateral to the homicide.

The homicide must be so clearly connected to the felony as to fall within the "res gestae" of the felony. *State v. Harrison*, supra; *State v. Nelson*, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877 (1959) and *State v. Smelcer*, 30 N.M. 122, 228 P. 183 (1924). *See also*, *State v. Flowers*, 83 N.M. 113, 489 P.2d 178 (1971). Note, 7 Cal. W.L. Rev. 522 (1971) and Note, 22 Stan. L. Rev. 1059 (1970). Moreover, "Causation must be physical; causation consists of those acts of defendant or his accomplice initiating and leading to the homicide without an independent force intervening, even though defendant's or his accomplice's acts are unintentional or accidental." *State v. Harrison*, supra. If there is sufficient evidence to raise the issue of causation, the question must be left to the jury under this instruction and the causation instruction, No. 14-251.

For cases discussing the liability of defendant for a killing by someone resisting the felony, see Annot., 56 A.L.R.3d 239 (1974). For cases dealing with termination of the felony, see generally Annot., 58 A.L.R.3d 851 (1974).

The defense of "inability to form specific intent" does not apply to the murder element of felony murder because felony murder does not include the element of deliberate intention to take the life of another. *See generally*, commentary to UJI 14-5110. However, the felony which forms the basis for the felony murder may include a specific intent and the defense could apply to that element. *See, e.g.*, *People v. Mosher*, 1 Cal.3d 379, 82 Cal.Rptr. 379, 461 P.2d 659 (1969). See generally, commentary to UJI 14-5111.

Before a defendant can be convicted of felony murder, he must be given notice of the precise felony involved in the charge. The notice may be in the indictment or information, or otherwise furnished to the defendant in sufficient time to enable him to prepare his defense. *State v. Stephens*, supra; *State v. Hicks*, 89 N.M. 568, 571, 555

P.2d 689 (1976). Rule 5-303 of the Rules of Criminal Procedure for the District Courts would seem to indicate that the proper procedure may be to amend the indictment or information. The state must prove each element of the underlying felony [or attempt], otherwise it is improper to submit felony murder. *State v. DeSantos*, 89 N.M. 458, 461, 553 P.2d 1265 (1976).

## ANNOTATIONS

**The 1995 amendment,** effective March 15, 1995, rewrote Paragraph 2, added Paragraph 3, and redesignated former Paragraph 3 as Paragraph 4 in the instruction.

**Felony murder instruction parallels the statutory language and contains all the essential elements** of the crime of felony murder. *State v. Stephens*, 93 N.M. 458, 601 P.2d 428 (1979), overruled in part on other grounds, *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995).

**Requirement that defendant caused death. —** Under this instruction the jury had to find, in order to convict the defendant of felony murder, that he caused the death of the victim. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

**Instructions must link felony and death of victim. —** The giving of this instruction, in conjunction with UJI 14-251, defining "proximate cause," meets the requirement of establishing the causal link between the felony and the death of the victim. *State v. Wall*, 94 N.M. 169, 608 P.2d 145 (1980).

**And intervening cause precludes felony murder. —** In a felony murder, the death must be caused by the acts of the defendant or his accomplice without an independent intervening force. *State v. Perrin*, 93 N.M. 73, 596 P.2d 516 (1979).

**Failure to give unrequested proximate cause instruction not error. —** The proximate cause instruction is only a definition or an amplification of the cause language of this instruction and as such the failure to give the proximate cause instruction when unrequested is not error. *State v. Stephens*, 93 N.M. 458, 601 P.2d 428 (1979), overruled in part on other grounds, *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995).

**Effect of failure to instruct. —** The Supreme Court will only affirm a conviction in which the trial court failed to instruct the jury on an essential element when, under the facts adduced at trial, that omitted element was undisputed and indisputable and no rational jury could have concluded otherwise. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

The trial court's failure to instruct the jury on the element of mens rea in the defendant's case did not give rise to fundamental error since the defendant's mens rea with respect to felony murder was conclusively established by his own testimony and was fully corroborated by the state's evidence; there was no evidence presented by either side

that cast doubt on the fact that the defendant fired his rifle at the intended robbery victim, knowing his act created a strong probability of death or great bodily harm and the outcome of the trial would most assuredly have been the same had the jury been instructed on the omitted mens rea element. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

**Collateral felony must be inherently dangerous.** — In a felony murder charge, involving a collateral lesser-degree felony, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous. In cases where the collateral felony is a first degree felony, the res gestae or causal relationship test shall be used. This instruction will have to be altered to conform with this decision. *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

**Law reviews.** — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 498, 506, 534, 535.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

40 C.J.S. Homicide § 46.

## 14-203. Act greatly dangerous to life; essential elements.

The defendant is charged with first degree murder by an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life. For you to find the defendant guilty [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe act of defendant);*

2. The defendant's act caused[2] the death of _____ *(name of victim);*

3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;

4. The defendant knew that his act was greatly dangerous to the lives of others;

5. This happened in New Mexico on or about the _____ day of _____, _____.

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

[As amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-251 NMRA must also be used if causation is in issue.

**Committee commentary.** — In New Mexico, depraved mind murder is classified as first-degree murder. *See* NMSA 1978, § 30-2-1(A)(3) (1994). Depraved mind murder requires "outrageously reckless conduct performed with a depraved kind of wantonness or total indifference for the value of human life." *State v. Reed*, 2005-NMSC-031, ¶ 24, 138 N.M. 365, 120 P.3d 447. *See State v. Ibn Omar-Muhammad*, 102 N.M. 274, 278, 694 P.2d 922, 926 (1985). Wayne R. LaFave further explains depraved mind murder:

Extremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others- though unaccompanied by any intent to kill or do serious bodily injury-and which actually causes the death of another . . . . 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.4, at 436-7 (2d ed. 2003).

"[O]ne way our courts have distinguished depraved mind murder is by the number of persons exposed to danger by a defendant's extremely reckless behavior." *Reed*, 2005-NMSC-031, ¶ 22. *See State v. Brown*, 1996-NMSC-073, ¶14, 122 N.M. 724, 931 P.2d 69. Generally, in New Mexico, "depraved mind murder convictions have been limited to acts that are dangerous to more than one person." *Reed*, 2005-NMSC-031, ¶ 22. "Such condemned behavior is required to be extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness: for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions' cage in the zoo." *State v. Johnson*, 103 N.M. 364, 368, 707 P.2d 1174, 1178 (Ct. App. 1985). Other types of conduct that have been held to involve a "very high degree of unjustifiable homicidal danger" include "starting a fire at the front door of an occupied dwelling, shooting into the caboose of a passing train or into a moving automobile necessarily occupied by human beings," and "driving a car at very high speeds along a main street." 2 LaFave, *supra*, § 14.4, at 440. LaFave cites additional examples imaginable, including "throwing stones from the roof of a tall building onto the busy street below" and "piloting a speedboat through a group of swimmers." *Id*. at 441.

"In addition to the number of people endangered, [New Mexico] has construed depraved mind murder as requiring proof that the defendant had 'subjective knowledge' that his act was greatly dangerous to the lives of others." *Reed*, 2005-NMSC-031, ¶ 23. *See State v. McCrary*, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984). "The required *mens rea* element of 'subjective knowledge' serves as proof that the accused acted with 'a depraved mind' or 'wicked or malignant heart' and with utter disregard for human life." *Brown*, 1996-NMSC-073, ¶ 16. "[T]he legislature intended the offense of depraved mind murder to encompass an intensified malice or evil intent." *Reed*, 2005-NMSC-031, ¶ 24 (quoting *Brown*, 1996-NMSC-073, ¶ 15). "[O]ne way to distinguish depraved mind murder from manslaughter when an underlying act involves extremely reckless conduct is by identifying an element of viciousness . . . ." *Reed*, 2005-NMSC-031, ¶ 24 (citing Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 60 (3d ed.1982)). "Obviously, mere negligence or recklessness will not do." *Reed*, 2005-NMSC-031, ¶ 23.

Therefore, this instruction sets forth a subjective test for depraved mind murder. "The defendant must know his act is greatly dangerous to the lives of others." *Johnson*, 103 N.M. at 368, 707 P.2d at 1178. But, "[a] defendant does not have to actually know that his victim will be injured by his act." *Ibn Omar-Muhammad*, 102 N.M. at 278, 694 P.2d at 926. *See also McCrary*, 100 N.M. at 673, 675 P.2d at 122. In *McCrary*, the defendant had attended a carnival in Hobbs and felt he was cheated out of sixty-four dollars. He and a co-defendant claimed that they decided to get revenge by shooting the tires of the carnival trucks. They discharged about twenty-five shots into several tractor-trailers and cabs. Not a single tire was shot. The victim was in a sleeper cab of one of the trucks and was killed by one of these bullets. The Court stated, "Defendants did not have to actually know that [victim] was in the sleeper compartment. Rather, sufficient subjective knowledge exists if Defendants' conduct was very risky, and under the circumstances *known to Defendants* they should have realized this very high degree of risk." *Id.* The fact that no tires were shot and there were twenty-five bullet holes in the upper parts of the vehicles was substantial evidence of the defendants' knowledge of the risk. The Court also pointed out the fact that the defendants contemplated slashing the tires but rejected it for fear of being caught, indicating that defendants had reason to know people were in the area. The Court held that in light of the surrounding circumstances known to defendants, there was substantial evidence for a jury to find that defendants had subjective knowledge of the risk.

The Supreme Court has held that "a fact finder may consider evidence of extreme intoxication when determining whether a defendant possessed the requisite mental state of 'subjective knowledge' for first-degree depraved mind murder." *See Brown*, 1996-NMSC-073, ¶ 1.

Also note that the existence of an intent to kill a particular individual does not remove the act from this class of murder. *See State v. Sena*, 99 N.M. 272, 657 P.2d 128 (1983). In *Sena*, the defendant, a woman, and another man entered a bar through the front entrance. The woman was holding a drink and the doorman did not allow her to enter with the drink. A dispute arose and the defendant hit the doorman. The doorman then sprayed defendant with mace, hit him with a flashlight, and threw him out of the door.

Within a few seconds the defendant returned with a gun. He then opened fire on the doorman, who immediately turned and ducked. The defendant fired four or five times. The first shot hit the doorman in the face, but the other shots missed. One of these shots struck and killed an innocent bystander. The Court held, "By firing at the doorman in a room containing other persons within the line of fire, [defendant] committed an act 'greatly dangerous to the lives of others' which falls within the depraved mind theory. It is irrelevant whether he intended only to kill the doorman . . . ." *Id.* at 274, 657 P.2d at 130.

As LaFave explains, "[I]t is what the defendant should realize to be the degree of risk, in the light of the surrounding circumstances which he knows, which is important, rather than the amount of risk as an abstract proposition of the mathematics of chance." 2 LaFave, *supra*, § 14.4, at 439. Here is an example:

The risk is exactly the same when one fires his rifle into the window of what appears to be an abandoned cabin in a deserted mining town as when one shoots the same bullet into the window of a well-kept city home, when in fact in each case one person occupies the room into which the shot is fired. In the deserted cabin situation it may not be, while in the occupied home situation it may be, murder when the occupant is killed. *Id.*

Additionally, it must also be unjustifiable for the defendant to take the risk. Here is an example:

If [a defendant] speeds through crowded streets, thereby endangering other motorists and pedestrians, in order to rush a passenger to the hospital for an emergency operation, he may not be guilty of murder if he unintentionally kills, though the same conduct done solely for the purpose of experiencing the thrill of fast driving may be enough for murder. *Id.*

As said in a simpler way, "the extent of the defendant's knowledge of the surrounding circumstances and the social utility of his conduct" are to be considered. *Id.*

In contrast, the second-degree murder instruction provides an objective test. *See* NMSA 1978, § 30-2-1(B) (1994) and UJI 14-210 NMRA 2005. "The sole difference [between the two instructions] rests with the requirement in the depraved mind murder instruction that the jury find Defendant's act indicated a depraved mind without regard for human life . . . ." *Reed*, 2005-NMSC-031, ¶ 21. *See also Brown*, 1996-NMSC-073, ¶ 17 (recognizing that "[t]he instruction for first-degree depraved murder sets forth a *subjective test*, whereas the instruction for second-degree murder requires only an objective test").

[As amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

## ANNOTATIONS

**The 2008 amendment,** as approved by Supreme Court Order No. 08-8300-060, effective February 2, 2009, added the second paragraph and replaced the committee commentary.

**Elements of depraved mind murder.** — The elements that are required to support a depraved mind murder conviction are that more than one person must be endangered by defendant's act; defendant's act must be intentional and extremely reckless; defendant must possess subjective knowledge that defendant's act was greatly dangerous to the lives of others; and the act must encompass an intensified malice and evil intent. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

**Sufficient evidence of depraved mind murder.** — Where defendant drove a truck at approximately 80 miles per hour for approximately one mile on a four-lane suburban street during the middle of a weekday, striking and injuring a jogger on the street's raised median, then driving onto a sidewalk and striking and killing a second pedestrian; all the while speeding and weaving in and out of traffic, including into oncoming traffic, almost colliding with other vehicles, until defendant crossed all four lanes of the street and finally crashed into a boulder on the raised median, the evidence was sufficient to support defendant's conviction of depraved mind murder. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

**Extreme risk suggests subjective knowledge that acts were greatly dangerous.** — Where defendants fired at a truck they presumed was empty, killing the victim inside, subjective knowledge that their acts were greatly dangerous to the lives of others is present if those acts were very risky and, under the circumstances known to them, the defendants should have realized this very high degree of risk. *State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984).

**Intent to kill particular victim.** — A murder committed by an act which indicates a depraved mind is a first-degree murder and the existence of an intent to kill a particular individual does not remove the act from this class of murder. *State v. Sena*, 99 N.M. 272, 657 P.2d 128 (1983).

**Instruction held improper.** — Where defendant was charged with depraved mind murder involving a motor vehicle and the trial court instructed the jury that to find defendant guilty of first degree murder, the jury had to find that defendant drove defendant's vehicle erratically and recklessly for a long distance striking the victims, the jury instruction misstated the law on depraved mind murder because the instruction did not require the jury to find that defendant's conduct was extremely reckless. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

Instruction on depraved mind murder which set out an objective standard of knowledge of the risk, stating that "defendant should have known that his act was greatly dangerous to the lives of others" rather than subjective standard that "defendant knew that his act was greatly dangerous . . .," was improper, entitling defendant to reversal of

murder conviction and new trial. *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 694 P.2d 922 (1985).

**Vehicular homicide by reckless conduct is lesser included offense of depraved mind murder by vehicle.** *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 694 P.2d 922 (1985).

**Sole difference between instructions in this rule and UJI 14-210 NMRA** rests with the requirement in the depraved mind murder instruction that the jury find defendant's act indicated a depraved mind without regard for human life, for which the jury receives no further definition or guidance. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

**Law reviews.** — For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 76.

# Part B
# Second Degree Murder

## 14-210. Second degree murder; voluntary manslaughter lesser included offense; essential elements.1

For you to find the defendant guilty of second degree murder [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that his acts created a strong probability of death or great bodily harm[4] to _____ (*name of victim*) [or any other human being][3];

3. The defendant did not act as a result of sufficient provocation;[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.[4]

USE NOTE

1. This instruction is to be given only when provocation is an issue.

2. Insert the count number if more than one count is charged.

3. Use this bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following UJI 14-220 NMRA, voluntary manslaughter; lesser included offense.

4. The following instructions must also be given after UJI 14-220 NMRA, voluntary manslaughter, lesser included offense:

UJI 14-141 NMRA, general criminal intent;

UJI 14-131 NMRA, definition of great bodily harm;

UJI 14-222 NMRA, definition of sufficient provocation; and

UJI 14-250 NMRA, jury procedure for various degrees of homicide.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary to UJI 14-211 NMRA for a discussion of instructions on second degree murder.

Essential Element Number 3, providing for the jury to consider the issue of provocation, is consistent with the requirements of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Parties must be aware that an attempt to commit reckless or unintentional murder is "a crime that does not exist." *State v. Carrasco*, 2007-NMCA-152, ¶ 7, 143 N.M. 62, 172 P.3d 611. Therefore, to avoid potential confusion, if the charge of attempt to commit second degree murder proceeds to a jury, the instructions should be drafted to take into account the holding below from *Carrasco* and the specific facts of the case.

Attempt to commit a felony is the commission of "an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." NMSA 1978, § 30-28-1 (1963). It is a specific intent crime. *Jernigan*, 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537. Attempted second degree murder, however, is not a valid crime in all circumstances because second degree murder can be committed either intentionally or unintentionally. *See Johnson*, 103 N.M. at 368-70, 707 P.2d at 1178-80. When second degree murder is committed as a general intent crime, it requires that the defendant kill the victim with the knowledge that the defendant's acts "create a strong probability of death or great bodily harm." Section 30-2-1(B). As a general intent crime, it does not require an intent to kill; a reckless killing satisfies the statutory requirements.

*Carrasco*, 2007-NMCA-152, ¶ 7.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — For second degree murder, *see* Section 30-2-1B NMSA 1978.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added "NMRA" after the UJI citations in the Use Note; and in the committee commentary, after the second sentence, added the new language.

**Defective jury instruction cured by other instructions.** — Where defendant was charged with second degree murder; the jury was instructed on both second degree murder and, as a lesser-included offense, voluntary manslaughter; the second degree murder instruction, which was given pursuant to UJI 14-211 NMRA, did not contain language stating that defendant "did not act as a result of sufficient provocation"; and the instruction on voluntary manslaughter, which was given pursuant to UJI 14-220 NMRA, contained an instruction on the element negating sufficient provocation, the deficiency in the second degree murder instruction was corrected by the voluntary manslaughter instruction and there was no fundamental error. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *cert. granted*, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

**Court of appeals has no authority to review claim that instruction is erroneous.** *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

**And bound by supreme court order.** — The court of appeals was bound by the supreme court order approving challenged instructions, UJI 14-210 and 14-211, and had no authority to set the instructions aside. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Provocation and self-defense mutually exclusive.** — The instructions on provocation and self-defense are each accurate and unambiguous; however, as applied to the facts of this case they are confusing. The defendant suggests that it is impossible to determine whether the jury understood that the claim of self-defense supersedes the element of provocation. Any confusion could have been eliminated if the jury had been told that it was required to find the defendant not guilty if his conduct met the definition of self-defense, regardless of if that same conduct could be found to be provocation. In the future, when a case presents similar circumstances, juries should be so instructed. *State v. Parish*, 118 N.M. 39, 878 P.2d 988 (1994).

**Location of crime, as element of offense, may be proved by circumstantial evidence,** and the defendant's confession, together with circumstantial evidence, supplied substantial evidence for the jury's verdict that the crime was committed in New Mexico, where the bodies were found, since if a choice exists between two conflicting chains of inference, that choice is for the trier of fact. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

**Failure to refer to malice in homicide instructions was deliberate** and not an inadvertent omission. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Giving provocation instruction was not fundamental error.** — Even if the jury instruction setting forth the elements of second degree murder erroneously included a provocation element, elimination of the instruction would not have altered the jury's determination. The evidence overwhelmingly supported the conviction for intentional killing during the commission of a felony. Since the issue was not preserved below, the court only needs to find the instruction did not otherwise constitute fundamental error. *State v. Bankert*, 117 N.M. 614, 875 P.2d 370 (1994).

**Failure to give provocation instruction was fundamental error.** — Where defendant was convicted of second-degree murder for stabbing and bludgeoning the victim; defendant maintained that the victim stabbed defendant before defendant stabbed the victim; police officers testified that defendant's knife wound could have been defensive in nature; although the trial court had determined that voluntary manslaughter was a lesser-included offense in the case, the trial court instructed the jury on voluntary manslaughter using UJI 14-211 NMRA, which omitted the element of sufficient provocation; and the trial court instructed the jury with UJI 14-220 NMRA, which states that the difference between second-degree murder and voluntary manslaughter was sufficient provocation, and UJI 14-221 NMRA which defines sufficient provocation, the omission of "without sufficient provocation" from the voluntary manslaughter instruction was fundamental error because the lack of sufficient provocation is an essential element of second-degree murder when the jury is instructed on voluntary manslaughter as a potential lesser-included offense, and because without being instructed on this element the jury had no way of knowing that the state had the burden of proving beyond a reasonable doubt that defendant acted without sufficient provocation in order to prove that defendant committed second-degree murder. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, rev'g 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

**Provocation at issue.** — When provocation is at issue, an instruction on voluntary manslaughter must be given. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

**Failure to give instruction not prejudicial.** — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

**In a prosecution for felony murder,** giving of an unmodified form of this instruction on second-degree murder was sufficient without giving a general criminal intent instruction, which requires a higher level of criminal intent. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

**Sole difference between instructions in UJI 14-203 NMRA** and this rule rests with the requirement in the depraved mind murder instruction that the jury find defendant's act indicated a depraved mind without regard for human life, for which the jury receives no further definition or guidance. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

**Evidence that defendant orchestrated the beating of the victim,** that he used both his fists and a baseball bat to hit the victim, that the victim's condition worsened shortly thereafter, and that the victim died, permitted the jury to make a reasonable inference that the acts of the defendant constituted a significant cause of the victim's death and that there was no other independent event that broke the chain of events from the beating to the victim's death. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 499.

41 C.J.S. Homicide §§ 64, 75.

## 14-211. Second degree murder; voluntary manslaughter not lesser included offense; essential elements.1

For you to find the defendant guilty of second degree murder [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that his acts created a strong probability of death or great bodily harm[3] to _____ (*name of victim*) [or any other human being][4];

3. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTE

1. This instruction is to be used only when second degree murder is the lowest degree of homicide to be considered by the jury.

2. Insert the count number if more than one count is charged.

3. UJI 14-131 NMRA, the definition of great bodily harm, must be given.

4. Use this bracketed phrase when the intent was directed to someone other than the victim. In such a case, UJI 14-255 NMRA must also be given.

5. UJI 14-141 NMRA, general criminal intent, must also be given.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-2-1(B) (1994). Second degree murder is committed when death results from acts which the defendant knew created a strong probability of death or great bodily harm. This was formerly known as "depraved-heart" murder, which is also murder in the first degree. *See* NMSA 1978, § 30-2-1(A)(3) (1994). The intent necessary for this crime was formerly defined by the courts as "implied" or "inferred" malice. *See* commentary to UJI 14-201 NMRA and 14-203 NMRA and *State v. Smith*, 26 N.M. 482, 488, 194 P. 869 (1921). *See generally* Perkins, *Criminal Law* 34-35, 88, 770 (2d ed. 1969) and LaFave & Scott, *Criminal Law* 529 (1972).

Implied malice, the intent required as an element of the crime, may be inferred from certain facts, for example, the use of a deadly weapon. *See, e.g.*, *State v. Duran*, 83 N.M. 700, 496 P.2d 1096 (Ct. App. 1972), *cert. denied*, 83 N.M. 699, 496 P.2d 1095 (1972). Although the New Mexico court in *Duran* and in other cases refers to the inference as "implying malice," the committee believed that the inference of malice was more appropriate. *See* UJI 14-5061 NMRA. *See generally* Perkins, *"A Reexamination of Malice Aforethought,"* 43 Yale L.J. 537, 549 (1934). Malice may also be inferred where the defendant does not use a deadly weapon. *See State v. Garcia*, 61 N.M. 291, 299 P.2d 467 (1956). *See generally* Annot., 22 A.L.R.2d 854 (1952).

The New Mexico Supreme Court in *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933), a felony murder case, indicated that second degree murder could be found where there is "independent" evidence of an intent to kill. It is assumed that this decision was impliedly overruled by *State v. Reed*, 39 N.M. 44, 39 P.2d 1005 (1934).

The court in *Reed*, *supra*, held that where the evidence clearly indicates a certain means was used, for example, the torture used by the defendants in that case, a conviction for second degree murder could not be sustained and the defendants were discharged. This case supports the approach of the committee to the lesser included offense problem and requires the district judge to exercise careful judgment in submitting second degree murder to the jury. The decision in *Reed* was sought to be overruled by a statute which says that the defendant cannot complain if convicted of a

lesser degree of homicide although the evidence clearly establishes that a higher degree was actually committed. This law has not been repealed but is no longer in the annotated statutes. N.M. Laws 1937, ch. 199, § 1 (formerly compiled as Section 41-13-1 NMSA 1953 Comp.). This law is unconstitutional insofar as it purports to authorize conviction of a lesser included offense when there is no evidence of one or more elements of the lesser offense. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

Element 2 of UJI 14-210 NMRA and of UJI 14-211 NMRA was revised in 1981 to be consistent with the 1980 amendments to NMSA 1978, § 30-2-1 (1980).

Although the 1980 Legislature amended NMSA 1978, § 30-2-1 (1980) to provide that murder in the second degree is a lesser included offense of the crime of murder in the first degree, an instruction on second degree murder should not be given when the evidence only supports murder in the first degree.

Parties must be aware that an attempt to commit reckless or unintentional murder is "a crime that does not exist." *State v. Carrasco*, 2007-NMCA-152, ¶ 7, 143 N.M. 62, 172 P.3d 611. Therefore, to avoid potential confusion, if the charge of attempt to commit second degree murder proceeds to a jury, the instructions should be drafted to take into account the holding below from *Carrasco* and the specific facts.

Attempt to commit a felony is the commission of "an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." NMSA 1978, § 30-28-1 (1963). It is a specific intent crime. *Jernigan*, 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537. Attempted second degree murder, however, is not a valid crime in all circumstances because second degree murder can be committed either intentionally or unintentionally. *See Johnson*, 103 N.M. at 368-70, 707 P.2d at 1178-80. When second degree murder is committed as a general intent crime, it requires that the defendant kill the victim with the knowledge that the defendant’s acts "create a strong probability of death or great bodily harm." Section 30-2-1(B). As a general intent crime, it does not require an intent to kill; a reckless killing satisfies the statutory requirements.

*Carrasco*, 2007-NMCA-152, ¶ 7.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added "NMRA" after the UJI citations in the Use Note; and in the committee commentary, in the first sentence, changed "Section 30-2-1B NMSA 1978" to "NMSA 1978, § 30-2-1(B) (1994)"; in the fourth sentence, changed "30-2-1A(3) NMSA 1978" to "NMSA 1978, § 30-2-1(A)(3) (1994)"; in the fifth paragraph, changed "Section 30-2-1 NMSA 1978" to "NMSA 1978, § 30-2-1 (1980)"; in the sixth paragraph, changed "30-2-1 NMSA 1978" to "NMSA 1978, § 30-2-1 (1980)"; added the eighth paragraph; and added "NMRA" after the UJI citations throughout.

**Failure to follow the Use Note for a uniform jury instruction is not jurisdictional error** which automatically requires reversal. *State v. Doe*, 100 N.M. 481, 672 P.2d 654 (1983) (failure to give Instruction 14-141, pursuant to Use Note 5 of this instruction).

**Refusal to instruct on second degree murder.** — Refusal by the trial court to give an instruction on second-degree murder is appropriate when the evidence simply did not support a finding of second-degree murder. There was no evidence that the killing was anything less than deliberate and intentional. *State v. Aguilar*, 117 N.M. 501, 873 P.2d 247, cert. denied, 513 U.S. 859, 115 S. Ct. 168, 130 L. Ed. 2d 105, 513 U.S. 865, 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

**Law reviews.** — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

# Part C
# Voluntary Manslaughter

## 14-220. Voluntary manslaughter; lesser included offense.1

For you to find the defendant guilty of voluntary manslaughter, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ *(name of victim);*

2. The defendant knew that his acts created a strong probability of death or great bodily harm[2] to _____ *(name of victim)* [or any other human being][3];

3. This happened in New Mexico on or about the _____ day of _____, _____.

The difference between second degree murder and voluntary manslaughter is sufficient provocation. In second degree murder the defendant kills without having been sufficiently provoked, that is, without sufficient provocation. In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, that is, as a result of sufficient provocation. Sufficient provocation reduces second degree murder to voluntary manslaughter.[4]

USE NOTE

1. This instruction should immediately follow the second degree murder instruction.

2. UJI 14-131 NMRA, the definition of "great bodily harm," must be given following this instruction.

3. Use the bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following this instruction.

4. UJI 14-222 NMRA, the definition of sufficient provocation, must be given following this instruction.

**Committee commentary.** — *See* Section 30-2-3A NMSA 1978. Manslaughter is an intentional homicide which is committed under adequate legal provocation. *See generally*, LaFave & Scott, Criminal Law 572 (1972). Perkins, Criminal Law 923 (2d ed. 1969). *See State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968); *State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct. App. 1970), cert. denied, 81 N.M. 668, 472 P.2d 382.

For cases discussing provocation, *see State v. Kidd*, 24 N.M. 572, 175 P. 772 (1971). As a matter of law, mere words are not sufficient to establish provocation. *State v. Nevares*, 36 N.M. 41, 7 P.2d 933 (1932). *See generally*, *Perkins*, supra at 61.

There must be evidence that the defendant acted immediately or soon after the provocation. In *State v. Trujillo*, 27 N.M. 594, 203 P. 846 (1921), the defendant was tried for murder, convicted of voluntary manslaughter and the conviction was reversed on appeal. The evidence showed a quarrel between the defendant and deceased some three and one half hours before the time the deceased could have reached the place where he was later found dead. There was no witness to the killing and the defense was alibi. The supreme court held that there was clearly no evidence of a sudden quarrel or heat of passion and that the district court should not have submitted manslaughter to the jury.

Voluntary manslaughter is a lesser included offense to second degree murder only if there is sufficient evidence to show provocation. *See State v. Rose*, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028 (1968); *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934). The voluntary manslaughter instruction should not be given when the evidence would not support a finding of manslaughter. *State v. Trujillo*, supra; *State v. Nevares*, supra. It is reversible error to submit voluntary manslaughter when the evidence does not warrant the instruction, and no objection is necessary to preserve the error. If there is insufficient evidence of provocation and the defendant is convicted of voluntary manslaughter, he is entitled to be discharged, even though he made no objection to submission of voluntary manslaughter. *Smith v. Smith*, 89 N.M. 770, 558 P.2d 39 (1979).

This instruction made no change in the law of New Mexico. The burden of proof is on the state (once there is enough evidence of provocation to raise the issue and warrant the submission of voluntary manslaughter along with second degree murder) and the measure of proof is beyond a reasonable doubt.

It is not a violation of due process if the state is not required to prove, beyond a reasonable doubt, the absence of facts which mitigate the degree of criminality to reduce the crime from second degree murder to voluntary manslaughter. *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). The supreme court stated in that case, "To recognize at all a mitigating circumstance does not require the state to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." The court went on to say, "We thus decline to adopt the constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."

The court further explained:

We therefore will not disturb the balance struck in previous cases holding that the due process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

In the case, the New York statute reduced murder in the second degree to voluntary manslaughter if the defendant "acts under the influence of extreme emotional disturbance, . . . . " The New Mexico statute reduces second degree murder to voluntary manslaughter if the homicide is "committed upon a sudden quarrel or in the heat of passion." Once the state has proved, beyond a reasonable doubt, the elements of second degree murder, the burden may be placed on the defendant to prove the mitigating circumstances constituting sufficient provocation without violating due process. *Patterson v. New York*, supra. In *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (Ct. App.), rev'd on other grounds, 89 N.M. 770, 558 P.2d 39 (1976), the court stated that "proof of provocation beyond a reasonable doubt is not required for a conviction of voluntary manslaughter." The court pointed out, by way of dicta, that the state has the burden of proving that the defendant did not act as a result of sufficient provocation in order to prove the material elements of second degree murder. It did not decide which of the parties has the burden of proving sufficient provocation in order to establish the elements of voluntary manslaughter. The committee has found no New Mexico appellate court opinion which resolves the issue of proving sufficient provocation to establish voluntary manslaughter.

## ANNOTATIONS

### I. GENERAL CONSIDERATION.

**Manslaughter not invariably included in murder.** — Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit this instruction to the jury;

however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

**Failure to refer to malice in homicide instructions was deliberate** and not an inadvertent omission. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**No error in manslaughter finding where no objection to instruction.** — Where the trial court fully and completely instructed the jury on first and second degree murder, as well as voluntary manslaughter, and no objection was made to these instructions as given by the court, there is no error in finding defendant guilty of manslaughter when charged with murder. *State v. Rose*, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

**Instruction on voluntary manslaughter should be given when there is sufficient evidence** to sustain conviction on the charge. *State v. Benavidez*, 94 N.M. 706, 616 P.2d 419 (1980); *State v. Montano*, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980); *State v. Maestas*, 95 N.M. 335, 622 P.2d 240 (1981); *State v. Marquez*, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

In order to warrant an instruction on voluntary manslaughter, there must be some evidence in the record which would support such an instruction, and which would support a conviction for voluntary manslaughter. State v. Garcia, 95 N.M. 260, 620 P.2d 1285 (1980).

Defendant is entitled to instruction on voluntary manslaughter as a lesser included offense of murder in the first degree if there is evidence to support, or tending to support, such an instruction. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Error to submit issue of manslaughter where no such issue is involved.** *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

**"Unlawfulness" and self-defense.** — It is the element of unlawfulness that is negated by self-defense. When self-defense or the defense of others is at issue, the absence of such justification is an element of the offense. The instruction, derived from this instruction, was simply erroneous in neglecting to instruct on the element of

unlawfulness after the self-defense evidence had been introduced. *State v. Parish*, 118 N.M. 39, 878 P.2d 988 (1994).

**Jury to be instructed on elements of each crime before deliberations begin.** — Even though the jury is instructed to consider first degree murder and make a determination before moving on to any lesser offenses, the jury must be instructed on each of the crimes charged, and the elements of each, before deliberation ever begins; assuming that there is evidence of provocation, the jury should be given the choice of finding that the defendant committed voluntary manslaughter; failure to do so is not harmless and is prejudicial. *State v. Benavidez*, 94 N.M. 706, 616 P.2d 419 (1980).

**When erroneous manslaughter instruction harmless.** — In light of the instructions by the trial court that the jury was first to determine whether defendant was guilty of second degree murder (of which defendant was convicted) and that guilt of voluntary manslaughter was to be considered only if it was determined that defendant was not guilty of second degree murder, any error in the voluntary manslaughter instruction was harmless. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Failure to give instruction not prejudicial.** — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

**Court of appeals was bound by supreme court order approving challenged instructions,** UJI 14-210 and 14-211, and had no authority to set the instructions aside. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

## II. PROVOCATION.

**Provocation as element of voluntary manslaughter.** — Although not willing to rule unequivocally either that provocation is or is not an "element" of voluntary manslaughter, there must be some evidence that the killing was committed upon a sudden quarrel or in the heat of passion in order for a conviction of voluntary manslaughter to stand; in this sense, provocation is a part of voluntary manslaughter. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

To convict someone of voluntary manslaughter, the jury must have evidence that there was a sudden quarrel or heat of passion at the time of the commission of the crime in order, under the common-law theory, to show that the killing was the result of provocation sufficient to negate the presumption of malice. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

Viewing evidence in light most favorable to giving an instruction on voluntary manslaughter, defendant presented sufficient evidence to support an attempted voluntary manslaughter instruction. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

Under limited circumstances, where attempted second-degree murder is offered as a greater-included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter is a crime in New Mexico. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

**Sudden anger or heat of passion and provocation must concur** to make a homicide voluntary manslaughter. *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

**Provocation and disclosure may occur at different times.** — A homicide defendant's testimony that he was provoked to shoot the victim after learning from his wife that the victim, her father, had sexually molested her was sufficient evidence to support submitting the defendant's requested jury instruction on the lesser-included offense of voluntary manslaughter, notwithstanding the fact that the victim did not convey the provocative information to the defendant. Although the victim must be the source of the provocation to reduce a murder charge to voluntary manslaughter, the provocation and the disclosure of the events constituting the provocation may occur at different times. *State v. Munoz*, 113 N.M. 489, 827 P.2d 1303 (Ct. App. 1992).

**Defendant has burden to come forward with evidence establishing sufficient provocation** in order to be entitled to an instruction on voluntary manslaughter. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

**Evidence of provocation required for instruction.** — Defendant in first-degree murder prosecution was not entitled to voluntary manslaughter instruction where there was no evidence of provocation on the part of victim. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

**Evidence may be circumstantial.** — If there is enough circumstantial evidence to raise an inference that the defendant was sufficiently provoked to kill the victim, he is entitled to an instruction on manslaughter. *State v. Martine*z, 95 N.M. 421, 622 P.2d 1041 (1981).

**Victim must be source of defendant's provocation.** — In order to reduce murder to manslaughter, the victim must have been the source of the defendant's provocation. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

**Defendant may not originate provocation.** — If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked; in such a case, the circumstances show that he

acted with malice aforethought, and the offense is murder. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

**Provocation must be such as affects ability of ordinary person to reason.** — Evidence of provocation sufficient to reduce a charge of second-degree murder to voluntary manslaughter must be such as would affect the ability to reason and cause a temporary loss of self control in an ordinary person of average disposition. *State v. Jackson*, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983).

Provocation must concur with sudden anger or heat of passion, such that an ordinary person would not have cooled off before acting. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Words alone inadequate provocation.** — Words alone, however scurrilous or insulting, will not furnish adequate provocation to make a homicide voluntary manslaughter. *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979); *State v. Montano*, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

Although words alone, however scurrilous or insulting, will not furnish adequate provocation to require the submission of a voluntary manslaughter instruction, if there is evidence to raise the inference that by reason of actions and circumstances the defendant was sufficiently "provoked," as defined in 30-2-3A NMSA 1978 or in UJI 14-222, then the jury should be given the voluntary manslaughter instruction. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Informational words may constitute provocation.** — Informational words, as distinguished from mere insulting words, may constitute adequate provocation; thus, the substance of the informational words spoken, the meaning conveyed by those informational words, the ensuing arguments and other actions of the parties, when taken together, can amount to provocation. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Exercise of legal right, no matter how offensive, is no provocation** as lowers the grade of a homicide from murder to manslaughter. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979); *State v. Marquez*, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981); *State v. Fero*, 105 N.M. 339, 732 P.2d 866 (1987), aff'd, 107 N.M. 369, 758 P.2d 783 (1988).

**Transference of heat of passion not allowed.** — The weight of authority is against allowing transference of one's passion from the object of the passion to a related bystander. *State v. Gutierrez*, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

**Issue of self-defense found not raised.** — Evidence that the defendant had been instructed by his employer to recover a stolen truck containing contraband from those who had it (the decedents) or to kill them if they refused under threat of death from the

employer did not raise an issue of self-defense, which requires the preservation of one's self from attack; no sudden quarrel, heat of passion or sufficient provocation was shown and thus the trial court did not err in refusing to give instructions on manslaughter. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

**Provocation a jury question.** — Generally, it is for the jury to determine whether there is sufficient provocation under an appropriate instruction on voluntary manslaughter. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 532.

41 C.J.S. Homicide § 75.

## 14-221. Voluntary manslaughter; no murder instruction; essential elements.1

For you to find the defendant guilty of voluntary manslaughter [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ *(name of victim);*

2. The defendant knew that his acts created a strong probability of death or great bodily harm[3] to [him] _____ *(name of victim)* [or any other human being][4];

3. The defendant acted as a result of sufficient provocation;[5]

4. This happened in New Mexico on or about the _____ day of _____, _____.[6]

USE NOTE

1. This instruction is to be used if the defendant has been charged only with voluntary manslaughter or if voluntary manslaughter is the highest degree of homicide given to the jury.

2. Insert the count number if more than one count is charged.

3. UJI 14-131, the definition of great bodily harm, must be given.

4. Use the bracketed phrase when the intent to kill or do great bodily harm was directed to someone other than the victim. UJI 14-255 must also be given.

5. UJI 14-222, the definition of sufficient provocation, must also be given.

6. UJI 14-141, General criminal intent, must also be given.

**Committee commentary.** — As explained in the commentary to UJI 14-220, manslaughter is essentially second degree murder committed under sufficient provocation. To make a case of manslaughter, the state must prove all of the essential elements of second degree murder plus the additional element of sufficient provocation.

**ANNOTATIONS**

**Cross references.** — For voluntary manslaughter, *see* Section 30-2-3A NMSA 1978.

**Failure to give instruction not prejudicial.** — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 56.

41 C.J.S. Homicide § 389.

## 14-222. Sufficient provocation; defined.

"Sufficient provocation" can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition. The "provocation" is not sufficient if an ordinary person would have cooled off before acting.

**Committee commentary.** — In defining sufficient provocation, the court in *State v. Kidd*, 24 N.M. 572, 175 P. 772 (1917) stated:

All that is required is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment, or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, and to exclude malice, and to render the defendant incapable of cool reflection.

In *State v. Trujillo*, 27 N.M. 594, 203 P. 846 (1921), the court pointed out that "[no] mere words, however opprobrious or indecent, are deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter." In *State v. Nevares*, 36 N.M. 41, 7 P.2d 933 (1932), the court pointed out that:

Mere sudden anger or heat of passion will not reduce the killing from murder to manslaughter. There must be adequate provocation. The one without the other will not suffice to effect the reduction in the grade of the offense. The two elements must concur.

And words alone, however scurrilous or insulting, will not furnish the adequate provocation required for this purpose.

The test of whether the provocation was adequate must be determined by considering whether it would have created the passion offered in mitigation in the ordinary man of average disposition. If so, then it is adequate and will reduce the offense to manslaughter.

The phrase "heat of passion" includes a killing in circumstances which arouse anger, fear, rage, sudden resentment, terror or other extreme emotions. Such killings are held to be upon "sufficient provocation." *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (1976), rev'd on other grounds, 89 N.M. 770, 558 P.2d 39 (1976).

Examples of fact situations which support a conviction of manslaughter include cases where: the defendant and deceased draw their guns and fire at each other through a closed door, and it is unknown who fired first, *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934); the defendant feared that the deceased was attempting to get a gun with which to shoot the defendant, and the defendant acts to prevent the deceased from getting his gun, *State v. Wright*, 38 N.M. 427, 34 P.2d 870 (1934); and the defendant was suddenly, and without warning, partially pulled from the seat of his car, by the deceased who could not be seen by the defendant, and defendant reacted by firing a gun, *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968).

Examples of provocative acts are: the finding of a wife by her husband in the act of adultery with a paramour; the seduction of the defendant's infant daughter; the rape of a close female relative of the defendant; the murder or injury of a close relative of the defendant; the act of sodomy with the defendant's young son; a killing to prevent the rape of the defendant's wife. Perkins, Criminal Law (2d ed.) p. 65.

Examples of sufficient heat of passion in other jurisdictions include: shooting of mistress by defendant who was aroused to heat of passion by a series of events over a considerable period of time, *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958); knifing by defendant during fist fight where defendant has a depressed skull which caused him to fear that a blow to his head could cause blindness or death, *People v. Otwell*, 61 Cal. Rptr. 427 (Ct. App. 1967); shooting of man defendant's wife found with where the wife's illicit activities had been suspected by defendant over a long period of time, *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); shooting by defendant of father-in-law upon learning deceased had raped defendant's wife while defendant on business trip, *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929); shooting of deceased after deceased accosted defendant and defendant's father with a pistol and slightly wounded them both, *Sanders v. State*, 26 Ga. App. 475, 106 S.E. 314 (Ct. App. 1921); shooting by defendant of brother where evidence showed series of events [acts] by brother provided "pent-up anger" which defendant relieved by shooting after brother made statement which further aroused defendant, *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967).

"Heat of passion" may be based upon a series of events over a considerable period of time which would arouse a person to an extreme emotion when an otherwise dispassionate event occurs. *See State v. Benavidez*, 94 N.M. 706, 616 P.2d 419 (1980).

An example of sufficient provocation arising from a "sudden quarrel" is the shooting of a person, who had been drinking extensively and had become angered at the defendant to such an extent as to knock a hole in defendant's wall, when, upon being requested to leave, he looked threateningly at defendant and started to rise from his chair. *State v. Montano*, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

An example of lack of sufficient provocation is presented in *State v. Farris*, 95 N.M. 96, 619 P.2d 541 (1980) where the deceased, who was the wife of defendant and whose boyfriend had previously threatened defendant, poked defendant in the chest and called him names prior to his shooting her.

## ANNOTATIONS

**Provocation supporting conviction for voluntary manslaughter is** an act committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense. *State v. Melendez*, 97 N.M. 738, 643 P.2d 607 (1982).

**Provocation a jury question.** — Generally, it is for the jury to determine whether there is sufficient provocation under an appropriate instruction on voluntary manslaughter. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**A series of events as provocation.** — Where defendant's spouse had a series of affairs with the victim; defendant kidnapped the victim and killed the victim; the trial court instructed the jury on voluntary manslaughter; defendant tendered an instruction defining sufficient provocation that added the language that "A series of events over a considerable period of time may constitute sufficient provocation" to the instruction according to UJI 14-222 NMRA; and the trial court refused defendant's tendered instruction and instructed the jury according to UJI 14-222 NMRA, the trial court's instruction did not rule out the notion that sufficient provocation could arise from events occurring over a period of time and could not have confused or misled the jury. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-002.

**Provocation and self-defense mutually exclusive.** — The instructions on provocation and self-defense are each accurate and unambiguous; however, as applied to the facts of this case they are confusing. The defendant suggests that it is impossible to determine whether the jury understood that the claim of self-defense supersedes the element of provocation. Any confusion could have been eliminated if the jury had been told that it was required to find the defendant not guilty if his conduct met the definition of self-defense, regardless of if that same conduct could be found to be provocation. In the future, when a case presents similar circumstances, juries should be so instructed. *State v. Parish*, 118 N.M. 39, 878 P.2d 988 (1994).

**Exercise of legal right, no matter how offensive, is not adequate provocation** to reduce homicide from murder to manslaughter. *State v. Marquez*, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

**Words alone generally not adequate provocation.** — Although words alone, however scurrilous or insulting, will not furnish adequate provocation to require the submission of a voluntary manslaughter instruction, if there is evidence to raise the inference that by reason of actions and circumstances the defendant was sufficiently "provoked," as defined in 30-2-3A NMSA 1978 or in this instruction, then the jury should be given the voluntary manslaughter instruction. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**But informational words may constitute provocation.** — Informational words, as distinguished from mere insulting words, may constitute adequate provocation; thus, the substance of the informational words spoken, the meaning conveyed by those informational words, the ensuing arguments and other actions of the parties, when taken together, can amount to provocation. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Provocation must concur with sudden anger or heat of passion.** *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

Provocation must concur with sudden anger or heat of passion, such that an ordinary person would not have cooled off before acting. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

**Provocation and disclosure may occur at different times.** — A homicide defendant's testimony that he was provoked to shoot the victim after learning from his wife that the victim, her father, had sexually molested her was sufficient evidence to support submitting the defendant's requested jury instruction on the lesser-included offense of voluntary manslaughter, notwithstanding the fact that the victim did not convey the provocative information to the defendant. Although the victim must be the source of the provocation to reduce a murder charge to voluntary manslaughter, the provocation and the disclosure of the events constituting the provocation may occur at different times. *State v. Munoz*, 113 N.M. 489, 827 P.2d 1303 (Ct. App. 1992).

**What constitutes sufficient cooling time** depends upon the nature of the provocation and the facts of each case, and is a question for the jury. *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

**Actions of police officer exercising his duties** in a lawful manner cannot rise to the level of sufficient provocation. *State v. Martinez*, 97 N.M. 540, 641 P.2d 1087 (Ct. App. 1982).

**Failure to give instruction not prejudicial.** — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

**Instructions not confusing.** — Where jury was instructed that, if defendant was sufficiently provoked to kill another, he might be guilty of voluntary manslaughter and sufficient provocation was defined, in part, as fear, and where defendant testified that he was afraid when shots were fired at him, there was no reason for the jury to be confused by the instruction. *State v. Melendez*, 97 N.M. 738, 643 P.2d 607 (1982).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

# Part D
# Involuntary Manslaughter

## 14-230. Withdrawn.

**ANNOTATIONS**

**Withdrawals. —** Pursuant to a court order dated June 17, 1997, this instruction, relating to involuntary manslaughter based on an unlawful act not amounting to a felony, was withdrawn effective for cases filed in the district courts on and after August 1, 1997.

## 14-231. Involuntary manslaughter; essential elements.1

For you to find the defendant guilty of involuntary manslaughter [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* _____ *(describe defendant's act);*

2. _____ *(name of defendant)* should have known of the danger involved by _____'s *(name of defendant)* actions;

3. _____ *(name of defendant)* acted with a willful disregard for the safety of others;

4. _____'s *(name of defendant)* act caused the death of _____ *(name of victim);*

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction is used in all involuntary manslaughter prosecutions.

2. Insert the count number if more than one count is charged.

[As amended, effective August 1, 1997.]

**Committee commentary. —** *See* Section 30-2-3B NMSA 1978. *See generally* LaFave & Scott, Criminal Law 586-94 (1972). Manslaughter committed by a lawful act done in an unlawful manner or without due caution and circumspection requires a showing of criminal negligence, i.e., conduct which is reckless, wanton or willful. *State v. Grubbs,* 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Except for vehicular homicide cases, there does not appear to be any negligent-act manslaughter case reported in New Mexico. In *State v. Sisneros,* 42 N.M. 500, 82 P.2d 274 (1938), the court held that a charge of death resulting from reckless driving was an example of a lawful act done in an unlawful manner. This example no longer has any direct bearing since vehicular homicide caused by reckless driving must be charged

under the vehicular homicide statute. *See* UJI 14-240 and commentary. *See State v. Lujan,* 76 N.M. 111, 412 P.2d 405 (1966); *State v. Blevins,* 40 N.M. 367, 60 P.2d 208 (1936).

*State v. McFall,* 67 N.M. 260, 354 P.2d 547 (1960), indicates that involuntary manslaughter as well as voluntary manslaughter may be a lesser included offense to a charge of murder. *See also* N.M. Laws 1937, ch. 199, § 1, as discussed in the commentary to UJI 14-210.

*See* Section 30-2-3B NMSA 1978. This instruction should be used in all involuntary manslaughter prosecutions whether the death was caused by a lawful act or an "unlawful" act. Both require a showing of an underlying unlawful act. *State v. Yarborough,* 122 N.M. 596, 930 P.2d 131; *State v. Kirby,* 122 N.M. 609, 930 P.2d 144 (1996); *State v. Abeyta,* 120 N.M. 233, 901 P.2d 164 (1995).

Vehicular homicide caused by reckless driving must be charged under the vehicular homicide statute, Section 66-8-101 NMSA 1978. *Yarborough, supra.*

## ANNOTATIONS

**The 1997 amendment,** effective August 1, 1997, rewrote Paragraphs 2 and 3 and made stylistic changes in Paragraphs 1 and 4, and added Use Note 1 and redesignated the existing Use Note as Use Note 2.

**Where there is sufficient evidence of both criminal negligence and accident, it is proper to grant an involuntary manslaughter instruction.** *State v. Skippings*, 2011-NMSC-021, 150 N.M. 196, 258 P.3d 1008.

**Sufficient evidence of criminal negligence. —** Where defendant and the victim engaged in an argument that escalated into a physical confrontation; when the victim and defendant became entangled, defendant sought to extricate defendant from the victim and forced the victim off of defendant; the victim landed on the asphalt roadway, cracking the victim's skull; the victim died from the injury; and there was evidence to support the view that defendant engaged in the dispute and behaved in a fashion that exposed the victim to danger without intending the victim's death, defendant was entitled to an involuntary manslaughter instruction. *State v. Skippings*, 2011-NMSC-021, 150 N.M. 196, 258 P.3d 1008.

**The *mens rea* for involuntary manslaughter is criminal negligence. —** An involuntary manslaughter jury instruction is proper only when the evidence presented at trial permits the jury to find the defendant had a mental state of criminal negligence when engaging in the act causing the victim's death. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

**Evidence of excessive self-defense and accident are not a substitute for evidence of criminal negligence. —** The confluence of evidence of imperfect self-defense with

evidence of accidental shooting is not a substitute for evidence of the criminal negligence mental state required for an involuntary manslaughter conviction, because if the homicide is accidental, defendant acted without a criminally culpable state of mind in performing a lawful act unintentionally killing the victim, and if the homicide occurred as a result of imperfect self-defense, defendant acted intentionally in self-defense and the use of excessive force rendered the killing lawful, whereas, an involuntary manslaughter instruction is proper only where there is evidence of an unintentional killing and a *mens rea* of criminal negligence. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

**Evidence did not support instruction on involuntary manslaughter.** — Where the evidence most favorable to defendant showed that defendant was sitting in a car; the victim approached the car and held a gun to defendant's head; defendant grabbed the gun and it discharged; defendant gained control of the gun and fired it at the victim; and defendant then drove away without realizing that the victim had been shot, the evidence failed to establish a mental state of criminal negligence, which is required to support a jury instruction on involuntary manslaughter. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

**Lesser-included offense of second degree murder.** — Where the defendant caused an accident by driving without headlights, speeding and running a stop sign and where the defendant was charged with second degree murder for shooting the driver of the other vehicle in the accident, the car accident was not a sufficient provocation for the fatal shooting to establish the provocation required for an involuntary manslaughter instruction. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

**Instruction should have been given** where defendant was not contending imperfect self defense, i.e. that he used excessive force while otherwise lawfully defending himself, but his contention was that he was always in the lawful exercise of self defense and that unusual circumstances caused the victim to die as a result of that lawful exercise, for which the jury might find him culpable. *State v. Romero*, 2005-NMCA-060, 137 N.M. 456, 112 P.3d 1113, cert. granted, 2005-NMCERT-005.

**Involuntary manslaughter statute excludes all cases of intentional killing,** and includes only unintentional killings by acts unlawful, but not felonious, or lawful, but done in an unlawful manner, or without due caution and circumspection; the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

**Inflicting beating is an unlawful act,** and, accordingly, there was no basis for an instruction on involuntary manslaughter by lawful act, nor was there any basis for an instruction on manslaughter by unlawful act not amounting to a felony. *State v. Gutierrez*, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

**Instruction on negligent self-defense improperly denied.** — Since the defendant could be viewed as in a position where his safety or the safety of his friend was threatened and, if, in an attempt to protect himself or ward off the attackers, the defendant inadvertently shot the victim, then his actions could be viewed as being the commission of a lawful act of self-defense committed in an unlawful manner or without due caution and circumspection, such that an instruction on involuntary manslaughter based on negligent self-defense should have been given. *State v. Arias*, 115 N.M. 93, 847 P.2d 327 (Ct. App. 1993), overruled on other grounds, *State v. Abeyta*, 120 N.M. 233, 901 P.2d 164.

**Law reviews.** — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 499, 534.

Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter, 161 A.L.R. 10.

41 C.J.S. Homicide § 88 et seq.

# Part E
# Vehicle Homicide

## 14-240. Homicide or great bodily injury by vehicle; essential elements.

For you to find the defendant guilty of causing [death][1] [or] [great bodily injury][2] by vehicle [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[4]
[while under the influence of intoxicating liquor[5];][1]
[while under the influence of _____, a drug[6];]
[in a reckless manner[7];]

2. The defendant thereby caused[8] the [death of][1] [or] [great bodily injury[2] to]
_____ *(name of victim);*

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only applicable alternative or alternatives.

2. If defendant is charged with great bodily injury by vehicle, the definition of great bodily harm, Instruction 14-131, must be given with the word "injury" substituted for "harm".

3. Insert the count number if more than one count is charged.

4. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

5. Instruction 14-243, the definition of under the influence of intoxicating liquor, must be given if this element is given.

6. Instruction 14-245, the definition of under the influence of a drug, must be given if this element is given.

7. Instruction 14-241, the definition of driving a motor vehicle in a reckless manner, must be given if this element is given.

8. If causation is in issue, Instruction 14-251, the definition of causation, must be given.

[UJI Criminal Rule 2.60 NMSA 1978; UJI 14-240 SCRA; as amended, effective August 1, 1989; June 1, 1994; May 1, 1997.]

**Committee commentary.** — Homicide or great bodily injury by vehicle is not a strict liability crime and requires a mens rea element, "a mental state of conscious wrongdoing". *State v. Jordan,* 83 N.M. 571, 494 P.2d 984 (Ct. App. 1972). The use of a vehicle to commit a homicide may under certain circumstances result in a charge of murder if the mens rea for murder is present. *See, e.g., State v. Montoya,* 72 N.M. 178, 381 P.2d 963 (1963); *see generally, Annot.,* 21 A.L.R.3d 116 (1968).

Driving while intoxicated must be the direct and proximate cause of the death when the homicide is based on that provision. *State v. Sisneros,* 42 N.M. 500, 505-06, 82 P.2d 274 (1938). *State v. Myers,* 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. *See State v. Yarborough,* 122 N.M. 596, 930 P.2d 131 (1996), aff'g, 120 N.M. 669, 905 P.2d 209 (Ct. App. 1995).

In a prosecution for depraved mind murder, if there is evidence of the use of drugs or alcohol which could have impaired the defendant's ability to drive "to the slightest degree", in addition to the depraved mind murder instructions, the jury must also be instructed on vehicle homicide. *See State v. Omar-Muhammad,* 105 N.M. 788, 792, 737 P.2d 1165 (1987).

## ANNOTATIONS

**Cross references. —** For great bodily harm by vehicle, *see* Sections 66-8-101 NMSA 1978.

For reckless driving, *see* Section 66-8-113 NMSA 1978.

For the Controlled Substances Act, *see* Section 30-31-1 NMSA 1978 and notes thereto.

**The 1994 amendment,** effective June 1, 1994, inserted "in a reckless manner" in Paragraph 1 of the instruction, added Use Note 6 and redesignated former Use Note 6 as Use Note 7, and substituted "given if this element is given" for "used" at the end of Use Note 7.

**The 1997 amendment,** effective May 1, 1997, substituted "Homicide or great bodily injury by vehicle" for "Vehicle homicide; great bodily harm" in the instruction heading, substituted "injury" for "harm" throughout the instruction and made related stylistic changes, and rewrote the Use Notes.

**The charges of party to the crime of homicide by vehicle** and great bodily harm by a vehicle do not require physical control over a vehicle. *State v. Marquez*, 2010-NMCA-064, 148 N.M. 511, 238 P.3d 880, *cert. granted*, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

**Party to the crime of homicide by vehicle and great bodily harm by a vehicle. —** Where defendant and defendant's friend were drinking together in a bar; the friend became so intoxicated that the bar refused service; defendant and the friend were refused service at another bar; defendant bought a twelve-pack of beer and suggested that the friend drive them in the friend's vehicle so that they could continue to party; the friend's vehicle rear-ended a van that resulted in the death of two and great bodily injury of five occupants of the van; seven open beer cans were found in the friend's vehicle; the friend had a breath alcohol content of .19; and defendant stated that defendant knew the friend was intoxicated at the time of the accident, and that defendant should have taken the friend's keys away, although defendant did not have physical control over the friend's vehicle, defendant was guilty of homicide by a vehicle and of great bodily injury by a vehicle while driving a vehicle under the influence of alcohol. *State v. Marquez*, 2010-NMCA-064, 148 N.M. 511, 238 P.3d 880, *cert. granted*, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

**This instruction and UJI 14-241 adequately instruct the jury on reckless driving** even though they fail to instruct the jury on willful and wanton conduct. *State v. Blakley*, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

**Willful and wanton conduct instruction omitted. —** The prior practice of instructing on willful and wanton conduct was not considered to be helpful and was deliberately

omitted from UJI 14-241 and this instruction. *State v. Blakley*, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

**Law reviews.** — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 7A Am. Jur. 2d Automobiles and Highway Traffic § 324 et seq.

Alcohol-related vehicular homicide: nature and elements of offense, 64 A.L.R.4th 166.

61A C.J.S. Motor Vehicles § 668.

## 14-240A. Injury to pregnant woman by vehicle; essential elements.

For you to find the defendant guilty of causing injury to a pregnant woman by vehicle [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2]
[while under the influence of intoxicating liquor[3];][4]
[while under the influence of _____, a drug[5];]
[in a reckless manner[6];]

2. The defendant thereby caused[7] _____ *(name of victim)* to suffer a [miscarriage[8]][4] [or] [stillbirth[8]].

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. See Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

3. Instruction 14-243, the definition of under the influence of intoxicating liquor, must be given if this element is given.

4. Use only applicable alternative or alternatives.

5. Instruction 14-245, the definition of under the influence of a drug, must be given if this element is given.

6. Instruction 14-241, the definition of driving in a reckless manner, must be given if this element is given.

7. If causation is in issue, Instruction 14-251, the definition of causation, must be given.

8. If requested, Instruction 14-246, the definition of miscarriage or stillbirth, may be given.

[Adopted, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references.** — For injury to pregnant woman by vehicle, *see* Section 66-8-101.1 NMSA 1978.

## 14-241. Homicide by vehicle; "driving in a reckless manner"; defined.

For you to find that the defendant operated a motor vehicle in a reckless manner, you must find that the defendant drove with willful disregard of the safety of others and at a speed or in a manner that endangered or was likely to endanger any person.

USE NOTE

This instruction must be given immediately after UJI Criminal 14-240 or 14-240A if driving in a reckless manner is an issue.

[As amended, effective August 1, 1997.]

**Committee commentary.** — The 1997 amendments to this instruction simplify while retaining the essential meaning of Section 66-8-113 NMSA 1978.

**ANNOTATIONS**

**Cross references.** — For reckless driving, *see* Section 66-8-113 NMSA 1978.

**The 1997 amendment,** effective August 1, 1997, substituted "Homicide by vehicle; 'driving in a reckless manner'" for "Vehicle homicide; reckless driving" in the instruction heading, substituted "operated a motor vehicle in a reckless manner" for "was driving recklessly", substituted "at a speed or in a manner that endangered or was likely to endanger" for "[at a speed] [or] [in a manner] which [endangered] [or] [was likely to endanger]", deleted "or property" following "person" at the end of the instruction, and rewrote Use Note 1 and deleted former Use Note 2 relating to use of the applicable alternative.

**UJI 14-240 and this instruction adequately instruct the jury on reckless driving** even though they fail to instruct the jury on willful and wanton conduct. *State v. Blakley*, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

**Willful and wanton conduct instruction omitted.** — The prior practice of instructing on willful and wanton conduct was not considered to be helpful and was deliberately omitted from UJI 14-240 and this instruction. *State v. Blakley*, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

**Vehicular homicide by reckless conduct is lesser included offense of depraved mind murder by vehicle.** *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 694 P.2d 922 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 7A Am. Jur. 2d Automobiles and Highway Traffic § 312 et seq.

61A C.J.S. Motor Vehicles § 668.

## 14-242. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to a court order dated May 2, 1989, this instruction, relating to statutory presumptions regarding intoxication, was withdrawn effective after August 1, 1989.

## 14-243. Vehicle homicide; "under the influence of intoxicating liquor"; defined.

A person is under the influence of intoxicating liquor when as a result of drinking such liquor the person is less able, to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.

USE NOTE

This instruction may be given immediately after UJI Criminal 14-240 or 14-240A.

[Adopted July 1, 1980; UJI Criminal Rule 2.63 NMSA 1978; UJI 14-243 SCRA; as amended, August 1, 1989; May 1, 1997.]

**Committee commentary.** — On May 1, 1997 this instruction was split into two instructions, UJI 14-243 and 14-245, to be consistent with Sections 66-8-101 and 66-8-102 NMSA 1978 and UJI Criminal 14-4502. Subsection A of Section 66-8-102 NMSA 1978 does not contain a definition of "under the influence of intoxicating liquor" while

Subsection B of Section 66-8-102 NMSA 1978 does contain a definition of "under the influence of any drug".

The definition of driving "under the influence of intoxicating liquor" was taken from *State v. Dutchover,* 85 N.M. 72, 73, 509 P.2d 264, 265 (Ct. App. 1973). *See also State v. Omar-Muhammad,* 105 N.M. 788, 792, 737 P.2d 1165 (1987); *State v. Scussel,* 117 N.M. 241, 243, 871 P.2d 5 (Ct. App. 1994); *State v. Harrison,* 115 N.M. 73, 846 P.2d 1082 (Ct. App.), cert. denied, 114 N.M. 720, 845 P.2d 814 (1993); *State v. Myers,* 88 N.M. 16, 19, 536 P.2d 280, 283 (Ct. App. 1975); and *Boone v. State,* 105 N.M. 223, 226, 731 P.2d 366, 369 (1986).

**ANNOTATIONS**

**Cross references.** — For driving while under the influence of intoxicating liquor, *see* Section 66-8-102 NMSA 1978.

**The 1989 amendment,** effective for cases filed in the district courts on or after August 1, 1989, in the Use Note, substituted present Item 1 for former Item 1, which read "This instruction may be given at the request of either party".

**The 1997 amendment,** effective May 1, 1997, deleted "[under the influence of a drug] [under the combined influence of intoxicating liquor and a drug]" following the first occurrence of "liquor", substituted "the person" for "[and] [using a drug] he", and substituted "the person" for "himself" at the end, and added "or 14-240A" at the end of Use Note 1 and deleted former Use Note 2 relating to the deleted alternatives.

**Finding of impairment by alcohol proper.** — Where based on the evidence of impairment demonstrated to the people who saw defendant right after the accident, his evasiveness about his drinking and his initial refusal to submit to a warrant ordering a blood test, the evidence contradicting his claim about swerving to avoid an animal, the alcohol in his blood four hours after the accident, and the police officers' opinions, a rational jury could easily have found beyond a reasonable doubt that defendant was impaired by alcohol. *State v. Montoya*, 2005-NMCA-078, 137 N.M. 713, 114 P.3d 393, cert. denied, 2005-NMCERT-006.

**Instruction in murder trial.** — District court, in a murder trial, committed reversible error in refusing to instruct the jury on the lesser included offense of vehicular homicide, where the evidence of the defendant's use of marijuana the night before and the morning of the killing could have supported a conviction of vehicular homicide while under the influence of drugs. *State v. Omar-Muhammad*, 105 N.M. 788, 737 P.2d 1165 (1987).

## 14-244. Vehicle homicide; great bodily harm; resisting, evading or obstructing a police officer; essential elements.

For you to find the defendant guilty of causing [death] [or] [great bodily harm][1] while operating a vehicle and resisting, evading or obstructing an officer of this state as charged in Count _____[2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was operating a motor vehicle;

2. A uniformed police officer in a marked police vehicle signaled the defendant to stop the motor vehicle;

3. The defendant was aware the officer had signaled (him) (her) to stop;

4. The defendant wilfully failed to stop the vehicle;

5. The defendant's failure to stop the vehicle caused[3] the [death] [or] [great bodily harm][4] of _____ (name of victim);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only applicable alternative or alternatives. If defendant is charged with causing great bodily harm by vehicle, the definition of "great bodily harm", UJI 14-131, must also be given.

2. Insert the count number if more than one count is charged.

3. If causation is in issue, UJI 14-251, the definition of causation, must also be used.

4. Use the bracketed alternatives that are applicable.

[Adopted, effective July 1, 1993.]

**ANNOTATIONS**

**Cross references.** — For great bodily harm by vehicle, *see* Section 66-8-101F NMSA 1978.

## 14-245. Vehicle homicide; "under the influence of a drug"; defined.

A person is under the influence of a drug when as a result of using a drug the person is incapable of safely driving a vehicle.

USE NOTE

This instruction may be given immediately after UJI Criminal 14-240.

[Adopted, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references.** — For driving while under the influence of drugs, *see* Section 66-8-102 NMSA 1978.

## 14-246. Injury to pregnant woman; "miscarriage" or "stillbirth"; defined.

A "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth and which is not an induced abortion, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception.

A "stillbirth" means the death of a fetus prior to the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy and which is not an induced abortion; and death is manifested by the fact that after the expulsion or extraction the fetus does not breathe spontaneously or show any other evidence of life such as heartbeat, pulsation of the umbilical cord or definite movement of voluntary muscles.

USE NOTE

Upon request the applicable definition may be given immediately after UJI Criminal 14-240A.

[Adopted, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references.** — For injury to pregnant woman by vehicle, *see* Section 66-8-101.1 NMSA 1978.

# Part F
# General Homicide Instructions

## 14-250. Jury procedure for various degrees of homicide.

You have been instructed on the crimes of first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter.[1] You must consider each of these crimes. You should be sure that you fully understand the elements of each crime before you deliberate further.

You will then discuss and decide whether the defendant is guilty of murder in the first degree.[1] If you unanimously agree that the defendant is guilty of murder in the first degree, you will return a verdict of guilty of murder in the first degree. If you do not agree, you should discuss the reasons why there is a disagreement.

If, after reasonable deliberation, you do not agree that the defendant is guilty of murder in the first degree you should move to a discussion of murder in the second degree. If you unanimously agree that the defendant is guilty of murder in the second degree, you will return a verdict of guilty of murder in the second degree. If you do not agree you should discuss the reasons why there is a disagreement.

If, after reasonable deliberation, you do not agree that the defendant is guilty of murder in the second degree, you should consider whether the defendant is guilty of voluntary manslaughter. If you unanimously agree that the defendant is guilty of voluntary manslaughter, you will return a verdict of guilty of voluntary manslaughter. If you do not agree, you should discuss the reasons why there is a disagreement.

If, after reasonable deliberation, you do not agree that the defendant is guilty of voluntary manslaughter, you should consider whether the defendant is guilty of involuntary manslaughter. If you agree that the defendant is guilty of involuntary manslaughter, you will return a verdict of guilty of involuntary manslaughter.

You may not find the defendant guilty of more than one of the foregoing crimes. If you have a reasonable doubt as to whether the defendant committed any one of the crimes, you must determine that he is not guilty of that crime. If you find him not guilty of all of these crimes, you must return a verdict of not guilty.

USE NOTE

1. The form of this instruction must be altered depending on what crimes are to be considered by the jury.

**Committee commentary.** — The district court must instruct the jury on every degree of homicide for which there is evidence in the case tending to sustain such degree. *State v. Ulibarri*, 67 N.M. 336, 355 P.2d 275 (1960). This could involve instructing the jury on various types of first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter. *Cf. State v. McFall*, 67 N.M. 260, 354 P.2d 547 (1960). UJI 14-250 attempts to direct the method of jury consideration, recognizing the difficulty that juries can have with homicide cases. The committee considered, but expressly decided against, advising the jury what they should do if they are unable to reach any verdict. The instruction also satisfies the holding of the supreme court in *State v. Jones*, 51 N.M. 141, 179 P.2d 1001 (1947). The instruction in that case which required the jury to give to the defendant the benefit of doubt between degrees need not be given.

**ANNOTATIONS**

**This instruction is commonly referred to as a "step-down" instruction.** *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

**Court inquiry to deadlocked jury.** — In cases in which first and second degree murder charges are submitted to the jury, a district court need only inquire whether the jury has truly deadlocked on the greater offense of first degree murder. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

**Defendant entitled to manslaughter instruction upon showing of enough circumstantial evidence.** — If there is enough circumstantial evidence to raise an inference that the defendant was sufficiently provoked to kill the victim, he is entitled to an instruction on manslaughter. *State v. Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981).

**Jury to be instructed on elements of each crime before deliberations begin.** — Even though the jury is instructed to consider first-degree murder and make a determination before moving on to any lesser offenses, the jury is to be instructed on each of the crimes charged, and the elements of each, before deliberation ever begins: assuming that there is evidence of provocation, the jury should be given the choice of finding that the defendant committed voluntary manslaughter; failure to do so is not harmless and is prejudicial. *State v. Benavidez*, 94 N.M. 706, 616 P.2d 419 (1980).

**Law reviews.** — For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 525.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense, 15 A.L.R.4th 118.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 A.L.R.4th 861.

41 C.J.S. Homicide § 335.

## 14-251. Homicide; "proximate cause"; defined.1

In addition to the other elements of the crime of _____ *(name of crime)* as set forth in instruction number _____[2], the state must also prove to your satisfaction beyond a reasonable doubt that

1. The death was a foreseeable result of the defendant's act;

2. The act of the defendant was a significant cause of the death of _____ *(name of victim)*. The defendant's act was a significant cause of death if it was an act which, in a natural and continuous chain of events, uninterrupted

by an outside event, resulted in the death and without which the death would not have occurred.

[There may be more than one significant cause of death. If the acts of two or more persons significantly contribute to the cause of death, each act is a significant cause of death.][3]

USE NOTE

1. For use only if causation is in issue. *See also* UJI 14-252 if there is evidence that the negligence of another person may have caused the death or great bodily injury.

2. Insert here the number assigned by the court to the elements instruction for the named offense.

3. Use the bracketed language if there is evidence that the acts of more than one person contributed to the death of the victim.

[As amended, effective, January 1, 2000.]

**Committee commentary.** — In response to the Supreme Court's decision in *State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143, the committee prepared UJI 14-134 to be given when causation is a question of fact to be resolved by the jury. In *Munoz*, the Court set out the two elements for finding that the defendant's act was the proximate cause of a harm or injury: (1) that the defendant's act was a significant cause of the harm; and (2) that the harm or injury was a foreseeable result of the defendant's act.

The bracketed phrase relating to more than one cause of death is based on *Poore v. State*, 94 N.M. 172, 174, 608 P.2d 148, 150 (1980) and should be used when supported by the evidence.

*See generally* LaFave & Scott, Criminal Law 246-67 (1972). In *Territory v. Yarberry*, 2 N.M. 391, 455-56 (1883), the Court noted that the district court properly refused an instruction requiring the jury to find that one of the two codefendants, both of whom apparently shot the victim, had inflicted the fatal wounds.

**ANNOTATIONS**

**The 1999 amendment,** effective for cases filed on and after January 1, 2000, added present Paragraph 1; designate the second paragraph as Paragraph 2; in Paragraph 2, substituted "was a significant cause of" for "caused" in the first sentence; inserted "defendant's act was a significant cause of dath if it was" for "The cause of a death is and act", and substituted "uninterrupted by and outside event, resulted in" in the second sentence; in the undesignated Paragraph following Paragraph 2, inserted "significant"

and "significantly" and made minor stylistic changes; rewrote Use Note 1, added Use Note 2, renumbered Use Note 2 as Use Note 3.

**Proximate cause issue does not shift burden of proof to defendant.** — General principles of criminal law do not require that a defendant's conduct be the sole cause of the crime. Instead, it is only required that the result be proximately caused by, or the "natural and probable consequence of," the accused's conduct. Thus, as the causation instruction given in this case clearly states, the State has the burden of proving beyond a reasonable doubt that the defendant's actions caused the deaths and great bodily harm, in the sense that his unlawful acts, "in a natural and continuous chain of events," produced the deaths and the great bodily harm. This instruction does not instruct the jury to convict the defendant if he is at fault only to an insignificant extent. Accordingly, the vehicular homicide statute does not unconstitutionally shift the burden of proof and the trial court did not err in giving jury instructions that tracked the statute. *State v. Simpson*, 116 N.M. 768, 867 P.2d 1150 (1993).

**Instructions must link felony and death of victim in felony murder.** — The giving of UJI 14-202, outlining the essential elements of felony murder, in conjunction with this instruction, meets the requirement of establishing the causal link between the felony and the death of the victim. *State v. Wall*, 94 N.M. 169, 608 P.2d 145 (1980).

**Failure to give unrequested instruction with felony-murder instruction not error.** — This instruction is only a definition or an amplification of the cause language of the felony murder instruction and, as such, the failure to give this instruction when unrequested is not error. *State v. Stephens*, 93 N.M. 458, 601 P.2d 428 (1979), overruled in part on other grounds, *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995).

**Jury to be particularly instructed on defenses.** — The defendant in a criminal case should be accorded some semblance of liberality in having the jury instructed with particularity as to his defenses that are supported by the evidence; this is the reason for adopting both this instruction and UJI 14-252, regarding negligence of the deceased. *Poore v. State*, 94 N.M. 172, 608 P.2d 148 (1980).

**And failure to adequately instruct jury results in prejudicial error.** — The harm or prejudice that in fact resulted to a homicide defendant was prejudicial error where the jury was instructed with this instruction but not UJI 14-252, regarding negligence of the deceased, when UJI 14-252 was the only instruction which affirmatively set out defendant's theory of the case. *Poore v. State*, 94 N.M. 172, 608 P.2d 148 (1980).

**Additional instruction not required.** — In a prosecution for first degree murder, failure to give an additional instruction regarding the acts of two or more persons contributing to cause of death was not a fundamental error, since it did not relate to an essential element of the crime. *State ex rel. Haragan v. Harris*, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 506.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 A.L.R. 921.

40 C.J.S. Homicide § 6.

## 14-252. Homicide; negligence of deceased or third person.

The State must prove beyond a reasonable doubt that the defendant's act was a significant cause of the death of _____ *(name of victim)*. Evidence has been presented that the negligence of a person other than the defendant may have contributed to the cause of death. Such contributing negligence does not relieve the defendant of responsibility for an act that significantly contributed to the cause of the death so long as the death was a foreseeable result of the defendant's actions. However, if you find the negligence of a person other than the defendant was the only significant cause of death, then the defendant is not guilty of the offense of _____ *(name of offense)*.

USE NOTE

For use in conjunction with Instruction 14-251 when there is evidence of negligence by another person. This instruction may be modified and used as appropriate in non-homicide cases.

[As amended, effective January 1, 2000.]

**Committee commentary.** — *See State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143; *State v. Romero*, 69 N.M. 187, 191, 365 P.2d 58 (1961) and *State v. Myers*, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

The defendant is entitled to an instruction on the theory of the case if there is evidence to support it. *See State v. Benavidez*, 94 N.M. 706, 616 P.2d 419 (1980); and *State v. Lujan*, 94 N.M. 232, 608 P.2d 1114 (1980).

**ANNOTATIONS**

**The 1999 amendment,** effective for cases filed on and after January 1, 2000, rewrote the instruction and the Use Note.

**Victim's negligence deemed defense only where accident's sole cause.** — The defense that the victim was negligent has value only if it establishes that the victim's negligence was the sole cause of the accident. *State v. Maddox*, 99 N.M. 490, 660 P.2d 132 (Ct. App. 1983).

**Jury to be particularly instructed on defenses.** — The defendant in a criminal case should be accorded some semblance of liberality in having the jury instructed with particularity as to his defenses that are supported by the evidence, this is the reason for adopting both UJI 14-251, defining "proximate cause," and this instruction. *Poore v. State*, 94 N.M. 172, 608 P.2d 148 (1980).

**And failure to adequately instruct jury results in prejudicial error.** — The harm or prejudice that in fact resulted to a homicide defendant was prejudicial error where the jury was instructed with UJI 14-251, defining "proximate cause," but not this instruction, when this instruction was the only instruction which affirmatively set out defendant's theory of the case. *Poore v. State*, 94 N.M. 172, 608 P.2d 148 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 21, 22.

Negligent homicide as affected by negligence or other misconduct of the decedent, 67 A.L.R. 922.

40 C.J.S. Homicide § 5.

## 14-253. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — The instruction pertaining to homicide; effect of improper medical treatment, was withdrawn effective January 1, 2000.

## 14-254. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — The instruction pertaining to homicide; unlawful injury accelerating death, was withdrawn effective January 1, 2000.

## 14-255. Intent to kill one person; another killed.

When one intends to kill or injure a certain person, and by mistake or accident kills a different person, the crime, if any, is the same as though the original intended victim had been killed. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

USE NOTE

Insert this instruction immediately after the instruction on the elements of the crime. This instruction is not necessary if the state has charged and introduced evidence of the crime of first degree murder by a deliberate design to effect the death of any human

being. In that event, the bracketed phrase described in Use Note No. 2 of UJI 14-201 supplies the necessary "transferred intent" instruction.

**Committee commentary.** — As indicated in the use note, this instruction is not necessary for instructing on first degree murder resulting from a deliberate design to effect the death of any human being. *See* former 30-2-1A(5) NMSA 1978 (Laws 1963, ch. 303, § 2-1). This instruction can be used for other first degree murder or for second degree murder. *See State v. Ochoa*, 61 N.M. 225, 297 P.2d 1053 (1956), and *State v. Wilson*, 39 N.M. 284, 46 P.2d 57 (1935). *See generally* LaFave & Scott, Criminal Law 252-53 (1972).

**ANNOTATIONS**

**Voluntary manslaughter.** — The trial court did not err in refusing to give defendant's requested instruction on transferred intent for voluntary manslaughter. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 498, 506, 534, 535.

Homicide by unlawful act aimed at another, 18 A.L.R. 917.

40 C.J.S. Homicide § 39.

# CHAPTER 3
# Assault and Battery

# Part A
# Assault

## 14-301. Assault; attempted battery; essential elements.

For you to find the defendant guilty of assault [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[2];

2. The defendant intended to touch or apply force to _____ *(name of victim)* by _____[2];

3. The defendant acted in a rude, insolent or angry manner[3];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.00 NMSA 1978; UJI 14-301 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* Section 30-3-1(A) and 30-3-1(B) NMSA 1978. Although assault is a petty misdemeanor, instructions on assault are included in UJI Criminal because they may be given to the jury as a necessarily included offense to an aggravated assault. *See, e.g., State v. Mitchell,* 43 N.M. 138, 87 P.2d 432 (1939); *Chacon v. Territory,* 7 N.M. 241, 34 P. 448 (1893). *See also* commentary to UJI 14-6001.

There are three separate instructions on assault for use depending on the evidence. If the evidence supports the theory of assault by attempted battery, UJI 14-301 is to be given; if the evidence supports the theory of assault by a threat or by menacing conduct, UJI 14-302 is to be given; if the evidence supports both theories, UJI 14-303 is to be given.

UJI 14-301 and UJI 14-303 contain the elements of statutory battery as the attempted act of assault. Therefore, the defendant must attempt but fail to unlawfully and intentionally touch or apply force to another in a rude, insolent or angry manner. *See* Section 30-3-4 NMSA 1978. The intentional element is not given the jury in this instruction, but the general criminal intent instruction, UJI 14-141, is given.

An assault by an attempted battery requires an intent to commit the battery. *See generally* Perkins, *supra,* at 116. *Cf.* Section 30-28-1 NMSA 1978. *See generally* reporter's addendum to commentary to UJI 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico", following these instructions. Proof of the intent to commit a battery may require an actual possibility or present ability to carry out the attempt. *See* Perkins, *supra* at 121; LaFave & Scott, Criminal Law 609-10 (1972).

Assault by threat or menacing conduct (UJI 14-302 and UJI 14-303) was probably derived from the tort theory of assault and was made a crime on the theory that any menacing conduct which might result in a breach of the peace should be a punishable

offense. *See* Perkins, *Criminal Law* 116-18 (2d ed. 1969). Unlike the attempted battery, this type of assault may be committed without any present ability or the actual possibility of committing a battery. *See* Perkins, *supra* at 121. This concept of assault is most often used as the supporting assault element for certain types of aggravated assaults. *See also* LaFave & Scott, *Criminal Law* 611 (1972).

The statute contains a third type of assault, one committed by the use of insulting language toward another or by impugning the honor, delicacy or reputation of another. *See* Section 30-3-1(C) NMSA 1978. The elements of this type of assault have never been included in the UJI assault instructions, for three reasons. First, there are serious free speech implications that must be considered in using this form of the offense. *See e.g., State v. Wade,* 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983). Second, the offense is a rarity in actual practice. Third, the elements of this offense would not be used to support an aggravated assault; therefore, this type of assault would not be a necessarily included offense. If the state attempts to prove an assault by insulting language, etc., a special instruction must be drafted.

**ANNOTATIONS**

**Cross references..** — Section 30-3-1(A) NMSA 1978. Section 30-3-4 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in the sentence numbered 1, deleted "[but failed]" and added "touch or apply force to", and changed the phrase "*(describe act and name victim)*" to "*(name of victim)* by"; in the sentence numbered 2, added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; and in the Use Note deleted former paragraph 2; redesignated former paragraph 3 as present paragraph 2 and substituted "ordinary" for "laymen's"; and added present paragraph 3.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 3.

6A C.J.S. Assault and Battery § 65.

## 14-302. Assault; threat or menacing conduct; essential elements.

For you to find the defendant guilty of assault [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[2];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.01 NMSA 1978; UJI 14-302 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* committee commentary following UJI 14-301. The essence of the crime is to place the victim in fear of a battery.

This instruction has been modified to include the element of "unlawful". If there is some other issue of unlawfulness, such as self-defense, an appropriate instruction must also be given and this instruction modified. *See* UJI 14-5181 to 14-5184 for self-defense or defense of another and UJI 14-132.

**ANNOTATIONS**

**Cross references.** — For assault, *see* Section 30-3-1 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, rewrote the paragraph numbered 2 and in the Use Note rewrote number 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 28.

6A C.J.S. Assault and Battery § 65.

## 14-303. Assault; attempted battery; threat or menacing conduct; essential elements.[1]

For you to find the defendant guilty of assault [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[3];

2. The defendant intended to touch or apply force to _____ *(name of victim)* by _____[3]; and

3. The defendant acted in a rude, insolent or angry manner[4];

OR

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[4]; and

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

AND

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of two of the types of assault in Section 30-3-1 NMSA 1978; one type involves attempted battery and the other involves an unlawful act, a threat or menacing conduct which causes another to reasonably believe he is about to be touched or have force applied to him. If the evidence supports both of these theories of assault, use this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.02 NMSA 1978; UJI 14-303 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* the committee commentaries following UJI 14-132 and UJI 14-301 NMRA.

The UJI 14-301 and 14-302 NMRA pattern is used throughout Chapters 3 and 22 of these instructions.

**ANNOTATIONS**

**Cross references.** — For assault, *see* Section 30-3-1 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in the first paragraph numbered 1 deleted "[but failed]" and substituted "*(name of victim)* by" for "*(describe act and name of victim)*"; designated the third sentence as "2", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name of victim)*"; designated the fourth sentence as "3"; designated the fifth sentence as "1" and added "*unlawful conduct*" after "*describe*"; designated the sixth sentence as "2" and rewrote it; designated the seventh sentence as "3"; redesignated the previous sentence numbered "2" as "4"; in Use Note 1 deleted "struck", added "an unlawful act" and "touched or have force applied to him."; deleted previous Use Note number 3; redesignated previous Use Note 4 as 3 and substituted "ordinary" for "laymen's"; and added present Use Note 4.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 28.

6A C.J.S. Assault and Battery § 65.

## 14-304. Aggravated assault; attempted battery with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[2];

2. The defendant acted in a rude, insolent or angry manner[3];

3. The defendant used a [_____;][4] [deadly weapon. The defendant used a _____ *(name of object)*. A _____ *(name of object)* is a deadly weapon only if you find that a _____ *(name of object)*, when used as a weapon, could cause death or great bodily harm[5]][6];

4. The defendant intended to touch or apply force to _____ *(name of victim)*;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

5. UJI 14-131, the definition of "great bodily harm", must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.03 NMSA 1978; UJI 14-304 SCRA; as amended, effective January 15, 1998; February 1, 2000.]

**Committee commentary.** — *See* Section 30-3-2A NMSA 1978. *See* commentary to UJI 14-301 NMRA, UJI 14-302 NMRA and UJI 14-303 NMRA. An aggravated assault by use of a deadly weapon requires only a general criminal intent. *State v. Manus*, 93 N.M. 95, 99, 597 P.2d 280 (1979); *State v. Mascarenas*, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974). Under New Mexico law, an aggravated assault does not include an intent to do physical harm or bodily injury. *State v. Cruz*, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974). *See also United States v. Boone*, 347 F. Supp. 1031 (D.N.M. 1972).

An aggravated assault by use of a deadly weapon may typically occur when the defendant points a gun at the victim, thereby causing the victim to reasonably believe that he is in danger of receiving a battery. *See State v. Anaya*, 79 N.M. 43, 439 P.2d 561 (Ct. App. 1968). However, the crime may also be committed by an assault by attempted battery with a deadly weapon. *State v. Woods*, 82 N.M. 449, 483 P.2d 504 (Ct. App. 1971). The distinction between the two types of assault which support an assault with a deadly weapon charge may be the ability of the defendant to actually inflict the battery. The first type, merely putting the person in apprehension, may occur with the use of an unloaded weapon whereas the second type, the attempted battery, would require a loaded weapon. *See* Perkins, *Criminal Law 121* (2d ed. 1969).

Following the general theory that every battery includes an assault, an assault with a deadly weapon conviction may be upheld even though the evidence establishes that the

victim was shot and severely wounded. *See State v. Brito*, 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969). *See generally* Perkins, *supra* at 127-30. An injury inflicted on the victim by use of the deadly weapon is an aggravated battery. *See State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974).

A deadly weapon may be those items listed as deadly weapons as a matter of law in Section 30-1-12B NMSA 1978. If the weapon is not listed in the statute, the jury must find as a matter of fact that the weapon used was a deadly weapon. *See State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861; *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154; *State v. Gonzales*, 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973); *State v. Conwell*, 36 N.M. 253, 13 P.2d 554 (1932).

The statute provides that the defendant may either "strike at" or "assault" the victim with a deadly weapon. The committee believed that the concept of "striking at" was included within the concept of "assault by attempted battery" and consequently did not include the "striking at" language in this instruction.

## ANNOTATIONS

**Cross references.** — For aggravated assault, *see* Section 30-3-2(A) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in sentence 1, deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name of victim)*"; redesignated former sentence 2 as present sentence 4, adding "touch or apply force" and substituting "*(name of victim)*" for "*(describe act and name of victim)*"; redesignated former sentence 3 as present sentence 2; redesignated former sentence 4 as present sentence 3; deleted former Use Note 2; redesignated former Use Note 3 as present Use Note 2, substituting "ordinary" for "laymen's"; and added present Use Note 3.

**The 1999 amendment,** effective February 1, 2000, rewrote element 3 which read: "The defendant used .....;*4*" and, in the Use Note, rewrote Paragraph 4 to correspond to the amendment of element 3, and inserted Paragraphs 5 and 6.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 53.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon, 92 A.L.R.2d 635.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 A.L.R.5th 823.

6A C.J.S. Assault and Battery § 78.

## 14-305. Aggravated assault; threat or menacing conduct with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct)*;

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[2];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. The defendant used a [_____][3] [deadly weapon. The defendant used a _____ *(name of object)*. A _____ *(name of object)* is a deadly weapon only if you find that a _____ *(name of object)*, when used as a weapon, could cause death or great bodily harm[4]][5];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

3. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

4. UJI 14-131, the definition of "great bodily harm", must also be given.

5. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.04 NMSA 1978; UJI 14-305 SCRA; as amended, effective January 15, 1998; February 1, 2000.]

**Committee commentary.** — *See* committee commentary following UJI 14-302 NMRA for a discussion on the element of "lawfulness". *See also* the committee commentary to UJI 14-304 NMRA.

**ANNOTATIONS**

**Cross references.** — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in sentence 1 inserted "*unlawful act*"; rewrote sentence 2; and rewrote Use Note 2.

**The 1999 amendment,** effective February 1, 2000, rewrote element 4 which read: "The defendant used .....;*4*" and, in the Use Note, rewrote Paragraph 3 to correspond to the amendment of element 4, and inserted Paragraphs 4 and 5.

**Giving of instruction in aggravated battery prosecution not error.** — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery and, accordingly, trial court did not err in instructing jury on aggravated assault, simple battery and simple assault, as well as aggravated battery, where indictment charged only aggravated battery. *State v. DeMary*, 99 N.M. 177, 655 P.2d 1021 (1982).

**Failure to give instruction not error, absent prejudice to defendant.** — Where the giving of this instruction as requested would have avoided guilty verdicts on multiple charges of aggravated assault and aggravated battery that merged under the evidence, the failure to give the instruction was not error in the absence of prejudice to the defendant. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 53.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

6A C.J.S. Assault and Battery § 78.

## 14-306. Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements.1

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[3];

2. The defendant acted in a rude, insolent or angry manner[4];

3. The defendant intended to touch or apply force to _____ *(name of victim)* by _____[3];

OR

1. The defendant _____ *(describe unlawful act, threat or menacing conduct)*;

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[4];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

AND

4. The defendant used a [_____][5] [deadly weapon. The defendant used a _____ *(name of object)*. A _____ *(name of object)* is a deadly weapon only if you find that a _____ *(name of object)*, when used as a weapon, could cause death or great bodily harm[6]][7];

AND

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of two of the types of assault in Section 30-3-1 NMSA 1978; one type involves attempted battery and the other involves a threat or menacing conduct which causes another to reasonably believe he is about to be struck. If the evidence supports both of these theories of assault, use this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131, the definition of "great bodily harm", must also be given.

7. This alternative is given only if the object used is not a "deadly weapon" which is specifically listed in Section 30-1-12B NMSA 1978.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.05 NMSA 1978; UJI 14-306 SCRA; as amended, effective January 15, 1998; February 1, 2000.]

**Committee commentary.** — *See* committee commentary following UJI 14-304 NMRA.

**ANNOTATIONS**

**Cross references.** — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in the sentence numbered 1, deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; designated the former sixth line as 2; designated the former seventh line as 3, added "touch or apply force to", substituted "*(name of victim)* by" for "*(describe act and name victim)*" and deleted "and"; designated the former eighth line as 1 and added "unlawful act"; designated the former ninth line as 2 and rewrote the line; designated the former eleventh line as 3; redesignated the line formerly numbered 2 as present number 4 and added "and"; redesignated the line formerly designated 3 as present number 5; deleted former Use Note 3; renumbered former Use Note 4 as present Use Note 3 and substituted "ordinary" for "laymen's"; and added present Use Note 4.

**The 1999 amendment,** effective February 1, 2000, rewrote element 4 which read: "The defendant used .....;[4]" and, in the Use Note, rewrote Paragraph 5 to correspond to the amendment of element 4, and inserted Paragraphs 6 and 7.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 54.

6A C.J.S. Assault and Battery § 78.

## 14-307. Aggravated assault in disguise; essential elements.

For you to find the defendant guilty of aggravated assault in disguise [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[2];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. At the time _____ *(name of defendant)* was [wearing a _____[3]] [or][4] [disguised] for the purpose of concealing _____'s *(name of defendant)* identity;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

3. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use either or both alternatives.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.06 NMSA 1978; UJI 14-307 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* Section 30-3-2(B) NMSA 1978. The committee believed that an assault in disguise would of necessity be the threat or menacing conduct type which gives a reasonable person the belief that he is about to receive a battery. No New Mexico cases interpreting this particular type of assault were found by the committee's reporter.

**ANNOTATIONS**

**Cross references.** — For aggravated, *see* Section 30-3-2 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in the line designated 1 added "*unlawful act*"; rewrote the lines designated 2 and 4; and rewrote Use Notes 2 and 4.

## 14-308. Aggravated assault; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to commit _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[3];

2. The defendant acted in a rude, insolent or angry manner[4];

3. The defendant intended to touch or apply force to _____ *(name of victim)* by _____[3];

4. The defendant intended to commit the crime of _____[1];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.07 NMSA 1978; UJI 14-308 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — Although the statute uses both the terms "willfully" and "unlawfully", neither term has been added to this instruction as it is covered by the addition of "unlawfully" when lawfulness is an issue. *See* Use Note 4.

*See* Section 30-3-2(C) NMSA 1978. The felony intended must be other than a violent felony as defined in Section 30-3-3 NMSA 1978. *See* UJI 14-311, 14-312 and 14-313 NMRA and commentary if the felony intended is a violent felony.

At common law, an assault with intent to commit a felony was considered merely an attempt to commit the felony. *See* Perkins, *Criminal Law* 133 (2d ed. 1969). Aggravated battery and aggravated assault are lesser included offenses of the crime of attempted murder. *See State v. Meadors,* 121 N.M. 38, 908 P.2d 731 (1995) (aggravated battery is a lesser included offense of attempted murder); and *State v. DeMary,* 99 N.M. 177, 179-80, 655 P.2d 1021, 1023-24 (1982), (aggravated assault is a lesser included offense of aggravated battery).

Because it requires an act coupled with an intent to commit a further act, this is a specific intent crime.

**ANNOTATIONS**

**Cross references.** — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; redesignated former element 2 as present element 3 and added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; redesignated former element 3 as present element 2; in Use Note 1 added "or felonies" in the first sentence and in the second deleted "the" and added "each"; deleted former Use Note 3; redesignated former Use Note 4 as present use note 3, substituting "ordinary" for "laymen's"; and added present Use Note 4.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

## 14-309. Aggravated assault; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to commit _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[3];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. The defendant intended to commit the crime of _____[1];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the name of the felony. If there is more than one felony, insert the names of the felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

2. Insert the count number if more than one count is charged.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.08 NMSA 1978; UJI 14-309 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* committee commentary for UJI 14-308 NMRA.

**ANNOTATIONS**

**Cross references.** — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 added "*unlawful act*"; rewrote element 2; in Use Note 1 added "If there is more than one felony, insert name of the" and made stylistic changes; and rewrote Use Note 3.

**Instruction on felony aggravated assault.** — The trial court committed reversible error when it instructed the jury on the elements of aggravated assault with intent to commit felony aggravated battery, but then failed to instruct on the essential elements of felony aggravated battery and, instead, instructed on the essential elements of misdemeanor aggravated battery. *State v. Armijo*, 1999-NMCA-087, 127 N.M. 594, 985 P.2d 764.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

## 14-310. Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements.1

For you to find the defendant guilty of aggravated assault with intent to commit _____[2] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to *(name of victim)* by _____[4];

2. The defendant acted in a rude, insolent or angry manner[5];

3. The defendant intended to touch or apply force to *(name of victim)* by _____[4];

OR

1. The defendant intentionally _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[5];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

AND

4. The defendant intended to commit the crime of _____[2];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction combines the essential elements in UJI 14-308 and UJI 14-309.

2. Insert the name of the felony. If there is more than one felony, insert the names of the felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.09 NMSA 1978; UJI 14-310 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* committee commentary for UJI 14-308 NMRA.

**ANNOTATIONS**

**Cross references.** — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; designated the former sixth line as 2; designated the former fifth line as 3 and added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; designated the former seventh line as 1 and added "intentionally" and "unlawful act"; designated former line eight as 2 and rewrote the line; designated former line ten as 3; redesignated former element 2 as 4 and former element 3 as 5; rewrote Use Note 1; in Use Note 2 added "If there is more than one felony, insert the names of the" and made stylistic changes; deleted former Use Note 4; redesignated former Use Note 5 as present Use Note 4 and substituted "ordinary" for "laymen's"; and added Use Note 5.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

## 14-311. Aggravated assault; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to [kill] [or][1] [commit _____[2]] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[4];

2. The defendant acted in a rude, insolent or angry manner[5];

3. The defendant intended to touch or apply force to _____ *(name of victim)* by _____[4];

4. The defendant intended to [kill] [or][1] [commit _____[2]] on _____ *(name of victim);*

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, i.e., mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961. For robbery, *see* UJI 14-1620. For burglary, *see* UJI 14-1630.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.10 NMSA 1978; UJI 14-311 SCRA; as amended, effective September 1, 1988; January 15, 1998.]

**Committee commentary.** — *See* Section 30-3-3 NMSA 1978. *See also* committee commentaries to UJI 14-301 NMRA and UJI 14-304 NMRA.

Instructions 14-311, 14-312, and 14-313 are used only where the assault is accompanied by an intent to commit mayhem, rape, robbery or burglary. The statute provides for an assault with intent to kill or with intent to commit any murder. The courts have had problems in developing a distinction between the two types of intent. In *State v. Melendrez,* 49 N.M. 181, 159 P.2d 768 (1945), the Court determined that an assault with intent to kill was different from an assault with intent to murder. The basis for the distinction was that an assault with intent to kill may be committed without malice, whereas an assault with intent to murder required malice aforethought. This distinction no longer is viable under the current murder statute, Section 30-2-1 NMSA 1978, which no longer incorporates the malice concept. Assault with intent to commit murder therefore no longer is different from assault with intent to kill.

In *State v. Rogers,* 31 N.M. 485, 247 P. 828 (1926), the court held that a depraved-mind murder, which does not require intent to kill, could not form the basis for an assault with intent to murder. *See also State v. Cowden,* 121 N.M. 703, 917 P.2d 972 (Ct.App. 1996) (conviction of both assault with intent to commit a violent felony, murder, Section 30-3-3 NMSA 1978 and for aggravated battery with a deadly weapon, Section 30-3-5(C) NMSA 1978); and *State v. Fuentes,* 119 N.M. 104, 104, 888 P.2d 986, 986 (Ct.App. 1994).

**ANNOTATIONS**

**Cross references. —** For aggravated assault, *see* Section 30-3-2 NMSA 1978.

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in Item 2 in the Use Note, in the second sentence, substituted "criminal sexual penetration" for "rape", and substituted the present sixth sentence for the former sixth sentence, which read "For rape, see UJI .

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; redesignated former element 3 as present element 2; redesignated former element 2 as present element 3 and added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; in element 4 added "*(name of victim)*"; in Use Note 1 deleted "murder" after "violent felony, i.e." and deleted the former fourth sentence which read "For murder, see second degree murder, UJI ; deleted former Use Note 4; redesignated former Use Note 5 as present Use note 4 and substituted "ordinary" for "laymen's"; and added present Use Note 5.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

## 14-312. Aggravated assault; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to [kill] [or][1] [commit _____[2]] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[4];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. The defendant intended to [kill] _____ *(name of victim)]* [or][1] [commit _____[2] on _____ *(name of victim)];*

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, i.e., mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961. For robbery, *see* UJI 14-1620. For burglary, *see* UJI 14-1630.

3. Insert the count number if more than one count is charged.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.06 NMSA 1978; UJI 14-307 SCRA; as amended, effective September 1, 1988; January 15, 1998.]

**Committee commentary.** — *See* committee commentary to UJI 14-308 NMRA and UJI 14-311 NMRA.

**ANNOTATIONS**

**Cross references.** — For assault with intent to commit felony, *see* Section 30-3-3 NMSA 1978.

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in Item 2 in the Use Note, in the second sentence, substituted "criminal sexual penetration" for "rape", and substituted the present sixth sentence for the former sixth sentence, which read "For rape, see UJI .

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1, broadened the description of the defendant's conduct;

rewrote element 2; added a date requirement in 4; deleted the references to murder in Use Note 2; and rewrote Use Note 4.

**Instruction improper. —** Where defendant was convicted of assault with intent to commit a violent felony against the adult child of the victim whom defendant shot and killed; defendant fired shots into a house that was occupied by the victim's adult child and others; and the jury was instructed that for it to find defendant guilty of assault with intent to commit a violent felony on the victim's adult child, the jury had to find that defendant intended to kill the victim's child or any other person or commit murder or mayhem on the victim's adult child or any other person, the instruction misstated the law regarding assault with intent to commit a violent felony, and because the jury instruction allowed the jury to convict defendant of assaulting the victim's adult child on the ground that defendant intended to commit a violent felony against the victim, not the victim's adult child, the jury may have convicted defendant of crime that did not exist. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

## 14-313. Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements.[1]

For you to find the defendant guilty of aggravated assault with intent to [kill] [or][2] [commit _____[3]] [as charged in Count _____][4], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ *(name of victim)* by _____[5];

2. The defendant acted in a rude, insolent or angry manner[6];

3. The defendant intended to touch or apply force to _____ *(name of victim)* by _____[5];

OR

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner[6];

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

AND

4. The defendant intended to [kill] [or][2] [commit _____[3]] on _____ *(name of victim);*

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction combines the essential elements set forth in UJI 14-311 and 14-312, for use when the two forms of the offense are charged in the alternative.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony; *i.e.,* mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961. For robbery, *see* UJI 14-1620. For burglary, *see* UJI 14-1630.

4. Insert the count number if more than one count is charged.

5. Use ordinary language to describe the touching or application of force.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.06 NMSA 1978; UJI 14-307 SCRA; as amended, effective September 1, 1988; January 15, 1998.]

**Committee commentary.** — This instruction combines UJI 14-311 and 14-312 NMRA. *See* committee commentary for UJI 14-311 NMRA.

**ANNOTATIONS**

**Cross references.** — For assault with intent to commit felony, *see* Section 30-3-3 NMSA 1978.

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in Item 3 in the Use Note, in the second sentence, substituted "criminal sexual penetration" for "rape", and substituted the present sixth sentence for the former sixth sentence, which read "For rape, see UJI .

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, rewrote element 1 to eliminate the bracketed material dealing with attempt, specifically set out the requirement of "touch or apply force" and changed the blank to cover "*name of victim*" only; designated the former third line following the colon as element 2; designated the former second line following the colon as element 3 and specifically set out the requirement of "touch or apply force" and changed the blank to cover "*name of victim*" only; designated the former fourth line following the colon as 1 and broadened the scope of coverage of the description; combined the former fifth and sixth lines following the colon into one element, designated it as 2 and specifically set out the requirement that the victim believe the defendant was about intrude on the victim's safety or bodily integrity; redesignated the former second element as 4 and added the date requirement; redesignated the former third element as 5; rewrote Use Note 1; deleted references to murder in Use Note 3; deleted former Use Note 5; redesignated former Use Note 6 as 5 and substituted "ordinary" for "laymen's"; and added present Use Note 6.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

## 14-314. "Mayhem"; defined; essential elements for aggravated assault.

Mayhem consists of intentionally and violently depriving another person of the use of a member or organ of that person's body, making that person less able to fight.

USE NOTE

To be used with UJI 14-311, 14-312, 14-313, 14-2207, 14-2208 and 14-2209.

[As amended, effective January 15, 1998.]

**Committee commentary.** — New Mexico no longer has a statutory crime of mayhem. The Act of February 15, 1854 (see Code 1915, Section 1476) included the expanded concept of mayhem known in England as the Coventry Act. *See generally* Perkins, Criminal Law 185 (2d ed. 1969). *See State v. Hatley,* 72 N.M. 377, 384 P.2d 252 (1963); *State v. Trujillo,* 54 N.M. 307, 224 P.2d 151 (1950); *State v. Raulie,* 40 N.M. 318, 59 P.2d 359 (1936). The mayhem statute was repealed in 1963. *See* N.M. Laws 1963, Ch. 303, Section 30-1.

It has been suggested by some authorities that the crime of aggravated battery replaces mayhem. *See, e.g.,* LaFave & Scott, Criminal Law 615 (1972). The New Mexico Courts have not specifically held that aggravated battery replaces mayhem. In *State v. Ortega,* 77 N.M. 312, 422 P.2d 353 (1966), the Supreme Court affirmed the conviction for aggravated battery where the defendant had forcibly tattooed the victim with a needle. The Court held that this was sufficient evidence of great bodily harm as defined in Section 30-1-12A NMSA 1978 and that the statute defining great bodily harm "in effect" covers the crime of mayhem.

Because New Mexico no longer has a statutory crime of mayhem, the committee believed that the common-law crime of mayhem should be used for assault with intent to commit mayhem, if the courts determine that the assault crime survived the 1963 repeal of the underlying substantive offense. *See* Section 30-1-3 NMSA 1978. The definition used in UJI 14-314 follows the common-law definition of mayhem. *See State v. Martin,* 32 N.M. 48, 250 P. 842 (1926). *See also* Perkins, *supra* at 185.

**ANNOTATIONS**

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, rewrote the instruction to make it gender neutral.

**Compiler's notes.** — Section 1476, Code 1915, referred to in the second sentence in the first paragraph of the committee commentary, was compiled as Section 40-30-1, 1953 Comp., before being repealed.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 57.

Mayhem as dependent on part of body injured and extent of injury, 16 A.L.R. 955, 58 A.L.R. 1320.

56 C.J.S. Mayhem §§ 2, 3, 10.

## 14-315. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to a court order dated June 16, 1988, this instruction, defining "rape", was withdrawn effective for cases filed in the district courts on or after September 1, 1988.

## 14-316. Recompiled.

**ANNOTATIONS**

**Recompilations.** — UJI 14-316, relating to shooting at a dwelling or occupied building, was recompiled as UJI 14-340 NMRA in 1996.

## 14-317. Recompiled.

**ANNOTATIONS**

**Recompilations.** — UJI 14-317, relating to shooting at a dwelling or occupied building, was recompiled as UJI 14-341 NMRA in 1996.

# Part B
# Battery

## 14-320. Battery; essential elements.

For you to find the defendant guilty of battery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally touched or applied force to _____ *(name of victim)* by _____[2];

2. The defendant acted in a rude, insolent or angry manner[3];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.50 NMSA 1978; UJI 14-320 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* Section 30-3-4 NMSA 1978. Battery is a necessarily included offense of aggravated battery offenses. *See State v. Duran,* 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

The 1998 amendments added the word "intentionally" to the first element and made other clarifying amendments. Use Note 3 was added to explain how to modify this instruction if there is an issue of the unlawfulness of an act. *See* UJI 14-4581 to UJI 14-

4584 [UJI 14-5181 to 14-5184]. *See State v. Padilla,* 122 N.M. 92, 920 P.2d 1046 (1997) (it is fundamental error to fail to instruct on unlawfulness of the act unless "that element is undisputed (i.e., by concession it is not at issue) and indisputable (i.e., the jury undoubtedly would have so found)" citing *State v. Orosco,* 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992) and *State v. Osborne,* 111 N.M. 654, 661-62, 808 P.2d 624, 831-32 (1991).

**ANNOTATIONS**

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 specifically set out the requirement of intentional touching or application of force, limited the first blank line to the victim's name and added a second blank line for the name of the perpetrator; substituted "ordinary" for "laymen's" in Use Note 2; and added Use Note 3.

**Battery under Section 30-3-4 NMSA 1978** is a lesser included offense of aggravated battery upon a peace officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Battery upon a police officer.** — If there is a factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

Subsection A of 30-22-24 NMSA 1978 includes as unlawful only those acts that physically injure officers, that actually harm officers by jeopardizing their safety, or that meaningfully challenge their authority; an instruction that the state must prove the defendant acted in a rude, insolent or angry manner clearly did not describe the element of harm to the safety or authority of the officers, and was fundamental error. *State v. Padilla*, 1997-NMSC-022, 123 N.M. 216, 937 P.2d 492.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 5, 37.

6A C.J.S. Assault and Battery § 127.

## 14-321. Aggravated battery; without great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery without great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ *(name of victim)* by _____[2];

2. The defendant intended[3] to injure _____ *(name of victim)* [or another][4];

3. The defendant caused _____ *(name of victim)*

[painful temporary disfigurement]

[OR][5]

[a temporary loss or an impairment of the use of _____ *(name of organ or member of the body)*];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

5. Use only the applicable bracketed element established by the evidence.

[Adopted, effective October 1, 1976; UJI Criminal Rule 3.51 NMSA 1978; UJI 14-321 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* Subsections A and B of Section 30-3-5 NMSA 1978. *See also* commentaries to UJI 14-320 and 14-322 NMRA. This misdemeanor instruction was included in UJI because it is a necessarily included offense to third degree felony aggravated battery. *See State v. Chavez,* 82 N.M. 569, 484 P.2d 1279 (Ct. App.), *cert. denied,* 82 N.M. 562, 484 P.2d 1272 (1971).

This instruction and UJI 14-322 and 14-323 provide distinct and separate instructions for the crime of aggravated battery. It is error to give the jury types of aggravated battery not supported by the evidence. *State v. Urban,* 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

*See State v. Cowden,* 121 N.M. 703, 917 P.2d 972 (Ct.App. 1996) (conviction of both assault with intent to commit a violent felony, murder, Section 30-3-3 NMSA 1978 and for aggravated battery with a deadly weapon, Section 30-3-5(C) NMSA 1978); and *State v. Fuentes,* 119 N.M. 104, 104, 888 P.2d 986, 986 (Ct.App. 1994).

**ANNOTATIONS**

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 specifically set out the requirement of touching or applying force, and added a blank line for the name of the perpetrator; clarified the meaning of "member" in element 3; substituted "ordinary" for "laymen's" in Use Note 2; added present Use Note 3; redesignated former Use Note 3 as present Use Note 4; and redesignated former Use Note 4 as present Use Note 5.

**Instruction defining aggravated battery was not a necessary instruction** where the trial court instructed the jury as to the material elements of the aggravated battery charge. *State v. Urban*, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 51.

6A C.J.S. Assault and Battery § 80.

## 14-322. Aggravated battery; with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ *(name of victim)* by _____[2] with a [_____][3] [deadly weapon. The defendant used a _____ *(name of instrument or object)*. A _____ *(name of instrument or object)* is a deadly weapon only if you find that a _____ *(name of object)*, when used as a weapon, could cause death or great bodily harm[4]][5];

2. The defendant intended[6] to injure _____ *(name of victim)* [or another][7];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

4. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

5. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

7. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

[Adopted, effective October 1, 1976; UJI Criminal Rule 3.52 NMSA 1978; UJI 14-322 SCRA; as amended, effective January 15, 1998; February 1, 2000.]

**Committee commentary.** — *See* Section 30-3-5A and 30-3-5C NMSA 1978. *See also* commentary to UJI 14-320.

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

An aggravated battery requires an intent to injure. *State v. Vasquez*, 83 N.M. 388, 492 P.2d 1005 (Ct. App. 1971). The intent to injure is a classic specific intent which may be inferred from the conduct of the defendant in the surrounding circumstances and may also be negated by voluntary intoxication or mental disease or defect. *State v. Valles*, 84 N.M. 1, 498 P.2d 693 (Ct. App. 1972). The intent to injure may be directed towards several persons and it is not necessary to identify the specific person to whom the intent was directed in order to "transfer" the intent to the eventual victim. *State v. Mora*, 81 N.M. 631, 471 P.2d 201 (Ct. App. 1970), *cert. denied*, 81 N.M. 668, 472 P.2d 382 (1970).

*See State v. Cowden*, 121 N.M. 703, 917 P.2d 972 (Ct.App. 1996) (conviction of assault with intent to commit a violent felony, murder, Section 30-3-3 NMSA 1978 and aggravated battery with a deadly weapon, Section 30-3-5C NMSA 1978).

## ANNOTATIONS

**The 1999 amendment,** effective February 1, 2000, rewrote element 1 which read: "The defendant touched or applied force to _____ (name of victim) by _____[2] with

_____ (deadly weapon)[3]" and, in the Use Note, rewrote Paragraph 3 to correspond to the amendment of element 1, inserted Paragraphs 4 and 5 and redesignated former Paragraphs 5 and 5 as present Paragraphs 6 and 7.

**Unlawfulness required.** — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another. *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

**Failure to give instruction not error, absent prejudice to defendant.** — Where the giving of this instruction as requested would have avoided guilty verdicts on multiple charges of aggravated assault and aggravated battery that merged under the evidence, the failure to give the instruction was not error in the absence of prejudice to the defendant. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

**Ambiguous instruction.** — Instruction which created an ambiguity as to whether the judge or the jury decided if a brick wall was a "deadly weapon" constituted reversible error. *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861, cert. denied, 126 N.M. 533, 972 P.2d 352, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

**Baseball bat as deadly weapon.** — In a prosecution for aggravated battery with a deadly weapon, the question of whether a baseball bat was a deadly weapon should have been left to the jury; however, the error is not fundamental and must be preserved for appeal. *State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 53.

6A C.J.S. Assault and Battery §§ 75, 76.

## 14-323. Aggravated battery; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ *(name of victim)* by _____[2];

2. The defendant intended[3] to injure _____ *(name of victim)* [or another][4];

3. The defendant [caused great bodily harm[5] to _____ *(name of victim)*] [or][6] [acted in a way that would likely result in death or great bodily harm[5] to _____ *(name of victim)*];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 .

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

5. The definition of great bodily harm, UJI 14-131 NMRA, must also be given.

6. Use only the applicable bracketed element established by the evidence.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.53 NMSA 1978; UJI 14-323 SCRA; as amended, effective January 15, 1998.]

**Committee commentary.** — *See* Subsections A and B of Section 30-3-5 NMSA 1978. *See also* commentaries to UJI 14-320 and 14-322 NMRA.

**ANNOTATIONS**

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, in element 1 specifically set out the requirement of touching or applying force and added a blank line for the name of the perpetrator; substituted "ordinary" for "laymen's" in Use Note 2; and added present Use Note 3, redesignating all Use Notes thereafter.

**Giving aggravated assault instruction in aggravated battery prosecution.** — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery and, accordingly, trial court did not err in instructing jury on aggravated assault, simple battery and simple assault, as well as aggravated battery, where indictment charged only aggravated battery. *State v. DeMary*, 99 N.M. 177, 655 P.2d 1021 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 51.

6A C.J.S. Assault and Battery § 80.

# Part C
# Harassment and Stalking

## 14-330. Harassment; essential elements.

For you to find the defendant guilty of harassment as [charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant maliciously pursued a pattern of conduct that was intended to [annoy] [seriously alarm] [or] [terrorize][2] _____ *(name of victim)*;

2. A reasonable person would have suffered substantial emotional distress as a result of the defendant's actions;

3. The defendant's conduct served no lawful purpose;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed alternatives.

[Adopted, effective February 1, 1995.]

**ANNOTATIONS**

**Cross references.** — For harassment, *see* Section 30-3A-2 NMSA 1978.

## 14-331. Stalking; essential elements.

For you to find the defendant guilty of stalking as [charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant maliciously pursued a pattern of conduct that would cause a reasonable person to feel frightened, intimidated or threatened on more than one occasion by:[2]

[(a) following _____ *(name of victim)* in a place other than in the residence of the defendant;]

[(b) placing _____ *(name of victim)* under surveillance by being present outside _____'s *(name of victim)* [school] [residence] [workplace] [vehicle] or [_____, a place frequented by _____ *(name of victim)]* [other than the defendant's residence][3]; [or]

[(c) harassing _____ *(name of victim);*][4]

2. The defendant intended

[to place _____ *(name of victim)* in reasonable apprehension of [death] [bodily harm] [sexual assault] [confinement or restraint][3];]

[or]

[to cause a reasonable person to fear for the person's safety or the safety of a household member[5];]

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed alternatives.

3. Give this alternative only if it is in issue.

4. If this alternative is used, instruction UJI 14-330 NMRA must also be given.

5. If this alternative is given, UJI 14-332 NMRA must be given immediately after this instruction.

[Adopted, effective February 1, 1995; as amended, effective July 1, 1998.]

**ANNOTATIONS**

**Cross references.** — For stalking, *see* Section 30-3A-3 NMSA 1978.

**The 1998 amendment,** effective for cases filed on or after July 1, 1998, in Subparagraph 1, substituted "would cause a reasonable person to feel frightened, intimidated or threatened" for "posed a credible threat*2* to _____ *(name of victim)*"; in Subparagraph 1(a), inserted "in a place"; in Subparagraph 1(b), substituted "being" for "remaining" and substituted "a" for "_____, other"; renumbered Subparagraph 3 as 2 and added "[or] [to cause a reasonable person to fear for the person's safety or the safety of a household member*5*;]; renumbered Subparagraph 4 as 3; and in the Use Notes, deleted Use Note 2 and renumbered to others accordingly, and added Use Note 5.

## 14-332. Stalking; "household member"; defined.

A "household member" means a spouse, former spouse, family member, including a relative, parent, present or former step-parent, present or former in-law, child or co-parent of a child, or a person with whom the threatened _____ *(name of victim)* has had a continuing personal relationship. Cohabitation is not necessary for _____ *(name of victim)* to be considered a household member.

USE NOTE

This instruction is given if the term "household member" is used in UJI 14-331 NMRA.

[Adopted, effective February 1, 1995; as amended July 1, 1998.]

**ANNOTATIONS**

**Cross references. —** For stalking, *see* Section 30-3A-3 NMSA 1978.

**The 1998 amendment,** effective for cases filed on or after July 1, 1998, rewrote the instruction and Use Note.

## 14-333. Aggravated stalking; essential elements.

For you to find the defendant guilty of aggravated stalking [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* committed the crime of stalking[2];

2. At the time of the offense:

[_____ *(name of defendant)* knowingly violated a permanent or temporary order of protection issued by a court (and the victim did not also violate the court order);][3]

[or]

[_____ *(name of defendant)* violated a court order setting conditions of release and bond;]

[or]

_____ *(name of defendant)* was in possession of a [_____][4] [_____ *(name of object)* with the intent to use it as a weapon and a _____ *(name of object)*, when used as a weapon, is capable of inflicting death or great bodily harm[5]][6];

[or]

[the victim was less than sixteen years of age;]

USE NOTE

1. Insert the count number if more than one is charged.

2. Unless the court has instructed on the essential elements of the crime of stalking, these essential elements must be given immediately after this instruction.

3. Use only applicable alternative.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978. If the object used is not listed in Section 30-1-12B NMSA 1978 as a weapon, the second alternative is given.

5. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

6. Use this alternative only if the "weapon" is not one that is specfically listed in Section 30-1-12B NMSA 1978.

[Approved, effective July 1, 1998; as amended, effective January 10, 2002.]

**ANNOTATIONS**

**Cross references.** — For aggravated stalking, *see* Section 30-3A-3.1 NMSA 1978.

**The 2001 amendment,** effective January 10, 2002, in Element 2 in the third option, substituted "[_____][4] [_____ *(name of object)* with the intent to use it as a weapon and a _____ *(name of object)*, when used as a weapon, is capable of inflicting death or great bodily harm[5]]" for "[deadly weapon]" and added Use Notes 4 through 6.

**Possession of "deadly weapon".** — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of 30-1-12B NMSA 1978, the jury must be instructed (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

# Part D
# Shooting at Dwelling or Occupied Building; Shooting at or from Motor Vehicle

## 14-340. Shooting at inhabited dwelling or occupied building; no death or great bodily harm; essential elements.

For you to find the defendant guilty of shooting at an [inhabited dwelling[1]][2] [occupied building] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm at [a dwelling][2] [an occupied building];

2. The defendant knew that the building was [a dwelling][2] [occupied];

[3. The defendant was not a law enforcement officer engaged in the lawful performance of duty;][4]

4. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTE

1. If this alternative is given, UJI 14-1631 NMRA, the definition of "dwelling", must be given. When used with this instruction, UJI 14-1631 NMRA should be modified to delete the word "house".

2. Use only applicable alternative or alternatives.

3. Insert the count number if more than one count is charged.

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[14-316 SCRA 1986, adopted, effective March 15, 1995.]

**ANNOTATIONS**

**Cross references.** — For shooting at dwelling or occupied building, *see* Section 30-3-8 NMSA 1978.

**Compiler's notes.** — In 1996, this instruction, formerly compiled as UJI 14-316, was recompiled by the compiler to provide for additional contiguous instructions.

**Evidence sufficient.** — Where defendant fired two gunshots into a house; the bullets found in the house matched those fired from defendant's handgun; the trajectory of the bullets indicated that the shooter was aiming directly at the house; defendant had expressed hostility towards one of the occupants of the house whom defendant knew was in the house; after defendant fired into the house, defendant aimed the gun downward and shot and killed the victim; the trajectory of the bullets that entered the body of the victim was different from the trajectory of the bullets that entered the house, there was sufficient evidence to support defendant's conviction for shooting at a dwelling. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

**Knowledge of occupation is not an element** of shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Evidence sufficient to prove conspiracy to commit shooting at a dwelling.** — Where defendant's friends asked defendant for a ride from a party; one of the friends suggested that they go "do some shootings"; defendant agreed to the plan and drove to the location of a trailer selected by the friend; the friend exited defendant's vehicle and fired three shots at the trailer; the owner of the trailer had recently moved from the trailer, but kept some possessions in the trailer and parked two vehicles in front of the trailer; and defendant claimed that defendant had no reason to know that the trailer was occupied at the time of the shooting, the evidence was sufficient to prove that defendant had the requisite intent to agree and the intent to commit shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

## 14-341. Shooting at dwelling or occupied building; resulting in death or great bodily harm; essential elements.

For you to find the defendant guilty of causing [death] [or] [great bodily harm][1] by shooting at a [dwelling][1] [occupied building] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm at [a dwelling[3]][1] [an occupied building];

2. The defendant knew that the building was [a dwelling][1] [occupied];

3. The defendant caused[4] [the death of][1] [or] [great bodily harm to[5]] _____ *(name of victim)*;

[4. The defendant was not a law enforcement officer engaged in the lawful performance of duty;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.[7]

USE NOTE

1. Use only applicable alternative or alternatives.

2. Insert the count number if more than one count is charged.

3. If this alternative is given, UJI 14-1631 NMRA, the definition of dwelling, must be given. When used with this instruction, UJI 14-1631 NMRA should be modified to delete the word "house".

4. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must also be given.

5. If this alternative is given, the definition of "great bodily harm", UJI 14-131 NMRA, must also be given.

6. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

7. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[14-317 SCRA 1986, adopted, effective March 15, 1995.]

**ANNOTATIONS**

**Cross references.** — For shooting at dwelling or occupied building, *see* Section 30-3-8 NMSA 1978.

**Compiler's notes.** — In 1996, this instruction, formerly compiled as UJI 14-317, was recompiled by the compiler to provide for additional contiguous instructions.

## 14-342. Shooting at or from a motor vehicle; no injury; essential elements.

For you to find the defendant guilty of shooting [at][1] [from] a motor vehicle [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm [at][1] [from] a motor vehicle with reckless disregard[3] for another person;

[2. The defendant was not a law enforcement officer engaged in the lawful performance of duty;][4]

3. This happened in New Mexico on or about the _____ day of _____ , _____ .[5]

USE NOTE

1. Use only applicable alternative or alternatives.

2. Insert the count number if more than one count is charged.

3. A definition of "reckless disregard" must be given after this instruction. The definition of "reckless disregard" in UJI 14-1704 NMRA, "negligent arson", should be modified by substituting the term "with reckless disregard" for the word "recklessly".

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted, effective January 1, 1996.]

**ANNOTATIONS**

**Cross references.** — For shooting at or from a motor vehicle, *see* Section 30-3-8(B) NMSA 1978.

**Compiler's notes.** — This instruction was approved as UJI 14-318. It was recompiled in 1996 as UJI 14-342 to provide for additional contiguous instructions.

## 14-343. Shooting at or from a motor vehicle; injury; essential elements.

For you to find the defendant guilty of shooting [at][1] [from] a motor vehicle [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm [at][1] [from] a motor vehicle with reckless disregard[3] for another person;

2. _____ *(name of victim)* was injured by the shooting;

[3. The defendant was not a law enforcement officer engaged in the lawful performance of duty;][4]

4. This happened in New Mexico on or about the _____ day of _____ , _____.[5]

USE NOTE

1. Use only applicable alternative or alternatives.

2. Insert the count number if more than one count is charged.

3. A definition of "reckless disregard" must be given after this instruction. The definition of "reckless disregard" in UJI 14-1704 NMRA, "negligent arson", should be modified by substituting the term "with reckless disregard" for the word "recklessly".

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted, effective January 1, 1996.]

**ANNOTATIONS**

**Cross references.** — For shooting at or from a motor vehicle, *see* Section 30-3-8(B) NMSA 1978.

**Compiler's notes.** — This instruction was approved as UJI 14-319. It was recompiled in 1996 as UJI 14-343 to provide for additional contiguous instructions.

## 14-344. Shooting at or from motor vehicle; resulting in great bodily harm; essential elements.

For you to find the defendant guilty of shooting [at] [from][1] a motor vehicle resulting in great bodily harm [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm [at][1] [from] a motor vehicle with reckless disregard[3] for another person;

2. The shooting caused great bodily harm[4] to _____ *(name of victim);*

[3. The defendant was not a law enforcement officer engaged in the lawful performance of duty;][5]

4. This happened in New Mexico on or about the _____ day of _____ , _____.[6]

USE NOTE

1. Use only applicable alternative or alternatives.

2. Insert the count number if more than one count is charged.

3. A definition of "reckless disregard" must be given after this instruction. The definition of "reckless disregard" in UJI 14-1704 NMRA, "negligent arson", should be modified by substituting the term "with reckless disregard" for the word "recklessly".

4. The definition of "great bodily harm", UJI 14-131 NMRA, must also be given.

5. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

6. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted, effective January 1, 1996.]

**ANNOTATIONS**

**Cross references.** — For shooting at or from a motor vehicle, *see* Section 30-3-8(B) NMSA 1978.

**Compiler's notes.** — This instruction was approved as UJI 14-320. It was recompiled in 1996 as UJI 14-344 to provide for additional contiguous instructions, and because of an existing UJI 14-320.

# CHAPTER 4
# Kidnapping

## 14-401. False imprisonment; essential elements.

For you to find the defendant guilty of false imprisonment [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [restrained][2] [confined] _____ *(name of victim)* against [his] [her] will;

2. The defendant knew that [he] [she] had no authority to [restrain][2] [confine] _____ *(name of victim)*;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable alternative or alternatives.

[As amended, effective September 1, 1994.]

**Committee commentary.** — *See* Section 30-4-3 NMSA 1978. This instruction sets forth the essential elements of false imprisonment. False imprisonment is distinguished from kidnapping in that it requires confinement or restraint against the will with knowledge of lack of authority, but it does not require an intent to hold for ransom, as a hostage or to service. *State v. Clark*, 80 N.M. 340, 455 P.2d 844 (1969). If kidnapping by holding to service is charged, false imprisonment is a necessarily included offense. *State v. Armijo*, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

**ANNOTATIONS**

**Cross references.** — For false imprisonment, *see* Section 30-4-3 NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made gender neutral changes in Item 1 and 2 in the instruction.

## 14-402. Criminal use of ransom; essential elements.

For you to find the defendant guilty of criminal use of ransom [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [received][2] [possessed] [concealed] [disposed of] [money][2] [_____ *(describe property)* which had been delivered for ransom.[3]

2. At the time the defendant [received][2] [possessed] [concealed] [disposed of] the [money][2] [_____ *(describe property)* [he] [she] knew or believed that it was ransom.

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable alternative or alternatives.

3. The definition of "ransom," UJI 14-406 NMRA, must be given after this instruction.

[As amended, effective September 1, 1994.]

**Committee commentary.** — *See* Section 30-4-2 NMSA 1978. This instruction sets forth the elements of the offense of criminal use of ransom. The statute requires that the money or property has been delivered for ransom and does not include transfers of money or property prior to delivery to the kidnapper or his agent. While a thief cannot be guilty of receiving (by acquiring) stolen property, *see* UJI 14-1650 NMRA, a kidnapper may be guilty of criminal use of ransom.

**ANNOTATIONS**

**Cross references.** — For criminal use of ransom, *see* Section 30-4-2 NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made gender neutral changes in Item 2 in the instruction.

## 14-403. Kidnapping; essential elements.1

For you to find the defendant guilty of kidnapping [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [took][3] [restrained] [confined] [transported] _____ *(name of victim)* by [force][3] [intimidation] [or] [deception];

2. The defendant intended to hold _____ *(name of victim)* against _____'s *(name of victim)* will:

[for ransom[4]][3]

[OR]

[as a hostage or shield]

[OR]

[to inflict death, physical injury or a sexual offense on _____ *(name of victim)*]

[OR]

[for the purpose of making the victim do something or for the purpose of keeping the victim from doing something];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. To be given in every kidnapping case. If first degree kidnapping is an issue, Instruction 14-6018 NMRA is also given.

2. Insert the count number if more than one count is charged.

3. Use applicable alternative or alternatives.

4. The definition of "ransom," Instruction 14-406 NMRA, should be given after this instruction.

[As amended, effective September 1, 1994; August 1, 1997.]

**Committee commentary.** — *See* Section 30-4-1 NMSA 1978. This instruction is for the crime of second degree felony kidnapping where the victim is freed without great bodily harm having been inflicted.

The supreme court construed a prior version of this statute to create three separate types of kidnapping. *State v. Clark*, 80 N.M. 340, 455 P.2d 844 (1969). The court ruled that Section 30-4-1 NMSA 1978 required an intent to confine against the victim's will when the victim is held for ransom or as a hostage but that holding to service against the victim's will does not require an intent to confine the victim against his will. This construction distinguished the crime of kidnapping from the crime of false imprisonment by requiring elements of intent in kidnapping which were not required for false imprisonment.

Section 30-4-1 NMSA 1978 was revised in 1973. As rewritten, the requirement that there be an intent to confine against the victim's will if the victim is held for ransom was eliminated. The specific intent to confine against the victim's will is now required for the crime of kidnapping by holding for service.

The court of appeals has held that false imprisonment is a necessarily included offense of kidnapping by holding to service against the victim's will because both offenses require confining or restraining, and the difference is whether the defendant had the specific intent to hold for service against the victim's will. *State v. Armijo*, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

In *State v. Aguirre*, 84 N.M. 376, 503 P.2d 1154 (1972), the supreme court held that the phrase "held to service against the victim's will" has a common meaning which can be understood by the general public. However, a definition has been provided for use if sexual molestation is in issue.

**ANNOTATIONS**

**Cross references.** — For kidnapping, *see* Section 30-4-1 NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made gender neutral changes in two places in Item 2 in the instruction and substituted "this alternative is given" for "sexual molestation is in issue" in Use Note 4.

**The 1997 amendment,** effective August 1, 1997, deleted "no great bodily harm" following "kidnapping" in the instruction heading, inserted "[transported]" and "[intimidation] [or]" in Paragraphs 1, rewrote Paragraph 2, added Use Note 1 and redesignated the following Use Notes accordingly, and deleted former Use Note 4 relating to giving UJI 14-405 defining "hold for service".

**Proof in kidnapping by deception.** — Proof of the victim's state of mind is not essential to prove kidnapping by deception. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

**Refusal to give a requested instruction defining "hostage" is no error,** because "hostage" is not a technical term; the jurors can properly apply the common meaning of "hostage" and the application of the common meaning did not prejudice the defendant. *State v. Carnes*, 97 N.M. 76, 636 P.2d 895 (Ct. App. 1981).

**Evidence that defendant used his truck to block the victim from leaving defendant's property;** that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim; and, that defendant was angry and immediately became involved in the beating of the victim when the other defendants arrived, permitted the jury to conclude that the defendant held the victim so that the victim could be physically beaten. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

## 14-404. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to a court order dated June 17, 1997, this instruction, relating to the essential elements of kidnapping resulting in great bodily harm, was withdrawn effective for cases filed in the district courts on or after August 1, 1997.

## 14-405. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to a court order dated June 17, 1997, this instruction, defining hold for service, was withdrawn effective for cases filed in the district courts on or after August 1, 1997.

## 14-406. Ransom; definition.

Ransom is [money] [1] [property] [things of value] which has been paid or demanded for the return of a kidnapped person.

USE NOTE

1. Use applicable alternative or alternatives.

# CHAPTER 5
# (Reserved)

# CHAPTER 6
# Crimes Against Children and Dependents

## 14-601. Contributing to delinquency of minor; essential elements.

For you to find the defendant guilty of contributing to the delinquency of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ ;[2]

2. This [caused][3] [encouraged] _____ *(name of child)* to:[3]

[commit the offense of _____[4]][3]

[OR]

[refuse to obey the reasonable and lawful commands or directions of (his)[3] (her) (parent)[3] (parents) (guardian) (custodian) (teacher) (a person who had lawful authority over _____ *(name of child)*)][3]

[OR]

[conduct (himself)[3] (herself) in a manner injurious to (his)[3] (her) (the) (morals)[3] (health) (welfare) (of _____ *(name of child)*[5])][3];

3. _____ *(name of child)* was under the age of 18;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Describe act or omission of the defendant.

3. Use only the applicable alternative or alternatives.

4. Identify the offense and give the essential elements.

5. Name of other person whose morals, health or welfare were injured or endangered by the delinquent child as a result of the defendant's acts or omissions.

**Committee commentary.** — In *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949), the supreme court of New Mexico held that the offense of contributing to the delinquency of a minor (Laws 1943, Chapter 36, Section 1) was not unconstitutionally vague, as a juvenile delinquent was defined by Laws 1943, Chapter 40, Section 1 for purposes of juvenile court jurisdiction. *State v. McKinley* was followed in *State v. Leyba*, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969) and *State v. Favela*, 91 N.M. 476, 576 P.2d 282 (1978).

In *State v. Leyba*, the court of appeals looked to Laws 1955, Chapter 205, Section 8 for the definition of juvenile delinquent for purposes of juvenile court jurisdiction. In *State v. Favela*, supra, the New Mexico Supreme Court held that "although the Children's Code in 1972 narrowed the definition of a delinquent act committed by a child that definition did not extend, amend, change or become incorporated into Section 40A-6-3, supra (Section 30-6-3 NMSA 1978)."

It is assumed that the legislature in enacting the Criminal Code in 1963 intended that the definition of juvenile delinquent for purposes of juvenile court jurisdiction be used in interpreting Section 30-6-3 NMSA 1978. Laws 1955, Chapter 205, Section 8(a) granted jurisdiction to the juvenile court over juveniles as follows:

Section 8. The juvenile court shall have exclusive original jurisdiction in proceedings:

a. concerning any juvenile under the age of eighteen years living or found within the county:

(1) who has violated any law of the state, or any ordinance or regulation of a political subdivision thereof;

(2) or, who by reason of habitually refusing to obey the reasonable and lawful commands or directions of his or her parent, parents, guardian, custodian, teacher or any person of lawful authority, is deemed to be habitually uncontrolled, habitually disobedient or habitually wayward;

(3) or, who is habitually truant from school or home;

(4) or, who habitually deports himself as to injure or endanger the morals, health or welfare of himself or others.

Intent is not an element of the crime of contributing to the delinquency of a minor. *State v. Gunter*, 87 N.M. 71, 529 P.2d 297 (Ct. App.), cert. denied, 87 N.M. 48, 529 P.2d 274 (1974), cert. denied, 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975). Therefore, UJI 14-141 need not be given.

For an adult to be guilty of the criminal offense of contributing to the delinquency of a minor, it is not necessary for the juvenile to be a delinquent. It is only necessary that the actions of the defendant cause or tend to cause or encourage the delinquency of the juvenile. *See* Section 30-6-3 NMSA 1978. Mere presence of the defendant at the time a juvenile is engaged in a delinquent act is insufficient. *State v. Grove*, 82 N.M. 679, 486 P.2d 615 (Ct. App. 1971). But *see People v. Miller*, 145 Cal. App. 2d 473, 302 P.2d 603 (1956) (presence of minor during fornication held sufficient to sustain conviction; child need not be a participant).

## ANNOTATIONS

**Cross references.** — For contributing to delinquency of a minor, *see* Section 30-6-3 NMSA 1978.

For the Children's Code, *see* Section 32A-1-1 NMSA 1978 et seq.

For the Criminal Code, *see* Section 30-1-1 NMSA 1978 et seq.

**Compiler's notes.** — Laws 1943, ch. 36, § 1, referred to in the first sentence in the first paragraph of the committee commentary, was compiled as 13-8-18, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1.

Laws 1943, ch. 40, § 1, referred to in the first sentence in the first paragraph of the committee commentary, was compiled as 13-8-9, 1953 Comp., before being repealed by Laws 1955, ch. 505, § 57.

Laws 1955, ch. 205, § 8, referred to in the second and third paragraphs of the committee commentary, was compiled as 13-8-26, 1953 Comp., before being repealed by Laws 1972, ch. 97, § 71.

**Time as essential element.** — Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990).

**Knowledge as essential element.** — In order to convict defendant of contributing to the delinquency of a minor for causing or encouraging the minor to refuse to obey the reasonable and lawful command or direction of the minor's parent, parents, guardian, custodian, or person who has lawful authority over the minor, the state must prove that defendant knew or by the exercise of reasonable care should have known of such command or direction. *State v. Romero*, 2000-NMCA-029, 128 N.M. 806, 999 P.2d 1038.

**Instruction sufficient.** — In this case the jury was instructed to find the defendant guilty of contributing to the delinquency of a minor if his acts encouraged each of the girls in question to conduct herself in a manner injurious to her morals, health or welfare. The language of the instruction substantially followed the statute and used language equivalent to the meaning of "delinquent" as that term is used in the statute. *State v. Henderson*, 116 N.M. 537, 865 P.2d 1181 (1993), overruled in part on other grounds, *State v. Meadors*, 121 N.M. 38, 908 P.2d 731 (1995).

## 14-602. Child abuse; intentional act or negligently "caused"; great bodily harm; essential elements.

For you to find _____ *(name of defendant)* guilty of child abuse resulting in death or great bodily harm, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* caused _____ *(name of child)*

[to be placed in a situation which endangered the life or health of _____ *(name of child)*;][2]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished] _____ *(name of child)*;]

2. The defendant acted [intentionally][3] [or] [with reckless disregard][4] [and without justification][5]. [To find that _____ *(name of defendant)* acted with reckless disregard, you must find that _____ *(name of defendant)* knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of _____ *(name of child)*;][4]

3. _____'s *(name of defendant)* [actions] [or] [failure to act][2] resulted in [the death of] [great bodily harm to[6]][2] _____ *(name of child)*;

4. _____ *(name of child)* was under the age of 18;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

3. If this alternative is given, the definition of "intentionally", Instruction 14-610, must also be given.

4. Use this alternative if criminal negligence is in issue. The concept of criminal negligence has been incorporated into this instruction by including the term "reckless disregard" as defined in *State v. Magby*, 1998-NMSC-042, P9, 126 N.M. 361, 969 P.2d 965.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. If this alternative is given, the definition of "great bodily harm", Instruction 14-131, must also be given.

[Approved, effective, October 1, 1993; as amended, effective, February 1, 2000.]

**Committee commentary. —**

*Criminal offense*

Subsection C of Section 30-6-1 NMSA 1978 provides that it is a criminal offense for any person, without justifiable cause, to intentionally or negligently permit or cause:

(1) a child to be placed in a situation dangerous to the life or health of the child;

(2) a child to be tortured, cruelly confined or cruelly punished; or

(3) a child to be exposed to the inclement weather.

*Negligence*

UJI 14-602, 14-603, 14-604 and 14-605 incorporate a criminal negligence standard of conduct for child abuse cases. This is consistent with the Supreme Court's opinion in *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

*Caused or Permitted*

In *State v. Leal*, 104 N.M. 506, 723 P.2d 977 (Ct.App. 1986), the New Mexico Court of Appeals reversed the conviction of a mother because the mother was charged with "permitting" child abuse while the jury was instructed that the mother either "caused or permitted" the child abuse. The Court of Appeals held that permitting child abuse and causing child abuse were separate and distinct and that the state must prove that the defendant permitted the abuse to take place, not that she caused or permitted the abuse to take place. If properly charged in the alternative, child abuse may be committed by either "causing" or "permitting" the abuse. In such case, both an instruction on "caused" (UJI 14-602 or UJI 14-604) and an instruction on "permitted" (UJI 14-603 or UJI 14-605) is to be given. Although separate instructions (UJI 14-603 and 14-605) have been drafted for "permitting" child abuse, this does not make "causing" and "permitting" child abuse separate offenses. If the defendant is charged with having "caused or permitted" child abuse, a single jury verdict form is to be used for "caused or permitted" child abuse.

*Separate Offenses*

In *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990), the New Mexico Supreme Court noted that Section 30-6-1(C)(1) creates alternative ways of characterizing the same abusive act. A conviction of multiple counts of child abuse may be sustained only if the state charges and proves that the acts of child abuse arose as separate and distinct episodes. In Pierce, supra, the Supreme Court also held that:

Depending upon the facts of a particular case, the offense of child abuse resulting in death or great bodily harm, contrary to Section 30-6-1(C), may be a lesser included offense of first-degree murder as defined in Section 30-2-1(A)(1) . . . (citing authority). The rule of merger precludes an individual's conviction and sentence for a crime that is

a lesser included offense of a greater charge upon which defendant has also been convicted. (citing authority) Although the state properly may charge in the alternative, *State v. Roque*, 91 N.M. 7, 569 P.2d 417 (Ct.App. 1977), where defendant is convicted of one or more offenses which have merged into the greater offense he may be punished for only one . . .

Since child abuse resulting in death of a child includes first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter, a transitional instruction between UJI 14-602 and first degree murder does not seem feasible.

*Separate counts of child abuse*

A defendant may be convicted of multiple counts of child abuse (either child abuse resulting in death or child abuse not resulting in death) only when each conviction is supported by evidence that:

(1) a single abusive act or a continuous series of abusive acts was interrupted and then another act or series was commenced, and

(2) each separate act or series of acts was accompanied by the requisite unlawful conduct.

*See State v. Pierce, supra.*

*Enhanced Penalty*

Section 30-6-1 NMSA 1978 provides that it is a third degree felony for the first offense of child abuse not resulting in death or great bodily harm and a second degree felony for a second or subsequent offense. If death or great bodily harm results from the abuse, it is a first degree felony. In *State v. Lucero*, supra, the defendant was convicted of three counts of child abuse and was sentenced to three fourth degree felonies rather than as a second offender under Section 30-6-1 NMSA 1978. Each of these sentences were enhanced under the Habitual Offender Act. *See also State v. Fulton*, 99 N.M. 348, 657 P.2d 1197 (Ct.App. 1983). In *State v. Sanders*, 93 N.M. 450, 601 P.2d 83 (Ct.App.1979) the conviction was reversed because the state introduced evidence of prior child abuse to prove the incident in question was not an accident.

*Intent*

If there is evidence that the offense was committed intentionally, UJI 14-610 is to be given and not 14-141, general criminal intent. [As revised September 10, 1993.]

**ANNOTATIONS**

**The 1999 amendment,** effective February 1, 2000, in element 1, deleted "[intentionally] [or] [negligently] [and without justification]" near the beginning; rewrote element 2; and, in the Use Note, rewrote and renumbered the present paragraphs.

**Instruction on lesser included offense not warranted.** — Where defendant was charged with child abuse resulting in the death of a child under twelve years of age; the state presented expert evidence that the child's death was caused by blunt force injuries to the child's head due to vigorous shaking of the child; and defendant requested an instruction on the lesser included offense of child abuse not resulting in death on the basis of defendant's admission that when defendant pulled the child's pants too hard, the child fell backward on the child's head, the trial court did not abuse its discretion in refusing the lesser included instruction because the incident to which defendant admitted did not rise to the level of criminally punishable conduct and there was insufficient evidence to support a conviction of child abuse not resulting in death. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**This instruction incorporates a criminal negligence standard of conduct for child abuse cases.** *State v. Chavez*, 2007-NMCA-162, 143 N.M. 126, 173 P.3d 48, cert. denied, 2007-NMCERT-011.

**"Reckless disregard" for child's safety.** — The trial court erred in refusing to charge the jury with an instruction tendered by defendant to clarify the language "reckless disregard" in this instruction: the use of the words "reckless disregard" and "negligently" in this instruction could confuse jurors on the critical issue of mens rea. *State v. Magby*, 1998-NMSC-042, 126 N.M. 361, 969 P.2d 965.

**"Criminal negligence" instruction.** — Trial court's instruction did not adequately define criminal negligence because it failed to sufficiently define the proper negligence standard for child abuse, and there is no way to determine if the jury based their conviction on the terms "knew or should have known," language typically associated with a civil negligence standard, or on the proper criminal negligence standard, which requires that they find defendant acted in "reckless disregard" of the safety of the child. *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221.

**Concept of criminal negligence** was incorporated into instruction by including the definition of reckless disregard. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, cert. granted, 2005-NMCERT-001.

## 14-603. Child abuse; negligently "permitting" child abuse; [with great bodily harm] [without great bodily harm]; essential elements.

_____ *(name of defendant)* has [also][1] been charged with negligently permitting child abuse resulting in death or great bodily harm. For you to find _____ *(name of defendant)* guilty of child abuse resulting in death or great bodily harm, [as charged in Count _____][2], the state must prove

to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* permitted _____ *(name of child)*

[to be placed in a situation which endangered the life or health of _____ *(name of child)*;][3]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished][3] _____ *(name of child)*;]

2. The defendant acted with reckless disregard[4] [and without justification][5]. To find that _____ *(name of defendant)* acted with reckless disregard, you must find that _____ *(name of defendant)* knew or should have known the defendant's [actions] [or] [failure to act][3] created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the [failure to act] [conduct] and to the welfare and safety of _____ *(name of child)*.

3. _____ *(name of defendant)* was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child's welfare;

4. _____'s *(name of defendant)* [actions] [or] [failure to act][3] resulted in [the death of] [great bodily harm[6]] to _____ *(name of child)*;

5. _____ *(name of child)* was under the age of 18;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. The bracketed word "also" is included when Instruction 14-602 NMRA is also given.

2. Insert the count number if more than one count is charged.

3. Use only applicable alternative or alternatives.

4. The concept of criminal negligence has been incorporated into this instruction by including the term "reckless disregard" as defined in *State v. Magby*, 1998-NMSC-042, P9, 126 N.M. 361, 969 P.2d 965.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. If this alternative is given, the definition of "great bodily harm", Instruction 14-131 NMRA, must also be given.

[Approved, effective October 1, 1993; as amended, effective February 1, 2000.]

**ANNOTATIONS**

**Cross references.** — For abuse of a child, *see* Section 30-6-1 NMSA 1978.

**The 1999 amendment,** effective February 1, 2000, in element 1, deleted "[negligently] [recklessly] [and without justification]" near the beginning; rewrote element 2; and, in the Use Note, rewrote and renumbered the paragraphs.

**UJI 14-603 NMRA applies a criminal negligence standard.** *State v. Vasquez*, 2010-NMCA-041, 148 N.M. 202, 232 P.3d 438.

**This instruction incorporates a criminal negligence standard of conduct for child abuse cases.** *State v. Chavez*, 2007-NMCA-162, 143 N.M. 126, 173 P.3d 48, cert. denied, 2007-NMCERT-011.

**Harmless error.** — Where jury was given former version of jury instruction, even assuming that the reckless disregard instruction did not correct the improper child abuse instruction, and that juror confusion persisted due to the order the instructions were given, any error in the child abuse instruction was harmless and not fundamental error. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

## 14-604. Child abuse; intentionally or negligently "caused"; without great bodily harm or death; essential elements.

For you to find _____ *(name of defendant)* guilty of child abuse which did not result in death or great bodily harm, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* caused _____ *(name of child)*

[to be placed in a situation which endangered the life or health of _____ *(name of child)*;][2]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished][2] _____ *(name of child)*;]

2. The defendant acted [intentionally][3] [or] [with reckless disregard][4] [and without justification][5]. [To find that _____ *(name of defendant)* acted with reckless disregard, you must find that _____ *(name of defendant)* knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of _____ *(name of child)*;][4]

3. _____ *(name of child)* was under the age of 18;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

3. If this alternative is given, the definition of "intentionally", Instruction 14-610 NMRA, must also be given.

4. Use this alternative if criminal negligence is in issue. The concept of criminal negligence has been incorporated into this instruction by including the term "reckless disregard" as defined in *State v. Magby*, 1998-NMSC-042, P9, 126 N.M. 361, 969 P.2d 965.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

[Approved, effective October 1, 1993; as amended, effective February 1, 2000.]

**ANNOTATIONS**

**Cross references.** — For abuse of a child, *see* Section 30-6-1 NMSA 1978.

**The 1999 amendment,** effective February 1, 2000, in element 1, deleted "[intentionally] [or] [negligently] [and without justification] near the beginning; rewrote element 2; and, in

the Use Note, added present Paragraph 2, redesignated former Paragraphs 2 and 3 as present Paragraphs 3 and 4, and deleted former Paragraphs 4 and 6.

**Replacing language regarding element.** — Where "knew or should have known" was an element that was omitted from the jury instruction, replacing "knew or should have known" with "willful" not only adequately addressed the omitted language, but benefited defendant because it increased the state's burden to prove defendant knew her actions constituted an unlawful act. *State v. Watchman*, 2005-NMCA-125, 138 N.M. 488, 122 P.3d 855, cert. denied, 2005-NMCERT-011.

**Insufficient evidence of endangerment based on DWI.** — Where defendant was seated in the driver's seat of a vehicle with defendant's spouse in the middle, and defendant's four-year-old child on the passenger side of the vehicle; the vehicle was not running; defendant was holding the keys; open alcohol containers were on the floor and in the cup holders; defendant was intoxicated; defendant informed police officers that defendant was going to a local store; and defendant was convicted of DWI by actual physical control, there was insufficient evidence to support a conviction for felony child abuse by endangerment. *State v. Etsitty*, 2012-NMCA-012, 270 P.3d 1277, cert. denied, 2011-NMCERT-012.

**Insufficient evidence of child abuse based on DWI.** — Where police officers found defendant in the driver's seat of a van that was parked on a roadside; the van was not running; the keys were not in the ignition; both defendant and the passenger in the van were intoxicated and incapable of driving; the passenger's children were in the back seat; and the state did not rely on a theory of past driving, but on the theory that defendant might drive the van while impaired and place the children in a situation which endangered their lives and health, the evidence was insufficient to support defendant's conviction of child abuse. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Sufficient evidence of child abuse.** — Where defendant fired two gunshots into a house in which a child, aged three weeks, was situated at the time of the shooting; the bullets found in the house matched those fired from defendant's handgun; and before the shooting, a witness told defendant that there was a newborn baby in the house, there was sufficient evidence to support defendant's conviction of negligent abuse of a child. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

**A moving DWI is a sufficient factual basis for a child abuse by endangerment conviction.** — The mere fact that defendant was driving a vehicle in which a child was a passenger while defendant was intoxicated, standing alone, is sufficient as a matter of law to support a conviction for child abuse by endangerment. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. granted, 2012-NMCERT-008.

Where defendant was driving a vehicle with defendant's nine-year-old child in the vehicle; defendant drove through an intersection without stopping at a stop sign and crashed into a ditch across the intersecting roadway; the child suffered minor injuries;

defendant claimed he could not stop the vehicle because the brakes failed; and defendant was convicted of driving while intoxicated, defendant's moving DWI conviction alone was a sufficient factual basis to support defendant's conviction of child abuse by endangerment even if the DWI did not otherwise separately evince indicia of unsafe driving. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. granted, 2012-NMCERT-008.

## 14-605. Child abuse; negligently "permitting" child abuse; without great bodily harm; essential elements.

_____ *(name of defendant)* has [also][1] been charged with negligently permitting child abuse which did not result in death or great bodily harm. For you to find _____ *(name of defendant)* guilty of child abuse which did not result in death or great bodily harm, [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* permitted _____ *(name of child)*

[to be placed in a situation which endangered the life or health of _____ *(name of child)*;][3]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished][3] _____ *(name of child)*;]

2. The defendant acted [intentionally]*3* [or] [with reckless disregard][4] [and without justification][5]. [To find that _____ *(name of defendant)* acted with reckless disregard, you must find that _____ *(name of defendant)* knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of _____ *(name of child)*;][4]

3. _____ *(name of defendant)* was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child's welfare;

4. _____ *(name of child)* was under the age of 18;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. The bracketed word "also" is included when Instruction 14-604 NMRA is also given.

2. Insert the count number if more than one count is charged.

3. Use only applicable alternative or alternatives.

4. Use this alternative if criminal negligence is in issue. The concept of criminal negligence has been incorporated into this instruction by including the term "reckless disregard" as defined in *State v. Magby*, 1998-NMSC-042, P9, 126 N.M. 361, 969 P.2d 965.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

[Approved, effective October 1, 1993; as amended, effective February 1, 2000.]

**ANNOTATIONS**

**Cross references.** — For abuse of a child, *see* Section 30-6-1 NMSA 1978.

**The 1999 amendment,** effective February 1, 2000, in element 1, deleted "[negligently] [and without justification]" near the beginning; rewrote element 2; and, in Use Note, added present Paragraphs 3 and 4 and redesignated former Paragraph 3 as present Paragraph 5 and deleted former Paragraph 4.

## 14-606. Abandonment of a child resulting in great bodily harm or death.

For you to find _____ *(name of defendant)* guilty of abandonment of a child resulting in great bodily harm, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* was a [parent] [guardian] [or] [custodian][2] of _____ *(name of child)*;

2. _____ *(name of defendant)* intentionally[3] left or abandoned _____ *(name of child)*;

3. As a result of _____ *(name of defendant)* leaving or abandoning _____ *(name of child)*,

_____ *(name of child)* was without proper parental care and control necessary for _____'s *(name of child)* well being;

4. _____ *(name of defendant)* had the ability to provide proper parental care and control necessary for _____'s *(name of child)* well-being;

5. _____'s *(name of defendant)* failure to provide proper parental care and control necessary for _____'s *(name of child)* well-being resulted in [the death of] [great bodily harm to[4]][2] _____ *(name of child)*;

6. _____ *(name of child)* was under the age of 18;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged. If the jury is to be instructed on first degree murder for the same offense, UJI 14-250 NMRA must also be given.

2. Use only applicable alternatives.

3. The definition of "intentionally", UJI 14-610 NMRA, must also be given immediately after this instruction.

4. If this alternative is given, the definition of "great bodily harm", UJI 14-131 NMRA, must also be given.

[Approved, effective October 1, 1993.]

**ANNOTATIONS**

**Cross references.** — For abandonment of a child, *see* Section 30-6-1 NMSA 1978.

## 14-607. Abandonment of a child without great bodily harm or death.

For you to find _____ *(name of defendant)* guilty of abandonment of a child which did not result in death or great bodily harm, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* was a [parent] [guardian] [or] [custodian][2] of _____ *(name of child)*;

2. _____ *(name of defendant)* intentionally[3] left or abandoned _____ *(name of child)*;

3. As a result of _____ *(name of defendant)* leaving or abandoning _____ *(name of child)*, _____ *(name of child)* was without proper parental care and control necessary for _____'s *(name of child)* well-being;

4. _____ *(name of defendant)* had the ability to provide proper parental care and control necessary for _____'s *(name of child)* well-being;

5. _____ *(name of child)* was under the age of 18;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged. If the jury is to be instructed on first degree murder for the same offense, UJI 14-250 NMRA must also be given.

2. Use only applicable alternatives.

3. The definition of "intentionally", UJI 14-610 NMRA, must also be given immediately after this instruction.

[Approved, effective October 1, 1993.]

**ANNOTATIONS**

**Cross references.** — For abandonment of a child, *see* Section 30-6-1 NMSA 1978.

## 14-610. Child abuse; "intentional"; defined.

A person acts intentionally when the person purposely does an act. Whether the _____ *(name of defendant)* acted intentionally may be inferred from all of the surrounding circumstances, such as _____'s actions or failure to act, conduct and statements.

USE NOTE

This instruction is to be given with child abuse and abandonment cases when required by UJI 14-602, 14-603, 14-606 or 14-607 NMRA. UJI 14-141 NMRA, general criminal intent, shall not be given in child abuse cases and child abandonment cases.

[Approved, effective October 1, 1993.]

# CHAPTER 7
# Firearms; Deadly Weapons

## 14-701. Receipt, transportation or possession of a firearm or destructive device by a felon; essential elements.

For you to find the defendant guilty of receipt, [transportation] [or][1] [possession] of a [firearm] [or] [destructive device] by a felon [as charged in count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [received] [transported] [or][1] [possessed] a [firearm[3]] [or][1] [destructive device[4]]

2. The defendant, in the preceding ten years, was convicted and sentenced to one or more years imprisonment by a court of the United States or by a court of any state [and has not been pardoned of the conviction by the appropriate authority][5];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only the applicable alternative.

2. Insert count number if more than one count is charged.

3. Give UJI 14-704 NMRA, the definition of a firearm, if applicable.

4. Give the Section 30-7-16(C)(1) definition of "destructive device", if applicable.

5. Use bracketed language only if there is an issue as to whether the defendant has been pardoned for the offense.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

**Committee commentary.** — The name of the prior felony conviction is not necessary. If the defendant stipulates to the commission of the offense, evidence of the nature of defendant's predicate felony convictions is irrelevant and prejudicial under evidence Rule 11-403 NMRA. *State v. Tave,* 1997-NMCA-056, 122 N.M. 29, 919 P.2d 1094; *accord, Old Chief v. United States,* 117 S. Ct. 644 (1997).

If the defendant does not stipulate to the prior offense, the state may prove the prior offense by a redacted record or other evidence which satisfies the rules of evidence. *See State v. Tave,* at Para. 15.

Section 30-7-16 NMSA 1978 requires that the defendant have been sentenced for the predicate offense to a term of more than one year. This definition would include suspended sentences, which are imposed before their execution is suspended, but would not include deferred sentences, which defer the imposition of sentence so long as no violation of probation occurs. *Compare* Section 31-20-3(B) NMSA 1978 with Section 31-20-3(A) NMSA 1978. "[T]he difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. Suspension always subjects the defendant to criminal consequences, although he may be pardoned, while deferral ordinarily results in the charges being dismissed." *State v. Kenneman,* 98 N.M. 794, 797, 653 P.2d 170 (Ct.App. 1982). Misdemeanor offenses, which by law cannot invoke sentences of more than one year on a particular offense are not predicate offenses under the statute.

[Amended November 12, 1998.]

**ANNOTATIONS**

**Cross references.** — For firearms or destructive devices, *see* Section 30-7-16 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, substituted "a firearm [or] [destructive device]" for "[firearms]" in the introductory language; substituted "a [firearm] [or] [destructive device]" for "a [[shotgun] [rifle] [handgun__ [firearm]" in Element 1; and in Element 2 substituted "was convicted" for "was previously convicted of the crime of]" near the beginning and added "and sentenced to one or more years imprisonment by a court of the United States or by a court of any state [and has not been pardoned of the conviction by the appropriate authority]" at the end.

**Erroneous use of instruction.** — In a prosecution for being a felon in possession of a firearm, the court's use of this instruction naming the predicate offense, aggravated assault with a deadly weapon, was reversible error. *State v. Tave*, 1996-NMCA-056, 122 N.M. 29, 919 P.2d 1094.

## 14-702. Unlawful carrying of firearm in licensed liquor establishment.

For you to find the defendant guilty of unlawfully carrying a firearm in a licensed liquor establishment [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____[2] is licensed to dispense alcoholic beverages;

2. While _____ *(name of defendant)* was in _____[2] _____ *(name of defendant)* was carrying a loaded or unloaded firearm;

[3. _____ *(name of defendant)* did not have legal authority to possess the firearm while in _____[2];][3]

4. This happened in New Mexico on about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Insert the name of the establishment.

3. Give bracketed information if this is an issue.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

**ANNOTATIONS**

**Cross references. —** For unlawful carrying of a firearm in licensed liquor establishments, *see* Section 30-7-3 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, made minor stylistic changes in Paragraphs 1 and 2 and in Element 3 substituted "possess" for "have" and "while" for "in his possession in".

## 14-703. Negligent use of a deadly weapon.

For you to find the defendant guilty of negligent use of a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [The defendant discharged a firearm into a [building][2] [vehicle];]

[OR][2]

[The defendant discharged a firearm knowing that he was endangering [a person][2] [property];]

[OR]

[The defendant was carrying a firearm while under the influence of [alcohol][2] [narcotics];]

[OR]

[The defendant endangered the safety of another, by handling or using a [deadly weapon[3]] [firearm] in a negligent[4] manner;]

[OR]

[The defendant discharged a firearm within one hundred and fifty yards of a [dwelling[5]] [or] [building] without permission of the owner or lessee. [The state must also prove that either:

A. the weapon was discharged on non-public lands; or

B. the discharge did not occur during hunting season; or

C. that the [dwelling] [or] [building] was not an abandoned or vacated building];]*6*

[2. The defendant was not a peace officer[7] or other public employee who is required or authorized by law to carry or use a firearm in the course of employment and who carries, handles, uses or discharges a firearm while lawfully engaged in carrying out the duties of such office or employment;]

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative.

3. If this alternative is used, Subsection B of Section 30-1-12 NMSA 1978, the definition of "deadly weapon", is given immediately after this instruction.

4. If this alternative is used, UJI 14-133, the definition of criminal negligence, is given immediately after this instruction.

5. If this alternative is given, Instruction 14-1631, definition of "dwelling house" is given as the definition of "dwelling".

6. This alternative is to be given only if the court finds that the evidence presents issues on whether: (1) the building was an abandoned or vacated building; (2) the building was located on public lands; and (3) the defendant discharged the firearm during hunting season.

7. This alternative may be given if there is an issue as to whether the defendant was a peace officer or public employee in the lawful discharge of duty. This alternative is not to be given if the defendant is charged with carrying a firearm while under the influence of an intoxicant or narcotic.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

**Committee commentary. —** The 1998 amendments to this instruction were made to conform this instruction with the 1993 amendment of Section 30-7-4 NMSA 1978 and to be consistent with the Supreme Court's opinions construing "negligence" as used in the criminal code to mean "criminal negligence. *See State v. Yarborough,* 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131 (1996) and *Santillanes v. State,* 115 N.M. 215, 849 P.2d 358 (1993). If the issue is whether or not the defendant handled a firearm or deadly weapon in a negligent manner, UJI 14-133 is to be given.

The committee also deleted the requirement that the definition set forth in UJI 14-704 NMRA be used with this instruction. UJI 14-704 NMRA is based on the definitions in Section 30-7-16(C) NMSA 1978, which was enacted eighteen years after 30-7-4, does not refer to it and specifically recites that the definition applies only to the term "as used in this section". The definitions in Section 30-7-16 NMSA 1978 may be limited to Section 30-7-16 NMSA 1978 offenses.

[Amended November 12, 1998.]

## ANNOTATIONS

**Cross references. —** For negligent use of a deadly weapon, *see* Section 30-7-4 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, in Element 1, added the first footnote 2 designations in the first through third paragraphs, made a gender neutral change in the third paragraph, added the footnote 4 designation in the fourth paragraph, in the fifth paragraph substituted "a [dwelling] or [building]" for "an occupied [dwelling] [building]", made a minor stylistic change, and added "The state must also prove that either:" at the end, and added paragraphs A through C; added Element 2; and redesignated former Element 2 as Element 3.

**Adding "negligently" to instruction not necessary. —** The trial court did not have to modify this instruction to add the word "negligently." Section 30-7-4(A)(2) NMSA 1978 defines negligent use of a deadly weapon as "carrying a firearm while under the

influence of an intoxicant or narcotic." The proscribed conduct is negligence per se. State v. Rivera, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

## 14-704. Firearm; definition.

A firearm means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of a firearm, any firearm muffler or firearm silencer. Firearm includes any handgun, rifle or shotgun.

USE NOTE

For use with UJI 14-701.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

**Committee commentary.** — In 1998, use note 1 was amended to delete "UJI 14-702 and UJI 14-703". The definition of "firearm" in Section 30-7-16 NMSA 1978 is limited to Section 30-7-16 NMSA 1978 offenses. UJI 14-702 is the essential elements instruction for Section 30-7-3 NMSA 1978 offenses and UJI 14-703 is the essential elements instruction for 30-7-4 NMSA 1978 offenses.

Section 30-7-2.2 NMSA 1978 contains a definition of "handgun". However, it is limited to "unlawful possession of a handgun". The only general definition in the Criminal Code is the definition of "deadly weapon" which includes a firearm, whether loaded or unloaded.

[Amended November 12, 1998.]

**ANNOTATIONS**

**Cross references.** — For firearms, *see* Section 30-7-16 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, substituted "A firearm means" for "A firearm is any handgun, rifle, shotgun or" at the beginning, substituted "the frame or receiver of a firearm, any firearm muffler or firearm silencer" for "including the frame receiver, muffler or silencer" at the end of the first sentence; and added the second sentence.

# CHAPTER 8
# (Reserved)

# CHAPTER 9
# Sex Crimes

# Part A
# Criminal Sexual Contact

## 14-901. Chart.

SECTION 30-9-12 NMSA 1978
CRIMINAL SEXUAL CONTACT OF AN ADULT

Misdemeanor and Fourth Degree

| | MISDEMEANOR | FOURTH DEGREE — TYPES OF CRIMINAL SEXUAL CONTACT | | | |
|---|---|---|---|---|---|
| TYPE OF FORCE OR COERCION | | A. Personal Injury | B. Aided or Abetted | C. Armed With a Deadly Weapon | D. Multiple 4th Degree Types (A-B) |
| 1. Use of physical force or physical violence | 14-902 | 14-906 | 14-910 | | |
| 2. Threats of force or coercion | 14-903 | 14-907 | 14-911 | | |
| 3. Victim physically or mentally unable to consent | 14-904 | 14-908 | 14-912 | | |
| 4. All of the above (1-3) | 14-905 | 14-909 | 14-913 | | 14-915 |
| FORCE OR COERCION NOT AN ELEMENT | | | | 14-914 | |

## 14-902. Criminal sexual contact; use of physical force or physical violence; essential elements.

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant used physical force or physical violence;

[3. The defendant's act was unlawful;][4]

4. _____ (*name of victim*) was 18 years of age or older;

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual contact perpetrated through the use of force or coercion. In this instruction "force or coercion" is defined as physical force or physical violence. Section 30-9-10A NMSA 1978.

The other definitions of force or coercion are contained in UJI 14-903 (threats) and 14-904 (unconscious, etc.). UJI 14-905 combines 14-902, 14-903 and 14-904 NMRA. It may be used when more than one definition of force or coercion is supported by the evidence.

The introductory paragraph of this instruction identifies the charge as "criminal sexual contact". It would be misleading to include the words "by force or coercion" in the charge. The definition of "force or coercion" includes both active interference by the defendant with the normal consent functions of the victim, e.g., physical force, and passive incapacity of the victim to engage in normal consent functions, e.g., unconsciousness. A jury might be confused as to the elements of the offense if the term "by force or coercion" were used when the force or coercion is supplied by the incapacity of the victim.

Element 1 sets out in the alternative the two ways that the contact may be committed. It was decided that the legislature intended the term "unclothed" to mean "bare to the touch."

The language "without her consent" was omitted from the second alternative in Element 1 because the language does not appear in the second portion of the statutory definition of criminal sexual contact. It would seem that the concept is covered by the requirement that the defendant "caused" the victim to do the act.

The committee was of the opinion that the parts of the body included in the term "primary genital area" are those set forth in Section 30-9-14 NMSA 1978 relating to indecent exposure. Definitions for those terms are provided in UJI 14-981 and must be given. Dictionary definitions were considered insufficient because the definitions contained in several dictionaries, such as Webster's and Random House, were found to be excessively technical.

The term "groin" was included in the instructions but was left undefined. The use of this term should be avoided because its technical definition is so broad that it includes parts of the body which the committee considered beyond the scope of the intended prohibited contacts.

Element 2 defines "force or coercion" as physical force or physical violence. Threats of force or violence are a separate statutory definition of force or coercion and are covered in UJI 14-903 NMRA. The issue is not how much force or violence is used, but whether the force or violence was sufficient to negate consent. "Physical or verbal resistance of the victim" is not an essential element. Section 30-9-10(A) NMSA 1978. *Cf. State v. Sanchez*, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967), a robbery case. The force or violence can be directed against the victim or another.

In all cases of criminal sexual contact the age of the victim is an essential element because it fixes the degree of the crime. The committee considered the argument that the age of the victim should be irrelevant unless the charge of criminal sexual contact of a minor is also submitted to the jury, in which case age is in issue. However, the element was left in this instruction because the committee believed that there was no danger that a defendant would be acquitted of the charge of criminal sexual contact of an adult merely because the evidence showed that the victim was a minor.

The committee recognized that other unconsented touchings are covered by Section 30-3-4 NMSA 1978, relating to battery. *See* commentary to UJI 14-320 NMRA.

**ANNOTATIONS**

**Cross references.** — For criminal sexual contact, *see* Sections 30-9-12(D) and 30-9-10(A)(1) NMSA 1978

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 4 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 5 of the instruction as Item 4; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "3" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

## 14-903. Criminal sexual contact; threats of force or coercion; essential elements.

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____;] (*name of victim or other person*)

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

[4. The defendant's act was unlawful;][5]

5. _____ (*name of victim*) was 18 years of age or older;

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual contact perpetrated through the use of force or coercion. In this instruction "force or coercion" is supplied by threats. Section 30-9-10(A)(2) and Section 30-9-10A(3) NMSA 1978. The definitions from both subsections of the statute; i.e., threats to use physical force or physical violence and threats of other action, have been combined into one element in this instruction.

The statute is broad and includes various types of threats. However, the threat must be of such a coercive nature that its use negates the victim's consent. It is therefore a question of law whether a particular threat is sufficient to support the charge. Threats of criminal conduct, such as the statutory examples of kidnapping or extortion, would clearly be sufficient. Promises to confer a benefit upon the victim, such as a raise or

promotion, would probably not be considered threats. In such case a purported victim may have bargained for the benefit and thus consented. The threats can be directed against the victim or another.

If the jury requests a definition of the threatened act or offense, e.g., kidnapping, extortion, etc., then in accordance with the general UJI rule, an ordinary dictionary definition should be given. An exception to this general rule should be made if the defendant is also charged with the substantive crime which was threatened. In such case, if the jury asks for the definition, the essential elements of the substantive crime should be referred to as the definition of the threatened offense. Otherwise the jury would be confused as to the elements of the accompanying offense.

The belief of the victim as to the ability and intention of the defendant to carry out the threat is measured by a subjective standard. The committee was of the opinion that an objective test for reasonableness of the fear is inapplicable to sex crimes. If the victim's apprehension caused submission to the contact, the defendant cannot rely on an argument that the victim's response to the threat was irrational. The victim's fear need not be reasonable, it must only be real.

*See also* the commentary to UJI 14-902 NMRA.

**ANNOTATIONS**

**Cross references.** — For criminal sexual contact, *see* Sections 30-9-12(D) and 30-9-10(A)(2)(3) NMSA 1978

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 67.

75 C.J.S. Rape § 82.

## 14-904. Criminal sexual contact; victim unconscious, asleep, physically or mentally helpless; essential elements.

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. _____ (*name of victim*) was [unconscious] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. _____ (*name of victim*) was 18 years of age or older;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* Section 30-9-12 NMSA 1978; misdemeanor.

This instruction contains the essential elements of criminal sexual contact perpetrated through the use of force or coercion. In this instruction "force or coercion" is supplied by the inability of the victim to consent. This statutory definition for force or coercion focuses on the status of the victim and not on the intention of the actor. 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. This knowledge of the victim's condition is measured by either an objective or subjective standard, i.e., the defendant is culpable for what he knew or had reason to know.

The term "physically helpless" means incapable of giving consent. "Unconscious" and "asleep" have meanings which are generally understood.

In *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975), the court cited with approval from *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F.2d 847, 851 (1962) ". . . [A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral control." If the jury requests a definition of "mental condition," the language from *State v. Nagel*, supra, may be used because the dictionary is inadequate to define the term.

*See also* the commentary to UJI 14-902.

## ANNOTATIONS

**Cross references.** — For criminal sexual contact, *see* Sections 30-9-12(D) and 30-9-10(A)(4) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment**, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

## 14-905. Criminal sexual contact; force or coercion; essential elements.1

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the unclothed _____[4] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant

(used threats of physical force or physical violence against _____) (*name of victim or other person*)[3]

(OR)

(threatened to _____[5]);

AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious) (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing);

AND the defendant knew or had reason to know of the condition of _____; (*name of victim*)]

[3. The defendant's act was unlawful;][6]

4. _____ (*name of victim*) was eighteen (18) years of age or older;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Subsection A of Section 30-9-10 NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* Section 30-9-12B NMSA 1978; misdemeanor.

This instruction combines UJI 14-902 (physical force or physical violence), UJI 14-903 (threats) and UJI 14-904 (unconscious, etc.). It may be used if the evidence supports more than one type of force or coercion as the means employed in perpetrating the criminal contact. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

Note, however, that even if different theories of force or coercion are submitted to the jury, in this instruction the defendant is being charged with only one crime, misdemeanor criminal sexual contact. Throughout the statutes on sexual offenses (Sections 30-9-11 to 30-9-13 NMSA 1978) alternative methods are set forth for

committing the offenses. For example, there are three ways in which a defendant can commit criminal sexual contact in the fourth degree. Section 30-9-12A NMSA 1978. Separate instructions have been prepared for each of these methods, and where force or coercion is an essential element of a particular method, separate instructions for each definition of force or coercion have been prepared. There are, therefore, ten separate instructions setting forth the essential elements of the single crime of criminal sexual contact in the fourth degree.

In all cases where alternate methods of committing one offense are submitted to the jury, the defendant is being charged with only one offense and may be found guilty of only one offense.

*See also* commentary to UJI 14-902, 14-903 and 14-904 NMRA.

**ANNOTATIONS**

**Cross references.** — For criminal sexual contact, *see* Sections 30-9-12(C) and 30-9-10(A) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 4 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 5 of the instruction as Item 4; and deleted former Use Note 6, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "3" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

## 14-906. Criminal sexual contact; use of physical force or physical violence; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in _____[4];

[4. The defendant's act was unlawful];[5]

5. _____ (*name of victim*) was 18 years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — Four separate instructions have been prepared for criminal sexual contact which results in personal injury to the victim. UJI 14-906 NMRA (physical force or physical violence), 14-907 NMRA (threats) and 14-908 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-906, 14-907, 14-908 and 14-909 NMRA are the same as UJI 14-902, 14-903, 14-904 and 14-905 NMRA, respectively, with the additional element of personal injury to the victim.

UJI 14-909 NMRA combines UJI 14-906, 14-907 and 14-908 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

The statutory definition of personal injury is broad and includes various types of personal injuries. It is therefore a question of law as to whether a particular injury constitutes an aggravating factor sufficient to support the charge. Personal injury includes but is not limited to: disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ. Section 30-9-10(C) NMSA 1978.

*See also* commentaries to UJI 14-902, 14-903 and 14-904 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-12(C)(1) and 30-9-10(A)(1) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**UJI 14-946 proper instruction for fellatio.** — UJI 14-946, stating the elements of criminal sexual penetration in the second degree, is the appropriate instruction when the offense is fellatio, rather than this instruction. *State v. Gabaldon*, 92 N.M. 93, 582 P.2d 1306 (Ct. App. 1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

## 14-907. Criminal sexual contact; threats of force or coercion; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant[2]

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][2]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

4. The defendant's acts resulted in _____[5];

[5. The defendant's act was unlawful][6];

6. _____ (*name of victim*) was 18 years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-906 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-12(C)(1) and 30-9-10(A)(3) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 6, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 67.

75 C.J.S. Rape § 82.

## 14-908. Criminal sexual contact; victim unconscious, asleep, physically or mentally helpless; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in _____[4];

[5. The defendant's act was unlawful;][5]

6. _____ (*name of victim*) was 18 years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-906 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-12(C)(1) and 30-9-10(A)(4) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

## 14-909. Criminal sexual contact; force or coercion; personal injury; essential elements.1

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the unclothed _____[4] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*)[3] (OR) (threatened to _____[5]; AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6];

4. _____ (*name of victim*) was 18 years of age or older;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion", this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-906 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-12(C)(1) and 30-9-10(A) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 7, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

## 14-910. Criminal sexual contact; use of physical force or physical violence; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][4]

5. _____ (*name of victim*) was 18 years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — Four separate instructions have been prepared for criminal sexual contact when the perpetrator is aided or abetted by one or more persons. UJI 14-910 NMRA (physical force or physical violence), 14-911 NMRA (threats) and 14-912 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-910, 14-911, 14-912 and 14-913 NMRA are the same as UJI 14-902, 14-903, 14-904 and 14-905 NMRA, respectively, with the additional element of aided or abetted.

UJI 14-913 NMRA combines UJI 14-910, 14-911 and 14-912 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some

circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

The committee was of the opinion that the legislative use of the terms "aided and abetted" to describe the aggravated offense was not intended to involve consideration of complicated issues of the necessary criminal intent for an accessory. The culpability of the defendant for this aggravated charge of criminal sexual contact does not depend upon the intention of another entertained without his knowledge; it is the intention of the defendant and the effect of the assistance which is controlling.

The committee considered whether the statute must be construed to require that the aiding and abetting be an assist to the force or coercion. The committee decided that the help or encouragement provided the defendant by another may be an assist to any element of the unlawful contact. The gravamen of the offense is the use of another as a tool in the perpetration of the crime.

Therefore, the committee was of the opinion that the element of aided and abetted was properly stated by the phrase "acted with the help or encouragement of one or more persons." The committee noted that the legislature was expressing concern for the victim by including this element as an aggravating factor. A sexual assault by persons acting in concert poses a greater threat to a victim's physical and mental safety than an assault by a single defendant. Statistical support for this theory is reported by Menachem Amir in his two studies of rape and rape victims in Philadelphia. *See* generally MacDonald, *Rape Offenders and Their Victims*, (Charles C. Thomas, 1971).

The committee also considered what degree of contemporaneity must exist between the actions of the defendant and the help or encouragement of the purported aider and abettor. It decided that there must be a sufficient nexus in time and place for the victim to be aware of the aggravated danger. For example, it would be sufficient if the defendant threatened that his assistant would harm the victim's family or if the victim was aware that the defendant had an assistant in the next room ready to provide aid if victim resisted, etc. *See also* commentaries to UJI 14-902, 14-903 and 14-904 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-12(C)(2) and 30-9-10(A)(1) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 65 Am. Jur. 2d Rape §§ 4, 28, 29.

75 C.J.S. Rape § 82.

## 14-911. Criminal sexual contact; threats of force or coercion; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant[2]

[used threats of physical force or physical violence against _____ (*name of victim or another*);][2]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][5]

6. _____ (*name of victim*) was 18 years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-910 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-12(C)(2) and 30-9-10(A)(3) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 28, 29, 57.

75 C.J.S. Rape § 82.

## 14-912. Criminal sexual contact; victim unconscious, asleep, physically or mentally helpless; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][4]

6. _____ (*name of victim*) was 18 years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-910 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-12(C)(2) and 30-9-10(A)(4) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 28, 29, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

## 14-913. Criminal sexual contact; force or coercion; aided or abetted by another; essential elements.1

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the unclothed _____[4] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*)[3] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][6]

5. _____ (*name of victim*) was 18 years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or physical incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion", this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-910 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-12(C)(2) and 30-9-10(A) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 6, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 28, 29.

75 C.J.S. Rape § 82.

## 14-914. Criminal sexual contact; deadly weapon; essential elements.

For you to find the defendant guilty of criminal sexual contact when armed with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant was armed with and used a [_____][4] [_____] (*name of object*) with the intent to use it as a weapon and a _____ (*name of object*) when used as a weapon, is capable of inflicting death or great bodily harm[5]][6];

[3. The defendant's act was unlawful;][7]

4. _____ (*name of victim*) was 18 years of age or older;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12(B) NMSA 1978.

5. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — UJI 14-914 NMRA contains the essential elements of criminal sexual contact when the perpetrator is armed with a deadly weapon, a fourth degree felony.

The statute states that the offense of criminal sexual contact is a fourth degree felony "when the perpetrator is armed with a deadly weapon." The instruction requires in Element 2 that the defendant be armed with and use a deadly weapon. The statute must be construed to require use of the weapon because there is no requirement of

force or coercion. It would seem that the legislative intent was to supplant the element of force or coercion with the element of "being armed." In order for the substitution to be logically consistent, the weapon must be used.

Compare UJI 14-1621 NMRA (armed robbery), UJI 14-1632 NMRA (aggravated burglary) and Section 30-7-3 NMSA 1978 (unlawful carrying of a firearm into a liquor dispensary).

The defendant uses the deadly weapon if he employs it in any manner that constitutes an express or implied threat to use it against the victim or another. That may be done by displaying the weapon, or referring to it or by permitting its presence to become known to the victim. The weapon must be used to supply the required coercion.

This instruction was revised in 1999 and 2004 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154. *See* commentary to UJI 14-304 NMRA.

*See also* commentary to UJI 14-902 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-9-12(C)(3) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 4 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 5 of the instruction as Item 4; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 1999 amendment,** effective February 1, 2000, rewrote element 2 which read: "The defendant was armed with and used .....;[4]" and, in the Use Note, rewrote Paragraph 4 to correspond to the amendment of element 2, and inserted Paragraphs 5 and 6.

**The 2004 amendment,** effective January 20, 2005, revised element 2, added the bracketed essential element number "3" and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75 C.J.S. Rape § 25.

## 14-915. Criminal sexual contact in the fourth degree; force or coercion; essential elements.1

For you to find the defendant guilty of criminal sexual contact in the fourth degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the unclothed _____[4] of _____ (*name of victim*) without _____'s (*name of victim*) consent;]

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant

(used threats of physical force or physical violence against _____) (*name of victim or other person*))[3]

(OR)

(threatened to _____[5]);

AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6]; OR, the defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][7]

5. _____ (*name of victim*) was 18 years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Subsection A of Section 30-9-10 NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. The instruction also sets forth, in the alternative, two of the three types of criminal sexual contact in the fourth degree in Section 30-9-12(A) NMSA 1978: (1) contact resulting in personal injury; (2) contact while aided and abetted by another. If the evidence supports one or more theories of "force or coercion" and also supports both of these theories of criminal sexual contact in the fourth degree, this instruction may be used. If the evidence also supports the third type of criminal sexual contact in the fourth degree (contact while armed with a deadly weapon), Instruction 14-914 NMRA must also be given.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternative.

4. Name one or more of the following parts of the anatomy touched: "groin", "anus", "buttocks", "breast", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Subsection D of Section 30-9-10 NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005.]

**Committee commentary.** — This instruction combines UJI 14-906 NMRA (physical force or physical violence; personal injury), 14-907 NMRA (threats; personal injury), 14-908 NMRA (unconscious, etc.; personal injury), 14-910 NMRA (physical force or physical violence; aided or abetted), 14-911 NMRA (threats; aided or abetted) and 14-912 NMRA (unconscious, etc.; aided or abetted).

This instruction may be used if the evidence supports two theories of aggravation of the offense; i.e., personal injury and aided or abetted. However, in some circumstances

individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

This combined instruction does not include UJI 14-912 NMRA (deadly weapon). It is awkward and confusing to combine it with the other fourth degree sexual contacts because UJI 14-914 NMRA contains no definitions of force or coercion. If the evidence also supports the charge that the defendant was armed with a deadly weapon, UJI 14-914 NMRA must be given. That is because the use of the deadly weapon element of UJI 14-914 NMRA supplants the force or coercion set forth in UJI 14-915 NMRA.

*See also* commentary to UJI 14-902 NMRA.

**ANNOTATIONS**

**Cross references.** — See Sections 30-9-12(C)(1), 30-9-12(C)(2) and 30-9-10(A) NMSA 1978.

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 7, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape §§ 14, 82.

# Part B
# Criminal Sexual Contact of a Minor

## 14-920. Chart.

SECTION 30-9-13 NMSA 1978
CRIMINAL SEXUAL CONTACT OF A MINOR

Fourth Degree and Third Degree

| TYPE OF | FOURTH | THIRD DEGREE — TYPES OF CRIMINAL SEXUAL |
|---|---|---|

| FORCE OR COERCION | DEGREE | CONTACT OF A MINOR | | | | | |
|---|---|---|---|---|---|---|---|
| | 13–18 | A. Child Under 13 | B. Person in Position of Authority | C. Personal Injury 13-18 | D. Aided or Abetted 13-18 | E. Armed With Deadly Weapon 13-18 | F. Multiple 3rd Degree Types 13-18 (B-C) |
| 1. Use of physical force or physical violence | 14-921 | | | 14-927 | 14-931 | | |
| 2. Threats of force or coercion | 14-922 | | | 14-928 | 14-932 | | |
| 3. Victim physically or mentally unable to consent | 14-923 | | | 14-929 | 14-933 | | |
| 4. All of the above (1-3) | 14-924 | | | 14-930 | 14-934 | | 14-936 |
| FORCE OR COERCION NOT AN ELEMENT | 14-925 | 14-926 | | | 14-935 | | |

## 14-921. Criminal sexual contact of a minor in the fourth degree; use of physical force or physical violence; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the _____[3] of _____ (*name of victim*);][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant used physical force or physical violence;

3. _____ (*name of victim*) was at least 13 but less than 18 years old;

[4. The defendant's act was unlawful;][4]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* Section 30-9-13(B) NMSA 1978: fourth degree felony.

Four separate instructions have been prepared for criminal sexual contact of a minor. UJI 14-921 NMRA (physical force or physical violence), 14-922 NMRA (threats) and 14-923 NMRA (unconscious, etc.) contain separate definitions of "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-921, 14-922, 14-923 and 14-924 NMRA are the same as UJI 14-902, 14-903, 14-904 and 14-905 NMRA, respectively, with the additional element that the victim is a minor.

UJI 14-924 NMRA combines UJI 14-921, 14-922 and 14-923 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

Criminal sexual contact of an adult requires that the part of the body contacted be "unclothed." That is not the case in criminal sexual contact of a minor, and these instructions omit the requirement.

Criminal sexual contact of an adult by the touching or application of force, as distinguished from the causing of a touching, etc., requires that the contact be without the consent of the victim. That is not the case in criminal sexual contact of a minor, and these instructions omit the requirement.

The committee recognized that other unconsented touchings are covered by Section 30-3-4 NMSA 1978 relating to battery. *See* commentary to UJI 14-320 NMRA.

The statute requires that the touching be intentional. This element is covered by the general intent instruction, UJI 14-141 NMRA.

The parts of the body which are protected by Section 30-9-13 NMSA 1978 are more extensive than in criminal sexual contact of an adult. The breast and buttocks are included as well as the anus, penis and genital area. The committee was of the opinion that the parts of the body protected against unlawful touchings by the term "primary genital area" are those set forth in Section 30-9-14 NMSA 1978 relating to indecent exposure. Definitions for those terms are provided in UJI 14-981 NMRA and must be given. Dictionary definitions were considered insufficient because the definitions contained in several dictionaries, such as Webster's and Random House, were found to be excessively technical.

Definitions for "breast" and "buttock" were not included because the meaning of these terms is generally understood. In accordance with the general UJI rule, a dictionary definition of these terms should be given if the jury requests a definition.

The term "groin" was included in the instructions but was left undefined. The use of this term should be avoided because its technical definition is so broad that it includes parts of the body which the committee considered beyond the scope of the intended prohibited contacts.

Section 30-9-13 NMSA 1978 requires that the sexual contact be both unlawful and intentional. The term "unlawful" means "without consent". Sex offenses may be defined in terms of "force" or "nonconsent" since these terms are substantially the same. *See* Perkins, Criminal Law 156 (2d ed. 1969). Force or coercion is merely a factor negating consent. Under this statute a minor may consent to sexual contact. If the minor did not consent, the touching is unlawful.

In all cases of criminal sexual contact, the age of the victim is an essential element, because the age of the victim fixes the degree of the crime. A "minor" is a person under the age of 18. A person 18 years of age has reached majority. *See* Section 28-6-1 NMSA 1978.

*See* commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of the definitions of "force or coercion".

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13(B)(1) and 30-9-10(A)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element "4" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

**Compiler's notes.** — Section 30-9-12 NMSA 1978, which deals with criminal sexual contact of an adult, was amended in 1981 and now also protects breasts and buttocks, along with 30-9-13 NMSA 1978, referred to in the ninth paragraph of the committee commentary.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-922. Criminal sexual contact of a minor in the fourth degree; threats of force or coercion; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant[2]

[used threats of physical force or physical violence against _____ (*name of victim or other person*);]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

4. _____ (*name of victim*) was at least 13 but less than 18 years old;

[5. The defendant's act was unlawful;][5]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. *See* Subsection A of Section 30-9-10 NMSA 1978 for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-921 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13(B)(1), 30-9-10(A)(2) and 30-9-10(A)(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-923. Criminal sexual contact of a minor in the fourth degree; victim unconscious, asleep, physically or mentally helpless; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. _____ (*name of victim*) was at least 13 but less than 18 years old;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given

after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-921 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13(B)(1) and 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 16, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

## 14-924. Criminal sexual contact of a minor in the fourth degree; force or coercion; essential elements.1

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the _____[4] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch _____[4] of the defendant;]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant

(used threats of physical force or physical violence against _____) (*name of victim or other person*))[3]

[OR]

(threatened to _____[5]);

AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. _____ (*name of victim*) was at least 13 but less than 18 years old;

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-921 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13(B) and 30-9-10(A)(2), 30-9-10(A)(3) or 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element "4" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-925. Criminal sexual contact of a minor in the [third] [second] degree; child under thirteen; essential elements.

For you to find the defendant guilty of criminal sexual contact of a child under the age of thirteen (13) [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;][2]

2. _____ (*name of victim*) was a child under the age of thirteen (13);

[3. The defendant's act was unlawful;][4]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective October 1, 1992; January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* Section 30-9-13A(1) NMSA 1978: third degree felony.

This instruction contains the essential elements for criminal sexual contact of a child under 13. If the victim is under the age of 13 years, no force or coercion is necessary.

Mistake of the defendant as to the age of a child under the age of 13 is not a defense. *Perez v. State*, 111 N.M. 160, 162, 803 P.2d 249 (1990); Perkins, *Criminal Law*, 168 (2d ed. 1969).

If the child is "spouse" to the defendant, sexual contact is not a crime. Marriage may be permitted at any age by the children's court or family court and therefore the contact would not be unlawful. *See* Section 40-1-6B NMSA 1978.

This instruction was revised in 1992 to comply with the Supreme Court's opinion in *State v. Osborne*, 111 N.M. 654, 808 P.2d 624 (1991). *See also* footnote 3 of *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992) the New Mexico Supreme Court which further clarifies the Court's earlier decision in *Osborne*.

In 1991, Section 30-9-13 NMSA 1978 was amended to delete "other than one's spouse". To be consistent with this 1991 amendment, the Supreme Court approved in 1992 the deletion of former element 3, "victim was not the spouse of the defendant".

[As revised, September 10, 1993.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-9-13A(1) NMSA 1978.

**The 1992 amendment,** effective October 1, 1992, inserted "unlawfully and intentionally" in Item 1, deleted former Item 3, relating to the victim not being the spouse of the defendant, redesignated former Item 4 as Item 3; and, in the "Use Note", added present Items 2 and 3, redesignated former Item 2 as present Item 5, deleted former Item 4, relating to sentencing when a spousal relationship issue has been raised, and redesignated former Item 3 as present Item 4.

**The 2004 amendment,** effective January 20, 2005, deleted "unlawfully and intentionally" in essential element 1, added the bracketed essential element 3 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former Use Notes 2, 3 and 5.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title , after "third", added the brackets and word "second"; in the first sentence, after "child under the age of", added "thirteen"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 2, after "(name of victim) was", deleted "12 years of age or younger" and added "a child under the age of thirteen (13)".

**Second degree criminal sexual contact of a minor.** — Second degree criminal sexual contact of a minor as defined in Subsection B of Section 30-9-13 NMSA 1978 is limited to instances in which a defendant touches or applies force to the unclothed intimate parts of a minor. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

**Sufficient evidence of third degree criminal sexual contact of a minor.** — Where defendant caused the ten-year-old victim to touch defendant’s unclothed penis while in bed; the trial court instructed the jury using the language of the uniform jury instruction in effect at the time for third degree criminal sexual contact of a minor; and defendant was found guilty of and was sentenced for second degree criminal sexual contact of a minor; defendant’s conduct was a third degree felony under Subsection C, not a third degree felony under Subsection B. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

**Use of term "groin" in instruction proper.** *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

**Time as essential element.** — Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time

limitations in connection with the charges at issue. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990).

**Disjunctive in instruction not error. —** It was not error for the district court to instruct the jury that in order to convict defendant of criminal sexual contact of a minor under the age of 13, it must conclude that defendant touched or applied force either to the vagina or breast of the victim, as the essential element of the crime is touching an intimate part of the child. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 65 Am. Jur. 2d Rape §§ 16 to 19.

75 C.J.S. Rape § 82.

## 14-926. Criminal sexual contact of a minor in the [third] [second] degree; use of coercion by person in position of authority; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor by use of coercion by a person in a position of authority [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant was a

[parent] [relative] [household member] [teacher] [employer][4]

[person who by reason of the defendant's relationship to _____ (*name of victim*) was able to exercise undue influence over _____ (*name of victim*)]

AND used this authority to coerce _____ (*name of victim*) to submit to sexual contact;

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][5]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the applicable alternative. *See* Subsection E of Section 30-9-10 NMSA 1978 for the definition of "position of authority".

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual contact of a minor perpetrated through the use of coercion by a person in a position of authority.

Only one instruction was prepared for this method of committing the crime of criminal sexual contact of a minor because the term "force or coercion", with its three definitions, has no application. The meaning of "coerce" in this offense is uniquely related to the status of the defendant. The defendant must occupy a position which enables that person to exercise undue influence over the victim and that influence must be the means of compelling submission to the contact. The committee recognized that such coercion might take many forms but is less overtly threatening than physical force or threats.

*See also* the commentary to UJI 14-921 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-9-13(C)(2) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added bracketed "parent", "relative" household member", "teacher" and "employer" to essential element 1 and new Use Note 4 relating to "position of authority", deleted essential element 4 and added a new essential element 4 and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 3, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Coercion.** — The defendant's requested jury instruction that "[t]he fact the Defendant was in a position of authority does not alone establish that he used that authority to coerce sexual contact" was not a correct statement of the law because coercion for the purposes of the criminal sexual contact of a minor statute, 30-9-13 NMSA 1978, occurs when a defendant occupies a position which enables that person to exercise undue influence over the victim and that influence is the means of compelling submission to the contact. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 41 Am. Jur. 2d Incest § 14; 65 Am. Jur. 2d Rape § 41.

75 C.J.S. Rape § 15.

## 14-927. Criminal sexual contact of a minor in the [third] [second] degree; use of physical force or physical violence; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);][2]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in _____[4];

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful[5];]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — Four separate instructions have been prepared for criminal sexual contact of a minor which results in personal injury to the victim. UJI 14-927 NMRA (physical force or physical violence), 14-928 NMRA (threats) and 14-929 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-927, 14-928, 14-929 and 14-930 NMRA are the same as UJI 14-921, 14-922, 14-923 and 14-924 NMRA, respectively, with the additional element of personal injury to the victim.

UJI 14-930 combines UJI 14-927, 14-928 and 14-929 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and

therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The statutory definition of personal injury is broad and includes various types of personal injuries. It is therefore a question of law as to whether a particular injury constitutes an aggravating factor sufficient to support the charge. "Personal injury" includes but is not limited to: disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ. Section 30-9-10(D) NMSA 1978.

*See* commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of each of the definitions of force or coercion.

*See also* the commentary to UJI 14-921 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13A(2)(b) and 30-9-10A(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-928. Criminal sexual contact of a minor in the third degree; threats of force or coercion; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant's acts resulted in _____[5];

5. _____ (*name of victim*) was at least 13 but less than 18 years old;

[6. The defendant's act was unlawful;][6]

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10 A(3) NMSA 1978 for examples of types of threats.

5. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-927 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13A(2)(b) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element "6" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-929. Criminal sexual contact of a minor in the third degree; victim unconscious, asleep, physically or mentally helpless; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in _____[4];

5. _____ (*name of victim*) was at least 13 but less than 18 years old;

[6. The defendant's act was unlawful;][5]

7. This happened in New Mexico on or about the _____ day of_____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-927 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13A(2)(b) and 30-9-10A(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element "6" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 16, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

## 14-930. Criminal sexual contact of a minor in the [third] [second] degree; force or coercion; personal injury; essential elements.1

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the [unclothed] _____[4] of _____ (*name of victim*)]

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

[2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant caused _____ (*name of victim*) to touch the _____[4] through the use of threats of physical force or physical violence against _____ (*name of victim or other person*)] [OR] [threatened to _____[5]]; AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing]; AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6];

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion", this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10 (A)(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary under UJI 14-927 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13A(2)(b) and 30-9-10A NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, revised the first essential element 2 to delete "used" and insert "caused _____ (name of victim) to touch the _____ through the use of", added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-931. Criminal sexual contact of a minor in the [third] [second] degree; use of physical force or physical violence; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* Section 30-9-13A(2)(c) NMSA 1978: third degree felony.

Four separate instructions have been prepared for criminal sexual contact of a minor when the perpetrator is aided or abetted by one or more persons. UJI 14-931 NMRA (physical force or physical violence), UJI 14-932 NMRA (threats) and UJI 14-933 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10A NMSA 1978.

UJI 14-931, 14-932, 14-933 and 14-934 NMRA are the same as UJI 14-921, 14-922, 14-923 and 14-924 NMRA, respectively, with the additional element of "aided or abetted."

UJI 14-934 NMRA combines UJI 14-931, 14-932 and 14-933 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

*See* the commentary to UJI 14-910 NMRA for a discussion of the element of "aided or abetted."

*See* commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of each of the definitions of "force or coercion."

*See also* the commentary to UJI 14-921 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-13A(2)(c) and 30-9-10A(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title after "third", added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 16, 28, 29.

75 C.J.S. Rape § 82.

## 14-932. Criminal sexual contact of a minor in the [third] [second] degree; threats of force or coercion; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][2]

[OR]

[threatened _____[4];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant acted with the help or encouragement of one or more persons;

5. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[6. The defendant's act was unlawful;][5]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary under UJI 14-931 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13A(2)(c) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 6 and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title after "third", added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 5, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 16, 28, 29.

75 C.J.S. Rape § 82.

## 14-933. Criminal sexual contact of a minor in the [third] [second] degree; victim unconscious, asleep, physically or mentally helpless; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when aided and abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;] _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

2. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

3. The defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary under UJI 14-931 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13(A)(2)(c) and 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 6 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title, added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 16, 28, 29, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

## 14-934. Criminal sexual contact of a minor in the [third] [second] degree; force or coercion; aided or abetted by another; essential elements.1

For you to find the defendant guilty of criminal sexual contact of a minor when aided or abetted by another [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the [unclothed] _____[4] of _____ (*name of victim*);

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant [used threats of physical force or physical violence against _____ (*name of victim or other person*)][3] [OR] [threatened to _____[5]];

AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing]; AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][6]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2)

threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion", this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary under UJI 14-931 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-13A(2)(c) and 30-9-10A NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title, added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 16, 28, 29.

75 C.J.S. Rape § 82.

## 14-935. Criminal sexual contact of a minor in the [third] [second] degree; deadly weapon; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when armed with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant was armed with and used a [_____[4] (*name of object*) with the intent to use it as a weapon and a _____ (*name of object*), when used as a weapon, is capable of inflicting death or great bodily harm[5]][6];

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina". When definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12(B) NMSA 1978.

5. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* Section 30-9-13A(2)(d) NMSA 1978: third degree felony.

This instruction sets forth the charge of criminal sexual contact of a minor when the perpetrator is armed with a deadly weapon. *See* the commentary to UJI 14-914 NMRA for a discussion of the meaning of "while armed with a deadly weapon."

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

*See also* the commentary to UJI 14-921 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Section 30-9-13A(2)(d) NMSA 1978.

**The 1999 amendment,** effective February 1, 2000, rewrote element 2 which read: "The defendant was armed with and used .....;[4]" and, in the Use Note, rewrote Paragraph 4 to correspond to the amendment of element 2, inserted Paragraphs 5 and 6 and redesignated former Paragraph 5 as present Paragraph 7.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title, added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 3, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75 C.J.S. Rape §§ 25, 82.

## 14-936. Criminal sexual contact of a minor in the third degree; force or coercion; essential elements.1

For you to find the defendant guilty of criminal sexual contact of a minor in the third degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[touched or applied force to the _____[4] of _____ (*name of victim*);]

[OR]

[caused _____ (*name of victim*) to touch the _____[4] of the defendant;]

2. [The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*)][3]

(OR)

[threatened to _____[5]];

AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6]; OR the defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least 13 but less than 18 years old;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. The instruction also sets forth two of the four types of criminal sexual contact of a minor 13 to 18 in the third degree in Section 30-9-13(A)(2) NMSA 1978: (1) contact resulting in personal injury; (2) contact while aided or abetted by another. If the evidence supports one or more theories of "force or coercion" and also supports both of these theories of criminal sexual contact of a minor in the third degree, this instruction may be used. If the evidence also supports either of the other two theories of criminal sexual contact of a minor 13 to 18 in the third degree, the appropriate instruction or instructions must also be given: (1) UJI 14-926 NMRA for contact by a person in position of authority; (2) UJI 14-935 NMRA for contact while armed with a deadly weapon.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "buttock", "breast", "groin", "anus", "mons pubis", "penis", "testicles", "mons veneris", "vulva" or "vagina." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Subsection C of Section 30-9-10 NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — This instruction combines UJI 14-927 NMRA (physical force or physical violence; personal injury), 14-928 NMRA (threats; personal injury), 14-929 NMRA (unconscious, etc.; personal injury), 14-931 NMRA (physical force or physical violence; aided or abetted), 14-932 NMRA (threats; aided or abetted) and 14-933 NMRA (unconscious, etc.; aided or abetted).

This instruction may be used if the evidence supports two theories of aggravation of the offense; i.e., personal injury and aided or abetted. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore

preferable. The court has discretion as to which instruction should be given for these essential elements.

This combined instruction does not include UJI 14-926 (position of authority), nor UJI 14-935 NMRA (deadly weapon). It is awkward and confusing to combine either with the other third degree sexual contacts because UJI 14-926 NMRA and 14-935 NMRA contain no definitions of force or coercion. If the evidence also supports the giving of UJI 14-926 NMRA or 14-935 NMRA, that individual instruction should also be given.

*See also* commentary to UJI 14-921 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-13A(2)(b) and 30-9-13A(2)(c) and 30-9-10A NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

## 14-937. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to a court order dated November 19, 1997, this instruction, dealing with the definition of unlawful in the context of criminal sexual contact of a minor, was withdrawn effective on and after January 15, 1998.

# Part C
# Criminal Sexual Penetration

## 14-940. Chart.

SECTION 30-9-11 NMSA 1978
CRIMINAL SEXUAL PENETRATION

Third Degree, Second Degree and First Degree

| TYPE OF FORCE OR COERCION | THIRD DEGREE | SECOND DEGREE | | | | | | | FIRS DEGR |
|---|---|---|---|---|---|---|---|---|---|
| | | Person in Position of Authority 13-16 | Personal Injury | Aided or Abetted | Commission of a Felony | Armed With Deadly Weapon | Multiple 2nd Degree Types | Child Under 13 | H M A |
| 1. Use of physical force or physical violence | 14-941 | | 14-946 | 14-950 | | | | | 1 |
| 2. Threats of force or coercion | 14-942 | | 14-947 | | | | | | 1 |
| 3. Victim physically or mentally unable to consent | 14-943 | | 14-948 | 14-952 | | | | | 1 |
| 4. All of the above (1-3) | 14-944 | | 14-949 | 14-953 | | | 14-956 | | 1 |
| FORCE OR COERCION NOT AN ELEMENT | | 14-945 | | | 14-954 | 14-955 | | 14-957 | |

## 14-941. Criminal sexual penetration in the third degree; use of physical force or physical violence; essential elements.

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant caused _____ (*name of victim*) to engage in _____[3] through the use of physical force or physical violence;

[3. The defendant's act was unlawful;][6]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* Section 30-9-11(E) NMSA 1978: third degree felony.

UJI 14-941 NMRA (physical force), 14-942 NMRA (threats) and 14-943 NMRA (unconscious, etc.) contain the three definitions of "force or coercion" in criminal sexual penetration perpetrated through the use of force or coercion. *See* the commentary to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of the definitions of "force or coercion".

UJI 14-944 NMRA combines UJI 14-941, 14-942 and 14-943 NMRA with the three definitions of "force or coercion" set out in the alternative. It may be used when there is evidence of more than one type of force or coercion. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The introductory paragraph of these instructions identifies the charge as "criminal sexual penetration." It would be misleading to include the words "by force or coercion" in the charge. The definition of "force or coercion" includes both active interference by the defendant with the normal consent functions of the victim, e.g., physical force, and passive incapacity of the victim to engage in normal consent functions, e.g., unconsciousness. A jury might be confused as to the elements of the offense if the term "by force or coercion" were used when the force or coercion is supplied by the incapacity of the victim.

The statute requires that the penetration be intentional. This element is covered by the general intent instruction, UJI 14-141 NMRA.

The statute provides that criminal sexual penetration may be committed: (1) by unlawfully and intentionally causing another to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse; or (2) by unlawfully and intentionally causing penetration, to any extent and with any object, of the genital or anal openings of another.

The first alternative in Paragraph 1 covers the case in which the defendant causes the victim to engage in one of the acts with the defendant or with another.

The second alternative in Paragraph 1 covers the case in which the penetration occurs with an object other than the genital organ. This type of penetration may be committed by the defendant directly or indirectly, i.e., by the defendant inserting the object, or causing the victim or another to insert the object.

These instructions do not refer to consent, because lack of consent as such is not an element of the offense of criminal sexual penetration. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App.), cert. denied, 89 N.M. 652, 556 P.2d 60 (1976) so holds in a case involving force or coercion resulting in personal injury.

The statute refers to sexual intercourse, anal intercourse, cunnilingus and fellatio. Definitions for those acts are contained in UJI 14-982. *See* the commentary to that instruction for a discussion of the statutory construction involved.

In the part of the statute which refers to penetration by an object, the legislature used the phrase "the genital or anal openings of another". The instructions use the terms "vagina", "penis" and "anus". UJI 14-981 NMRA defines the terms. Dictionary definitions were considered insufficient because the definitions contained in several dictionaries, such as Webster's and Random House, were found to be excessively technical.

The committee recognized that an unlawful penetration of the penis with an object is an unlikely occurrence, but supplied the term as an alternative because it is included within the statute.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-11(E) and 30-9-10(A)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, deleted "used" in element 2 and inserted in its place "caused _____ (name of victim) to engage in _____3 through the use of", added the bracketed essential element 3 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**Not incumbent upon state to prove victim not wife.** — It was not incumbent on the state to prove that the victim was not the wife of the defendant since the statutory definition of the crime creates by negative exclusion the exculpatory status of husband. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-942. Criminal sexual penetration in the third degree; threats of force or coercion; essential elements.

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3] through the use of threats of physical force or physical violence against _____ (name of victim or other person);] ]

[OR]

[threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus." The applicable definition from Instruction 14-981 NMRA must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10 (A)(3) NMSA 1978 for examples of types of threats.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-941 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(E), 30-9-10(A)(2) and 30-9-10(A)(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, deleted "used" in element 2 and inserted in its place "caused _____ (name of victim) to engage in _____3 through the use of", added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 57, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-943. Criminal sexual penetration in the third degree; victim unconscious, asleep, physically or mentally helpless; essential elements.

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Use only the applicable alternatives.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-941 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(E) and 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 110, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

## 14-944. Criminal sexual penetration in the third degree; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (name of victim);]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[3] (OR) [threatened to _____[7]]; AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (name of victim) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (name of victim);]

[3. The defendant's act was unlawful;][8]

4. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-974 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-941 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(E) and 30-9-10(A) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 3 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-945. Criminal sexual penetration of a 13 to 18 year old in the second degree; use of coercion by person in position of authority; essential elements.

For you to find the defendant guilty of criminal sexual penetration of a child at least thirteen (13) but less than eighteen (18) years old by use of coercion by a person in a position of authority [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

3. The defendant was a

[parent] [relative] [household member] [teacher] [employer][6]

[person who by reason of the defendant's relationship to _____ (*name of victim*) was able to exercise undue influence over _____ (*name of victim*)]

AND used this authority to coerce _____ (*name of victim*) to submit to sexual contact;

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

This instruction is only to be used in cases based on crimes that occurred before the 2007 amendment (July 1, 2007).

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: *i.e.*, "sexual intercourse," "anal intercourse," "cunnilingus," or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: *i.e.*, "vagina," "penis." or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the applicable alternative. *See* Subsection E of Section 30-9-10 NMSA 1978 for the definition of "position of authority".

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual penetration of a child at least thirteen and less than eighteen years of age perpetrated through the use of coercion by a person in a position of authority. Only one instruction was prepared for this method of committing the crime of criminal sexual penetration because the term "force or coercion", with its three definitions, has no application. The meaning of "coerce" in this offense is uniquely related to the status of the defendant. The defendant must occupy a position which enables that person to exercise undue influence over the victim and that influence must be the means of compelling submission to the penetration. The committee recognized that such coercion might take many forms but is less overtly threatening than physical force or threats.

*See also* the commentary to UJI 14-941 NMRA.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-9-11(D)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first sentence, after "criminal sexual penetration of a child", changed "13 to 18" to "at least thirteen (13) but less than eighteen (18) year old"; and in Paragraph 2, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old"; and in the committee commentary, in the first sentence after "a child", deleted "13 to 16 years" and added "at least thirteen and less than eighteen years".

**The 2011 amendment,** approved by Supreme Court Order 11-8300-037, effective November 18, 2011, in the Use Note, added the introductory sentence to restrict the use of the instruction to crimes that occurred prior to July 1, 2007.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 41 Am. Jur. 2d Incest § 14; 65 Am. Jur. 2d Rape §§ 3, 41.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

Liability of parent for injury to unemancipated child caused by parent's negligence - modern cases, 6 A.L.R.4th 1066.

75 C.J.S. Rape §§ 15, 82.

## 14-946. Criminal sexual penetration in the second degree; use of physical force or physical violence; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant caused the insertion of _____[4] into the _____[5] of _____ (*name of victim*) through the use of physical force or physical violence;

3. The defendant's acts resulted in _____[6];

[4. The defendant's act was unlawful[7];]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina," "penis" or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — Four separate instructions have been prepared for criminal sexual penetration which results in personal injury to the victim. UJI 14-946 NMRA (physical force or physical violence), 14-947 NMRA (threats) and 14-948 NMRA (unconscious, etc.) contains separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-946, 14-947, 14-948 and 14-949 NMRA are the same as UJI 14-941, 14-942, 14-943 and 14-944 NMRA, respectively, with the additional element of personal injury to the victim.

UJI 14-949 NMRA combines UJI 14-946, 14-947 and 14-948 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The statutory definition of "personal injury" is broad and includes various types of personal injuries. It is therefore a question of law as to whether a particular injury constitutes an aggravating factor sufficient to support the charge. "Personal injury" includes but is not limited to: disfigurement, mental anguish, chronic or recurrent pain, pregnancy, or disease or injury to a sexual or reproductive organ. Section 30-9-10(C) NMSA 1978.

*See* commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of the definitions of "force or coercion".

*See also* the commentary to UJI 14-941 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-11(D)(3) and 30-9-10(A)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added to essential element 2 "caused the insertion of _____4 into the _____5 of _____ (name of victim) through the use of", deleted former essential element 5 and former Use Note 7 which required proof that the victim was not the spouse of the defendant and added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

**This instruction is appropriate when offense is fellatio,** rather than UJI 14-906 stating the elements of criminal sexual contact. *State v. Gabaldon*, 92 N.M. 93, 582 P.2d 1306 (Ct. App. 1978).

**Instruction in language of statute sufficient.** — An instruction which set forth the elements of the crime of second degree criminal sexual penetration in the language of the statute was sufficient, and there was no error in failing to instruct on the absence of the victim's consent. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

**Consent defense.** — Defendant was not denied effective assistance of counsel because of counsel's failure to request an instruction on consent of his wife to the sexual intercourse. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. granted, 2005-NMCERT-008.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-947. Criminal sexual penetration in the second degree; threats of force or coercion; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);]

[OR]

[threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant's acts resulted in _____[7];

[5. The defendant's act was unlawful;][8]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

7. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-946 NMRA.

## ANNOTATIONS

**Cross references. —** *See* Sections 30-9-11(D)(3), 30-9-10(A)(2) and 30-9-10(A)(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 65 Am. Jur. 2d Rape §§ 3, 57, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-948. Criminal sexual penetration in the second degree; victim unconscious, asleep, physically or mentally helpless; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in _____[6];

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary to UJI 14-946 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(D)(3) and 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 110.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

## 14-949. Criminal sexual penetration in the second degree; force or coercion; personal injury; essential elements.1

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[3] (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[8];

[4. The defendant's act was unlawful;][9]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2)

threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion", this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-946 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-11(D)(3) and 30-9-10(A) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 4 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-950. Criminal sexual penetration in the second degree; use of physical force or physical violence; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];][2]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant used physical force or physical violence;

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — Four separate instructions have been prepared for criminal sexual penetration when the perpetrator is aided or abetted by one or more persons. UJI 14-950 (physical force or physical violence), 14-951 (threats), 14-952 (unconscious, etc.) contain separate definitions for "force or coercion". Section 30-9-10(A) NMSA 1978.

UJI 14-950, 14-951, 14-952 and 14-953 NMRA are the same as UJI 14-941, 14-942, 14-943 and 14-944 NMRA, respectively, with the additional element of "aided or abetted".

UJI 14-953 NMRA combines UJI 14-950, 14-951 and 14-952 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

*See* the commentary to UJI 14-910 NMRA for a discussion of the element of "aided or abetted".

*See* commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of each of the definitions of "force or coercion".

*See also* the commentary to UJI 14-941 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-11(D)(4) and 30-9-10(A)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 4 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**Intent for accessory crimes not required in instruction on principal's crime.** — Where the defendants were charged with aiding and abetting the crime of sexual penetration in the second degree, the required intent for accessory crimes was not required to be included in the instruction setting forth the elements of the principal's crime. *State v. Urioste*, 93 N.M. 504, 601 P.2d 737 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 28, 29, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-951. Criminal sexual penetration in the second degree; threats of force or coercion; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][2]

[OR]

[threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary to UJI 14-950 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(D)(4), 30-9-10(A)(2) and 30-9-10(A)(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 28, 29, 57, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-952. Criminal sexual penetration in the second degree; victim unconscious, asleep, physically or mentally helpless; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of_____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][6]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-950 NMRA.

**ANNOTATIONS**

**Cross references. —** *See* Sections 30-9-11(D)(4) and 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 5 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 28, 29, 110, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

## 14-953. Criminal sexual penetration in the second degree; force or coercion; aided or abetted by another; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (name of victim or other person)) (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][8]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary to UJI 14-950 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(D)(4) and 30-9-10(A) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 4 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 28, 29, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-954. Criminal sexual penetration in the second degree; commission of a felony; essential elements.

For you to find the defendant guilty of criminal sexual penetration while committing another felony [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant committed the act during the commission of _____[6];

[3. The defendant's act was unlawful;][7]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Identify the felony, and give the essential elements unless they are covered in an essential element instruction for the substantive offense.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual penetration perpetrated in the commission of any other felony. Note that the essential elements of the accompanying felony must be given, unless they are covered in another instruction.

The felony must be other than a violation of Sections 30-9-10 through 30-9-14 NMSA 1978. It might have to be other than an aggravated assault or battery on the victim. *Cf.* the commentary to UJI 14-202 NMRA, felony murder.

Note the language that the felony must be "in the commission of any other felony". The language might be construed to mean within the "res gestae" of the felony. *See* commentary to UJI 14-202 NMRA.

*See also* the commentary to UJI 14-941 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Section 30-9-11(D)(5) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, added the bracketed essential element 3 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

## 14-955. Criminal sexual penetration in the second degree; deadly weapon; essential elements.

For you to find the defendant guilty of criminal sexual penetration while armed with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant was armed with and used a [_____][6] [_____ (*name of object*) with the intent to use it as a weapon and a _____ (*name of object*) when used as a weapon, is capable of inflicting death or great bodily harm[7]][8];

[3. The defendant's act was unlawful;][9]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12(B) NMSA 1978.

7. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

8. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective February 1, 2000; January 20, 2005.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual penetration when the perpetrator is armed with a deadly weapon.

This instruction was revised in 1999 and 2004 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

*See* the commentary to UJI 14-914 NMRA for a discussion of "armed with a deadly weapon".

*See also* the commentary to UJI 14-941 NMRA.

## ANNOTATIONS

**Cross references.** — *See* Section 30-9-11(D)(6) NMSA 1978.

**The 1999 amendment,** effective February 1, 2000, rewrote element 2 which read: "The defendant was armed with and used .....;[6]" and, in the Use Note, rewrote Paragraph 6 to correspond to the amendment of element 2, inserted Paragraphs 7 and 8, and redesignated former Paragraph 7 as present Paragraph 9.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 3 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

**Other deadly weapons.** — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of Section 30-1-12(B) NMSA 1978, the jury must be instructed (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 25, 82.

## 14-956. Criminal sexual penetration in the second degree; force or coercion; essential elements.1

For you to find the defendant guilty of criminal sexual penetration in the second degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*)[3] (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[8]; OR the defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][9]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. The instruction also sets forth two of the five types of criminal sexual penetration in the second degree: (1) penetration resulting in personal injury; (2) contact while aided or abetted by another. If the evidence supports one or more theories of "force or coercion" and also supports both of these theories of criminal sexual penetration, this instruction may be used. If the evidence also supports one or more of the other three theories of criminal sexual penetration, the appropriate instruction or instructions must also be given: (1) UJI 14-945 NMRA for crimes committed before July 1, 2007, for penetration of a person 13 to 18 years old by a person in a position of authority; (2) UJI 14-954 NMRA for penetration during the commission of a felony; (3) UJI 14-955 NMRA for penetration while armed with a deadly weapon.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from UJI 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina," "penis" or "anus." The applicable definition or definitions from UJI 14-980 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

**Committee commentary.** — *See* Section 30-9-11B NMSA 1978; second degree felony.

This instruction combines UJI 14-946 NMRA (physical force or physical violence; personal injury), UJI 14-947 NMRA (threats; personal injury), UJI 14-948 NMRA

(unconscious, etc.; personal injury), UJI 14-950 NMRA (physical force or physical violence; aided or abetted), UJI 14-951 NMRA (threats; aided or abetted) and UJI 14-952 NMRA (unconscious, etc.; aided or abetted).

This instruction may be used if the evidence supports two theories of aggravation of the offense; i.e., personal injury and aided or abetted. However, in some circumstances the individual and particularized Uniform Jury Instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

This combined instruction does not include UJI 14-945 NMRA (position of authority), nor UJI 14-954 NMRA (commission of a felony) nor UJI 14-955 NMRA (deadly weapon). It is awkward and confusing to combine these methods of commission of the offense with the other second degree sexual penetrations because UJI 14-945, 14-954 and 14-955 NMRA contain no definitions of “force or coercion.” If the evidence also supports the giving of UJI 14-945, 14-954 and 14-955 NMRA, that individual instruction should also be given. For a person thirteen (13) to eighteen (18) years old, *see* UJI 14-956A NMRA.

*See* the committee commentary to UJI 14-941 NMRA.

[As amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

## ANNOTATIONS

**Cross references.** — *See* Sections 30-9-11(D)(3), 30-9-11(D)(4) and 30-9-10(A) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 4 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

**The 2013 amendment,** approved by Supreme Court Order No. 13-8300-023 effective December 31, 2013, advised the user that UJI 14-945 NMRA may also be used for crimes committed before July 1, 2007 when the evidence supports a theory of criminal sexual penetration that is not included in UJI 14-956 NMRA; and in the Use Note, in Paragraph 1, in the fourth sentence, after “UJI 14-945 NMRA”, added “for crimes committed before July 1, 2007”.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-956A. Criminal sexual penetration in the second degree; force or coercion; child 13 to 18; essential elements.1

For you to find the defendant guilty of criminal sexual penetration in the second degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____;[4]]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;]

[OR]

[The defendant [used threats of physical force or physical violence against _____(*name of victim or other person*)[3]] [OR] [threatened to _____[7]]; AND _____(*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing]; AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. _____ (*name of victim*) was at least 13 but less than 18 years old;

[4. The defendant's act was unlawful;][8]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., “sexual intercourse,” “anal intercourse,” “cunnilingus” or “fellatio.” The applicable definition or definitions from UJI 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., “vagina,” “penis” or “anus.” The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman’s language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant’s actions. If this element is given, UJI 14-132 NMRA, “unlawful defined”, must be given after this instruction.

[Adopted by Supreme Court Order No. 13-8300-023, effective for all cases filed or pending on or after December 31, 2013.]

## 14-957. Criminal sexual penetration; child under 13; essential elements.

For you to find the defendant guilty of criminal sexual penetration of a child under the age of thirteen (13) [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2] [caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was a child under the age of thirteen (13);

[3. The defendant's act was unlawful;][6]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — This instruction contains the essential elements of criminal sexual penetration of a child under 13. If the victim is under the age of 13 years, no force or coercion is necessary.

Mistake of the defendant as to the age of the child is not a defense. Perkins, *Criminal Law*, 168 (2d ed. 1969). *Compare* Sections 40A-9-3 and 40A-9-9 NMSA 1953 (repealed) (a reasonable belief that the child was 16 years of age or older is a defense to statutory rape and sexual assault, respectively).

*See also* the commentary to UJI 14-941 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-9-11(C)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 3 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

**The 2010 amendment,** effective December 31, 2010, in the first sentence, after "child under the age of", added "thirteen"; in Paragraph 2, after "(name of victim) was", deleted "12 years of age or younger" and added "a child under the age of thirteen (13)".

**Use of wrong alternative in uniform instruction.** — Where defendant was charged with first degree criminal sexual penetration of a minor for vaginal penetration and first degree criminal sexual penetration of a minor for anal penetration; the court instructed the jury that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the vagina and/or vulva" of the victim and that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the anus" of the victim; and although the court erred in using the second alternative of the uniform instruction as the form of the instructions given to the jury, the instructions as given accurately reflected the statutory law and did not constitute reversible error. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92.

**Instruction was held properly given,** where the defendant was charged with causing a child under the age of 13 to engage in cunnilingus, even though there was no penetration. *State v. Orona*, 97 N.M. 232, 638 P.2d 1077 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 16.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-958. Criminal sexual penetration in the first degree; use of physical force or physical violence; great bodily harm or great mental anguish; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][1] [great mental anguish] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[1]

[caused _____ (name of victim) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (name of victim);]

2. The defendant used physical force or physical violence which resulted in [great bodily harm[6]][1] [great mental anguish[7]] to _____ (name of victim);

[3. The defendant's act was unlawful;][8]

4. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Use only the applicable alternatives.

2. Insert the count number if more than one count is charged.

3. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. The definition of "great bodily harm," Instruction 14-131 NMRA, must be given after this instruction.

7. The definition of "great mental anguish," Instruction 14-980 NMRA, must be given after this instruction.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — Four separate instructions have been prepared for criminal sexual penetration which results in great bodily harm or great mental anguish to the victim. UJI 14-958 NMRA (physical force or physical violence), 14-959 NMRA (threats) and 14-960 NMRA (unconscious, etc.) contain separate definitions for "force or coercion". Section 30-9-10(A) NMSA 1978.

UJI 14-958, 14-959, 14-960 and 14-961 NMRA are the same as UJI 14-941, 14-942, 14-943 and 14-944 NMRA, respectively, with the additional element of great bodily harm or great mental anguish to the victim.

UJI 14-961 combines UJI 14-958, 14-959 and 14-960 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances

the individual and particularized Uniform Jury Instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The definitions of "great bodily harm" and "great mental anguish" are contained in UJI 14-131 and 14-980 NMRA, respectively.

*See also* the commentary to UJI 14-941 NMRA.

**ANNOTATIONS**

**Cross references. —** *See* Sections 30-9-11(C)(2) and 30-9-10(A)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 3 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

**Phraseology of instruction not prejudicial.** — In a prosecution for criminal sexual penetration, the defendant is not prejudiced by the giving of jury instructions, such as this instruction, referring to "sexual intercourse" or "penis." *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 90, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-959. Criminal sexual penetration in the first degree; threats of force or coercion; great bodily harm or great mental anguish; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][1] [great mental anguish] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[1]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant:

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][1]

[OR]

[threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant's acts resulted in [great bodily harm[7]][1] [great mental anguish[8]] to _____ (*name of victim*);

[5. The defendant's act was unlawful[9];]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only the applicable alternatives.

2. Insert the count number if more than one count is charged.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

7. The definition of "great bodily harm", Instruction 14-131 NMRA, must be given after this instruction.

8. The definition of "great mental anguish", Instruction 14-980 NMRA, must be given after this instruction.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-958 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(C)(2), 30-9-10(A)(2) and 30-9-10A(3) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 5 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 57, 90, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-960. Criminal sexual penetration in the first degree; victim unconscious, asleep, physically or mentally helpless; great bodily harm or great mental anguish; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][1] [great mental anguish] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[1]

[caused _____ (*name of victim*) to engage _____[3];][1]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][1] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in [great bodily harm[6]][1] [great mental anguish[7]] to _____ (*name of victim*);

[5. The defendant's act was unlawful[8];]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTE

1. Use only the applicable alternatives.

2. Insert the count number if more than one count is charged.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. The definition of "great bodily harm", Instruction 14-131 NMRA, must be given after this instruction.

7. The definition of "great mental anguish", Instruction 14-980 NMRA, must be given after this instruction.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary. —** *See* committee commentary to UJI 14-958 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(C)(2) and 30-9-10(A)(4) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 5 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 90, 110, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

## 14-961. Criminal sexual penetration in the first degree; force or coercion; great bodily harm or great mental anguish; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][2] [great mental anguish] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][2]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[2] (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[2] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (name of victim);]

3. The defendant's acts resulted in [great bodily harm[8]][2] [great mental anguish9] to _____ (*name of victim*);

[4. The defendant's act was unlawful;][10]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

2. Use only the applicable alternatives.

3. Insert the count number if more than one count is charged.

4. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. The definition of "great bodily harm", Instruction 14-131 NMRA, must be given after this instruction.

9. The definition of "great mental anguish," Instruction 14-980 NMRA, must be given after this instruction.

10. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* committee commentary under UJI 14-958 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-9-11(C)(2) and 30-9-10(A) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 4 and Use Note 10 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 10 relating to whether the victim was the spouse of the defendant.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 3, 4, 90, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

## 14-962. Criminal sexual penetration of a 13 to 16 year old; by person 18 years or older; essential elements.

For you to find the defendant guilty of criminal sexual penetration of a child 13 to 16 by a person who is at least 18 years old and at least 4 years older than the victim, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused (*name of victim*) to engage in ;][3]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was at least 13 but less than 16 years old;

3. The defendant was 18 years old or older at the time of the offense;

4. The defendant is at least 4 years older than _____ (*name of victim*);

[5. _____ (*name of victim*) was not the spouse of the defendant];[6]

[6. The defendant's act was unlawful;][7]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of "spouse", Instruction 14-983 NMRA, must also be given.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**Committee commentary.** — *See* UJI 14-957, Criminal sexual penetration; child under 13 years of age.

This instruction contains the essential elements of criminal sexual penetration of a child 13 to 16 years of age perpetrated by a person who was at least 18 years old and who is at least 4 years older than the child.

*See* Sections 40-1-5 and 40-1-6 NMSA 1978 for marriage of minors.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-9-11(F)(1) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 6 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

## 14-963. Criminal sexual penetration of an inmate by a person in position of authority; essential elements.

For you to find the defendant guilty of criminal sexual penetration of an inmate confined in a correctional facility or jail [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was an inmate at a [correctional facility] [jail][2] at the time of the offense;

3. The defendant was in a position of authority over _____ (*name of victim*);

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-9-11D(2) NMSA 1978.

**The 2004 amendment,** effective January 20, 2005, deleted "unlawfully and intentionally" in the first essential element of this instruction, inserted a new essential element 4 and deleted Use Notes 2 and 3.

# Part D
# Indecent Exposure and Enticement of a Child

## 14-970. Indecent exposure; essential elements.

For you to find the defendant guilty of indecent exposure [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly and intentionally exposed [his] [her] _____[2] to public view;

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Name the part or parts of the anatomy exposed: i.e., “mons pubis,” “penis,” “testicles,” “mons veneris,” “vulva” or “vagina.” The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

[As amended, effective September 1, 1994; as amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

**Committee commentary.** — *See* Section 30-9-14 NMSA 1978; petty misdemeanor or misdemeanor.

Indecent exposure was a common-law offense. Some jurisdictions have held that it is a specific intent crime while others have held that a conviction may be based on criminal negligence. *See* Perkins, Criminal Law 395 (2d ed. 1969). For a discussion of the term "indecent," *see State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App. 1969).

The scope of the term "public" is not defined in the statute. The committee decided that this term meant "any group of persons who would ordinarily expect to be protected against a visual assault." The ordinary use of a public restroom, for example, is not contemplated as within the purview of the prohibition.

[As amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

**ANNOTATIONS**

**The 1994 amendment,** effective September 1, 1994, made a gender neutral change in Item 1 of the instruction.

**The 2013 amendment,** approved by Supreme Court Order No. 13-8300-023, effective December 31, 2013, added the elements of knowledge and intent; eliminated the element that the child be under the age of thirteen; in Paragraph 1, after "The defendant", added "knowingly and intentionally"; and deleted former Paragraph 2, which required that the defendant committed the crime before a child was thirteen years of age.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Lewdness, Indecency and Obscenity § 39.

Criminal offense predicated upon indecent exposure, 93 A.L.R. 996, 94 A.L.R.2d 1353.

Indecent exposure: what is "person", 63 A.L.R.4th 1040.

67 C.J.S. Obscenity § 5.

## 14-970A. Aggravated indecent exposure; essential elements.

For you to find the defendant guilty of aggravated indecent exposure [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly and intentionally exposed [his] [her] _____[2] to public view in a lewd and lascivious manner;

2. The defendant did so with the intent to threaten or intimidate another person;

3. The defendant did so [before a child under the age of eighteen (18) years of age] [while committing an assault] [while committing an aggravated assault] [while committing an assault with intent to commit a violent felony] [while committing a battery] [while committing an aggravated battery] [while committing criminal sexual penetration] or [while committing abuse of a child][3];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Name the part or parts of the anatomy exposed: i.e., “mons pubis,” “penis,” “testicles,” “mons veneris,” “vulva” or “vagina.” The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

3. Use the applicable bracketed element(s). If element(s) other than “before a child under eighteen (18) years of age” are used, the essential elements(s) for those offenses must also be given unless given elsewhere as a substantive instruction. *See* UJI 14-140 NMRA.

[Adopted by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

## 14-971. Enticement of a child; essential elements.1

For you to find the defendant guilty of enticement of a child [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[(enticed)[3] (persuaded) (attempted to persuade) _____ *(name of child)* to enter a _____[4]];

[OR]

[had possession of _____ *(name of child)* in a _____[4]];

2. The defendant intended to commit the crime or crimes of _____[5];

3. _____ *(name of child)* was less than 16 years old;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth, in the alternative, the two types of enticement of a child set forth in Section 30-9-1 NMSA 1978.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Use applicable term or terms: vehicle; building; room; secluded place.

5. Identify the crime or crimes the defendant intended to commit and give the essential elements, unless they are covered in an essential elements instruction for the substantive offense.

**Committee commentary.** — *See* Section 30-9-1 NMSA 1978; misdemeanor.

This instruction sets forth the two ways in which the offense of enticement of a child may be committed. It should be noted that the defendant must intend the substantive sexual offense underlying the enticement.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 43 C.J.S. Infants § 93.

## 14-972. Aggravated criminal sexual penetration in the first degree; child under thirteen;1 essential elements.

For you to find the defendant guilty of aggravated criminal sexual penetration of a child under the age of thirteen [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. _____ (*name of victim*) was twelve (12) years of age or younger;

3. [The defendant acted with an intent to kill][3]

[OR]

[the act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;]

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the ____ day of _____, _____.

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

USE NOTE

1. This instruction is to be used for crimes that occurred on or after July 1, 2009. For crimes occurring on or after July 1, 2007, but before July 1, 2009, the child's age must be under nine (9).

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Name the sexual act or acts: *i.e.*, "sexual intercourse," "anal intercourse," "cunnilingus," or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: *i.e.*, "vagina," "penis," or "anus." The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[Adopted by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011.]

# Part E
# Definitions

## 14-980. "Mental anguish" and "great mental anguish"; defined.

Mental anguish means psychological or emotional damage marked by change of behavior or physical symptoms.

Great mental anguish means psychological or emotional damage marked by extreme change of behavior or severe physical symptoms.

**Committee commentary.** — *See* Section 30-9-10B NMSA 1978.

The committee was of the opinion that the legislature employed the statutory reference to psychiatric or psychological treatment or care as a vehicle to demonstrate the severity of the mental anguish being defined. It was not intended to be an element of the definition that the victim actually received such care, but only that such care would have been beneficial. The committee further recognized that a psychological trauma which causes extreme change of behavior or severe physical symptoms is, by definition, in need of treatment and therefore the statutory reference to treatment is surplusage.

## 14-981. Definitions of parts of the primary genital area.

The "mons pubis" is the rounded eminence or protuberance at the lower point of the abdomen that is ordinarily covered with pubic hair on an adult. The mons pubis of a man extends upward in a triangular shape to a point in the middle line of the abdomen.

The "mons veneris" is the rounded eminence or protuberance at the lowest point of the abdomen of a woman that is ordinarily covered with pubic hair on an adult. The upper border of the hair on the mons veneris forms a horizontal line.

The "penis" is the male organ of urination and sexual intercourse.

The "testicles" are the male sex glands which are located in a sac known as the scrotum. The testicles are round or oval and produce the male sperm.

The "vulva" are the external parts of the female organ of sexual intercourse. It is composed of the major and minor lips, the clitoris and the opening of the vagina. The outer lip of the vulva is covered with hair and the inner surface is smooth. The inner lips or parts of the vulva are completely covered by the outer lips.

The "vagina" is the canal or passage for sexual intercourse in the female, extending from the vulva to the neck of the uterus.

The "anus" is the opening to the rectum.

**Committee commentary.** — Neither Section 30-9-12 nor Section 30-9-13 NMSA 1978 defines "primary genital area." The committee decided that it was the intent of the legislature that this term include those anatomical parts referred to in Section 30-9-14 NMSA 1978. Dictionary definitions were rejected as being too technical to convey to the average juror the areas of the body intended by these terms.

Definitions for "breast" and "buttocks" were not included because these terms are in common usage and have a commonly understood meaning. In accordance with the general UJI rule, a dictionary definition of these words should be given if the jury requests a definition.

## 14-982. "Sex acts"; defined.

Sexual intercourse means the penetration of the vulva or vagina, the female sex organ, by the penis, the male sex organ, to any extent.

Cunnilingus means the touching of the edge or inside of the female sex organ with the lips or tongue.

Fellatio means the touching of the penis with the lips or tongue.

Anal intercourse means the penetration of the anus by the penis to any extent.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — The definitions of "cunnilingus" and "fellatio" are dictionary definitions. The definition of "anal intercourse" is an adaptation of the definition of "sexual intercourse." The definition of "sexual intercourse" is the legal definition of that element of rape. *See, e.g., State v. Harbert*, 20 N.M. 179, 147 P. 280 (1915). It is not an accurate dictionary definition of "sexual intercourse" because the statute provides that no emission is required for criminal sexual penetration. 30-9-11 NMSA 1978.

The committee considered the question of whether the legislature intended to restrict the definitions of "cunnilingus" and "fellatio" to those acts involving penetration. It was concluded that the legislature used those terms in the sense set out in these definitions. In the Encyclopedia Britannica, Macropoedia, v. 16, p. 610 (1975), the term "fellatio" is defined as "oral stimulation of the penis," and the term "cunnilingus" is defined as "oral stimulation of the vulva or clitoris." In the Random House Dictionary of the English Language (unabridged ed., 1971), the term "fellatio" is defined as "oral stimulation of the penis, especially to orgasm," and the term "cunnilingus" is defined as "act, practice, or technique of orally stimulating the female genitalia." *See also People v. Hunter*, 158

C.A.2d 500, 322 P.2d 942 (1958), in which the term "cunnilingus" was defined as placing the mouth upon the genital organ, and the act was held to constitute a violation of a statute proscribing "oral copulation." In *State v. Tafoya*, 2010-NMCA-010, ¶ 52, 147 N.M. 602, 227 P.3d 92, the New Mexico Court of Appeals clarified that the definition of "sexual intercourse," as used in the jury instructions for criminal sexual penetration, includes penetration of the vulva.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first sentence, after "penetration of the", added "vulva or"; and in the committee commentary, added the last paragraph.

**Cunnilingus is not limited to acts involving penetration.** *State v. Orona*, 97 N.M. 232, 638 P.2d 1077 (1982).

## 14-983. "Spouse"; defined.

"Spouse" means a husband or wife, unless they are living apart or unless one has filed a legal action for divorce or separate maintenance against the other.

**Committee commentary.** — Sexual conduct between spouses is not within the scope of Chapter 9. However, the definition of "spouse," for purposes of this chapter, is much more limited than the usual meaning of the term. By the terms of the definition in Section 30-9-10E NMSA 1978, two people, legally married but living apart, are not spouses. Apparently the separation need not be on account of marital difficulty; the separation by itself is sufficient to take the couple out of the spousal relationship.

**ANNOTATIONS**

**Last sentence of committee commentary is incorrect statement of law.** — The committee commentary "apparently the separation need not be on account of marital difficulty; the separation itself is sufficient to take the couple out of the spousal relationship" is an incorrect statement of the law. *State v. Brecheisen*, 101 N.M. 38, 677 P.2d 1074 (Ct. App. 1984).

## 14-984. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, defining "unlawful" for purposes of criminal sexual penetration or contact, was withdrawn by Supreme Court order effective January 20, 2005. *See* UJI Criminal 14-132 NMRA, "unlawfulness as an element" for the instruction on the definition of "unlawful".

## 14-985. Criminal sexual penetration; medical procedure.

Evidence has been presented that the criminal sexual penetration was performed as part of a medically indicated procedure.

The burden is on the state to prove beyond a reasonable doubt that the criminal penetration was not performed as a part of a medically indicated procedure. If you have a reasonable doubt as to whether the defendant performed the sexual penetration as part of a medically indicated procedure, you must find the defendant not guilty.

USE NOTE

If there is an issue as to whether "sexual penetration", as defined by Subsection A of Section 30-9-11 NMSA 1978, was performed as part of a medically indicated procedure, this instruction must be given. If this instruction is given, the following should be added to the essential elements instruction: "The penetration was not performed as part of a medically indicated procedure".

[Adopted, effective January 1, 1997.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-9-11(B) NMSA 1978.

# CHAPTER 10 to 13
# (Reserved)

# CHAPTER 14
# Trespass

# Part A
# Criminal Trespass

## 14-1401. Criminal trespass; public property; essential elements.

For you to find the defendant guilty of criminal trespass [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ *(identify lands or structure entered)*; [the least intrusion constitutes an entry;][2]

2. This property was not open to the public at that time;

3. The defendant knew or should have known that he did not have permission to enter;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

**Committee commentary.** — UJI 14-1401 is limited to criminal trespass of public property.

UJI 14-1402 and UJI 14-1403 apply to criminal trespass of private or state or local government property.

In *State v. Cutnose,* 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), Chief Judge Wood carefully traced the history of New Mexico's criminal trespass statutes. It is helpful to review this decision, and subsequent statutory enactments in deciding which statute is applicable to public and private property criminal trespasses. In *Cutnose,* Judge Wood concluded that former Section 40A-14-1 NMSA 1953 (now Section 30-14-1 NMSA 1978) did not apply to remaining upon public property and that since Paragraph (2) of Subsection A of Section 40A-14-5 NMSA 1953 (now Section 30-14-4 NMSA 1978) had previously been declared unconstitutional in *State v. Jaramillo,* 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972) there was no statute dealing with remaining on public property without consent.

In 1975, presumably following Judge Wood's opinion in *State v. Cutnose,* the New Mexico legislature enacted Chapter 52, Laws 1975. Section 1 of this 1975 act enacted a new Subsection B to Section 40A-14-1 NMSA 1953 (now Subsection B of 30-14-1 NMSA 1978). As amended by the 1981 legislature, present Section 30-14-1 NMSA 1978 provides that criminal trespass also includes unlawfully entering or remaining upon lands owned by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian of the lands.

In addition to adding a new Subsection B to present Section 30-14-1 NMSA 1978, Chapter 52, Laws 1975 also amended former Section 40A-20-10 NMSA 1953 (now Section 30-20-13 NMSA 1978) prohibiting interference with the lawful use of public property. Subsection C of present Section 30-20-13 NMSA 1978 also provides that it is criminal trespass for a person to willfully refuse or fail to leave the property of, or any building owned by, the state or its political subdivisions. This would seem to apply to the same unlawful conduct covered by Subsection B of Section 30-14-1 NMSA 1978; however, Section 30-20-13 adds a further element that the trespasser must also

threaten to commit or incite others to commit any act which would disrupt the lawful mission, processes, procedures or function of the property, building or facility involved.

Prior to the 1975 amendment to Section 30-20-13 NMSA 1978 this section applied only to institutions of higher education and was enacted in 1970 as a part of a bill appropriating $1.00 to district attorneys.

It is assumed that the 1975 session of the legislature was responding to the court of appeals decision in *Cutnose,* supra, when it amended both Sections 30-14-1 and 30-20-13 NMSA 1978 to make both sections of the law applicable to property owned or under the control of the state or its political subdivisions. The legislature is also presumed to have been aware that Section 30-20-13 NMSA 1978 had been found to be constitutional in *State v. Silva,* 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974). These two sections have been construed together as creating separate offenses. *See* UJI 14-1401.

Section 30-14-4 NMSA 1978 also governs unlawfully entering a public building. The provisions of this section which were not ruled unconstitutional in *Cutnose,* supra, are deemed by the committee to have been superseded by Sections 30-14-1 and 30-20-13 NMSA 1978 insofar as they relate to buildings owned or under the control of governmental entities. Section 30-14-4 NMSA 1978 is thought to be the applicable law for "wrongful use" of property owned or controlled by private educational institutions, religious organizations, charitable organizations and recreational associations, even though the elements of the crime are identical to Section 30-14-1 NMSA 1978.

Section 30-14-6 governs trespass cases when the property is not owned or controlled by the state or a political subdivision, but is posted or fenced.

"Lands" as used in Section 30-14-1 NMSA 1978 includes buildings and fixtures. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

A criminal trespass is a lesser included offense of the crime of burglary. *See State v. Ruiz, supra.*

**ANNOTATIONS**

**Cross references.** — *See* Section 30-14-4A(1) NMSA 1978.

**Defendant's belief that warnings did not apply to press is no defense.** — Where defendant journalist purposely entered barricaded area even after he had heard the warnings, it was no defense that defendant did not believe warnings applied to press. *State v. McCormack,* 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).

## 14-1402. Criminal trespass; private or state or local government property; essential elements.

For you to find the defendant guilty of criminal trespass [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered or remained _____ *(identify lands or structure entered)* without permission from the [owner][2] [occupant] [custodian] of that property; [the least intrusion constitutes an entry;][3]

2. The defendant knew or should have known that permission to enter or remain had been [denied][2] [withdrawn];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative. If custodian is used, give UJI 14-1420, Custodian; definition.

3. Use bracketed phrase if entry is in issue.

**Committee commentary.** — UJI 14-1402 is a general criminal trespass instruction. It applies to trespass of lands or buildings owned or controlled by a state agency or political subdivision of the state when the person has been denied permission to enter the premises or where previous permission has been withdrawn. It also applies to trespass onto private property.

UJI 14-2001 should be used instead of UJI 14-1402 if there is sufficient evidence that the failure or refusal to leave a state or local government building is accompanied by the impairment or interference with or obstruction of the lawful processes, procedures or functions of the property.

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. *See* Section 12-6-2 NMSA 1978 for a definition of "political subdivisions." "State" generally includes all three branches of government.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-14-1A and B and 30-14-1.1 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

## 14-1403. Criminal trespass; damage; essential elements.

For you to find the defendant guilty of criminal trespass [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ *(identify lands or structure entered)* without permission; [the least intrusion constitutes an entry;][2]

2. The defendant [damaged][3] [destroyed] _____ *(identify part of realty or improvements (e.g. buildings, trees));*

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. Use only the applicable alternative.

**Committee commentary.** — UJI 14-1403 applies to entering upon the lands of another and causing damage to the real property. Subsection C of 30-14-1 NMSA 1978 was added to the criminal trespass statute in 1979 making it a petty misdemeanor to injure, damage or destroy any part of the real property after having entered without permission. Lands, as used in this section, are synonymous with real property and includes buildings and natural features such as trees. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

**ANNOTATIONS**

**Statutory reference.** — Section 30-14-1C NMSA 1978.

**Lesser included offense.** — The court properly refused to give defendant's requested instruction of criminal trespass with damage as a lesser-included offense of breaking and entering where there was no dispute that defendant gained entry by breaking a window and the jury could not have rationally acquitted defendant on the greater offense of breaking and entering. *State v. Contreras*, 2007-NMCA-119, 142 N.M. 518, 167 P.3d 966.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

# Part B
# Breaking and Entering

## 14-1410. Breaking and entering; essential elements.

For you to find the defendant guilty of breaking and entering [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ *(identify lands, vehicle or structure)* without permission; [the least intrusion constitutes an entry;][2]

2. The entry was obtained by [fraud][3] [deception] [the breaking of _____[4]] [the dismantling of _____[4]][5];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. If the jury requests a definition of "fraud," a dictionary definition of this term should be given.

4. Insert the property or device which was broken or dismantled in order to secure entry of the lands, vehicle or structure. Example: "[by the breaking of a window]"

5. Use the applicable alternative.

**Committee commentary.** — The territory of New Mexico passed New Mexico's first "breaking and entering" statute in 1876 (Laws 1876, ch. 9, § 4) which was codified as § 1524 in the 1915 Code. This original statute dealt with unlawfully entering into an occupied home "by breaking or piercing the wall, or without breaking the same, climb upon any roof or in any other manner . . ." (1915 Code § 1524). This section remained exactly the same until its repeal in 1963 (Laws 1963, ch. 303, § 30-1) except for a

change in title from "Unlawfully entering house" to "Entering house without consent - Breaking with intent to enter."

Breaking and entering as a separate offense undoubtedly arose out of common law burglary. To constitute burglary at common law, the following elements had to have been proven: (1) breaking and; (2) entering of; (3) a dwelling house; (4) of another; (5) in the nighttime; (6) with intent to commit a felony therein. The requirements of breaking and entering have remained the same while dwelling house has been expanded to include "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable" (30-16-3 NMSA 1978); the requirement that the act take place in the nighttime has been eliminated in most jurisdictions (New Mexico included), and; the intent to commit a felony has been changed in New Mexico to include "the intent to commit a felony or theft therein." (30-16-3 NMSA 1978.)

"Statutory burglary" is the term used to describe acts which are similar to, but do not include all the requirements of, common law burglary. Such legislative expansion of the common law crime of burglary was necessary because that social interest intended to be protected by common law burglary, i.e., privacy of one's home and belongings, was not adequately protected by strict adherence to the common law burglary requirements.

Common types of statutory burglary involve unlawful invasions which would be common law burglary except that they do not require one or more or any of the following: That the misconduct (1) occur during the nighttime, or (2) include a breaking, or (3) involve a dwelling or building within the curtilage, or (4) an intended crime which constitutes a felony or petty larceny.

R. Perkins, Perkins on Criminal Law, 2nd Ed., Ch. 3, § 1H, pp. 215-16.

New Mexico's breaking and entering statute is a type of statutory burglary. It requires no intent to commit a crime upon entering, only the breaking and entering need be shown. The doctrine of "breaking," however, appears to be more specific than when used in the context of burglary. In burglary, "the breaking need not involve force or violence. Thus, the opening of a door or window which was closed but not locked in any way was a sufficient breaking." LaFave & Scott, Criminal Law, Ch. 8, § 96, p. 708. The breaking and entering statute specifically requires "the breaking or dismantling of any part . . . or breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure." (30-14-8 NMSA 1978). To put it another way, if a person opens an unlocked door or window to enter a dwelling with the intent merely to go in and lie down, that person would be guilty of neither burglary nor breaking and entering. It would not be burglary since lying down does not constitute a felony or theft, and it would not be breaking and entering since the door was not locked and no breaking or dismantling occurred. In this instance, the individual would most likely be guilty of criminal trespass.

As in burglary, though, the use of fraud or deception to gain entrance into the dwelling, aircraft, watercraft, vehicle, or other structure will be deemed constructive entry. The

theory behind this is that there was actually no consent to enter given since the consent was based on fraud or deception. Also, the mere intrusion of a finger will constitute enough of an entry. LaFave & Scott, supra, p. 710.

It is unclear why the legislature failed to reenact a breaking and entering provision in the new Criminal Code adopted in 1963. Perhaps they surmised that if the crime committed did not meet all of the requirements of burglary (e.g., no intent to commit a felony or theft), then the criminal trespass statute (30-14-1 NMSA 1978) would be an adequate offense to charge. However, the 1980 case, *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980), pointed out the need for a law making it an offense to break and enter where there is no intent to commit a felony or theft, or where, because of some impairment, it was impossible for the defendant to form the requisite intent to commit a felony or theft.

In *Ruiz,* the issue was whether the defense should have been allowed to introduce hospital records to support the defendant's contention that he had ingested PCP (phencyclidine, aka "angel dust") just prior to committing the alleged burglary. This introduction of evidence should have been allowed, said the court of appeals, because it was crucial to the defendant's "no intent" defense to the burglary charge. Intoxication may be shown to negate the specific intent required to prove burglary under 30-16-3 NMSA 1978. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App. 1971). The question of actual intoxication, and further, whether such intoxication prevented the defendant from being able to form the specific intent required for burglary are for the jury to answer.

In *Ruiz,* it was determined that an instruction on criminal trespass should have been given, since the court held that criminal trespass is a lesser included offense of burglary of a dwelling. *See* UJI 14-1401 through 14-1403 for criminal trespass instruction. (Criminal trespass is *not* a lesser included offense when the burglary is of a vehicle, watercraft or aircraft, since they are not real property within the meaning of Section 30-14-1 NMSA 1978). However, breaking and entering does encompass vehicles, watercraft and aircraft, so this instruction may be used as a lesser included offense of burglary, if intent is at issue. Furthermore, while criminal trespass is a misdemeanor offense, breaking and entering is a fourth degree felony with a more severe penalty than trespass.

## ANNOTATIONS

**Cross references. —** *See* Section 30-14-8 NMSA 1978.

**Variation from statutory language. —** Even though 30-14-8 NMSA 1978 uses the phrase "unauthorized entry," while this instruction uses the phrase "without permission," this variation from the strict language of the statute does not, by itself, make the instruction improper. *State v. Rubio,* 1999-NMCA-018, 126 N.M. 579, 973 P.2d 256.

# Part C
# Definitions

## 14-1420. Custodian; definition.

The term "custodian" means any person including a law enforcement officer who has charge or control of the property, building or facility.

USE NOTE

For use with Instructions 14-1402 and 14-2001 when the authority of the person asking the trespasser not to enter or to leave is an issue.

**Committee commentary.** — This instruction is to be used with UJI 14-1402 and 14-2001 when the authority of the person asking the trespasser not to enter or to leave is an issue. The committee was of the opinion that the term "custodian" may be ambiguous and confusing to the jury, and this instruction is intended to clear up that confusion.

Sections 30-14-1B and 30-20-13C NMSA 1978 refer to the individual in control of the building, facility or property as the "custodian" and "lawful custodian." This term was probably chosen due to the creation, in 1901, of the capitol custodian commission (§§ 5391-5399, 1915 Code). This commission had the duty of care, control and custody of the capitol building and grounds. The commission was given the authority to promulgate "all necessary rules and regulations for the conduct of persons in and about the buildings and grounds thereof, necessary and proper for the safety, care and preservation of the same." (§ 5393, 1915 Code).

In 1971 the capitol custodian commission was abolished, and replaced by the property control division of the department of finance and administration (Laws 1971, ch. 285) [now property control division of general services department]. The duties of the property control division are exactly the same as those of the commission, with the expansion of control to all state buildings (exceptions noted in 15-3-2A(1) NMSA 1978). In neither the laws relating to the commission nor the division was there any specific mention of authority to evict trespassers. In fact, it seems absurd to imagine that the governor would need to call the director of the division in order to have a trespasser evicted from his office, even though the director is the lawful custodian of the capitol building. The committee is sure that this was not the legislative intent in using the word custodian in 30-14-1B and 30-20-13C NMSA 1978.

The New Mexico Court of Appeals and Supreme Court have never spoken to the issue of who is a lawful custodian. Therefore, it was necessary for the committee to look elsewhere for a definition to aid the jury in its deliberations.

It was decided that the standard Webster's Dictionary definition lacked sufficient detail. The Black's Law Dictionary definition of "custody" provided useful wording which was adopted into UJI 14-1420. In criminal trespass jury instructions from other jurisdictions, the following terms were employed to define a person authorized to give permission to enter or to evict another: "person in possession or his duly authorized agent," "regularly employed guard or authorized employee" (Maryland Crim. J. Inst. § 4.85); "person in charge, his representative or his employee who has lawful control of the premises by ownership, tenancy, official position or other legal relationship" (Oregon UJI 421.51); "owner or any person occupying the land or premises and authorized to give such consent [to enter]" (Virginia Model J. Inst. Crim.; Trespass Inst. 1).

It appears that great flexibility is needed in determining the authority of the person stating he is a custodian. An actual, written authorization is not necessary, nor would it be practical in all circumstances. Developing some relationship between the person and the property he is attempting to control is imperative, though. After presentation of all the evidence, it is up to the jury to decide whether an individual comes within the definition of "custodian."

The statement referring to law enforcement officers as custodians for the purposes of the instruction was added because of common usage. Common law and general custom dictate that, since law enforcement officers are charged with the duty of enforcing laws, they must be allowed to exercise that authority. It is obvious that, upon the request of an occupant of a building or facility, a law enforcement officer should be allowed to evict an individual who is in apparent violation of the law.

**ANNOTATIONS**

**Department of finance and administration.** — The property control division of the department of finance and administration, referred to in the third paragraph of the committee commentary, was transferred to the general services department by Laws 1983, ch. 301, § 3. See 9-17-3 NMSA 1978 and notes thereto.

# CHAPTER 15
# Criminal Damage to Property

## 14-1501. Criminal damage to property; essential elements.

For you to find the defendant guilty of criminal damage to property [in excess of $1000.00][1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally[3] damaged property of another;

[2. The defendant did not have the owner's permission to damage the property;][4]

[3. The amount of damage to the property was more than $1000.00;][1]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Bracketed language is to be used if the amount of damage to the property exceeds $1000.00. If the bracketed language is used UJI 14-1510 must also be given.

2. Insert the count number if more than one count is charged.

3. UJI 14-141, general criminal intent, must also be given.

4. Use this alternative only if sufficient evidence has been introduced to raise an issue of permission.

[Approved, effective October 1, 1992.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-15-1 NMSA 1978.

## 14-1510. "Amount of damage"; defined.

"Amount of damage" means the difference between the price at which the property could ordinarily be bought or sold prior to the damage and the price at which the property could be bought or sold after the damage. If the cost of repair of the damaged property exceeds the replacement cost of the property, the value of the damaged property is the replacement cost.

USE NOTE

This instruction is to be used with UJI 14-1501.

[Approved, effective October 1, 1992.]

**ANNOTATIONS**

**Cost of repair.** — The state may rely on cost of repair evidence and when it does, the amount of damage can be assessed without determining the before and after value of the property. *State v. Barreras*, 2007-NMCA-067, 141 N.M. 653, 159 P.3d 1138, cert. denied, 2007-NMCERT-005.

# CHAPTER 16
# Crimes Against Property

# Part A
# Larceny

## 14-1601. Larceny; essential elements.

For you to find the defendant guilty of larceny [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away[2] _____ (*describe property*), belonging to another, which had a market value[3] [over $_____[4]];[5]

2. At the time he took this property, the defendant intended to permanently deprive the owner of it;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. *See* UJI 14-1603 if "asportation" is in issue.

3. *See* UJI 14-1602 for definition of market value. Use this bracketed provision for property other than money if the value is over $250. State whether the value of merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

4. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $500 in the blank. If the charge is a misdemeanor (over $250), use $250 in the blank.

5. This bracketed provision should not be used if: (a) the property is a firearm with a value of less than $2,500; (b) if the property is livestock; or (c) if the property has a value of less than $250.00 or less. In these cases, value is not in issue.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* § 30-16-1 NMSA 1978. The intent to permanently deprive the owner or another of the property is the intent to steal. *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct. App.), *cert. denied*, 86 N.M. 281, 523 P.2d 16 (1974). *State v. Parker*, 80 N.M. 551, 458 P.2d 803 (Ct. App.), *cert. denied*, 80 N.M. 607, 458 P.2d 859 (1969). It is not necessary that the property taken be owned by a certain person. It is only necessary that the property did not belong to the defendant. *State v. Ford*, 80 N.M. 649, 459 P.2d 353 (Ct. App. 1969). *See also State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

This instruction does not use the words "without consent" or the like to indicate that larceny involves a trespassory taking. *See generally* Perkins, *Criminal Law* 245-46 (2d ed. 1969). The committee believed that the element of trespassory taking was covered by this instruction together with the instruction on general criminal intent, UJI 14-141.

The statute provides that larceny of livestock is a third degree felony without regard to the value of the property. The constitutionality of this provision was upheld in *State v. Pacheco*, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

## ANNOTATIONS

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 3, added the second, third and fourth sentences; in Paragraph 4, added the first sentence; in the third sentence, after "fourth degree felony", deleted "(over $100), use $100" and added "(over $500), use $500"; and added the last sentence; and in Paragraph 5, in the first sentence, after "less than $2,500;", deleted "or"; after "property is livestock,", added "or (c) if the property has a value of less than $250.00 or less"; and in the last sentence, after "In", deleted "either case" and added "these cases".

**This instruction and UJI 14-141 correctly state law applicable to larceny.** *Lopez v. State*, 94 N.M. 341, 610 P.2d 745 (1980).

**Proof by state in fourth degree larceny.** — The approved jury instructions do not require the state to prove, in a case of fourth degree larceny, that the value of the stolen property was less than $2,500. *State v. Dominguez*, 91 N.M. 296, 573 P.2d 230 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

**Instruction as incorrect statement of larceny.** — The defendant's requested instruction which told the jury that if the defendant was an employee of the corporate owner and as such had the right to have the possession of the equipment in question, then even though he sold said equipment without authority, he was not guilty of larceny, was an incorrect statement of the law, because it failed to recognize that the defendant's physical control of the equipment was no more than custody on behalf of an employer who retained possession. *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Instruction construed where property stolen in another jurisdiction.** — Because a party taking stolen property from one jurisdiction to another is guilty of a new caption and asportation in the latter jurisdiction, the uniform jury instructions do not either conflict with or overrule prior case law. *State v. Stephens*, 110 N.M. 525, 797 P.2d 314 (Ct. App. 1990).

**Modification of instruction acceptable.** — The defendant's requested instruction for fourth-degree larceny, which substituted "under $2,500" for the term "over $100," included the correct elements of the crime and was a minor and inconsequential modification of the instruction where the issue in the case was whether the value of the stolen property was more or less than $2,500, not whether the value was over $100. *Gallegos v. State*, 113 N.M. 339, 825 P.2d 1249 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Larceny § 180.

Intent to convert property to one's own use or to the use of third person as element of larceny, 12 A.L.R. 804.

Taking and pledging or pawning another's property as larceny, 82 A.L.R.2d 863.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violations of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

52A C.J.S. Larceny § 142.

## 14-1602. "Market value"; defined.1

"Market value" means the price at which the property could ordinarily be bought or sold at the time of the alleged _____ *(criminal act)*[2].

USE NOTE

1. For use if market value is in issue. This instruction should be given immediately after UJI 14-1601, 14-1640, 14-1641 or 14-1650.

2. Theft, receipt of stolen goods, etc.

**Committee commentary.** — This instruction is used with the following crimes: larceny - 40A-16-1 NMSA 1953 Comp. [30-16-1 NMSA 1978]; fraud - 40A-16-6 [30-16-6 NMSA 1978]; embezzlement - 40A-16-7 [30-16-8 NMSA 1978]; receiving stolen property - 40A-

16-11 [30-16-11 NMSA 1978]. All four statutes use the term "value" without further qualification.

This instruction by its terms should not limit the type of evidence that is admissible to prove market value; nor was it the intent of the committee to indicate what evidence is sufficient to prove market value in a particular case. For New Mexico cases on this issue *see*: *State v. Gallegos*, 63 N.M. 57, 312 P.2d 1067 (1957); *State v. Landlee*, 85 N.M. 449, 513 P.2d 186 (Ct. App. 1973); *State v. Williams*, 83 N.M. 477, 493 P.2d 962 (Ct. App. 1972).

Market value as the best test is supported by decisions in other jurisdictions. *See, e.g.*, *People v. Cook*, 233 Cal. App. 2d 435, 43 Cal. Rptr. 646 (1965); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); *Cunningham v. State*, 90 Tex. Crim. 500, 236 S.W. 89 (1921); 4 Nichols, Eminent Domain § 12.31. Use of market value as a test distinguished petty larceny from grand larceny at common law on the theory that the more serious crime required stricter proof. *See generally*, Perkins, Criminal Law 273-74 (2d ed. 1969); Note, 59 Dick. L. Rev. 377 (1955). For a discussion of when property may be aggregated under a single "transaction," *see State v. Klasner*, 19 N.M. 474, 145 P. 679 (1914). *See also*, Annot., 37 A.L.R.3d 1407 (1971); Annot., 136 A.L.R. 948 (1942).

The owner is competent to testify as to the market value of his property. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App. 1970). His testimony may be sufficient to withstand a motion for a directed verdict. *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

The definition used in this instruction is derived from the instruction used in *State v. Gallegos*, supra. *See also*, *Stephens v. State*, 1 Ala. App. 159, 55 So. 940 (1911); *Hoffman v. State*, 24 Okla. Crim. 236, 218 P. 176 (1923).

The market value of an item is the retail price. Gross receipts tax is not to be considered when determining "value," unless the advertised retail or actual market price included this tax. *Tunnell v. State*, 99 N.M. 446, 659 P.2d 898 (1983).

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Larceny § 50 et seq.

52A C.J.S. Larceny § 147.

## 14-1603. Larceny; "carried away"; defined.

"Carried away" means moving the property from the place where it was kept or placed by the owner.

USE NOTE

This instruction is to be given with UJI 14-1601, 14-1620 and 14-1621 when there is a question as to whether the evidence establishes the element of asportation.

**Committee commentary.** — For a discussion of the element of asportation or "carrying away," *see State v. Curry*, 32 N.M. 219, 252 P. 994 (1927), and *Wilburn v. Territory*, 10 N.M. 402, 62 P. 968 (1900).

**ANNOTATIONS**

**Element of "carrying away" satisfied.** — The instant cashier, under coercion, removes money from a register, the element of "carrying away" the money is satisfied. *State v. Williams*, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Larceny § 22.

52A C.J.S. Larceny § 143.

# Part B
# Shoplifting

## 14-1610. Shoplifting; conversion of property without payment; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [took possession[2] of][3] [concealed] _____ (*describe merchandise*);

2. This merchandise had a market value[4] [over $_____[5]];

[3. This merchandise was offered for sale to the public in a store;][6]

4. At the time the defendant took this merchandise, the defendant intended to take it without paying for it;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use UJI 14-130 if "possession" is in issue.

3. Use applicable alternative.

4. *See* UJI 14-1602 for definition of market value. Use this bracketed provision for merchandise if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

5. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $500 in the blank.

6. For use if there is an issue as to whether or not the items taken were merchandise in a store.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — UJI 14-1610 is to be used when the defendant is accused of taking possession of or concealing merchandise with the intent to convert it without paying for it. UJI 14-1611 is to be used when the defendant is accused of altering a price tag or other marking on the merchandise or transferring the merchandise from one container to another with the intent to deprive the merchant of all or part of its value.

Although the statute, in defining degrees of the offense, uses the term "value," without specifying how value is to be determined, the statute is interpreted to mean "market value." *State v. Richardson*, 89 N.M. 30, 546 P.2d 878 (Ct. App. 1976). *See also* commentary to UJI 14-1602.

Section 30-16-22 NMSA 1978 creates two presumptions in the offense of shoplifting. The first is the presumption that one who willfully conceals merchandise intends to convert it. The second is the presumption that merchandise found concealed on a person or in his belongings has been willfully concealed. If the state is relying on either of these presumptions, UJI 14-5061, Presumptions or inferences, should be given.

## ANNOTATIONS

**Cross references.** — *See* Section 30-16-20 NMSA 1978.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 4, added the second, third and fourth sentences; and in Paragraph 5, added the first sentence, and in the third sentence, after "fourth degree felony", deleted "(over $100), use $100" and added "(over $500), use $500".

## 14-1611. Shoplifting; alteration of label or container; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [altered a label, price tag or marking upon _____ (*describe merchandise*)][2] [transferred _____ (*describe merchandise*) from the container [in] [on][2] which it was displayed to another container];

2. The [altered] [transferred][2] merchandise had a market value[3] [over $_____[4]];

[3. The [altered] [transferred][2] merchandise was offered for sale to the public in a store;][5]

4. The defendant intended to deprive _____ (*name of merchant*) of all or some part of the value of this merchandise;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable alternative.

3. *See* UJI 14-1602 for definition of market value. Use this bracketed provision for merchandise if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed alternative.

4. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $500 in the blank. If the charge is a misdemeanor (over $250), use $250 in the blank.

5. For use if there is an issue as to whether or not the items were merchandise in a store.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary to UJI 14-1610.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-20 NMSA 1978.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 3, added the second, third and fourth sentences; and in Paragraph 4, added the first sentence; in the third sentence, after "third degree felony", changed "(over $100), use $100" to "(over $500), use $500", and added the last sentence.

# Part C
# Robbery

## 14-1620. Robbery; essential elements.

For you to find the defendant guilty of robbery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away[2] _____ *(identify property),* from _____ *(name of victim),* or from his immediate control intending to permanently deprive _____ *(name of victim)* of the property; [the _____ *(property)* had some value;][3]

2. The defendant took the _____ *(property)* by [force or violence][4] [or] [threatened force or violence];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use UJI 14-1603 if asportation is in issue.

3. Use the bracketed provision only if there is a question as to whether or not the property taken had any value.

4. Use the applicable bracketed phrase.

**Committee commentary.** — *See* § 30-16-2 NMSA 1978. The gist of the offense of robbery is the use of force or intimidation. *State v. Sanchez,* 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967); *State v. Walsh,* 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969). Although the amount of force is immaterial, the force or threatened use of force must be directly

related to the separation of the property from the person of another. *See State v. Baca,* 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971); *State v. Martinez,* 85 N.M. 468, 513 P.2d 402 (Ct. App. 1973).

Theft, an element of robbery, requires an intent to steal, that is, the intent to permanently deprive the owner of his property. *State v. Puga,* 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

Some examples of decisions finding "immediate control" of the property in the victim are: the defendant forced the store clerk to open the cash register and lie down on the floor, *People v. Day,* 256 Cal. App. 2d 83, 63 Cal. Rptr. 677 (1967); the property was taken from the victim's pants pockets some 10 feet from his bed, *Osborne v. State*, 200 Ga. 763, 38 S.E. 2d 558 (1946); the goods were upstairs from the person who had custody of them, *State v. Cottone,* 52 N.J. Super. 316, 145 A.2d 509 (1958), petition for certification denied, 28 N.J. 527, 147 A.2d 305 (1959); the victim was locked in the bathroom before the property was taken from the bedroom, *State v. Culver,* 109 N.J. Super. 108, 262 A.2d 422 (1970); the victim was locked within a building by the defendant and the defendant took the property from the victim's automobile outside the building, *Fields v. State,* 364 P.2d 723 (Okla. Crim. 1961).

**ANNOTATIONS**

**No evidence to support instruction on lesser offenses of robbery. —** Where the testimony did not give rise to any other conclusion than that the defendant committed the robbery while armed, the defendant was not entitled to have the jury instructed on the lesser offenses of robbery and larceny because there was no evidence to establish them. *State v. Sweat*, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 67 Am. Jur. 2d Robbery § 10.

77 C.J.S. Robbery § 1 et seq.

## 14-1621. Armed robbery; essential elements.

For you to find the defendant guilty of armed robbery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away[2] _____ *(identify property),* from _____ *(name of victim)* or from his immediate control intending to permanently deprive _____ *(name of victim)* of the _____ *(property);* [the property had some value;][3]

2. The defendant was armed with a _____[4];

3. The defendant took the _____ *(property)* by [force or violence][5] [or] [threatened force or violence];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use UJI 14-1602 if asportation is in issue.

3. Use the bracketed provision only if there is a question as to whether or not the property taken had any value.

4. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12B NMSA 1978, or use the phrase "an instrument or object which, when used as a weapon, could cause death or very serious injury."

5. Use the applicable bracketed phrase.

**Committee commentary.** — *See* § 30-16-2 NMSA 1978. Armed robbery is an aggravated form of robbery by use of a deadly weapon. Some courts indicate that being armed means only that the defendant has the ability to inflict an injury by having the weapon in his possession, not that the weapon is exhibited. *See, e.g., Commonwealth v. Chapman,* 345 Mass. 251, 186 N.E.2d 818 (1962); *People v. Rhem,* 261 N.Y.S.2d 808, 24 A.D.2d 517 (1965). *See also State v. Encee,* 79 N.M. 23, 439 P.2d 240 (Ct. App. 1968) and *State v. Sweat*, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972). Where the jury may find the absence of a deadly weapon, it should be instructed on simple robbery as a lesser included offense. *Cf. State v. Mitchell,* 43 N.M. 138, 87 P.2d 432 (1939).

A deadly weapon may include an unloaded gun. *State v. Montano,* 69 N.M. 332, 367 P.2d 95 (1961). If the weapon is not listed in the statute as a deadly weapon, it must be established that it was a deadly weapon as a matter of fact under the general, statutory definition. *State v. Gonzales,* 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973) (tire tool used as a deadly weapon).

**ANNOTATIONS**

**Element of "carrying away" satisfied.** — The instant that a cashier, under coercion, removes money from a register, the element of "carrying away" the money is satisfied. *State v. Williams*, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 67 Am. Jur. 2d Robbery § 4.

77 C.J.S. Robbery § 1 et seq.

# Part D
# Burglary and Possession of Burglary Tools

## 14-1630. Burglary; essential elements.

For you to find the defendant guilty of burglary [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization; [the least intrusion constitutes an entry;][3]

2. The defendant entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____][4] *(name of felony)* when inside;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the charge is burglary of a dwelling house, UJI 14-1631 should be given.

3. Use bracketed phrase if entry is in issue.

4. It is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony must be given.

[As amended, effective August 1, 2001.]

**Committee commentary.** — *See* Section 30-16-3 NMSA 1978. The crime of burglary is complete at the time the person makes the unauthorized entry into the structure with intent to commit a theft or felony. *State v. Gutierrez*, 82 N.M. 578, 484 P.2d 1288 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971). Consequently, the intention to carry out the theft or felony is sufficient and the act itself need not be carried out. *See also State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

Under the general rule, the least intrusion is sufficient to show entry. *See State v. Grubaugh*, 54 N.M. 272, 221 P.2d 1055 (1950) (Sadler, J., dissenting). *See also State v. Pigques*, 310 S.W.2d 942 (Mo. 1958); *People v. Massey* , 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (1961).

Criminal trespass, Section 30-14-1 NMSA 1978, may be a lesser included offense to burglary. Possession of burglary tools is not a necessarily included offense to burglary. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969). *See also* commentary to UJI 14-6002.

A single premise may be comprised of more than one structure, and entry into each structure constitutes an act of burglary. *See State v. Ortega*, 86 N.M. 350, 524 P.2d 522 (Ct. App. 1974).

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-3 NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, inserted in Paragraphs 1. and 2. identification of the types of structures that may be burgled, substituted in Paragraph 1."authorization" for "permission," substituted "with the intent" for "he intended" in Paragraph 2., and made stylistic changes.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary § 67.

Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

12A C.J.S. Burglary §§ 127 to 130.

## 14-1631. Burglary; "dwelling house"; defined.

A "dwelling house" is any structure, any part of which is customarily used as living quarters.

USE NOTE

For use in conjunction with UJI 14-1630.

**Committee commentary.** — Under a case decided prior to the division of burglary into third and fourth degree felonies, the supreme court upheld the conviction of a charge of burglary of a dwelling house where the victim slept on a cot in his drugstore. *State v. Hudson*, 78 N.M. 228, 430 P.2d 386 (1967).

**ANNOTATIONS**

**Attached garage with no opening to house was, nonetheless, part of "dwelling house"** within the meaning of 30-16-3 NMSA 1978, because the garage was a part of the habitation, directly contiguous to and a functioning part of the residence. *State v. Lara*, 92 N.M. 274, 587 P.2d 52 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

**And structure unoccupied for year does not lose its character as "dwelling house"** for purposes of 30-16-3A NMSA 1978, unless there is evidence that the last tenant has abandoned the structure with no intention of returning. *State v. Ervin*, 96 N.M. 366, 630 P.2d 765 (Ct. App. 1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary § 4.

Outbuilding or the like as part of "dwelling house," 43 A.L.R.2d 831.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

12A C.J.S. Burglary §§ 28, 29.

## 14-1632. Aggravated burglary; essential elements.

For you to find the defendant guilty of aggravated burglary [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization;

2. The defendant entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____][2] *(name of felony)* once inside;

3. The defendant

[was armed with a _____[3];][4]

[became armed with a _____[3] after entering;]

[touched or applied force to _____ *(name of victim)* in a rude or angry manner while entering or leaving, or while inside;]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. It is not necessary to instruct on the elements of a theft. If intent to commit a felony other than theft is alleged, the essential elements of the felony must be given.

3. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12(B) NMSA 1978, or use the phrase "an instrument or object which, when used as a weapon, could cause death or very serious injury".

4. Use the applicable bracketed phrase.

[As amended, effective August 1, 2001.]

**Committee commentary.** — *See* commentary to UJI 14-1621 for explanation of the deadly weapon provision. Carrying a deadly weapon is not a lesser included offense to aggravated burglary. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

The elements of a statutory battery are included in this instruction as one of the "aggravating" circumstances. *See* Section 30-3-4 NMSA 1978. For a case involving the distinctions between aggravated burglary, aggravated battery and robbery, *see State v. Ranne*, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

## ANNOTATIONS

**Cross references.** — *See* Section 30-16-4 NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, inserted in Paragraphs 1. and 2. identification of the types of structures that may be burgled; deleted in Paragraph 1. "[or permission]" after "authorization"; deleted the word "when" at the start of Paragraph 2.; added "with the intent" before "to commit a theft" for "he intended to commit [a theft]," and substituted "once" for "[when he got]" in Paragraph 2.; substituted "became armed" for "armed himself" in Paragraph 3.; and made stylistic changes.

**Intent to commit felony deemed crucial factor.** — The crucial factor in the crime of aggravated burglary is whether a defendant had the intent to commit a felony on entering the dwelling, not whether the felony was actually committed, and the intent does not have to be consummated. *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

**As commission of felony unimportant.** — Proof of intent at the time of entry does not depend upon the subsequent commission of the felony, failure to commit the felony or even an attempt to commit it. *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

**Defendant's tendered instruction on intent covered by this instruction.** — Where the defendant tendered an instruction stating that, even if he was found sane at the time of the crime, the jury must still determine whether he had an ability to form an intent to commit the underlying felony, though this may have been a correct statement of the law, the matter was adequately covered by other instructions (including this instruction) given. *State v. Luna*, 93 N.M. 773, 606 P.2d 183 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 12A C.J.S. Burglary § 91.

## 14-1633. Possession of burglary tools; essential elements.

For you to find the defendant guilty of possession of burglary tools [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession[2] _____ *(name of tools or devices),* which are designed for or commonly used in the commission of a burglary;

2. The defendant intended that these _____ *(tools or devices)* be used for the purpose of committing a burglary;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. *See* UJI 14-130 for definition of "possession," if the question of possession is in issue.

**Committee commentary.** — *See* § 30-16-5 NMSA 1978. No New Mexico appellate decision defines burglary tools. *See generally* Annot., 33 A.L.R.3d 798 (1970).

Constructive possession is sufficient for conviction of possession of burglary tools. *State v. Langdon*, 46 N.M. 277, 127 P.2d 875 (1942). Cf. Annot., 51 A.L.R.3d 727, 810 (1973).

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary § 74.

Construction and application of statute relating to burglar's tools, 33 A.L.R.3d 798.

12A C.J.S. Burglary §§ 131, 136, 138.

# Part E
# Fraud, Embezzlement, Extortion and Forgery

## 14-1640. Fraud; essential elements.

For you to find the defendant guilty of fraud [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant, by any words or conduct, [made a promise he had no intention of keeping] [misrepresented a fact][2] to _____ (*name of victim*), intending to deceive or cheat _____ (*name of victim*);

2. Because of the [promise] [misrepresentation][2] and _____'s (*name of victim*) reliance on it, defendant obtained _____ (*describe property or state amount of money*)[3];

3. This _____ (*property*) belonged to someone other than the defendant;

[4. The _____ (*property*) had a market value[4] [of over $_____;][5]]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed phrase.

3. If money is involved, state whether the amount charged is "over $20,000"or over "over $2,500" or "over $500" or "over $250."

4. *See* UJI 14-1602 for definition of "market value."

5. Use this bracketed provision for property other than money if the value is over $250. State whether the value of the property at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* § 30-16-6 NMSA 1978. Reliance is included as an element of this instruction following the interpretation of the statute in *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969). *See also* Perkins, *Criminal Law* 297 (2d ed. 1969).

Fraudulent intent must exist at the time the defendant obtains the property or the crime is embezzlement. *State v. Gregg*, 83 N.M. 397, 492 P.2d 1260 (Ct. App.), *cert. denied*, 83 N.M. 562, 494 P.2d 975 (1972).

"Fraudulent intent" and "fraudulently" are frequently defined as "with intent to defraud" or "with intent to cheat or deceive." *See e.g., State v. Probert*, 19 N.M. 13, 140 P. 1108 (1914); *State v. Harris*, 313 S.W.2d 664 (Mo. 1958); *People v. Leach*, 168 Cal. App. 2d 463, 336 P.2d 573 (1959); *Roderick v. State*, 9 Md. App. 120, 262 A.2d 783 (1970); *Clark v. State*, 287 A.2d 660 *appeal dismissed and cert. denied*, 409 U.S. 812, 93 S.Ct. 139, 34 L.Ed. 2d 67 (Del. 1972). Perkins, *supra*. *See also State v. Dosier*, 88 NM. 32, 536 P.2d 1088 (Ct. App.), *cert. denied*, 88 N.M. 28, 536 P.2d 1084 (1975).

## ANNOTATIONS

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 3, after "whether the amount charged is", added "'over $20,000' or" and after "'over $2,500' or", deleted "'over $100'" and added "'over $500' or 'over $250'"; and in Paragraph 5, in the first sentence, after "property other than money", added the remainder of the sentence, and added the second and third sentences.

**Ownership of website.** — Where an independent website designer created a website on the internet under contract with the defendant who was seeking to use the website for commercial purposes; the contract recognized the designer's legal ownership of the copyright to the web pages; the contract provided that upon payment to the designer, the defendant would receive a license to use the web pages; the contract never transferred any interest in the web page design or ownership of the web site to the defendant; in breach of the contract, the defendant never paid the designer; the defendant locked out the designer from access to the website by changing the password, the designer was the owner of the website and the defendant was properly convicted of criminal fraud by taking property that belonged to someone other than the defendant. *State v. Kirby*, 2007-NMSC-034, 141 N.M. 838, 161 P.3d 838.

**Fraud includes the intentional taking of anything of value which belongs to another** by means of fraudulent conduct, practices or representations. *State v. Thoreen,* 91 N.M. 624, 578 P.2d 325 (Ct. App.), *cert. denied,* 91 N.M. 610, 577 P.2d 1256 (1978).

**Reliance as essential element of fraud.** — Because the fraud statute does not require the making of a false voucher; and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

**Intent to induce reliance.** — Although reliance is an element of fraud, the fact that defendant did not succeed in inducing reliance on the photocopied non-carbon records of checks is not the issue. The fact remains that he intended to induce reliance on them, as an attempt conviction requires. *State v. Cearley,* 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. denied, 2004-NMCERT-006.

**Validity of contract provisions as affecting fraud.** — The question of whether a specific contractual provision is based on a valid statute or regulation is irrelevant in a criminal case for fraud. The prosecution here was directed at the alleged criminal fraud of each of the defendants rather than a civil action to enforce the contract. Under these circumstances, defendants' convictions for fraud were not invalid. *State v. Crews,* 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

**Instruction amplifying element of crime of fraud properly refused.** *State v. Hamilton*, 94 N.M. 400, 611 P.2d 223 (Ct. App.), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980).

**Variance.** — In a criminal fraud case, the defendants' argument that the instruction using the words "would pay" constituted a material variance from the language of the indictment using the words "were paying", was without merit. *State v. Crews*, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 37 Am. Jur. 2d Fraud and Deceit §§ 11, 12.

37 C.J.S. Fraud §§ 3, 154.

## 14-1641. Embezzlement; essential elements.

For you to find the defendant guilty of embezzlement [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was entrusted with _____[2]. [This _____ (*property*) had a market value[3] [of $_____;][4]]

2. The defendant converted this _____ (*property or money*) to the defendant's own use. "Converting something to one's own use" means keeping another's property rather than returning it, or using another's property for one's own purpose [rather than][5] [even though the property is eventually used] for the purpose authorized by the owner;

3. At the time the defendant converted _____ (*property or money*), the defendant fraudulently intended to deprive the owner of the owner's property. "Fraudulently intended" means intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Describe property. If money is involved, state the amount.

3. *See* UJI 14-1602 for definition of "market value".

4. Use this bracketed provision for property other than money if the value is over $250. State whether the value alleged to have been embezzled or converted is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

5. Use the applicable bracketed phrase.

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* Section 30-16-8 NMSA 1978. Embezzlement, like larceny, is divided into degrees depending on the value of the property. *See generally* LaFave & Scott, *Criminal Law* 654 (1972). For the purpose of this crime, money has its face value, and the state need not prove that its value is something else. *Territory v. Hale*, 13 N.M. 181, 81 P. 583 (1905). The same rule applies to checks. *State v. Peke*, 70 N.M. 108, 371 P.2d 226 (1962).

In *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971), the court held that the term "entrusted" had an ordinary meaning and need not be defined in the instructions. In *State v. Archie*, 1997-NMCA-058, ¶¶ 8-9, 123 N.M. 503, 943 P.2d 537, the court determined the term "use" applies when a person having possession of another's property treats it as their own, whether the person uses it, sells it, or discards it; the details are less important than the interference.

In contrast to the intent to permanently deprive in larceny, this crime requires only intent to deprive the owner of his property, even temporarily. *Archie*, 1997-NMCA-058, ¶ 4; *State v. Gonzales*, 99 N.M. 734, 735, 663 P.2d 710, 711 (Ct. App. 1983); *Moss*, 83 N.M. at 43, 487 P.2d at 1348; *State v. Prince*, 52 N.M. 15, 18, 189 P.2d 993, 995 (1948). "Fraudulent intent" is defined in this instruction. *See State v. Green*, 116 N.M. 273, 278-79, 861 P.2d 954, 959-60 (1993).

Following *State v. Brooks*, 117 N.M. 751, 877 P.2d 557 (1994), the legislature amended Section 30-16-8 NMSA 1978 to exclude the single criminal intent doctrine (single larceny doctrine) in embezzlement cases by adding the following language: "Each separate incident of embezzlement or conversion constitutes a separate and distinct

offense." *See State v. Faubion*, 1998-NMCA-095, ¶ 11, 125 N.M. 670, 964 P.2d 834; *State v. Rowell*, 121 N.M. 111, 118, 908 P.2d 1379, 1386 (1995). Prior to this legislative amendment, the single larceny doctrine had allowed a series of takings of property or money from a single victim to be treated as a single offense. *See Brooks*, 117 N.M. at 752-53, 877 P.2d at 558-59; *State v. Pedroncelli*, 100 N.M. 678, 675 P.2d 127 (1984); *State v. Allen*, 59 N.M. 139, 280 P.2d 298 (1955).

[Commentary revised, June 24, 1999; amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-16-8 NMSA 1978.

**The 1995 amendment,** effective March 15, 1995, added the last sentence in Paragraph 2 of the instruction defining "converting something to one's own use", inserted "fraudulently intended" and added the last sentence defining "fraudulently intended" in Paragraph 3 of the instruction, deleted the former last paragraph of the instruction which defined "converting something to one's own use", rewrote Use Note 2, and added the last sentence of Use Note 4.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 1, after "market value of", deleted "over"; and in the Use Note, in Paragraph 2, in the second sentence, after "money is involved, state", deleted "whether the amount charged is '($100) or less', 'over ($100)', 'over ($250)', 'over ($2,500)' or 'over twenty thousand dollars ($20,000)'", and added "the amount"; and in Paragraph 4, in the first sentence, after "property other than money", added "if the value is over $250"; in the second sentence, after "embezzled or converted is", deleted "'over one hundred dollars ($100)', 'over two hundred fifty dollars ($250)', 'over twenty-five hundred dollars ($2,500)', or over ($20,000)'" and added the remainder of the sentence; and added the last sentence.

**Compiler's notes.** — Revised committee commentary was added to this instruction in 1999.

**Embezzlement requires specific intent to deprive owner of property at time of conversion.** — Embezzlement is a crime which requires proof that at the time of the conversion of the property, the defendant entertained a specific intent to deprive the owner of the property. *State v. Gonzales*, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Fraudulent intent is an essential element of embezzlement as that crime is defined by 30-16-8 NMSA 1978, and a jury instruction which omitted this statutory element was deficient, warranting reversal of conviction. *State v. Green*, 116 N.M. 273, 861 P.2d 954 (1993).

**Fraudulent intent essential instruction.** — The failure to instruct the jury on an essential element of embezzlement, fraudulent intent, is reversible error and can never be corrected by including the concept elsewhere in the instructions. *State v. Clifford*, 117 N.M. 508, 873 P.2d 254 (1994).

**No mistake-of-fact instruction unless defendant believed he was authorized to expend public funds.** — The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales*, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

**Insufficient evidence of entrustment.** — Where defendant was never given possession of the pre-signed checks she was convicted of embezzling, or authority over the pre-signed checks or the bank account on which the checks were drawn, and defendant had access to the filing cabinet where the checks were stored only for purposes other than taking possession or control of the checks, there was insufficient evidence of entrustment. *State v. Kovach*, 2006-NMCA-122, 140 N.M. 430, 143 P.3d 192, cert. denied, 2006-NMCERT-009.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Embezzlement § 79.

29A C.J.S. Embezzlement § 49.

## 14-1642. Extortion; essential elements.

For you to find the defendant guilty of extortion [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* threatened

[to injure the person or property of _____ *(name of victim)* or another][2]

[to accuse _____ *(name of victim)* or another of a crime]

[to expose or imply the existence of a deformity or disgrace of _____ *(name of victim)* or another]

[to expose any secret of _____ *(name of victim)* or another]
[to kidnap _____ *(name of victim)* or another],

intending to wrongfully[4]

[obtain anything of value from _____ *(name of victim)*][3]

[compel _____ *(name of victim)* to do something _____ *(name of victim)* would not have done]

[compel _____ *(name of victim)* to refrain from doing something _____ *(name of victim)* would have done];

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable threatening acts.

3. Use the applicable element.

4. If there is a specific issue of wrongfulness of an act, a specific definition may need to be prepared. *See for example* UJI Criminal 14-937, defining "unlawful" for purposes of criminal sexual contact of a minor.

[UJI Criminal 16.32; UJI 14-1642 SCRA 1986; UJI 14-1642 NMRA; as amended, effective July 1, 1998.]

**Committee commentary.** — This instruction has been amended to add the term "wrongfully" because of the line of cases such as *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991) and *State v. Parish,* 118 N.M. 39, 42, 878 P.2d 988, 991 (1994).

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-9 NMSA 1978.

**The 1998 amendment,** effective for cases filed on or after July 1, 1998, substituted "_____ *(name of defendant)*" for "The defendant"; added "wrongfully[4]" following the phrase "intending to"; substituted "_____ *(name of victim)*" for "he" in the second and third phrases under "intending to" in Paragraph 1; and added Use Note 4.

**Crime of extortion is complete when person makes threat, intending to compel victim** to do something he would not have done. *State v. Wheeler*, 95 N.M. 378, 622 P.2d 283 (Ct. App. 1980).

**Evidence sufficient for charge of extortion to go to jury.** *State v. Barber*, 93 N.M. 782, 606 P.2d 192 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31 Am. Jur. 2d Extortion, Blackmail, and Threats § 9.

Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to the person", 87 A.L.R.5th 715.

35 C.J.S. Extortion §§ 2, 13.

## 14-1643. Forgery; essential elements.

For you to find the defendant guilty of forgery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2] [made up a false _____ (*name of writing*)] [made a false signature] [made a false endorsement] [changed a genuine _____ (*name of writing*) so that its effect was different from the original];

2. At the time, the defendant intended to injure, deceive or cheat _____ (*name of victim*) or another;

[3. The damage was over _____;][3]

[4. The writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting the title to real property.][4]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative bracketed provisions.

3. For use if the damage was quantifiable and exceeds $2,500. If the damage was over $2,500, use "$2,500" in the blank. If the damage was over $20,000, use "$20,000" in the blank.

4. For use if the writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting the title to real property. If the type of writing is in issue, please add an instruction containing the relevant legal definition. *See, e.g.*, Sections 45-1-201 and 46A-1-103 NMSA 1978.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-16-10 (2006). This instruction does not require the jury to find that the writing purports to have any legal efficacy. Whether or not the state had proved the legal efficacy of the writing is a question of law. *See, e.g.*, *Poe v. People*, 163 Colo. 20, 428 P.2d 77 (1967); *Davis v. Commonwealth*, 399 S.W.2d 711 (Ky. 1965), *cert. denied*, 385 U.S. 831, 87 S. Ct. 67, 17 L. Ed. 2d 66 (1966). The phrase "legal efficacy" refers to the fact that the instrument on its face could be made the foundation of some liability. *State v. Cowley*, 79 N.M. 49, 439 P.2d 567 (Ct. App.), *cert. denied*, 79 N.M. 98, 440 P.2d 136 (1968). The court may refer to the Uniform Commercial Code [Chapter 55 NMSA 1978] to determine the legal efficacy of the writing. *Cf. State v. Weber*, 76 N.M. 636, 417 P.2d 444 (1966) and *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970).

The four types of forgery listed in this instruction are derived from the following decisions: false writing - *State v. Smith*, 32 N.M. 191, 252 P. 1003 (1927), *State v. Nation*, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973); false signature - *State v. Crouch*, 75 N.M. 533, 407 P.2d 671 (1965), *State v. Garcia*, 26 N.M. 70, 188 P. 1104 (1920), *State v. Weber*, supra; false endorsement - *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), *cert. denied*, 81 N.M. 140, 464 P.2d 559 (1970), *State v. Martinez*, 85 N.M. 198, 510 P.2d 916 (Ct. App. 1973); alteration of genuine document - *State v. Cowley*, supra. *See also* California Jury Instructions Criminal No. 15.04 (1970).

The intent to injure or defraud is not limited to economic harm. *See, e.g.*, *State v. Nation*, supra, where the defendant obtained drugs by use of a forged prescription. The intent to defraud is the same as the element in the crime of fraud, the intent to deceive or cheat. *People v. Leach*, 168 Cal. App. 2d 463, 336 P.2d 573 (1959). Neither proof of an intent to injure or defraud a specific person (*State v. Smith, supra*) nor proof that the intent was accomplished (*State v. Nation* and *State v. Weber*, supra), is a necessary element of the crime.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added Paragraphs 3 and 4 and renumbered former Paragraph 3 as Paragraph 5; in the Use Note, added Paragraphs 3 and 4; and in the committee commentary, in the first sentence after "See", added "NMSA 1978" and after "§ 30-16-10", deleted "NMSA 1978" and added "(2006)".

**Before jury may return verdict of guilty** it must have been proved to their satisfaction and beyond a reasonable doubt that, among other things, the check in question is forged. *State v. Bibbins*, 66 N.M. 363, 348 P.2d 484 (1960).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 36 Am. Jur. 2d Forgery § 3.

37 C.J.S. Forgery § 106.

## 14-1644. Issuing or transferring a forged writing; essential elements.

For you to find the defendant guilty of forgery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant gave or delivered to _____ (*name of victim*) a _____ (*name of writing*) knowing it to [be a false _____ (*name of writing*)][2] [have a false signature] [have a false endorsement] [have been changed so that its effect was different from the original or genuine] intending to injure, deceive or cheat _____ (*name of victim*) or another;

[2. The damage was over _____;][3]

[3. The writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting title to real property;][4] and

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative bracketed provisions.

3. For use if the damage was quantifiable and exceeds $2,500. If the damage was over $2,500, use "$2,500" in the blank. If the damage was over $20,000, use "$20,000" in the blank.

4. For use if the writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting title to real property. If the type of writing is in issue, please add an instruction containing the relevant legal definition. *See, e.g.*, Sections 45-1-201, 46A-1-103 NMSA 1978.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* § 30-16-10B NMSA 1978. Since the writing must be forged, this instruction contains all of the elements of forgery. *See* commentary to UJI 14-1643. Relying on the Uniform Commercial Code [Chapter 55 NMSA 1978] for definitions, the court of appeals has held that this crime requires an issuing or transfer of an interest and not merely a physical transfer. *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970). A transfer, etc., which does not come within the commercial law definitions is an attempted forgery. *State v. Tooke*, supra. The court must determine the

commercial law question as a matter of law. *See* commentary to UJI 14-1643. The instruction requires that the jury make only a determination of the physical transfer.

Knowledge that the writing is forged may be proved by all of the facts and circumstances surrounding the incident. *State v. Nation*, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

**ANNOTATIONS**

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added Paragraphs 2 and 3 and renumbered former Paragraph 2 as Paragraph 4; and in the Use Note, added Paragraphs 3 and 4.

**Non-standard instruction.** — A non-standard instruction on forgery that tracks the language of the forgery statute, includes all the elements of the forgery statute, and does not differ from the uniform jury instruction in any material way does not constitute fundamental error. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 36 Am. Jur. 2d Forgery § 20.

37 C.J.S. Forgery § 37.

## 14-1645. Insurance policies; false applications; essential elements.

For you to find the defendant guilty of making a false application, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made a false or fraudulent statement or representation as to any application for insurance [or] _____ (*describe other coverage*);

2. The false statement or representation was material to the application for insurance which means the statement or representation had a natural tendency to influence the decision of _____ (*insert name of insurance company or other provider of coverage*).

3. The defendant [knew the statement to be untrue][2] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

**ANNOTATIONS**

**Cross references.** — *See* Section 59A-16-23(A)(1) NMSA 1978.

## 14-1646. Insurance; false claims or proof of loss; essential elements.

For you to find the defendant guilty of making a [false claim][1] [false proof of loss][1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [presented][3] [or] [caused to be presented] [a false or fraudulent claim][1] [any proof in support of a false or fraudulent claim for payment of loss under an insurance policy];

2. The [claim] [proof in support of a claim for payment] was made for the purpose of obtaining any money or benefit;

3. The defendant [knew the statement to be untrue][2] [or] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. If both making a false claim and presenting proof in support of a fraudulent claim are in issue, a separate elements instruction must be prepared for each issue.

2. Insert the count number if more than one count is charged.

3. Use applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

**ANNOTATIONS**

**Cross references.** — *See* Section 59A-16-23(A)(2) NMSA 1978.

## 14-1647. Insurance; false or fraudulent account; essential elements.

For you to find the defendant guilty of making preparing, making or signing a false or fraudulent account, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant prepared, made or signed a false or fraudulent [account,][2] [certificate,] [affidavit] [proof of loss] [or] [_____ (*other document*)];

2. The defendant intended that the [account,][2] [certificate,] [affidavit] [proof of loss] [or] [_____ (*other document*)] be presented or used in support of a claim for payment of a loss under an insurance policy;

3. The defendant [knew the statement to be untrue][2] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

**ANNOTATIONS**

**Cross references.** — *See* Section 59A-16-23(A)(3) NMSA 1978.

## 14-1648. Insurance; false statement or representation; essential elements.

For you to find the defendant guilty of making a false statement or representation relative to an insurance policy [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made a false or fraudulent statement or representation [on an application for an insurance policy] [or] [relative to an application for an insurance policy];

2. The statement or representation was made for the purpose of obtaining any fee, commission or benefit from an insurer, agent, broker or individual;

3. The defendant [knew the statement to be untrue][2] [or] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

**ANNOTATIONS**

**Cross references.** — *See* Section 59A-16-23(A)(4) NMSA 1978.

# Part F
# Receiving Stolen Property

## 14-1650. Receiving stolen property; essential elements.

For you to find the defendant guilty of receiving stolen property [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The _____ (*describe the property in question*) had been stolen [by another][2];

2. The defendant [acquired possession[3] of] [kept] [disposed of][4] this property;

3. At the time the defendant [acquired possession[3] of] [kept] [disposed of][4] this property, the defendant knew or believed that it had been stolen;

[4. The property was a firearm;][5]

[5. The property had a market value[6] [of over $_____][7];][8]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. This bracketed material must be used for a charge of receiving (acquiring possession of) stolen property. It must not be used for a charge of either retaining (keeping) stolen property or disposing of stolen property.

3. Use UJI 14-130 if possession is in issue.

4. Use only applicable bracketed phrase.

5. Use this element if the stolen property is a firearm.

6. *See* UJI 14-1602 for definition of market value.

7. Use this bracketed provision for property other than money if the value is over $250. State whether the value of the property at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

8. This bracketed provision need not be used if the property is a firearm with a value of less than $2,500.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-16-11 (2006). This is a general intent crime. *See State v. Viscarra*, 84 N.M. 217, 501 P.2d 261 (Ct. App. 1972). The committee concluded that the statutory provision "unless received, etc. with intent to restore the property to its owner" should be treated as a defense rather than a negative "specific intent" element which must be proven by the state. Knowledge that the goods are stolen may be proven by inference from all of the facts and circumstances. *State v. Elam*, 86 N.M. 595, 526 P.2d 189 (Ct. App. 1974).

In *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976), it was held that a thief, convicted of larceny under Section 30-16-1 NMSA 1978, can also be convicted of receiving stolen property by disposing of it in violation of Section 30-16-11 NMSA 1978. In dicta, the *Tapia* decision also indicates that the thief may not be convicted of unlawfully retaining the stolen property. The committee was of the view that although the thief may not be convicted of both stealing and acquiring stolen property, he may be convicted of either offense.

In *State v. Bryant*, 99 N.M. 149, 655 P.2d 161 (Ct. App. 1982), the court held that, under Section 30-16-11 NMSA 1978, embezzled property does not come within the meaning of stolen property.

[Amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-16-11 NMSA 1978.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 3, after "At the time", changed "he" to "the defendant"; in the Use Note, in Paragraph 7, deleted the former first sentence, which provided if the charge is a third degree felony, $2,500 should be used in the blank; deleted the former second sentence, which provided that if the charge is a fourth degree felony, $100 should be used in the blank; and added the first, second, and third sentences; and in the committee commentary, in the first sentence, deleted "40A-16-11 NMSA 1953 Comp." and added "(2006)"; and in the third paragraph, changed the citation for *State v. Brown* from "22 N.M. St. B. Bull. 18 (Ct. App., Jan. 6, 1983)" to "99 N.M. 149, 655 P.2d 161 (Ct. App. 1982)".

**Intent-to-return defense.** — The Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate. *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

Defendant was entitled to an instruction on the intent-to-return defense, where reasonable doubt could arise from the possibility that defendant's involvement consisted of only awareness of the burglary, knowledge of where the goods were being kept, use of reward money from an investigator to purchase the goods from those holding them, and delivery of the goods to the investigator. *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 66 Am. Jur. 2d Receiving and Transporting Stolen Goods § 3.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

76 C.J.S. Receiving Stolen Goods § 1 et seq.

## 14-1651. Receiving stolen property; dealers; statutory presumptions on knowledge or belief.[1]

If you find that the defendant was a person in the business of buying and selling goods and[2]

[was in possession or control of property stolen from two or more persons on separate occasions]

[acquired stolen property for a price which he knew was far below the property's market[3] value]

[had possession of five or more items of stolen property within one (1) year prior to his possession of the property involved in this charge]

you may, but are not required to, find that the defendant knew or believed that the property involved in this case had been stolen. However, you may do so only if, upon consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant knew or believed that the property had been stolen.

USE NOTE

1. For use when the state relies on the statutory presumption to prove the defendant's knowledge or belief that the goods were stolen.

2. Use only the applicable presumptions.

3. *See* UJI 14-1602 for the definition of market value.

**Committee commentary.** — *See* § 30-16-11B & 30-16-11C NMSA 1978. The use of evidence of independent offenses to prove knowledge is a recognized exception to the rule against introducing evidence of other crimes. *See* commentary to UJI 14-5028. The statutory "presumption" of knowledge is treated as an inference. New Mexico Rules of Evidence, Rule 11-303. *State v. Jones,* 88 N.M. 110, 537 P.2d 1006 (Ct. App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975).

By the 1975 amendment to this statute, the legislature limited the use of these presumptions to cases involving "dealers." The statute includes a further presumption that a dealer knows the fair market value of the property when he acquires property he knows is far below the property's reasonable value. This further presumption was not included in this instruction because it would require the jury to find a presumption within a presumption.

Some doubt has been expressed concerning the constitutionality of the first bracketed presumption in this instruction. *See State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct. App.), *cert. denied,* 86 N.M. 593, 526 P.2d 187 (1974).

## 14-1652. Possession of stolen vehicle; essential elements.

For you to find the defendant guilty of possession of a stolen vehicle [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had possession[2] of _____ *(describe vehicle in question)*;

2. This vehicle had been stolen or unlawfully taken;

3. At the time the defendant had this vehicle in his possession he knew or had reason to know that this vehicle had been stolen or unlawfully taken;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use UJI 14-130 "Possession" defined, if possession is in issue.

**Committee commentary.** — Section 66-3-505 NMSA 1978 defines two separate offenses: receipt or transfer of a stolen vehicle and possession of a stolen vehicle. *State v. Wise*, 85 N.M. 640, 515 P.2d 644 (Ct. App. 1973). The offense of receipt or transfer of a stolen vehicle has the same elements as possession of a stolen vehicle, but requires an additional element of intent to procure or pass title. The committee was of the opinion that since possession of a stolen vehicle includes the same conduct as the offense of receipt or transfer of a stolen vehicle the state would never charge the offense of receipt or transfer of a stolen vehicle. An instruction for the offense of receipt or transfer of a stolen vehicle has therefore not been prepared.

UJI 14-1652, Possession of stolen vehicle; essential elements, is to be given when the defendant is charged only with having possession of a stolen vehicle.

Although a person may be found guilty of "stealing" a motor vehicle without proof of an intent to permanently deprive the owner of his property, as required for larceny, *see Kilpatrick v. Motors Insurance Corporation*, 90 N.M. 199, 561 P.2d 472 (1977), a person may not be found guilty of receiving a stolen vehicle unless the vehicle has been "stolen." The committee was of the opinion that the phrase "stolen or unlawfully taken without the owner's consent" includes any of the common law methods of "stealing" property as well as statutory unlawful taking of a motor vehicle, UJI 14-1660. This includes "stealing" by larceny, burglary, robbery (including armed robbery) and embezzlement. *See* LaFave & Scott, Criminal Law at 684.

In New Mexico a car thief can be convicted of both stealing the vehicle and "receiving or disposing of the vehicle." *See State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976) and *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968) (defendant convicted of both armed robbery and unlawful taking of a vehicle).

UJI 14-141, General criminal intent, must also be given with this instruction. *See State v. Lopez*, 84 N.M. 453, 504 P.2d 1086 (Ct. App. 1972) and *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

## ANNOTATIONS

**Cross references.** — *See* Section 66-3-505 NMSA 1978.

# Part G
# Unlawful Taking of Vehicle

## 14-1660. Unlawful taking of vehicle or motor vehicle; essential elements.

For you to find the defendant guilty of unlawfully taking a [vehicle] [motor vehicle][1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took a _____ (*describe vehicle*) without the owner's consent;

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the applicable bracketed phrase.

2. Insert the count number if more than one count is charged.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — For a discussion of the elements of this crime, *see State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969), and *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968). The "intentional" element of this crime was not included in this instruction because it would duplicate UJI 14-141. *See* NMSA 1978, §§ 66-1-4.11(H) (2007) and 66-1-4.19(B) (2005) (for the definitions of "motor vehicle" and "vehicle").

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* Section 66-3-504 NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, added present Paragraph 2 and redesignated former Paragraph 2 as present Paragraph 3, and added Use Note 2.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added "or motor vehicle"; in the first sentence, after "unlawfully taking a vehicle", added the brackets and "[motor vehicle]"; deleted former Paragraph 2, which stated "The value of the vehicle taken was $2,500 or more"; and renumbered former Paragraph 3 as Paragraph 2; in the Use Note, deleted former Paragraph 1, which provided that the count number should be inserted if more than one

count is charged; deleted former Paragraph 2, which provided that the bracketed language is given if there is evidence that the value of the vehicle is $2,500 or more and that if the value is disputed, a lesser included offense may be appropriate; and added current Paragraphs 1 and 2; and in the committee commentary, deleted the last sentence, which read "*See* Section 66-8-9 NMSA 1978 for the penalty for this crime."; and added the current last sentence.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 7A Am. Jur. 2d Automobiles and Highway Traffic § 349.

Asportation of motor vehicle as necessary element to support charge of larceny, 70 A.L.R.3d 1202.

61A C.J.S. Motor Vehicles § 696.

# Part H
# Worthless Checks

## 14-1670. Fraud by worthless check; essential elements.

For you to find the defendant guilty of fraud by worthless check [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant gave a check[2] for $_____[3] to _____ *(identify person or company)*;

2. _____ *(identify person or company)* gave [money][4] [_____,[5] which had some value] for the check;

3. When the defendant gave the check, he knew that there would be neither sufficient funds nor credit[6] for payment of the check in full;

4. The defendant intended to cheat or deceive _____ *(identify person or company)* or another by use of the check;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-1674, the definition of a check, should be given immediately following this instruction if the instrument is not a check within the commonly understood meaning of that term.

3. Insert face amount of check.

4. Use applicable alternative or alternatives.

5. Insert description of thing of value.

6. UJI 14-1675, the definition of credit, may be given immediately following this instruction if requested.

**Committee commentary.** — The Worthless Check Act is made up of Sections 30-36-1 to 30-36-9 NMSA 1978. The act defines the crime of issuance of a worthless check, divided into petty offenses and felonies. If the amount of the check is $25.00 or more, the offense is a felony. This instruction is appropriate for a felony or petty misdemeanor charge. Although Section 30-36-5 NMSA 1978 authorizes the aggregation, or totaling, of two or more checks to establish a felony, the totaling portion of the penalty statute has been found to be so vague as to deny due process. *State v. Conners,* 80 N.M. 662, 459 P.2d 461 (Ct. App. 1969), and *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

In the introductory paragraph, the offense is referred to as fraud by worthless check, instead of issuance of a worthless check. The use of the word "fraud" better describes the offense, because the gist of the offense is obtaining money or property by the use of false pretenses. The giving of a check is a representation of the existing fact that the drawer has credit with the drawee bank for the amount involved. *State v. Tanner*, 22 N.M. 493, 164 P. 821 (1917).

The statute makes it unlawful for a person to "issue" a worthless check. Issue means the "first delivery of an instrument to a holder or a remitter." Section 55-3-102(1)(a) NMSA 1978. New Mexico courts have approved the application of definitions contained in the Uniform Commercial Code [Chapter 55 NMSA 1978] where appropriate for criminal offenses. *State v. Weber*, 76 N.M. 636, 417 P.2d 444 (1966); *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970). If the court finds a particular transfer of a check to be an issuance within the meaning of Section 55-3-102(1)(a) NMSA 1978, then the jury may properly be instructed that they must find the defendant "gave" the check.

In most cases, the worthless instrument will be a check. "Check" is a term commonly understood and, therefore, identification of the instrument simply as a check will not confuse the jury. In cases where the instrument is one other than that readily recognizable as a check and commonly referred to as such, then the definition of "check" must be given.

The statute is in the language, "knowing . that the offender has insufficient funds in or credit with the bank .. " However, Paragraph 3 of this instruction requires that the defendant know there are neither sufficient funds nor sufficient credit. The state must show both. Lack of credit is an essential element of the crime. *See State v. Thompson*, 37 N.M. 229, 20 P.2d 1030 (1933).

Something of value must have been received by the defendant in exchange for the check. One who gives a worthless check in payment of an account lacks the intent to defraud which is an essential element of the offense. Thus, the offense is not committed by the giving of a worthless check to pay a debt if no property changes hands on the strength of the check. *See State v. Davis*, 26 N.M. 523, 194 P. 882 (1921), decided under a prior statute.

It is not essential that the defendant intend that the one who accepts the check be the one who ultimately suffers the loss. *See* 35 C.J.S., False Pretenses, § 21; *cf., State v. Smith*, 32 N.M. 191, 252 P. 1003 (1927). For that reason, Paragraph 4 requires that the defendant intended to cheat or deceive someone.

Fraud by worthless check is a specific intent crime. Intent to defraud may be established prima facie by proof of dishonor and notice of dishonor. Section 30-36-7 NMSA 1978. The statute sets out a rule of evidence and does not require notice as an essential element of the offense. *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969). *See also Marchbanks v. Young*, 47 N.M. 213, 139 P.2d 594 (1943).

As in the crime of fraud, UJI 14-1640, "cheat" does not mean to permanently deprive a person of his money or property.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-36-1 et seq., NMSA 1978.

## 14-1671. Worthless checks; statutory presumption regarding intent when defendant had no account.1

Evidence has been presented that the defendant delivered the check at a time when he had no account in the bank upon which the check was drawn. If you find that the defendant gave or issued the check and that at the time he gave or issued the check he had no account in the bank upon which the check was drawn, and that the bank refused payment because the defendant had no account, then you may but are not required to find that the defendant knew that there were insufficient funds in or credit with the bank with which to pay the check, and that he intended to cheat or deceive someone by use of the check. Upon consideration of all of the evidence, you must be convinced beyond a reasonable doubt that the defendant did know that there were insufficient funds in or credit with the bank with which to pay the check, and that he did intend to cheat or deceive by use of the check.

USE NOTE

1. For use when there is sufficient evidence that the defendant was the maker of the check and that the check was dishonored because the defendant had no account, unless there is evidence that the defendant had credit with the bank.

[As amended, effective September 1, 1988.]

**Committee commentary.** — This instruction sets out the statutory presumption contained in Section 30-36-7A NMSA 1978.

Essential elements are presumed; hence, the cautionary language of the last sentence is required. Evidence Rule 11-303(c). *See also State v. Jones*, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

This instruction should not be given if there is evidence of credit with the bank. When the issue is whether the defendant thought he had a credit arrangement with the bank, it would be inappropriate to infer an intent to defraud from the fact that the defendant had no checking account in the bank.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-36-7A NMSA 1978.

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in the second sentence, substituted "defendant gave or issued the check and that at the time he gave or issued the check" for "the defendant wrote, signed and delivered the check, and that at the time he delivered the check" and, in the last sentence, substituted "Upon consideration of all of the evidence, you must be convinced" for "However, you may do so only if on considering all of the evidence you are convinced".

## 14-1672. Worthless checks; statutory presumption regarding intent when notice of dishonor given.[1]

Evidence has been presented that the bank refused to pay the check. If you find that the defendant gave or issued the check, and that the bank upon which it was drawn refused to pay the check because of insufficient funds or credit in the account, and that thereafter the defendant was given notice that the check was not honored by the bank and that the defendant failed to pay the check in full within three (3) business days after such notice, then you may but are not required to find that the defendant knew that there were insufficient funds in the account and that the defendant intended to deceive or cheat someone by use of the check. You must consider all of the evidence in making your determination. In order to find the defendant guilty of _____ *(set forth offense)* [as charged in Count _____][2], you must be convinced beyond a

reasonable doubt that the defendant did know that there were insufficient funds in the account and that the defendant intended to deceive or cheat by use of the check.

Notice may be given orally or in writing. [If you find that written notice was addressed to the defendant at his address as it appears on the check and was deposited in the United States mail as certified mail, then you may but are not required to find that the defendant was given notice. You must consider all of the evidence in making your determination. In order to find the defendant guilty of _____ *(set forth offense)* [as charged in Count _____][2], you must be convinced beyond a reasonable doubt that the defendant did receive such notice.][3]

USE NOTE

1. For use when there is sufficient evidence that the defendant was the maker of the check and that the check was dishonored for insufficient funds or credit with the bank.

2. Insert the count number if more than one count is charged.

3. Use the bracketed material when there is evidence supporting this theory of notice.

[As amended, effective September 1, 1988.]

**Committee commentary.** — This instruction sets out the statutory presumptions contained in Section 30-36-7B NMSA 1978. Essential elements are presumed; hence, the cautionary language of the last sentence of the first paragraph is required. Evidence Rule 11-303(c). *See also State v. Jones,* 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The last sentence of the bracketed material in the second paragraph is not required by Evidence Rule 11-303, because notice is not an essential element of the crime. However, the sentence is included because of what appears to be a statutory presumption on a statutory presumption in this instruction. *See State v. Serrano,* 74 N.M. 412, 394 P.2d 262 (1964).

Although the statute requires payment of the check and protest fees and costs to void the presumption, the instruction refers only to payment of the check. The inference of intent to defraud cannot rationally be drawn from a failure to pay protest fees.

The 1979 legislature amended Section 30-36-7 NMSA 1978, effective June 15, 1979, to require payment of a dishonored check within three business days. It is not clear whether "business day" means that part of any day, excluding Saturday, Sunday and legal holidays, the business of the payee is open to the public for carrying on substantially all of its functions or the business day of the financial institution. Legal holidays for banks are set forth in Section 12-5-2 NMSA 1978. *See also* Section 55-4-104(1)(c) NMSA 1978 for the definition of a banking "day." The general rule for

computation of time is that the first day shall be excluded and the last included unless the last falls on a Saturday, Sunday or legal holiday, in which case the time is extended to include all of the next business day. *See* Section 12-2-2 NMSA 1978 [*see now* Section 12-2A-7 NMSA 1978].

**ANNOTATIONS**

**Cross references. —** *See* Section 30-36-7B NMSA 1978.

**Compiler's notes. —** Section 12-2-2 NMSA 1978, referred to in the last paragraph of the commentary, was repealed in 1997. For comparable provisions, *see* Section 12-2A-7 NMSA 1978.

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in the first paragraph, substituted "defendant gave or issued the check" for "defendant wrote, signed and delivered the check" and "to deceive or cheat someone" for "to defraud someone" in the second sentence, and, in the last sentence of the paragraph, substituted "the defendant intended to deceive or cheat" for "he did intend to defraud"; in both the first and second paragraphs, substituted the present language in the third and fourth sentences through "you must be convinced" for "However, you may do so only if on considering all of the evidence, you are convinced"; inserted Item 2 in the Use Note; and made minor stylistic changes.

## 14-1673. Defense of notice to payee that check is worthless.[1]

Evidence has been presented [as to Count _____][2] that _____[3] was on notice that the check was an insufficient funds check. If _____[3] was on notice that the check was an insufficient funds check, then you must find the defendant not guilty [of Count _____][2].

A person who accepts a check is on notice that it is an insufficient funds check if:

[The check is postdated; that is, dated later than the day that the check is delivered][4]

[or]

[The person who accepts the check (knows)[5] (has been told) (has reason to believe) that at the time the check was delivered and accepted, the person who signed the check did not have on deposit (or to his credit)[6] sufficient funds to insure payment of the check when it reached the bank].

The burden is on the state to prove beyond a reasonable doubt that _____[3] was not on notice that the check was an insufficient funds check.

USE NOTE

1. For use when there is an issue as to an exception under the Worthless Check Act [30-36-1 NMSA 1978].

2. Insert the count number if more than one count is charged.

3. Identify the person or persons, in the alternative, to whom notice would constitute a defense.

4. Use applicable bracketed paragraph or paragraphs.

5. If this bracketed paragraph is used, use in the alternative the applicable parenthetical phrase or phrases.

6. Use parenthetical clause if credit is in issue.

**Committee commentary.** — Section 30-36-6 NMSA 1978 states that certain checks are excepted from the Worthless Check Act. These exceptions are covered in this instruction, which sets out an absolute defense under the act. *See State v. Downing*, 83 N.M. 62, 488 P.2d 112 (Ct. App. 1971).

Subsection A of the statute refers to actual knowledge and express notice "prior to the drawing of the check." This instruction refers to the time that the check was delivered and accepted, using the definition of "draw" that is most favorable to the defendant. Section 30-36-2C NMSA 1978.

Although the statute refers to the knowledge of the payee or holder, the instruction is worded more broadly. If an agent of the payee receives the notice, the defense is applicable.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-36-6 NMSA 1978.

## 14-1674. Check; definition.

A check is a written order to a bank or other depository for the payment of money.

USE NOTE

For use, on request, when the instrument is not a check within the commonly understood meaning of that term, i.e., when the instrument is a draft or other written order for money.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-36-2A NMSA 1978.

## 14-1675. Worthless checks; "credit"; defined.

"Credit" means an understanding with the bank to pay the check although there is not sufficient money in the account.

USE NOTE

For use when the jury requests a definition of "credit."

**Committee commentary.** — This definition of "credit" is substantially the same as the statutory definition, Section 30-36-2E NMSA 1978, and is in understandable language. The dictionary definition is inadequate. The definition is not incorporated into the essential elements, UJI 14-1670, because the word "credit" is commonly understood in this context, and it is unlikely that the jury will need a definition.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-36-2E NMSA 1978.

# Part I
# Credit Card Offenses

## 14-1680. Theft of credit card; essential elements.

For you to find the defendant guilty of theft of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took from the [person][2] [possession[3]] [custody] [control] of another a credit card[4] issued to _____ without the cardholder's[4] consent;

2. At the time the defendant took this credit card, the defendant intended to permanently deprive the cardholder of the card;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable alternative.

3. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

4. If the jury requests a definition of "credit card" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

**Committee commentary.** — The purpose in enacting legislation dealing specifically with credit cards was that the existing structure of law was inadequate to deal with the socio-economic phenomenon of credit card transactions. While certain aspects of credit card transactions may be sufficiently covered by traditional statutes regulating forgery and fraud, inter alia, other aspects did not fall within the existing legal framework. Therefore, for example, because of the negligible value of the credit card itself, the theft of a credit card, if charged as larceny under Section 30-16-1 NMSA 1978, would be a petty misdemeanor, whereas under the specific law, Section 30-16-26 NMSA 1978, theft of a credit card is a fourth degree felony.

The first enactment of credit card legislation in New Mexico was in 1963 (Laws, ch. 86, § 1). More detailed legislation was enacted in 1969 (Laws, ch. 73, §§ 1-10), and in 1971 (Laws, ch. 239, §§ 1-14) the present statutory scheme was signed into law. Sections 30-16-25 through 30-16-38 NMSA 1978 evidence an increasing complexity in credit card law which reflects the increasing complexity in types of credit cards and transactions made with them.

Because one person could commit numerous statutory offenses with a credit card, the committee is of the opinion that an example of possible combinations, and any resultant problems, will be helpful. An individual could steal eight credit cards; sell or give away two of them; change the numbers on the others; sign the name of the cardholder on the back of the cards; purchase merchandise with one of the cards; and have in his possession the machinery necessary to alter credit cards. This could give rise to charges under the following statutory sections: § 30-16-26 NMSA 1978 - Theft of a credit card; § 30-16-28 NMSA 1978 - Fraudulent transfer of a credit card; § 30-16-30 NMSA 1978 - Dealing in credit cards of another; § 30-16-31 NMSA 1978 - Forgery of a credit card; § 30-16-32 NMSA 1978 - Fraudulent signing of a credit card or sales slips or agreements; § 30-16-33 NMSA 1978 - Fraudulent use of credit cards; and § 30-16-35 NMSA 1978 - Possession of machinery designed to reproduce credit cards. Additionally, because these statutes have an applicability clause, § 30-16-38 NMSA 1978, the individual could also be charged with larceny, § 30-16-1 NMSA 1978, fraud, § 30-16-6 NMSA 1978 and forgery, § 30-16-10 NMSA 1978.

Obviously, problems may arise as to multiplicitous charging and merger. Prosecutorial discretion will have to be observed, because public policy seems to prohibit such "overzealousness" in charging.

Section 30-16-26 NMSA 1978 provides that taking a credit card without consent includes obtaining it by conduct defined or known as "statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick, embezzlement or obtaining property by false pretense, false promise or extortion." The elements of each of these crimes are set forth in LaFave & Scott, Criminal Law, as follows:

Common law larceny by trespassory taking:

trespassory (either constructive or actual)

taking dominion over

carrying away (slight distance is enough)

personal property

of another

with intent to steal or deprive owner of perma-

nent possession or of possession for unreasonable period of time.

LaFave & Scott at p. 622.

Statutory larceny:

enlarged types of personal property included within common law larceny.

LaFave & Scott at p. 622.

Common law embezzlement:
fraudulent conversion of property
of another
by one in lawful possession of it.

LaFave & Scott at p. 644.

Common law obtaining property by false pretenses:

false representation of material present or past
fact which causes victim

to pass title

to a wrongdoer

who knows his misrepresentation is false

and intends to defraud victim.

LaFave & Scott at p. 655.

Common law larceny by trick:

Same as common law obtaining property by false pretenses except defendant obtains "possession" as opposed to "title" by false pretenses.

LaFave & Scott at p. 627.

Extortion (assume statutory as set forth in NMSA 1978):

*See* UJI 14-1642 for essential elements of statutory extortion.

LaFave & Scott at p. 704.

**ANNOTATIONS**

**Cross references. —** *See* Section 30-16-26 NMSA 1978.

## 14-1681. Possession of stolen credit card; essential elements.

For you to find the defendant guilty of possession of a stolen credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant possessed[2] a credit card[3] issued to _____;

2. At the time the defendant acquired the credit card, the defendant knew or had reason to know that the credit card had been stolen;

3. At the time the defendant acquired the credit card, the defendant intended to [use the credit card][4] [sell or transfer the credit card to another person other than to the cardholder or issuer[3]];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card," "cardholder," or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. Use applicable alternative.

[As amended, effective March 15, 1995.]

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1660.

The essential elements of possession of a stolen credit card as described in Sections 30-16-26 and 30-16-27 NMSA 1978 are identical except that Section 30-16-27 provides that the crime is committed if the defendant knew or had reason to know that the card had been stolen while Section 30-16-26 seems to require actual knowledge that the card had been stolen.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-26 NMSA 1978.

**The 1995 amendment,** effective March 15, 1995, substituted "possessed" for "had in his possession" in Paragraph 1 of the instruction, and added "At the time the defendant acquired the credit card" to the beginning of Paragraphs 2 and 3 of the instruction.

## 14-1682. Possession of stolen, lost, mislaid or delivered by mistake credit card; essential elements.

For you to find the defendant guilty of possession of a [stolen credit card][1] [lost or mislaid credit card] [credit card which was delivered under a mistake as to identity or address] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The credit card[3] had been [stolen][1] [lost or mislaid] [delivered under a mistake as to the identity or address of the cardholder];

2. The defendant [received][1] [had in his possession[4]] a credit card issued to _____;

3. The defendant knew or had reason to know that the credit card had been [stolen][1] [lost or mislaid] [delivered under a mistake as to the identity or address of the cardholder];

4. The defendant retained possession with the intent to [use the credit card][1] [sell or transfer the credit card to another person other than to the cardholder or issuer[3]];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use applicable alternative.

2. Insert the count number if more than one count is charged.

3. If the jury requests a definition of "credit card," "cardholder" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

For possession of a stolen credit card, *see* UJI 14-1681. This section also deals with credit cards which have been "lost, mislaid or delivered under a mistake as to the identity or address of the cardholder."

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-27 NMSA 1978.

## 14-1683. Fraudulent transfer of a credit card; essential elements.

For you to find the defendant guilty of fraudulent transfer of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant transferred possession[2] of a credit card[3] to a person other than the cardholder[3];

2. The defendant intended to deceive or cheat;

3. The defendant was not the issuer[3] or an authorized agent of the issuer;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card," "cardholder" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Sections 30-16-28 and 30-16-29 provide that it is a criminal offense to fraudulently transfer or fraudulently receive a credit card. The essential difference between the two sections is that Section 30-16-29 is limited to a misstatement of a material fact relating to identity or financial condition while 30-16-28 merely requires an intent to defraud. *See* UJI 14-1640 for a review of the elements of fraud.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-28 NMSA 1978.

## 14-1684. Fraudulent receipt of a credit card; essential elements.

For you to find the defendant guilty of fraudulent receipt of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant obtained possession[2] of a credit card[3] from a person other than the issuer[3] or the authorized agent of the issuer;

2. The defendant intended to deceive or cheat;

3. The credit card was issued to someone other than the defendant;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

*See* UJI 14-1640 for a review of the elements of fraud.

*See* commentary to UJI 14-1663.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-28 NMSA 1978.

## 14-1685. Fraudulent taking, receiving or transferring credit cards; essential elements.

For you to find the defendant guilty of fraudulent [taking][1] [receiving] [transferring] of a credit card [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [received][1] [sold] [transferred] a credit card[3];

2. The defendant made a false statement [about his (identity)[4] (financial condition)][1] [about the (identity)[4] (financial condition) of (another person)[4] (firm) (corporation)];

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use applicable alternative.

2. Insert the count number if more than one count is charged.

3. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. Use applicable word or phrase set forth in parentheses.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680. Also *see* commentary to UJI 14-1683 for discussion of fraudulent transfer or receipt of a credit card. For a review of the elements of fraud, *see* UJI 14-1640.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-29 NMSA 1978.

## 14-1686. Dealing in credit cards of another; essential elements.

For you to find the defendant guilty of dealing in credit cards of another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [had in his possession[2]][3] [received] [or] [transferred] four or more credit cards[4];

2. The credit cards were issued to one or more persons other than the defendant;

[3. The defendant was not the issuer[4] of the credit cards or the authorized agent of the issuer;][5]

4. [The defendant, without consent, took the credit cards from the person, possession, custody or control of another with the intent to permanently deprive the (cardholder)[3] (cardholders) of possession of the credit cards;][6] or

[The defendant knew that the credit cards had been stolen and intended (to use the credit cards)[3] (sell or transfer the credit cards to another person other than to the cardholder or issuer);][6] or

[The credit cards had been (stolen)[3] (lost or mislaid) (delivered under a mistake as to identity or address of the cardholder). The defendant knew or had reason to know that the credit cards had been (stolen)[3] (lost or mislaid) (delivered under a mistake as to the identity or address of the cardholder). The defendant retained possession of the credit cards with the intent to (use the credit cards)[3] (sell or transfer the credit cards to another person other than to the cardholder or issuer[4]);][7] or

[The defendant transferred possession of the credit cards to a person other than the cardholder with the intent to deceive or cheat;][8] or

[The defendant obtained possession of the credit cards from a person other than the issuer or the authorized agent of the issuer with the intent to deceive or cheat;][8] or

[The defendant (received)[3] (sold) (transferred) the credit cards by making a false statement (about his identity or financial condition)[3] (about the identity or financial condition of another) with the intent to deceive or cheat;][9]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. Use the applicable alternative.

4. If the jury requests a definition of "credit card," "issuer" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

5. Use bracketed phrase only if an issue.

6. Use this element if the underlying offense is Section 30-16-26 NMSA 1978.

7. Use this element if the underlying offense is Section 30-16-27 NMSA 1978.

8. Use this element if the underlying offense is Section 30-16-28 NMSA 1978.

9. Use this element if the underlying offense is Section 30-16-29 NMSA 1978.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-30 NMSA 1978 reflects a legislative intent to punish more severely an individual in possession of four or more credit cards. Presumably, the legislature assumed that one who possesses, receives, sells or transfers four or more credit cards is dealing in unlawfully obtained credit cards, and is not merely a petty thief.

The committee was of the opinion that the offense of dealing in credit cards may be committed in more than one way and that if alternative elements in Element 4 are given, it is not necessary for all jurors to agree on any single alternative element. It is only necessary that the jury unanimously agree that the defendant had possession of, received or transferred four or more credit cards in one or more of the unlawful manners set forth in Element 4. Thus six jurors could believe that the credit cards were taken and six believe that they were delivered to the defendant under a mistake of identity of address. *See State v. Roy,* 40 N.M. 397, 416, 60 P.2d 646 (1936).

It is the committee's opinion that dealing is a separate offense, not an enhancement provision. No position was taken as to lesser included offenses of this crime.

The committee did not include the term "sale" in Element 1, as any sale is also a transfer.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-30 NMSA 1978.

## 14-1687. Forgery of a credit card; essential elements.

For you to find the defendant guilty of forgery of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant, without the consent of the issuer[2] of the credit card,[2] [made][3] [altered] [embossed] a credit card;

2. The defendant intended to deceive or cheat;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "issuer" or "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable alternative. If the jury requests a definition of "made," "altered" or "embossed," the statutory definition set forth in 30-16-31 NMSA 1978 is to be given.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-31 NMSA 1978 deals with the making of a purported credit card, or the embossing or altering of a legitimately issued credit card. This includes, but is not limited to, changing the number or expiration date on a credit card.

*See* UJI 14-1640 for a review of the elements of fraud.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-31 NMSA 1978.

## 14-1688. Fraudulent signing of credit cards or sales slips; essential elements.

For you to find the defendant guilty of fraudulently signing a [credit card][1] [sales slip or agreement] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant signed a [credit card[3]][1] [sales slip or agreement[3]] with a name other than his own name;

2. The defendant was not authorized to use the credit card;

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use applicable alternative.

2. Insert the count number if more than one count is charged.

3. If the jury requests a definition of "credit card" or "sales slip or agreement," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

**Committee commentary. —** For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-32 NMSA 1978 has been held not to be unconstitutionally vague. *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972). The word "another" as used in Section 30-16-32 means "other than oneself." Id. at 417.

**ANNOTATIONS**

**Cross references. —** *See* Section 30-16-32 NMSA 1978.

## 14-1689. Fraudulent use of credit cards obtained in violation of law; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[2] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a market value[3] [over _____;][4]

3. The defendant intended to deceive or cheat;

4. [The credit card was taken from the person, possession, custody or control of another with the intent to permanently deprive the cardholder of possession of the credit card;][5] or [The credit card was stolen, and possession was transferred to another person who intended to use, sell or transfer the credit card;] or

[The credit card had been lost, mislaid or delivered under a mistake as to the identity or address of the cardholder, and was retained by someone with the intent to use, sell or transfer the credit card to another person other than the cardholder or issuer]; or

[The credit card was given to someone other than the cardholder with the intent to deceive or cheat;] or

[The credit card was received by someone who intended to deceive or cheat;] or

[The credit card was acquired by the making of a false statement about identity or financial condition;] or

[The credit card was forged with the intent to deceive or cheat;] or

[The credit card was signed by someone other than the cardholder with the intent to deceive or cheat;]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. *See* UJI 14-1602 for definition of "market value."

4. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

5. Use only the applicable bracketed phrase or phrases.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — Section 30-16-33 NMSA 1978 deals with the actual use of an illegally obtained, or invalid, credit card. This section also deals with situations where an individual fraudulently represents that he is the cardholder, or is using the card without the cardholder's consent. While a person may have another's credit card with the cardholder's permission, it may be only for a specific use, and any other use without the cardholder's consent would be a violation of this section.

"[E]ach use of another's credit card is punishable as a separate offense. . . . [T]he Legislature intended to punish each use of a credit card, not the continuing possession and usage of one card." *State v. Salazar*, 98 N.M. 70, 644 P.2d 1059 (Ct. App. 1982). In *Salazar*, the defendant was convicted of seven counts of fraudulent use of a credit card under Section 30-16-33A(4). The total value of all things received by this fraudulent use

was $109.66, therefore, he could not be tried under Subsection B which provides for a third degree felony if the total value is over $300.00. Instead, Salazar received seven separate fourth degree felony convictions under Subsection A.

The committee is of the opinion that Subsection B is not unconstitutional under the ruling in *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969), where totalling provisions of the Worthless Check Act, Section 40-49-5 NMSA 1953 [30-36-5 NMSA 1978] were held to be so vague as to offend due process, and were, therefore, declared void. However, Subsection B to Section 30-16-33, *supra*, is not so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Ferris*, 80 N.M. at 665, 459 P.2d at 464. Moreover, it does not fail to "convey a sufficiently definite warning of the proscribed conduct." *Id.* Subsection B is explicit in its language, and no ambiguities are inherent in its interpretation.

Although as of yet there is no case law in New Mexico interpreting the constitutionality of Subsection B, a 1973 Idaho case is on point. In *State v. Boyenger*, 95 Idaho 396, 509 P.2d 1317 (1973), a similar provision was upheld as being within the police power of the state "to protect the people of Idaho from fraud and deceit by the use of credit cards. . . ." *Id.* at 1324. The statute in question provided for a misdemeanor penalty for fraudulent use of a credit card, but

if the value of goods or services obtained through a violation of . . . this act amounts to the sum of $60.00 or more, or if the value of the goods or services obtained through a series of violations . . . committed within a period not exceeding six (6) months amounts in the aggregate to the sum of $60.00 or more, any such violation or violations shall constitute a felony. . .

Idaho Code Section 18-3119.

In *Boyenger*, the defendant was charged under the aggregation clause, and he appealed alleging that this provision was unconstitutional. The court upheld the statute stating "the distinction between felony and misdemeanor based on value of goods obtained is a rational distinction based on the police power of the state and therefore is not a violation of equal protection of the laws." *State v. Boyenger*, *supra*, at 1324. This is analogous to our Section 30-16-33B which differentiates between a third and fourth degree felony based on the value of things obtained by the fraudulent use of credit cards. Therefore, the committee is of the opinion, using the reasoning in *State v. Salazar*, *supra*, and *State v. Boyenger*, *supra*, that if an individual's fraudulent use of a credit card results in obtaining goods of a value less than $300.00, each individual use should be charged under the applicable subparagraph of Section 30-16-33A. If a single use or the aggregation of amounts is over $300.00, the charge should be brought under Subsection B. It would seem that if an individual made two separate charges of $350.00 each, he could only be charged with one violation of Subsection B, unless these transactions occurred in a time span of over six months apart.

The committee is of the opinion that more than one of the alternatives set forth in Element 4 may be given. *See* UJI 14-1686.

**ANNOTATIONS**

**Cross references. —** *See* Paragraph (1) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, after "market value", changed "value over $300" to "over ____"; and in the Use Note, in Paragraph 4, deleted the former first sentence, which provided that if the value of all goods or services exceeds $300, the bracketed phrase should be used; and added the first, second and third sentences.

## 14-1690. Fraudulent use of invalid, expired or revoked credit card; essential elements.

For you to find the defendant guilty of fraudulent use of [an invalid] [an expired] [a revoked][1] credit card [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[3] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a value [over _____];[4]

3. At the time the defendant used the credit card, the credit card [was invalid] [had expired] [had been revoked][1];

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use applicable alternative.

2. Insert the count number if more than one count is charged.

3. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. *See* UJI 14-1602 NMRA for a definition of "market value." Use this bracketed provision for goods and services if the value is over $250. State whether the value of

the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

**ANNOTATIONS**

**Cross references.** — *See* Paragraph (2) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first sentence, changed "[an invalid] [a revoked]" to "[an expired] [a revoked]"; in Paragraph 2, after "services had a", changed "[value] [value over $300]" to "value [over ____]"; and in the Use Note, added Paragraph 4.

## 14-1691. Fraudulent use of credit card by person representing that he is the cardholder; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card by representing that he was the cardholder [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[2] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a value [over _____];[3]

3. The defendant was not the cardholder[2];

4. The defendant represented by words or conduct [that he was the cardholder] [that he was authorized by the cardholder to use the credit card][4];

5. The defendant intended to deceive or cheat;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

4. Use applicable bracketed phrase.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary. —** For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

**ANNOTATIONS**

**Cross references. —** *See* Paragraph (3) of Subsection A, Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, deleted the former sentence which stated "These goods or services had a [value] [value over $300]" and added the current sentence; and in the Use Note, deleted former Paragraph 3 which provided that the applicable alternative should be used, and added new Paragraphs 3 and 4.

## 14-1692. Fraudulent use of credit card without consent of the cardholder; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card without consent, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[2] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a value [over _____];[3]

3. The defendant used the credit card without the cardholder's[2] consent;

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

**ANNOTATIONS**

**Cross references.** — *See* Paragraph (4) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, deleted the former sentence which stated "The goods or services had a [value] [value over $300]" and added the current sentence; in the Use Note, in Paragraph 3 deleted the former sentence which provided that the applicable alternative should be used, and added the first, second, and third sentences; and in the committee commentary added "NMRA" after the UJI citations.

## 14-1693. Fraudulent acts by merchants or their employees; fraudulently furnishing something of value; essential elements.

For you to find the defendant guilty of fraudulently furnishing something of value [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. In his capacity as [a merchant][2] [an employee of _____][3],the defendant [furnished] [allowed to be furnished][3] _____ (*describe money, goods or services furnished*);

2. These goods or services had a market value[4] [over _____];[5]

3. The defendant accepted for payment a credit card[2] that he knew was being used to deceive or cheat;

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "merchant" or "credit card" the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable bracketed phrase.

4. *See* UJI 14-1602 NMRA for definition of "market value."

5. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA.

Section 30-16-34A NMSA 1978 deals with the fraudulent furnishing of something of value upon presentation of a credit card which in some way is invalid. Section 30-16-34B NMSA 1978 deals with the situation where a credit slip is filled out, but no merchandise is actually furnished.

In the former situation there seems to be an assumption of collusion between the merchant or employee and the individual presenting the credit card. An example of an offense under Subsection B would be when the merchant or employee accepts a credit card for a valid purchase, and makes two credit slips; the customer signs one not knowing about the second and the merchant or employee signs the cardholder's name to the second credit slip and pockets the money from the alleged sale.

For a discussion on the aggregation of amounts provided for in this section, *see* committee commentary to UJI 14-1689 NMRA.

*See* UJI 14-1640 NMRA for a review of the elements of fraud.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-34A NMSA 1978.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, deleted the former sentence which stated "These goods or services had a market value [over $300]" and added the current sentence; in the Use Note, added Paragraph 3; renumbered former Paragraph 3 as Paragraph 4; deleted former Paragraph 4, which provided that if the value of the goods or services exceed $300, the bracketed phrase should be used; and added Paragraph 5; and in the committee commentary added "NMRA" after the UJI citations.

## 14-1694. Fraudulent acts by merchants or their employees; representing that something of value has been furnished; essential elements.

For you to find the defendant guilty of fraudulently representing that something of value has been furnished [as charged in Count _____[1]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. In the defendant's capacity as [a merchant[2]] [an employee of _____][3], the defendant falsely represented in writing to _____ (*issuer or participating party*[2]) that he furnished _____ (*describe money, goods or services allegedly furnished*) on a credit card[2] of the issuer[2], which had a market value[4] of _____[5];

2. The defendant [did not furnish such goods or services][3] [furnished goods or services of a market value only of _____[5]][3];

[3. The difference between the represented market value and the actual market value is _____[6]];

4. The defendant intended to deceive or cheat; and

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "merchant," "credit card," "issuer" or "participating party," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable alternative.

4. *See* UJI 14-1602 for definition of "market value."

5. Insert the applicable represented or actual value.

6. If the charge is a second degree felony (over $20,000), use "over $20,000" in the blank. If the charge is a third degree felony (over $2,500), use "over $2,500" in the blank. If the charge is a fourth degree felony (over $500), use "over $500" in the blank. If the charge is a misdemeanor (over $250), use "over $250" in the blank. If the charge is a petty misdemeanor (under $250), use "under $250" in the blank.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary. —** *See* NMSA 1978, § 30-16-34(C) (2006). For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1673 for a discussion of fraudulent acts by merchants or their employees.

*See* UJI 14-1640 NMRA for a review of the elements of fraud.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references. —** *See* Section 30-16-34B NMSA 1978.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added Paragraph 3; and renumbered former Paragraphs 3 and 4 as Paragraphs 4 and 5; in the Use Note, added Paragraphs 5 and 6; and in the committee commentary, added "*See* NMSA 1978, § 30-16-34(C) (2006)."

## 14-1695. Possession of incomplete credit cards; essential elements.

For you to find the defendant guilty of possession of incomplete credit cards [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession[2] [4 or more][3] incomplete credit cards[4];

2. The defendant intended to deceive or cheat;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. Use only if applicable.

4. If the jury requests a definition of "incomplete credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-35A NMSA 1978 makes it an offense for a person to possess an incomplete credit card. Section 30-16-35B makes it an offense to "possess machinery, plates or other contrivance designed to reproduce instruments purporting to be credit cards."

An "incomplete credit card means a credit card upon which a part of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder, has not been stamped, embossed, imprinted or written on it." Section 30-16-25H NMSA 1978.

This section is aimed at the person who manufactures credit cards without the consent of an issuer. The committee can envision an individual setting up quite a lucrative "business" by making and selling purported credit cards which look like the real thing. It is this that the legislature is trying to prevent, and the clause in Subsection A making it a fourth degree felony to possess four or more incomplete credit cards, reflects this legislative intent.

*See* UJI 14-1640 for a review of the elements of fraud.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-35A NMSA 1978.

## 14-1696. Possession of machinery, plates or other contrivance; essential elements.

For you to find the defendant guilty of possession of a device used to make credit cards [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession[2] a device used to make credit cards[3] of an issuer[3];

2. The issuer did not authorize the defendant to make such credit cards;

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680. Also *see* commentary to UJI 14-1695 for a discussion of Section 30-16-35 NMSA 1978. For a review of the elements of fraud, *see* UJI 14-1640.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-35B NMSA 1978.

## 14-1697. Receipt of property obtained by fraudulent use of credit card; essential elements.

For you to find the defendant guilty of receiving property obtained by fraudulent use of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____ *(describe money, goods or services received)*;

2. This property was obtained by another's fraudulent use of a credit card[2];

3. The defendant knew or had reason to believe that:[4]

[the credit card was obtained in violation of law and then used;] or

[the credit card was invalid, expired or had been revoked, and was used with the intent to deceive or cheat;] or

[the credit card was used with the intent to deceive or cheat by a person misrepresenting that he was the cardholder, or was authorized by the cardholder to use the credit card;] or

[the credit card was used without the cardholder's consent by a person with the intent to deceive or cheat;]

4. These goods or services had a [value][3] [value over $300.00];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable alternative.

4. Use only the applicable bracketed phrase or phrases set forth in Element 3. If there is an issue as to the underlying elements of one of the crimes set forth in Element 3 of this instruction, then upon request, the court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140.

**Committee commentary.** — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-36 NMSA 1978 is similar to our receiving stolen property statute, Section 30-16-11 NMSA 1978. Here though, the property was not technically stolen, but was obtained by another's fraudulent use of a credit card. The knowledge requirement is the same: the defendant "knows or has reason to believe" the money, goods or services were obtained in violation of law.

For a discussion on the aggregation of amounts provided for in this section, *see* committee commentary to UJI 14-1689.

The committee is of the opinion that one or more of the alternatives set forth in Element 3 may be given. *See* UJI 14-1686.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-16-36 NMSA 1978.

Section 30-14-1 NMSA 1978.

Section 30-14-8 NMSA 1978.

# CHAPTER 17
# Arson

## 14-1701. Arson; with purpose of destroying or damaging property; essential elements.

For you to find the defendant guilty of arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally or maliciously [started a fire] [or] [caused an explosion][2];

2. The defendant did so with the intent to destroy or damage _____ (*identify property*), which belonged to another and which had a [market][3] value of over $_____;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed phrase.

3. Unless the property has no market value, this bracketed word should be used and UJI 14-1707 also given. If the charge is a second degree felony (over $20,000), use "$20,000" in the blank. If the charge is a third degree felony (over $2,500), use "$2,500" in the blank. If the charge is a fourth degree felony (over $500), use "$500" in the blank. If the charge is a misdemeanor (over $250), use "$250" in the blank.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* § 30-17-5 NMSA 1978. The prior statute, N.M. Laws 1963, ch. 303, § 17-5, which made criminal the "intentional damaging by any explosive substance or setting fire to" certain structures, was held unconstitutional in *State v. Dennis*, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969). Since both the New Mexico statute prior to 1963 (N.M. Laws 1927, ch. 61, § 1) and common-law arson required a willful and malicious state of mind, the court concluded that the legislature intended to eliminate that element. The court held that to eliminate this mental element was not a reasonable exercise of the police power by the legislature since the statute then made criminal what could be a burning for innocent and beneficial purposes.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Compiler's notes. —** Laws 1963, ch. 303, § 17-5, referred to in the first sentence in the first paragraph of the committee commentary, was compiled as 40A-17-5, 1953 Comp., before being repealed by Laws 1970, ch. 39, § 1.

Laws 1927, ch. 61, § 1, referred to in the second sentence in the first paragraph of the committee commentary, was compiled as 40-5-1, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1.

Section 448a of the California Penal Code, referred to in the fourth sentence in the third paragraph of the committee commentary, was repealed in 1979. *See now* § 452 of the Penal Code.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 1, after "The defendant", added "intentionally or maliciously"; in the Use Note, in Paragraph 3, added the second, third, fourth and fifth sentences; and in the committee commentary, deleted the second, third, fourth, fifth, sixth, seventh, eighth and ninth paragraphs.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 5 Am. Jur. 2d Arson and Related Offenses § 1.

6A C.J.S. Arson § 55.

## 14-1702. Arson; with purpose of collecting insurance; essential elements.

For you to find the defendant guilty of arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally or maliciously [started a fire][2] [or] [caused an explosion][2] with the intent to destroy or damage _____ (*identify property*) which had a [market][3] value of over $_____;

2. The defendant did so for the purpose of collecting insurance for the loss;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use the applicable bracketed phrase.

3. Unless the property has no market value, this bracketed word should be used and UJI 14-1707 NMRA must also be given. If the charge is a second degree felony (over $20,000), use "$20,000" in the blank. If the charge is a third degree felony (over $2,500), use "$2,500" in the blank. If the charge is a fourth degree felony (over $500), use "$500" in the blank. If the charge is a misdemeanor (over $250), use "$250" in the blank.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* § 30-17-5A NMSA 1978. *See* the commentary to UJI 14-1701 NMRA. Arson with intent to defraud an insurer is a statutory addition to common-law arson.

This type of arson is divided into degrees depending on the value of the property, not on the amount of the insurance. This arson applies to all types of property and is not limited to that "of another."

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Compiler's notes.** — Section 450a of the California Penal Code, referred to in the sixth sentence in the first paragraph of the committee commentary, was repealed in 1979.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 1, after "The defendant", added "intentionally or maliciously"; in the Use Note, in Paragraph 3, added the second, third, fourth, and fifth sentences; and in the committee commentary, deleted all of the first paragraph after the second sentence; deleted the former second paragraph; and in the third paragraph, after "This type of arson is" deleted "also".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arson and Related Offenses § 3.

6A C.J.S. Arson § 6.

## 14-1703. Negligent arson; essential elements.

For you to find the defendant guilty of negligent arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant recklessly[2] [started a fire][3] [caused an explosion] on [his] [another's] property;

2. This act caused[4]

[the death of _____ *(name of victim)*][3]

[bodily injury to _____ *(name of victim)*]

[the damage to another's building]

[the damage to another's _____[5]]

[the destruction of another's building]

[the destruction of another's _____[5]];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.
2. *See* UJI 14-1704 for definition of "recklessly."
3. Use only applicable bracketed word or phrase.
4. UJI 14-1705 must also be used if causation is in issue.
5. Insert name or description of the appropriate occupied structure.

**Committee commentary.** — *See* § 30-17-5B NMSA 1978. The statute is derived from the Model Penal Code § 220.1(2) (Proposed Official Draft, 1962). *See also* Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960). Following the general policy of the committee, the instruction eliminates the word "directly" as a modifier of "causing the death, etc., of " as found in the statute. If there is a factual question concerning causation, UJI 14-1705 should be given. This crime is not divided into degrees.

This crime may only be committed by a fire or explosion which causes the death or bodily injury of another or the destruction or damaging of a "building or occupied structure" of another. The definition of occupied structure is derived from the Model Penal Code § 220.1(4) (Proposed Official Draft, 1962). The intent of the model code appears to include only those burnings which ordinarily endanger life. Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960). However, the New Mexico version includes structures used for storing property.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65A C.J.S. Negligence § 306.

## 14-1704. Negligent arson; "recklessly"; defined.

For you to find that the defendant acted recklessly in this case, you must find that he knew that his conduct created a substantial and foreseeable risk, that he disregarded that risk and that he was wholly indifferent to the consequences of his conduct and to the welfare and safety of others.

**Committee commentary.** — *See* § 30-17-5B NMSA 1978. The concept of recklessness is the same as criminal negligence. *Cf. State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973). *See also* Perkins, Criminal Law 760 (2d ed. 1969); Model Penal Code § 2.02(2)(c) (Proposed Official Draft, 1962).

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65A C.J.S. Negligence § 306.

## 14-1705. Negligent arson; "causation"; defined.

For you to find that the [death][1] [injury] [damage] [destruction] in this case was "caused" by the conduct of the defendant, you must find that the [death][1] [injury] [damage] [destruction] was an actual result of the conduct of the defendant and that the natural sequence of events from the defendant's act to the resulting [death][1] [injury] [damage] [destruction] was not interrupted by any other intervening cause.

USE NOTE

Use applicable bracketed word.

**Committee commentary.** — *See* § 30-17-5B NMSA 1978. The statute requires that the death, harm, destruction, etc., be directly caused by the defendant's conduct. Following its general policy, the committee determined that the jury should be instructed on causation only if a question of fact exists. *See, e.g.*, UJI 14-230 and commentary. *See generally* Perkins, Criminal Law 704 (2d ed. 1969); Model Penal Code § 2.03(3)(b) (Proposed Official Draft, 1962).

## 14-1706. Aggravated arson; essential elements.

For you to find the defendant guilty of aggravated arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [set fire to][2] [damaged by any explosive substance] a _____[3] which belonged to another;

2. His act caused[4] _____ *(name of victim)* to sustain

[an injury creating a high probability of death][5]

[serious disfigurement]

[an injury resulting in permanent or long-lasting loss or impairment of the function of any member organ of the body];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed phrase.

3. Insert name or description of property from Section 30-17-6 NMSA 1978.

4. *See* UJI 14-1705 if causation is in issue.

5. Use applicable bracketed phrase depending on the great bodily harm caused.

**Committee commentary.** — *See* 30-17-6 NMSA 1978. This statute requires a "willful or malicious" damaging but not an "intent to destroy or damage." *See* the commentary to UJI 14-1701. *See also* Practice Commentary, N.Y. Penal Code § 150. The instruction uses the statutory elements of "great bodily harm." *See* § 30-1-12A NMSA 1978. The property or structure, the "burning" of which may create culpability under this crime, is limited under the terms of the statute. The value of the property is not relevant under this statute as the gravamen of the offense is the physical harm to others.

The willful or malicious, i.e., intentional, element is not listed in the elements in this instruction because the mandatory criminal intent instruction includes that element and this instruction is limited to the burning of another's property. *See* UJI 14-141 and commentary. To include the element in this instruction would duplicate the element. *See also* commentary to UJI 14-1701.

The statute does not require that the burning be of the property of another or that the burning be with an intent to cause great bodily harm. Apparently any willful and malicious burning resulting in great bodily harm to another gives rise to culpability under the statute. The committee, therefore, believed that the better view was to limit this instruction to a burning, etc., of the property of another. *See State v. Dennis*, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969). *See generally* Perkins, Criminal Law 226 (2d ed. 1969). If the defendant is charged under this section with burning his own property, a special instruction will have to be drafted.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arson and Related Offenses § 52.

6A C.J.S. Arson § 24.

## 14-1707. Arson; "market value"; defined.

"Market value" means the price at which the property could ordinarily be bought or sold just prior to the time of its destruction or damage.

USE NOTE

For use in conjunction with Instructions 14-1701 and 14-1702.

**Committee commentary.** — *See* § 30-17-5A NMSA 1978. The arson statute does not establish a test for determining value. The committee adopted a market value test recognizing that the New Mexico courts have not settled on any one test. *See* committee commentary to UJI 14-1602. However, if the property burned or destroyed has no market value, for example, a bridge, a sign, etc., a special instruction should be drafted using an appropriate test of value.

# CHAPTER 18 and 19
# (Reserved)

# CHAPTER 20
# Crimes Against Public Peace

# Part A
# Refusal to Leave State or Local Government Property

## 14-2001. Crimes against public peace; refusal to leave state or local government property; essential elements.

For you to find the defendant guilty of refusal to leave state or local government property [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant failed or refused to leave _____ *(identify lands or structure entered)*; [the least intrusion constitutes an entry;][2]

2. The defendant knew that consent to remain had been [denied][3] [withdrawn] by the custodian[4] of the property;

3. The defendant [committed][3] [threatened to commit] [incited] _____ *(describe act)*, an act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the _____ *(identify lands or structure)*;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. Use only the applicable alternative.

4. Also give UJI 14-1420, Custodian; definition.

**Committee commentary.** — UJI 14-2001 is used when the failure or refusal to leave state or local government property is accompanied by the impairment or interference with, or obstruction of the lawful processes, procedures or functions of the property.

Unlike the criminal trespass statute found unconstitutional due to vagueness in *State v. Jaramillo*, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972), Section 30-20-13 NMSA 1978 specifically gives the custodian guidelines upon which to draw in determining whether or not to request a person leave the property. The trespasser must commit, threaten to commit, or incite others to commit any act which would interfere with the mission of the property. (*See* committee commentary UJI 14-1401.)

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. *See* Section 12-6-2 NMSA 1978 for a definition of "political subdivisions." "State" generally includes all three branches of government.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-20-13C NMSA 1978.

# CHAPTER 21
# (Reserved)

# CHAPTER 22
# Custody; Confinement; Arrest

# Part A
# Assault and Battery Against Peace Officers; Essential Elements

## 14-2201. Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements.1

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[9];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);]

[or][4]

[challenged the authority of _____ (*name of peace officer*);]

5. The defendant acted in a rude, insolent or angry manner[5];

6. The defendant intended to touch or apply force to _____ (*name of peace officer*) by _____[3];

7. The defendant used a [_____][6] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[7]][8];

8. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2202 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. Use only applicable alternative or alternatives.

5. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

7. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

8. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

9. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978 and UJI 14-2216 NMRA. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 22.00 NMSA 1978; UJI 14-2201 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-22(A)(1) (1971). This crime follows the elements of an aggravated assault by use of a deadly weapon, UJI 14-306 NMRA. *See State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct. App.), *cert. denied*, 87 N.M. 299, 532 P.2d 888 (1974).

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

NMSA 1978, § 30-22-22(A)(1) (1971) provides that the peace officer must be in the lawful discharge of duty at the time of the assault. If the officer was attempting to make an arrest while not in the lawful discharge of duty, an appropriate defense instruction for "resisting an unlawful arrest" must be prepared. *See State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978) for a discussion of "lawful discharge of duties."

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-22A(1) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt, specifically set out the requirement of touching or applying force in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout the instruction; added present element 2; redesignated former element 2 as present element 4, specifically set out the requirement of touching or applying force and redesignated all elements thereafter accordingly; deleted previous Use Note 2; redesignated former Use Note 3 as present Use Note 2 and substituted "ordinary" for "laymen's"; added present Use Notes 3 and 4; redesignated former Use Note 4 as present Use Note 5; and added present Use Note 6.

**The 1999 amendment,** effective February 1, 2000, rewrote element 5 which read: "The defendant used .....;[5]" and, in the Use Note, rewrote Paragraph 6 to correspond to the amendment of element 5 and renumbered the paragraphs.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered Paragraph 6 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 9, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12" and "and "UJI 14-2216 NMRA"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, in the first paragraph, changed the statutory reference from "Section 30-22-22A(1) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(1) (1971)" and added "NMRA" after the UJI citation; deleted the former third paragraph and inserted the current language; and in the fourth paragraph, changed the statutory reference from "Section 30-22-22A(1) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(1) (1971)".

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**If there is factual issue as to performance of duties,** the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 17, 24.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2202. Aggravated assault on a peace officer; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[8];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;

5. The defendant's conduct[3]

[threatened the safety of _____ (*name of peace officer*);]

[or][4]

[challenged the authority of _____ (*name of peace officer*);]

6. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

7. The defendant used a [_____][5] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[6]][7];

8. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2201 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.

2. Insert the count number if more than one count is charged.

3. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. Use only applicable alternative or alternatives.

5. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

7. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

8. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.01 NMSA 1978; UJI 14-2202 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-22A(1) NMSA 1978. Section 30-22-21A(2) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of conduct to be described in the blank line of element 1; rewrote elements 2 and 3, redesignated all elements thereafter accordingly and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout the instruction; rewrote Use Note 2; added present Use Note 3; redesignated previous Use Note 3 as present Use Note 4; and added present Use Note 5.

**The 1999 amendment,** effective February 1, 2000, rewrote element 5 which read: "The defendant used .....;[4]" and, in the Use Note, rewrote Paragraph 5 to correspond to the amendment of element 5 and renumbered the paragraphs.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 6 as Paragraph 2; added Paragraph 3; and renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 8, in the first sentence, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Officer performing duties essential element of offense.** — The failure to instruct that an officer must have been performing his duties is the omission of an essential element, and this omission requires reversal of a conviction of aggravated assault upon a peace officer. *State v. Rhea*, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2203. Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements.1

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[9];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant acted in a rude, insolent or angry manner[4];

5. The defendant intended to touch or apply force to _____ (*name of peace officer*) by _____[3];

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[9];

3. The defendant knew _____ (*name of peace officer*) was a peace officer.

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

6. The defendant's conduct[4]

[threatened the safety of _____ (*name of peace officer*);][5]

[or][5]

[challenged the authority of _____ (*name of peace officer*);]

7. The defendant used a [_____][6] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[7]][8];

8. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction combines the elements of UJI 14-2201 and 14-2202 NMRA. If the evidence supports both of the theories of assault set forth in UJI 14-2201 and 14-2202 NMRA, use this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. Use only applicable alternative or alternatives.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

7. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

8. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

9. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.02 NMSA 1978; UJI 14-2203 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-22A(1) and A(2).

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt and specifically set out the requirement of touching or applying force in present elements 1 and 3, created present elements 2 and 3 from previous lines 2 and 3, respectively, of former element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout the instruction; divided the previous three undesignated lines following "OR" as the present second set of elements 1, 2 and 3; broadened the conduct to be described in the second present element 1; rewrote the second previous element 2 to set out specifically the victim's beliefs; added present element 4; redesignated previous element 2 as present element 5; added present element 6; redesignated previous element 4 as present element 7; rewrote Use Note 1; deleted previous Use Note 3; redesignated previous Use Note 4 as present Use Note 3 and substituted "ordinary" for "laymen's"; added present Use Notes 4 and 5; redesignated previous Use Note 5 as present Use Note 6; and added present Use Note 7.

**The 1999 amendment,** effective February 1, 2000, rewrote element 5 which read: "The defendant used .....;[6]" and, in the Use Note, rewrote Paragraph 6 to correspond to the amendment of element 5, inserted Paragraphs 7 and 8 and redesignated former Paragraph 7 as present Paragraph 9.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first alternative set of paragraphs before "OR", renumbered former Paragraph 6 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 and 3 as Paragraphs 4 and 5; and in the second alternative set of paragraphs after "OR", added Paragraphs 2 and 3; and renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 9, in the first sentence, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2204. Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[5];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant acted in a rude, insolent or angry manner[4];

5. The defendant intended to touch or apply force to _____ (*name of peace officer*) by _____[3];

6. The defendant intended to commit the crime of _____[1];

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.03 NMSA 1978; UJI 14-2204 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-22(A)(3) (1971). This crime includes the elements of an aggravated assault with intent to commit a felony. *See* commentary to UJI 14-308, 14-309, and 14-310 NMRA. *See also* commentary to UJI 14-2201, 14-2202, and 14-2203 NMRA.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M.142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-22(A)(3) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt and added the language dealing with touching or applying force in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; redesignated former element 3 as present element 2; redesignated former element 2 as present element 3 and added the language dealing with touching or applying force; made stylistic changes and the language gender neutral in element 5; made a stylistic change in Use Note 1; deleted former Use Note 3; redesignated former Use Note 4 as present Use Note 3, substituting "ordinary" for "laymen's"; and added present Use Notes 4 and 5.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 4, added "NMRA" after the UJI citations; in Paragraph 5, in the first sentence, changed the statutory reference from "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, changed the statutory reference from "[Section 30-22-22(A)(3) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(3) (1971)"; added "NMRA" after the UJI citations; and in the second paragraph, deleted ""Peace officer" is defined in Section 30-1-12(C) NMSA 1978. If there is an issue as to whether or not the victim is a peace officer, UJI 14-2216 must be given. *See Reese v. State*, 106 N.M. 498, 501, 745 P.2d 1146, 1149 (1987)."; and added the current language.

**Instruction modified by the Supreme Court. —** The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Obstructing Justice § 10.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2205. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[3];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

6. The defendant intended to commit the crime of _____[1];

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

2. Insert the count number if more than one count is charged.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.04 NMSA 1978; UJI 14-2205 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-22(A) (3) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of coverage of the blank line in element 1; rewrote element 2 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout, making corresponding stylistic changes; rewrote Use Note 3; and added Use Note 4.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 4, in the first sentence, changed the statutory reference from "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation and added the last sentence.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2206. Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements.1

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____[2] [as charged in Count _____][3], the state

must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ (*name of peace officer*) by _____[4];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[6];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant acted in a rude, insolent or angry manner[5];

5. The defendant intended to touch or apply force to _____(*name of peace officer*) by _____[4];

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[6];

3. The defendant knew _____ (*name of peace officer*) was a peace officer.

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[5];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

6. The defendant intended to commit the crime of _____[2];

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction combines the essential elements in UJI 14-2204 and UJI 14-2205 NMRA.

2. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.05 NMSA 1978; UJI 14-2206 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-22(A) (3) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt in element 1 and the corresponding Use Note; added the language dealing with touching or applying force in elements 1 and 3 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; broadened the scope of coverage of the blank line in the second element 1; rewrote the second element 2; rewrote Use Note 1; made a stylistic change in Use Note 2; deleted former Use Note 4; redesignated former Use Note 5 as present Use Note 4, substituting "ordinary" for "laymen's"; and added Use Notes 5 and 6.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first alternative set of paragraphs before "OR", renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 and 3 as Paragraphs 4 and 5; in the second alternative set of paragraphs after "OR", added Paragraphs 2 and 3; and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 6, in the first sentence, changed the statutory reference from "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2207. Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to kill [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ (*name of peace officer*) by _____[2];

2. The defendant intended to touch or apply force to _____ (*name of peace officer*) by _____[2];

3. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[4];

4. The defendant knew _____ (*name of peace officer*) was a peace officer;

5. The defendant acted in a rude, insolent or angry manner[3];

6. The defendant intended to kill _____ (*name of peace officer*);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.06 NMSA 1978; UJI 14-2207 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-23(A) (1971). *Compare* UJI 14-311 NMRA, UJI 14-312 NMRA, UJI 14-313 NMRA and commentary. *See also* commentary to UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-23 NMSA 1978 and Section 30-22-21(A) (1).

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt in element 1 and the corresponding Use Note; added the touching or applying force language in elements 1 and 3 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout, making corresponding stylistic changes; redesignated former Use Note 3 as present Use Note 2, substituting "ordinary" for "laymen's"; and added Use Notes 3 and 4.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 3; added Paragraph 4; and renumbered former Paragraphs 3, 4 and 6 as Paragraphs 5 through 7; in the Use Note, in Paragraph 4, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, changed the statutory reference from "Section 30-22-23(A) NMSA 1978" to "NMSA 1978, § 30-22-23(A) (1971)"; added "NMRA" after the UJI citations; and added the last sentence.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2208. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to kill [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[3];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[2];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

6. The defendant intended to kill _____ (*name of peace officer*);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.07 NMSA 1978; UJI 14-2208 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary for UJI 14-2207 NMRA. *See also* UJI 14-312 NMRA for aggravated assault by threat or menacing conduct with intent to commit a violent felony. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Sections 30-22-23 NMSA 1978 and 30-22-21(A) (2) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of coverage of the blank line in element 1; rewrote element 2; substituted "*(name of peace officer)*" for "*(name of victim)*" throughout and made corresponding stylistic changes; deleted former Use Note 2; and added present Use Notes 2 and 3.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2, added Paragraph 3, and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; and in the Use Note, in Paragraph 3, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added

the last sentence; and in the committee commentary, added "NMRA" after the UJI citations; and added the last sentence.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 24.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2209. Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements.1

For you to find the defendant guilty of aggravated assault on a peace officer with intent to kill [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _____ (*name of peace officer*) by _____[3];

2. The defendant intended to touch or apply force to _____ (*name of peace officer*) by _____[3];

3. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[5];

4. The defendant knew _____ (*name of peace officer*) was a peace officer;

5. The defendant acted in a rude, insolent or angry manner[4];

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[5];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of*

*peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[4];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

6. The defendant intended to kill _____ (*name of peace officer*);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction combines the essential elements set forth in UJI 14-2207 and 14-2208 NMRA.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.08 NMSA 1978; UJI 14-2209 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* committee commentary for UJI 14-2207 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-23 NMSA 1978.

**The 1997 amendment,** effective for cases field in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt in element 1 and the corresponding Use Note; added the touching or applying force language in elements 1 and 3 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; broadened the scope of coverage of the blank line in the second element 1; rewrote the second element 2 and made corresponding stylistic changes; rewrote Use Note 1; redesignated former Use Note 4 as present Use Note 3, substituting "ordinary" for "laymen's"; and added present Use Notes 4 and 5.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first alternative set of paragraphs before "OR", renumbered former Paragraph 5 as Paragraph 3, added Paragraph 4, renumbered former Paragraph 3 as Paragraph 5; in the second alternative set of paragraphs after "OR", added Paragraphs 2 and 3 and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; and in the Use Note, in Paragraph 5, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 17, 24.

What constitutes offense of obstructing or resisting Officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2210. Aggravated assault in disguise on a peace officer; essential elements.

For you to find the defendant guilty of aggravated assault in disguise on a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[5];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[2];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

6. At the time _____ (*name of defendant*) was [wearing a _____[3]] [or][4] [disguised] for the purpose of concealing _____'s (*name of defendant*) identity;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use either or both alternatives.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.09 NMSA 1978; UJI 14-2210 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-22(A)(2) (1971). This crime includes the elements of regular aggravated assault in disguise. *See* UJI 14-307 NMRA and commentary. *See also* commentary to UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-22(A)(2) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of coverage of the blank line in element 1; rewrote element 2 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; made elements 4 and 5 gender neutral and made stylistic changes; rewrote Use Notes 2 and 4; and added Use Note 5.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2, added Paragraph 3, and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; and in the Use Note, in Paragraph 5, in the first sentence, after "'Peace officer' is defined in", changed "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, changed "Section 30-22-22(A)(2) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(2) (1971)"; added "NMRA" after the UJI citations; and added the last sentence.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice § 10.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2211. Battery upon a peace officer; essential elements.

For you to find the defendant guilty of a battery upon a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally [and unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[5];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused

[an actual injury to _____ (*name of peace officer*)];

[or][4]

[an actual threat to the safety of _____ (*name of peace officer*)];

[or][4]

[a meaningful challenge to the authority of _____ (*name of peace officer*)];

5. The defendant acted in a rude, insolent or angry manner;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. In *State v. Padilla*, 1996-NMSC-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA. *See also State v. Jones*, 2000-NMCA-047, ¶ 1, 129 N.M. 165, 3 P.3d 142, *cert. denied*, 129 N.M. 207, 4 P.3d 35.

3. Use ordinary language to describe the touching or application of force.

4. Use only applicable alternative or alternatives.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was

within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.10 NMSA 1978; UJI 14-2211 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-24 (1971). *See* commentaries to UJI 14-320 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA.

The committee believed that it would be seldom, if ever, that a person would be charged with the crime of assisting in assault on a peace officer during a riot or unlawful assemblage pursuant to NMSA 1978, § 30-22-26 (1971) and, therefore, provided no instruction for the latter offense. In almost every conceivable situation, the state will probably want to proceed under NMSA 1978, § 30-22-24 (1971), charging one who assists in the battery upon a peace officer as an accessory. *See* NMSA 1978, § 30-1-13 (1972).

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Statutory reference.** — Section 30-22-24 NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added element 2 and made corresponding stylistic changes; substituted "ordinary" for "laymen's" in Use Note 2; and added Use Notes 3 through 5.

**The 2001 amendment,** effective November 1, 2001, inserted "intentionally [and unlawfully][2]" in Element 1; inserted "caused" in the introductory language, substituted "and actual" for "[caused]", "an actual threat to" for "[threatened]" and "a meaningful challenge to" for "[challenged]" in Element 2; renumbered Use Note 2 as Use Note 3, added present Use Note 2, and deleted former Use Note 3.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 4 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2, 3 and 5 as Paragraphs 4 through 6; in the Use Note, in Paragraph 5, in the first sentence, changed "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must

be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, in the first paragraph changed the statutory reference from "Section 30-22-24 NMSA 1978" to "NMSA 1978, § 30-22-24 (1971)", and added "NMRA" after the UJI citations"; in the second paragraph, changed the statutory references from "Section 30-22-26 NMSA 1978" to "NMSA 1978, § 30-22-26 (1971)"; from "Section 30-22-24 NMSA 1978" to "NMSA 1978, § 30-22-24 (1971)"; and from "Section 30-1-13 NMSA 1978" to "NMSA 1978, § 30-1-13 (1972)"; and in the third paragraph, deleted the sentence which read "'Peace officer' is defined in Section 30-1-12(C) NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given."; and inserted the current language.

**Instruction modified by the Supreme Court. —** The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Sufficiency of evidence. —** Where a defendant coupled his rude, insolent, or angry remarks with force upon a police officer, the jury could properly find defendant guilty of battery upon a police officer. *State v. Cruz,* 110 N.M. 780, 800 P.2d 214 (Ct. App. 1990).

**Use of "lawful discharge of his duties" not required. —** In a prosecution for battery upon a police officer, the trial court did not commit error in refusing defendant's requested jury instruction seeking the use of the words "lawful discharge of his duties" instead of "performing the duties of a peace officer." *State v. Nemeth,* 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936.

**Instruction when officer not discharging duties. —** One cannot batter a peace officer while in the lawful discharge of his duties without battering the person of another, and there being evidence that the police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul,* 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977).

**If there is factual issue as to performance of duties,** the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales,* 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

**There was no error in refusing instruction on officer's right to detain person** where the requested instruction was incomplete because it focused only on the officer's initial approach to the defendant and disregarded the officer's attempt to arrest after the defendant allegedly hit the officer. In light of the evidence, the requested instruction would have confused the jury on the issue of lawful discharge of duties. *State v. Kraul,* 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10, 20, 24.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2212. Aggravated battery on a peace officer with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery on a peace officer with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3] with a [_____][4] [deadly weapon. A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[5]][6];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[8];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct

[caused injury to _____ (*name of peace officer*)];

[or][7]

[threatened the safety of _____ (*name of peace officer*)];

[or][7]

[challenged the authority of _____ (*name of peace officer*)];

5. The defendant intended to injure _____ (*name of peace officer*);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Subsection B of Section 30-1-12 NMSA 1978.

5. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

6. This alternative is given only if the object used is not specifically listed in Subsection B of Section 30-1-12 NMSA 1978.

7. Use only applicable alternative or alternatives.

8. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.11 NMSA 1978; UJI 14-2212 SCRA; as amended, effective January 15, 1998; February 1, 2000; November 1, 2001; as amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009; by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-25 (1971). *See* commentaries to UJI 14-322 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA.

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009; by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**ANNOTATIONS**

**Cross references.** — *See* NMSA 1978, § 30-22-25 (1971).

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added element 2 and made corresponding stylistic changes; substituted "ordinary" for "laymen's" in Use Note 2; and added Use Notes 4 through 6.

**The 1999 amendment,** effective February 1, 2000, rewrote element 1 which read: "The defendant touched or applied force to _____ (name of peace officer) by _____[2] with a" and, in the Use Note, rewrote Paragraph 3 to correspond to the amendment of element 1, inserted Paragraphs 4 and 5 and redesignated former Paragraphs 4, 5 and 6 as present Paragraphs 6, 7 and 8, respectively.

**The 2001 amendment,** effective November 1, 2001, inserted "[unlawfully][2]" at the beginning of Element 1 and deleted the former second sentence in Element 1, pertaining to the name of the object the defendant used; rewrote former Use Note 6 as present Use Note 2; and renumbered Use Notes 2 through 5 as 3 through 6.

**The 2008 amendment,** as approved by Supreme Court Order 08-8300-060, effective February 2, 2009, in Paragraphs 4, 6 and 8 of the "USE NOTE" changed the form of the statutory citation.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 4 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2, 3, and 5 as Paragraphs 4 through 6; in the Use Note, in Paragraphs 4 and 6, changed "NMSA 1978, Section 30-1-12(B) (1963)" to "Subsection B of Section 30-1-1-2 NMSA 1978"; in Paragraph 8, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citations; and added the last sentence.

**Knowledge of the victim's identity as a peace officer.** — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 17, 20.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2213. Aggravated battery on a peace officer; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm on a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[6];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct

[caused injury to _____ (*name of peace officer*)];

[or][4]

[threatened the safety of _____ (*name of peace officer*)];

[or][4]

[challenged the authority of _____ (*name of peace officer*)];

5. The defendant intended to injure _____ (*name of peace officer*);

6. The defendant

[caused great bodily harm[5] to _____ (*name of peace officer*)];

[or][4]

[acted in a way that would likely result in death or great bodily harm[5] to _____ (*name of peace officer*)];

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. The definition of "great bodily harm," UJI 14-131 NMRA, must also be given.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.12 NMSA 1978; UJI 14-2213 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-25(A) and (C) (1971). *See* commentaries to UJI 14-131 NMRA, UJI 14-320 NMRA, UJI 14-322 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M.142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-25(C) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added Use Note 2 and made corresponding stylistic changes; substituted "ordinary" for "laymen's" in Use Note 2; rewrote Use Note 3; and added Use Notes 5 and 6.

**The 2001 amendment,** effective November 1, 2001, inserted "[unlawfully][2]" at the beginning of Element 1; rewrote former Use Note 3 as present Use Note 2; and renumbered former Use Note 2 as present Use Note 3.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 6, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA", which defined 'peace officer'"; and added the last sentence; and in the committee commentary, changed "Subsections A and C of Section 30-22-25 NMSA 1978" to "NMSA 1978, § 30-22-25(A) and (C) (1971)"; added "NMRA" after the UJI citations; deleted the last two sentences, which read "'Peace officer' is defined in Section 30-1-12C NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given."; and inserted the current last sentence.

**Knowledge of the victim's identity as a peace officer.** — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Instruction on lesser included offense of battery.** — Where the defendant is tried for aggravated battery on a peace officer, the defendant is entitled to an instruction on the lesser included offense of battery. *State v. Nozie*, 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756, cert. granted, 2007-NMCERT-009.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 17, 20.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2214. Aggravated battery on a peace officer; without great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery on a peace officer without great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[6];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct

[caused injury to _____ (*name of peace officer*)];

[or][4]

[threatened the safety of _____ (*name of peace officer*)];

[or][4]

[challenged the authority of _____ (*name of peace officer*)];

5. The defendant intended to injure _____ (*name of peace officer*);

6. _____'s (*name of peace officer*) injury was not likely to cause death or great bodily harm[5];

7. The defendant caused _____ (*name of peace officer*) [painful temporary disfigurement] [or][4] [a temporary loss or impairment of the use of _____ (*name of organ or member of the body*)];

8. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. UJI 14-131 NMRA, the definition of "great bodily harm" must be given if this alternative is used.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[UJI 14-2214 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-25(A) and (B) (1971). *See* commentaries to UJI 14-321 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-25B NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language of element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added elements 2 and 4 and made corresponding stylistic changes; clarified the meaning of "member" in element 5; substituted "ordinary" for "laymen's" in Use Note 2; added Use Note 3 and made a corresponding stylistic change; and added Use Notes 5 and 6.

**The 2001 amendment,** effective November 1, 2001, inserted "[unlawfully][2]" at the beginning of Element 1; rewrote former Use Note 3 as present Use Note 2; and renumbered former Use Note 2 as present Use Note 3.

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 6 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 6, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, deleted "Section 30-22-25A and 30-22-25B NMSA 1978" and added "NMSA 1978, § 30-22-25(A) and (B) (1971)"; added "NMRA" after the UJI citations; deleted the last two sentences, which read ""Peace officer" is defined in Section 30-1-12C NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given."; and added the current last sentence.

**Knowledge of the victim's identity as a peace officer.** — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Instruction modified by the Supreme Court.** — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 17, 20.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

## 14-2215. Resisting, evading or obstructing an officer; essential elements.1

For you to find the defendant guilty of resisting, evading or obstructing an officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of officer*) was a [peace officer[2]] [judge] [magistrate][3] in the lawful discharge of duty;

2. The defendant knew_____(*name of officer*) was a [peace officer] [judge] [magistrate][3];

3. [The defendant knowingly obstructed, resisted or opposed _____ (*name of officer*) in serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;]

[OR][3]

[The defendant, with the knowledge that _____ (*name of officer*) was attempting to apprehend or arrest the defendant, fled, attempted to evade or evaded _____ (*name of officer*);]

[OR][3]

[The defendant willfully refused to bring a vehicle to a stop when given a visual or audible signal to stop by _____ (*name of officer*), a uniformed officer who was in an appropriately marked police vehicle;]

[OR][3]

[The defendant resisted or abused _____ (*name of officer*) in the lawful discharge of _____'s (*name of officer*) duties;]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert count number if more than one count is charged.

2. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." The mistake of fact referred to in prior UJI 16-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

3. Use only the applicable alternative.

[Adopted May 1, 1986; UJI 14-2215 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

**Committee commentary.** — Pursuant to the court order of February 10, 1986, this instruction is applicable to cases tried after May 1, 1986. This instruction was amended in 2011 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

"'Resisting, evading, or obstructing an officer' primarily consists of acts of physical resistance." *State v. Wade*, 100 N.M. 152, 153, 667 P.2d 459, 460 (Ct. App. 1983). "New Mexico courts have found [NMSA 1978,] § 30-22-1 to prohibit certain speech, when that speech is abusive, but not when it is merely evasive." *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1216-17 (10th Cir. 2008) (citing *Wade*, 100 N.M. at 154, 667 P.2d at 461). "'[A]busing' speech in § 30-22-1(D) . . . covers only speech that can be called 'fighting' words." *Wade*, 100 N.M. at 154, 667 P.2d at 461. "'Fighting' words are those which tend to incite an immediate breach of the peace." *Id.*

[As amended by Supreme Court Order No. No. 11-8300-004, effective March 21, 2011.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-1(B) and (D) NMSA 1978.

**The 1997 amendment,** effective for cases filed in the district courts on and after January 15, 1998, substituted "*(name of peace officer)*" for "*(name of victim)*" throughout and made related stylistic changes; made element 1 gender neutral; added present Use Note 3, redesignating former Use Note 3 as present Use Note 4; and deleted former Use Note 4.

**The 2011 amendment,** approved by Supreme Court Order No. 11-8300-004, effective March 21, 2011, added Paragraph 2 concerning the defendant's knowledge of the victim's official status; in Paragraph 3, added alternative instructions concerning obstruction of the service of process and refusal to stop a vehicle; and in the Use Note, added references to jury instructions that define "peace officer" and that concern the defense of mistake of fact.

**Burden of proof on state.** — In order to convict defendant of evading and eluding a police officer, the state had the burden of proving that officer was a peace officer engaged in the lawful discharge of his duty and defendant, with knowledge that officer was attempting to apprehend or arrest him, fled, attempted to evade, or evaded officer. *State v. Gutierrez*, 2005-NMCA-093, 138 N.M. 147, 117 P.3d 953, cert. granted, 2005-NMCERT-007, 138 N.M. 146, 117 P.3d 952.

**Sufficient evidence.** — Where police officers arrested defendant for DWI; defendant argued with the officers and refused to cooperate; defendant would not put defendant's legs into the police car, preventing the officers from closing the door; when the officers forced defendant's legs into the car, defendant placed defendant's head in a position that prevented the officer from closing the door; defendant intentionally fell out of the car; and defendant twice kicked one officer, the evidence was sufficient to support defendant's conviction of resisting and abusing an officer. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

## 14-2216. "Peace officer"; defined.1

A "peace officer"[1] is any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

USE NOTE

1. The definition of "peace officer" is taken from Subsection C of Section 30-1-12 NMSA 1978.

[Adopted, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary. —** The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into UJIs 14-2201 NMRA to 14-2215 NMRA. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, deleted the former title of the rule which stated "Defendant did not know victim was a peace officer" and added the current title; deleted all of the former paragraphs of the instruction except the current paragraph; in the Use Note, deleted former Paragraph 1, which provided that the instruction is to be given if there is a question of fact as to whether or not the defendant knew that the victim was a law enforcement officer; renumbered former Paragraph 2 as Paragraph 1 and changed the statutory reference; and replaced the former committee commentary with the current commentary.

**Resisting, evading or obstructing an officer. —** Where defendant, who was charged with resisting, evading or obstructing a law enforcement officer, testified that defendant did not know that the persons pursuing defendant were police officers, because the officers were in plain clothes and drove unmarked vehicles, defendant was entitled to a jury instruction requiring the state to prove that the defendant knew that the persons seeking to detain defendant were law enforcement officers. *State v. Akers*, 2010-NMCA-103, 149 N.M. 53, 243 P.3d 757.

Where defendant was charged with resisting, evading or obstructing law enforcement officers and with aggravated assault on one of the officers; defendant provided evidence that defendant did not know that the persons pursuing defendant were police officers; on the charge of resisting, evading and obstructing a law enforcement officer, the trial court refused to instruct the jury that defendant needed to know that the persons pursuing defendant were peace officers; on the charge of aggravated assault, the trial court gave the jury an instruction in conformance with UJI 14-2216 NMRA; and the jury was instructed that each crime should be considered separately, the instruction given

on aggravated assault was not sufficiently applicable to both crimes, and defendant was entitled to an instruction in conformance with UJI 14-2216 NMRA that, to convict defendant of resisting, evading and obstructing a peace officer, the state had to prove the defendant knew that the officers were peace officers. *State v. Akers*, 2010-NMCA-103, 149 N.M. 53, 243 P.3d 757.

**Knowledge of the victim's identity as a peace officer.** — Where a reasonable jury could have found that defendant was in a dazed, disoriented, and intoxicated state; the defendant was fighting with the defendant's spouse in a supermarket parking lot; a supermarket security guard subdued the defendant; the defendant escaped and walked to an adjacent parking lot; a police officer arrived at the scene and followed the defendant in a marked police car; the police officer was wearing a police uniform; the police officer did not verbally identify himself as a police officer or activate the siren or emergency lights on the police car; the defendant physically attacked the police officer; the defendant believed that the victim was the private security guard who had followed the defendant from the supermarket parking lot; and the jury was not otherwise instructed that knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, the defendant was entitled to a mistake of fact instruction. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, aff'g 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Aggravated battery on a peace officer.** — This instruction applies to the offense of aggravated battery on a peace officer when there is a question of fact as to whether the defendant knew the victim was a peace officer. *State v. Nozie*, 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756, cert. granted, 2007-NMCERT-009.

## 14-2217. Aggravated fleeing a law enforcement officer.

For you to find the defendant guilty of aggravated fleeing a law enforcement officer [as charged in Count _____]1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;

2. The defendant drove willfully and carelessly in a manner that endangered the life of another person;

3. The defendant had been given a visual or audible signal to stop by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle;

4. The defendant knew that a law enforcement officer had given him an audible or visual signal to stop;

5. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

[Adopted by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

**Committee commentary.** — Although the statute requires that the pursuit be conducted "in accordance with" the Law Enforcement Safe Pursuit Act, NMSA 1978, Sections 29-20-1 to -4 (2003), this is not an essential element of the crime. *State v. Padilla*, 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299, rev'g *State v. Padilla*, 2006-NMCA-107, ¶ 19.

[Adopted by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

**ANNOTATIONS**

**Cross references.** — *See* NMSA 1978, § 30-22-1.1 (2003).

# Part B
# Escape and Rescue

## 14-2220. Unlawful rescue; felony; capital felony; essential elements.

For you to find the defendant guilty of unlawful rescue [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in [custody of _____ *(name of peace officer)*][2] [confinement];

2. _____ *(name of prisoner)* was [under conviction of _____[3]][2] [charged with _____[3]];

3. The defendant freed _____ *(name of prisoner);*

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Insert name of crime.

**Committee commentary.** — *See* Section 30-22-7 NMSA 1978. The intentional element of the statutory crime is covered by the general intent instruction, UJI 14-141.

Although the lawfulness of the custody or confinement of the prisoner is an essential element of the crime of unlawful rescue, this issue is almost always a question of law to be decided by the judge. (*See* "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

Unlawful Rescue; Assisting Escape Distinguished. - The essential elements of unlawful rescue (Section 40A-27-7 NMSA 1953 Comp.) and assisting escape (Section 40A-27-11; UJI 14-2224), as set forth in the Criminal Code, appear to be the same. The courts, when confronted with similar statutory provisions, have held that the distinguishing element between the two offenses is the cooperation of the prisoner. An unlawful rescue takes place where there is no effort on the part of the prisoner to escape. The prisoner's deliverance must be effected by the intervention of others without his cooperation. The crime of assisting a prisoner to escape consists of inciting, supporting or reenforcing a prisoner's exertions to escape. *See Merrill v. State*, 42 Ariz. 341, 26 P.2d 110 (Ariz. 1933); *People v. Murphy*, 130 Cal. App. 408, 20 P.2d 63 (1933); *Day v. State*, 86 Ga. App. 757, 72 S.E.2d 500 (1952); and *Robinson v. State*, 82 Ga. 535, 9 S.E. 528 (1889).

In New Mexico there is one further distinguishing characteristic between the crime of unlawful rescue and the crime of assisting escape: unlawful rescue is limited to confinement or custody for felony offenses while assisting escape is not so limited.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not a person is a peace officer is normally a question of law to be decided by the court. In the event there is a question of fact as to whether the person having custody of the defendant is a peace officer, a special instruction would have to be drafted.

## ANNOTATIONS

**Cross references.** — *See* Section 30-22-7 NMSA 1978.

**Compiler's notes.** — The reference to 40A-27-7 and 40A-27-11, 1953 Comp., in the first sentence in the third paragraph of the committee commentary should seemingly be to 40A-22-7 and 40A-22-11, 1953 Comp., which are compiled as 30-22-7 and 30-22-11 NMSA 1978.

**Criminal Code.** — *See* 30-1-1 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 5.

30A C.J.S. Escape and Related Offenses; Rescue § 28 et seq.

## 14-2221. Escape from jail; essential elements.1

For you to find the defendant guilty of escape from jail [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed[3] to jail;

2. The defendant [escaped from][4] [or] [attempted to escape from] jail;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. If the escape is from a jail release program, use UJI 14-2228.

2. Insert the count number if more than one count is charged.

3. The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge. (*See* "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest", following these instructions.)

4. Use only the applicable bracketed element established by the evidence.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.00 NMSA 1978; UJI 14-2221 SCRA; as amended, effective January 1, 1999.]

**Committee commentary.** — *See* Section 30-22-8 NMSA 1978. In *State v. Weaver,* 83 N.M. 362, 492 P.2d 144 (Ct. App. 1971), the Court held that an escape from the kitchen of the jail was the same as escape from the jail. Escape from jail includes escape from a jail release program. *See State v. Najar,* 118 N.M. 230, 232, 880 P.2d 327, 329 (Ct.App. 1994) (*cert. denied* 118 N.M. 90, 879 P.2d 91):

Escape from jail or a jail inmate-release program is a fourth degree felony. NMSA 1978, § 30-22-8 (Repl. Pamp. 1994); *State v. Coleman*, 101 N.M. 252, 253, 680 P.2d 633, 634 (Ct. App. 1984).

Section 30-22-8 NMSA 1978 requires that the defendant must have been lawfully committed for the crime of escape from jail to be committed. The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge.

[Amended November 12, 1998.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-8 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, inserted the first instance of "from" in Element 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

30A C.J.S. Escape §§ 6 to 9.

## 14-2222. Escape from the penitentiary; essential elements.

For you to find the defendant guilty of escape from the penitentiary [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed to the penitentiary;

2. The defendant [escaped][2] [attempted to escape] from [the penitentiary][2] [_____ *(official title)*[3]];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Describe the name or place of custody or confinement if it is not actually within the confines of the penitentiary.

**Committee commentary.** — *See* Section 30-22-9 NMSA 1978. Escape from the penitentiary includes escape from other facilities under the department of corrections. *See State v. Peters,* 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962), and *State v. Budau,* 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), *cert. denied,* 86 N.M. 5, 518 P.2d 1209 (1974).

Section 30-22-9 NMSA 1978 requires that the defendant must have been lawfully committed for the crime of escape from the penitentiary to be committed. The issue of the lawfulness of the commitment is almost always a question of law to be decided by the judge.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-9 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

30A C.J.S. Escape §§ 6 to 9.

## 14-2223. Escape from custody of a peace officer; essential elements.

For you to find the defendant guilty of escape from custody of a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was arrested [under authority of a warrant][2] [upon reasonable grounds to believe that he had committed _____[3]];

2. The defendant [escaped][2] [attempted to escape] from the custody of a _____ *(official title)*;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Insert name of felony for which the defendant had been arrested. The essential elements of the felony must also be given immediately following this instruction.

**Committee commentary.** — *See* Section 30-22-10 NMSA 1978. A charge of escape from the custody of a peace officer may be shown by evidence of escape from an institution. *See State v. Millican,* 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

An essential element of the crime of escape from custody of a peace officer is that the person escaping must have been placed under lawful arrest. If the arrest is without a warrant and the jury finds that the person was arrested upon reasonable grounds that the defendant committed a felony, the person has been lawfully arrested. If the arrest is made under authority of a warrant, the question of lawfulness will almost always be a question of law to be decided by the judge.

*See State v. Selgado,* 76 N.M. 187, 413 P.2d 469 (1966), for a discussion of when a police officer may make an arrest for a misdemeanor without a warrant.

*See* Perkins, Criminal Law 500 (2d ed. 1969), for when an arrest takes place.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-10 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

30A C.J.S. Escape §§ 6 to 9.

## 14-2224. Assisting escape; essential elements.

For you to find the defendant guilty of assisting escape [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in [custody of _____ *(name of peace officer)*][2]

[confinement at _____[3]];

2. _____ *(name of prisoner)* escaped;

3. The defendant aided the escape of _____ *(name of prisoner)*;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Describe place of custody or confinement.

**Committee commentary.** — *See* Section 30-22-11A NMSA 1978. In New Mexico, the statutory offense of assisting escape is a separate and distinct offense from the crime of unlawful rescue (Section 30-22-7 NMSA 1978) and the crime of furnishing articles for

prisoner's escape (Section 30-22-12 NMSA 1978). *See* commentary to UJI 14-2220 for the distinction between the offense of unlawful rescue and assisting escape.

The crime of assisting escape may be a lesser included offense of the crime of furnishing articles for prisoner's escape.

If a question is raised concerning the lawfulness of the custody or confinement of the prisoner, this question will almost always be a question of law to be decided by the judge.

*See* Section 30-1-12H NMSA 1978 for the definition of lawful custody or confinement.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not a person is a peace officer is normally a question of law to be decided by the court. In the event there is a question of fact as to whether the person having custody of the defendant is a peace officer a special instruction would have to be drafted.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-11A NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 5, 6.

30A C.J.S. Escape § 19.

## 14-2225. Assisting escape; officer, jailer or employee permitting escape; essential elements.

For you to find the defendant guilty of assisting escape [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in custody of the defendant;

2. The defendant was _____ *(official title or position)*;

3. _____ *(name of prisoner)* escaped;

4. The defendant permitted the escape of _____ *(name of prisoner)* from his custody;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

**Committee commentary.** — *See* Section 30-22-11B NMSA 1978.

The crime of assisting an escape may be committed by an officer, jailer or employee permitting a prisoner in his custody to escape.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-11B NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 23, 24, 25.

30A C.J.S. Escape §§ 6 to 9.

## 14-2226. Furnishing articles for escape; essential elements.

For you to find the defendant guilty of furnishing articles for escape [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in custody or confinement;

2. The defendant gave to _____ *(name of prisoner)*

[(a _____[2])[3] (an explosive substance) without the express consent of the officer in charge of _____;[4]][3]

[OR]

[a _____[5] which would be useful in aiding an escape;]

3. The defendant intended to assist _____ *(name of prisoner)* to escape;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12B NMSA 1978, or use the phrase "an instrument or object which, when used as a weapon, could cause death or very serious injury."

3. Use only applicable element established by the evidence.

4. Identify the place of confinement.

5. Identify the disguise, instrument or tool or other item which would be useful in gaining escape.

**Committee commentary.** — *See* Section 30-22-12 NMSA 1978.

Assisting escape is most often committed by furnishing articles for a prisoner's escape.

The cooperation of the prisoner is not an element of the offense of furnishing articles for prisoner's escape. *See* commentary to UJI 14-2220.

If a question is raised concerning the lawfulness of the custody or confinement of the prisoner, this question will almost always be a question of law to be decided by the judge.

The third element of UJI 14-2226, requiring the jury to find that the defendant intended to assist the prisoner to escape, is implicit in Section 30-22-12 NMSA 1978, supra.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-12 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 5.

30A C.J.S. Escape § 25.

## 14-2227. Assault on a jail; essential elements.

For you to find the defendant guilty of assault on a jail [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant assaulted[2] or attacked _____,[3] [a jail][4] [a prison] [place of confinement of prisoners];

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the jury asks for a definition of "assaulted," use a non-law dictionary definition.

3. Identify the place of the attack.

4. Use only the applicable bracketed element established by the evidence.

**Committee commentary.** — *See* Section 30-22-19 NMSA 1978. Although the statutory elements do not include any specific intent to procure the escape of prisoners, that intent was included in jury instructions in the prosecution for the Tierra Amarilla courthouse raid of 1967. *See State v. Tijerina*, 86 N.M. 31, 519 P.2d 127 (1973), aff'g 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974), and *State v. Tijerina*, 84 N.M. 432, 441, 504 P.2d 642, 651 (Ct. App. 1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974). The instruction was not the subject of a direct appeal in that case because the defendants were acquitted of the charge.

If a question is raised concerning whether the place of confinement is a place where prisoners are held in lawful custody, this question will almost always be a question of law to be decided by the judge.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-19 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 30A C.J.S. Escape § 25.

## 14-2228. Escape; inmate-release program; essential elements.

For you to find the defendant guilty of escape from an inmate-release program [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed[3] to _____ *(identify institution)*;

2. The defendant was released from _____ *(identify institution)* to _____ *(describe purpose for release)*;

3. The defendant failed to return to confinement within the time fixed for the defendant's return;

4. The defendant's failure to return was willful, without sufficient justification or excuse[4];

5. The defendant intended not to return within the time fixed;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction is also to be used for escape from jail.

2. Insert the count number if more than one count is charged.

3. The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge. (*See* "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest", following these instructions.)

4. This element is necessary to comply with *State v. Rosaire,* 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.28 NMSA 1978; UJI 14-2228 SCRA; as amended, effective January 1, 1999.]

**Committee commentary.** — *See* Section 33-2-46 NMSA 1978. The inmate-release program was established by Chapter 166, Laws 1969. In 1975, Section 33-2-46 NMSA 1978 was amended to make escape from the inmate-release program the equivalent of a third degree felony.

The inmate-release program is described in Sections 33-2-43 to 33-2-47 NMSA 1978. Since this is a specific offense carrying a lesser penalty than escape from the penitentiary, the essential elements include the specific reasons for the prisoner's release. Unless the prisoner is released for one of the specific purposes set forth in Section 33-2-44 [or] 33-2-45 NMSA 1978, an escape from custody by the prisoner is governed by Section 30-22-9 NMSA 1978, escape from the penitentiary.

**ANNOTATIONS**

**Cross references.** — *See* Sections 33-2-43 through 33-2-47 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, rewrote this instruction to conform it to State v. Rosaire, 123 N.M. 701, 945 P.2d 66 (1997).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape, 76 A.L.R.3d 658.

## 14-2229. Failure to appear; bail.

For you to find the defendant guilty of failure to appear as required by conditions of release [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* was released pending [trial] [an appeal] in a criminal action on the condition that _____ *(name of defendant)* appear as required by the court;

2. _____ *(name of defendant)* failed to appear as required by the court;

3. The defendant's failure to appear was willful, without sufficient justification or excuse;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.29 NMSA 1978; UJI 14-2229 SCRA; as amended, effective January 1, 1999.]

**Committee commentary.** — *See* Section 31-3-9 NMSA 1978.

Section 31-3-9 NMSA 1978, *supra,* provides that the defendant must willfully fail to appear. The third element of this instruction was added in 1998 to comply with *State v. Rosaire,* 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Amended November 12, 1998.]

**ANNOTATIONS**

**Cross references.** — *See* Section 31-3-9 NMSA 1978.

**The 1998 amendment,** effective January 1, 1999, amended this instruction to conform language with 31-3-9 NMSA 1978, rewriting Elements 1 and 2, adding present Element 3, and redesignating former Element 3 as Element 4.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

# Part C
# Obstruction of Justice

## 14-2240. Harboring a felon; essential elements.

For you to find the defendant guilty of harboring a felon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [concealed][2] [gave aid to] _____ *(name of felon)*, with the intent that _____ *(name of felon)* [escape][2] [avoid arrest, trial, conviction or punishment];

2. The defendant knew that _____ *(name of felon)* had committed _____[3];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed elements established by the evidence.

3. Identify the felony committed.

**Committee commentary.** — *See* Section 30-22-4 NMSA 1978. A conviction under this statute was upheld by the supreme court upon evidence that the defendant had witnessed the crime and then allowed the perpetrator to hide in her home. *See State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975).

The statute provides that certain relatives, either by consanguinity or affinity, may harbor or aid a felon with impunity. The supreme court has held that the enumeration of certain persons does not deny a person who is only "living" with another person the equal protection of the law. *See State v. Lucero*, supra.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking and Rescue § 6.

Charge of harboring or concealing or assisting one charged with crime to avoid arrest, predicated upon financial assistance, 130 A.L.R. 150.

30A C.J.S. Escape §§ 26, 27; 67 C.J.S. Obstructing Justice § 14.

## 14-2241. Tampering with evidence; essential elements.

For you to find the defendant guilty of tampering with evidence [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [destroyed] [changed] [hid] [fabricated] [placed][2] _____(*identify physical evidence*);

2. By doing so, the defendant intended to [prevent the apprehension, prosecution, or conviction of _____ (*name*) for the crime of _____ (*identify crime*)[4]] [create the false impression that _____ (*name*) had committed the crime of _____ (*identify crime*)[4]][2];

3. This happened in New Mexico on or about the _____ day of _____, _____.

You must complete the special verdict [form] [forms][2] to indicate your findings and report your determination.[3]

USE NOTE

1. If the defendant is charged with more than one count of tampering with evidence, this instruction must be repeated for each count. Likewise, if the defendant is charged with one count of tampering with evidence but the tampering with evidence is alleged to involve more than one crime, this instruction must be repeated for each category of crime for which tampering with evidence is alleged to have been committed. *See* Use Note 3.

2. Use only the applicable bracketed elements established by the evidence.

3. If the defendant is charged with tampering with evidence involving multiple crimes that fit into more than one category, the special verdict in UJI 14-6019 NMRA must be repeated for each category of offense as defined in Section 30-22-5(B) NMSA 1978. For example, if the defendant is charged with tampering with evidence involving three crimes, two of which fit in category one and the third that fits in category two, the jury should receive a special verdict instruction for the category one crimes and a separate instruction for the category two crime.

4. If a violation for probation or parole is at issue, the instruction must identify the underlying offense for which the defendant was serving probation or parole. *See State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754 (upholding tampering with evidence conviction for tampering with urine specimen required under terms of defendant's probation).

[As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court

Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013.]

**Committee commentary.** — *See* Section 30-22-5 NMSA 1978.

A verdict in a criminal case must be unanimous. N.M. Const., Art. II, § 12. Because the permissible punishment range under Section 30-22-5 NMSA 1978 depends on the highest crime for which tampering with evidence is committed, the jury must be given the special verdict in UJI 14-6019 NMRA for each crime for which tampering with evidence is alleged to have been committed. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond reasonable doubt).

[As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013.]

**The 2011 amendment,** approved by Supreme Court Order 11-8300-037, effective November 18, 2011, required that the physical evidence be identified in Paragraph 1 by adding "(identify physical evidence)" at the end of Paragraph 1 of the instruction and deleted former Paragraph 3 of the Use Notes which required the user to "Identify the physical evidence"; and in Paragraph 2, added "By doing so" to indicate that by committing the act described in Paragraph 1 of the instruction, the defendant intended the consequences described in Paragraph 2 of the instruction.

**The 2013 amendment,** approved by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013, required that separate instructions be given for each crime with respect to which defendant was charged with tampering with evidence and that the crime be identified in the instruction; in Paragraph 2, after “conviction of ____ (name)” added “for the crime of ____ (identify crime)” and after “committed the crime”, added “of ____ (identify crime)”; added the last sentence of the instruction; and in the Use Note, in Paragraph 1, deleted the former sentence that instructed the user to insert the count number if more than one count was charged, added the current language of Paragraph 1, and added Paragraphs 3 and 4.

## ANNOTATIONS

**Factors that determine punishment are elements of tampering with evidence.** — The factors listed in Subsection B of Section 30-22-5 NMSA 1978 are elements of the offense of tampering with evidence, rather than mere sentencing factors. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2014-NMCERT-____.

Where, after defendant shot and killed the victim, defendant put the gun in a crawl space under the house; defendant was charged with second-degree murder and tampering with evidence of a capital crime or a first- or second-degree felony; and the

jury instruction on tampering with evidence required the jury to find that defendant hid the gun in an effort to avoid being apprehended, prosecuted, or convicted, but did not require the jury to find that the evidence that was tampered with related to a first- or second-degree felony, the jury instruction omitted an essential element of the crime that the gun was evidence of a capital crime or a first- or second-degree felony and violated defendant's right under the Sixth and Fourteenth Amendments to have a jury find all elements of the offense beyond a reasonable doubt. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2014-NMCERT-____.

**Failure to give instruction on factors that determine punishment was not fundamental error.** — Where defendant testified that defendant shot the victim and then placed the gun under the house; defendant was charged with second-degree murder and tampering with evidence of a capital crime or a first- or second-degree felony; and the jury instruction on tampering with evidence did not require the jury to find that the evidence that was tampered with related to a capital crime or a first- or second-degree felony; and the jury found that defendant hid the gun with intent to prevent apprehension, prosecution, or conviction and that the act of shooting and killing the victim was second-degree murder, although the omission in the jury instruction of the essential element that the gun was evidence of a capital crime or a first- or second-degree felony violated defendant's rights under the Sixth and Fourteenth Amendments, the omission was not fundamental error because the facts at trial established that the tampering related to a second-degree felony. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2014-NMCERT-____.

**Standard for sufficiency of evidence to a support tampering conviction.** — Absent either direct evidence of a defendant's specific intent to tamper or evidence from which the factfinder may infer such intent, the evidence cannot support a tampering conviction. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Where the state alleged that defendant tampered with evidence based on the fact that defendant had a weapon at the scene of the crime, defendant used the weapon to kill someone, the weapon was removed from the scene of the crime, and the weapon was never recovered, the evidence was insufficient as a matter of law to support defendant's conviction of tampering with evidence because the state cannot convict a defendant of tampering with evidence simply because evidence that must have once existed cannot be found. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

**Sentencing under the "indeterminate crime" provision.** — When the state seeks a conviction under Section 30-22-5 NMSA 1978, tampering with evidence of a capital, first, or second degree felony, a determination that defendant tampered with evidence related to a capital, first, or second degree felony must be made by the jury. Absent this determination, the court is limited to sentencing defendant under the "indeterminate crime" provision. *State v. Alvarado*, 2012-NMCA-089, ____ P.3d ____.

Where defendant was charged with first degree murder and tampering with evidence; and the jury acquitted defendant of murder and convicted defendant of tampering with

evidence, defendant was properly sentenced under the indeterminate crime provision of Section 30-22-5 NMSA 1978. *State v. Alvarado*, 2012-NMCA-089, ____ P.3d ____.

**Failure prove intent.** — Where the state alleged that the defendant had a gun at the scene of the crime, a gun was used to murder the victim, the murder weapon was removed from the scene of the murder, and the murder weapon was never recovered, the state failed to meet its burden of proof because the state failed to offer direct evidence of the defendant's specific intent to tamper with evidence or evidence of an overt act from which the jury may infer such intent. *State v. Silva*, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

**Insufficient evidence.** — Where defendant was convicted of tampering with a gun that defendant had used to shoot into an occupied house; the state provided evidence that defendant took the gun when defendant left the crime scene; the state offered no evidence that defendant actively hid or disposed of the gun; the police recovered the gun from another person during a traffic stop a few weeks after the shooting; the state did not offer any evidence regarding how the other person acquired possession of the gun; and the only evidence that defendant tampered with the gun was that the police could not find the gun when they searched defendant's house, the evidence was insufficient to support defendant's conviction. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

Where, in a case in which the victim died from multiple stab wounds, the only evidence presented by the state was that a knife or sharp object existed, that defendant's clothing might have been blood stained and that ten days passed between the murder and defendant's arrest, but there was no evidence of an overt act to destroy or hide any knife or blood stained clothing, the evidence was insufficient to support a finding beyond a reasonable doubt of intent by defendant to disrupt the police investigation or that defendant actively destroyed or hid evidence. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 67 C.J.S. Obstructing Justice §§ 8 to 10.

# Part D
# Prisoners

## 14-2250. Assault by a prisoner; essential elements.

For you to find the defendant guilty of assault by a prisoner [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe act, threat or menacing conduct)*;

2. This caused _____ *(name of officer, employee or visitor)*[2] to believe he was about to be killed or to receive great bodily harm[3];

3. A reasonable person in the same circumstances would have had the same belief;

4. At the time, the defendant was confined at _____[4];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If there is a question of fact as to whether victim was an officer, employee or visitor, a special instruction must be drafted.

3. The definition of "great bodily harm," UJI 14-131, must also be given.

4. Identify the place of custody or confinement.

**Committee commentary.** — *See* Section 30-22-17A NMSA 1978. This crime, one of four different crimes designated as an assault by a prisoner, is in effect an assault by threat or menacing conduct putting one in apprehension of receiving an aggravated battery. Compare with UJI 14-305 and 14-323.

## 14-2251. Aggravated assault by a prisoner; attempting to cause great bodily harm; essential elements.

For you to find the defendant guilty of aggravated assault by a prisoner attempting to cause great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [tried to][2] _____ *(describe act and insert name of victim)*[3] who was an [officer] [employee] [visitor][4] at _____[5];

2. The defendant intended to cause great bodily harm[6] to _____ *(name of officer, employee or visitor)*;

3. At the time, the defendant was confined at _____[5];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use bracketed material only if no battery occurs.

3. Use laymen's language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. Identify place of custody or confinement.

6. The definition of "great bodily harm," UJI 14-131, must also be given.

**Committee commentary.** — *See* Section 30-22-17B NMSA 1978. This crime is essentially as assault by an attempt to commit a modified aggravated battery. Compare UJI 14-304 and UJI 14-323.

## 14-2252. Aggravated assault by a prisoner; causing great bodily harm; essential elements.

For you to find the defendant guilty of aggravated assault by a prisoner causing great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe act and insert name of victim)*[2] who was an [officer][3] [employee] [visitor] at _____[4];

2. The defendant caused great bodily harm[5] to _____ *(name of officer, employee or visitor)*;

3. At the time, the defendant was confined at _____[4];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use laymen's language to describe the touching or application of force.

3. Use only the applicable bracketed element established by the evidence.

4. Identify the place of custody or confinement.

5. The definition of "great bodily harm," UJI 14-131, must also be given.

**Committee commentary.** — *See* Section 30-22-17B NMSA 1978. This crime is essentially a modified aggravated battery. Compare UJI 14-323.

## 14-2253. Assault by a prisoner; taking a hostage; essential elements.

For you to find the defendant guilty of assault by a prisoner taking a hostage [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [confined][2] [restrained] _____ *(name of victim)* who was an [officer][2] [employee] [visitor] at _____[3];

2. The defendant intended to use _____ *(name of victim)* as a hostage;

3. At the time, the defendant was confined at _____[3];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Identify the place of custody or confinement.

**Committee commentary.** — *See* Section 30-22-17C NMSA 1978. Although included within the statute describing assault by a prisoner, this crime is more nearly like the crime of kidnapping. The specific intent to use the person confined or restrained as a hostage probably indicates that the crime is committed for the purpose of gaining escape.

## 14-2254. Possession of a deadly weapon by a prisoner; essential elements.

For you to find the defendant guilty of possession of a deadly weapon by a prisoner [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was in custody or confinement[2] at _____[3];

2. The defendant was in possession[4] of a [_____ *(a deadly weapon)*[5]].

[OR]

The defendant possessed a _____ *(name of object)*. A _____ *(name of object)* is as deadly weapon only if you find that if used as a weapon, a _____ *(name of object)* could cause death or great bodily harm[6]][7];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If there is a question of fact involving the lawfulness of the custody or confinement, an appropriate instruction must be prepared.

3. Identify the place of custody or confinement.

4. Use UJI 14-130 if possession is in issue.

5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131, the definition of "great bodily harm", must also be given.

7. This alternative is given only if the instrument or object possessed is not specifically listed as a deadly weapon in Section 30-1-12B NMSA 1978.

[As amended, effective February 1, 2000.]

**Committee commentary.** — The committee rewrote this instruction in 1999 to apply only to charges that a prisoner possessed a deadly weapon. The committee drafted a new Instruction 14-2255 for cases in which the defendant is charged with possession of an explosive by a prisoner.

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-16 NMSA 1978.

**The 1999 amendment,** effective February 1, 2000, in the first pagagraph, substituted "a deadly weapon" for "[a deadly weapon] [an explosive]"; rewrote element 2 which read: "The defendant was in possession of .....;[5]" and, in the Use Note, rewrote Paragraph 5 to correspond to the amendment of element 2, and renumbered the paragraphs.

## 14-2255. Possession of an explosive by a prisoner; essential elements.

For you to find the defendant guilty of possession of an explosive by a prisoner [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was in custody or confinement[2] at _____[3];

2. The defendant was in possession[4] of [_____ *(name of explosive)*[5]].

[OR]

A _____ *(name of substance)* is an explosive substance if it is a chemical compound or mixture, the primary purpose of which is to explode][6];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If there is a question of fact involving the lawfulness of the custody or confinement, an appropriate instruction must be prepared.

3. Identify the place of custody or confinement.

4. Use UJI 14-130 if possession is in issue.

5. Insert the name of the explosive. Use this alternative only if it is an explosive specifically listed in Section 30-7-18 NMSA 1978.

6. This alternative is given only if the item possessed is not specifically listed in Section 30-7-18 NMSA 1978.

[Approved, effective February 1, 2000.]

**Committee commentary.** — The committee drafted this new instruction to apply only to charges that a prisoner possessed an explosive. Although the term "explosive" is

defined in the criminal code, it applies only to Section 30-7-17 NMSA 1978. The definition in this instruction was modified after the statutory definition found in Section 30-7-18 NMSA 1978.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-22-16 NMSA 1978.

**Recompilations.** — Former Instruction 14-2255, relating to furnishing drugs or liquor to a prisoner, was recompiled as Instruction 14-2256, effective February 1, 2000.

## 14-2256. Furnishing drugs or liquor to a prisoner; essential elements.

For you to find the defendant guilty of furnishing [narcotic drugs][1] [intoxicating liquor] to a prisoner [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant furnished _____ *(name of narcotic drug or intoxicating liquor)* to _____ *(name of prisoner)*;

2. _____ *(name of prisoner)* was in custody or confinement;[3]

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use only the applicable bracketed element established by the evidence.

2. Insert the count number if more than one count is charged.

3. If there is a question of fact involving the lawfulness of the custody or confinement, an appropriate instruction must be prepared.

[14-2255 NMRA; as recompiled, effective February 1, 2000.]

**Committee commentary.** — *See* Section 30-22-13 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 72 C.J.S. Prisons § 22.

# CHAPTER 23
# (Reserved)

# CHAPTER 24
# Witnesses

## 14-2401. Bribery of a witness by giving anything of value.

For you to find the defendant guilty of bribery of a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of witness)* was [a witness][2] [likely to become a witness] in a [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

2. The defendant knowingly [gave] [or] [offered to give] _____ *(describe item of value)* to _____ *(name of witness)* for the purpose of causing _____ *(name of witness)* [to testify falsely] [or] [to abstain from testifying] to any fact in the [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

[3. _____ *(name of proceeding)* was an official proceeding;][3]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed alternatives.

3. This alternative must be given if the official proceeding was not a judicial, administrative or legislative proceeding.

[Approved, effective October 1, 2001.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-24-3A(1) NMSA 1978.

## 14-2402. Intimidation or threatening a witness.

For you to find the defendant guilty of intimidating or threatening a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of witness)* was a [witness][2] [person likely to become a witness] in a [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

2. The defendant knowingly [intimidated] [or] [threatened] _____ *(name of witness)* for the purpose of [preventing _____ *(name of witness)* from testifying to any fact] [causing _____ *(name of witness)* to abstain from testifying] [or] [causing _____ *(name of witness)* to testify falsely] in the [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

[3. _____ *(name of proceeding)* was an official proceeding;][3]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed alternatives.

3. This alternative must be given if the official proceeding was not a judicial, administrative or legislative proceeding.

[Approved, effective October 1, 2001.]

**ANNOTATIONS**

**Cross references. —** *See* Section 30-24-3A(2) NMSA 1978.

## 14-2403. Intimidation of a witness to prevent reporting.

For you to find the defendant guilty of intimidation of a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly [intimidated] [threatened] [gave _____ *(describe item given)*] [or] [offered to give a _____ *(describe item offered to be given)*] with the intent to keep _____ *(name of witness)* from truthfully reporting to [a law enforcement officer] [or] [any agency that is responsible for enforcing criminal laws] information relating to:

[the commission or possible commission of _____ *(name of felony)*[2];]

[a violation of conditions of probation;]

[a violation of conditions of parole;] [or]

[a violation of conditions of release pending judicial proceedings;]

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction, generally worded as follows:

"In New Mexico, the elements of the crime of _____ *(name of felony)* are as follows: _____ *(summarize elements of the felony)*". *See State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276.

[Approved, effective October 1, 2001.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-24-3A(3) NMSA 1978.

## 14-2404. Retaliation against a witness.

For you to find the defendant guilty of retaliation against a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

[1. The defendant knowingly engaged in conduct that caused:

[[bodily injury to _____ *(name of person)*] [or]

[damage to the tangible property of _____ *(name of person)*__

[OR]

[1. The defendant knowingly threatened:

[bodily injury to _____ *(name of person)*] [or]

[damage to the tangible property of _____ *(name of person)*];

2. The defendant engaged in the conduct with the intent to retaliate against _____ *(name of witness)* for providing any information to a law enforcement officer relating to:

[the commission or possible commission of _____ *(name of felony)*[2];] [or]

[a violation of conditions of probation;] [or]

[a violation of conditions of parole;] [or]

[a violation of conditions of release pending judicial proceedings;]

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction, generally worded as follows: "In New Mexico, the elements of the crime of _____ *(name of felony)* are as follows: _____ *(summarize elements of the felony)*". *See State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276.

[Approved, effective October 1, 2001.]

**ANNOTATIONS**

**Cross references.** — *See* Section 30-24-3(B) NMSA 1978.

# CHAPTER 25
# Perjury and False Affirmations

## 14-2501. Perjury; essential elements.

For you to find the defendant guilty of perjury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made a false statement under oath or affirmation to the _____[2];

2. The defendant knew the statement to be untrue;

3. The false statement was material to the issue or matter involved in the [judicial] [administrative] [legislative] [or] [official] proceeding, which means the statement had a natural tendency to influence the decision of the _____[2];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Insert the specific name of the judicial, administrative, legislative or other official body before which the statement was made.

**Committee commentary.** — The 1997 amendment of this instruction added element 3 to make the materiality of the false statement a jury question. This is required by the sixth amendment right to a jury trial. *See United States v. Gaudin,* 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

**ANNOTATIONS**

**Cross references.** — *See* Section 30-25-1 NMSA 1978.

**The 1997 amendment,** effective August 1, 1997, made stylistic changes in Paragraphs 1 and 2, added Paragraph 3 and redesignated former Paragraph 3 as Paragraph 4, and rewrote Use Note 2 which formerly provided that the issue of materiality is a matter of law to be decided by the judge.

**Materiality essential element of perjury.** — Under the Fifth and Sixth Amendments of the United States constitution, a defendant is entitled to have the question of materiality submitted to the jury, and *State v. Albin*, 104 N.M. 315, 720 P.2d 1256 (Ct. App. 1986) and *State v. Gallegos*, 98 N.M. 31, 644 P.2d 546 (Ct. App. 1982) are overruled to the extent they hold that materiality is an element for the trial court to decide as a matter of law. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury - state cases, 41 A.L.R.5th 1.

# CHAPTER 26 and 27
# (Reserved)

# CHAPTER 28
# Initiatory Crimes; Accomplices

# Part A
# Attempt Crimes

## 14-2801. Attempt to commit a felony; essential elements.

For you to find the defendant guilty of an attempt to commit the crime of _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of _____[1];

2. The defendant began to do an act which constituted a substantial part of the _____[1] but failed to commit the _____[1];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the name of the felony. A separate one of these instructions is required for each of such felonies. The essential elements of the felony must be given immediately following this instruction, unless they are set out in an instruction dealing with the completed offense.

2. Insert the count number if more than one count is charged.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — *See* NMSA 1978, § 30-28-1 (1963).

This instruction sets forth the essential elements of an attempt to commit a felony. The instruction should be given only when there is sufficient evidence to establish an attempted crime which failed to be completed. In *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App. 1971), *cert. denied*, 82 N.M. 534, 484 P.2d 754 (1971), the court rejected the defendant's claim that a jury should always be instructed on attempt as a

lesser offense, stating that when there is no evidence of failure to complete the crime such an instruction presents a false issue.

The evidence must establish overt acts which show the intent to commit the felony. *See, e.g.*, *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972) (attempted anal intercourse); *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), *cert. denied*, 81 N.M. 140, 464 P.2d 559 (1970) (attempted forgery); *State v. Flowers*, 83 N.M. 113, 489 P.2d 178 (1971) (attempted larceny). The overt acts must constitute a substantial part of the attempted felony. Mere preparation does not suffice as an attempt.

The essential elements of the attempted felony must be given. In cases where multiple attempts are charged the committee was of the opinion that a separate instruction should be given for each attempt. A combination instruction on attempts to commit a felony is excessively cumbersome and might tend to confuse a jury. Element 1 is included in the essential elements, because attempt requires a specific intent to commit the felony.

There is no crime of attempt to commit a felony when the underlying charge upon which the attempt is based has the element of negligence or recklessness, since the first element has an intent requirement. *See* committee commentary following UJIs 14-210 NMRA and 14-211 NMRA, second degree murder, which refer to *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

## ANNOTATIONS

**The 2010 amendment,** approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the committee commentary, changed "Section 30-28-1 NMSA 1978" to "NMSA 1978, § 30-28-1 (1963)"; and added the last paragraph.

**An instruction to the jury that the defendant must have intended to commit the crime of second degree murder to be guilty of attempted second degree murder** adequately informed the jury of the issue of intent and enabled the jury to properly reach its verdict. *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611. cert. granted, 2007-NMCERT-11.

**Attempt to manufacture methamphetamine.** — The jury was properly instructed that, to convict defendant of an attempt to manufacture methamphetamine, it had to find beyond a reasonable doubt that defendant intended to commit the crime of manufacturing methamphetamine and that she began to do an act which constituted a substantial part of the manufacturing but failed to commit the act of manufacturing. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010.

**This instruction may be modified** to fit the evidence offered at trial and the theory on which the defendant's culpability rests, e.g., doctrine of transferred intent in charge of attempted murder by poison. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 21 Am. Jur. 2d Criminal Law §§ 110 to 113.

22 C.J.S. Criminal Law §§ 74 to 77.

# Part B
# Conspiracy

## 14-2810. Conspiracy; essential elements.

For you to find the defendant guilty of conspiracy to commit _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant and another person by words or acts agreed together to commit _____[1];

2. The defendant and the other person intended to commit _____[1];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the name of the felony or felonies in the alternative and give the essential elements other than venue immediately after this instruction unless they are covered by essential element instructions relating to the substantive offenses.

2. Insert the count number if more than one count is charged.

**Committee commentary. —** *See* Section 30-28-2 NMSA 1978.

This instruction sets forth the essential elements of the crime of conspiracy. The offense is complete when the defendant combines with another for felonious purpose. No overt act in furtherance of the conspiracy need be proved. Perkins, Criminal Law 616 (2d ed. 1969).

The agreement need not be verbal but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme. The agreement may be established by circumstantial evidence. *State v. Deaton*, 74

N.M. 87, 390 P.2d 966 (1964); *State v. Dressel*, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973).

A defendant may be charged with conspiracy to commit a felony or felonies. However, a conspiracy to commit two felonies has been held to constitute only a single conspiracy. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974). If the conspiracy is alleged to be for the purpose of committing more than one felony, the essential elements of each felony must be given.

The statute includes a conspiracy to commit a felony outside of New Mexico. In such cases, the foreign law is controlling as to the essential elements of the felony. *See State v. Henneman*, 40 N.M. 166, 56 P.2d 1130 (1936).

Although the gist of the offense is the combination between two or more persons, conviction of all the conspirators is not required. *State v. Verdugo*, 79 N.M. 765, 449 P.2d 781 (1969).

## ANNOTATIONS

**Facts sufficient to find guilt of conspiracy.** — Where there was evidence that defendant was found in the stash house, that the smell of marijuana was strong and obvious, that there was a large quantity of marijuana in the basement, and that defendant tried to escape from the police when the investigation turned up marijuana, even punching one of the officers, and once subdued, defendant threw up, and slammed his head on the floor like a “child throwing a temper tantrum,” these facts are sufficient to allow a rational jury to find defendant guilty of possession with intent to distribute and conspiracy. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

**Evidence that defendant used his truck to block the victim from leaving defendant's property;** that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim; and, that when the other defendants arrived, the defendant became involved in the beating of the victim, permitted the jury to conclude that the defendants shared an intent to hold the victim and then beat him. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy §§ 7 to 11.

Prosecution or conviction of one conspirator as affected by disposition of case against co-conspirators, 19 A.L.R.4th 192.

15A C.J.S. Conspiracy § 35(1).

## 14-2811. Liability as a co-conspirator.[1]

The defendant [also] may be found guilty of _____ [attempt to commit _____] [as charged in Count _____], as a [co-conspirator] [partner in crime] even though he himself did not do the acts constituting the [crime], [attempt] if the state proves to your satisfaction beyond a reasonable doubt that:

1. The defendant and _____ by words or acts agreed together to commit the _____ and intended to commit the _____; and

2. The defendant or _____, or both of them, [committed] [attempted to commit] the crime.

USE NOTE

1. No instruction on this subject shall be given.

**Committee commentary.** — This instruction is a statement of the theory of liability as a co-conspirator for crimes committed by others. It applies whether the crime of conspiracy is charged, *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974), or not charged. *Territory v. McGinnis*, 10 N.M. 269, 61 P. 208 (1900); *Territory v. Neatherlin*, 13 N.M. 491, 85 P. 1044 (1906); *State v. Armijo*, 90 N.M. 10, 12, 558 P.2d 1149, 1151 (Ct. App. 1976). If the existence of a conspiracy is established, then all members of a conspiracy are equally guilty whether present or not and irrespective of physical participation, aid or encouragement extended at the time of the offense. *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937).

The court in *Ochoa* noted that, although aiding and abetting and conspiracy usually accompany each other, they are two different theories of liability. *See also State v. Armijo*, supra. However, the language of UJI 14-2820, 14-2821, and 14-2822 is broad enough to include liability as an aider or abettor or co-conspirator or both. Therefore, a separate instruction on this subject should not be given.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy § 14.

15A C.J.S. Conspiracy § 74.

## 14-2812. Conspiracy; multiple defendants; each defendant entitled to individual consideration.[1]

In this case, you must consider separately whether each of the defendants is guilty or not guilty of conspiracy [and the other charge][2] [and each of the other charges]. Even

if you cannot agree upon a verdict as to one or more of the defendants [or charges][3], you must return the verdict or verdicts upon which you agree.

USE NOTE

1. This instruction is appropriate for a multiple-defendant trial in which a charge of conspiracy is submitted to the jury. UJI 14-6003 should not be used in such cases.

2. Use one or the other or neither of these bracketed phrases, as applicable.

3. Use if applicable.

**Committee commentary.** — This instruction replaces UJI 14-6003 in cases in which a charge of conspiracy is being submitted to the jury. UJI 14-6003 is not appropriate for conspiracy cases because the second sentence of that instruction directs the jury to " . analyze . the evidence . with respect to each individual defendant separately." That direction conflicts with the rule that the acts and declarations of a conspirator may be the acts and declarations of all of the members of the conspiracy.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy § 42.

Right of defendants in prosecution for criminal conspiracy to separate trials, 82 A.L.R.3d 366.

## 14-2813. Conspiracy; proof of express agreement not necessary.

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — This instruction is California Jury Instructions, Criminal, No. 6.12, p. 171 (3rd ed. 1970). No instruction on this subject is necessary to guide the jury because the subject is covered in the essential elements instruction. It is better to leave the subject matter to the argument of counsel. Moreover, an instruction on this subject may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy § 7.

15A C.J.S. Conspiracy § 40.

## 14-2814. Conspiracy; evidence of association alone does not prove membership in conspiracy.

Evidence that a person was in the company of or associated with one or more other persons alleged or proved to have been members of a conspiracy is not, in itself, sufficient to prove that such person was a member of the alleged conspiracy.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — This instruction is California Jury Instructions, Criminal, No. 6.13, p. 172 (3rd ed. 1970). No instruction on this subject is necessary to guide the jury because the subject is covered in the essential elements instruction. It is better to leave the subject matter to the argument of counsel. Moreover, an instruction on this subject may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 15A C.J.S. Conspiracy § 39.

## 14-2815. Acts or declarations of co-conspirators; conditional admissibility; limiting instruction; withdrawal.

Evidence has been admitted concerning _____. You may consider such [acts] [remarks] against the [other] defendants if you find that the [acts] [remarks] were authorized by them.

The [acts] [remarks] were authorized by a defendant if the defendant and the one [doing the acts] [making the remarks] were in a [conspiracy to commit crime] [partnership in crime] and the [acts] [remarks] were during and for the purpose of helping in carrying out the [conspiracy] [partnership].

Unless you find by other evidence that the [acts] [remarks] were authorized by a defendant, then you should not consider them against that defendant.

[If a (co-conspirator) (partner in crime) withdraws from a (conspiracy) (partnership in crime), then the (acts) (remarks) of the others made after the withdrawal are not authorized by, and should not be considered against, the one who withdraws.

In order to withdraw, a person must

(in good faith notify the others he knows are involved that he is no longer involved in the [conspiracy] [partnership] and urge them to give it up.)

(make proper efforts to prevent the carrying out of the [conspiracy] [partnership in crime] and end his participation in such a way as to remove the effect of his assistance).]

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — This instruction sets forth the standard of conditional admissibility of evidence which is admitted subject to the condition precedent that a conspiracy be established by evidence aliunde. *See* Rule 11-104 NMRA. If the conspiracy is shown to have existed, then declarations of a co-conspirator during the course of and in furtherance of the conspiracy are not hearsay. Rule 11-801 D(2)(e) NMRA. *See also State v. Armijo*, 90 N.M. 10, 12, 558 P.2d 1149, 1151 (Ct. App. 1976), which recognizes that the rule applies to acts as well as declarations, and applies whether conspiracy is charged or not charged.

The portion of the instruction on withdrawal sets forth the defense theory that such declarations, made after effective withdrawal, are not admissible against the co-conspirator who has withdrawn.

The standards for admissibility of co-conspirator acts or declarations are the same whether conspiracy is charged (in which case the defendant would be referred to as "co-conspirator") or not charged (in which case the defendant would be referred to as a "partner in crime").

The committee was of the opinion that no instruction on this subject should be given. The issue of admissibility of evidence is a preliminary question of law to be decided by the judge. *See* Rule 11-104(A) NMRA. Questions of admissibility of evidence are not to be decided beyond a reasonable doubt or by a preponderance of the evidence. Substantial evidence in support of the preliminary fact suffices. *United States v. Herrera*, 407 F. Supp. 766 (N.D. Ill., 1975). When the preliminary question is the existence of a conspiracy, a prima facie case must be made out by substantial, independent evidence of the conspiracy. Whether the standard has been satisfied is a question of the admissibility of evidence to be decided by the trial judge. *United States v. Herrera*, supra. *See also* n. 14 in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

The comments to Evidence Rule 104(b), Rules of Evidence for United States Courts and Magistrate Courts, suggest that the judge makes a preliminary determination as to whether the foundation is sufficient to support a finding that the condition has been fulfilled and then submits to the jury the issue of whether the condition has been fulfilled and instructs on conditional admissibility to guide the jury in its deliberations. However,

the problem with this approach was pointed out in *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 2d 498 (1964), rehearing denied, 377 U.S. 1010, 84 S. Ct. 1902, 12 L. Ed. 2d 1058 (1964), aff'd, 357 F.2d 800 (9th Cir. 1966). When conspiracy is charged, the admissibility of the evidence depends upon a disputed preliminary question of fact which coincides with the ultimate determination on the merits. Carbo, supra, p. 736. In effect, the jury must find a prima facie conspiracy prior to considering the evidence on the question of whether the conspiracy has been proved beyond a reasonable doubt. Such mental compartmentalization has been recognized as a practical impossibility. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd on other grounds, 341 U.S. 494 (1951).

Submitting the issue to the jury in cases where conspiracy is not charged does not result in such a circular reasoning process. The jury must only consider the conspiracy question for one purpose. Because admissibility of co-conspirator declarations is not dependent upon a charge of conspiracy in the indictment, *State v. Armijo*, supra, *United States v. Herrera*, supra, the procedure for handling the issue of admissibility should be the same whether conspiracy is charged or not charged.

The authorities are split on the requirement of an instruction on conditional admissibility, and the rules of evidence in some jurisdictions expressly require such an instruction. The Rules of Evidence expressly require instructions in certain instances, but Rule 11-104(B) NMRA does not expressly require such an instruction and no New Mexico case requires such an instruction. Therefore, the decision as to admissibility should be left to the judge and no instruction should be given. *See* Morgan, Basic Problems of Evidence, p. 48. Such a procedure was tacitly approved in *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), aff'd, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), motion to vacate judgment denied, 386 U.S. 940, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1967), rehearing denied, 386 U.S. 951, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1967), motion for new trial denied, 382 F.2d 856 (6th Cir. 1967), where the court in dictum said that a prima facie case linking the appellants with the conspiracy would have justified the court ruling that the evidence was admissible. *Carbo v. United States*, supra, expressly states that no instruction is necessary. The supreme court in *United States v. Nixon*, supra, indicates that no instruction is necessary, by citing with approval the *Hoffa* and *Carbo* cases.

The judge may make the determination of admissibility at the time the evidence is offered or may admit the evidence subject to a further ruling as to whether the necessary foundation has been established. The order of proof is within the discretion of the trial judge. Rule 11-104(B) NMRA. If the judge concludes at the close of the evidence that the necessary foundation has not been established, the evidence should be withdrawn from the consideration of the jury. *See* commentary to UJI 14-5042.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy §§ 29, 38 to 40.

15A C.J.S. Conspiracy §§ 78, 92.

## 14-2816. Withdrawal from conspiracy; termination of complicity.

Evidence has been admitted concerning a [conspiracy] [partnership in crime] and withdrawal by the defendant from any such [conspiracy] [partnership].

A person may withdraw from a [conspiracy] [partnership in crime]. If a member of a [conspiracy] [partnership in crime] has withdrawn, he is not liable for any act of the other [conspirators] [partners] after the withdrawal.

In order to withdraw, a person must

[in good faith notify the others he knows are involved that he is no longer in the (conspiracy) (partnership) and urge them to give it up.]

[make proper efforts to prevent the carrying out of the (conspiracy) (partnership in crime) and end his participation in such a way as to remove the effect of his assistance.]

The burden is on the state to prove beyond a reasonable doubt that the defendant did not withdraw from any such [conspiracy] [partnership].

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — 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.

Withdrawal may commence the running of the statute of limitations as to the conspirator who withdraws. *Eldredge v. United States,* 62 F.2d 449 (10th Cir. 1932). However, under state law, that problem is too remote to warrant a UJI instruction. If withdrawal in relation to limitations becomes an issue, an instruction on the issue will need to be drafted by the court. *See Eldredge v. United States, supra*.

Withdrawal may affect the admissibility of acts and declarations of co-conspirators. However, the jury will not be instructed on the admissibility issue (UJI 14-2815, conditional admissibility, is not to be given), and therefore no instruction is necessary on withdrawal as it pertains to admissibility.

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. *See* the commentary to Section 5.03(b), Model Penal Code (tentative draft No. 10). UJI 14-2810, the essential elements of conspiracy, does not require an overt act, and therefore no instruction is necessary on withdrawal as a defense to the charge of conspiracy.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy § 29.

15A C.J.S. Conspiracy § 78.

## 14-2817. Criminal solicitation; essential elements.

For you to find the defendant guilty of criminal solicitation [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended that another person commit _____ *(name of felony)*[2];

2. The defendant [solicited][3] [commanded] [requested] [induced] [employed] the other person to commit the crime;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Give the essential elements of the felony, if not covered by other instructions. *See* UJI 14-140 for example of how essential elements instructions are to be modified when not given as separate offense.

3. Use applicable alternative.

**Committee commentary.** — Section 30-28-3 NMSA 1978 sets out not only the essential elements of the crime of criminal solicitation, but also what is and is not a defense. 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.

There is much confusion over the distinctions between solicitation, attempt and conspiracy. Under the Model Penal Code a solicitation may be "a substantial step in a course of conduct planned to culminate in [the] commission of the crime" for the purpose of proving an attempt. Model Penal Code § 5.01(1)(c) and (2)(g) (1962). There is some disagreement with this view, however. The Memorandum to Virginia Model Jury Instructions - Criminal, Attempts and Solicitations No. 6, states, "[s]olicitation *does not* amount to a direct act towards the commission of the crime. . . . Where the inciting to crime does proceed to the point of some overt act in the commission of the offense, it becomes an attempt. . . ." (Citing *Wiseman v. Commonwealth*, 143 Va. 631, 130 S.E. 249 (1925).) (Emphasis added.) It is unclear which view prevails in New Mexico due to the lack of case law on solicitation, but the committee was of the opinion that mere solicitation is not enough of an overt act to constitute an attempt. As stated by Perkins, "[t]he usual statement is to the effect that, although a few cases have held otherwise, a solicitation is not an attempt. . . ." R. Perkins, Perkins on Criminal Law, p. 585 (2d ed. 1969). A more definite distinction can be drawn when the solicitor does not merely solicit another to commit the crime, but plans to actually assist in the commission of the crime. In these instances there is a specific intent to commit the crime, which may rise to the level of attempt. To prove solicitation, one must only show the solicitor intended someone else to commit the crime.

The solicitation of another to commit a crime is an attempt to commit that crime if, but only if, it takes the form of urging the other to join with the solicitor in perpetrating that offense, - not at some future time or distant place, but here and now, and the crime is such that it cannot be committed by one without the cooperation or submission of another, such as bribery or buggery. Where such cooperation or submission is an essential feature of the crime itself, the request for it now is a step in the direction of the offense.

Id. at 586-7.

To be guilty of solicitation, the crime need not be committed. It must only be proven that the defendant intended that the other person commit the crime.

# Part C
# Accomplices

## 14-2820. Aiding or abetting; accessory to crime of attempt.1

The defendant may be found guilty of an attempt even though he himself did not do the acts constituting the attempt, if the state proves to your satisfaction beyond a reasonable doubt that:

1. The defendant intended that the crime be committed;

2. An attempt to commit the crime was committed;

3. The defendant helped, encouraged or caused the attempt to commit the crime.

[This instruction does not apply to the charge of felony murder.][2]

USE NOTE

1. For use if the evidence supports liability of the defendant as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for any crime of attempt. This instruction should not be used for felony murder. The essential elements of the attempt or attempts must also be given.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury.

**Committee commentary.** — *See* Section 30-1-13 NMSA 1978.

*See* commentary to UJI 14-2822.

This instruction sets out the theory of liability as an aider or abettor for crimes of attempt to commit a felony. It may be used if the defendant is charged as a principal, as an aider and abettor, or as both.

This instruction does not define "attempt," and therefore it is necessary that UJI 14-2801, the essential elements of attempt, be given along with this instruction on aiding and abetting. Further, since UJI 14-2801 is incomplete without the essential elements of the felony that was attempted, those essential elements must also be given to make this instruction complete. Therefore, when this instruction is given, UJI 14-2801 should also be given, and the essential elements of the felony attempted should be given in some form.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory or aider and abettor, 9 A.L.R.4th 972.

**Attempt to manufacture methamphetamine. —** The jury was properly instructed that it could convict defendant of attempt to manufacture methamphetamine under the theory of accessory liability if it found, beyond a reasonable doubt, that defendant intended that the crime of manufacturing be committed, an attempt to commit the crime was committed, and defendant helped, encouraged, or caused the attempt to commit the crime. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010.

## 14-2821. Aiding or abetting accessory to felony murder.1

The defendant _____ *(name of defendant)* may be found guilty of felony murder [as charged in Count _____][2], even though the defendant did not commit the murder if the state proves to your satisfaction beyond a reasonable doubt that:

1. The felony of _____ was committed [or] [attempted][3] [under circumstances or in a manner dangerous to human life][3];

2. The defendant _____ *(name of defendant)* helped, encouraged or caused the felony of _____[4] *(name of felony)* to be committed [or attempted];

3. The defendant _____ *(name of defendant)* intended that the _____ *(name of felony)* be committed;

4. During the [commission] [attempted commission] of the felony _____ *(name of deceased)* was killed;

5. The defendant _____ *(name of defendant)* helped, encouraged or caused[5] the killing to be committed;

6. The defendant _____ *(name of defendant)* intended the killing to occur or knew that [he] [she] was helping to create a strong probability of death or great bodily harm;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. For use if the evidence supports liability as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for felony murder.

2. Insert the count number to which this instruction is applicable if more than one count is submitted to the jury on any theory.

3. Use applicable alternatives.

4. The essential elements of this felony or these felonies must also be given unless they are otherwise covered by the instructions.

5. UJI 14-251 must also be used if causation is in issue.

[As amended, effective March 15, 1995.]

**Committee commentary.** — *See* Sections 30-1-13 and 30-2-1A(2) NMSA 1978.

This instruction sets out the theory of liability as an aider or abettor for a felony murder. A separate instruction was appropriate because the requisite intent in felony murder is different from that in other crimes. *See* committee commentary to UJI 14-202 (felony murder).

*See also* the committee commentary to UJI 14-2822.

This instruction is considerably different from UJI 14-2822, because under that instruction the defendant must have intended the crime that was committed, and in this instruction on felony murder, the defendant need only intend that the underlying felony be committed. *State v. Smelcer*, 30 N.M. 122, 125, 228 P. 183 (1924). *See also* Perkins, Criminal Law 37-44 (2d ed. 1969). In order to make that distinction, the committee merged into this instruction the essential elements of felony murder from UJI 14-202.

**ANNOTATIONS**

**The 1995 amendment,** effective March 15, 1995, rewrote the instruction, deleted "Insert the name of the felony or felonies underlying the felony murder charge" from the beginning of Use Note 4, deleted former Use Note 5 which read "Use bracketed phrase unless the felony is a first degree felony", and redesignated former Use Note 6 as Use Note 5.

**"Helped, encouraged, or caused" the crime to be committed.** — The terms "help", "cause", and "encourage" are words with common meanings, thus not requiring definition for the jury, and the court's failure to give a definitional jury instruction was not error. *State v. Gonzales*, 112 N.M. 544, 817 P.2d 1186 (1991).

It is not enough for "someone" to cause the death of the victim; it is necessary that the defendant cause the death, either through his own acts or through the acts of an accomplice whom the defendant "helped, encouraged or caused" to commit the crime, and only if the defendant intends the crime to be committed. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

**Abolition of the distinction between principal and accessory places defendant on notice** that he or she could be charged as a principal and convicted as an accessory or vice versa. *State v. Wall*, 94 N.M. 169, 608 P.2d 145 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Conspiracy §§ 119, 124.

22 C.J.S. Criminal Law §§ 74 to 77.

## 14-2822. Aiding or abetting; accessory to crime other than attempt and felony murder.

The defendant may be found guilty of a crime even though he himself did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt that:

1. The defendant intended that the crime be committed;

2. The crime was committed;

3. The defendant helped, encouraged or caused the crime to be committed.

[This instruction does not apply to the charge of felony murder.][2]

USE NOTE

1. For use if the evidence supports liability of the defendant as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for any crime except attempt and felony murder. This instruction should not be used for attempt or felony murder. The essential elements of the crime or crimes must also be given.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury.

**Committee commentary.** — *See* Section 30-1-13 NMSA 1978.

This instruction sets out the theory of liability as an aider and abettor for crimes other than attempt or felony murder. It may be used if the defendant is charged as a principal, as an aider or abettor or as both.

One who aids or abets the commission of a crime is guilty as a principal. It is not necessary that there be a charge of aiding or abetting. The distinction between principal and accessory has been abolished. *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

The aider and abettor must share the criminal intent required for the conviction of the principal. *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937). However, the element of intent must be evaluated independently for each party charged with participation in criminal conduct. The liability of the aider and abettor for the crime depends upon his own acts and intent, and not upon the intent of the other, entertained without knowledge of the aider and abettor. *State v. Wilson*, 39 N.M. 284, 46 P.2d 57 (1935).

In all cases the aider and abettor must share the intent of the principal, but the essential element of intent is stated differently in the three types of cases: 1) felony murder; 2) attempts; and 3) completed offenses other than felony murder. In felony murder, the intent of the aider and abettor is that the felony be committed, not that the crime (felony murder) be committed. In attempts, the intent of the aider and abettor is that the crime that was attempted be committed, rather than that the crime charged (attempt) be

committed. By reason of these different intent requirements, and the difficulty of setting them all out in the alternative in one instruction, the committee prepared three different instructions. This instruction covers the completed crimes except for felony murder; UJI 14-2820 covers the attempts; and UJI 14-2821 covers felony murder.

## ANNOTATIONS

**Sufficient instruction on intent.** — This instruction is sufficient to direct the jury on the issue of intent in accessory cases and the trial court did not err in refusing to add an instruction that the defendant's intent must be the intent that is specified in the specific elements instruction for the crime itself. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

**Intent for accessory crimes not required in instruction on principal's crime.** — Where the defendants were charged with aiding and abetting the crime of sexual penetration in the second degree, the required intent for accessory crimes was not required to be included in the instruction setting forth the elements of the principal's crime. *State v. Urioste*, 93 N.M. 504, 601 P.2d 737 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

**The terms "help", "cause", and "encourage"** are words with common meanings, thus not requiring definition for the jury, and the court's failure to give a definitional jury instruction was not error. *State v. Gonzales*, 112 N.M. 544, 817 P.2d 1186 (1991).

**Definition of accessory liability.** — New Mexico has adopted the Model Penal Code definition of accessory liability. *Valdez v. Bravo*, 373 F.3d 1093 (10th Cir. 2004).

**Jury might find that defendant aided and abetted, but did not commit, murder.** — That the jury could have refused to find that the defendant personally committed the murder is not alone a sufficient reasonable hypothesis that he did not aid and abet its commission. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

**Accomplice's drug trafficking conviction upheld despite no actual possession.** — Since the evidence showed a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and that the defendant is the third party's accomplice, the evidence is sufficient to support a conviction under 30-31-20 NMSA 1978. The fact the defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. The defendant's actions as financier of the endeavor and transporter via his personal vehicle sufficiently demonstrated accomplice status. *State v. Bankert*, 117 N.M. 614, 875 P.2d 370 (1994).

**Submission of alternative instructions not error.** — Where an indictment charged that the defendants "did intentionally distribute, possess with intent to distribute, or aided and abetted one another in the distribution of a controlled substance," and where two of the alternatives, distribution or aiding and abetting in distribution, were submitted

to the jury, there was no error in either the charges or the submission of the alternatives to the jury. *State v. Turner,* 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

**Instruction properly refused.** — An instruction stating there was no presumption that the defendant was an accessory and that the defendant did not have the burden of proving that he was not an accessory was refused as it did not state a theory of the case. *State v. Gunzelman,* 85 N.M. 535, 514 P.2d 54 (Ct. App. 1973).

The trial court did not err in refusing to give defendant's requested instruction on self-defense against an accessory in conjunction with an instruction on self-defense based on UJI 14-5171. *State v. Coffin,* 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Defendant need not intend particular result.** — In a prosecution for aggravated battery, the defendants requested the following instruction, which was properly refused: "A defendant may not be held guilty as aider and abettor for independent act of another person, even though same victim was assaulted by both, since sharing of criminal intent is absent." The evidence demonstrated that the defendants and the principal defendant did not act independently of each other, even if the defendants did not intend or foresee the stabbing of the victim by the principal defendant. *State v. Dominguez,* 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

**Knowledge of the method of the crime and presence when the crime is committed are not required.** — There is no legal requirement that an accessory know in advance the exact method by which a crime is to be carried out or even that the accessory be physically present when the crime is committed. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

**Sufficient evidence.** — Where defendant’s primary co-conspirator beat, drugged, and tied the victim to a bed in defendant’s residence; defendant did not object to the treatment of the victim; defendant chided a secondary co-conspirator for being nervous and smoked marijuana with co-conspirator to calm the co-conspirator’s nerves; defendant did not object when the primary co-conspirator considered killing the victim and burning the victim’s car, but defended a secondary co-conspirator against the primary co-conspirator’s violence; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant demanded that the primary co-conspirator determine what to do with the victim before defendant’s child returned from school; defendant left the residence to take the child to a store where, at the direction of the primary co-conspirator, defendant purchased charcoal liter fluid; and while defendant remained at the residence with the child, defendant’s co-conspirators put the victim in the trunk of the victim’s car, drove the car to a school, doused the car with the liter fluid, and burned the car, there was sufficient evidence to convict defendant of kidnapping, second-degree murder and aggravated arson, as an accessory, beyond a reasonable doubt. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Conspiracy §§ 119, 124.

Propriety of specific jury instructions as to credibility of accomplices, 4 A.L.R.3d 351.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory or aider and abettor, 9 A.L.R.4th 972.

22 C.J.S. Criminal Law §§ 85 to 89.

## 14-2823. Accessory to the crime; not established by mere presence; circumstantial evidence sufficient.

Mere presence of the defendant, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient to establish that the defendant aided and abetted a crime. However, the evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs or by any means sufficient to incite, encourage or instigate commission of the crime.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction is taken from *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937). No instruction on this subject is necessary to guide the jury because the subject is covered in the essential elements instruction. It is better to leave the subject matter to the argument of counsel. Moreover, an instruction on this subject may constitute a comment on the evidence. *See* Evidence Rule 11-107.

**ANNOTATIONS**

**Use notes.** — The trial court did not commit error by following the use note for this instruction, which states that "no instruction on this subject shall be given", and refusing to give this instruction. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

**Refusal to give instruction.** — Trial court did not err when it refused defendant's tendered jury instruction on "mere presence" at a crime because the jury was properly instructed on the essential elements of the crimes charged. *State v. Smith*, 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

**Relationship to victim relevant.** — Although mere presence is insufficient to establish that defendant aided and abetted a crime, defendant's relationship with victim is a factor invoking criminal liability. Where defendant was charged with care and welfare of child, he stood in position of parent and was convicted on the basis that he failed to take reasonable steps to prevent the molestation, coupled with his friendship with

perpetrator. *State v. Orosco,* 113 N.M. 789, 833 P.2d 1155 (Ct. App. 1991), aff'd, 113 N.M. 780, 833 P.2d 1146 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Conspiracy §§ 121 to 123.

22 C.J.S. Criminal Law § 88.

# CHAPTER 29 and 30
# (Reserved)

# CHAPTER 31
# Controlled Substances

## Part A
## Possession, Distribution and Possession with Intent to Distribute

### 14-3101. Marijuana; possession; essential elements.[1]

For you to find the defendant guilty of possession of marijuana [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had [one ounce or less][3] [more than one ounce but less than eight ounces] [eight ounces or more] of marijuana in his possession[4];

2. The defendant knew it was marijuana;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction may be used for any of the three degrees of possession of marijuana.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternative.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue. UJI 14-3131, the definition of marijuana, should be given if there is an issue as to whether the substance is marijuana.

**Committee commentary.** — *See* Sections 30-31-23B(1), 30-31-23B(2) & 30-31-23B(3) NMSA 1978.

*See generally* Annot. 91 A.L.R.2d 810 (1963). The New Mexico Controlled Substances Act was derived from the Uniform Controlled Substances Act.

The three crimes of possession of marijuana are based upon the amount of marijuana possessed. The weight of the marijuana must be determined as of the time of the occurrence of the crime, whether or not the plant is green or is dried. *See State v. Olive,* 85 N.M. 664, 515 P.2d 668 (Ct. App.), *cert. denied,* 85 N.M. 639, 515 P.2d 643 (1973).

Marijuana is defined in Section 30-31-2O NMSA 1978 as "all parts of the plant Cannabis," with certain exceptions. The instruction requires the jury to find that the defendant had "marijuana" in his possession. Case law supports the conclusion that marijuana is the correct term for use in the instruction.

In *State v. Esquibel,* 90 N.M. 117, 560 P.2d 181 (Ct. App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977), the appellant contended that the legislature has narrowed the definition of marijuana to include only the plant cannabis sativa L., and not other cannabis. The court declined to consider this argument because there was evidence from which the jury could find that the substance was "cannabis sativa L." In *State v. Romero*, 74 N.M. 642, 397 P.2d 26 (1964), the court construed the prior statute and concluded that marijuana was identical to cannabis, cannabis sativa L. and cannabis indica. In accord are *State v. Tapia,* 77 N.M. 168, 420 P.2d 436 (1966); and *State v. Everidge,* 77 N.M. 505, 424 P.2d 787, cert. denied, 386 U.S. 976, reh. denied, 386 U.S. 1043 (1967). *See also State v. Claire,* 193 Neb. 341, 227 N.W.2d 15 (1975) (cannabis sativa L., construed to include any species of genus cannabis), *United States v. Gaines,* 489 F.2d 690 (5th Cir. 1974) (refusal to instruct on statutory definition of marijuana not error), and 75 A.L.R.3d 717, 727-735. Contra, dictum in *State v. Benavidez,* 71 N.M. 19, 23, 375 P.2d 333 (1962).

Although the statute contains no requirement that the defendant know that the substance is marijuana, *State v. Giddings,* 67 N.M. 87, 89, 352 P.2d 1003 (1960), requires that the defendant have actual knowledge of the presence of the drug. Knowledge may be inferred from all of the surrounding facts and circumstances. *See, e.g.*, *State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct. App.), *cert. denied,* 86 N.M. 593, 526 P.2d 187 (1974). *See also Hacker v. Superior Court,* 268 Cal. App. 2d 387, 73 Cal. Rptr. 907 (1968). Note that this crime requires only a general criminal intent. Therefore, UJI 14-141 must be given.

UJI 14-3130, the definition of possession, need only be given when the element of possession is in issue.

The state need not prove that the substance is not included in the exceptions to the definition of marijuana. *See State v. Everidge,* 77 N.M. 505, supra.

The statute excepts possession from criminal punishment if such possession is authorized. Authority is granted by the statute to registered persons or to persons who have obtained the substance by a valid prescription from a practitioner acting in the ordinary course of business. However, the state need not prove a negative status created by a statutory exclusion. *See State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977). The burden is on the defendant to go forward with evidence to show that he has authority. Section 30-31-37 NMSA 1978. *See* commentary to UJI 14-3132. *See generally State v. Everidge,* supra. Consequently, these instructions do not require the state to prove the absence of authority or the jury to find that the person did not have authority as one of the essential elements. The existence of such exceptions in the case of marijuana would be rare. *See Commonwealth v. Stawinsky,* 339 A.2d 91 (Pa. Super. 1975); *State v. White,* 213 Kan. 276, 515 P.2d 1081 (1973); *People v. Meyers,* 182 Colo. 21, 510 P.2d 430 (1973) (information was not defective for failure to allege defendant not a pharmacist); *State v. Jung,* 19 Ariz. App. 257, 506 P.2d 648 (1973) (state not required to prove defendant did not possess a license); *State v. Karathanos,* 158 Mont. 461, 493 P.2d 326 (1972); *Cartwright v. State,* 289 N.E.2d 763 (Ind. App. 1972); *State v. Conley,* 32 Ohio App. 2d 54, 288 N.E.2d 296 (1971); *State v. Bean,* 6 Ore. App. 364, 487 P.2d 1380 (1971); *State v. Winters,* 16 Utah 2d 139, 396 P.2d 872 (1964); *People v. Marschalk,* 206 Cal. App. 2d 346, 23 Cal. Rptr. 743 (1962) (claimed privilege must be affirmatively shown by defendant); *Contra, State v. Segovia,* 93 Idaho 208, 457 P.2d 905 (1969); *People v. Rios,* 386 Mich. 172, 191 N.W.2d 297 (1971). *See also* Uniform Controlled Substances Act, Section 506, and commentary to UJI 14-3132.

## ANNOTATIONS

**Where instruction given and defendant found guilty of higher offense, retrial prevented.** — Where two counts are charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury should disregard the former count if it finds the defendant guilty under the latter operates as an acquittal of the former count and prevents retrial of this issue when the verdict on the latter is overturned. *State v. Moreno,* 69 N.M. 113, 364 P.2d 594 (1961).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 141.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

28A C.J.S. Drugs and Narcotics § 265.

## 14-3102. Controlled substance; possession; essential elements.[1]

For you to find the defendant guilty of possession of _____[2] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[2] in his possession[4];

2. The defendant knew it was _____[2] [or believed it to be _____[2]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction is appropriate for possession cases other than possession of marijuana.

2. Identify the substance.

3. Insert the count number if more than one count is charged.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Sections 30-31-23B(4) and 30-31-23B(5) NMSA 1978.

This instruction may be used for either the crime of possession of a narcotic drug from Schedule I or II or possession of any other controlled substance from Schedules I through IV. Knowledge of the defendant is an essential element of the crime. Therefore, if the evidence supports the theory that the defendant believed the substance to be other than that charged, the applicable alternative must be given. Note, however, that accurate knowledge of the identity of the controlled substance is not controlling; the crime is complete if the defendant believed he possessed *some* controlled substance.

In *People v. James,* 38 Ill. App. 3d 594, 348 N.E.2d 295 (1976), appeal dismissed, 429 U.S. 1082, 97 S. Ct. 1087, 51 L. Ed. 2d 528 (1977), the defendant appealed his conviction of selling LSD on the grounds that he believed the substance to be mescaline. The court affirmed the conviction and stated "If the accused knows he is delivering a controlled substance, he commits the criminal act specified. . . ." *See also People v. Garringer,* 48 Cal. App. 3d 827, 121 Cal. Rptr. 922 (1975) (it is no defense to the charge of possession of phenobarbital that the defendant believed he possessed secobarbital); *State v. Barr,* 237 N.W.2d 888 (N.D., 1976); *United States v. Davis,* 501 F.2d 1344 (9th Cir. 1974), and *United States v. Jewell,* 532 F.2d 697 (9th Cir.), *cert. denied,* 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed. 2d 1188 (1976). Compare *United States v. Moser,* 509 F.2d 1089 (7th Cir. 1975) (jury could infer that defendant knew drug was LSD even though defendant told buyer defendant was selling psilocybin and mescaline); but compare *State v. Pedro,* 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971) (defendant thought the bag of anhalonium [peyote] was "medicine," and court found no evidence of intent to possess peyote).

Note that this crime requires only a general criminal intent. Therefore, UJI 14-141 must be given.

This instruction requires the state to prove only that the defendant possessed a substance which is listed in one of the controlled substances schedules. *See State v. Atencio,* 85 N.M. 484, 513 P.2d 1266 (Ct. App.), *cert. denied,* 85 N.M. 483, 513 P.2d 1265 (1973). For example, heroin is a narcotic drug by statutory definition and proof that the defendant possessed heroin is sufficient without evidence that heroin is a narcotic drug. *See State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

The amount of the substance is not relevant to the charge of possession of a controlled substance. *See State v. Grijalva*, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973).

For additional discussion of the requirement of knowledge, and a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101.

## ANNOTATIONS

**Jury unanimity as to the form of cocaine involved in a lesser included offense was not required.** — Where police officers found crack cocaine in defendant's vehicle and powder cocaine that belonged to defendant in the vehicle of defendant's friend; defendant was charged with one count of trafficking and one count of the lesser included offense of possession; the jury found defendant guilty of possession of cocaine; defendant claimed that there were two substances at issue and that the trial court failed to instruct the jury that any conviction of possession had to be based on the same substance considered by the jury for the trafficking offense; the state's theories of possession were based on the crack cocaine found in defendant's vehicle and the powder cocaine found in the friend's vehicle; and witnesses testified that a lab analysis does not distinguish between crack cocaine and powder cocaine and that both forms of cocaine were in quantities large enough to qualify for a count of trafficking, jury

unanimity was not required as to the specific form of cocaine involved, jury unanimity was required only on the overall verdict. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

**No instruction on possession warranted.** — Although possession of heroin is a lesser included offense of trafficking in heroin, it should not be instructed on when the evidence does not support the defendant's claim that possession was the highest crime which occurred. *State v. Hernandez,* 104 N.M. 268, 720 P.2d 303 (Ct. App.), *cert. denied,* 104 N.M. 201, 718 P.2d 1349 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

28A C.J.S. Drugs and Narcotics § 265.

## 14-3103. Controlled substance; distribution; essential elements.

For you to find the defendant guilty of "distribution of _____[2]" [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][4] [caused the transfer of] [attempted to transfer] _____[2] to another;

2. The defendant knew it was _____[2] [or believed it to be _____[2]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction is not applicable to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

2. Identify the substance.

3. Insert the count number if more than one count is charged.

4. Use only the applicable alternatives.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Section 30-31-22A NMSA 1978.

This instruction is to be used for distribution of any controlled substance, including marijuana. Although the amount of the substance is not relevant for conviction for the crime of distribution, giving away of a "small amount" of marijuana is treated as if it were possession of more than eight ounces, Section 30-31-22C NMSA 1978, and therefore is punishable by a fine of only $5,000 or imprisonment for 1 to 5 years or both, Section 30-31-23B(3) NMSA 1978.

The introductory paragraph of this instruction gives the crime its statutory name, "distribution." Section 30-31-2J NMSA 1978 defines "distribute" as "deliver." Section 30-31-2G NMSA 1978 defines "deliver" as "actual, constructive or attempted transfer." "Transfer" is a word in common usage which will not ordinarily require further definition. If a definition is requested by the jury, a dictionary definition should be given.

Section 30-31-2G NMSA 1978 includes "attempted transfer" in the definition of "deliver." Therefore, the crime of "attempted distribution" is included in this instruction. Apparently, UJI 14-2801 is not appropriate for an attempted distribution because the legislature, in defining this offense, has specifically included an attempt within the definition of the substantive crime. *See State v. Vinson,* 298 So.2d 505 (Fla. App. 1974) (one who attempts to make a transfer is guilty of the substantive offense).

Unlike the crime of trafficking a controlled substance, the statute prohibiting distribution of a controlled substance does not specifically include a provision for penalizing a gift of the controlled substance. However, the court of appeals has held that the definition of "distribute" and the definition of "delivery" do not require any remuneration for the transfer. *See State v. Montoya,* 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

Possession is a necessarily included offense to the crime of distribution because one cannot commit the crime of distribution without also committing the crime of possession. *See State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). *See also State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974). *See* Rule 5-608 NMRA and UJI 14-6002 and commentary. Distribution may be by constructive transfer, for example, by mailing the substance. *State v. McHorse,* 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973). Consequently, constructive possession would be sufficient for a constructive distribution. *See* State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3102.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

**ANNOTATIONS**

**Ownership not element of crime.** — Section 30-31-20 NMSA 1978 prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: ownership is not an element. *State v. Hernandez*, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19.

28A C.J.S. Drugs and Narcotics § 266.

## 14-3104. Controlled substance; possession with intent to distribute; essential elements.1

For you to find the defendant guilty of "possession with intent to distribute _____[2]" [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[2] in his possession[4];

2. The defendant knew it was _____[2] [or believed it to be _____[2]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The defendant intended to transfer it to another;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction is not applicable to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

2. Identify the substance.

3. Insert the count number if more than one count is charged.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Section 30-31-22A NMSA 1978.

This instruction is for use for possession with intent to distribute of any controlled substance except a narcotic drug in Schedules I or II. An essential element of this offense is the intent to transfer. *State v. Tucker,* 86 N.M. 553, 525 P.2d 913 (Ct. App.), *cert. denied,* 86 N.M. 528, 525 P.2d 888 (1974).

Mere possession alone is insufficient to prove an intent to distribute. *State v. Moreno,* 69 N.M. 113, 364 P.2d 594 (1961). The intent to distribute may be inferred from the facts and circumstances. *State v. Ortega,* 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968). For example, it may be shown by the possession of a large quantity of the substance. *State v. Bowers,* 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974). It may also be shown if the person in possession is not, nor ever has been, a user of the substance. *State v. Quintana,* 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

The crime of possession with intent to distribute is complete if there is possession with intent to transfer. The place of the intended transfer is not an essential element of the crime. *State v. Bowers, supra*. The necessary intent may be proved by intent to complete any of the types of transfer which are set forth in Section 30-31-2G NMSA 1978.

Although this instruction is also applicable to marijuana, it will probably be seldom used for that substance. The statute provides the same penalty for a first offense of possession with intent to distribute marijuana and the offense of possession of more than eight ounces of marijuana.

For a discussion of use of the word "transfer" to define "distribute," *see* commentary to UJI 14-3103.

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

## ANNOTATIONS

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

28 C.J.S. Drugs and Narcotics § 175 et seq.

## 14-3105. Controlled substance; distribution to a minor; essential elements.

For you to find the defendant guilty of "distribution of _____[1] to a minor" [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][3] [caused the transfer of] [attempted to transfer] _____[1] to _____ *(name of transferee);*

2. The defendant knew it was _____[1] [or believed it to be _____[1]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The defendant was 18 years of age or older;

4. _____ *(name of transferee)* was 17 years of age or younger;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Identify the substance.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Section 30-31-21 NMSA 1978.

This crime may be committed by distribution of marijuana or any controlled substance enumerated in Schedules I through IV. The statute does not require that the distributor have knowledge of the age of the distributee. A reasonable construction of the statute supports the conclusion that the legislative intent was the protection of minors. Therefore, the crime is one of strict liability. With respect to the element of attempted transfer this instruction would be appropriate if there is evidence to support an attempt to transfer to a person under the age of 18. *Cf. United States v. Leazer,* 460 F.2d 864 (D.C. Cir. 1972). In adopting the Uniform Controlled Substances Act, New Mexico did not follow the suggestion of the uniform commissioners that there be at least a three year age difference between the distributor and distributee. *See* Uniform Controlled Substances Act, Section 406 and commissioners note.

For a discussion of exceptions and exemptions, *see* commentary to UJI 14-3101.

*See also* commentary to UJI 14-3103.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 82, 83.

Giving, selling or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

28 C.J.S. Drugs and Narcotics § 159 et seq.

# Part B
# Trafficking

## 14-3110. Controlled substance; trafficking by distribution; narcotic drug; essential elements.

For you to find the defendant guilty of "trafficking a controlled substance by distribution" [as charged in Count _____ ][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][3] [caused the transfer of] [attempted to transfer] _____[4] to another;

2. The defendant knew it was _____[4] [or believed it to be _____[4]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. This happened in New Mexico on or about the _____ day of _____, _____.

## USE NOTE

1. This instruction is applicable only to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. Identify the substance.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Section 30-31-20A(2) NMSA 1978.

This instruction is to be used for the crime of trafficking by distribution, sale, barter or giving away any controlled substance in Schedule I or II which is a narcotic drug. The statutory term "trafficking" is used in the introductory paragraph. However, sale (the transfer of ownership of and title to property from one person to another for a price), barter (to trade by exchanging one commodity for another) and give away (to make a present of) each have definitions which can be classified as subsets of distribute. Therefore, the term "transfer" is applicable to describe all types of trafficking by distribution. For a discussion of the use of "transfer," *see* commentary to UJI 14-3103.

Note that this crime requires only a general criminal intent. Therefore, UJI 14-141 must be given.

The definition of "deliver" includes an attempted transfer. Apparently UJI 14-2801 is not appropriate for an attempted distribution because the definition of the substantive offense specifically includes an attempt.

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

## ANNOTATIONS

**Ownership not element of crime.** — Section 30-31-20 NMSA 1978 prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: ownership is not an element. *State v. Hernandez,* 104 N.M. 268, 720 P.2d 303 (Ct. App.), *cert. denied,* 104 N.M. 201, 718 P.2d 1349 (1986).

**Trafficking in a controlled substance by distribution is not a specific intent crime.** — Since that portion of 30-31-20 NMSA 1978 which prohibits trafficking by "distribution, sale, barter or giving away any controlled substance . which is a narcotic drug" only describes a particular act without reference to a defendant's intent to do some further act or achieve some additional consequence, the crime is properly one of general intent. *State v. Bender,* 91 N.M. 670, 579 P.2d 796 (1978).

**Giving of alternative instructions not error.** — Where an indictment charged that the defendants "did intentionally distribute, possess with intent to distribute, or aided and abetted one another in the distribution of a controlled substance," and where two of the alternatives, distribution or aiding and abetting in distribution, were submitted to the jury in accordance with UJI 14-2822 and this instruction, there was no error in either the charges or the submission of the alternatives to the jury. *State v. Turner,* 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

**Court properly refused instruction on penalties.** — Where the jury was instructed as to the elements of the alleged heroin offenses in substantial compliance with this instruction and certain definitions, taken from the statutory provision, were included in the instruction, the court did not commit error in refusing the defendant's requested instruction based on 30-31-23B NMSA 1978 (relating to penalties for possession). *State v. Bustamante*, 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 A.L.R.5th 464.

28 C.J.S. Drugs and Narcotics § 178.

## 14-3111. Controlled substance; trafficking by possession with intent to distribute; narcotic drug; essential elements.1

For you to find the defendant guilty of "trafficking a controlled substance by possession with intent to distribute" [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[3] in his possession[4];

2. The defendant knew it was _____[3] [or believed it to be _____[3]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The defendant intended to transfer it to another;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction is applicable only to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

2. Insert the count number if more than one count is charged.

3. Identify the substance.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Section 30-31-20A(3) NMSA 1978. *See also* commentary to UJI 14-3104.

This instruction is for use for the crime of "trafficking" by possession with intent to distribute a narcotic drug in Schedule I or II.

Trafficking by possession with intent to distribute requires proof of a specific intent to transfer. *State v. Gonzales*, 86 N.M 556, 525 P.2d 916 (Ct. App. 1974).

There is authority that it is no defense to this charge that the defendant believed the substance to be a controlled substance other than a Schedule I or II narcotic. *See People v. James,* 38 Ill. App. 3d 594, 348 N.E.2d 295 (1976), appeal dismissed, 429 U.S. 1082, 17 S. Ct. 1087, 51 L. Ed. 2d 528 (1977). *See also* commentary to UJI 14-3101 and 14-3102. *But compare Mullaney v. Wilbur,* 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (due process requires that prosecution prove every fact necessary to constitute the crime charged).

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

For a discussion of the use of the word transfer, *see* commentary to UJI 14-3103.

**ANNOTATIONS**

**Actual possession not required.** — Since the evidence showed a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and that the defendant is third party's accomplice, the evidence is sufficient to support a conviction under 30-31-20 NMSA 1978. The fact the defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. *State v. Bankert*, 117 N.M. 614, 875 P.2d 370 (1994).

**Facts sufficient to find guilt of possession with intent to distribute.** — Where there was evidence that defendant was found in the stash house, that the smell of marijuana was strong and obvious, that there was a large quantity of marijuana in the basement, and that defendant tried to escape from the police when the investigation turned up marijuana, even punching one of the officers, and once subdued, defendant threw up, and slammed his head on the floor like a “child throwing a temper tantrum,” these facts are sufficient to allow a rational jury to find defendant guilty of possession with intent to distribute and conspiracy. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

28 C.J.S. Drugs and Narcotics § 175 et seq.

## 14-3112. Controlled substance; trafficking by manufacturing; essential elements.

For you to find the defendant guilty of "trafficking a controlled substance by manufacturing" [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [manufactured*][2] [packaged or repackaged] [labelled or relabelled] _____[3];

2. The defendant knew it was _____[3];

3. This happened in New Mexico on or about the _____ day of _____, _____.

* "Manufactured" means produced, prepared, compounded, converted or processed.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Identify the controlled substance.

**Committee commentary.** — *See* Section 30-31-20A(1) NMSA 1978. *See also* Uniform Controlled Substances Act, Section 401.

This instruction is for use in the charge of trafficking a controlled substance by manufacturing. The instruction uses the statutory term "manufacture" to include those activities included in the ordinary meaning of that term. The alternative activities of packaging and labelling are included in the statutory definition of "manufacture" and are only to be used when there is evidence of this type of activity. *See* Section 30-31-2N NMSA 1978.

The definition of manufacture excepts the preparation or compounding of a controlled substance for the defendant's own use. *See State v. Whitted,* 21 N.C. App. 649, 205 S.E.2d 611, cert. denied, 285 N.C. 669, 207 S.E.2d 761 (1974), *cert. denied,* 419 U.S. 1120, 95 S. Ct. 803, 42 L. Ed. 2d 820 (1975). For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

Any controlled substance enumerated in Schedules I through V may be manufactured.

**ANNOTATIONS**

**Although possession is not an element** of trafficking by manufacture and a jury instruction on possession was not required to be given with the instruction on trafficking by manufacture, where possession is an issue in dispute, it would be error not to give the instruction on possession. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28 C.J.S. Drugs and Narcotics § 160 et seq.

## 14-3113. Controlled substance; acquisition or attempt to acquire by misrepresentation; essential elements.

For you to find the defendant guilty of [intentionally acquiring or obtaining][1] [attempting to acquire or obtain] possession of _____[2] by misrepresentation or deception, [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant did [intentionally acquire or obtain][1] [attempt to acquire or obtain] possession of _____[2];

2. The defendant did so by misrepresentation or deception;

3. The defendant knew it was _____[2] [or believed it to be _____[2]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Use applicable alternative.

2. Identify the controlled substance.

3. Insert the count number if more than one count is charged.

4. If there is evidence that the defendant believed the substance to be some controlled substance other than that charged, use applicable alternative or alternatives.

**Committee commentary.** — The 1979 amendment to 30-31-25 NMSA 1978 added "or attempt to acquire or obtain" after "to intentionally acquire or obtain" in Subsection A(3). This indicates a legislative intent to make the attempt to obtain possession of a controlled substance by the proscribed conduct a separate substantive offense from that of actually obtaining a controlled substance by such conduct. The offenses are different, although of equal magnitude. For purposes of specificity, the jury should be instructed on one offense or the other, or instructed on both offenses alternatively when there is an issue as to whether the defendant actually obtained possession of the controlled substance.

The statute provides that the acquisition or attempt to acquire may be committed by misrepresentation, fraud, forgery, deception or subterfuge. The committee was of the opinion that the terms misrepresentation or deception adequately cover fraud, forgery or subterfuge and that the terms fraud, forgery or subterfuge would only confuse the jury.

The question of whether or not the substance is a controlled substance is a question of law to be decided by the judge.

# Part C
# Counterfeit Substances

## 14-3120. Counterfeit substance; creation; essential elements.

For you to find the defendant guilty of creating a counterfeit substance [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant placed an unauthorized _____*2* on _____[3];

2. The unauthorized _____[2] falsely represented the manufacturer, distributor or dispenser of the _____[3];

3. The defendant knew that the use of the _____[2] was unauthorized;

4. The defendant knew the substance was _____[3] [or believed it to be _____[3]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Insert one or more of the following terms in the alternative: trademark, trade name, imprint, number, device, identifying mark.

3. Identify the substance.

4. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* Section 30-31-22B NMSA 1978.

These instructions incorporate the statutory definitions of "counterfeit substance" from Section 30-31-2F NMSA 1978. The instructions are appropriate for use with any controlled substance in Schedules I through V. For a discussion of the use of the word "transfer," *see* commentary to UJI 14-3103. *See also* commentary to UJI 14-3102 and 14-3104.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28 C.J.S. Drugs and Narcotics § 192.

## 14-3121. Counterfeit substance; delivery; essential elements.

For you to find the defendant guilty of "delivering a counterfeit substance" [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][2] [caused the transfer of] [attempted to transfer] _____[3] to another;

2. The _____[3] had an unauthorized _____[4] which falsely represented its manufacturer, distributor or dispenser;

3. The defendant knew that the use of the _____[4] was unauthorized;

4. The defendant knew the substance was _____[3] [or believed it to be _____[3]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Identify the substance.

4. Insert one or more of the following terms in the alternative: trademark, trade name, imprint, number, device, identifying mark.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

**Committee commentary.** — *See* committee commentary under UJI 14-3120.

**ANNOTATIONS**

**Cross references.** — *See* Sections 30-31-22B, 30-31-2F and 30-31-2G NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28 C.J.S. Drugs and Narcotics § 159.

## 14-3122. Counterfeit substance; possession with intent to deliver; essential elements.

For you to find the defendant guilty of "possession with intent to deliver a counterfeit substance" [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[2] in his possession[3];

2. The defendant knew the substance was _____[2] [or believed it to be _____[2]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The _____[2] had an unauthorized _____[5] which falsely represented its manufacturer, distributor or dispenser;

4. The defendant knew that the use of the _____[5] was unauthorized;

5. The defendant intended to transfer the _____[2] to another;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Identify the substance.

3. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

4. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

5. Insert one or more of the following terms in the alternative: trademark, trade name, imprint, number, device, identifying mark.

**Committee commentary. —** *See* committee commentary under UJI 14-3120.

**ANNOTATIONS**

**Cross references. —** *See* Sections 30-31-22B and 30-31-2F NMSA 1978.

# Part D
# Definitions

## 14-3130. Possession of controlled substance; defined.[1]

A person is in possession [of] _____ *(name of substance)* when he knows it is on his person or in his presence, and he exercises control over it.

[Even if the substance is not in his physical presence, he is in possession if he knows where it is, and he exercises control over it.][2]

[Two or more people can have possession of a substance at the same time.]

[A person's presence in the vicinity of the substance or his knowledge of the existence or the location of the substance, is not, by itself, possession.]

USE NOTE

1. This instruction is designed to be used in controlled substance cases in which possession is an element and is in issue.

2. One or more of the following bracketed sentences may be used depending on the evidence.

**Committee commentary.** — This instruction defines the various methods by which possession of a controlled substance may occur. This instruction must be given if possession is in issue and its use replaces UJI 14-130 which should not be used in controlled substance cases.

Possession may be constructive. *See State v. Bowers,* 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974); *State v. Bauske,* 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974); *State v. Montoya,* 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973). *See also State v. Perry,* 10 Wash. App. 159, 516 P.2d 1104 (1973). Possession need not be exclusive. *See State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974). The definition of "possession," if given, should include only those alternatives which are supported by the evidence.

Possession need not be defined unless its definition is in issue. *Brothers v. United States,* 328 F.2d 151 (9th Cir.), cert. denied, 377 U.S. 1001, 84 S. Ct. 1934, 12 L. Ed. 2d 1050 (1964); *Johnson v. United States,* 506 F.2d 640 (8th Cir. 1974), *cert. denied,* 420 U.S. 978, 95 S. Ct. 1404, 43 L. Ed. 2d 659 (1975).

**ANNOTATIONS**

**Constructive possession.** — Evidence that the defendant fled from the police wearing a Lakers jersey, the defendant hid behind an abandoned refrigerator, cocaine was found under the refrigerator and near the place where the defendant dropped the Lakers jersey, and the defendant's phone calls from jail indicated that he knew the location of the cocaine, was substantial evidence that the defendant had constructive possession of the cocaine. *State v. Templeton*, 2007-NMCA-108, 142 N.M. 369, 165 P.3d 1145.

**First sentence of this instruction is designed** to be used in a controlled substance case in which possession is an element and is in issue. *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

**One or more of the second, third, and fourth sentences of this instruction "may" be used,** "depending on the evidence." *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

**No error in not giving last sentence from instruction.** — Where the whole issue in the case was whether defendant threw a Tylenol bottle out of the bathroom window, knowing that the bottle contained cocaine, under these circumstances, defendant would not have been entitled to the instruction, even if she had requested it. Therefore, there was no fundamental error in not giving the last sentence from the instruction on possession. *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

**Failure to tender instruction did not constitute ineffective assistance of counsel.** — Counsel's failure to tender an instruction concerning the last sentence of this instruction did not constitute ineffective assistance of counsel where it was rational for defense counsel to conclude that the best defense to both charges was that defendant did not throw a Tylenol bottle outside a bathroom window when the police arrived, knowing that cocaine was inside it, and substantial evidence was available and used at trial which, if believed by the jury, would have resulted in an acquittal. *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

**"Possession" may be actual or constructive.** *State v. Montoya,* 92 N.M. 734, 594 P.2d 1190 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

**Elements of constructive possession.** — "Constructive possession" requires no more than knowledge of a narcotic and control over it; "control," in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Montoya,* 92 N.M. 734, 594 P.2d 1190 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

**In a prosecution of a physician for violation of 30-31-25A(3) NMSA 1978,** constructive possession requires no more than knowledge of a narcotic and control over it; control, in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Carr,* 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, and *cert. denied,* 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, *State v. Olguin,* 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

**Evidence sufficient to infer knowledge.** — Evidence of defendant's exclusive control of the vehicle in which marijuana was found, his lies to the arresting officer, and his nervous demeanor were sufficient to allow a jury to find that he had knowledge of the marijuana. *State v. Hernandez,* 1998-NMCA-082, 125 N.M. 661, 964 P.2d 825.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28A C.J.S. Drugs and Narcotics § 265.

## 14-3131. Marijuana; definition.1

"Marijuana" means any part of the cannabis plant, whether growing or not; or the seeds of the plant; or any substance made from the plant or its seeds; [except][2]:

[the mature stalks of the plant][3]

[hashish];

[tetrahydrocannabinols extracted or isolated from the plant];

[fiber produced from the stalks];

[oil or cake made from the seeds of the plant];

[any substance made from the mature stalks];

[any substance made from the fiber];

[any substance made from the oil];

[any substance made from the cake];

[any substance made from the sterilized seed].

USE NOTE

1. This instruction is to be used if there is an issue as to whether the substance is marijuana.

2. Use the bracketed word if there is an issue involving one or more of the listed exceptions.

3. Use only the alternatives required by the evidence.

**ANNOTATIONS**

**Cross references.** — *See* Section 30-31-2O NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 8.

28A C.J.S. Drugs and Narcotics § 1.

# Part E
# Exceptions and Exemptions

## 14-3140. Exceptions and exemptions; burden of proof.

If _____[1], the defendant is not guilty of _____[2] [as charged in Count _____][3], the burden is on the state to prove beyond a reasonable doubt that _____[4].

USE NOTE

1. Describe the exemption or exception in issue: e.g., the drug was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice.

2. Insert the name of the offense or offenses to which the exception or exemption is applicable.

3. Use this bracketed phrase and insert the count number or count numbers if more than one count is charged.

4. Restate the exception or exemption in the negative: e.g., the drug was not obtained pursuant to a valid prescription, etc.

**Committee commentary.** — *See* Section 30-31-37 NMSA 1978.

This instruction is for use when an exception or exemption is at issue. Although the statute states that the burden of proof is on the defendant, such burden never shifts from the state in a criminal trial. The defendant has the burden of going forward with evidence sufficient to raise the issue of the exception or exemption, and then the state must disprove the existence or validity of such exception or exemption beyond a reasonable doubt. 28 C.J.S. Supp., Drugs & Narcotics, § 190, p. 278 (1974). *In accord, State v. Jourdain,* 225 La. 1030, 74 So.2d 203 (1954), cited with approval in *State v. Everidge,* 77 N.M. 505, 424 P.2d 787, cert. denied, 386 U.S. 976, reh. denied, 386 U.S. 1043 (1967). Other cases cited with approval in *Everidge* are consistent with the Jourdain case. Compare *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977) (in a rape case, the defense has the burden of going forward with evidence of spousal relationship, and then the burden of proof shifts to the state to prove beyond a reasonable doubt that the victim was not the spouse of the defendant); *Mullaney v. Wilbur,* 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (due process requires that the state prove all facts necessary to establish guilt); and *United States v. Rosenberg,* 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031, 96 S. Ct. 562, 46 L. Ed. 2d 404 (1975) (due process objection to federal statute is rejected because statute does not shift burden of proof).

Although the rule states that the defendant has the burden of going forward with the evidence, and the statute itself states that the defendant has the burden of proof, the burden may be satisfied by evidence that comes in on the government's case in chief. *United States v. Black*, 512 F.2d 864 (9th Cir. 1975) (construing the federal narcotic

statute, 21 U.S.C.A. 885(2)(1), which imposes on the defendant the burden of ". . . going forward with the evidence.")

For a discussion of the difference between burden of proof and burden of going forward in cases involving the defense of insanity, *see State v. James,* 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971), and *State v. Wilson,* 85 N.M. 552, 514 P.2d 603 (1973); and for a general discussion of the difference between these burdens, *see* 22A C.J.S. Criminal Law, § 573, p. 317 (1961). *See also* commentary to UJI 14-3101.

**ANNOTATIONS**

**Defendant must prove that he is within exception to penal statute** in order to take advantage of it; the state is generally not required to negate those exceptions. *State v. Roybal*, 100 N.M. 155, 667 P.2d 462 (Ct. App. 1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 211.

28A C.J.S. Drugs and Narcotics § 232.

# CHAPTER 32 to 42
# (Reserved)

# CHAPTER 43
# Securities Offenses

# Part A
# Elements

## 14-4301. Offer or sale of unregistered securities; essential elements.

For you to find the defendant guilty of the (offer to sell)[1] (or) (sale of) unregistered securities [as charged in Count _____][2], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant (offered to sell)[1] (or) (sold) a security[3];

2. The security was required by the state securities law to be registered with the State of New Mexico prior to the (sale)[1] (or) (offer for sale)[4];

3. The security was not registered as required by the state securities law;

4. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTE

1. Use only the applicable alternatives.

2. Insert the Count Number if more than one count is charged.

3. UJI 14-4310, the definition of "security", must also be given immediately after this instruction.

4. If the defendant claims that the security was exempt and there is a factual basis for this claim, UJI 14-4320 must be given. If the defendant claims that the sales transaction or offer to sell transaction was exempt and there is a factual basis for this claim, UJI 14-4321 must be given.

5. UJI 14-141, General criminal intent, must also be given with this instruction.

[Approved, effective September 1, 1988.]

**Committee commentary.** — Criminal Intent.

The sale of unregistered securities is not a specific intent crime. *State v. Sheets,* 94 N.M. 356, 365, 610 P.2d 760 (Ct. App. 1980), cert. denied 94 N.M. 675, 615 P.2d 992 (1980). UJI 14-141, general criminal intent, must be given with this instruction. Security - Question of Fact - Question of Law

The question of what constitutes a "security" is a mixed question of law and fact. *See* Modern Federal Jury Instructions, Section 57.10; *United States v. Austin,* 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961) (cert den. 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29) (1961). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine.

Almost all cases stating that the question of what is a security is a matter of fact for the jury involve the sale of an "investment contract". *See* for example: *State v. Shade,* 104 N.M. 710, 726 P.2d 864 (Ct.App. 1986) (cert. quashed) (sale of time-share memberships - relying on *Roe v. United States,* supra, held question whether a time-share contract was an investment contract was question of fact); *Roe v. United States*, supra; (sale of mineral lease - question whether the mineral lease was sale of real property or an investment contract was question of fact for the jury); *Ahrens v. American-Canadian Beaver Co., Inc.,* 428 F.2d 926 (10th Cir. 1970) (sale of beaver contracts by owner of beaver farm - held not error to submit to jury question of whether a beaver contract was an investment contract); *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983) (sale of gold certificate contract purporting to assign quantity of

gold); *Hentzner v. Alaska,* 613 P.2d 821 (Alaska 1980) (payment to defendant to find gold - question whether investment contract was question of fact for the jury).

All other cases stating that the question of whether the instrument was a security is a question of fact also involve the sale of some other novel type security. *See: People v. Figueroa,* 224 Cal. Rptr 719, 41 Cal.3rd 714, 715 P.2d 680 (Cal., 1986) (sale of promissory note); *Miller v. Florida,* 285 So.2d 41 (Fla., 1973) (sale of joint venture in Bogota, Columbia - question of whether personal loan or an investment in a joint venture question for jury).

In *SEC v. C. M. Joiner Corp.,* 320 U.S. 344, 64 S. Ct. 120, 88 L.Ed 88 (1943), the United States Supreme Court held that:

In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share", "investment contract", and "in general any interest or instrument commonly known as a security". We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as a matter of law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in terms of courses of dealing which establish their character in commerce as 'investment contracts', or as 'any interest or instrument commonly known as a 'security'. (Emphasis added.)

Even though an instrument may be called by a name which is commonly considered to be a type of security, the instrument may not be a security if the "context otherwise requires". In *Marine Bank v. Weaver,* 455 U.S. 551, 71 L. Ed. 2d 409, 102 S. Ct. 1220 (1982), the United States Supreme Court held that a non-publicly traded certificate of deposit of a financial institution was not a security. The court said that profit alone is not enough.

In *United Housing Foundation Inc. v. Forman et al.*, 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975), the court held that even though the instruments involved were called shares of "stock", they were not securities as they did not confer rights to receive dividends contingent upon an apportionment of profits. The United Housing case involved a massive non-profit housing cooperative constructed and financed under New York's Private Housing Finance Law to provide low income housing. Tenants were required to purchase 18 shares of "stock" for each room of an apartment at $25.00 per share ($1,800 for 4 room apartment). The shares could not be pledged, encumbered or bequeathed (except to surviving spouse). Shareholders had no voter rights. When the shares were sold to a new tenant, the seller could not receive more than $25.00 per

share plus a fraction of the mortgage then paid off. No dividends were to be paid. The court held that the shares were not purchased for profit, but to participate in the project and were therefore not "securities".

In *Landreth v. Landreth Timber Co.,* 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985), the Supreme Court rejected the argument that the *Forman, Marine Bank and Tcherepnin v. Knight,* 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967), cases mandated a case by case determination as to whether the economic realities call for an application of the federal securities act, holding that if the instrument involved is "traditional stock" there is no need to look beyond the characteristics of the instrument. Landreth involved the sale of 100% of the stock of a business. The Supreme Court rejected the so-called "sale of business" doctrine. (*See*, however, committee commentary to UJI 14-4312.) The Supreme Court distinguished *Forman, Marine Bank and Tcherepnin* stating that:

these cases, like the other cases on which respondents rely, involved unusual instruments that did not fit squarely within one of the enumerated specific kinds of securities listed in the definition. Tcherepnin involved withdrawable capital shares in a state savings and loan association, and Weaver involved a certificate of deposit and a privately negotiated profit sharing agreement.

* * *

. . . Nor does Forman require a different result. Respondents are correct that in Forman we eschewed a "literal" approach that would involve the Acts' coverage simply because the instrument carried the label "stock." Forman does not, however, eliminate the Court's ability to hold an instrument is covered when its characteristics bear out the label.

* * *

As Professor Loss explains, "It is one thing to say that the typical cooperative apartment dweller has bought a home, not a security; or that not every installment purchase 'note' is a security; or that a person who charges a restaurant meal by signing his credit card slip is not selling a security even though his signature is an 'evidence of indebtedness.' But stock (except for the residential wrinkle) is so quintessentially a security as to foreclose further analysis."

## ANNOTATIONS

**Cross references.** — *See* Section 58-13B-20 NMSA 1978.

**Ignorance of law.** — The court did not err in refusing to give an ignorance or mistake-of-law instruction based on defendant’s alleged reliance on the advice of defendant’s attorney that the promissory notes defendant issued to investors who advanced funds to defendant for the purpose of buying investment properties from the Resolution Trust

Corporation were lawful, because good faith reliance on the advice of counsel is not a defense to a charge of selling unregistered securities. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951.

## 14-4302. Fraudulent practices; sale of securities; essential elements.

For you to find the defendant guilty of fraudulent practices [as charged in Count _____][1], the State must prove beyond a reasonable doubt each of the following elements of the crime:

1. The defendant (offered to sell)[2] (sold) (offered to purchase) (or) (purchased) a security[3];

2. In connection with the (offer to sell)[2] (sale) (offer to purchase) (or) (purchase) of the security, the defendant purposely and directly or indirectly:

[used a plan or scheme to deceive

or cheat others;][2]

[OR]

[made an untrue statement of fact that under the circumstances would have been important or significant to the investment decision of a reasonable person;]

[OR]

[omitted a fact that under the circumstances would have been misleading to the investment decision of a reasonable person;]

[OR]

[engaged in an act, practice or course of business which would cheat or would operate as a fraud or deceit upon a reasonable person;]

3. This happened in New Mexico on or about the _____ day of _____, _____.[4]

USE NOTE

1. Insert the Count Number if more than one count is charged.

2. Use only the applicable alternatives.

3. UJI 14-4310, the definition of "security", must also be given immediately after this instruction.

4. UJI 14-141, General criminal intent, must also be given.

[Approved, effective September 1, 1988.]

**Committee commentary.** — Unlike general "criminal fraud", the fraudulent sale of securities is not a specific intent crime. *State v. Ross*, 104 N.M. 23, 26, 715 P.2d 471 (Ct.App., 1986). UJI 14-141, general criminal intent, must be given with this instruction.

The general rule is that the question of what constitutes a "security" is a mixed question of law and fact. *See* committee commentary to UJI 14-4301.

**ANNOTATIONS**

**Cross references.** — *See* Section 58-13B-30 NMSA 1978.

**Exempt transaction as an element of the sale of unregistered securities.** — Where defendant was charged with selling unregistered securities in a limited liability company in violation of Section 58-13B-20 NMSA 1978 of the New Mexico Securities Act of 1986; defendant proposed instructions that required the jury to acquit defendant if the jury found that defendant sold securities in the course of exempt transactions; and the issue of exemption was never raised at trial, the trial court did not err in denying defendant's instructions. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154 (decided under prior law).

**Specific intent is not an element of securities fraud** and the trial court did not err by refusing defendant's requested instruction that required the jury to find a specific intent. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951.

# Part B
# Definitions

## 14-4310. "Security"; defined.[1]

A "security" is any (ownership right) (right to an ownership position) (or) (creditor relationship) and includes any:[2]

[bond. A "bond" is any interest bearing instrument that obligates the issuer to pay the bondholder a specified sum of money, usually at specified intervals, and to repay the principal amount of the loan at maturity.]

[collateral-trust certificate. A "collateral-trust certificate" is a corporate debt instrument which is used to back collateral-trust bonds held by a bank or other trustee.]

[certificate of interest or participation in a security] [(temporary or interim certificate for)[2] (receipt for) (guarantee of) the right to purchase a security.]

[a warrant or right to subscribe to or purchase any security. A "warrant" or "subscription warrant" is a type of security which is usually issued together with a bond[3] or preferred stock,[4] that entitles the holder to buy a proportionate amount of stock, bonds or debentures at a specified price, usually higher than the market price at the time of issuance, for a period of years or to perpetuity.]

[a right to subscribe to or purchase any security. A "right" or a "subscription right" is a privilege granted to existing shareholders of a corporation to subscribe to shares of a new issue of stock, bonds or debentures before it is offered to the public, which normally has a life of two to four weeks, is freely transferable and entitles the holder to buy the new stock, bonds or debentures below the public offering price.]

[debenture. A "debenture" is an unsecured general debt obligation or loan backed only by the integrity of the borrower and usually documented by an agreement known as an "indenture".]

[draft. A "draft" is a signed, written order by which one party (drawer) instructs another party (drawee) to pay a specified sum to a third party (payee). The payee and drawer are usually the same person. A sight draft is payable on demand. A time draft is payable either on a definite date or at a fixed time after sight or demand.]

[evidence of indebtedness]

[any interest or instrument commonly known as a security]

[investment contract. An "investment contract" means a contract:

1. where an individual invests his money;

2. in an undertaking or venture of two or more people or entities;

3. with an expectation of profit;

4. based primarily on the efforts of others.

An "investment" is the use of capital or money to create more money.]

[limited partnership interest. A "limited partnership" is an organization made up of a general partner, who manages a project, and limited partners, who invest money but have limited liability.]

[note. A "note" is a written promise to pay a specified amount to a certain person or entity on demand or on a specified date.]

[interest in oil, gas or other mineral rights other than a landowner royalty interest in the production of oil, gas or other minerals created through the execution of a lease of the lessor's mineral interest.]

[promissory note. A "promissory note" is a written promise committing the maker to pay the payee a specified sum of money either on demand or at a fixed or determined future date, with or without interest.]

[(put)[5] (call)[5] (straddle)[5] (or) (option)[5] entered into on a national securities exchange relating to foreign currency.]

[(put)[5] (call)[5] (straddle)[5] (or) (option)[5] on any (security)[2] (group or index of securities including any interest therein or based on the value thereof).]

[subscription. A "subscription"[6] is an agreement of intent to buy newly issued securities.]

[stock. "Stock" is the ownership of a corporation represented by shares that are a claim on the corporation's earnings and assets.]

[treasury stock. "Treasury stock" is stock reacquired by the issuing company and available for retirement or resale.[4]]

[voting-trust certificate. A "voting trust certificate" is a transferable certificate of beneficial interest in a voting trust, a limited-life trust set up to permit control of a corporation by a few individuals, called voting trustees. The certificates, which are issued by the voting trust to stockholders in exchange for their common stock [4], represent all the rights of common stock except voting rights. The common stock is then registered on the books of the corporation in the names of the trustees.]

USE NOTE

1. It is generally a question of law as to whether or not a specific instrument is a security. If the instrument is a novel, uncommon or irregular device, the jury must be instructed on underlying factual disputes. An "investment contract" is a type of security which almost always requires a factual determination to be made. This instruction contains definitions of the common types of securities. It does not contain a definition of all of the terms set forth in the New Mexico Securities Act of 1986 to describe a security. If a term is not provided in this instruction, the court may draft an appropriate definition for the jury.

2. Use only the applicable alternatives.

3. The definition of "bond" as set forth in this instruction should also be given with this definition.

4. The definition of "stock" as set forth in this instruction should also be given with this definition.

5. The definitions of "put", "call", "call option", "option", and "certificate" are set forth in UJI 14-4311 and should be given when any of these terms are used.

6. *See also* the definitions of "subscription rights" and "subscription warrants" set forth above.

[Approved, effective September 1, 1988.]

**Committee commentary.** — The question of whether a specific instrument is a "security" is a mixed question of law and fact. *See* committee commentary to UJI 14-4301; Modern Federal Jury Instructions, Section 57.10; *United States v. Austin*, 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961) (*cert. denied* 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29 (1961) ). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine. These are usually cases involving an investment contract or a unique or novel type of instrument. *See State v. Shade* and *State v. Vincent,* 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986) (sale of time-share memberships - question whether a time-share contract was an investment contract).

As a general rule, if the jury requests an instruction on the definition of a term used in UJI Criminal, the judge is to give a Webster's Dictionary definition of the term, however, the committee believed that because of the technical nature of many of the types of securities, definitions should be prepared by the committee for the more commonly used terms. In preparing the definitions found in UJI 14-4310, the committee relied upon numerous sources, including Barron's, Dictionary of Finance and Investment Terms, Barron's, Finance and Investment Handbook and securities decisions.

## ANNOTATIONS

**The federal investment contract test in the definition of "security" in the federal Securities Act of 1933** is not an element of the definition of the term "security" as defined in the New Mexico Securities Act of 1986, Sections 58-13B-1 et seq. NMSA 1978, and the jury is not required to apply the investment contract test in security violations cases. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154 (decided under prior law).

**Security defined.** — Where defendant was charged with violations of the New Mexico Securities Act of 1986, Sections 58-13B-1 et seq. NMSA 1978 for selling interests in a limited liability company; defendant’s proposed a jury instruction to define "security" that did not actually define the term, but identified the circumstances under which an interest in a limited liability company constitutes a security; focused on the meaning of "common enterprise", not on the meaning of "security"; and required the jury to apply the federal investment contract test in the definition of "security" in the federal Securities Act of

1933, the court did not err in denying defendant's requested instruction. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154 (decided under prior law).

**Investment contract defined.** — This instruction defining "investment contract" as one in which the profits must be garnered "primarily" by a third party is a correct statement of the law. *State v. Danek*, 118 N.M. 8, 878 P.2d 326 (1994).

## 14-4311. Securities; additional definitions.

"Call". A "call" is the right to buy a specific number of shares at a specified price by a fixed date.

"Call Option". A "call option" is an option that gives the owner the right to buy a specified number of shares at a definite price within a specified period of time.

"Certificate". A "certificate" is a formal declaration that can be used to document a fact. Examples of types of certificate include: a birth certificate, a stock certificate, a partnership certificate and a certificate of deposit.

"Option". An "option" is right to buy or sell property within an agreed upon time in exchange for an agreed-upon sum.

"Put option". A "put option" is an option that gives the owner the right to sell a particular stock at a certain price within a designated period.

USE NOTE

The definitions in this Instruction may be used with the definitions set forth in UJI 14-4310.

[Approved, effective September 1, 1988.]

## 14-4312. "Isolated transaction"; definition.

An "isolated transaction" is a transaction which is unique, occurs only once or sporadically.

[Approved, effective September 1, 1988.]

**Committee commentary.** — Certain securities transactions are not required to be registered prior to sale. One common defense to the sale of unregistered securities is that the sale was an isolated sale. The Court of Appeals in a civil case held that the sale of all of the stock of a business by a non-issuer may sell as an "isolated sale" a whole business by selling 100% of the securities without registration if the purpose of the sale is to pass complete ownership, including managerial control, of the business of the corporation to the buyer. *See White v. Solomon,* 105 N.M. 366, 732 P.2d 1389 (Ct. App.

1986). *See also State v. Sheets,* 94 N.M. 356, 364, 610 P.2d 760 (Ct. App. 1980) (*cert. denied* 94 N.M. 675, 615 P.2d 992) for the definition of "isolated sale".

*White v. Solomon*, supra, adopts the sale of business doctrine. The New Mexico Court of Appeals improperly relies upon the United States Supreme Court decision of *Tcherepnin v. Knight*, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967) in holding that the sale of 100% of the stock of a business is not the sale of securities for purposes of registration. This interpretation of Tcherepnin, was specifically rejected by the United States Supreme Court in *Landreth v. Landreth,* 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985). *See* committee commentary to UJI 14-4301 for a discussion of the Tcherepnin and Landreth decisions.

It is noted that even though the sale of 100% of the stock of a business may not have to be registered in New Mexico, the transaction is still subject to the fraud provisions of the the New Mexico Securities Act of 1986. *See State v. McCall,* 101 N.M. 616, 629, 686 P.2d 958 (Ct. App. 1983).

# Part C
# Defenses

## 14-4320. Defense; exempt security.[1]

Evidence has been presented that the security which was (sold)[2] (offered for sale) [as charged in Count _____][3] was an exempt security and was not required to be registered under the State Securities Act. A security which is

[(issued by)[2] (insured by) (guaranteed by) a _____,[4]][2]

[an option issued by _____,[4]] [a _____,[4]]

is an exempt security and is not required to be registered by the state securities law.

If you find that the security was

[(issued by)[2] (insured by) (guaranteed by) a _____,[4]][2]

[an option issued by _____,[4]] [a _____,[4]]

you must find the defendant not guilty of the sale of an unregistered security [as charged in Count _____][3].

The burden is on the state to prove beyond a reasonable doubt that the security (sold)[2] (offered for sale) was not an exempt security.

USE NOTE

1. For use if there is an issue that the sale or offer for sale was an exempt security under the State Securities Act.

2. Use only the applicable alternative.

3. Insert the count number if more than one count is charged.

4. *See* Section 58-13B-26 NMSA 1978 for the types of exempt securities. Many of the terms set forth in Section 58-13B-26 NMSA 1978 have been defined in UJI 14-4310 and 14-4311.

[Approved, effective September 1, 1988.]

**Committee commentary.** — Certain securities are not required to be registered prior to sale or offer for sale. It is a defense to the offense of selling or offering to sell an unregistered security if the security transaction is an exempt transaction or the security is an exempt security. Other defenses, such as "mistake of fact" and good faith reliance on the advice of counsel are not available to the charge of offer to sell or sale of unregistered securities. *See State v. Shafer*, et al., 102 N.M. 629, 698 P.2d 902 (Ct. App., 1985) (cert. denied 102 N.M. 613).

**ANNOTATIONS**

**State Securities Act.** — The reference in the first paragraph of the instruction to the State Securities Act is apparently a reference to the New Mexico Securities Act of 1986, which appears as Chapter 58, Article 13B NMSA 1978.

## 14-4321. Defense; exempt transaction.[1]

Evidence has been presented that the security which was (sold)[2] (offered for sale) [as charged in Count _____][3] was an exempt transaction and was not required to be registered under the state securities law.

[An isolated transaction[4],][2]

[OR]

[A transaction (by)[2] (between) (in) _____[5],]

is an exempt transaction which is not required to be registered under the state securities law.

If you find that the (sale)[2] (offer to sell) of the unregistered security was

[an isolated transaction,][2]

[OR]

[a transaction (by)[2] (between) (in) _____[5],],

you must find the defendant not guilty of the sale of an unregistered security as charged in [Count _____][3].

The burden is on the state to prove beyond a reasonable doubt that the security (sold)[2] (offered for sale) was not an exempt transaction.

USE NOTE

1. For use if there is an issue that the sale or offer for sale was an exempt transaction. *See* Section 58-13B-27 NMSA 1978 for exempt transactions.

2. Use only the applicable alternative.

3. Insert the count number if more than one count is charged.

4. The definition of "isolated transaction", UJI 14-4312 is to be given immediately following this alternative.

5. Set forth the elements of the exempt transaction. *See* Section 58-13B-27 NMSA 1978 for the type of exempt securities transactions.

[Approved, effective September 1, 1988.]

**Committee commentary.** — Although the sale of all of the stock of a business is a transaction subject to the New Mexico Securities Act of 1986, a non-issuer may sell as an "isolated sale" a whole business by selling 100% of the securities without registration if the purpose of the sale is to pass complete ownership, including managerial control, of the business of the corporation to the buyer. *See White v. Solomon,* 105 N.M. 366, 732 P.2d 1389 (Ct. App., 1986); *State v. Sheets, supra;* and *State v. Shafer,* for the definition of "isolated sale". *See also* the Committee commentaries to UJI 14-4301 and 14-4312.

# CHAPTER 44
# (Reserved)

# CHAPTER 45
# Motor Vehicle Offenses

## 14-4501. Driving while under the influence of intoxicating liquor; essential elements.

For you to find the defendant guilty of driving while under the influence of intoxicating liquor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2];

2. At the time, the defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;

3. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. Insert count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

[Adopted, October 1, 1985; UJI Criminal Rule 35.01 NMSA 1978; UJI 14-4501 SCRA 1986; as amended, effective May 1, 1997.]

**Committee commentary.** — This instruction does not contain a definition of "under the influence of intoxicating liquor". UJI Crim. 14-243, which defines "under the influence of intoxicating liquor", should be given if requested. *See* committee commentary for UJI Crim. 14-243 for the sources of this definition.

The phrase "to drive" does not require motion of the vehicle. The offense is committed when a person under the influence is in actual physical control of a motor vehicle. Motion of the vehicle is not a necessary element of the offense. *See State v. Harrison,* 115 N.M. 73, 846 P.2d 1082 (Ct.App. 1992) and *Boone v. State,* 105 N.M. 223, 731 P.2d 366 (1986). *See also* Subsection K of Section 66-1-4.4 NMSA 1978 defining "driver" for purposes of the Motor Vehicle Code.

A person may be charged, under Section 66-8-102A NMSA 1978, with driving any motor vehicle while under the influence of intoxicating liquor, or in the alternative, under Section 66-8-102C NMSA 1978, with driving any motor vehicle with eight one-hundredths or more alcohol in the person's blood or breath. The jury may render a guilty verdict for a violation of Subsection A or for a violation of Subsection C. If the defendant is charged in the alternative, the jury may not render a guilty verdict for both offenses. *See State v. Cavanaugh,* 116 N.M. 826, 867 P.2d 1208 (Ct. App. 1993).

**ANNOTATIONS**

**The 1997 amendment,** effective May 1, 1997, substituted "operated" for "drove" in Paragraph 1, and substituted "the defendant" for "he" and added the language beginning "that is" in Paragraph 2.

**Compiler's notes.** — Notwithstanding Use Note number 2, the definition of motor vehicle is contained in 66-1-4.11 NMSA 1978.

## 14-4502. Driving while under the influence of drugs; essential elements.

For you to find the defendant guilty of driving while under the influence of drugs [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;[2]

2. At that time, the defendant was under the influence of drugs to such a degree that the defendant was incapable of safely driving a vehicle;

3. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. Insert count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of "motor vehicle".

[Adopted, October 1, 1985; UJI Criminal Rule 35.02 NMSA 1978; UJI 14-4502 SCRA 1986; as amended, effective May 1, 1997.]

**Committee commentary.** — Section 66-8-102B NMSA 1978 states that it is unlawful for any person who is under the influence "of any drug" to a degree which renders the person incapable of safely driving a vehicle to drive any vehicle in New Mexico. Section 66-8-102 NMSA 1978 does not define the term "drug". Drug is defined in the Controlled Substances Act. *See* Subsection K of Section 30-31-2 NMSA 1978.

For a discussion of the meaning of the phrase "to drive," *see* committee commentary to UJI Crim. 14-4501.

**ANNOTATIONS**

**The 1997 amendment,** effective May 1, 1997, substituted "operated" for "drove" in Paragraph 1 and made gender neutral changes in Paragraph 2, and rewrote Use Note 2 and deleted former Use Note 3 prohibiting giving UJI 14-243.

## 14-4503. Driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more; essential elements.

For you to find the defendant guilty of driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more [as charged in Count _____]1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle2;

2. Within three (3) hours of driving, the defendant had an alcohol concentration of eight one-hundredths (.08) grams or more in [one hundred milliliters of blood]3 [or] [two hundred ten liters of breath] [and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle]3.

3. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. Insert count number if more than one count is charged.

2. For the definition of "motor vehicle," *see* § 66-1-4.11 (H) NMSA 1978 (2007).

3. Use only the applicable alternative or alternatives.

[Adopted, October 1, 1985; UJI Criminal Rule 35.02 NMSA 1978; UJI 14-4502 SCRA 1986; as amended, effective August 1, 1989; May 1, 1997; as amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

**Committee commentary.** — This instruction pertains to Section 66-8-102 NMSA 1978 which makes it a criminal offense for a person to drive any vehicle within New Mexico while having eight one-hundredths or more alcohol in the person's blood or breath. It is commonly known as the *"per se"* violation.

Subsection C of Section 66-8-110 NMSA 1978 provides that "when the blood or breath of the person tested contains an alcohol concentration of eight one-hundredths or more, the arresting officer shall charge him with a violation of Section 66-8-102 NMSA 1978". The determination of blood or breath concentration is based on the grams of alcohol in one hundred milliliters of blood or grams of alcohol in two hundred ten liters of breath. *See* Subsection C of Section 66-8-111 NMSA 1978. Therefore, Section 66-8-102(C) and Section 66-8-110 NMSA 1978 create a *per se* standard. It is not necessary for the state to prove that the defendant was driving "while under the influence" in order for the jury to render a guilty verdict under Section 66-8-102(C) NMSA 1978.

For a discussion of alternative charges under Sections 66-8-102(A) and 66-8-102(C) NMSA 1978, *see* committee commentary for UJI Crim. 14-4501.

For a discussion of the meaning of the phrase "to drive," *see* committee commentary for UJI Crim. 14-4501.

This instruction pertains to § 66-8-102(C)(1) NMSA 1978 (2007), which makes it a criminal offense for "a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle." It is commonly known as the "per se" violation. This instruction should be used for all driving under the influence of intoxicating liquor cases in which a per se violation is alleged to have been committed after April 1, 2007, to reflect amendments to § 66-8-102 NMSA 1978.

§ 66-8-110(C)(1) NMSA 1978 (2007) provides, "The arresting officer shall charge the person tested with a violation of § 66-8-102 NMSA 1978 when the blood or breath of the person contains an alcohol concentration of . . . eight one hundredths or more."

"The determination of alcohol concentration shall be based on the grams of alcohol in one hundred milliliters of blood or the grams of alcohol in two hundred ten liters of breath." § 66-8-110(F) NMSA 1978 (2007).

Therefore, §§ 66-8-102(C) and 66-8-110 NMSA 1978 create a per se standard. It is not necessary for the state to prove that the defendant was driving "while under the influence" in order for the jury to render a guilty verdict under § 66-8-102(C) NMSA 1978.

For a discussion of alternative charges under §§ 66-8-102(A) and 66-8-102(C) NMSA 1978, *see* committee commentary for UJI 14-4501 NMRA.

For a discussion of the meaning of the phrase "to drive," *see* committee commentary for UJI 14-4501 NMRA.

## ANNOTATIONS

**The 1989 amendment,** effective for cases filed in the district courts on or after August 1, 1989, near the beginning of the instruction, substituted "driving with one-tenth of one percent or more by weight of alcohol in his blood" for "driving while under the influence of intoxicating liquor".

**The 1997 amendment,** effective May 1, 1997, substituted "a blood or breath alcohol concentration of eight one-hundredths (.08) or more" for "a blood alcohol content of .10 or more" in the instruction heading, substituted "a blood or breath alcohol concentration of eight one-hundredths (.08) or more" for "one tenth of one percent or more by weight of alcohol in his blood" in the introductory paragraph, substituted "operated" for "drove"

in Paragraph 1, substituted the language beginning "the defendant" for "he had one tenth of one percent or more by weight of alcohol in his blood" in Paragraph 2, and rewrote Use Note 2 and added Use Note 3.

**The 2008 amendment,** approved by Supreme Court Order 08-8300-08, effective March 21, 2008, in Paragraph 2, substituted "Within three (3) hours of driving" for "At that time" and added "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle"; and rewrote the committee commentary to explain the impact of the 2007 amendments to 66-8-102 NMSA 1978 on this instruction.

**Minimum concentration relates to time of operation.** — The Uniform Jury Instructions for both per se DWI and per se aggravated DWI require that the minimum alcohol concentration relate to the time the defendant operated a motor vehicle. *State v. Notah-Hunter*, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006.

**Where delay between driving and testing is significant,** the state must prove a nexus between the defendant's blood alcohol content score and the time of driving through evidence corroborating the inference that the defendant's blood alcohol content at the time of driving was at the statutory level of 0.08 or above. *State v. Hughey*, 2005-NMCA-114, 138 N.M. 308, 119 P.3d 188, cert. granted, 2005-NMCERT-008.

**Extrapolation to blood alcohol content at time of driving.** — If an expert can testify as to a method that reliably extrapolates from a defendant's blood alcohol content test result to a likely blood alcohol content at the time of driving, the blood alcohol content result is helpful to the fact finder and may be admissible. *State v. Hughey*, 2005-NMCA-114, 138 N.M. 308, 119 P.3d 188, cert. granted, 2005-NMCERT-008.

**Critical inquiry.** — In any case where the state attempts to prove a violation of the per se driving while intoxicated statute, which requires a minimum blood alcohol concentration at the time "the defendant operated a motor vehicle", the critical inquiry is how to determine the defendant's blood alcohol concentration at the time of driving if there is a significant delay between the time of driving and the time the blood alcohol concentration is measured. *State v. Silago*, 2005-NMCA-100, 138 N.M. 301, 119 P.3d 181.

## 14-4504. Reckless driving; essential elements.[1]

For you to find the defendant guilty of reckless driving [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. The defendant drove carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a

speed or in a manner so as to endanger or be likely to endanger any person or property;

3. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. If UJI Crim. 14-240 and 14-241 are given, this instruction should not be given.

2. Insert count number if more than one count is charged.

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

[As amended, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references. —** *See* Section 66-8-113 NMSA 1978.

**The 1997 amendment,** effective May 1, 1997, substituted "operated" for "drove" in Paragraph 1 and rewrote Use Note 3.

## 14-4505. Careless driving; essential elements.

For you to find the defendant guilty of careless driving [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2] on a highway[3];

2. The defendant operated the motor vehicle in a careless, inattentive or imprudent manner without due regard for the width, grade, curves, corners, traffic, weather, road conditions and all other attendant circumstances;

3. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. Insert count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

3. *See* Section 66-1-4.8 NMSA 1978 for the definition of a highway.

[Adopted, October 1, 1985; UJI Criminal Rule 35.05 NMSA 1978; UJI 14-4505 SCRA 1986; as amended, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references. —** *See* Section 66-8-114 NMSA 1978.

**The 1997 amendment,** effective May 1, 1997, rewrote Use Notes 2 and 3.

## 14-4506. Aggravated driving with alcohol concentration of (.16) or more; essential elements.1

For you to find the defendant guilty of aggravated driving while under the influence of intoxicating liquor [as charged in Count _____]2, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle3;

2. Within three hours of driving, the defendant had an alcohol concentration of sixteen one-hundredths (.16) grams or more in [one hundred milliliters of blood;]4 [or] [two hundred ten liters of breath;] [and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle].4

3. This happened in New Mexico, on or about the _____ day of _____, _____.

**USE NOTE**

1. If the evidence supports more than one theory of aggravated driving while intoxicated the applicable alternatives set forth in UJI 14-4509 NMRA are to be given. This instruction is to be used if the only theory of aggravated driving in issue is aggravated driving with an alcohol concentration of (.16) or more.

2. Insert count number if more than one count is charged.

3. For a definition of "motor vehicle," *see* § 66-1-4.11 NMSA 1978 (2007).

4. Use applicable alternative or alternatives.

[Adopted, effective May 1, 1997; amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

**ANNOTATIONS**

**Committee commentary. —** This instruction should be used for all aggravated driving under the influence of intoxicating liquor cases in which a per se violation is alleged to

have been committed after April 1, 2007, to reflect amendments to § 66-8-102 NMSA 1978.

**The 2008 amendment,** approved by Supreme Court Order 08-8300-08, effective March 21, 2008, in Paragraph 2, substituted "Within three hours of driving" for "At that time", and added "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle"; and added a new committee commentary.

**Minimum concentration relates to time of operation.** — The Uniform Jury Instructions for both per se DWI and per se aggravated DWI require that the minimum alcohol concentration relate to the time the defendant operated a motor vehicle. *State v. Notah-Hunter*, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006.

**Measurement ratio not for jury.** — The measurement ratio of grams per 210 liters of breath is a foundational requirement for admission of breath test results, rather than an element of the offense for the jury to decide. *State v. Onsurez*, 2002-NMCA-082, 132 N.M. 485, 51 P.3d 528, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

## 14-4507. Aggravated driving while under influence of alcohol or drugs and causing bodily injury; essential elements.[1]

For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. At that time the defendant was under the influence of

[intoxicating liquor; that is, as a result of drinking such liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;][4]

[or]

[drugs to such a degree that the defendant was incapable of safely driving a vehicle;]

3. The defendant caused painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of _____ *(set forth name of victim)*;

4. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. If the evidence supports more than one theory of aggravated driving while intoxicated, the applicable alternatives set forth in Instruction 14-4509 are to be given. This instruction is to be used if the only theory of aggravated driving in issue is causing bodily injury while under the influence.

2. Insert count number if more than one count is charged.

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

4. Use applicable alternative or alternatives.

[Adopted, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references.** — *See* Section 66-8-102 NMSA 1978.

## 14-4508. Aggravated driving while under influence of alcohol or drugs and refusing to submit to chemical testing; essential elements.1

For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. At that time the defendant was under the influence of

[intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;][4]

[or]

[drugs to such a degree that the defendant was incapable of safely driving a vehicle;]

3. The defendant refused to submit to chemical testing[5];

4. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. If the evidence supports more than one theory of aggravated driving while intoxicated, the applicable alternatives set forth in Instruction 14-4509 are to be given. This instruction is to be used if the only theory of aggravated driving in issue is refusing to submit to chemical testing while driving under the influence.

2. Insert count number if more than one count is charged.

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

4. Use applicable alternative or alternatives.

5. Instruction 14-4510, the definition of refusal to submit to chemical testing, must be given immediately after this instruction.

[Adopted, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references.** — *See* Section 66-8-102 NMSA 1978.

**DWI based on an inference of past driving.** — Where police officers were called to investigate a report of domestic violence occurring in a van parked on a roadside; when the officers arrived, defendant was in the driver's seat of the van; the van was not running; the keys were not in the ignition; defendant exhibited signs of intoxication, failed a standard field sobriety test, and refused to submit to chemical testing; defendant admitted to drinking twenty-four ounces of beer about one hour earlier; and the state prosecuted defendant exclusively on the past impaired driving theory, the evidence was insufficient to prove that defendant operated a motor vehicle while impaired to the slightest degree. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Substantial evidence.** — Defendant's conviction of DWI was supported by substantial evidence where police officers observed that the defendant had red, blood shot and watery eyes, slurred speech and a very strong odor of alcohol on his breath; one officer testified that the defendant had admitted to the officer that he had been drinking at this mother's apartment; the officers observed several open cans of beer at the apartment of the defendant's mother; and defendant did not dispute that he refused to consent to take a breath test. *State v. Soto*, 2007-NMCA-077, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006.

## 14-4509. Aggravated driving while under influence of alcohol or drugs; essential elements.1

For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. At that time, the defendant

[had an alcohol concentration of sixteen one-hundredths (.16) grams or more in [one hundred milliliters of blood;][4] [or] [two hundred ten liters of breath;]][4]

[OR]

[was under the influence of

[intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;][4]

[or]

[drugs to such a degree that the defendant was incapable of safely driving a vehicle]

and

[caused painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of _____ *(set forth name of victim)*;]

[or]

[refused to submit to chemical testing[5].]]

3. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTE

1. This instruction sets forth the elements of all three types of "aggravated driving while under the influence" in Subsection D of Section 66-8-102 NMSA 1978: (1) driving with an alcohol concentration of .16 or more; (2) causing bodily injury while driving intoxicated; and (3) refusing to submit to chemical testing when driving while intoxicated. If the evidence supports two or more of these theories of "aggravated driving while under the influence of intoxicating liquor or drugs", this instruction must be

used. If the evidence supports only one theory of aggravated driving while under the influence, use instruction 14-4506, 14-4507 or 14-4508, whichever is applicable.

2. Insert count number if more than one count is charged.

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

4. Use applicable alternative or alternatives.

5. Instruction 14-4510, the definition of refusal to submit to chemical testing, must be given if this element is given.

[Adopted, effective May 1, 1997.]

**ANNOTATIONS**

**Cross references.** — *See* Section 66-8-102 NMSA 1978.

## 14-4510. Refusal to submit to chemical testing; defined.[1]

The defendant refused to submit to chemical testing if:

1. the defendant was arrested on reasonable grounds to believe that the defendant was driving while under the influence of intoxicating liquor or drugs;

2. the defendant was advised by a law enforcement officer that failure to submit to the test could result in the revocation of the defendant's privilege to drive;

3. a law enforcement officer requested the defendant to submit to a chemical [breath][2] [blood] test;

4. the defendant was conscious and otherwise capable of submitting to a chemical test; and

5. the defendant willfully refused to submit to a [breath][2] [blood] test.

USE NOTE

1. This instruction must be given immediately after UJI Criminal 14-4508 or 14-4509 if the defendant is charged with aggravated driving while under the influence of intoxicating liquor or drugs by refusing to submit to a chemical test.

2. Use only applicable bracketed alternative.

[Adopted, effective May 1, 1997; as amended effective April 1, 1998.]

**ANNOTATIONS**

**Cross references.** — *See* Sections 66-8-103 and 66-8-105 to 66-8-112 NMSA 1978.

**The 1998 amendment,** effective April 1, 1998, deleted former paragraph 2 and Use Note 2, both relating to the right to independent chemical testing, and redesignated the subsequent paragraphs and Use Note accordingly.

## 14-4511. "Operating" or driving a motor vehicle; defined.1

A person is "operating" a motor vehicle[2] if the person is:

[driving the motor vehicle;][3]

[or]

[in actual physical control with the intent to drive the vehicle, whether or not the vehicle is moving;]

[or]

[exercising control over or steering a vehicle being towed by a motor vehicle;]

[or]

[operating an off-highway motor vehicle;]

[or]

[in actual physical control with the intent to drive the vehicle, of an off-highway motor vehicle whether or not the vehicle is moving].

USE NOTE

1. Use this instruction if "operating" or "driving" is in issue.

2. If there is an issue as to whether the vehicle is a motor vehicle, the definition of "motor vehicle", Section 66-1-4.11 NMSA 1978 should be given.

3. Use only applicable alternative or alternatives.

[Approved, effective April 1, 1997; as amended, effective August 1, 2001; as amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

**Committee commentary.** — *See State v. Sims*, 2010-NMSC-027, 148 N.M. 330, 236 P.3d 642 (holding that when a DWI charge is based on the allegation that the defendant

was in actual physical control of the vehicle, the state must prove that the defendant had an intent to drive and limiting the holdings of *Boone v. State*, 105 N.M. 223, 731 P.2d 366 (1986); *State v. Johnson*, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233).

[As amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

**ANNOTATIONS**

**Cross references.** — *See* Section 66-7-2 NMSA 1978; Section 66-1-4.4 NMSA 1978; Section 66-1-4.4K NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, deleted the phrase "if the vehicle is on a highway" after "whether or not the vehicle is moving"; added "[or] [operating an off-highway motor vehicle;]," added the phrase "whether or not the vehicle is moving]" at the end of the last clause, and deleted Use Note 4 which read "If there is an issue as to whether or not the motor vehicle was on a 'highway', the definition of 'highway' set forth in Section 66-1-4.8 NMSA 1978 should be given".

**The 2011 amendment,** approved by Supreme Court Order No. 11-8300-004, effective March 21, 2011, required the jury to find that the defendant had the intent to drive a vehicle that was in the actual physical control of the defendant.

**"Operating" vs. "driving" motor vehicle. –** The term "operating" a motor vehicle as used in this instruction is synonymous with the term "driving" a motor vehicle under the driving while intoxicated statute, 66-8-102 NMSA 1978. *State v. Laney,* 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

In a prosecution for vehicular homicide under 66-8-101 NMSA 1978 and reckless driving under 66-8-113 NMSA 1978 where the issue was whether the defendant was in fact the driver, the defendant was not prejudiced by this instruction, because the instructions defining the offenses required that the defendant be "driving" the vehicle in the ordinary sense. *State v. Laney,* 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

**Vehicle on private property.** — The state may charge a person with DWI pursuant to 66-8-102 NMSA 1978, despite the fact that the defendant is found on private property in actual physical control of a non-moving vehicle. *State v. Johnson,* 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233.

## 14-4512. Actual physical control; defined.

In determining whether the state has proved beyond a reasonable doubt that the defendant was in actual physical control of the vehicle and that the defendant intended to drive the vehicle, thereby posing a real danger to [himself] [herself] or the public, you should consider the totality of the circumstances shown by the evidence. You may consider the following factors and any other relevant factors supported by the evidence:

1. whether the vehicle was running;

2. whether the ignition was in the "on" position;

3. where the ignition key was located;

4. where and in what position the driver was found in the vehicle;

5. whether the person was awake or asleep;

6. whether the vehicle's headlights were on;

7. where the vehicle was stopped;

8. whether the driver had voluntarily pulled off the road;

9. the time of day;

10. the weather conditions;

11. whether the heater or air conditioner was on;

12. whether the windows were up or down;

13. whether the vehicle was operable;

14. any explanation of the circumstances shown by the evidence.

It is up to you to examine all the available evidence in its totality and weigh its credibility in determining whether the defendant was simply using the vehicle as stationary shelter or actually posed a threat to the public by the exercise of actual control over it while impaired.

[Adopted by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

**Committee commentary.** — *See State v. Sims*, 2010-NMSC-027, ¶ 26, 148 N.M. 330, 236 P.3d 642 (holding that when a DWI charge is based on the allegation that the defendant was in actual physical control of the vehicle, the state must prove that the defendant had an intent to drive and limiting the holdings of *Boone v. State*, 105 N.M. 223, 731 P.2d 366 (1986); *State v. Johnson*, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233). *See also State v. Mailman*, 2010-NMSC-036 , ¶ 20, 148 N.M. 702, 242 P.3d 269 (holding that the operability of a vehicle is an additional factor for the jury to consider in determining whether a defendant has the general intent to drive).

[Adopted by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

# CHAPTER 46 to 49
# (Reserved)

# CHAPTER 50
# Evidence and Guides for Its Consideration

# Part A
# General Rules

## 14-5001. Direct and circumstantial evidence.

There are two types of evidence. One is direct evidence, such as the testimony of an eyewitness, which directly proves a fact. The other is circumstantial evidence. Circumstantial evidence means evidence that proves a fact from which you may infer the existence of another fact.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The committee believed that defining the types of evidence has little practical value for the jury. Consequently, no instruction should be given on this subject. The use of circumstantial evidence and the requirement that the state must prove the guilt of the defendant beyond a reasonable doubt are certainly proper subjects for discussion by counsel during final argument.

The language of this instruction is derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 11.02 (1970), and California Jury Instructions Criminal, 2.00 (1970). *Compare* with UJI Civ. 17.6 (1966).

**ANNOTATIONS**

**Traditional distinction between direct and circumstantial evidence has been disapproved** by this instruction and UJI 14-5002. *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977).

**Circumstantial evidence rule is special application of rule concerning reasonable doubt;** it is not independent of the question of whether there is substantial evidence to

support the verdict. *State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

**Circumstantial evidence may be used to establish element of crime.** *State v. Sanchez,* 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

**Substantial support by circumstantial evidence sustains verdict.** — Even if the evidence is circumstantial, if the circumstantial evidence substantially supports the verdict, the verdict will not be set aside. *State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

**Where circumstances alone are relied upon by the prosecution for a conviction,** the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other hypothesis than the defendant's guilt, and they must satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt. *State v. Seal,* 75 N.M. 608, 409 P.2d 128 (1965) (decided prior to adoption of instructions).

Where circumstantial evidence alone is relied upon for a conviction, such evidence must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. *State v. Zarafonetis,* 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Circumstantial evidence alone can be sufficient to prove guilt beyond a reasonable doubt. *State v. Duncan,* 113 N.M. 637, 830 P.2d 554 (Ct. App. 1990), aff'd, 111 N.M. 354, 805 P.2d 621 (1991).

**Circumstantial evidence must exclude every reasonable hypothesis other than the guilt of the defendant.** *State v. Seal,* 75 N.M. 608, 409 P.2d 128 (1965).

Where circumstances alone are relied upon, they must point unerringly to the defendant and be incompatible with and exclude every reasonable hypothesis other than guilt. *State v. Page,* 83 N.M. 487, 493 P.2d 972 (Ct. App.), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

**Guilty knowledge is rarely susceptible to direct and positive proof** and generally can be established only through circumstantial evidence. *State v. Zarafonetis,* 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

**Circumstantial evidence as basis for inference of fact.** — Where the evidence connecting the defendant with the crime is circumstantial, it may properly serve as a basis for an inference of fact essential to the establishment of the offense. *State v. Paul,* 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

**Location of crime, as element of offense, may be proved by circumstantial evidence,** and the defendant's confession, together with circumstantial evidence, may supply substantial evidence for the jury's verdict that the crime was committed in New Mexico, since if a choice exists between two conflicting chains of inference, that choice is for the trier of fact. *State v. Ramirez,* 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

**Circumstantial evidence instruction found proper.** — Instruction informing the jury that it could consider both direct and circumstantial evidence in deciding the case, was a proper instruction, and where another instruction defined circumstantial evidence, it would not have been error to have given it in addition. *State v. Archuleta,* 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

**Instruction on uncollected evidence.** — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim; defendant was tried for first degree murder with the predicate felony of shooting at a dwelling; during their investigation of the crime scene, police officers observed spent and unspent bullet casings in the house, which were not photographed or collected, and spent bullet casings outside the house, which were photographed, but not collected; defendant’s theory of the case was that defendant shot toward the house at people who were shooting at him ; defendant requested a jury instruction that would have allowed the jury to assume that the uncollected evidence was unfavorable to the prosecution if the jury found that the evidence was lost, destroyed or altered without a reasonable explanation; and defendant did not contend that the officers acted in bad faith or that their failure to collect evidence was grossly negligent, the district court did not err in rejecting defendant’s tendered jury instruction. *State v. Torrez*, 2013-NMSC-034.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 29A Am. Jur. 2d Evidence § 1434 et seq.

Duty of court in criminal case, in absence of request, to charge with respect to circumstantial evidence, 15 A.L.R. 1049.

Instruction on circumstantial evidence in criminal case, 89 A.L.R. 1379.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial - state cases, 36 A.L.R.4th 1046.

22A C.J.S. Criminal Law § 530(1).

## 14-5002. Circumstantial evidence; sufficiency.

You are not permitted to find the defendant guilty of [the] [any] crime charged against him based on circumstantial evidence alone, unless the chain of circumstances

excludes every other reasonable explanation except the defendant's guilt beyond a reasonable doubt.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language in this instruction is the test for reviewing the evidence on appeal, *State v. Mares*, 82 N.M. 682, 486 P.2d 618 (Ct. App.), rev'd, 83 N.M. 225, 490 P.2d 667 (1971), and on a motion for directed verdict, *State v. Malouff*, 81 N.M 619, 471 P.2d 189 (Ct. App. 1970). The adoption of this instruction and use note eliminates the requirement that the jury must also be instructed on the issue when the state's case rests solely on circumstantial evidence. *See, e.g.*, *State v. Duran,* 86 N.M. 594, 526 P.2d 188 (Ct. App.), cert. denied, 86 N.M 593, 526 P.2d 187 (1974); *Territory v. Lermo,* 8 N.M. 566, 46 P. 16 (1896); *State v. Garcia,* 61 N.M. 291, 299 P.2d 467 (1956); and compare *State v. McKnight*, 21 N.M. 14, 42-43, 153 P. 76 (1915), appeal dismissed per curiam, 246 U.S. 653, 38 S. Ct. 335, 62 L. Ed. 923 (1917).

The committee believed that once the court has found that the state has met the legal test for sufficiency of the evidence, nothing is added by instructing the jury on this subject. The jury is instructed on its duty to find the facts and that it must be satisfied beyond a reasonable doubt of the defendant's guilt. Furthermore, this instruction would constitute a comment on the evidence prohibited by Rule 11-107 NMRA.

## ANNOTATIONS

**Traditional distinction between direct and circumstantial evidence has been disapproved** by UJI 14-5001 and this instruction. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

**Refusal to instruct jury on circumstantial evidence is proper** because such an instruction is not to be given. *State v. Williams*, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978); *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

**Circumstantial proof to support conviction** must be inconsistent with any reasonable hypothesis of the defendant's innocence. *State v. Brito,* 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969).

The defendants were convicted on circumstantial evidence. To support a conviction, circumstantial evidence must be inconsistent with any reasonable hypothesis of the defendants' innocence. *State v. Hardison,* 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

**Location of crime, as one element of offense, may be proved by circumstantial evidence,** and the defendant's confession, together with circumstantial evidence, may supply substantial evidence for the jury's verdict that the crime was committed in New Mexico, since if a choice exists between two conflicting chains of inference, that choice

is for the trier of fact. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

**Sufficient circumstantial evidence to sustain conviction.** — Evidence that both men were wearing boots when arrested and both sets of boots had cleats matching the description of the cleats in the tracks observed by the officer and, furthermore, the boots of the men were taken to the scene and these boots matched the tracks at the scene, both in length and width, "just exactly the size of the track," was held sufficient to sustain a conviction based on circumstantial evidence. *State v. Hardison,* 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

The defendant's flight from the crime, together with the circumstances that the defendant came to the store with intent of breaking in, and gave a false name when arrested, absent an explanation of his reasons or motive, permits an inference of guilt. The circumstances exclude every reasonable hypothesis other than the defendant's guilt and are sufficient to sustain a conviction. *State v. Gonzales,* 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 29A Am. Jur. 2d Evidence § 1467 et seq.

Duty of court in criminal case, in absence of request, to charge with respect to circumstantial evidence, 15 A.L.R. 1049.

Instruction on circumstantial evidence in criminal case, 89 A.L.R. 1379.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial - state cases, 36 A.L.R.4th 1046.

23A C.J.S. Criminal Law § 1251.

## 14-5003. Consciousness of guilt; falsehood.

If you find that before this trial the defendant made a false or deliberately misleading statement concerning the charge upon which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt, but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.03. The committee believed that no instruction

should be given on this subject because it singles out one item of evidence. The subject is more properly left to the final argument of counsel. *See also* commentary to UJI 14-5002.

**ANNOTATIONS**

**Instructions implicitly adopt policy against using instructions which comment on evidence.** *State v. Padilla*, 90 N.M. 481, 565 P.2d 352 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

**As comment on evidence is matter that should be left for argument.** *State v. Padilla*, 90 N.M. 481, 565 P.2d 352 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A C.J.S. Criminal Law § 623.

## 14-5004. Efforts by defendant to fabricate evidence.

Evidence that the defendant attempted [to persuade a witness to testify falsely] [to manufacture evidence to be produced at the trial] may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your determination.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.04. The committee believed that an instruction on this subject would constitute a comment on the evidence. *See* Rule 11-107 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23A C.J.S. Criminal Law § 1225.

## 14-5005. Efforts by others than defendant to fabricate evidence.

If there is evidence that efforts to procure false or fabricated evidence were made by another person on behalf of the defendant, you may not consider this as tending to show the defendant's guilt, unless you find that the defendant authorized those efforts.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.05. *See* the commentaries to UJI 14-5003 and 14-5004.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 A.L.R.3d 1156.

23A C.J.S. Criminal Law § 1225.

## 14-5006. Efforts to suppress evidence.

Evidence that the defendant attempted to suppress evidence against himself, in any manner [such as] [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.06. *See* the commentary to UJI 14-5003.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23A C.J.S. Criminal Law § 1225.

## 14-5007. Evidence limited to one defendant.[1]

Evidence concerning _____ *(describe evidence)* has been admitted against _____ *(name of defendant)* but not admitted against _____ *(name of defendant)*.

[At the time this evidence was admitted, you were instructed that it could not be considered by you against _____ *(name of defendant)*.][2]

You are [again][2] instructed that you must not consider such evidence against _____ *(name of defendant)*.

Your verdict as to each defendant must be reached as if he were being tried separately.

USE NOTE

1. Upon request, the court must instruct the jury of the limited scope of evidence admitted only as to one party.

2. Use only if jury was admonished at the time the evidence was admitted.

**Committee commentary.** — Rule 11-105 NMRA says that "[w]hen evidence which is admissible as to one party . . . but not admissible as to another party . . . is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Rule 11-105 NMRA was, in part, derived from the California Evidence Code, Section 355. *See* 56 F.R.D. 183, 200 (1973). This instruction is derived from California Jury Instructions Criminal, 2.07, which was also based upon the California Evidence Code.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1283.

23 C.J.S. Criminal Law § 1032(4).

## 14-5008. Statement limited to one defendant.

Evidence has been admitted of a statement made by _____ *(name of defendant)* after his arrest.

At the time the evidence of this statement was admitted, you were told that it could not be considered by you as against _____ *(name of other defendant or defendants).*

You are again instructed that you must not consider the evidence as against _____ *(name of other defendant or defendants).*

Your verdict as to each defendant must be rendered as if he were being tried separately.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.08. The committee determined that the instruction should no longer be given. The adoption of a "no instruction" instruction may help alert the bench and bar to the problems of allowing statements by a joint defendant into evidence.

If the prosecution "probably" was to present evidence against a joint defendant which would not be admissible in a separate trial of the defendant, the defendant will usually request a separate trial. *State v. Benavidez,* 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975). A defendant may know of, or, if he has pursued his discovery remedies under Rule 5-501 NMRA, will have discovered the codefendant's statement. Under such circumstances he may move for and may be granted a separate trial under Rule 5-203 NMRA. In that event, this instruction would, of course, be unnecessary.

In the event that the defendant overlooks his remedy under Rule 5-203 NMRA and the joint trial proceeds to the point at which the prosecution tenders the codefendant's out-of-court statement, there are at least two possible consequences: (1) if the "declarant" codefendant does not take the stand and subject himself to cross-examination, then this cautionary instruction does not overcome the violation of the right of the "injured" codefendant to confront the witnesses against him, *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); (2) if the declarant does take the stand and is subject to cross-examination, there is no denial of the right of confrontation, *Nelson v. O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). In the latter situation, the testimony and the cross-examination of the declarant and his out-of-court statement are admissible for all purposes. The limiting instruction is simply not necessary. This rule applies, according to *Nelson,* even if the declarant codefendant denies the statement in court and testifies favorably for the codefendant.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1283.

23A C.J.S. Criminal Law § 1032(4).

## 14-5009. Evidence admitted for a limited purpose.[1]

Evidence concerning _____ *(facts)* was admitted for the limited purpose of _____ *(proof).*

[At the time this evidence was admitted, you were admonished that it could not be considered for any other purpose.][2]

You are [again][2] instructed that you must not consider such evidence for any purpose other than _____ *(proof).*

USE NOTE

1. Upon request, the court must instruct the jury that evidence is admitted for a limited purpose. This is a general instruction. For special instructions, *see* UJI 14-5010, 14-5022, 14-5028, 14-5034, and 14-5035.

2. Use only if jury was admonished at the time the evidence was admitted.

**Committee commentary.** — This instruction is required by Rule 11-105 NMRA. It was derived from California Jury Instructions Criminal, 2.09, which was based upon the California Evidence Code, Section 355. *See also* the commentary to UJI 14-5007.

As indicated in the use note, there are special instructions for the following circumstances, and this instruction should not be given: a confession given to a psychiatrist under certain circumstances, UJI 14-5010; impeachment of the defendant by other crimes or wrongs, UJI 14-5022; impeachment of the defendant by use of otherwise inadmissible confessions, UJI 14-5034; impeachment of the defendant by use of inadmissible real evidence, UJI 14-5035. For a case where this instruction would have been appropriate, *see State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1283.

23A C.J.S. Criminal Law § 1163.

## 14-5010. Statements made by defendant during psychiatric examination or treatment.

Evidence has been admitted concerning statements made by the defendant in the course of a mental examination or treatment. These statements may be considered only for the limited purpose of showing the information upon which an expert based his opinion as to the defendant's mental capacity.

USE NOTE

Upon request, this instruction may be given upon completion of the witness' testimony, as well as at the time the balance of the instructions are given to the jury.

**Committee commentary.** — Under Rule 11-504 NMRA, a statement made in the course of a court-ordered mental examination is not privileged. Under Rule 5-602 NMRA, a "statement made by a person during a psychiatric examination or treatment subsequent to the commission of the alleged crime shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his sanity."

Assuming that the statement is not a privileged communication under Rule 11-504 NMRA, (*see, e.g., State v. Milton,* 86 N.M. 639, 526 P.2d 436 (Ct. App. 1974)), the statement will be admitted under the restrictions of Rule 5-602 NMRA. In construing a similar federal statute, 18 U.S.C. § 4244, the Tenth Circuit has noted that because "such statements could be prejudicial . [t]he district judge must therefore . be careful in instructing the jury as to the significance of the testimony." *United States v. Julian,* 469 F.2d 371, 376 (10th Cir. 1972). *See also United States v. Bennett,* 460 F.2d 872, 879 (D.C. Cir. 1972).

The language of this instruction was derived from California Jury Instructions Criminal, 2.10, and altered to conform to Rule 5-602 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial § 1190.

22A C.J.S. Criminal Law § 651.

## 14-5011. Production of all witnesses or all available evidence not required.

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence. You may not speculate on whether the testimony or evidence not produced would have been favorable or unfavorable to the party who apparently failed to present the witness or evidence.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.11. Following the precedent of UJI 13-2104, the committee believed that no instruction on the matter should be given. The subject may be covered in final argument. A "no instruction" instruction on this subject resolves the conflict of opinion on whether this or a similar instruction should be given in a criminal case. *See State v. Debarry,* 86 N.M. 742, 527 P.2d 505 (Ct. App. 1974); *State v. Archuleta,* 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971); *State v. Soliz,* 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

**ANNOTATIONS**

**Comment on failure to call witness permitted.** — Although no instruction is to be given concerning the production of witnesses, New Mexico law permits comment, in closing argument, concerning the failure to call a witness. *State v. Vallejos,* 98 N.M. 798, 653 P.2d 174 (Ct. App. 1982).

New Mexico law permits comment, in closing argument, concerning the failure to call a witness, so long as the argument has a basis in the evidence and the statement made cannot be construed as a comment on the failure of the defendant to testify. *State v. Ennis,* 99 N.M. 117, 654 P.2d 570 (Ct. App. 1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial - modern criminal cases, 76 A.L.R.4th 812.

## 14-5012. Transcript testimony; weight.1

Testimony given by a witness at a [preliminary hearing][2] [deposition] [previous trial] [has been read to you from the reporter's transcript of that proceeding][3] [has been presented by tape recording]. You are to give such testimony the same consideration as the testimony of witnesses who have testified here in court.

USE NOTE

1. This instruction shall be used only when the prior testimony has been admitted as substantive evidence, not when it is admitted solely for impeachment or as a prior consistent statement.

2. Use applicable description of source of prior testimony.

3. Use applicable type of presentation.

**Committee commentary.** — This instruction was derived from California Jury Instructions Criminal, 2.12, and UJI 13-203. The Civil UJI instruction is limited to deposition testimony, whereas the California instruction covers testimony at any prior proceeding. The committee has limited the transcribed testimony to testimony from either a preliminary hearing, a deposition or a previous trial. *See also* Subparagraph (1), Paragraph D of Rule 11-801 NMRA.

**ANNOTATIONS**

**No basis for giving instruction where defendant does not offer testimony into evidence.** — Where the defendant used a witness' preliminary hearing testimony for purposes of impeachment but did not offer the question and answer into evidence, no preliminary hearing testimony was admitted as substantive evidence, and, thus, there was no basis for giving this instruction. *State v. Traxler,* 91 N.M. 266, 572 P.2d 1274 (Ct. App. 1977).

## 14-5013. Facts established by judicial notice.1

Without requiring testimony or other evidence, the court has taken notice that _____.[2] You may, but are not required to, accept this as a fact.

USE NOTE

1. This instruction must be given each time an adjudicative fact is established by judicial notice. This instruction does not go to the jury room.

2. Here state fact judicially noticed.

**Committee commentary.** — Paragraph G of Rule 11-201 NMRA requires the judge to instruct the jury to accept, as established, any adjudicative facts judicially noticed. *See generally* 56 F.R.D. 183, 201-07 (1973). Compare the federal version of Rule 201, 88 Stat. 1926, 1930.

The commentary to [federal] Rule 201 describes adjudicative facts as those facts of the case concerning the parties; that is, the questions of what, where, when and how, which are determined by the trier of fact. 56 F.R.D. 183, 201-04 (1973). The rule does not cover the taking of judicial notice of legislative facts, i.e., facts which have relevance to legal reasoning and the law-making process. 56 F.R.D. 183, 202 (1973). In addition, Rule 11-201 does not cover the taking of judicial notice of law, a matter of procedure. *See, e.g.*, Fed. R. Crim. P. 26.1. The New Mexico Rules of Criminal Procedure do not have a similar provision for the taking of judicial notice of law. The absence of such a procedure has no bearing on the jury instruction, however, since the jury is not instructed on the taking of judicial notice of law.

## 14-5014. Failure of the state to call a witness.

If a witness whose testimony would have been material on an issue in the case was peculiarly available to the state and was not introduced by the state and the absence of that witness has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony by that witness would have been unfavorable to the state and favorable to the accused.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — This instruction sets out the rule that an inference may be drawn from the failure of a party to call a witness. UJI 13-2104 provides that no such instruction is to be given in civil cases.

The instruction may have been appropriate in criminal cases. *State v. Soliz,* 80 N.M. 297, 298, 454 P.2d 779 (Ct. App. 1969). However, it is not appropriate in cases where a witness is equally available to both sides. *State v. Smith,* 51 N.M. 328, 332, 184 P.2d 301 (1947).

Discovery procedures and the subpoena power make it most likely that all potential witnesses would be equally available to both sides. Therefore this instruction should not be used.

No instruction on this subject is necessary to guide the jury, and such an instruction may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial - modern criminal cases, 76 A.L.R.4th 812.

22A C.J.S. Criminal Law § 594.

## 14-5015. Testimony of an accomplice.

There has been testimony in this case by an alleged accomplice of the accused. You as members of the jury must view the testimony of the accomplice with suspicion and receive it with caution. The testimony of an accomplice must be weighed with great care. However, you are instructed that an accused may be convicted upon the testimony of an accomplice, even though it is uncorroborated.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was approved in *State v. Baca,* 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973). *See also* California Jury Instructions Criminal, 3.18, p. 84 (3rd ed. 1970). No instruction on this subject is necessary to guide the jury; the subject matter is adequately covered by UJI 14-5020; it is better to leave the subject to the argument of counsel; and the instruction may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

**ANNOTATIONS**

**Constitutionality.** — Trial court's refusal to use jury instruction tendered by defendant admonishing the jury to weigh accomplice testimony with greater care than other testimony was proper under New Mexico law and practice and did not violate defendant's constitutional right to due process. *State v. Sarracino,* 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial § 1225; 75B Am. Jur. 2d Trial § 1363.

Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, or cautionary instruction as to, testimony of accomplice, 119 A.L.R. 689.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring cautionary instruction, 53 A.L.R.2d 817.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

23 C.J.S. Criminal Law § 808.

# Part B
# Evaluation of Evidence

## 14-5020. Credibility of witnesses.

You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account the witness's truthfulness or untruthfulness, ability and opportunity to observe, memory, manner while testifying, any interest, bias or prejudice the witness may have and the reasonableness of the witness's testimony, considered in the light of all the evidence in the case.

USE NOTE

This is a basic instruction and may be given in all cases.

[As amended, effective August 1, 2001.]

**Committee commentary.** — This instruction was derived from UJI 13-2003. The precedent and authority for the civil instruction was a criminal case, *State v. Massey*, 32 N.M. 500, 258 P. 1009 (1927).

This instruction, a positive statement of the jury duty to determine the credibility of the witnesses, is particularly appropriate when the witness has been "impeached" in accordance with Rules 11-608, 11-609 and 11-613 NMRA. Compare New Mexico UJI 13-2004.

This instruction, together with the reasonable doubt instruction, UJI 14-5060, makes an instruction on the dangers of eyewitness testimony unnecessary. *See State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted "the witness" for "he," and "the witness's" for "his" throughout.

**Giving of this general instruction is sufficient;** it is not error to refuse to instruct on the credibility of the defendant as a witness. *State v. Wise,* 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Where the trial court gave this instruction, instructions requested by defendant which went to the credibility of certain witnesses were not required. *State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct. App.), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977).

The uniform jury instructions on witness credibility and reasonable doubt cover a defendant's theory of misidentification by an eyewitness. Therefore, the rejection of a specific instruction on the infirmities of eyewitness testimony was not reversible error. *State v. Gallegos,* 115 N.M. 458, 853 P.2d 160 (Ct. App. 1993).

**No requirement exists that instruction be given concerning weighing testimony of particular categories** of witnesses; the validity of special instructions concerning the evaluation of certain witnesses is doubtful; and the basic instruction on credibility of witnesses sufficiently instructs on witness evaluation. *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

**And instruction regarding scrutiny of certain witnesses refused.** — The trial court did not err in refusing the defendant's requested instructions, regarding a closer scrutiny of the testimony of witnesses who acted under a promise of immunity or reward, as well as that of accomplices, since the jury is the sole judge of the credibility of witnesses and it determines the weight to be given their testimony. *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

**Court not to comment on credibility.** — In a jury trial, the court must not in any manner comment upon the weight to be given certain evidence or indicate an opinion as to the credibility of a witness, but it is not error to advise a witness outside the presence of the jury of the consequences of perjury or to caution him about testifying truthfully, when the need arises because of some statement or action of the witness. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

**Jury determines credibility of coconspirator.** — The coconspirator rule does not apply to the in-court testimony of a conspirator who testifies about his own activities. The credibility of that testimony is for the jury to determine. *State v. Carr,* 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, *cert. denied,* 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, *State v. Olguin,* 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

**Jury instructions as to accomplice testimony.** — Trial court's refusal to use jury instruction tendered by defendant admonishing the jury to weigh accomplice testimony with greater care than other testimony was proper under New Mexico law and practice and did not violate defendant's constitutional right to due process. *State v. Sarracino,* 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72; *State v. Smith,* 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

**Instruction not objected to not heard on appeal.** — Where the instruction complained of was an instruction upon credibility, even though it might have contained erroneous statements of law, it still satisfied the requirements of this rule; therefore, as

the defendant made no objection to this instruction, he will not be heard on appeal. *State v. Cardona,* 86 N.M. 373, 524 P.2d 989 (Ct. App.), *cert. denied,* 86 N.M. 372, 524 P.2d 988 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1405 et seq.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony - state cases, 23 A.L.R.4th 1089.

Propriety, in federal criminal trial, of including in jury instruction statement disparaging defendants' credibility, 59 A.L.R. Fed. 514.

23A C.J.S. Criminal Law §§ 1254 to 1259.

## 14-5021. Credibility of witness; prior inconsistent statement.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including a statement made by him that is inconsistent with any part of his testimony.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.20. Under Rule 11-801D(1) NMRA, a prior inconsistent statement may be admitted as substantive evidence. *See California v. Green,* 399 U.S. 149 (1970) and 56 F.R.D. 183, 296 (1973). The committee believed that UJI 14-5020 generally covers this subject matter and no separate instruction should be given.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1411 et seq.

Testimony tending to show that party or witness has made contradictory statements as ground for evidence as to his truth and veracity, 6 A.L.R. 862.

23A C.J.S. Criminal Law § 1259.

## 14-5022. Impeachment of defendant; wrongs, acts or conviction of a crime.1

Evidence has been admitted that the defendant [was convicted of the crime[s] of _____[2]] [committed the act of _____[3]]. You may

consider such evidence for the purpose of determining whether the defendant told the truth when he testified in this case and for that purpose only.

USE NOTE

1. Upon request of the defendant, this instruction must be given when the state has used evidence of specific instances of bad conduct or the conviction of a crime to impeach the defendant.

2. Insert common name of crime or crimes.

3. Identify the specific acts of misconduct admitted for impeachment. An act admitted as substantive evidence under UJI 14-5028 may not be included in this instruction.

**Committee commentary.** — Evidence of some specific acts of misconduct and of some prior convictions are admissible for impeachment purposes under the provisions of Rules 11-608 and 11-609 NMRA. Under Rule 11-105 NMRA, the court, if requested, must instruct the jury on the limited purpose of the evidence.

Although Rules 11-608 and 11-609 NMRA cover impeachment of all witnesses, it is obviously not necessary to give the jury a limiting instruction for witnesses other than the defendant. UJI 14-5020 covers the right of the jury to determine the credibility of the witnesses as a general rule.

The use note cautions the court not to include matters which have been admitted as substantive evidence under Rule 11-404B NMRA. *See* commentary to UJI 14-5028.

**ANNOTATIONS**

**Testimony from defendant as to his prior convictions relates only to his credibility.** *State v. Archunde,* 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

**Omission of impeachment instruction found harmless.** — Where the court acted immediately to supply the impeachment instruction as soon as its omission became known and the appellant availed himself fully of the opportunity to argue the point prior to the state's closing its argument, the appellant has not met the burden imposed upon him and the error was harmless. *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1417 et seq.

Propriety of jury instruction regarding credibility of witness who has been convicted of a crime, 9 A.L.R.4th 897.

23A C.J.S. Criminal Law § 1262.

## 14-5023. Witness willfully false may be disregarded.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 12.05. *See also* UJI 13-2123. As stated by the committee drafting UJI Civil, an instruction on this subject matter invades the province of the jury and the subject matter is better left to the argument of counsel.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1405 et seq.

23A C.J.S. Criminal Law § 1259.

## 14-5024. Weighing conflicting testimony.

You are not bound to decide in favor of the party who produced the most witnesses. The final test is not the relative number of witnesses, but in the relative convincing force of the evidence.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.22. The committee believed that this was another subject which should be left to the argument of counsel.

## 14-5025. Refusal of witness to testify; exercise of privilege.[1]

The witness, _____ *(name)* has refused to testify as to a certain matter, basing his refusal on the exercise of a [privilege against self-incrimination][2] [lawful privilege]. You are not to draw any conclusions from his refusal to testify.

USE NOTE

1. To be given if requested by any party against whom the jury might draw an adverse inference from a claim of privilege.

2. Use the applicable bracketed phrase.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.26. Under Rule 11-513C NMRA, "[u]pon 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."

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Instructions as to inferences arising from refusal of witness other than accused to answer questions on the ground that answer would tend to incriminate him, 24 A.L.R.2d 895.

23A C.J.S. Criminal Law § 1266.

## 14-5026. Traits of character of defendant.

Evidence has been introduced in this case to prove that the defendant, prior to the time of the alleged commission of the crime, was a person of good character. The law presumes that a person of good character is less likely to commit a crime and therefore you shall consider such evidence in connection with all the other evidence in the case. If after considering all the evidence in the case, including that touching upon the good character of the defendant, you find and believe beyond a reasonable doubt that he is guilty of the crime charged, you should not acquit him solely upon the ground of such good character.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — Under Rule 11-404A(1) NMRA, the defendant may introduce pertinent evidence of good character and the prosecution may rebut with evidence of bad character. The defendant may introduce such evidence by: testimony as to reputation; opinion testimony; specific instances of his conduct in cases where character or trait of character is an essential element of the charge, claim or defense. *See also* Rule 11-405 NMRA.

It has apparently been a common practice to instruct the jury on the defendant's good character. *See, e.g.*, *State v. Burkett,* 30 N.M. 382, 234 P. 681 (1925). *See generally* Annot., 68 A.L.R. 1068 (1930). The committee, however, believed that this instruction invaded the province of the jury and was a prohibited comment on the evidence. *See* Rule 11-107 NMRA and *State v. Myers,* 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

**ANNOTATIONS**

**Defendant is not entitled to jury instructions on alibi and character witnesses,** even where he presents evidence to support them and tenders such instructions; UJI 14-5060 is adequate. *State v. Robinson*, 94 N.M. 693, 616 P.2d 406 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1417 et seq.

Right to and propriety of instruction as to credibility of defendant in criminal case as a witness, 85 A.L.R. 523.

23A C.J.S. Criminal Law § 1208.

## 14-5027. Cross-examination of a character witness.

_____ *(name of witness)* has testified to the good character of the defendant and on cross-examination he was asked if he knew or had heard of certain conduct of the defendant inconsistent with such good character. You may consider those questions and the witness' answers only for the purpose of determining the weight to be given the testimony of the witness concerning the good character of the defendant. Such questions and answers are not evidence that the defendant did engage in such conduct or that the reports are true.

USE NOTE

Upon request, this instruction shall be given upon completion of the testimony of the witness, as well as at the time the final instructions are given to the jury.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.42. *See also People v. Grimes*, 148 Cal. App. 2d 747, 307 P.2d 932 (1957), overruled in part, *People v. White,* 50 Cal. 2d 428, 325 P.2d 985 (1958); *People v. Bentley,* 138 Cal. App. 2d 687, 281 P.2d 1 (1955). Cross-examination of a character witness by inquiry into relevant specific instances of conduct is authorized by Rule 11-405A NMRA. *See, e.g.*, *State v. Hawkins,* 25 N.M. 514, 184 P. 977 (1919). *See generally* Annot., 47 A.L.R.2d 1258 (1956). *See also McCormick,* Evidence 457-59 (2d ed. 1972).

The necessity of a jury instruction explaining the limited purpose of the questions is assumed by the courts. *See, e.g.*, *Michelson v. United States,* 335 U.S. 469, 472, 69 S.

Ct. 213, 93 L. Ed. 168 (1948). *See generally* Annot., 47 A.L.R.2d 1258, 1274 (1956). The instruction is specifically authorized by Rule 11-105 of the Rules of Evidence.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1406.

## 14-5028. Evidence of other wrongs or offenses.1

Evidence has been admitted concerning whether the defendant committed[2] [_____[3]] [_____[4]] other than the crime charged in this case.

The evidence was received and you may consider it only for the purpose of determining:[2]

[the identity of the person who committed the crime charged in this case];

[a motive for the commission of the crime charged];

[the existence of the intent which is a necessary element of the crime charged];

[the existence of opportunity to commit the crime charged];

[the existence of the defendant's knowledge of _____[5]];

[the preparation or plan to _____[5]];

[the absence of mistake or accident in _____[5]].

USE NOTE

1. Upon request, this instruction shall be given at the time the evidence of the other crime is admitted as well as at the time the final instructions are given to the jury.

2. Use only applicable bracketed paragraphs. If more than one alternative is applicable, insert appropriate punctuation and conjunction.

3. Identify the crimes.

4. Identify the "wrong" or "acts."

5. Identify the facts relied on for the use of this provision.

**Committee commentary.** — The form of this instruction was derived from California Jury Instructions Criminal, 2.50. Its use, upon request, is required by Rule 11-105 NMRA. *See also* 1 Wharton, Criminal Evidence § 264 (13th ed. 1972).

Under the general rule, evidence of collateral offenses committed by defendant, even if similar in character to the crime charged, is not admissible to prove that he committed the crime charged. *See*, e.g., *State v. Velarde,* 67 N.M. 224, 354 P.2d 522 (1960). *See generally* 1 Wharton, Criminal Evidence § 240 (13th ed. 1972). The general rule is subject to exceptions. *See* Rule 11-404B NMRA. *See generally* 1 Wharton, Criminal Evidence §§ 241-259 (13th ed. 1972). As stated by the New Mexico Supreme Court, "[t]he courts are not divided upon these abstract rules, but are in hopeless confusion in their application to particular facts." *State v. Lord,* 42 N.M. 638, 652, 84 P.2d 80 (1938).

Some significant cases involving the collateral offenses rule include: proof of knowledge - *State v. Lindsey,* 81 N.M. 173, 178, 464 P.2d 903, 908 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559, cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970), and *State v. Sero,* 82 N.M. 17, 474 P.2d 503 (Ct. App. 1970); proof of scheme, plan or design - *State v. Mason,* 79 N.M. 663, 448 P.2d 175 (Ct. App.), *cert. denied,* 79 N.M. 688, 448 P.2d 489 (1968); proof of intent - *State v. Roy*, 40 N.M. 397, 406, 60 P.2d 646, 110 A.L.R. 1 (1936), and *State v. Marquez,* 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

The *Marquez* case, specifically interpreting Rule 11-404B NMRA, should be analyzed with caution. The relevant part of the decision did not receive a majority vote of the panel. Furthermore, the decision does not discuss the limitations on the use of collateral offenses to prove intent. *See generally* 1 Wharton, Criminal Evidence § 245 (13th ed. 1972). *See also State v. Mason*, supra.

Rule 11-404B NMRA also allows evidence of other "wrongs" or "acts" of the defendant to be admitted. This probably does not expand the common-law decisions admitting evidence of collateral offenses, although the commentaries to the Rules of Evidence do not fully explain the use of "wrongs" and "acts." *See* 56 F.R.D. 183, 221 (1973). Rule 11-404B NMRA, unlike Rule 11-609 NMRA, (impeachment by proof of other crimes), does not require conviction of the collateral offense. Evidence of wrongs and acts may include an offense not even punishable as a serious crime. Cf. commentary to UJI 14-230 (involuntary manslaughter by an act not amounting to a felony).

## ANNOTATIONS

**Evidence of other "offenses" is properly admitted** where they tend to show the defendant's knowledge of a crime and an absence of mistake or accident. *State v. Turner,* 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

**Limitation of testimony of prior child abuse.** — Where evidence as to the defendant's responsibility for a child's injury was severely disputed and the defendant's credibility is crucial, there is a sufficient showing of prejudice so that the failure to give

an instruction limiting a jury's consideration of prior incidents of child abuse is reversible error. *State v. Sanders,* 93 N.M. 450, 601 P.2d 83 (Ct. App. 1979).

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," *see* 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23 C.J.S. Criminal Law § 1032(3); 23A C.J.S. Criminal Law § 1242; 24B C.J.S. Criminal Law § 1915(17).

## 14-5029. Motive.

The state does not have to prove a motive. However, motive or lack of motive may be considered by you as a fact or circumstance in this case. You may give the presence or lack of motive such weight as you find it to be entitled.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — Motive is not an element of the crime nor its absence a defense. Its presence or absence may have some practical effect on the jury finding guilt beyond a reasonable doubt, especially in a case based upon circumstantial evidence. The majority of jurisdictions tend to the view that it is not necessary to instruct on motive. *See generally* Annot., 71 A.L.R.2d 1025 (1960). The New Mexico Supreme Court had taken the opposite view. In *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975), the court reversed the defendant's conviction because, *inter alia,* the district court had refused the defendant's tendered instruction on motive. *See also State v. Romero,* 34 N.M. 494, 285 P. 497 (1930), and *State v. Orfanakis*, 22 N.M. 107, 159 P. 674 (1916). The committee believed that an instruction on motive amounted to a comment on the circumstantial evidence. Such an instruction would be inconsistent with the elimination of other instructions on circumstantial evidence and would constitute a comment on the evidence. *See* the commentary to UJI 14-5002 and Rule 11-107 NMRA. The adoption of this instruction consequently supersedes the holding in *State v. Vigil*, supra.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1253, 1283.

23A C.J.S. Criminal Law § 1198.

## 14-5030. Flight.

The flight of a person immediately after the commission of a crime, or after he has been accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not

defendant's conduct amounted to flight, and if it did, whether or not it shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively for you to decide.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction is derived from California Jury Instructions Criminal, 2.52. In California, the instruction must be given when evidence of flight is relied upon as tending to show guilt. No New Mexico cases indicate that an instruction is required. However, in *State v. Hardison*, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970), the court held that the jury may draw an inference of guilt from an unexplained flight. *See also State v. Duran,* 86 N.M. 594, 526 P.2d 188 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974); *State v. Gonzales,* 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971). The committee believed that the instruction would constitute a comment on the evidence and that the matter was better left to argument of counsel.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1333 to 1335.

Flight as evidence of guilt, 25 A.L.R. 886.

23A C.J.S. Criminal Law § 1185.

## 14-5031. Defendant not testifying; no inference of guilt.

You must not draw any inference of guilt from the fact that the defendant did not testify in this case, nor should this fact be discussed by you or enter into your deliberations in any way.

USE NOTE

This instruction must be given on request of a defendant who does not testify and must not be given if the defendant objects.

**Committee commentary.** — In *Griffin v. California,* 380 U.S. 609 (1965), it was held that an instruction that a defendant's failure to testify supports an unfavorable inference against him violated the United States constitutional guarantee against compelling a person in a criminal case to be a witness against himself. However, it is only adverse comments that are prohibited under *Griffin.* In *Lakeside v. Oregon,* 435 U.S. 333, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978), the United States Supreme Court held that an instruction given over the defendant's objection that the jury must draw no adverse

inferences of any kind from the defendant's exercise of his privilege not to testify does not violate the privilege against self-incrimination.

The New Mexico courts have consistently held that this instruction may be given by the court over the defendant's objection. *See, e.g.*, *State v. Garcia*, 84 N.M. 519, 505 P.2d 862 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972); *Patterson v. State*, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970). The rationale of the cases is that the instruction is for the benefit of the defendant and, therefore, it is proper to give it sua sponte. However, the better view is that the instruction should be given upon request of the defendant and not given over the objection of the defendant. Under an adversary system, the use of this instruction should be the choice of the defendant.

Under prior law, if the defendant requested the instruction, it was error for the court to refuse to give this instruction. *State v. Spearman,* 84 N.M. 366, 503 P.2d 649 (Ct. App. 1972). The court in *Spearman* relied upon former Section 41-12-19 NMSA 1953 Comp. as authority for its holding. However, with the adoption of the Rules of Criminal Procedure in 1972, the supreme court abrogated the trial court rule codified as former Section 41-12-19. The adoption of this instruction reinstates the requirement that the jury, on the defendant's request, be instructed not to indulge any presumptions against him.

**ANNOTATIONS**

**Compiler's notes.** — Section 41-12-19 NMSA 1953 Comp., referred to in the first and second sentences in the third paragraph of the committee commentary, was repealed effective July 1, 1972.

**Prosecutor's comment on self-incrimination.** — Prosecutor's comment to grand jury explaining privilege against self-incrimination was consistent with this instruction. *State v. Martinez*, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 356; 75B Am. Jur. 2d Trial §§ 1297, 1300.

Propriety under Griffin v. California and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify, 18 A.L.R.3d 1335.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 A.L.R.3d 1093, 32 A.L.R.4th 774.

23A C.J.S. Criminal Law § 1266.

## 14-5032. Proof of knowledge.

You have been instructed that knowledge is an essential element of the crime of _____. Knowledge need not be established by direct evidence but may be inferred from all the surrounding circumstances, such as the manner in which the act was done, the means used, [and] the conduct of the defendant [and any statements made by the defendant].

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction states the legal test for the sufficiency of the circumstantial evidence needed to prove the mental element of knowledge. The committee believed that the subject matter was best left to the argument of counsel.

Knowledge of certain facts is an element of some property crimes and crimes under the Controlled Substance Law. For example: issuing or transferring a forged writing with knowledge that the writing is false, etc. - *see* UJI 14-1644 and commentary; receiving stolen property with knowledge that the property had been stolen - *see* UJI 14-1650 and commentary; knowledge of the presence of the controlled substance and its narcotic character as an element of possession of a controlled substance - *see State v. Giddings,* 67 N.M. 87, 352 P.2d 1003 (1960).

Knowledge may, and for the most part must, be proved by circumstantial evidence. *See, e.g.*, *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559, cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970); *State v. Nation,* 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973); *State v. Garcia,* 76 N.M. 171, 413 P.2d 210 (1966).

The courts recognize that the mental element of knowledge is a separate concept from the mental element of intent. *State v. Gonzales,* 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974). Conceding the general rule, the court in *Gonzales* proceeded to find that a separate reference to knowledge in the jury instructions was not necessary, since a reference to intent to sell embodied the idea that the defendant knew what he was selling. Under UJI Criminal, where knowledge and intent are elements of the crime, they are separately identified in the elements instruction.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1252, 1486.

23 C.J.S. Criminal Law § 918.

## 14-5033. Proof of intent to do a further act or achieve a further consequence.

The intent to _____ need not be established by direct evidence but may be inferred from all the surrounding circumstances, such as the manner in which certain acts were committed, the means used, [and] the conduct of the defendant [and any statements made by the defendant].

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction states the legal test for the sufficiency of the circumstantial evidence needed to prove the mental element of intent to do a further act or achieve a further consequence. The committee believed that the subject matter was best left to the argument of counsel.

Establishing a "specific intent" by inference from facts and circumstances is well established in the criminal law. *See, e.g.*, *State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968). Under these instructions, a "specific intent" is no longer treated as a special criminal intent. However, an intent to do a further act or achieve a further consequence is an essential element of some crimes. *See, e.g.*, UJI 14-1630. In addition, some special defenses still apply only to this element. *See* UJI 14-5111 and commentary.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial § 1209; 75B Am. Jur. 2d Trial §§ 1251, 1256, 1325, 1416.

23 C.J.S. Criminal Law § 919.

## 14-5034. Admission or confession used for impeachment.[1]

[During cross-examination, the defendant was asked about] [Evidence has been admitted concerning][2] certain statements [he] [the defendant][2] made to the authorities during the investigation of the case. You may consider the statement[s] for the purpose of determining whether the defendant told the truth when he testified in this case and for that purpose only.

USE NOTE

1. Upon request, this instruction must be given when the state uses an otherwise inadmissible statement for impeachment.

2. Use these bracketed alternative provisions when the statement has been introduced through extrinsic evidence.

**Committee commentary.** — Under the general rule, a prior inconsistent statement would be admissible as substantive evidence and there would be no need to instruct the jury on use of the statement for impeachment. *See* commentary to UJI 14-5021. A voluntary confession or admission obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), is not admissible as substantive evidence. However, its use to impeach the credibility of the defendant is permitted under federal constitutional law. *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Oregon v. Haas*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975).

In *Harris* and *Haas,* voluntariness of the confession was not in issue. The committee assumed that an involuntary confession cannot be used for impeachment. *See Jackson v. Denno*, 378 U.S. 368, 385-86, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964). Furthermore, the committee determined that the jury need not pass upon voluntariness when the confession is used for impeachment only. *See also* commentary to UJI 14-5040.

In *Harris* the prosecutor read parts of the statement during cross-examination. If the defendant denies making any statement, proof of its contents by extrinsic evidence would presumably be allowed. *See* commentary to UJI 14-5035.

A requirement that the jury be instructed on the limited nature of the use of the statement is implied in *Harris* and is supported by Rule 11-105 NMRA.

**ANNOTATIONS**

**Instruction is approved for use when statement has been used for impeachment purposes;** the instruction does not state when it is proper to use a statement for impeachment purposes. *State v. Trujillo*, 93 N.M. 728, 605 P.2d 236 (Ct. App. 1979), aff'd, 93 N.M. 724, 605 P.2d 232 (1980).

**Violation of due process where voluntariness not shown.** — The admission of evidence of a prior confession to impeach a defendant represents a denial of due process where the voluntariness of such a confession has not been shown and the defendant denies or claims inability to recall the statement. *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial §§ 1214, 1215; 75B Am. Jur. 2d Trial §§ 1353, 1355, 1361.

23A C.J.S. Criminal Law §§ 1230, 1233.

## 14-5035. Impeachment of defendant by inadmissible evidence.[1]

[Evidence has been admitted concerning _____ *(describe circumstances)*][2]. [On cross-examination, the defendant was asked about

_____ *(describe circumstances)*]. You may consider such evidence for the purpose of determining whether the defendant told the truth when he testified in this case and for that purpose only.

USE NOTE

1. Upon request, this instruction must be given when the state uses illegally seized evidence to impeach the defendant.

2. Use this bracketed alternative provision when the evidence has been introduced through extrinsic evidence.

**Committee commentary. —** If the defendant on direct examination specifically makes assertions which the state can contradict by use of unconstitutionally seized evidence, the state is not prohibited by federal constitutional law from using such evidence for impeachment. *Walder v. United States,* 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

A denial on cross-examination of any knowledge, etc., allows the state to impeach the defendant by extrinsic evidence. *Walder v. United States,* supra. Obviously, the state may not contrive a scenario on cross-examination in order to introduce illegally seized evidence which it could not otherwise introduce. *See Agnello v. United States,* 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925). This may be a situation where the court should carefully limit cross-examination to matters testified to on direct examination. *See* Rule 11-611B NMRA.

A requirement that the jury be instructed on the limited nature of the use of the evidence is implied in *Walder* and is supported by Rule 11-105 NMRA.

## 14-5036. Criminal sexual conduct; cautionary instruction.

A charge such as that made against the defendant in this case is one which is easily made, and, once made, difficult to defend against, even if the person accused is innocent. Therefore the law requires that you examine the testimony of the victim with caution.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — This instruction should never be used as it constitutes an impermissible comment on the evidence. By its terms, such a cautionary instruction imposes a stricter test of credibility on rape victims than on the victims of other crimes and results in the implication that the credibility of rape victims as a class is suspect. *See* Rule 11-107 NMRA. *See also State v. Feddersen,* 230 N.W.2d 510 (Iowa 1975).

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial § 1227.

23A C.J.S. Criminal Law §§ 1186, 1325(5).

# Part C
# Substantive Use of Admissions and Confessions

## 14-5040. Use of voluntary confession or admission.

Evidence has been admitted concerning a statement allegedly made by the defendant. Before you consider such statement for any purpose, you must determine that the statement was given voluntarily. In determining whether a statement was voluntarily given, you should consider if it was freely made and not induced by promise or threat.

USE NOTE

This instruction must be used when the court has made a determination that a statement by the defendant is voluntary and then submits it to the jury for consideration.

**Committee commentary.** — Under the federal constitution and New Mexico law, the court must determine the voluntariness of a confession or inculpatory admission out of the hearing of the jury. *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964); *State v. Martinez,* 30 N.M. 178, 192, 230 P. 379 (1924). *See also* Rule 11-104C NMRA. If the court finds that the statement is voluntary (and also was given after compliance with *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966)), the statement is admitted and the jury is instructed to determine that the statement is voluntary before considering it as substantive evidence. *See, e.g., State v. Burk,* 82 N.M. 466, 469-70, 483 P.2d 940, 943-44, (Ct. App.), *cert. denied,* 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Although required under New Mexico precedents, submission of the question of voluntariness to the jury is not required under federal constitutional law. *Lego v. Twomey,* 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). Under New Mexico law, failure to submit the voluntariness question is harmless error if the defendant substantially admits the facts which are contained in the confession. *State v. Barnett,* 85 N.M. 301, 512 P.2d 61 (1973), *rev'g* 84 N.M. 455, 504 P.2d 1088 (Ct. App. 1972).

Under Rule 11-801 NMRA, a nonverbal "assertion" may be admissible. The federal committee drafting the Rules of Evidence did not include any special provisions for an "admission by silence" made during custodial interrogation. The federal committee appears to doubt that the admission would be admissible under federal constitutional law. *See* 56 F.R.D. 183, 298 (1973). Cf. *United States v. Hale,* 442 U.S. 171, 95 S. Ct.

2133, 45 L. Ed. 2d 99 (1975). Consequently, the language of this instruction is based on the assumption that the statement is an oral or written assertion and not an admission by silence.

## ANNOTATIONS

**Purpose of instruction. —** This instruction was adopted by the supreme court as a protection for defendant against statements made after his arrest. It is broad and expansive in its language. It must be given when evidence has been admitted concerning a statement allegedly made by a defendant, even though the statement be admitted in evidence without objection. *State v. Zamora,* 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

**Instruction does not cover question of defendant's competency to give statement;** the question of competency is not being covered by a uniform instruction. *State v. Ruiz,* 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

**Instruction is mandatory,** not permissive, it must be used when the trial court submits to a jury voluntary statements of a defendant given to police officers. *State v. Zamora,* 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

**Statement of defendant can be induced by promise or threat of third persons.** *State v. Zamora,* 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

**Rule requires determination of voluntariness of confession by court** before being submitted to the jury under proper instructions requiring it to consider any questions concerning whether or not it was voluntary, as well as the truth or weight to accord it. *Pece v. Cox*, 74 N.M. 591, 396 P.2d 422 (1964).

**And judge's finding to be clear. —** Before permitting a defendant's statement to be submitted to a jury, the trial court is required to fully and independently resolve the question of voluntariness, and not only must the judge's conclusion be clearly evident, but his findings on disputed factual issues must either be expressly stated or ascertainable from the record. *State v. Stout,* 82 N.M. 455, 483 P.2d 510 (Ct. App. 1971).

**Rule as to exculpatory matters in an extra-judicial confession** is not the same where the defendant's testimony at the trial is substantially the same as that in the confession. *State v. Casaus,* 73 N.M. 152, 386 P.2d 246 (1963).

The trial court was not in error when it refused to give a requested instruction on exculpatory statements contained in the defendant's confession, where the court adequately instructed as to self-defense and the defendant voluntarily took the stand, and his own testimony corresponded to the exculpatory matter contained in the confession introduced by the state. *State v. Casaus,* 73 N.M. 152, 386 P.2d 246 (1963).

**Jury to consider claim of inducements.** — Where the judge, on record, passed on the voluntariness and admissibility of the defendant's statements at a suppression hearing, and submitted the statements to the jury with a charge which complied with this instruction, the defendant's argument that his statements were the product of promises and inducements was to be considered with all the conflicting evidence, and it was not for the appellate court to substitute its own judgment for that of the trier of fact and the trial judge. *State v. Ramirez,* 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Where it was apparent that the trial court fully performed its preliminary duty of inquiring into the voluntariness of the defendant's confession prior to submitting it to the jury, then submitted the confession to the jury under proper instructions, which imposed upon the jury the duty to determine the credibility of the testimony respecting the voluntariness and the mental capacity of the defendant to make a confession, the trial court did not err. *State v. Armstrong,* 82 N.M. 358, 482 P.2d 61 (1971).

**Word "threat" in instruction in criminal case should be defined;** members of a jury may easily disagree on what constitutes a threat. *State v. Zamora,* 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

**Jury was properly instructed on the voluntariness of defendant's confession** where it was instructed regarding the admission of a confession according to this instruction and, at defendant's request, the jury also received an instruction that defined both "promise" and "threat." *State v. Sanders,* 2000-NMSC-032, 129 N.M. 728, 13 P.3d 460.

**Where foundation for instruction not laid.** — Where no request was made at the trial for a hearing on the voluntariness of a confession, and the explanation of rights form and the confession were admitted in evidence without objection, no foundation was laid by the defense which required the trial court to give this instruction. *State v. McCarter,* 93 N.M. 708, 604 P.2d 1242 (1980).

**Waiver of error where no instruction requested.** — Where the defendant never requested an instruction on the voluntariness of certain statements made by him, any error committed by the court in failing to give one was waived. *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Where a typewritten signed statement of one defendant was admitted in evidence at the trial without objection and the other defendant did not request the trial court to instruct on the issue, the error claimed is waived. *State v. Riley,* 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

The defendant's contention that the jury could not have adequately performed their required function of determining the voluntariness of his statement because they were never informed as to what "Miranda rights" were, the attorneys, witnesses and the court

referred to all through the trial, was waived because the defendant never requested an instruction defining "Miranda rights." *State v. Torres,* 88 N.M. 574, 544 P.2d 289 (Ct. App. 1975).

**Acknowledgement of guilt requires confession instruction.** — Statements freely and voluntarily admitting a forced entry into another's house and the taking of another's property are so sufficiently close to an express acknowledgement of guilt that the trial court does not err in giving a confession instruction. *State v. Kijowski,* 85 N.M. 549, 514 P.2d 306 (Ct. App. 1973).

**Use of warnings on statement form negates prejudice.** — Where the petitioner had no attorney when the statement was given and claims that he had not been advised (contrary to what is clearly set forth in the form on which the confession was typed), that he did not have to make any statement at all and that if he did make a statement it could be used against him in a trial, no prejudice is shown where it was typed on the form that he did not have to make any statement and a codefendant who was at the time represented by counsel also gave a statement which was admitted in evidence by the trial court after a foundation as to its voluntary character had been ruled on by the judge. *Pece v. Cox,* 74 N.M. 591, 396 P.2d 422 (1964).

**Where statement of one defendant includes inculpatory facts concerning codefendant, the proper procedure** is to admit the statement but to exclude from the jury's consideration all parts thereof damaging to the other defendant. *State v. Alaniz,* 55 N.M. 312, 232 P.2d 982 (1951).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1353 to 1360.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 38 A.L.R. 116, 102 A.L.R. 641.

Voluntariness of confession admitted by court as question for jury, 85 A.L.R. 870, 170 A.L.R. 567.

23 C.J.S. Criminal Law § 838.

## 14-5041. Corpus delicti must be proved independent of admission or confession.

No person may be convicted of a criminal offense unless there is some proof that the crime was committed, independent of any [confession] [admission] made by him outside of this trial.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from California Jury Instructions Criminal, 2.72. In California, the instruction must be given sua sponte. The committee believed that, as a matter of law, a case could not go to the jury based entirely upon the extrajudicial confession or admission of the defendant. There must be facts and circumstances which would allow the jury to find the elements of the crime. *State v. Paris*, 76 N.M. 291, 294, 414 P.2d 512 (1966). Consequently, the committee believed that no instruction on this subject was necessary or proper.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23A C.J.S. Criminal Law § 1197.

## 14-5042. Withdrawal of evidence from consideration of jury.1

Evidence has been admitted concerning _____[2]. At the time that the evidence was admitted, it was admitted subject to a further ruling by the court. The court now rules that:

[You should not consider this evidence against the defendant _____.][3]

[You should disregard this evidence entirely and not consider it for any purpose.]

USE NOTE

1. When evidence is to be withdrawn from the jury, this instruction is appropriate to be given in writing with the other instructions, if requested, unless the court has given an oral instruction to this effect before the close of the evidence.

2. Describe the evidence with enough particularity to enable the jury to know to which evidence this instruction refers.

3. Use applicable alternative.

**Committee commentary.** — This instruction withdraws from the jury evidence which was erroneously admitted or evidence which was admitted subject to condition when such condition is not fulfilled. *See* Rule 11-104B NMRA. The instruction is appropriate for use in withdrawing co-conspirator acts or declarations when a prima facie case for existence of the conspiracy is not established by substantial, independent evidence. *See* Rules 11-801D(2)(e) and 11-104B NMRA. This instruction is also appropriate to withdraw from the jury evidence against one defendant in joint trials. *See* Evidence Rule 11-105.

A determination of the admissibility of evidence may be made by the judge at any time during the course of a trial. This instruction need not be given at the close of the evidence if an oral instruction has already been given.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial § 1185.

24B C.J.S. Criminal Law § 1915(11).

# Part D
# Opinion Testimony

## 14-5050. Opinion testimony.

You should consider each opinion received in evidence in this case and give it such weight as you think it deserves. If you should conclude that the reasons given in support of the opinion are not sound or that for any other reason an opinion is not correct, you may disregard the opinion entirely.

USE NOTE

Upon request, this instruction may be given whenever an expert has testified or when a layman has been allowed to state an opinion.

**Committee commentary.** — The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 11.27.

Under Rules 11-701 and 11-702 NMRA, both lay witnesses and experts may give opinions under certain conditions. In addition, Rule 11-405A NMRA permits testimony in the form of an opinion on the question of character or a trait of character. Furthermore, under Rule 11-704 NMRA, testimony in the form of an opinion is not objectionable merely because it embraces an ultimate issue to be decided by the jury. Compare UJI 13-213 and 13-715. Because opinion evidence is admissible, this instruction is used to caution the jury that an opinion need not be accepted as conclusive. *See, e.g., State v. Holden,* 85 N.M. 397, 512 P.2d 970 (Ct. App.), *cert. denied,* 85 N.M. 380, 512 P.2d 953 (1973).

**ANNOTATIONS**

**Qualifications of DNA expert.** — DNA expert witness, who held a bachelor of science degree in biology and was the DNA analyst for the New Mexico department of public safety, and whose training included specialized courses in molecular biology and a course in DNA analysis with the FBI, was not unqualified to testify; the jury was free to consider his qualifications when deciding what weight to give his testimony. *State v. McDonald,* 1998-NMSC-034, 126 N.M. 44, 966 P.2d 752.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 214; 75A Am. Jur. 2d Trial §§ 1190, 1226; 75B Am. Jur. 2d Trial § 1408.

23 C.J.S. Criminal Law § 891.

## 14-5051. Hypothetical questions.

In examining an expert witness, the lawyer may ask him to assume a state of facts and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved.

You must find from all the evidence whether or not the assumed facts have been proved. If you should find that any assumption has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — Under Rule 11-705 NMRA, it is no longer necessary for the expert to be asked a hypothetical question, i.e., to assume certain facts and to give an opinion based on that assumption. *See* 56 F.R.D. 183, 285 (1973). Consequently, the committee believed that it was not necessary for the jury to be instructed on this subject. Compare UJI 13-209.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial §§ 1135 to 1137, 1202.

Hypothetical questions in case of expert witness who has personal knowledge or observation of facts, 82 A.L.R. 1338.

23 C.J.S. Criminal Law § 883.

# Part E
# Presumptions or Inferences

## 14-5060. Presumption of innocence; reasonable doubt; burden of proof.

The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of his guilt.

The burden is always on the state to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

USE NOTE

This instruction must be given in all cases.

**Committee commentary.** — The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 11.01 (1970), and *State v. Ellison,* 19 N.M. 428, 144 P. 10 (1914). *See also State v. Rodriguez,* 23 N.M. 156, 167 P. 426, 1918A L.R.A. 1016 (1917).

Because of the importance of the presumption of innocence and the need to find guilt beyond a reasonable doubt, this instruction is required in all cases. It repeats some of the explanation given the jury at the outset of the trial in UJI 14-101.

It is generally accepted that the reasonable doubt instruction will cover a multitude of problems. For example, an instruction on the danger of eyewitness testimony is not necessary where the jury is given this instruction and UJI 14-5020, Credibility of witnesses. *See State v. Mazurek,* 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

**ANNOTATIONS**

**Question for reviewing sufficiency of the evidence** is whether, viewing all of the evidence in a light most favorable to upholding the jury's verdict, there is substantial evidence in the record to support any rational trier of fact being so convinced. *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

**This instruction is to be used in all jury trials,** unadorned by any added, illustrative language from any opinion. *State v. Garcia*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72.

**No due process violation where no burden of proof instruction on firearm use.** — Where the burden of proof instruction, by its wording, was applied to a determination of guilt, but no reference was made to use of a firearm, and after the guilty verdicts were returned instructions were given submitting the use-of-a-firearm issue to the jury without a burden of proof instruction, but the defendant did not complain of the absence of an instruction and the evidence was almost uncontradicted that a firearm was used as to each count, there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt. *State v.*

*Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**There can be proof beyond a reasonable doubt though proof depends on a presumed fact,** that is, a permissible inference from a basic fact or facts; the reasonable doubt standard is met if the evidence necessary to invoke the inference (the evidence as a whole, including the basic fact or facts) is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. *State v. Matamoros,* 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

**No requirement to instruct prior to introduction of evidence.** — Where the presumption of innocence was adequately covered in the instruction given, and since there is no requirement upon the trial court to instruct the jury in criminal cases prior to the introduction of evidence, the trial court did not err in refusing the premature request. *State v. Wesson,* 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

**Defendant not entitled to jury instructions on alibi and character witnesses,** even where he presents evidence to support them and tenders such instructions; this instruction is adequate. *State v. Robinson,* 94 N.M. 693, 616 P.2d 406 (1980).

**Requirement of evidence showing insanity lesser burden than creating reasonable doubt.** — The requirement that the defendant must offer evidence tending to show his insanity at the time of the offense in order to create a jury question upon this issue is a lesser burden than creating a reasonable doubt, as "reasonable doubt" is defined in this instruction. *State v. Day,* 90 N.M. 154, 560 P.2d 945 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

**Instruction on reasonable doubt found adequate.** — Since there was a direct charge that the jury must find beyond a reasonable doubt that the defendant was in the store when the offense occurred and that either he or his companion inflicted upon the deceased the injuries of which he later died, then the jury was adequately instructed on that issue. *State v. Ramirez,* 79 N.M. 475, 444 P.2d 986 (1968).

**Instruction need not be repeated with each element.** — When a correct general instruction as to reasonable doubt is given, it need not be repeated in dealing with each element of the case, and the trial court did not err in refusing the defendant's request to instruct on reasonable doubt in connection with the defendant's theory of self-defense. *State v. Harrison,* 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 29 Am. Jur. 2d Evidence § 168 et seq.; 75B Am. Jur. 2d Trial §§ 1291, 1292, 1297 to 1301, 1370, 1371, 1374 to 1380.

Presumption of innocence as evidence, 34 A.L.R. 938, 94 A.L.R. 1042, 152 A.L.R. 626.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony - state cases, 23 A.L.R.4th 1089.

23A C.J.S. Criminal Law § 1221.

## 14-5061. Presumptions or inferences.[1]

Proof of _____ *(set forth presumed fact)* is an essential element of _____ *(set forth crime)* as defined elsewhere in these instructions. The burden is on the state to prove _____ *(set forth presumed fact)* beyond a reasonable doubt.

In this case if you find that _____ *(here state basic fact or facts on which presumption rests)* [has] [have] been proved, you may but are not required to find that _____ *(presumed fact)* has been proved. You must consider all of the evidence in making your determination. In order to find the defendant guilty of _____ *(set forth offense charged)*, [as charged in Count _____][2], you must be convinced beyond a reasonable doubt that the defendant _____ *(set forth presumed fact)*.

USE NOTE

1. This instruction shall be given when the state relies upon a statutory "presumption" to prove an element of the crime or when an element is inferred ("implied") from certain facts. It may not be used if there is a specific UJI Criminal presumption instruction provided for the crime. *See* for example UJI 14-242, 14-1651, 14-1671 and 14-1672.

2. Insert the count number if more than one count is charged.

[As amended, effective September 1, 1988.]

**Committee commentary.** — Some New Mexico statutes allow the jury to "presume" certain facts from other facts. For example, the intention of converting merchandise may be presumed from the fact that the person concealed the merchandise. § 30-16-22 NMSA 1978. In addition, the courts often state that certain facts may be "implied" from other facts. For example, the intent to kill or do great bodily harm (malice aforethought) required for second degree murder may be implied from the use of a deadly weapon by defendant. It is believed that the courts mean "inferred," rather than "implied." *See generally* Perkins, "A Re-examination of Malice Aforethought," 43 Yale L.J. 537, 549 (1934).

Under Rule 11-303 NMRA, the court may not direct the jury to find a presumed fact against the accused. *See State v. Jones,* 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), and *United States v. Gainey,* 380 U.S. 63,

85 S. Ct. 754, 13 L. Ed. 2d 658 (1965). Furthermore, the jury must be told that it must find the ultimate facts beyond a reasonable doubt. For special instructions on the presumption of intoxication or presumption of knowledge by a dealer receiving stolen property, *see* UJI 14-242 and 14-1651.

**ANNOTATIONS**

**The 1988 amendment,** effective for cases filed in the district courts on or after September 1, 1988, in the second paragraph, substituted the present language in the second and third sentences for "However, you may do so only if upon consideration of all of the evidence you find that . . . . . (set forth presumed fact) has been proved beyond a reasonable doubt"; in Item 1 of the Use Note, deleted "On request" at the beginning of the first sentence, substituted the present second sentence for "It may not be used for the presumption of intoxication by use of an alcohol blood test or a dealer's presumption for knowledge that property is stolen", and, in the last sentence, inserted "for example" and "14-1671 and 14-1672"; added Item 2; and made minor stylistic changes.

**Inference is merely a logical deduction from the facts and evidence.** *State v. Romero*, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1293 to 1332.

23A C.J.S. Criminal Law §§ 1183 to 1185.

# CHAPTER 51
# Justification and Defense

# Part A
# Insanity and Incompetency

## 14-5101. Insanity; jury procedure.1

There is an issue in this case as to the defendant's mental condition at the time the act was committed. You will be given alternative verdict forms [for each crime charged][2] as follows:

["guilty" of _____;

"not guilty";

"not guilty by reason of insanity".

Only one of these forms is to be completed [for each crime charged][2].

You will first consider whether the defendant committed the act charged.

If you determine that the defendant committed the act charged, but you are not satisfied beyond a reasonable doubt that the defendant was sane at the time, you must find the defendant not guilty by reason of insanity.

The defendant was insane at the time of the commission of the crime if, because of a mental disease, as explained below, the defendant:

[did not know what [he] [she] was doing or understand the consequences of [his] [her] act,]

[or][3]

[did not know that [his] [her] act was wrong,]

[or]

[could not prevent [himself] [herself] from committing the act].

A mental disease is a specific disorder of the mind that both substantially affects mental processes and substantially impairs behavior controls. This specific disorder must also be a long-standing disorder. It must extend over a considerable period of time, as distinguished from a momentary condition arising under the pressure of circumstances.

The term mental disease does not include a personality disorder or an abnormality manifested only by repeated criminal conduct or by other anti-social conduct.

The burden is on the state to prove beyond a reasonable doubt that the defendant was sane at the time the offense was committed. If you have a reasonable doubt as to whether the defendant was sane at the time the offense was committed, you must find the defendant not guilty by reason of insanity.

In determining the defendant's mental condition at the time the act was committed, you may consider all of the evidence, including [testimony of medical experts][3] [testimony of lay witnesses] [acts and conduct of the defendant].

USE NOTE

1. This instruction must be modified if more than one offense is charged. If there is more than one defendant, the name of the defendant raising an insanity defense should be used. If this instruction is given, add the following essential element to the essential elements instruction for the offense charged: "The defendant was sane at the time the offense was committed".

2. Use the bracketed language when there is more than one crime charged.

3. Use only applicable bracketed alternative.

[As amended, effective January 1, 1997; January 1, 1999; as amended by Supreme Court Order No. 11-8300-015, effective April 25, 2011.]

**Committee commentary.** — Initially, 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. *See generally*, Annot., 17 A.L.R.3d 146 (1968).

Although the instruction requires the jury to find that the defendant was insane at the time of the commission of the offense, evidence of the defendant's mental condition before and after the commission of the offense may be considered by the jury in arriving at its determination. *State v. James*, 85 N.M. 230, 511 P.2d 556 (Ct. App. 1973).

In New Mexico, the jury is not required to first determine if the defendant committed the elements of the crime and then proceed to the question of insanity. *State v. Victorian*, 84 N.M. 491, 494, 505 P.2d 436, 439 (1973). This instruction slightly modifies the holding in *Victorian* by suggesting that the jury first find that the acts have been committed. This does not necessarily mean that they have to find the elements of the crime. Defense counsel may want to point out in closing argument that, if the jury is not persuaded that the crime was committed, the defendant is entitled to a verdict of not guilty. A determination of not guilty by reason of insanity by the jury is a prerequisite to a determination of present sanity by the judge under Rule 5-602 of the Rules of Criminal Procedure.

Rule 5-602A(2) of the Rules of Criminal Procedure requires the jury to return a special verdict if it finds that the defendant is not guilty by reason of insanity. However, the jury has no right to know the consequences of a verdict of "not guilty by reason of insanity". *State v. Chambers*, 84 N.M. 309, 502 P.2d 599 (1972).

Evidence of the defendant's mental condition may be presented by expert and lay witnesses. Since the jury is the final decision-maker on the question of insanity, it is up to them to decide whether to afford greater weight to expert testimony. "The purpose of psychiatry is to diagnose and cure mental illnesses, not to assess blame for acts resulting from these illnesses. The law seeks to find facts and assess accountability . . . ." Psychiatric testimony, however, is relevant evidence in determining accountability. *State v. Dorsey*, 93 N.M. 607, 609, 603 P.2d 717 (1979).

## ANNOTATIONS

**The 1997 amendment,** effective January 1, 1997, substituted "act charged" for "crime" in the third paragraph, substituted "the defendant" for "he" and "him" in the fourth paragraph, inserted the fifth through eighth paragraphs, inserted the tenth paragraph, substituted "and you further find the defendant was mentally ill at the time, you should find the defendant" for "but was mentally ill at the time, you should find him" in the eleventh paragraph, substituted "but do not find the defendant was mentally ill" for "and was not insane or mentally ill" in the next-to-last paragraph; and in Use Note 1, deleted the former first sentence which read: "This instruction should be given prior to 14-5102 and 14-5103", and added the last sentence.

**The 1998 amendment,** effective January 1, 1999, added "by reason of insanity" at the end of sixth paragraph from the end.

**The 2011 amendment,** approved by Supreme Court Order No. 11-8300-015, effective April 25, 2011, in the jury instruction, deleted the verdict form for "guilty but mentally ill" from the list of alternative verdict forms, deleted the instruction directing the jury, when it finds the defendant guilty, to consider whether the defendant was mentally ill at the time of the commission of the crime, and deleted the instructions prescribing the verdicts the jury should return if it finds the defendant mentally ill or not mentally ill; and in the Use Note, deleted the directions to insert the greater offense in the bracketed verdict form in the list of alternative verdict forms and to use only the applicable bracketed alternative verdict form.

**One accused of crime is presumed to be sane.** However, if the defendant introduces competent evidence reasonably tending to support insanity at the time of the alleged offenses, then an issue is raised as to the mental condition of the accused, and it becomes the duty of the jury to determine the issue from the evidence independent of the presumption of sanity. However, if the jury disbelieves the evidence as to the defendant's claimed insanity, then the presumption stands. *State v. Armstrong,* 82 N.M. 358, 482 P.2d 61 (1971).

There is a presumption of sanity which must be rebutted by the defendant, whereupon the jury shall make its determination. *State v. Torres,* 82 N.M. 422, 483 P.2d 303 (1971).

**And burden on defendant to overcome presumption.** — The burden of proof is upon the state to prove that the defendant is sane beyond a reasonable doubt; however, in the first instance, this burden is met or satisfied by the presumption that the defendant is sane. It then becomes the duty of the defendant and upon him is the onus or burden of going forward with evidence to overcome this presumption. *State v. James,* 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

**Insanity is question of fact which ordinarily is decided by trier of facts,** and where the testimony of the experts was not the only competent evidence touching on the

defendant's mental condition, their testimony was not conclusive on this issue. *State v. Victorian,* 84 N.M. 491, 505 P.2d 436 (1973).

It was the fact-finder's prerogative to reject the testimony of conflicting experts and determine that defendant was neither legally insane nor mentally ill. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008.

**Court determines whether evidence sufficient to take insanity question to jury.** — When the defendant has put in evidence reasonably tending to show him insane, the problem is then to determine whether it is sufficient to take the case to the jury and this is a question for the court to determine; however, if there has been adduced competent evidence reasonably tending to support the fact of insanity, it is the duty of the court to instruct on the question of insanity. *State v. James,* 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

**Jury should be instructed to consider first whether defendant is guilty of crime charged,** without consideration of the question of insanity. Should the defendant be found not guilty, there would be no necessity for further consideration. Should the defendant be found guilty, then the jury would determine whether the defendant is not guilty by reason of insanity. *State v. James,* 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

**Consideration of insanity before elements of offense not reversible error.** — Where the jury may possibly have considered the issue of sanity before considering whether the defendant had in fact committed the essential elements of the crimes charged, it cannot be said to be reversible error. *State v. Victorian,* 84 N.M. 491, 505 P.2d 436 (1973).

**Evidence sufficient to warrant insanity instruction.** — Evidence in a trial for aggravated battery that the defendant was a chronic alcoholic with organic brain damage was sufficient to warrant an instruction on the issue of sanity or mental illness as a defense. *State v. Crespin,* 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

**Evidence not sufficient to require insanity instruction.** — Where the evidence shows nothing more than the temporary effects of drug intoxication, on which the trial court instructed the jury, and where the defendant does not have a diseased mind, the evidence is not sufficient upon which to require an instruction on insanity. *State v. Nelson,* 83 N.M. 269, 490 P.2d 1242 (Ct. App.), *cert. denied,* 83 N.M. 259, 490 P.2d 1232 (1971).

A psychiatrist's testimony that the defendant had no organic brain damage or psychological damage, that the defendant's history of paint sniffing included instances when he would become violent and feel that devils were chasing him, but that in connection with the killing, the psychiatrist was of the opinion that the defendant knew what he was doing when he did it and that it was an impulsive act, was insufficient to raise a factual issue concerning a true disease of the mind and insufficient to raise a

factual issue as to substantial impairment of behavior controls, and the trial court did not err in refusing the requested insanity instruction. *State v. Gutierrez,* 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

Testimony by lay witnesses that the defendant was mentally disturbed and that, when committing the offense, he did not act, or look, normal, together with the defendant's testimony that he sniffed paint during periods of stress and when upset, and that when he sniffed he did not know what he was doing and went off on trips, was insufficient to raise a factual issue concerning a true disease of the mind and was insufficient to raise a factual issue concerning a substantial impairment of behavior controls, and the court did not err in refusing an insanity instruction. *State v. Gutierrez,* 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

**Instruction found proper.** — An instruction stating that: "In order to find the defendant not guilty by reason of insanity you must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind: (1) did not know the nature and quality of the act; (2) did not know that it was wrong; (3) was incapable of preventing himself from committing it," was correct. *State v. Chambers,* 84 N.M. 309, 502 P.2d 999 (1972).

**Law reviews.** — For annual survey of New Mexico law relating to criminal law, *see* 12 N.M.L. Rev. 229 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," *see* 13 N.M.L. Rev. 99 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 31 to 45.

Instructions in criminal case in which defendant pleads insanity as to his hospital confinement in the event of acquittal, 11 A.L.R.3d 737, 81 A.L.R.4th 659.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Construction and application of 18 USCS § 17, providing for insanity defense in federal criminal prosecutions, 118 A.L.R. Fed. 265.

22 C.J.S. Criminal Law §§ 56, 58 to 60.

## 14-5102. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to an order dated October 30, 1996, this instruction, relating to insanity, waswithdrawn effective January 1, 1997. For present comparable provisions, *see* UJI 14-5101.

## 14-5103. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — Pursuant to an order dated October 30, 1996, this instruction, relating to determination of mentally ill, was withdrawn effective January 1, 1997. For present comparable provisions, *see* UJI 14-5101.

## 14-5104. Determination of present competency.1

Evidence has been presented concerning the defendant's competency to stand trial. The defendant has the burden of proving by the greater weight of the evidence that he is mentally incompetent to be tried.

[Before considering whether the defendant committed the crime charged, you must make a determination of his competency to stand trial.][2] A person is competent to stand trial if he:

1. understands the nature and significance of the criminal proceedings against him;

2. has a factual understanding of the criminal charges; and

3. is able to assist his attorney in his defense.

As to this issue only, your verdict need not be unanimous. When as many as ten of you have agreed as to whether the defendant is competent to stand trial, your foreman must sign the proper form. If your verdict is that the defendant is incompetent, you will immediately return to open court without proceeding further. If your verdict is that the defendant is competent, you should proceed to consider the defendant's guilt or innocence.

USE NOTE

1. This instruction is to be given upon request of the defendant only if the evidence raises a reasonable doubt as to the defendant's competency to stand trial and this issue is submitted to the jury.

2. Delete bracketed material if this determination of competency is to be made by a jury other than the jury deliberating the guilt or innocence of the defendant.

**Committee commentary.** — Prior to 1967, a similar instruction was routinely given to the jury if a defendant has claimed that he was not competent to stand trial. *See e.g.,*

*State v. Ortega,* 77 N.M. 7, 419 P.2d 219 (1966); *State v. Folk*, 56 N.M. 583, 247 P.2d 165 (1952). The basis for the instruction was an 1855 statute which provided for "commitment" of a person "if upon the trial . . . such person shall appear to the jury charged with such indictment to be a lunatic . . .." Code 1915, § 4448. *See Territory v. Kennedy,* 15 N.M. 556, 110 P. 854 (1910).

The 1855 statute was repealed in 1967 by N.M. Laws 1967, ch. 231, § 1, compiled as § 41-13-3.1. Article II, Section 12 of the New Mexico Constitution and Rule 5-602 NMRA require the issue of competency to stand trial be submitted to the jury if the trial judge has a reasonable doubt regarding the issue of the defendant's competency. *See State v. Noble,* 90 N.M. 360, 563 P.2d 1153 (1977); *State v. Chavez,* 88 N.M. 451, 541 P.2d 631 (1975); and the committee commentary to Rule 5-602 NMRA. Absent an abuse of discretion, the trial judge's determination that there is not a reasonable doubt will not be overturned. *See State v. Noble*, supra at p. 363.

The defendant has the burden of proving by a preponderance or greater weight of the evidence that he is not competent to stand trial. *State v. Ortega*, supra, at p. 19. *See also* UJI 13-304.

It is only necessary for ten members of the jury to decide the issue of competency, as proceedings to ascertain the competency to stand trial are civil proceedings. Article II, Section 12 of the New Mexico Constitution provides that the legislature may provide that verdicts in civil cases may be rendered by less than an unanimous vote of the jury. Section 38-5-17 NMSA 1978 provides for verdicts of ten in civil cases.

Although the New Mexico appellate decisions on competency to stand trial have all involved incompetency because of some mental illness or disease, UJI 14-5104 is not limited to incompetency by reason of mental illness. It is clear that a mentally retarded (developmentally disabled) deaf mute who can neither read nor write and who is unable to communicate with his attorney may be incompetent to stand trial even though not suffering from any mental disease. *See Jackson v. Indiana,* 406 U.S. 715 (1972).

In the federal courts and New Mexico the test of present competency to stand trial is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402 (1960). It is a violation of due process to try a person who does not have these capabilities.

## ANNOTATIONS

**Compiler's notes.** — Section 4448, Code 1915, referred to in the next-to-last sentence in the first paragraph of the committee commentary, was compiled as 41-13-3, 1953 Comp., before being repealed by Laws 1967, ch. 231, § 1.

Laws 1967, ch. 231, § 1, referred to in the second paragraph of the committee commentary, was compiled as 41-13-3, 1953 Comp., prior to its repeal by Laws 1972, ch. 71, § 18. Section 2 of Laws 1967, ch. 231 enacted 41-13-3.1, 1953 Comp., relating to determination of present competency, which is presently compiled as 31-9-1 NMSA 1978.

**Giving instruction to jury not warranted.** — Where even if defendant had requested that this instruction be given or that the issue otherwise be submitted, but no offer of proof was made at trial and no evidence was presented for jury consideration concerning defendant's competency, that would not warrant giving the instruction to the jury. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

**Presumption of sanity does not deny the defendant due process of law.** — It merely gives the defendant the burden of going forward with evidence of insanity; if he meets this burden, his sanity must be proved by the state beyond a reasonable doubt; if he fails to meet this burden, by introducing no evidence of insanity, by offering evidence disbelieved by the jury or by offering evidence insufficient to rebut the presumption, the presumption of sanity decides the issue. *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

**Competency to plead same as to stand trial.** — The trial court did not err in applying the same standard to a defendant's competency to enter into a plea agreement as would have been appropriate in determining his competency to stand trial. *State v. Lucas,* 110 N.M. 272, 794 P.2d 1201 (Ct. App. 1990).

**Instruction cannot cover situation where there is existing ruling that defendant is incompetent** and incompetency is to be redetermined by the jury, because in that situation the state has the burden of persuading the fact finder that the defendant is competent to stand trial. *State v. Santillanes,* 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

**Evidence not sufficient to raise reasonable doubt as to competency.** — *See* State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

**Issue not preserved where no objection made nor instruction offered.** — Where the defendant did not offer an instruction on competence to stand trial, nor did he object to the instructions given the jury, this issue was not properly preserved for appeal. *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 62, 63.

22 C.J.S. Criminal Law § 940(2).

# Part B
# Intoxication

## 14-5105. Voluntary intoxication.

Evidence has been presented that the defendant was intoxicated from use of [alcohol] [drugs]. An act committed by a person while voluntarily intoxicated is no less criminal because of his condition. If the evidence shows that the defendant was voluntarily intoxicated when allegedly he committed the crime[s] of _____, that fact is not a defense.

USE NOTE

No instruction on this subject shall be given. (*See* Instructions 14-5110 and 14-5111 for special instructions for specific intent crimes.)

**Committee commentary.** — 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.

The UJI instructions cover the defense for the specific intent crimes. UJI 14-5110 is used for a willful and deliberate first degree murder where intoxication can negate the deliberate intention to take away the life of another person. 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.

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.

**ANNOTATIONS**

**Voluntary drug intoxication falls in same classification as voluntary alcohol intoxication.** *State v. Nelson*, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

**Voluntary drunkenness instruction error for specific intent offense.** — An instruction that voluntary drunkenness is no excuse or justification for a crime was erroneous in a trial for aggravated battery, a specific intent offense. *State v. Crespin,* 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

**Diminished capacity instruction properly refused.** — Although the defendant had been drinking and taking barbiturates, it was not error to refuse an instruction on diminished capacity when the effect of intoxication on the defendant's state of mind was covered in another instruction. *State v. Rushing,* 85 N.M. 540, 514 P.2d 297 (1973).

**Evidence insufficient to raise drug intoxication question.** — Evidence that the defendant used an unspecified amount of demerol on the evening that a conspiracy to commit burglary was formed, along with descriptions of the defendant as "stoned" or "high" (explained in that he could not walk or communicate "too good and had to lay down and take it easy"), along with testimony that he took some other unspecified drugs the next morning and was "high" when he left the house en route to the burglary, that he drove the car on one errand prior to the burglary and climbed a pipe to the roof of the burglarized store with the intention of warning his comrades about the presence of the police, was too vague and insufficient to raise a jury question as to drug intoxication in connection with either crime. *State v. Watkins,* 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

**Where the jury believed that defendant had necessary felonious intent,** this denies an appellate court the right, as a court of review, to grant relief, because the court does not sit as a second jury, and whether a defendant was so intoxicated as to be unable to form the necessary intent is a matter for the jury. *State v. Nelson,* 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 44, 107.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effect of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 65 to 68, 70, 72.

## 14-5106. Involuntary intoxication; defined.[1]

Evidence has been presented that the defendant was intoxicated but that the intoxication was involuntary.

Intoxication is involuntary if:[2]

[a person is forced to become intoxicated against the person's will]

[a person becomes intoxicated by using (alcohol)[3] (drugs) without knowing the intoxicating character of the (alcohol)[3] (drugs) and without willingly assuming the risk of possible intoxication].

## USE NOTE

1. If this instruction is given, add to the essential elements instruction for the offense charged:

The defendant was not involuntarily intoxicated at the time the offense was committed or, if defendant was involuntarily intoxicated, then defendant nonetheless:

knew what [he] [she] was doing or understood the consequences of [his] [her] act, knew that [his] [her] act was wrong and could have prevented [himself] [herself] from committing the act.

2. Use only the applicable source of the intoxication.

3. Use only the applicable alternative.

[As amended, effective January 1, 1997.]

**Committee commentary.** — The committee found no reported New Mexico decisions involving the defense of involuntary intoxication. Some commentators have suggested that the defense is nonexistent. However, intoxication can result from the mistaken use of a liquor or narcotic substance. *See generally* Perkins, Criminal Law 894 (2d ed. 1969). In that instance, it is as if the defendant was rendered mentally ill by an act over which he had no control. Consequently, this instruction includes the elements of mental illness, the test of insanity similar to that in UJI 14-5101. *See Perkins, supra,* at 898.

## ANNOTATIONS

**The 1997 amendment,** effective January 1, 1997, added "defined" in the rule heading, substituted "the person's" for "his" in the second paragraph, deleted the former third and fourth paragraphs relating to the effect of the involuntary intoxication on the defendant's mens rea and the burden of the state to prove that the defense of involuntary intoxication does not apply, rewrote Use Note 1, and substituted "alternative" for "insanity alternatives" in Use Note 3.

**Law reviews.** — For article, "Death in the Desert: A New Look at the Involuntary Intoxication Defense in New Mexico," *see* 32 N.M.L. Rev. 243 (2002).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 108.

When intoxication deemed involuntary so as to constitute defense to criminal charge, 73 A.L.R.3d 195.

22 C.J.S. Criminal Law §§ 69, 72.

# Part C
# Inability to Form Intent

## 14-5110. Inability to form a deliberate intention to take away the life of another.1

Evidence has been presented that the defendant was [intoxicated from use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was _____[3] and if so, what effect this had on the defendant's ability to form the deliberate intention to take away the life of another.

The burden is on the state to prove beyond a reasonable doubt that the defendant was capable of forming a deliberate intention to take the life of another. If you have a reasonable doubt as to whether the defendant was capable of forming such an intention, you must find the defendant not guilty of a first degree murder by deliberate killing.

USE NOTE

1. This instruction may be given only for a willful and deliberate murder and should immediately follow UJI 14-201 when the defendant has relied on the defense of "diminished responsibility" or "inability to form specific intent." If, in a "mental disease or disorder" case, the defendant has also relied on the complete defense of insanity, this instruction should follow UJI 14-5101. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant was not [intoxicated from use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder] at the time the offense was committed to the extent of being incapable of forming an intent to take away the life of another."

2. Use only the applicable bracketed phrase. If intoxication is in issue, use only the applicable source of intoxication.

3. Repeat bracketed and parenthetical words used in the first sentence.

[As amended, effective January 1, 1997.]

**Committee commentary.** — The willful and deliberate first degree murder is the only homicide requiring a so-called "specific intent" under New Mexico law. *State v. Tapia,* 81 N.M. 274, 276, 466 P.2d 551, 553 (1970); *State v. Chambers,* 84 N.M. 309, 502 P.2d 999 (1972). The intent required is "express malice," i.e., the deliberate intention unlawfully to take away the life of a fellow creature. *State v. Smith,* 26 N.M. 482, 488, 194 P. 869 (1921). Voluntary alcoholic and drug intoxication, *State v. Nelson,* 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971), and mental disorders, *State v. Padilla,* 66 N.M. 289, 347 P.2d 312, 78 A.L.R.2d 908 (1959),

may negate this intent. The defense of inability to form a "specific intent" is analogous to the defense of insanity. *State v. Holden,* 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

*State v. Smith*, supra, states that a willful and deliberate murder requires specific intent. *See* commentary to UJI 14-201. The same case also indicates that if the facts conclusively show that the murder was perpetrated by means of lying in wait, torture or poison, the means supply specific intent. In addition, both felony murder and the so-called depraved mind murder do not require a specific intent, since intent is implied as a matter of law. *See* commentaries to UJI 14-202 and 14-203.

The extent of the defense in drug use situations is unclear. If limited to narcotic drugs as defined in the Controlled Substances Act, the defense will have a limited application. *See* Sections 30-31-2P and 30-31-6 & 30-31-7 NMSA 1978. For example, marijuana is no longer defined as a narcotic drug under the statute, although its use and possession are still prohibited.

Two transition problems occur with the use of this instruction. The supreme court has made it clear that the defense is not available for second degree murder. *State v. Chambers*, supra; *State v. Tapia*, supra. *See also State v. Lunn*, 88 N.M. 64, 537 P.2d 672 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976). Because the committee recognized that the jury may have difficulty making the distinction between a deliberate intention to take the life of another and an intent to kill or do great bodily harm, the bracketed sentences are included so that the jury is told to consider other homicide offenses not requiring specific intent.

When the defense involves a mental disease or disorder, the defendant probably will have attempted to show insanity as a complete defense. *See State v. Padilla*, supra. The jury will undoubtedly have trouble with the distinction between insanity and inability to form specific intent. The use note therefore provides that the insanity instruction be given first. The insanity instruction contains an optional paragraph which must be given when the inability-to-form-specific-intent instruction follows.

## ANNOTATIONS

**The 1997 amendment,** effective January 1, 1997, rewrote the last paragraph, added the last sentence in Use Note 1, and deleted former Use Note 4 relating to giving bracketed sentences pertaining to alternative unlawful killing in the former last paragraph of the instruction.

**This instruction must be given as an element of the offense for which intent could be negated, not as a separate instruction.** *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

**Expert testimony.** — When an understanding of the purported cause of a defendant's inability to form specific intent goes beyond common knowledge and experience and requires scientific knowledge, lay witnesses are not qualified to testify and expert testimony is required. *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 355.

**Where the defendant claimed that organic brain damage** he suffered years earlier caused him some mental disease or disorder that made him incapable of forming the requisite intent for first degree murder, expert testimony was necessary to link the defendant's injury to his inability to form the requisite intent. *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 355.

**Instruction as to burden of proof.** — Instruction to jury, based on a former version of this law in effect at the time of defendant's trial, that if it had a reasonable doubt as to the capacity of defendant, who claimed intoxication, to form specific intent, it must find him not guilty of first-degree murder, adequately conveyed the current law in New Mexico, which is that the state has the burden of proving defendant's capacity to form specific intent beyond a reasonable doubt. *State v. Begay,* 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

**Inability to form an intention is distinct from the inability to control emotions** and the inability to stop oneself from committing a crime, and unless there is evidence that the defendant could not have formed the requisite intent, this instruction is improper. *State v. Lujan,* 94 N.M. 232, 608 P.2d 1114 (1980).

**Diminished-capacity instruction is proper** only when there is evidence that reasonably tends to show that the defendant's claimed mental disease or disorder rendered the defendant incapable of forming specific intent at the time of the offense. *State v. Balderama,* 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

**Evidence warranting instruction.** — Testimony from accomplices that murder defendant had consumed alcohol and methamphetamine on the evening of the murder, and expert testimony about the effect of those substances on the ability to form intent, was sufficient to warrant an instruction on intoxication. *State v. Begay,* 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

**Evidence required to instruct on intoxication.** — To authorize an instruction on intoxication, the record must contain some evidence showing or tending to show that defendant consumed an intoxicant and the intoxicant affected his mental state at or near the time of the homicide. The instruction does not, however, require expert evidence regarding the effect of intoxication upon defendant's ability to form a deliberate intent to kill. *State v. Privett,* 104 N.M. 79, 717 P.2d 55 (1986).

**Law reviews.** — For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," *see* 13 N.M.L. Rev. 99 (1983).

For article, "Death in the Desert: A New Look at the Involuntary Intoxication Defense in New Mexico," see 32 N.M.L. Rev. 243 (2002).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 106 to 109.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effort of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 29 to 32, 56, 58 to 60.

## 14-5111. Inability to form intent to do a further act or achieve a further consequence.1

Evidence has been presented that the defendant was [intoxicated from the use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was _____[3] and, if so, what effect this had on the defendant's ability to form the intent to [_____[4]].

[Intent to _____[4] is not an element of the crime of _____[5]. If you find the defendant not guilty of _____[6], you must proceed to determine whether or not the defendant is guilty of the crime of _____[5].]

The burden is on the state to prove beyond a reasonable doubt that the defendant was capable of forming an intention to _____[4]. If you have a reasonable doubt as to whether the defendant was capable of forming such an intention, you must find the defendant not guilty of _____[5].

USE NOTE

1. This instruction is used for the intoxication or mental disease defense for a crime which includes an element of intent to do a further act or achieve a further consequence. It may not be used for a homicide crime. *See* UJI 14-5110. When the defense is based on a "mental disease or disorder" and the defendant has also relied on the complete defense of insanity, this instruction should follow UJI 14-5110. Otherwise, the instruction should follow the elements instruction for the crime or crimes with the intent element. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant was not [intoxicated from use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder] at the time the offense was committed to the extent of being incapable of forming an intention to _____[4]."

2. Use only the applicable bracketed phrase. If intoxication is in issue, use only the applicable source of intoxication.

3. Repeat the bracketed and parenthetical words used in the first sentence.

4. Repeat the applicable specific intent to do a further act or achieve a further consequence from the essential elements instruction of the crime.

5. Name any other offenses or lesser included offense which does not have an intent to do a further act or achieve a further consequence and for which an instruction is being given to the jury.

6. Name the crime charged which requires specific intent.

[As amended, effective January 1, 1997.]

**Committee commentary.** — 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). This instruction may be used only for nonhomicide crimes containing an element of intent to do a further act or achieve a further consequence.

## ANNOTATIONS

**The 1997 amendment,** effective January 1, 1997, deleted the former second paragraph relating to finding the defendant not capable of forming intent, added the last paragraph, added the last sentence in Use Note 1, added Use Note 5, redesignated former Use Note 5 as Use Note 6 and substituted "which requires specific intent" for "or lesser included offense which contains an intent to do a further act or achieve a further consequence" in that use note, and deleted former Use Note 6 relating any other offense which does not have an intent to do a further act or achieve a further consequence for which an instruction is given.

**This instruction must be given as an element of the offense for which intent could be negated, not as a separate instruction.** *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

**Instruction inapplicable to general intent.** — Voluntary intoxication from the use of alcohol or drugs is not a defense to the question of whether a defendant had a general criminal intent. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**Inconsistent defenses of intoxication and noninvolvement.** — Where defendant was charged with multiple specific intent crimes that arose out of an altercation; defendant testified and denied having committed the acts underlying the charges; at the close of defendant’s trial, defendant requested a jury instruction on intoxication as a

defense to the specific intent crimes charged; and there was sufficient evidence that defendant was significantly intoxicated at the time of the altercation, defendant was entitled to the jury instruction on intoxication and the trial court erred in denying the instruction on the ground that defendant's trial theory of noninvolvement was inconsistent with the defense of intoxication. *State v. Dickert*, 2012-NMCA-004, 268 P.3d 515, cert. denied, 2011-NMCERT-012.

**But intoxication may be shown in all cases of crimes requiring specific intent,** to negate the existence of such an intent. *State v. Rayos,* 77 N.M. 204, 420 P.2d 314 (1967).

**Question of intent matter for jury.** — 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. *State v. Rayos,* 77 N.M. 204, 420 P.2d 314 (1967).

**Evidence supported jury instruction of intoxication.** — Where defendant was charged with multiple specific intent crimes that arose out of an altercation; defendant claimed that defendant was intoxicated during the altercation; defendant testified that defendant casually consumed alcohol between 5:00 p.m. and 10:00 p.m. on the day of the altercation; defendant then went to a house party where defendant consumed between six and ten beers, when defendant left the house party, a friend drove defendant to the location of the altercation, because defendant was too drunk to drive, and during the drive, defendant drank a "good portion" of a bottle of alcohol; defendant arrived at the location of the altercation around midnight; defendant was arrested at 2:00 a.m.; and the arresting officer testified that defendant smelled of alcohol, acted belligerent and violent, and appeared to be drunk, the evidence of intoxication was substantial both in terms of degree and proximity to the time of the alleged crimes and was sufficient to justify defendant's requested instruction on intoxication. *State v. Dickert*, 2012-NMCA-004, 268 P.3d 515, cert. denied, 2011-NMCERT-012.

**Diminished capacity instruction refused upon lack of evidence.** — Where the record does not contain any evidence which reasonably tends to show that the defendant's claimed intoxication rendered him incapable of acting in a purposeful way, a tendered instruction on diminished capacity was properly refused. *State v. Luna,* 93 N.M. 773, 606 P.2d 183 (1980).

Where a defendant was charged with aggravated battery, and there was evidence that the defendant was drinking heavily from 3:00 p.m. to 6:00 p.m. on the day of the crime and that he was "pretty drunk" at that time, but there was no evidence that the defendant was still intoxicated approximately four hours later when the crime was committed, the trial court properly denied the defendant's requested instruction on intoxication. *State v. Lovato,* 110 N.M. 146, 793 P.2d 276 (Ct. App. 1990).

**Procedure tending to simplify instruction not error.** — Where the jury was instructed as to each count of a particular crime and these instructions were followed by one instruction as to the specific intent required for that particular crime, after which the

trial court instructed, on the basis of this instruction concerning alcohol, drugs and mental disease or disorder, applying this instruction to the specific intent crimes by naming them in the instruction, the procedure followed by the trial court tended to simplify the instructions and avoid confusion, and was not in error. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

The application of a specific intent instruction to several counts involving the same specific intent crime was not a substantial modification of this instruction. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**Evidence sufficient to show intent to hold girl against will.** — Evidence that the defendant bound and gagged a girl and her mother, raped the mother and stated that the girl and her mother were to take the defendant out of state was sufficient to show an intent to hold the girl for service against her will. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), rev'd in part on other grounds, 90 N.M. 191, 561 P.2d 464 (1977).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 106 to 109.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effect of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 29 to 32, 56, 58 to 60.

# Part D
# Mistake

## 14-5120. Ignorance or mistake of fact.1

Evidence has been presented that the defendant believed that _____2. 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.

USE NOTE

1. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not [act] [fail to act] under a mistake of fact."

2. Describe the facts constituting a mistake of fact.

[As amended, effective January 1, 1997.]

**Committee commentary.** — In *State v. Bunce*, 116 N.M. 284, 285, 861 P.2d 965 (1993), the Supreme Court held it was fundamental error to fail to instruct on mistake-of-fact as a defense of embezzlement.

"Ordinarily, a defendant is not entitled to a specific instruction where the jury has already been adequately instructed upon the matter by other instructions." *State v. Venegas*, 96 N.M. 61, 63, 628 P.2d 306, 308 (1981). *See also, State v. Long*, 121 N.M. 333, 911 P.2d 227 (Ct. App. 1995) relying on *State v. Venegas*, 96 N.M. at 62-63, 628 P.2d at 307-08.

[As amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

## ANNOTATIONS

**The 1997 amendment,** effective January 1, 1997, substituted the language beginning "The burden" for language relating to the defendant acting or failing to act under an honest and reasonable belief in the existence of the facts, added Use Note 1, redesignated former Use Note 1 as Use Note 2, and deleted former Use Note 2 relating to giving bracketed alternatives.

**The 2009 amendment,** approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, in the committee commentary, deleted the former first sentence of the last paragraph and added the current first sentence of the last paragraph, but did not amend the jury instruction.

**Sufficient evidence for mistake-of-fact instruction.** — Where defendant, who was very intoxicated, checked into a motel, paid for a room, was issued a key card without a room number on it, was assigned Room 125, entered Room 121 by breaking a window, and was found by the police using Room 121 as one for which had paid, the evidence was sufficient to support an instruction on mistake of fact. *State v. Contreras*, 2007-NMCA-119, 142 N.M. 518, 167 P.3d 966.

**Mistake of fact common-law defense.** — At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act was a good defense. *State v. Gonzales,* 99 N.M. 734,

663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

**Mistake of fact concept included in intent instruction involving mental state.** — Whenever an intent instruction involving the defendant's mental state is given, the mistake of fact concept is automatically included and does not merit a separate instruction. *State v. Griscom,* 101 N.M. 377, 683 P.2d 59 (Ct. App. 1984).

**Instruction given where evidence defendant believed fact that, if true, made conduct lawful.** — To entitle himself to an instruction on mistake of fact, there must be some evidence that at the time in question, the defendant entertained a belief of fact that, if true, would make his conduct lawful. *State v. Gonzales,* 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

**Instruction improper where evidence showed active "aiding and abetting."** — In a prosecution for attempted murder, the defendant's tendered mistake-of-fact instruction, based on his "omission to act" did not correctly state the law applicable to the case, where the evidence showed that the defendant actively "aided and abetted" the crime. *State v. Johnson,* 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

**Requested instruction on mistake of fact in bank robbery properly refused.** — Where the defendant knew that another was going to rob the bank, went to the bank, not to stop the robbery, but with the purpose of preventing any shooting, a requested instruction on mistake of fact was properly refused. *State v. Roque,* 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

**As in embezzlement prosecution, defendant believed he was authorized to expend public funds.** — The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales,* 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

**Refusal of mistake-of-fact instruction in child abuse case is proper** because criminal intent is not required to commit child abuse, and since the accused's mental state is not essential to the crime, mistake of fact would not be a defense thereto. *State v. Fuentes,* 91 N.M. 554, 577 P.2d 452 (Ct. App.), *cert. denied,* 91 N.M. 610, 577 P.2d 1256 (1978).

**Deficient instructions on mistake of fact.** — Although the defendant offered an inadequate instruction on mistake of fact, the doctrine of fundamental error required reversal of the defendant's embezzlement conviction, since under the given instructions, the defendant could have been convicted for innocent conduct involving the application

of certain payments towards the balance allegedly due him by the alleged victim. *State v. Bunce,* 116 N.M. 284, 861 P.2d 965 (1993).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 93.

Mistaken belief in existence, validity or effect of divorce or separation as defense to prosecution for bigamy, 56 A.L.R.2d 915.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

Criminal offense of selling liquor to minor or permitting him to stay on licensed premises as affected by ignorance or mistake regarding his age, 12 A.L.R.3d 991.

Mistake or lack of information as to victim's age as defense to statutory rape, 46 A.L.R.5th 499.

22 C.J.S. Criminal Law § 47.

## 14-5121. Ignorance or mistake of law.1

Evidence has been presented that the defendant was [ignorant of] [mistaken about] the law which he is accused of violating. When a person voluntarily does that which the law forbids and declares to be a crime, it is no defense that he did not know that his act was unlawful or that he believed it to be lawful.

USE NOTE

1. No instruction on this subject shall be given.

**Committee commentary.** — The committee found no reported New Mexico decisions on the problem of the defendant who is ignorant of the law. As a general proposition, the problem of ignorance of the law arises primarily in the context of criminal intent. *See generally* Perkins, Criminal Law 923 (2d ed. 1969). Consequently, a provision is included in the general criminal intent UJI 14-141. For the exceptions to the general rule that ignorance of the law is no defense, *see generally* Perkins, supra, at 925.

**ANNOTATIONS**

**Mistake of law was not an appropriate issue for a jury instruction.** — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor and of contributing to the delinquency of a minor based on unclothed experiences with two teenage children; defendant claimed that because defendant believed that touching the children was a religious act, defendant was not guilty of committing a crime; and defendant requested an instruction that the State had the burden to provide that defendant did not act under a belief that touching the children was a religious act, the fact that defendant believed that defendant's behavior was excepted, because it was motivated by a sincere religious belief, from what would otherwise be considered criminal, was not an appropriate matter for the jury, because it was a legal, not a factual issue, and the instruction was properly rejected by the district court. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-____.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 94.

22 C.J.S. Criminal Law § 48.

# Part E
# Duress

## 14-5130. Duress; nonhomicide crimes.

Evidence has been presented that the defendant was forced to _____[2] 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.

USE NOTE

1. For use when duress is a defense to any crime except homicide, a crime requiring an intent to kill and escape from a penitentiary.

2. Describe acts of defendant constituting the offense.

**Committee commentary.** — UJI 14-5130 has been amended to expand the conditions which must exist to accept the defense of duress in the commission of a crime. Although the New Mexico Court of Appeals stated that former UJI 14-5130 was not complete in that it failed to include the requirement that the defendant must not have had a full opportunity to avoid the danger of great bodily harm, the supreme court, on certiorari, stated that "the full opportunity to avoid the act without danger" requirement

set forth in *State v. LeMarr*, 83 N.M. 18, 487 P.2d 1088 (1971) was covered by the requirement that the duress must be present, imminent and impending. *See Esquibel v. State,* 91 N.M. 498, 576 P.2d 1129 (1978).

UJI 14-5130 applies to all crimes, other than homicide, a crime requiring an intent to kill or escape from a penitentiary. *See generally,* Perkins, Criminal Law 951 (2d ed. 1969), and 69 A.L.R.3d 688 (1974); 40 A.L.R.2d 908 (1955) and *United States v. Boomer,* 571 F.2d 543 (10th Cir.), *cert. denied,* 436 U.S. 911, 98 S. Ct. 2250, 56 L. Ed. 2d 411 (1978).

## ANNOTATIONS

**Duress not shown.** — Where the evidence showed that after the defendant and the defendant's accomplice had shot the driver of a car who had been in an accident with the car driven by the defendant, the accomplice, who had the gun, hit the defendant with the gun because the accomplice believed that the defendant had ruined the accomplice's life by shooting the other driver; the accomplice forced the defendant to follow the accomplice because the defendant was confused and was going back to the scene of the shooting; the accomplice and the defendant kidnapped another person who was driving a van to escape the scene of the shooting; there was no evidence that the accomplice threatened the defendant if the defendant did not get into the van; the defendant gave directions to the driver of the van; and the defendant remained in the van after the accomplice had left the van, the evidence did not support the defense of duress and the trial court did not err in refusing the defendant's requested instruction on duress. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

**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).

**Act committed under compulsion not criminal.** — An act committed under compulsion, such as apprehension of serious and immediate bodily harm, is involuntary and, therefore, not criminal. *State v. Lee,* 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967); *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).

**Elements of defense of duress.** — From the wording of this rule, it appears 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. *State v. Duncan,* 111 N.M. 354, 805 P.2d 621 (1991).

To support the defense 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, 819 P.2d 1324 (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. *State v. Castrillo,* 112 N.M. 766, 819 P.2d 1324 (1991).

The standard of duress consists of both subjective and objective components: (1) did defendant in fact fear immediate great bodily harm?; if he did, (2) would a reasonable person have acted in the same way under the circumstances? *State v. Duncan,* 113 N.M. 637, 830 P.2d 554 (Ct. App. 1990), aff'd, 111 N.M. 354, 805 P.2d 621 (1991).

**Reasonable alternatives unavailable.** — The defense of duress is available against the charge of felon in possession of a firearm only when no reasonable alternatives are available - a reasonable person would resort to possession of a firearm only when committing the offense is the only reasonable alternative. *State v. Castrillo,* 112 N.M. 766, 819 P.2d 1324 (1991).

**Duress must be present, imminent and impending.** — In order to constitute a defense to a criminal charge, other than taking the life of an innocent person, the coercion or duress must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. *State v. Lee,* 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967); *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).

**And no duress where threatened at some prior time.** — The defense of duress is not established by proof that the defendant had been threatened with violence at some prior time, if he was not under any personal constraint at the time of the actual commission of the crime charged. *State v. Lee,* 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967).

**Duress need not be immediate and continuous during all of time act committed.** — The force which is claimed to have compelled criminal conduct against the will of the actor need not be immediate and continuous and threaten grave danger to his person or that of another during all of the time the act is being committed. A prolonged history of beatings and threats, the last of which occurred several days before a crime of fraud, is sufficient to create a jury question on duress. *State v. Torres,* 99 N.M. 345, 657 P.2d 1194 (Ct. App. 1983).

**What constitutes present, imminent and impending compulsion depends on circumstances** of each case. *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); *State v. Norush,* 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982).

Where there is substantial evidence of a prolonged history of beatings and serious threats toward a defendant by certain guards and prison personnel, a jury might conclude that the defendant, in escaping, had acted under a genuine fear of great bodily harm to himself, and the passage of two to three days between the threat and escape did not suffice to remove the defense of duress from the consideration of the jury. *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 character of the coercer** is not an element of the defense of duress. *State v. Duncan*, 111 N.M. 354, 805 P.2d 621 (1991).

**District court properly refused to submit the defense** of duress to the jury, where defendant, a convicted felon, could have contacted the police or simply avoided his estranged wife after she smashed his car windshield but instead he chose to arm himself by purchasing a handgun. *State v. Castrillo,* 112 N.M. 766, 819 P.2d 1324 (1991).

**Availability of defense to deadly weapon possession.** — While the duress defense is available to the charge of possession of a deadly weapon by a prisoner, it is extremely limited. The defendant must produce sufficient evidence that he could not have reasonably avoided the criminal conduct in which he engaged, and prove that a direct causal relationship existed between the criminal action and the avoidance of the threatened harm. *State v. Baca,* 115 N.M. 536, 854 P.2d 363 (Ct. App. 1993).

**Not available as defense to intentional murder.** — Defendant is not entitled to an instruction that would promote the misstatement of the law by suggesting that duress was available as a defense to the charge of intentional murder. *State v. Nieto,* 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 100.

Duress, necessity or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Coercion, compulsion, or duress as defense to charge of kidnapping, 69 A.L.R.4th 1005.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

22 C.J.S. Criminal Law § 44.

## 14-5131. Duress; no defense to homicide.1

The fact that the defendant may have acted under a threat of death or great bodily harm from another is no defense to an [intentional killing of][2] [attempted killing of] [assault with intent to kill] a human being.

USE NOTE

1. This instruction may also be used for an attempted homicide or assault with intent to kill.

2. Use only the applicable bracketed provisions.

[As amended by Supreme Court Order No. 12-8300-032, effective for all cases filed or pending on or after January 7, 2013.]

**Committee commentary.** — Duress is not a defense to an intentional homicide. *See Esquibel v. State*, 91 N.M. 498, 501, 576 P.2d 1129, 1132 (1978) ("We hold that duress is a defense available in New Mexico except when the crime charged is a homicide or a crime requiring intent to kill."); *State v. Finnell*, 101 N.M. 732, 737, 688 P.2d 769 (1984) ("We unhesitatingly adopt the rule duress is not a defense to an intentional homicide.").

[As amended by Supreme Court Order No. 12-8300-032, effective for all cases filed or pending on or after January 7, 2013.]

**ANNOTATIONS**

**Duress defense traditionally refused for homicide.** *State v. Finnell,* 101 N.M. 732, 688 P.2d 769, *cert. denied,* 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

**The 2012 amendment,** approved by Supreme Court Order No. 12-8300-032, effective January 7, 2013, eliminated the element of homicide of an innocent person; deleted the former first sentence of the instruction which stated that evidence had been presented that defendant killed or intended to kill the victim under a threat of death or great bodily harm from a third person; after "acted under threat", added "of death or great bodily harm"; and after "assault with intent to kill", deleted "an innocent person" and added "a human being".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 100.

22 C.J.S. Criminal Law § 44.

## 14-5132. Escape from jail or penitentiary; duress defined.1

Evidence has been presented that the defendant escaped from [jail] [the penitentiary][2] as a result of duress. An escape is a result of duress to avoid great bodily harm if:

1. The defendant feared [great bodily harm to (himself) (herself) (_____) *(name of other person)*] [(he) (she) would be sexually assaulted][2] if [he] [she] did not escape;

2. [The defendant did not have time to complain to the authorities;]

[OR]

[Under the circumstances it would have been futile for the defendant to complain to the authorities;][2]

3. The defendant did not use force or violence toward prison personnel or any other person during the escape;

4. The defendant [intended to report] [reported][2] immediately to the proper authorities when [he] [she] attained a position of safety from the immediate threat; and

5. A reasonable person would have acted in the same way under the circumstances.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act as a result of duress. If you have a reasonable doubt as to whether the defendant acted as a result of duress, you must find the defendant not guilty.

USE NOTE

1. For use when necessity is defense to crimes of escape or attempted escape from jail (UJI 14-2221) or escape or attempted escape from the penitentiary (UJI 14-2222). If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not escape as a result of duress".

2. Use only applicable alternatives.

[As amended, effective January 1, 1997.]

**Committee commentary.** — Generally, escape from confinement is unlawful and constitutes a crime which is punishable, unless the confinement was illegal. In recent years, the courts have begun to recognize the defense of coercion or duress when the defendant is charged with escape from confinement. In *People v. Lovercamp,* 42 Cal. App. 3d 823, 118 Cal. Rptr. 110, 69 A.L.R.3d 668 (1974), the court established the following requirements which must be proved in order to establish the defense of duress in an escape case:

specific threats of death, forcible sexual attack or substantial bodily injury in the immediate future;

no time for complaint to the authorities or complaint is futile based upon a history of futility of prior complaints;

no time to resort to the courts;

no force or violence used toward prison personnel or other innocent persons; and

the prisoner immediately reports to the proper authorities when he has attained a position of safety.

Although some cases refuse to consider sexual threats or attack as a sufficient reason for permitting the defense, the *Lovercamp* case involved female prisoners who complained of threats by lesbians that the escapees engage in sex acts with them, and the case holds that sexual attacks are equal to death or bodily harm.

In *United States v. Bailey,* 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), the United States Supreme Court held that in the federal courts duress or necessity is not a defense unless it is established that escape was the only reasonable alternative and there must be evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress has lost its coercive force.

In *Esquibel v. State,* 91 N.M. 498, 576 P.2d 1129 (1978), the supreme court held that UJI 14-5130 was to be given in escape cases where the claim was fear of great bodily harm.

UJI 14-5132 was adopted effective July 1, 1980, to set forth specific elements of the defense of duress when claimed in an escape case.

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, deleted "Duress" from the beginning of the rule heading and added "duress defined" in the rule heading, rewrote the introductory language, made gender neutral changes in Paragraph 1 and Paragraph 4, added the last paragraph, and added the last sentence in Use Note 1.

**Instruction not applied ex post facto. —** Supreme court orders as to the use of criminal jury instructions are not to be used, and are not intended to be used, to deprive defendants of a duress defense ex post facto; accordingly, the use of this instruction as the applicable instruction at a trial after 1980 for a prison escape prior to 1980 is prohibited. *State v. Norush,* 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982).

# Part F
# Accident and Misfortune

## 14-5140. Excusable homicide.

Evidence has been presented that the killing of _____ *(name of victim)* by defendant occurred by accident or misfortune

[while defendant was _____ *(describe facts),* with usual and ordinary caution and without any unlawful intent]

[upon any sudden and sufficient provocation against defendant]

[upon a sudden combat, with no undue advantage taken by defendant, nor any dangerous weapon used and the killing was not done in a cruel or unusual manner].

If you determine that the defendant killed _____ *(victim),* by accident or misfortune you must find him not guilty.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction is derived from the statute on excusable homicide, Section 30-2-5 NMSA 1978. In *State v. Bailey*, 27 N.M. 145, 198 P. 529 (1921), a prosecution for first degree murder, the court held that the district court had properly refused an instruction which simply listed all of the various elements in the statute. The court said that the instruction tendered in the language of the statute was inapplicable as an abstract statement of the law. The court goes on to say that the statute contains at least three identifiable defenses. *See also State v. Welch,* 37 N.M. 549, 555, 25 P.2d 211 (1933).

A comparison of the elements of the statute with the elements of involuntary manslaughter indicates that the excusable homicide statute merely provides that in the absence of the elements of involuntary manslaughter, the defendant cannot be found guilty of involuntary manslaughter.

The instruction on involuntary manslaughter requires the jury to find the elements of the crime before it can find the defendant guilty. In argument and through the presentation of defense witnesses or cross-examination of prosecution witnesses, the defendant will undoubtedly, where the defense is misfortune or accident, bring out the absence of the elements of involuntary manslaughter or will attempt to create a reasonable doubt. Consequently, the committee believed that no separate instruction on the defense was either necessary or proper.

**ANNOTATIONS**

**Distinction between self-defense and accident.** — The fundamental distinction between self-defense and accident is the defendant's mental state. A killing in self-defense is intentional in nature, but justified by the imminent threat to the defendant's life or limb, whereas an accidental killing is unintentional and non-negligent in nature.

*State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, rev'g 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

**No instruction. —** Juries are not given an instruction on the defense of accident because, in the absence of criminal negligence, the defendant cannot be found guilty of involuntary manslaughter. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, rev'g 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 40 Am. Jur. 2d Homicide §§ 514, 519, 520.

Unintentional killing of or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 A.L.R.3d 239.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 A.L.R.4th 983.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

40 C.J.S. Homicide §§ 101 to 138.

# Part G
# Alibi

## 14-5150. Alibi.

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.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary. —** The language of this instruction is derived from California Jury Instructions Criminal, 4.50. 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 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.

**ANNOTATIONS**

**Instruction unnecessary.** — An alibi instruction is unnecessary because an alibi is not a technical or "legal" defense, but an attempt to cast doubt on the proof of the elements of the crime, and an instruction therefor would merely comment on the evidence. *State v. McGuire,* 110 N.M. 304, 795 P.2d 996 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 136.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 A.L.R.3d 547.

Propriety and prejudicial effect of "on or about" instruction where alibi evidence in federal criminal case purports to cover specific date shown by prosecution evidence, 92 A.L.R. Fed. 313.

22 C.J.S. Criminal Law §§ 40, 1202 to 1206.

# Part H
# Entrapment

## 14-5160. Entrapment; unfair inducement; not predisposed.1

Evidence has been presented that _____ *(name of defendant)* was the subject of unfair inducement. Unfair inducement occurs when government agents unfairly cause the commission of a crime. "Government agents" include law enforcement officers or persons acting under their direction, influence or control.

Where a defendant was not ready and willing to commit the crime of _____[2] before first being contacted or approached by a government agent, but is induced or persuaded to commit the crime by a government agent, the defendant is a victim of unfair inducement. However, where a defendant is ready and willing to commit the crime at the time of the first contact with the government agent, the mere fact that the government agent provides what appears to be an opportunity to commit the crime is not unfair inducement.

The burden is on the state to prove to your satisfaction beyond a reasonable doubt that the defendant was not unfairly induced. If you have a reasonable doubt as to whether the defendant was unfairly induced, you must find the defendant not guilty.

USE NOTE

1. When entrapment is in issue this instruction or 14-5161, or both instructions, may be appropriate. When evidence exists that defendant was not predisposed to commit the crime before being contacted or approached by "government agents" and was unfairly induced to commit the crime by government agents, this instruction must be given at the defendant's request. When there is evidence that government agents exceeded the bounds of proper investigation, UJI 14-5161 also must be given at the defendant's request. UJI 14-5161 also must be given upon request when there is evidence that government agents both transferred an item to the defendant and subsequently reacquired the item from the defendant, or when there is evidence that the conduct of government agents created a substantial risk that an ordinary person would have been caused to commit the crime charged.

2. Insert the type of offense charged in the indictment, such as, "burglary", "trafficking" or "robbery".

[As amended, effective September 1, 1994; July 1, 1998; January 1, 2000.]

**Committee commentary.** — This instruction follows the subjective test for unfair inducement (*i.e.*, entrapment). To determine whether or not a defendant has been unfairly induced under the subjective standard, the key issue for the trier of fact is the defendant's intent - the defendant's predisposition - to commit the crime charged. *See Baca v. State*, 106 N.M. 338, 339, 742 P.2d 1043, 1044 (Ct. App. 1987); *see also State v. Vallejos*, 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957 (1997) and *State v. Fiechter*, 89 N.M. 74, 77, 547 P.2d 557, 560 (1976). Subjective entrapment - unfair inducement where the defendant is not predisposed - occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Vallejos*, 1997-NMSC-040, P5, 123 N.M. at 741, 945 P.2d at 959 (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)). However, where the defendant is predisposed to commit the crime, the subjective entrapment defense necessarily fails. *Vallejos*, 1997-NMSC-040, P5, 123 N.M. at 741, 945 P.2d at 959.

Unlike in subjective entrapment, under the "objective entrapment" standard, the actual intent of the defendant is not directly at issue. The objective standard is the focus of UJI 14-5161. For a full discussion of the objective test, *see Vallejos*; *see also State v. Sheetz*, 113 N.M. 324, 825 P.2d 614 (Ct. App. 1991); *Baca*, 106 N.M. at 339-41, 742 P.2d at 1044-46; and *State v. Gutierrez*, 114 N.M. 533, 843 P.2d 376 (Ct. App. 1992).

Finally, the Supreme Court made clear in Vallejos that defendants may assert either subjective or objective entrapment or both in defense of a charge. *Vallejos*, 1997-NMSC-040, P33, 123 N.M. at 749, 945 P.2d at 967.

**ANNOTATIONS**

**The 1999 amendment,** effective for cases filed on and after January 1, 2000, rewrote this instruction substituting unfair inducement for entrapment and adding the second paragraph, relating to the defendant's predisposition to commit a crime.

**Entrapment is a valid defense to a criminal prosecution.** *State v. Romero,* 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

**But entrapment is not a defense of constitutional dimension,** and New Mexico is not therefore bound to apply the law as announced by the United States Supreme Court. *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976).

**Focal issue is the intent or the predisposition of the defendant** to commit the crime, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976).

**Entrapment rarely matter of law.** — Under the subjective standards approved by the supreme court, it is rare indeed when entrapment may correctly be held to exist as a matter of law, and if entrapment in law is not present, then the jury must decide whether the defendant was predisposed to commit the crime. *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976).

**"Subjective entrapment".** — Subjective entrapment focuses on the intent or predisposition of a defendant to commit the crime. Government officials engage in subjective entrapment when they originate the criminal design and implant the disposition to commit the crime in the mind of an innocent person in order to enable prosecution. *In re Alberto L.*, 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428 (2002).

When the defendant presents evidence of unfair inducement and the defense of subjective entrapment is presented to the trier of fact, the state has the burden to persuade the trier of fact beyond a reasonable doubt that the defendant was not unfairly induced to commit the crime. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, *cert. denied,* 132 N.M. 732, 55 P.3d 428 (2002).

Where defendant presented evidence that a government agent gave the defendant the opportunity to make a cocaine sale, but did not present any evidence concerning a lack of disposition to sell cocaine, the defendant did not meet his burden of presenting evidence on the issue of subjective entrapment on a motion to suppress all evidence as the product of an unreasonable search and seizure. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, *cert. denied,* 132 N.M. 732, 55 P.3d 428 (2002).

**"Objective entrapment".** — The factual inquiry of objective entrapment is whether the actions of government officials create a substantial risk that an ordinary person who was not so predisposed would commit a crime. Because the analysis is objective, not

subjective, the defendant's predisposition is not relevant. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428 (2002).

The normative inquiry of objective entrapment focuses on the standards of proper investigative conduct. Certain conduct may be sufficiently fundamentally unfair or outrageous as to violate due process principles, even though it does not create a substantial risk that an ordinary person not predisposed to commit a crime would do so. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, *cert. denied,* 132 N.M. 732, 55 P.3d 428 (2002).

Given the purposes of the investigation to enforce the school's drug policy and to prohibit the exchange of drugs on campus, as well as the limited time in which to conduct the investigation because school was closing for winter break within the hour, the school officials did not exercise their discretion, in performing the investigation, in a manner so extreme that it violated constitutional due process principles of fundamental fairness, where the assistant principal provided one student money to buy cocaine from a second student and school officials observed the drug transaction. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428 (2002).

**Entrapment is not available to a defendant who denies committing the offense,** because to invoke entrapment necessarily assumes the commission of at least some of the elements of the offense. *State v. Garcia*, 79 N.M. 367, 443 P.2d 860 (1968).

**No entrapment exists when the accused himself initiates the unlawful act.** *State v. Romero,* 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

**And he is not entitled to defense when he was merely given opportunity** to commit offense he was already willing to commit. *State v. Mordecai,* 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

**Nor when he pooled thoughts to plan criminal enterprise. —** Where an addict, who was abruptly cut off from a methadone maintenance program which closed and forced to suffer a two-week waiting period before entering another, agreed with his former supplier who was acting as a police informer under a promise of immunity to engage in a marijuana transaction in order to obtain money for heroin, for which transaction he was convicted, entrapment did not exist as a matter of law, and the jury could reasonably have believed that the defendant and the informer pooled their thoughts to plan a criminal enterprise for which the defendant was predisposed. *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976).

**Officer may not initiate a criminal act, or use undue persuasion or enticement** to induce another to commit a crime, when without such conduct by the officer the other would not have committed the crime. *State v. Romero,* 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

**But may act in good faith to secure evidence.** — If an officer acts in good faith in the honest belief that the defendant is engaged in an unlawful business, of which the offense charged in the information is a part, and the purpose of the officer is not to induce an innocent person to commit a crime but to secure evidence upon which a guilty person can be brought to justice, the defense of entrapment is without merit. *State v. Roybal,* 65 N.M. 342, 337 P.2d 406 (1959).

**Defendant recruited as mere conduit.** — A criminal defendant may successfully assert the defense of entrapment, either by showing lack of predisposition to commit the crime for which he is charged, or showing that the police exceeded the standards of proper investigation, as where the government is both the supplier and the purchaser of contraband and the defendant is recruited as a mere conduit. *Baca v. State,* 106 N.M. 338, 742 P.2d 1043 (1987).

**Procedure to be followed in submitting issue to jury.** — When defendant alleges that the police exceeded the standards of proper investigation, the trial court should view the facts in the light most favorable to defendant, and if the facts do not raise an issue of misconduct of state agents, then the entrapment issue is to be submitted to the jury under this instruction. If the facts are undisputed or if the trial court, after resolving the facts, believes that they establish misconduct of state agents, the court shall dismiss the charges. If the trial court, after resolving the factual issues, does not find they establish such misconduct on the part of state agents but is of the opinion that another fact finder could so find, it shall submit the matter to the jury under instructions that place the burden of proof on the state, consistent with other defense jury instructions. *State v. Sheetz,* 113 N.M. 324, 825 P.2d 614 (Ct. App. 1991).

**No instruction where insufficient evidence.** — The court's refusal to instruct on entrapment, stating that it would inject a false issue into the case, was proper, where the evidence was insufficient to justify such an instruction. *State v. Garcia*, 79 N.M. 367, 443 P.2d 860 (1968).

Defendant was not entitled to an entrapment instruction where there was not sufficient evidence to submit the issue of entrapment to the jury. *State v. Ontiveros,* 111 N.M. 90, 801 P.2d 672 (Ct. App. 1990).

**Ordinarily question of entrapment is one for jury to decide under proper instruction.** *State v. Sainz*, 84 N.M. 259, 501 P.2d 1247 (Ct. App. 1972), overruled on other grounds, *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

For note, "Criminal Law - New Mexico Expands the Entrapment Defense: Baca v. State," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d §§ 143 to 145.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged, 5 A.L.R.4th 1128.

Burden of proof as to entrapment defense - state cases, 52 A.L.R.4th 775.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 A.L.R.5th 464.

Right of criminal defendant to raise entrapment defense based on having dealt with other party who was entrapped, 15 A.L.R.5th 39.

Propriety and prejudicial effect in federal criminal case of instruction distinguishing "lawful" and "unlawful" entrapment, 39 A.L.R. Fed. 751.

22 C.J.S. Criminal Law § 45.

## 14-5161. Entrapment; law enforcement unconscionable methods and illegitimate purposes.1

Evidence has been presented that government agents exceeded the bounds of permissible law enforcement conduct. Permissible law enforcement conduct is exceeded if government agents:

[supplied the _____[2] to the defendant and then obtained the same _____[2] from the defendant];

[or]

[_____ *(describe unconscionable method or illegitimate purpose)*][3];

or

[engaged in conduct which creates a substantial risk that an ordinary person would commit the crime of _____.][4]

"Government agents" include law enforcement officers or persons acting under their direction, influence or control.

The burden is on the state to prove to your satisfaction beyond a reasonable doubt that government agents did not exceed the bounds of permissible law enforcement

conduct. If you have a reasonable doubt as to whether the government agents exceeded the bounds of permissible law enforcement conduct, you must find the defendant not guilty.

## USE NOTE

1. When entrapment is in issue this instruction or UJI 14-5160, or both instructions, may be appropriate. This instruction must be given upon request in three different situations. First, it must be given when there is evidence of a circular transaction, in which government agents both transferred items to the defendant and subsequently reacquired some or all of the items from the defendant. Second, this instruction must be given when there is evidence that government agents created "a substantial risk" through their actions that an ordinary person would have been caused to commit the crime charged. Third, this instruction must be given when there is evidence that the conduct of government agents exceeded the bounds of proper investigation. If the court has decided as a matter of law the alleged conduct would be impermissible if it occurred, the jury must be instructed as provided in this instruction. If there is evidence that the defendant was not predisposed to commit the offense but was unfairly induced to do so, UJI-14-5160 also must be given upon request.

2. Describe the contraband or property transferred or sold which resulted in the charges against the defendant.

3. In *State v. Vallejos*, 1997-NMSC-040, PP18 to 20, 123 N.M. 739, 945 P.2d 957, the Supreme Court gave specific examples of unconscionable methods or illegitimate purposes as follows:

We find the following examples to be helpful as indicia of unconscionability: "coaxing a defendant into a circular transaction," *Gutierrez*, 114 N.M. at 535, 843 P.2d at 378 (following *Baca* and *Sheetz*); *see also* UJI 14-5161; "[giving defendant] free heroin until he [is] addicted and then play[ing] on [his] addiction to persuade [him] to purchase heroin and cocaine for an undercover police agent," *Sheetz*, 113 N.M. at 328-29, 825 P.2d at 618-19; an extreme plea of desperate illness, *see Grossman v. State*, 457 P.2d 226, 230 (Alaska 1969); an appeal based primarily on sympathy or friendship, *see Holloway*, 55 Cal. Rptr. 2d at 550; Wayne R. LaFave & Austin W. Scott Jr., *Substantive Criminal Law* § 5.2, 602 (1986); an offer of inordinate gain or a promise of excessive profit, *see Grossman*, 457 P.2d at 230; persistent solicitation to overcome a defendant's demonstrated hesitancy, *see People v. Isaacson*, 378 N.E.2d 78, 83 (N.Y. 1978); the use of brutality or physical or psychological coercion to induce the commission of a crime, *see State v. Lively*, 921 P.2d 1035, 1045 (Wash. 1996) (quoting *United States v. Bogart*, 783 F.2d 1428, 1435 (9th Cir. 1988), vacated on other grounds with respect to one defendant *sub nom. United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986)); an offer to sell drugs to one in a drug rehabilitation program, *see Lucci*, 662 A.2d at 7; employment of contingent fee agreements with informants, by which a key witness has "what amounts to a financial stake in criminal convictions," *see State v. Glosson*, 462 So.2d 1082, 1085 (Fla. 1985) (informant paid ten percent of civil forfeitures resulting

from criminal convictions in cases where he was the prosecution's critical witness); "unjustified intrusion into citizens' privacy and autonomy," *see State v. Johnson*, 606 A.2d 315, 322 (N.J. 1992); the inducement of others to engage in violence or the threat of violence against innocent parties, *see United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973) (dicta); the use of provocateurs sent into political organizations to suggest the commission of crimes, *see LaFave & Scott* § 5.2, at 612; excessive involvement by the police in creating the crime, *see United States v. Mosley*, 965 F.2d 906, 910-12 (10th Cir. 1992); the "manufacture [of] a crime from whole cloth," *United States v. Harris*, 997 F.2d 812, 816 (10th Cir. 1993); and the "'engineer[ing] and direct[ion of] the criminal enterprise from start to finish,'" *id.* (quoting *Mosley*, 965 F.2d at 911 (quoting *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983))).

***{ 19}*** Police also violate due process when they ensnare a defendant in an operation guided by an illegitimate purpose. "Illegitimate purpose" is not capable of being defined with great precision. *(footnote omitted)* However, other courts have described improper purposes in a number of ways. In West Virginia, a court considers whether police have ensnared a defendant "solely for the purpose of generating criminal charges and without any motive to prevent further crime or protect the public at large." *State v. Houston*, 475 S.E.2d 307, 322 (W. Va. 1996); *see also State v. Shannon*, 892 S.W.2d 761, 765 (Mo. Ct. App. 1995) (using similar language). The New York Court of Appeals has suggested that due process is violated when "the record reveals simply a desire to obtain a conviction . . . [rather than] to prevent further crime or protect the populace." *Isaacson*, 378 N.E.2d at 83; *see also Baca*, 106 N.M. at 340, 742 P.2d at 1045; *State v. Buendia*, 1996-NMCA-027, P10, 121 N.M. 408, 411, 912 P.2d 284, 287 (Ct. App. 1996); *Lively*, 921 P.2d at 1048.

***{ 20}*** While the normative inquiry is most appropriately conducted by the court, the jury may resolve factual disputes where credibility is an issue or where there is conflicting evidence pertaining to what events transpired. When the trial court finds that police have used unconscionable methods or have advanced illegitimate purposes, criminal charges should be dismissed. This is an extreme remedy for extreme government behavior. In formulating what we characterize as the normative inquiry, we have kept in mind the need to balance two competing legal and social values: "on the one hand, the necessity to detect criminal activity such as the sale of narcotics, prostitution, [illegal] gambling, and other consensual crimes," *Houston*, 475 S.E.2d at 314, and on the other hand, the need to prevent the government from engaging in conduct that is "patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government, and offends principles of fundamental fairness," *Johnson*, 606 A.2d at 322.

[Adopted, effective September 1, 1994; as amended, effective July 1, 1998; January 1, 2000.]

**Committee commentary.** — As noted in the Use Note above, this instruction is used if the defense raises the issue of objective entrapment and evidence is adduced that there was impermissible conduct by law enforcement which exceeded the standards of proper investigation or such that an ordinary person could have been ensnared.

If a defendant instead raises the defense of subjective entrapment, "the focal issue is 'the intent or predisposition of the defendant to commit the crime.'" *State v. Vallejos*, 1997-NMSC-040, P5, 123 N.M. 739, 741, 945 P.2d 957, 959 (1997) (quoting *State v. Fiechter*, 89 N.M. 74, 77, 547 P.2d 557, 560 (1976)). The defense of subjective entrapment is the focus of UJI 14-5160. Subjective entrapment - unfair inducement where the defendant is not predisposed - occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)).

When a defendant uses the defense of objective entrapment, the focus shifts away from an assessment of the defendant's predisposition toward whether the conduct of government agents created a substantial risk that an ordinary person would have been enticed to commit the crime charged or whether the conduct of government agents exceeded the standards of proper investigation. *State v. Vallejos*, 1997-NMSC-040, P2, 123 N.M 739, 740, 945 P.2d 957, 958 (1997).

The Supreme Court defined the latter inquiry as one focusing on cultural, "shared", definitions of desirable behavior, noting that, "[t]he entrapment and outrageous government conduct doctrines involve the normative issue of whether the government should have used inducements in the manner that it did." *Vallejos*, 1997-NMSC-040, P2, 123 N.M. at 740 n.1, 945 P.2d at 958 n.1 (quoting affirmatively John David Buretta, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 Geo. L.J. 1945, 1949 (1996)).

In *Baca v. State*, 106 N.M. 338, 742 P.2d 1043 (1987), the Supreme Court recognized the defense of objective entrapment - unfair inducement where the focus is on the conduct of government agents - as a means of compensating for critical shortcomings of the subjective entrapment standard. *Vallejos*, 1997-NMSC-040, P6, 123 N.M. at 741, 945 P.2d at 959. *See also State v. Sheetz*, 113 N.M. 324, 825 P.2d 614 (Ct. App. 1991). In *Sheetz*, the Court of Appeals asserted that objective entrapment turns in part on the question of whether the conduct of government agents "offends our notions of fundamental fairness." *Sheetz*, 113 N.M. at 328-29, 825 P.2d at 618-19.

In addition, the Supreme Court expressly recognized in Vallejos that under certain circumstances, the conduct of government agents might exceed the standards of proper investigation without creating a substantial risk that an ordinary person not ready and willing to commit a crime would be caused to commit one. *Vallejos*, 1997-NMSC-040, P15, 123 N.M. at 743-44, 945 P.2d at 961-62. According to the Supreme Court in *Vallejos*, both the methods and the purposes of law enforcement conduct must be carefully scrutinized to determine whether the tactics used "offend our notions of fundamental fairness," *Sheetz*, 113 N.M. at 329, 825 P.2d at 619, or are so outrageous that "due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *Vallejos*, 1997-NMSC-044, P16, 123 N.M. at 744, 945 P.2d at 962 (quoting *United States v. Russell*, 411 U.S. 423, 431-32 (1973)). Two broad categories of impropriety vis a vis the conduct of government agents were recognized in

Vallejos: unconscionable methods and illegitimate purposes. *Vallejos*, 1997-NMSC-044, § 17, 123 N.M. at 744, 945 P.2d at 962. Item 3 of the Use Note above lists the various "indicia of unconscionability" discussed in *Vallejos*. The Court noted that the phrase "illegitimate purpose" does not lend itself to being defined with great precision. *Vallejos*, 1997-NMSC-044, P19, 123 N.M. at 745, 945 P.2d at 963. Nonetheless, as possible indicia of illegitimacy, the Court suggested the following descriptions, used in other jurisdictions: whether government agents ensnared a defendant solely for the purpose of generating criminal charges and without any motive to prevent further crime or protect the public at large (West Virginia, Missouri); or when the record reveals a desire to simply obtain a conviction rather than to prevent further crime or protect the populace (New York). *Id.*

Ordinarily, the judge decides the issue of whether the alleged conduct, if it occurred, was acceptable as a matter of law, leaving for the jury the issue of whether this misconduct did occur. The Court expressly noted that the jury may resolve factual disputes where credibility is an issue or where there is conflicting evidence as to the events which transpired. *Vallejos*, 1997-NMSC-044, P20, 123 N.M. at 745, 945 P.2d at 963.

**ANNOTATIONS**

**The 1999 amendment,** effective for cases filed on and after January 1, 2000, rewrote this instruction, delineating the elements of impermissible conduct of government agents.

# Part I
# Justifiable Homicide

## 14-5170. Justifiable homicide; defense of habitation.[1]

Evidence has been presented that the defendant killed _____ *(name of victim)* while attempting to prevent a _____[2] in the defendant's _____[3].

A killing in defense of _____[3] is justified if:

1. The _____[3] was being used as the defendant's dwelling; and

2. It appeared to the defendant that the commission of _____[2] was immediately at hand and that it was necessary to kill the intruder to prevent the commission of _____[2]; and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not kill in defense of _____[3]. If you have a reasonable doubt as to whether the defendant killed in defense of _____[3], you must find the defendant not guilty.

USE NOTE

1. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not kill in defense of _____[3]".

2. Describe the felony being committed or attempted.

3. Identify the place where the killing occurred.

[As amended, effective October 1, 1985; January 1, 1997.]

**Committee commentary.** — Section 30-2-7A NMSA 1978 provides that a homicide is justifiable when committed in the necessary defense of property. Although this statute has been a part of New Mexico law since 1907, the New Mexico appellate courts have never given the statute a broad interpretation. *See also* commentary to UJI 14-5171. The New Mexico courts have consistently held, not always referring to the statute, that one cannot defend his property, other than his habitation, from a mere trespass to the extent of killing the aggressor. *State v. McCracken,* 22 N.M. 588, 166 P. 1174 (1917); *State v. Martinez,* 34 N.M. 112, 278 P. 210 (1929); *State v. Couch,* 52 N.M. 127, 193 P.2d 405 (1946). *See generally,* Annot., 25 A.L.R. 508, 525 (1923).

The "pure" defense of property, i.e., not including a defense against force and violence, is always limited to reasonable force under the circumstances. *See, e.g., State v. Waggoner,* 49 N.M. 399, 165 P.2d 122 (1946); *Brown v. Martinez,* 68 N.M. 271, 361 P.2d 152 (1961). In *Brown,* the court held that resort to the use of a firearm to prevent a mere trespass or an unlawful act not amounting to a felony was unreasonable as a matter of law.

In defense of habitation, although the defendant is limited by the elements of imminent threat, apparent necessity and reasonableness, he does not have to fear for the life of himself or others or necessarily believe that great bodily harm will come to himself or others. An apparent necessity to kill to prevent a felony is sufficient. *State v. Couch*, supra; Perkins, Criminal Law 1024 (2d ed. 1969).

This instruction requires a determination of what constitutes a habitation, if the structure is not obviously a home or apartment, under the particular facts of the case. *See generally*, Annot., 25 A.L.R. 508, 521 (1923). *See also* commentary to UJI 14-1631.

If the property being defended is not the defendant's habitation, he may kill the intruder only if the interference with the property is accompanied by a threat of death or great

bodily harm. *See* LaFave & Scott, Criminal Law 399 (1972). In such a case, UJI 14-5171 (Justifiable homicide; self-defense) must be given.

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, rewrote the last paragraph, added Use Note 1, and redesignated former Use Notes 1 and 2 as Use Notes 2 and 3.

**Criteria for asserting the defense.** — A person has a right to defend his or her residence not only when an intruder is already inside the home, but also when an intruder is outside the home, and attempting to enter to commit a felony involving violence against the occupants of the home. *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 355.

**Instruction not supported by evidence.** — The defendant's request for "defense of habitation" instruction was properly denied since the evidence showed that the confrontation between the defendant and the victims took place in a parking lot in front of the defendant's apartment, and the victims were running across the street away from the defendant when he fired at them. *State v. Niewiadowski*, 120 N.M. 361, 901 P.2d 779 (Ct. App. 1995).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 174 to 179.

41 C.J.S. Homicide § 109.

## 14-5171. Justifiable homicide; self defense.[1]

Evidence has been presented that the defendant killed _____ *(name of victim)* in self defense.

The killing is in self defense if:

1. There was an appearance of immediate danger of death or great bodily harm[2] to the defendant as a result of _____[3]; and

2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed _____ *(name of victim)* because of that fear; and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense you must find the defendant not guilty.

USE NOTE

1. For use when the self defense theory is based on: necessary defense of self against any unlawful action; reasonable grounds to believe a design exists to commit a felony; or reasonable grounds to believe a design exists to do some great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense".

2. The definition of great bodily harm, UJI 14-131, must be given if not already given.

3. Describe unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

[As amended, effective October 1, 1985; January 1, 1997.]

**Committee commentary.** — This instruction is a combination of the elements of self-defense contained in Subsections A and B of Section 30-2-7 NMSA 1978. The elements of the defenses originated in the Kearny Code, Crimes and Punishments, Art. 2, Sec. 1. The source of the more specific language of Subsection A of Section 30-2-7 NMSA 1978 is derived from Laws 1907, ch. 36, § 11, and the language of Subsection B of Section 30-2-7 NMSA 1978 is derived from Laws 1853-54, p. 86. The present statute was adopted in 1963, but as indicated in the report of the Criminal Law Study Committee (N.M. Legislature 1961-62), the policy was to retain the provisions of existing criminal laws wherever possible.

Although numerous New Mexico decisions deal with the principles of self-defense, few of the cases discuss the principles in terms of the statutory language. In the context of another justifiable homicide statute, Sections 40-24-12 and 40-24-13 NMSA 1953 (repealed by Laws 1963, Chapter 303, Section 30-1) the defense of a police officer to a killing of a fleeing felon, the supreme court has said that these statutes are merely a legislative recognition of the common law. *See Alaniz v. Funk,* 69 N.M. 164, 364 P.2d 1033 (1961). In addition, the supreme court has indicated that there is no requirement that the jury be instructed in the precise language of the statutes. *State v. Maestas,* 63 N.M. 67, 313 P.2d 337 (1957).

The New Mexico courts have not had occasion to catalog the unlawful actions which will allow a person to respond with a deadly force. For example, the type of felony which will allow a killing in self-defense has not been limited. *See e.g.*, *State v. Beal,* 55 N.M. 382, 387, 234 P.2d 331 (1951). *Cf. Alaniz v. Funk*, supra. The supreme court has said that the phrase "great personal injury" means something more than a mere battery not amounting to a felony. *Territory v. Baker*, 4 N.M. (Gild.) 236, 264-66, 13 P. 30 (1887).

There has been no attempt to define the "unlawful act" which will allow the use of deadly force, although in a related context it has been said that the use of deadly force to prevent an unlawful act not amounting to a felony is unreasonable as a matter of law. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961). (The court in *Brown* indicates that the rules of law governing the use of justifiable force apply to both civil and criminal cases.)

In view of the decisions requiring reasonableness and fear or apprehension of death or great bodily harm, the absence of specific definitions of unlawful act, felony or act creating a great personal injury does not appear to be crucial. Regardless of how the act is characterized or identified, it must be of such a quality as to create a fear of death or great bodily harm. Thus it would appear that Subsections A and B of Section 30-2-7, supra, are redundant.

Under New Mexico law, the danger to the defendant need not be real but need only be apparent under the circumstances. *State v. Chesher,* 22 N.M. 319, 161 P. 1108 (1916); *State v. Roybal,* 33 N.M. 187, 262 P. 929 (1928); *State v. Vansickel,* 20 N.M. 190, 147 P. 457 (1915). The danger under the circumstances must be such as would excite the fears of a reasonable person. *State v. Chesher*, supra; *State v. Vansickel*, supra; *State v. Dickens*, 23 N.M. 26, 165 P. 850 (1917). The apparent danger must be imminent. *Territory v. Baker*, supra; *State v. Vansickel*, supra. The danger must arouse a fear of death or great bodily harm or a fear of peril to life or limb. *State v. Chesher*, supra; *State v. Vansickel*, supra. The defendant must in fact entertain such a fear of death or great bodily harm or a fear of peril to life or limb. *State v. Chesher*, supra; *State v. Vansickel*, supra. The defendant must act solely upon that fear. *State v. Parks,* 25 N.M. 395, 183 P. 433 (1919).

The instruction does not require a separate instruction in the event the victim is an innocent bystander, i.e., a person who did not instigate the action which required the defense. Under New Mexico law, if the circumstances would justify the use of deadly force in self-defense, the defendant is not guilty of homicide if he unintentionally kills a third person. *State v. Sherwood,* 39 N.M. 518, 50 P.2d 968 (1935). *See generally*, Annot., 55 A.L.R.3d 620 (1974).

The elements of this instruction contain some general principles of self-defense which are often given as separate instructions. For example, the principle of apparent necessity. *See* California Jury Instructions Criminal, 5.51. In addition, the element of "a reasonable man under the same circumstances as the defendant," includes the principle that the defendant's right to use force may end when the danger ceases or the adversary is disabled. *See e.g.*, *State v. Garcia,* 83 N.M. 51, 54, 487 P.2d 1356, 1359 (Ct. App. 1971). *See also*, California Jury Instructions Criminal, 5.52 and 5.53.

Self-defense is not available to an aggressor unless he first tries to stop the fight he started or unless it is necessary to defend himself against an unreasonable force. *See State v. Padilla,* 90 N.M. 481, 565 P.2d 352, *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977) and UJI 14-5191.

The committee found no New Mexico cases specifically holding that the state had the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *See generally*, Annot., 43 A.L.R.3d 221 (1972). In *State v. Harrison,* 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970), a manslaughter case, the court held that the defendant was only required to produce evidence which would raise a reasonable doubt in the minds of the jurors and that the general reasonable doubt instruction was sufficient to place the burden on the state to prove its case. *Cf. State v. Parker,* 34 N.M. 486, 285 P. 490 (1930). Because these instructions do not require the jury to find the killing was unlawful as one of the elements, a sentence was inserted in this and similar defenses telling the jury that the burden was on the state to prove beyond a reasonable doubt that the defendant did not kill in self-defense. *See also, Mullaney v. Wilbur,* 421 U.S. 684 (1975).

Since *Mullaney* was decided, the Supreme Court of the United States upheld a jury instruction in a manslaughter case which placed the burden upon the defendant of proving his affirmative defense by a preponderance of the evidence, stating:

We thus decline to adopt as a constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in the previous cases holding that the due process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

*Patterson v. New York,* 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

UJI 14-5171 (Justifiable homicide; self-defense) must be given if the defendant kills another while defending his property, other than his habitation, if there is evidence that the victim's interference with the defendant's property was accompanied by a threat of death or great bodily harm.

## ANNOTATIONS

**Cross references.** — For justifiable homicide by citizen, *see* Sections 30-2-7 and 30-2-8 NMSA 1978.

**The 1997 amendment,** effective January 1, 1997, substituted "in self defense" for "while defending himself" in the first paragraph, rewrote the last paragraph, and added the last sentence in Use Note 1.

**Compiler's notes.** — The reference to Laws 1907, ch. 36, § 1, in the next-to-last sentence in the first paragraph of the committee commentary, seems incorrect, as that section was compiled as 40-24-4, 1953 Comp., which defined "first degree murder." Laws 1907, ch. 36, § 11, which was compiled as 40-24-11, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1, dealt with justifiable homicide.

Laws 1853-54, p. 86, referred to in the next-to-last sentence in the first paragraph of the committee commentary, was compiled as 40-24-13, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1.

**Imperfect self-defense.** — Imperfect self-defense, which occurs when a person uses excessive force while otherwise lawfully engaging in self-defense, is not a true affirmative defense for which a defendant is entitled to an instruction. Any issues raised by a claim of imperfect self-defense are properly addressed if the jury is instructed on voluntary manslaughter. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2014-NMCERT-____.

**Distinction between self-defense and accident.** — The fundamental distinction between self-defense and accident is the defendant's mental state. A killing in self-defense is intentional in nature, but justified by the imminent threat to the defendant's life or limb, whereas an accidental killing is unintentional and non-negligent in nature. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, rev'g 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

**Instruction on justifiable homicide improper.** — Where a car pulled up into defendant's driveway blaring loud music, revving its engine, and "peeling out"; defendant did not recognize the car; defendant went outside the house and loudly questioned the car's occupants, but received no response; defendant returned to the house, retrieved a pistol, and put the pistol in defendant's front pocket; defendant went back outside the house and walked toward the car with defendant's hand resting on the handle of the pistol; the car began to drive away and then stopped at the end of the driveway; the victim exited the car, walked toward defendant, and hit defendant in the face; defendant pulled the pistol out of the pocket and shot the victim; and defendant testified that defendant did not intend to shoot the victim and that the pistol discharged accidentally and reflexively as a result of being hit by the victim, defendant was not entitled to an instruction on justifiable homicide because the evidence established that the shooting was accidental, rather than intentional, and that the force used by defendant was excessive and unjustified under the circumstances. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, rev'g 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

**Test to determine when instruction is appropriate.** — For a defendant to be entitled to a self-defense instruction, there need be only enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense. *State v. Rudolfo*, 2008-NMSC-036, 144 N.M. 305, 187 P.3d 170.

**Self-defense instruction is required** whenever defendant presents evidence sufficient to allow reasonable minds to differ as to all elements of the defense. *State v. Branchal,* 101 N.M. 498, 684 P.2d 1163 (Ct. App. 1984); *State v. Gallegos,* 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986); *State v. Lopez,* 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727.

**Self-defense and "unlawfulness" of manslaughter.** — It is the element of unlawfulness that is negated by self-defense. When self-defense or the defense of others is at issue, the absence of such justification is an element of the offense. The instruction, derived from UJI 14-220, was simply erroneous in neglecting to instruct on the element of unlawfulness after the self-defense evidence had been introduced. *State v. Parish,* 118 N.M. 39, 878 P.2d 988 (1994).

**Instruction given where evidence defendant, acting reasonably, killed out of fear.** — In order to warrant an instruction on self-defense, the evidence must support a finding by the jury that the defendant was put in fear by an apparent danger of immediate death or great bodily harm, that the killing resulted from that fear, and that the defendant acted as a reasonable person would act in those circumstances. *State v. Chavez,* 99 N.M. 609, 661 P.2d 887 (1983).

**Self-defense and provocation of manslaughter.** — The instructions on provocation and self-defense are each accurate and unambiguous; however, as applied to the facts of this case they are confusing. The defendant suggests that it is impossible to determine whether the jury understood that the claim of self-defense supersedes the element of provocation. Any confusion could have been eliminated if the jury had been told that it was required to find the defendant not guilty if his conduct met the definition of self-defense, regardless of if same conduct could be found to be provocation. In the future, when a case presents similar circumstances, juries should be so instructed. *State v. Parish,* 118 N.M. 39, 878 P.2d 988 (1994).

**But not where defendant provoked encounter leading to use of deadly force.** — A defendant who provokes an encounter, as a result of which he finds it necessary to use deadly force to defend himself, is guilty of an unlawful homicide and cannot avail himself of the claim that he was acting in self-defense. *State v. Chavez,* 99 N.M. 609, 661 P.2d 887 (1983).

**Such as where defendant entered store with weapon, prepared to commit armed robbery.** — Where the defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez,* 99 N.M. 609, 661 P.2d 887 (1983).

**No instruction where no evidence of killing out of fear.** — Where defendant was convicted of second-degree murder for stabbing and bludgeoning the victim; defendant maintained that the victim stabbed defendant before defendant stabbed the victim;

police officers testified that defendant's knife wound could have been defensive in nature; defendant's relative testified that defendant stated that the victim stabbed defendant; the autopsy of the victim showed that the victim suffered multiple stab wounds and multiple blunt force injuries caused by a rock that defendant used to bludgeon the victim; and there was no evidence in the record that fear motivated defendant to kill the victim, the trial court did not err in refusing to instruct the jury on self-defense. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, aff'g 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

An instruction on self-defense should not be given when there is no evidence that the defendant killed out of fear. *State v. Montano,* 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

Where the evidence showed that defendant had a wound on one hand and that the victim had seven stab wounds to the chest, one stab wound to the right cheek, and one stab wound to the back and numerous, severe blunt-force injuries to the face and cranium, the instruction was properly refused because the evidence supplied no basis for inferring that defendant's attack on the victim was objectively reasonable. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

An instruction was properly refused because of insufficient evidence, where the victim fired his gun first, but there was neither evidence, nor an inference, that the defendant was put in fear by the apparent danger. *State v. Najar,* 94 N.M. 193, 608 P.2d 169 (Ct. App. 1980).

The trial court properly refused a self-defense instruction where defendant's violent actions (inflicting 54 stab wounds upon the victim and crushing his skull) suggested conduct fueled by hatred or by rage or other strong emotion, but not by fear. *State v. Lopez,* 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727.

**Error in rejecting instruction.** — Trial court erred in rejecting defendant's tendered self-defense instruction, where defendant introduced sufficient evidence of her ex-husband's past brutality and imminent danger upon which reasonable minds could disagree as to whether she, in fact, feared for her safety and killed him as a result of that fear. *State v. Gallegos,* 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986).

**Jury instruction proper.** — See *State v. Gibbins,* 110 N.M. 408, 796 P.2d 1104 (Ct. App. 1990); *State v. Coffin,* 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Evidence sufficient to raise reasonable doubt as to self-defense.** *State v. Montano,* 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

**No conflict with instruction limiting self-defense.** — The instruction limiting self-defense when the defendant is the aggressor (UJI 14-5191) does not conflict with this instruction or the instruction on absence of need of an assailed person to retreat (UJI

14-5190). *State v. Velasquez,* 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

**Evidence insufficient to raise issue of self-defense.** — To support an instruction on ordinary self-defense, there must be evidence that defendant was put in fear by an apparent danger of immediate death or great bodily harm, that the killing resulted from that fear, and that defendant acted as a reasonable person would act under those circumstances. *State v. Mantelli,* 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

Evidence that the defendant had been instructed by his employer to recover a stolen truck containing contraband from those who had it (the decedents) or to kill them if they refused under a threat of death from the employer did not raise an issue of self-defense, which requires the preservation of oneself from attack; no sudden quarrel, heat of passion or sufficient provocation was shown, and thus the trial court did not err in refusing to give instructions on manslaughter. *State v. Ramirez,* 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

**Jury instruction on self-defense adequate.** *State v. Vigil*, 110 N.M. 254, 794 P.2d 728 (1990).

**Burden of proof on state.** — It is settled law in New Mexico that the defendant does not have the burden of proving the killing was an exercise of self-defense. *State v. Parish,* 118 N.M. 39, 878 P.2d 988 (1994).

**Law reviews.** — For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 139, 140, 519.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of evidence of battered child syndrome on issue of self-defense, 22 A.L.R.5th 787.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

41 C.J.S. Homicide §§ 113 to 138.

## 14-5172. Justifiable homicide; defense of another.[1]

Evidence has been presented that the defendant killed _____ *(name of victim)* while defending another.

The killing was in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm[4] to _____[2] as a result of _____[3]; and

2. The defendant believed that _____[2] was in immediate danger of death or great bodily harm from _____ *(name of victim)* and killed _____ *(name of victim)* to prevent the death or great bodily harm; and

3. The apparent danger to _____[2] would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of another. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE NOTE

1. For use when the defense theory is based upon: a reasonable ground to believe a design exists to commit a felony; a reasonable ground to believe a design exists to do great bodily harm; or a defense of spouse or other member of the family, a necessary defense against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of another".

2. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

3. Describe the unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. The definition of great bodily harm, UJI 14-131, must be given if not already given.

[As amended, effective October 1, 1985; January 1, 1997.]

**Committee commentary.** — This instruction is a combination of the defense of spouse or family against any unlawful action, Subsection A of Section 30-2-7 NMSA 1978 and the defense of another against a felony or act which would result in some great personal injury to the other person, Subsection B of Section 30-2-7 NMSA 1978. *See e.g., State v. Beal,* 55 N.M. 382, 234 P.2d 331 (1951). For a discussion of the history of these

statutes and the general rules which apply to defense of another, *see* the commentary to UJI 14-5171.

Under Subsection A of Section 30-2-7 NMSA 1978 the defense of another against any unlawful action is limited to defending one's wife or family. On the assumption that the equal rights amendment guarantees that a wife is also entitled to this defense, the instruction is designed to be used for defense of any member of the family. *See generally*, Daniels, The Impact of the Equal Rights Amendment on the New Mexico Criminal Code, 3 N.M.L. Rev. 106, 109 (1973).

The prior versions of Subsection B of Section 30-2-7 NMSA 1978 specifically listed the persons who could be defended by deadly force. For example, in *State v. Brooks*, 59 N.M. 130, 279 P.2d 1048 (1955), the court held that the term "mistress," one of the persons entitled to be defended, was not a partner in an illicit relationship but was the feminine of master. By eliminating the shopping list of persons who could be defended, it would appear that the legislature clearly intended to broaden the scope of this defense. *See generally*, Perkins, Criminal Law 1019 (2d ed. 1969).

Some authorities have said that the person using deadly force in defense of another stands in the shoes of, and is bound by the intent of, the person defended. In *State v. Maestas,* 63 N.M. 67, 313 P.2d 337 (1957), the supreme court declined to decide if New Mexico would follow that authority. The supreme court held that the district court had instructed the jury that the defendant was to be judged on the basis of his own perception of the danger under the circumstances and, therefore, the defendant had no complaint. Because the statute uses the term "reasonable grounds to believe a design exists, etc.," it appears that New Mexico law does not require the person intervening to know the actual facts, but only to act as a reasonable person under the circumstances. *See generally*, Perkins, supra, at 1020-21. LaFave & Scott 397 (1972). The defendant in defense of another must entertain a reasonable belief that the person attacked is in danger. *Territory v. Baker,* 4 N.M. (Gild.) 236, 264-66, 13 P. 30 (1887).

The 1981 amendments to UJI 14-5172 are intended only to clarify the essential elements of justifiable homicide in the defense of another.

## ANNOTATIONS

**Cross references.** — For justifiable homicide by citizen, *see* Sections 30-2-7 and 30-2-8 NMSA 1978.

**The 1997 amendment,** effective January 1, 1997, rewrote the last paragraph, and added the last sentence in Use Note 1.

**A multiple assailant jury instruction must include all assailants in the description of the imminent threat of death or great bodily harm.** *State v. Sandoval*, 2011-NMSC-022, 150 N.M. 224, 258 P.3d 1016, rev'g 2010-NMCA-025, 147 N.M. 465, 225 P.3d 795.

**Multiple assailant instruction failed to include all assailants.** — Where defendant had an altercation with the victim and two friends of the victim at a convenience store; when defendant and defendant's friend drove away in an Acura, the victim and the victim's friends chased defendant in an Explorer and forced the Acura off the road; the driver and the front seat passenger of the Explorer, who had a gun, approached the Acura; the victim opened the rear door and partially exited the Explorer while reaching for something inside the Explorer; the victim was shot and killed when defendant and the passenger of the Explorer began shooting; the trial court issued a self-defense instruction as to the killing of the victim which stated that the killing was in self-defense if there was an appearance of immediate danger of death or great bodily harm to defendant as a result of the confrontation with the driver and the front seat passenger; and the instruction did not state or require the jury to find that the victim was an aggressor, the instruction was a misstatement of the law regarding multiple assailants because it allowed the jury to find that defendant acted in self-defense against an innocent bystander as a result of defendant's confrontation with the named assailants, but because there was sufficient evidence for the jury to find that defendant acted in self-defense without considering the victim as an assailant, the instruction did not constitute fundamental error. *State v. Sandoval*, 2011-NMSC-022, 150 N.M. 224, 258 P.3d 1016, rev'g 2010-NMCA-025, 147 N.M. 465, 225 P.3d 795.

**Self defense involving multiple assailants.** — Where defendant had an altercation with the victim and two friends of the victim at a convenience store; when defendant and defendant's girlfriend drove away from the store in an Acura, the victim and the victim's friends chased the Acura in an Explorer; the Explorer pulled up to and forced the Acura off the road; the front seat passenger, who had a gun, jumped out of the Explorer and approached the Acura; the driver of the Explorer ran to the front of the Acura while grabbing at the driver's side; the victim opened the rear door and partially exited the Explorer while reaching for something inside the Explorer; defendant, who had a gun, exited the Acura and approached the Explorer; the driver and the passenger of the Explorer got into an angry altercation with defendant; the passenger of the Explorer pointed a gun at defendant; the passenger and defendant began shooting; the driver was wounded and the passenger and the victim were killed; defendant's girlfriend, who was driving the Acura, testified that the girlfriend was afraid for defendant's life and the girlfriend's own life based on an apparent threat from all three of the occupants of the Explorer; the trial court instructed the jury that the killing of the victim was in self defense if there was an appearance of immediate danger of death or great bodily harm as a result of defendant's confrontation with the driver and the front seat passenger of the Explorer; and the instruction did not include the participation and complicity of the victim as part of the confrontation and immediate threat to defendant and defendant's girlfriend, the instruction did not direct the jury to consider defendant's theory of defense regarding the victim, relieved the state's burden of disproving self-defense beyond a reasonable doubt, misstated the law regarding an attack by multiple defendants, and constituted fundamental error. *State v. Sandoval*, 2010-NMCA-025, 147 N.M. 465, 225 P.3d 795, rev'd, 2011-NMSC-022, 150 N.M. 224, 258 P.3d 1016.

**Instruction on mistake of fact need not be given.** — Since an honest and reasonable mistaken belief fits within the justifiable homicide instruction, an instruction on mistake of fact would duplicate the justifiable homicide instruction and need not be given. *State v. Venegas,* 96 N.M. 61, 628 P.2d 306 (1981).

**Substantial evidence that actions based upon reasonable belief essential to justifiable homicide defense.** — It is essential to the justifiable homicide defense that there be substantial evidence that the defendant's actions were based upon a reasonable belief that such action was necessary to save the life or prevent great bodily harm to another. *State v. Venegas,* 96 N.M. 61, 628 P.2d 306 (1981).

The trial court's refusal to give the requested deadly force defense-of-others instruction was proper since there was no evidence tending to satisfy the reasonableness prong of the deadly force test. *State v. Duarte,* 1996-NMCA-038, 121 N.M. 553, 915 P.2d 309.

**And such a belief may rest upon apparent danger** and need not be supported by actual danger. *State v. Venegas,* 96 N.M. 61, 628 P.2d 306 (1981).

**Defense to involuntary manslaughter.** — Defendant charged with involuntary homicide could raise the theory of self-defense and was entitled to a jury instruction on her theory of defense of another. *State v. Gallegos,* 2001-NMCA-021, 130 N.M. 221, 22 P.3d 689, cert. denied, 130 N.M. 459, 26 P.3d 103 (2001).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 170 to 173, 519.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

41 C.J.S. Homicide § 108.

## 14-5173. Justifiable homicide; public officer or employee.[1]

Evidence has been presented that the killing of _____ *(name of victim)* was justifiable homicide by a public officer or employee.

The killing was justifiable homicide by a public officer or public employee if:

1. At the time of the killing, _____ *(name of defendant)* was a public officer or employee; and

2. The killing was committed while _____ *(name of defendant)* was performing [his] [her] duties as a public officer or employee;

3. The killing was committed while[2]

[overcoming the actual resistance of _____ *(name of victim)* to the execution of _____[3]]

[overcoming the actual resistance of _____ *(name of victim)* to the discharge of _____[4]]

[retaking [_____ *(name of victim)*] [a person], who committed _____[5] and who had [been rescued][6] [escaped__

[arresting _____ *(name of victim)* [a person], who committed _____[5] and was fleeing from justice]

[attempting to prevent the escape from _____[7] by [_____ *(name of victim)*] [a person] who committed _____ [5]]; and

4. A reasonable person in the same circumstances as _____ *(name of defendant)* would have reasonably believed that _____ *(name of victim)* posed a threat of death or great bodily harm to _____ *(name of defendant)* or another person. The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE NOTE

1. For use when the defense is based on Section 30-2-6 NMSA 1978. If this instruction is given, add to the essential elements instruction for the offense charged, "The killing was not justifiable homicide by a public officer or employee".

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Insert the name of the felony.

6. Use only the applicable parenthetical alternative.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003.]

**Committee commentary.** — Although the Section 30-2-6 NMSA 1978 requires that the defendant "necessarily committed" the killing, "necessarily" is defined as "probable

cause" to believe. The committee has used the definition of "probable cause", "reasonable person in the same circumstances as the defendant" in this instruction for purposes of clarity.

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, rewrote the introductory language, rewrote the last paragraph, and deleted "Part One" following "30-2-6" and added the last sentence in Use Note 1.

**The 2003 amendment,** effective April 15, 2003, added "by a public officer or employee" to the end of the first sentence; rewrote the second sentence which read, "a homicide is justifiable if it is committed while"; inserted the first two numbered sentences and the fourth numbered sentence; inserted "the killing was committed while" to the present third numbered sentence, and rearranged the use notes.

**In prosecution under Section 30-2-6 NMSA 1978** the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry. *State v. Mantelli,* 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 134 to 136.

40 C.J.S. Homicide §§ 104 to 107.

## 14-5174. Justifiable homicide; aiding public official.[1]

Evidence has been presented that the killing of _____ *(name of victim)* was justifiable homicide by a person aiding a public officer or public employee if:

1. At the time of the killing, _____ *(name of defendant)* was acting at the command and in the aid or assistance of a public officer or employee;

2. The killing was committed while[2]

[overcoming the actual resistance of _____ *(victim)* to the execution of _____[3]]

[overcoming the actual resistance of _____ *(victim)* to the discharge of _____[4]]

[retaking [_____ *(name of victim)*] [a person], who committed _____ and who had [been rescued][5] [escaped__

[arresting [_____ *(name of victim)*] [a person] who committed _____[6] and was fleeing from justice]

[attempting to prevent the escape from _____[7] of [_____ *(name of victim)*] [a person], who committed _____[6]]; and

3. A reasonable person in the same circumstances as _____ *(name of defendant)* would have reasonably believed that _____ *(name of victim)* posed a threat of death or great bodily harm to _____ *(name of public officer or public employee)* or another person.

The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE NOTE

1. For use when the defense is based on Section 30-2-6 NMSA 1978. If this instruction is given, add to the essential elements instruction for the offense charged, "The killing was not justifiable homicide by a public officer or employee".

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Use only applicable parenthetical alternative.

6. Insert name of felony.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003.]

**Committee commentary.** — The elements of this instruction are similar to the instruction for a killing by the public officer. *See* commentary to UJI 14-5173. As a matter of law, the person who aids a public officer stands in the same position as the officer and has no more rights than the officer. *State v. Gabaldon,* 43 N.M. 525, 533, 96 P.2d 293 (1939). For example, the person fleeing must actually be a felon. The defendant is not entitled to kill a misdemeanant even if under the circumstances the latter appears to be a felon. *State v. Gabaldon*, supra. In this respect, this defense is unlike the defense of another, where the defendant may act on an appearance of danger to another. *See* commentary to UJI 14-5172. For the reasons for omitting the

defense of "acting in obedience to a judgment of the court," see commentary to UJI 14-5173.

Section 30-2-7C NMSA 1978 contains a justifiable homicide provision for one who, on his own initiative, kills a fleeing felon or kills to suppress a riot or to keep and preserve the peace. The committee was of the opinion that, not only was the defense rarely available, it had an uncertain common-law basis. *See generally* Perkins, Criminal Law 989 (2d ed. 1969). The committee further believed that the public policy behind the statute should be the subject of legislative review. For these reasons, no instruction interpreting the statute was included. A special instruction must be drafted under the guidelines of the General Use Note in the event that the evidence justifies giving an instruction based on the statute.

**ANNOTATIONS**

**The 2003 amendment,** effective April 15, 2003, added element 3 and restructured the instruction.

**Instruction on mistake of fact need not be given.** — Since an honest and reasonable mistaken belief fits within the justifiable homicide instruction, an instruction on mistake of fact would duplicate the justifiable homicide instruction and need not be given. *State v. Venegas*, 96 N.M. 61, 628 P.2d 306 (1981).

**In prosecution under Section 30-2-6 NMSA 1978** the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry. *State v. Mantelli,* 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 C.J.S. Homicide § 104.

# Part J
# Nonhomicidal Defense of Self, Others or Property

## 14-5180. Defense of property.[1]

Evidence has been presented that the defendant acted while defending property.

The defendant acted in defense of property if:

1. The _____[2] was property [of the defendant][3] [in the defendant's lawful possession[4]];

2. It appeared to the defendant that _____ *(name of victim)* was about to _____ *(describe act)* and that it was necessary to

_____ *(describe defendant's action and name victim)* in order to stop _____ *(name of victim)*;

3. The defendant used an amount of force that the defendant believed was reasonable and necessary to defend the property;

4. A reasonable person in the same circumstances as the defendant would have acted as the defendant did;

[5. The force used by the defendant would not ordinarily create a substantial risk of death or great bodily harm.][5]

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of _____[2]. If you have a reasonable doubt as to whether the defendant acted in defense of property, you must find the defendant not guilty.

USE NOTE

1. For use when defense is based on defense of property against either felony act or nonfelony act. UJI 14-5170 is used for justifiable homicide; defense of habitation. UJI 14-5171 (Justifiable homicide; self-defense) is used if unlawful interference with property is accompanied by threat of death or great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of property."

2. Describe the property.

3. Use only the applicable bracketed language.

4. If there is a question of fact as to whether the defendant was in lawful possession of the property, an appropriate instruction must be prepared.

5. Use bracketed material only if the defendant's action resulted in death or great bodily harm. If the bracketed material is used, the definition of "great bodily harm," UJI 14-131, must also be given if not already given.

[As amended, effective January 1, 1997.]

**Committee commentary.** — In *State v. Couch,* 52 N.M. 127, 137, 193 P.2d 405 (1946), the New Mexico Supreme Court recognized that one cannot defend property, other than his habitation, to the extent of killing an aggressor for the mere purpose of preventing a trespass. *See also Brown v. Martinez,* 68 N.M. 271, 361 P.2d 152 (1961). A person may use reasonable force to protect his property from unlawful interference by another, however, no force is reasonable if a request to cease the unlawful interference would have been sufficient. *See* LaFave & Scott, Criminal Law 399 (1972).

A deadly force may be used in protection of a person's real or personal property if the interference with the property is accompanied by a deadly force. In such a case, a self-defense instruction must be given.

This instruction adopts the Model Penal Code position which permits the use of force to protect property in the defendant's lawful possession. *See* LaFave & Scott, supra.

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, made gender neutral changes in Paragraphs 1, 2, and 3, rewrote the last paragraph, and added the last sentence in Use Note 1.

**Defendant as aggressor.** — The defendant was not entitled to a defense of property instruction where the defendant chased down and confronted repo men at gun point for the purpose of recovering his truck, not to prevent a theft. *State v. Emmons*, 2007-NMCA-082, 141 N.M. 875, 161 P.3d 920, cert. denied, 2007-NMCERT-006.

**Exercise of legal right, no matter how offensive, is not adequate provocation** to reduce homicide from murder to manslaughter. *State v. Marquez,* 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

**Instruction properly not given.** — An individual may not use force to defend real or personal property where the attempt to dispossess is lawful. *State v. Trammel,* 100 N.M. 479, 672 P.2d 652 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Homicide or assault in defense of habitation or property, 25 A.L.R. 508, 32 A.L.R. 1541, 34 A.L.R. 1488.

## 14-5181. Self defense; nondeadly force by defendant.1

Evidence has been presented that the defendant acted in self defense.

The defendant acted in self defense if:

1. There was an appearance of immediate danger of bodily harm to the defendant as a result of _____2; and

2. The defendant was in fact put in fear of immediate bodily harm and _____3 because of that fear; and

3. The defendant used an amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and

[4. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; and]4

5. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTE

1. For use in nonhomicide cases when the self defense theory is based upon: necessary defense of self against any unlawful action; reasonable grounds to believe a design exists to commit an unlawful act; or reasonable grounds to believe a design exists to do some bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. Describe unlawful act which would result in some bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

3. Describe the act of defendant; e.g. "struck Richard Roe," "choked Richard Roe."

4. Use bracketed material only if the defendant's action resulted in death or great bodily harm. If bracketed material is used, the definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

**Committee commentary.** — Subsections A and B of NMSA 1978, Section 30-2-7 (1963) provide that a person may act in self-defense if necessarily or reasonably defending himself or herself against any unlawful action, felony or great personal injury. It is never reasonable to use deadly force against a nondeadly attack. A person may use a deadly force in self-defense only if defending himself or herself against an attack which creates a substantial risk of death or great bodily harm. *See* commentary to UJI 14-5171 NMRA and *LaFave & Scott, Criminal Law* 392 (1972).

Element 4 is bracketed and is to be used only if there is evidence that the defendant used a force which ordinarily would not cause death or great bodily harm but which resulted in death or great bodily harm. A person is not guilty of homicide if he or she unintentionally kills a third person in self-defense. *State v. Sherwood*, 39 N.M. 518, 50 P.2d 968 (1953). *See generally*, Annot., 55 A.L.R.3d 620 (1974).

NMSA 1978, Sections 30-3-2 (Aggravated assault) and 30-3-4 (Battery) (1963) provide that an aggravated assault or a battery must be unlawful. The term "unlawfully" means simply that the action is not authorized by law. *State v. Mascarenas*, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974). The words "without excuse or justification" have been held to be "clearly equivalent to the word unlawful." *Territory v. Gonzales*, 14 N.M. 31, 89 P.

250 (1907). *Cf. State v. Woods*, 82 N.M. 449, 483 P.2d 504 (Ct. App. 1971). The phrase "without excuse or justification" identifies a defense theory, i.e., even if all of the acts constituting the crime were committed, the act is otherwise excusable or justifiable. *Cf.* NMSA 1978, § 30-2-8 (1963).

The committee took the position that unlawfulness was generally present in an assault or a battery if the other elements were proved. It is, of course, possible for the state to proceed with a prosecution when the defense is based on some theory of lawfulness other than self-defense. *See e.g.*, *Perkins, Criminal Law* 987 (2d ed. 1969). In the event that the case does go to the jury and there is evidence to establish the defense of a lawful assault, an instruction must be drafted for that purpose. The burden on the defendant is only to produce evidence which raises a reasonable doubt in the minds of the jurors. *See State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct. App.), *cert. denied*, 81 N.M. 668, 472 P.2d 382 (1970). The burden is then on the state to prove beyond a reasonable doubt that the assault or battery was not justifiable. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The committee revised this instruction in 1981 to resolve the problem presented in *State v. Brown*, 93 N.M. 236, 599 P.2d 389 (Ct. App.), writ quashed, 93 N.M. 172, 598 P.2d 215, cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1979), where the defendant is charged with a nondeadly assault.

*See* UJI 14-5185 NMRA and UJI 14-5186 NMRA if the victim is a law enforcement officer.

[As amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

## ANNOTATIONS

**The 1997 amendment,** effective January 1, 1997, substituted "in self defense" for "while defending himself" in the first paragraph, deleted "by the apparent danger" following "fear" in Paragraph 2, substituted "that the defendant" for "which he" in Paragraph 3, rewrote the last paragraph, and added the last sentence in Use Note 1.

**The 2009 amendment,** approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, in Paragraph 4 of the Use Notes, added "NMRA"; in the committee commentary, changed the style of the statutory references, deleted the former last paragraph, and added the current last paragraph, but did not amend the jury instruction.

**Instruction on nondeadly force self defense improper.** — Where a car pulled up into defendant’s driveway blaring loud music, revving its engine, and "peeling out"; defendant did not recognize the car; defendant went outside the house and loudly questioned the car’s occupants, but received no response; defendant returned to the house, retrieved a pistol, and put the pistol in defendant’s front pocket; defendant went

back outside the house and walked toward the car with defendant's hand resting on the handle of the pistol; the car began to drive away and then stopped at the end of the driveway; the victim exited the car, walked toward defendant, and hit defendant in the face; defendant pulled the pistol out of the pocket and shot the victim; and defendant testified that defendant did not intend to shoot the victim and that the pistol discharged accidentally and reflexively as a result of being hit by the victim, defendant was not entitled to an instruction regarding nondeadly force self-defense because the evidence established that the shooting was accidental, rather that intentional, and that the force used by defendant was excessive and unjustified under the circumstances. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, rev'g 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

**Claim of self defense by a child.** — When a child asserts self-defense as a justification for a battery against his parent, the jury must first determine whether the parent's use of physical discipline was reasonable under the circumstances. *State v. Denzel B.*, 2008-NMCA-118, 144 N.M. 746, 192 P.3d 260.

Where a child asserts self-defense as a justification for battery against his parent, the self-defense instruction must be limited to account for the parental privilege to discipline the child. *State v. Denzel B.*, 2008-NMCA-118, 144 N.M. 746, 192 P.3d 260.

**The appropriate standard of analysis for determining whether an officer's use of force was excessive,** sufficient to justify a limited claim of self-defense, is an objective view based on a reasonable officer's opinion about the use of force, and not on the officer's subjective view. *State v. Ellis*, 2008-NMSC-032, 144 N.M. 253, 186 P.3d 245, rev'g 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775.

**Defendant did not have a right of self-defense against a police officer.** — Where a police officer stopped the defendant for a seat belt violation; the defendant got out of his truck, refused to sign the citation, grabbed his license from the officer, threatened the officer, and refused to obey the officer's instructions; the officer pulled his weapon and pointed it at the defendant; the defendant returned to his truck and left the scene; the officer pursued the defendant; the defendant stopped his truck, got out of the truck, grabbed a tire iron and approached the officer's vehicle, the evidence showed that the officer used only reasonable and necessary force to protect himself in the first encounter and the defendant was not entitled to a self-defense instruction. *State v. Ellis*, 2008-NMSC-032, 144 N.M. 253, 186 P.3d 245, rev'g 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775.

**Defendant as aggressor.** — The defendant was not entitled to a self-defense instruction where the defendant chased down and confronted repo men at gun point who had reposed the defendant's truck from his yard. *State v. Emmons*, 2007-NMCA-082, 141 N.M. 875, 161 P.3d 920, cert. denied, 2007-NMCERT-006.

**Reference to self-defense is required in elements instructions.** — If a self-defense instruction is given, a reference to self-defense must also be included in the elements

instruction for the charged crime. *State v. Ellis*, 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775, cert. granted, 2007-NMCERT-003.

**Self-defense against a police officer.** — In the context of self-defense against a police officer, the general self-defense instruction must be modified to reflect the understanding that an individual may use self-defense against a police officer only in the limited circumstances when excessive force is used by the police officer to affect an arrest. *State v. Ellis*, 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775, cert. granted, 2007-NMCERT-003.

**Evidence supported claim of self-defense against a police officer.** — Where defendant was stopped by a police officer in an isolated area for a seat-belt violation; the officer gave defendant out-of-control and contradictory instructions and allegedly pointed his gun at defendant who was not under arrest and who had not threatened the officer; defendant became frightened and believed that he was going to be shot and told the officer that he was going to a place where there were witnesses; defendant left the scene of the initial stop and the officer pursued him; the officer allegedly pointed his gun at defendant and sprayed him twice with pepper spray at the second stop; defendant, who was not attempting to escape, then took a tire tool to protect himself which he subsequently discarded, the evidence supported defendant's claim of self-defense and the district court's failure to properly instruct the jury with respect to self-defense was not harmless error. *State v. Ellis*, 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775, cert. granted, 2007-NMCERT-003.

**Where cause of death did not exclude accidental death** caused by the exercise of nondeadly force, the nondeadly force self defense instruction should be given. *State v. Romero*, 2005-NMCA-060, 137 N.M. 456, 112 P.3d 1113, cert. granted, 2005-NMCERT-005.

**Construed with UJI 14-131.** — A defendant's requested instruction that "the force used by the defendant would not ordinarily create a substantial risk of death or great bodily harm," was inappropriate where there was no evidence that the victim suffered great bodily harm. *State v. Lara,* 110 N.M. 507, 797 P.2d 296 (Ct. App. 1990).

**Burden of proof.** — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instructions thereon were erroneous because they did not clearly place the burden of proof on the state. *State v. Acosta,* 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

**Failure to include self-defense in elements instruction.** — It is not fundamental error for judges not to follow the use note for the self-defense instruction when no one alerts them to the need to insert the sentence about the defendant not acting in self defense in the elements instruction when an otherwise correct self-defense instruction is given. *State v. Armijo,* 1999-NMCA-087, 127 N.M. 594, 985 P.2d 764.

**Unlawfulness required.** — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another. *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

**Defendant had a limited right of self-defense against a police officer,** and was entitled to an instruction on that limited right. The instruction concerning a resistance to an unlawful arrest did not cover the defendant's right to self-defense since it went only to the arrest and did not cover the right to defend against excessive force, whether or not the arrest was unlawful. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

One has a right to defend oneself from a police officer, whether the attempted arrest is lawful or unlawful; this right, however, is limited, so that one may defend oneself against excessive use of force by the officer, but one may not resort to self-defense when the officer is using necessary force to effect an arrest. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Self-defense against a peace officer is sharply limited because officers are permitted to use necessary force to effect an arrest. *State v. Hernandez*, 2004-NMCA-045, 135 N.M. 416, 89 P.3d 88, cert. denied, 2004-NMCERT-004.

**Where instruction crosses line into suggesting that officer's perception of emergency** can eliminate a person's right to defend his bodily integrity, the jury instruction is erroneous. *State v. Hernandez*, 2004-NMCA-045, 135 N.M. 416, 89 P.3d 88, cert. denied, 2004-NMCERT-004.

**Defense to child abuse.** — In a prosecution for child abuse when a defendant is charged with having intentionally or negligently endangered the life or health of a child, if the evidence otherwise supports a claim that a defendant's acts were carried out in self-defense, the defendant is entitled to have the jury consider his claim of self-defense as justification for his acts. *State v. Ungarten*, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993).

**Fear of police may be element of self-defense.** — The defendant's fear of the police was relevant to whether he believed he was in immediate danger of bodily harm - an element of self-defense. *State v. Brown*, 91 N.M. 320, 573 P.2d 675 (Ct. App. 1977), cert. quashed, 91 N.M. 349, 573 P.2d 1204, cert. denied, 436 U.S. 928, 98 S. Ct. 2826, 56 L. Ed. 2d 772 (1978).

**But a refusal of the requested instruction was not error** because the requested instruction did not limit the defendant's right of self-defense to situations where the officer used excessive force, but would have given the defendant an unlimited right of

self-defense, and, thus, it was an incorrect statement of the law. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

**Self defense by trespasser.** — First, the jury must decide whether the victim was entitled to use potentially deadly force against defendant; if not justified, then the defendant had right to stand his ground and the state must prove the defendant did not act in self-defense. *State v. Southworth*, 2002-NMCA-091, 132 N.M. 615, 52 P.3d 987, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

**Defendant must prove error in refusal to give instruction.** — It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. *State v. Gonzales*, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

**Exercise of legal right, no matter how offensive, is not adequate provocation** to reduce homicide from murder to manslaughter. *State v. Marquez*, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

**Instruction to inform jury of elements of self-defense claim.** — Use of this instruction does not instruct the jury as a matter of law that the victim suffered great bodily harm; it informs the jury of the elements of the self-defense claim that it must decide. *State v. Mills*, 94 N.M. 17, 606 P.2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 69, 71, 80; 75B Am. Jur. 2d Trial § 1259.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

6A C.J.S. Assault and Battery § 128.

## 14-5182. Defense of another; nondeadly force by defendant.[1]

Evidence has been presented that the defendant acted while defending another person.

The defendant acted in defense of another if:

1. There was an appearance of immediate danger of bodily harm to _____[2] as a result of _____[3]; and

2. The defendant believed that _____[2] was in immediate danger of bodily harm from _____ *(name of victim)* and _____[4] to prevent the bodily harm; and

3. The defendant used an amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and

[4. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; and][5]

5. The apparent danger to _____[2] would have caused a reasonable person in the same circumstances to act as defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of _____[2]. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE NOTE

1. For use in nonhomicide cases when the defense theory is based upon: a reasonable ground to believe a design exists to commit an unlawful act; a reasonable ground to believe a design exists to do bodily harm; or a defense of spouse, or other member of the family, a necessary defense against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of _____"[2].

2. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

3. Describe unlawful act which would result in some bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. Describe the act of defendant; e.g., "struck Richard Roe", "choked Richard Roe".

5. Use bracketed material only if the defendant's action resulted in death or great bodily harm. The definition of great bodily harm, UJI 14-131, must be given if not already given.

[As amended, effective January 1, 1997.]

**Committee commentary.** — Subsection A of Section 30-2-7 NMSA 1978 provides that a person may necessarily defend a member of his family against any unlawful action. Subsection B of Section 30-2-7, supra, provides that a person may reasonably defend another when there is reasonable ground to believe a design exists to commit a felony or to do some great personal injury against another. Since it is never reasonable or

necessary to use a deadly force to repel a nondeadly attack, these subsections are redundant. A person may use a deadly force in defending another only if he reasonably believes the other person to be in danger of death or great bodily harm. *See* committee commentary to UJI 14-5172.

Element 4 is bracketed and is to be used only if there is evidence that the defendant used a force which ordinarily would not cause death or great bodily harm, but which resulted in death or great bodily harm.

The 1981 amendments to UJI 14-5172 were made to clarify this instruction and to make this instruction consistent with other instructions on self-defense.

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, substituted "that the defendant" for "which he" in Paragraph 3, rewrote the last paragraph, and added the last sentence in Use Note 1.

**Burden of proof.** — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instructions thereon were erroneous because they did not clearly place the burden of proof on the state. *State v. Acosta,* 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

**Unlawfulness required.** — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another. *State v. Acosta,* 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery § 63; 75B Am. Jur. 2d Trial § 1259.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

6A C.J.S. Assault and Battery § 128.

## 14-5183. Self defense; deadly force by defendant.1

Evidence has been presented that the defendant acted in self defense.

The defendant acted in self defense if:

1. There was an appearance of immediate danger of death or great bodily harm2 to the defendant as a result of _____3; and

2. The defendant was in fact put in fear of immediate death or great bodily harm and _____4 because of that fear; and

3. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTE

1. For use in nonhomicide cases when the self defense theory is based upon: necessary defense of self against any unlawful action; reasonable grounds to believe a design exists to commit a felony; or reasonable grounds to believe a design exists to do some great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. The definition of "great bodily harm," UJI 14-131 NMRA, must be given if not already given.

3. Describe unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in context of the evidence.

4. Describe act of defendant; e.g., "struck Richard Roe," "choked Richard Roe."

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 09-8300-28, effective September 16, 2009.]

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, substituted "in self defense" for "while defending himself" in the first paragraph, deleted "by the apparent danger" following "fear" in Paragraph 2, rewrote the last paragraph, and added the last sentence in Use Note 1.

**The 2009 amendment,** approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, made non-substantive changes.

**Self-defense.** — Where defendant was charged with aggravated battery with a deadly weapon, and the trial court denied her requested elements instruction, the failure to include the negation of self-defense in the essential elements instruction was reversible

error. *State v. Griffin,* 2002-NMCA-051, 132 N.M. 195, 46 P.3d 102, cert. denied, 132 N.M. 193, 46 P.3d 100 (2002).

**Self-defense instruction not warranted. —** Where defendant's child and the victim were going through a divorce; the defendant's child told defendant that the defendant's child and the victim had agreed to reconcile; defendant replied that defendant would "fix it" for the defendant's child; defendant went to a motel and accosted the victim; a fight broke out between defendant and the victim; the victim pleaded for an opportunity to talk; defendant was armed with a large knife; defendant, covered in blood and holding a knife, opened the door of the motel room and told defendant's child to "take your kids, you're free"; witnesses testified that they saw defendant in the room, with blood on defendant's hands, the victim was lying on the floor, and defendant was shouting obscenities and kicking the victim's body; defendant told the police that defendant killed the victim and that defendant had told defendant's child that defendant intended to kill the victim; the police found two knives covered with blood that came from a knife block in the home where defendant lived; the victim's body had thirty-one stab wounds; defendant wrote letters while in custody in which defendant admitted attacking and killing the victim without remorse; the victim was unarmed; and there was no evidence that the victim had previously threatened defendant, defendant was not entitled to a self-defense instruction. *State v. Guerra,* 2012-NMSC-014, 278 P.3d 1031.

## 14-5184. Defense of another; deadly force by defendant.[1]

Evidence has been presented that the defendant acted while defending another person.

The defendant acted in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm[2] to _____[3] as a result of _____[4]; and

2. The defendant believed that _____[3] was in immediate danger of death or great bodily harm from _____ *(name of victim)* and _____[5] to prevent the death or great bodily harm; and

3. The apparent danger to _____[3] would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of _____[3]. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE NOTE

1. For use in nonhomicide cases when the defense theory is based upon: a reasonable ground to believe a design exists to commit a felony; a reasonable ground

to believe a design exists to do great bodily harm; or a defense of spouse or other member of the family, a necessary defense against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of _____"[3].

2. The definition of great bodily harm, UJI 14-131, must be given if not already given.

3. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

4. Describe the unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

5. Describe the act of defendant; e.g. "struck Richard Roe", "choked Richard Roe".

[As amended, effective January 1, 1997.]

**ANNOTATIONS**

**The 1997 amendment,** effective January 1, 1997, rewrote the last paragraph, and added the last sentence in Use Note 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

## 14-5185. Self defense against excessive force by a peace officer; nondeadly force by defendant.1

Evidence has been presented that the defendant acted in self defense. A defendant has the right to defend himself or herself against an officer only if the officer used excessive force.

Excessive force means greater force than reasonably necessary.

The defendant acted in self defense if:

1. The officer used greater force than reasonable and necessary by _____2; and

2. There was an appearance of immediate danger of bodily harm to the defendant as a result of _____3; and

3. The defendant was in fact put in fear of immediate bodily harm and _____4 because of that fear; and

4. The defendant used an amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and

[5. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; and]5

6. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTE

1. For use in nonhomicide cases when the self defense theory is based upon the limited right of self-defense against excessive force by a peace officer. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. Describe the act of the officer.

3. Describe unlawful act which would result in some bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. Describe the act of defendant; e.g. "struck Officer Richard Roe,""choked Officer Richard Roe."

5. Use bracketed material only if the defendant's action resulted in death or great bodily harm. If bracketed material is used, the definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

**Committee commentary.** — When asserting self-defense against a private citizen, a defendant has an "unqualified right to a self-defense instruction in a criminal case when there is evidence which supports the instruction." *State v. Ellis*, 2008-NMSC-032, ¶ 15, 144 N.M. 253, 186 P.3d 245 (quoting *State v. Kraul*, 90 N.M. 314, 318, 563 P.2d 108, 112 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977)). "By comparison, a person has only a qualified right to assert self-defense against a police officer, because police officers have a duty to make arrests and a right to use reasonable force when necessary." *Ellis*, 2008-NMSC-032, ¶ 15 (citing *Kraul*, 90 N.M. at 319, 563 P.2d at 113). The burden is on the defendant to persuade the court that reasonable minds could differ on whether the officer's use of force was excessive, in order for this issue to be submitted to the jury. *Ellis*, 2008-NMSC-032, ¶ 34.

Element 5 is bracketed and is to be used only if there is evidence that the defendant used a force which ordinarily would not cause death or great bodily harm but which resulted in death or great bodily harm. A person is not guilty of homicide if he or she unintentionally kills a third person in self-defense. *State v. Sherwood*, 39 N.M. 518, 50 P.2d 968 (1953). *See generally*, Annot., 55 A.L.R.3d 620 (1974).

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

## 14-5186. Self defense against excessive force by a peace officer; deadly force by defendant.1

Evidence has been presented that the defendant acted in self defense. A defendant has the right to defend himself or herself against an officer only if the officer used excessive force. Excessive force means greater force than reasonably necessary.

The defendant acted in self defense if:

1. The officer used greater force than reasonable and necessary by _____2; and

2. There was an appearance of immediate danger of death or great bodily harm3 to the defendant as a result of _____4; and

3. The defendant was in fact put in fear of immediate death or great bodily harm and _____5 because of that fear; and

4. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTE

1. For use in nonhomicide cases when the self defense theory is based upon the limited right of self-defense against excessive force by a peace officer. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. Describe the act of the officer.

3. The definition of "great bodily harm," UJI 14-131 NMRA, must be given if not already given.

4. Describe unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in context of the evidence.

5. Describe act of defendant; e.g., "struck Officer Richard Roe,""choked Officer Richard Roe."

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

**Committee commentary.—** When asserting self-defense against a private citizen, a defendant has an "unqualified right to a self-defense instruction in a criminal case when there is evidence which supports the instruction." *State v. Ellis*, 2008-NMSC-032, ¶ 15, 144 N.M. 253, 186 P.3d 245 (quoting *State v. Kraul*, 90 N.M. 314, 318, 563 P.2d 108, 112 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977)). "By comparison, a person has only a qualified right to assert self-defense against a police officer, because police officers have a duty to make arrests and a right to use reasonable force when necessary." *Ellis*, 2008-NMSC-032, ¶ 15 (citing *Kraul*, 90 N.M. at 319, 563 P.2d at 113). The burden is on the defendant to persuade the court that reasonable minds could differ on whether the officer's use of force was excessive, in order for this issue to be submitted to the jury. *Ellis*, 2008-NMSC-032, ¶ 34.

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

# Part K
# Self Defense

## 14-5190. Self defense; assailed person need not retreat.

A person who is threatened with an attack need not retreat. In the exercise of his right of self defense, he may stand his ground and defend himself.

**Committee commentary. —** When acting in self-defense, a person may use no more force than is reasonably necessary to avoid the threatened harm. *See* UJI 14-5171 and 14-5181. A person need not, however, retreat even though he could do so safely. *See State v. Horton*, 57 N.M. 257, 258 P.2d 371 (1953), where it was held that it was erroneous to instruct the jury that the defendant could not kill his assailant if he could yield without being killed. *See also* LaFave & Scott, Criminal Law 395 (1972).

**ANNOTATIONS**

**Voluntary confrontation of victim.** – The second element of the foundational predicate for a self-defense instruction was not established where there was evidence that the defendant voluntarily left his trailer and confronted the victim, engaging in an altercation that left the victim dead; no evidence suggested that the defendant was put in fear of the victim, that the defendant killed the victim because of that fear, or that a

reasonable person would have killed the victim under these circumstances. *State v. Gurule,* 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

**Evidence must raise reasonable doubt on self-defense.** — To call for instruction on self-defense, the evidence may not be so slight as to be incapable of raising a reasonable doubt in the jury's mind on whether a defendant accused of a homicide did act in self-defense. *State v. Heisler,* 58 N.M. 446, 272 P.2d 660 (1954).

**Evidence sufficient to raise doubt warrants self-defense instruction.** — If there is evidence sufficient to raise a reasonable doubt in the jury's mind as to whether the defendant acted in self-defense, an instruction on self-defense must be given. *State v. Montano,* 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980); *State v. Martinez,* 95 N.M. 421, 622 P.2d 1041 (1981).

**And instruction proper even where supported only by defendant's own testimony.** — Where self-defense is involved in a criminal case and there is any evidence, although slight, to establish the same, it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on that issue that are warranted by the evidence, even though such a defense is supported only by the defendant's own testimony. *State v. Heisler,* 58 N.M. 446, 272 P.2d 660 (1954).

**Essential elements necessary before self-defense instruction can be given are:** (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez,* 95 N.M. 421, 622 P.2d 1041 (1981).

**No conflict with instruction limiting self-defense.** — The instruction limiting self-defense when the defendant is the aggressor (UJI 14-5191) does not conflict with the instruction on justifiable homicide (UJI 14-5171) or this instruction. *State v. Velasquez,* 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

**Use of "must" in instruction not error.** — Instructions dealing with the elements of self-defense have consistently referred to elements which "must" exist if self-defense is to be submitted to the jury, and as the instruction did no more than inform the jury of the necessary elements and made no reference to a burden of proof in regard to self-defense, the use of "must" in the instruction was not error. *State v. Harrison,* 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

**Defendant must show error in refusal to give instruction.** — It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. *State v. Gonzales,* 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Duty of trial court to instruct on self-defense in absence of request by accused, 56 A.L.R.2d 1170.

Duty to retreat where assailant is social guest on premises, 100 A.L.R.3d 532.

## 14-5191. Self defense; limitations; aggressor.

Self defense is not available to the defendant if he [started the fight] [or] [agreed to fight][1] unless:

[1. The defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and

2. _____ *(name of victim)* responded with force which would ordinarily create a substantial risk of death or great bodily harm];

[OR]

[1. The defendant tried to stop the fight;

2. The defendant let _____ *(name of victim)* know he no longer wanted to fight; and

3. _____ *(name of victim)* became the aggressor.]

USE NOTE

1. Use only applicable bracketed element established by the evidence.

**Committee commentary.** — In *State v. Pruett*, 24 N.M. 68, 172 P. 1044 (1918), the court stated that an instruction on this subject, or at least some part of it, is habitually given in New Mexico with instructions on self-defense. The committee believed that the use of this instruction, as with all instructions, is limited to cases where the matter has been put in issue by the evidence. *See* Annot., 55 A.L.R.3d 1000 (1974); LaFave & Scott, Criminal Law 395 (1972).

This instruction is not to be given if the defendant knew that there was no further danger from his opponent. *See* LaFave & Scott, Criminal Law 395 (1972). *See also State v. Garcia,* 83 N.M. 51, 487 P.2d 1356 (1971), where it was held erroneous to instruct the jury that the defendant could not pursue the aggressor after the aggressor was no longer able to continue the conflict or present a danger to the defendant.

**ANNOTATIONS**

**To warrant self-defense instruction, evidence must be sufficient to raise reasonable doubt** in the minds of the jury as to whether or not a defendant accused of homicide did act in self-defense. *State v. Martinez,* 95 N.M. 421, 622 P.2d 1041 (1981).

**Essential elements necessary before self-defense instruction can be given are:** (1) an appearance of immediate danger of death or great bodily harm to the defendant;

(2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez,* 95 N.M. 421, 622 P.2d 1041 (1981).

**No conflict with other instructions** — This instruction does not conflict with the instructions on justifiable homicide (UJI 14-5171) or on absence of need of an assailed person to retreat (UJI 14-5190). *State v. Velasquez,* 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

**Defendant must prove error in refusal to give instructions.** — It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. *State v. Gonzales,* 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

**Fight need not be lengthy.** — The defendant and the victim need not be engaged in a drawn-out battle for there to be a "fight," and where there is evidence that a bottle was thrown and defendant responded with a knife, the giving of his instruction is proper. *State v. Velasquez,* 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

**Instruction on negligent self-defense improperly denied.** — Where the defendant could be viewed as in a position where his safety or the safety of his friend was threatened and, if, in an attempt to protect himself or ward off the attackers, the defendant inadvertently shot the victim, then his actions could be viewed as being the commission of a lawful act of self-defense, committed in a unlawful manner or without due caution and circumspection, such that an instruction on involuntary manslaughter based on negligent self-defense should have been given. *State v. Arias,* 115 N.M. 93, 847 P.2d 327 (Ct. App. 1993), overruled on other grounds, *State v. Abeyta,* 120 N.M. 233, 901 P.2d 164.

**Defendant's creation of substantial risk of death.** — Trial court did not err in refusing to give defendant's self-defense instruction where defendant ad brandished and fired a gun into the air creating a substantial risk of death or great bodily harm. *State v. Lucero,* 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 A.L.R.4th 983.

# CHAPTER 52 to 59
# (Reserved)

# CHAPTER 60
# Concluding Instructions

# Part A
# General Explanation

## 14-6001. Duty to follow instructions.

The law governing this case is contained in instructions that I am about to give you. It is your duty to follow the law as contained in these instructions. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction and disregard others. A copy of these instructions will be given to you when you begin your deliberations.

USE NOTE

This is a proper instruction to be given in all cases.

[UJI Crim. 50.0; approved, effective September 1, 1975; as amended, effective November 1, 2003.]

**Committee commentary.** — This instruction was derived from and is identical with UJI 13-2002 NMRA.

**ANNOTATIONS**

**The 2003 amendment,** effective November 1, 2003, divided the former first sentence into the present first and second sentences, substituted "instructions that I am about to give you" for "these instructions" in the first sentence and "the law as contained in these instructions" for "that law" in the second sentence, and added the last sentence.

**Judge alone instructs the jury as to the law in a given case;** where counsel instructs on the law, counsel invades the province of the court. *State v. Payne,* 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981), overruled on other grounds *Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981).

**No duty to read instructions by jury.** — The defendant's contention that a jury should at least take sufficient time to read the instructions prior to rendering the verdict and that 10 minutes is not sufficient time to read the court's instructions is invalid, as it is based on the false premise that the only way for the jury to appraise itself of the instructions is to read them, which is not the case, as the instructions are read to the jury by the court and the written instructions need not go to the deliberation room unless there is a request. *State v. Mosier,* 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1456, 1486, 1487, 1490, 1491.

Propriety of instruction in criminal case as to the importance of enforcement of law, or duty of jury in that regard, 124 A.L.R. 1133.

Propriety of reference, in instruction in criminal case, to juror's duty to God, 39 A.L.R.3d 1445.

88 C.J.S. Trial §§ 297, 300, 349, 374.

## 14-6002. Necessarily included offense.[1]

If you should have a reasonable doubt as to whether the defendant committed the crime of _____ *(greater offense)*[2], you must proceed to determine whether the defendant committed the included offense of _____[3].

USE NOTE

1. This instruction should be given immediately preceding the instruction containing the elements of a lesser included offense. Repeat the instruction as necessary if there is more than one included offense. This instruction is not to be used where the offense charged is murder or manslaughter; UJI 14-250 should be given in those cases.

2. Identify the greater offense by the name used in the elements instruction.

3. Identify the lesser included offense by the name used in the elements instruction.

**Committee commentary.** — Under New Mexico decisions, a party has a right to have the jury instructed on a necessarily included offense if there is evidence to establish such offense. State v. Chavez, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971). The instruction on a necessarily included offense need not be given if the evidence would justify only a conviction for the higher offense or an acquittal. *State v. Chavez*, supra; *State v. James*, 76 N.M. 376, 415 P.2d 350 (1966); *State v. Sandoval,* 59 N.M. 85, 279 P.2d 850 (1955).

Under Rule 5-608 NMRA, if the jury is so instructed, the defendant may be convicted of "an offense necessarily included in the offense charged or of an attempt." For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). *See also State v. Everitt,* 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969). In certain property crimes, and in arson, this rule would be applied where the crime is divided into degrees depending on the amount of property stolen, etc. *See*, e.g., *State v. Schrager,* 74 Wash. 2d 75, 442 P.2d 1004 (1968).

The conviction of a lesser included offense constitutes an acquittal of the higher crime or degree of the crime. *State v. Medina*, supra. *Cf. State v. White*, 61 N.M. 109, 295 P.2d 1019 (1956), petition to correct mandate and commitment denied, 71 N.M. 342, 378 P.2d 379 (1962). An acquittal of the lesser included offense also bars prosecution for the greater offense. *Ex parte Williams,* 58 N.M. 37, 265 P.2d 359 (1954).

## ANNOTATIONS

**Lesser-included offense. —** Where the victim of criminal sexual contact of a minor specifically stated that defendant tried to penetrate her, there was no ambiguity in the victim's testimony that could lead a rational juror to acquit defendant of the crime of criminal sexual penetration and defendant's request for a lesser-included offense instruction was properly denied. *State v. Paiz*, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011.

**Instruction given where evidence on lesser offense. —** The defendant is entitled to an instruction on a lesser included offense if there is some evidence tending to establish the lesser offense. *State v. Jiminez,* 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

The right to instructions on lesser included offenses depends on there being some evidence tending to establish the lesser offenses. *State v. Gutierrez,* 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

**And denied where no evidence. —** Where there was no evidence in the state's case tending to reduce the offense, the instruction on the lesser included offense was properly denied. *State v. Vigil,* 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

While lesser offenses necessarily may be included, it is only where there is some evidence tending to reduce the offense charged to a lesser degree or grade that a refusal to instruct as to included offenses is error. *State v. Saiz,* 84 N.M. 191, 500 P.2d 1314 (Ct. App. 1972).

**Failure to give instruction not error absent prejudice to defendant. —** While the giving of this instruction, as requested, would have avoided guilty verdicts on multiple charges of aggravated assault and aggravated battery that merged under the evidence, the failure to give the instruction was not error in the absence of prejudice to the defendant. *State v. Gallegos,* 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

**Possible results by jury on included offenses. —** Within the framework of these instructions, a jury may reach one of three different results as to each included offense: (1) it may unanimously find a defendant guilty of a greater offense; (2) it may unanimously vote to acquit on the greater offense; or (3) it may fail to reach agreement. If the vote is not unanimous or if the vote is unanimous for acquittal, it must then move

to a consideration of the lesser offenses. *State v. Castrillo,* 90 N.M. 608, 566 P.2d 1146 (1977).

**Either acquittal or conviction of lesser included offense bars further prosecution** for the greater offense. *State v. Castrillo,* 90 N.M. 608, 566 P.2d 1146 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1245, 1250, 1283, 1381, 1393, 1428 to 1434.

Conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged, 47 A.L.R.2d 887.

Lesser-related state offense instructions: modern status, 50 A.L.R.4th 1081.

Propriety of lesser-included-offense charge to jury in federal criminal case - general principles, 100 A.L.R. Fed. 481.

## 14-6003. Multiple defendants; consider each separately.

In this case, you must consider separately whether each of the [two] [several] defendants is guilty or not guilty. You should analyze what the evidence in the case shows with respect to each individual defendant separately. Even if you cannot agree upon a verdict as to one [or more] of the defendants [or charges], you must return the verdict upon which you agree.

USE NOTE

This instruction is not appropriate for a conspiracy trial.

**Committee commentary.** — This instruction was derived from California Jury Instructions Criminal, 17.00, and Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.04.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1331, 1353.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

## 14-6004. Multiple counts; single defendant.

Each crime charged in the [indictment] [information] should be considered separately.

USE NOTE

If charge of felony murder and the underlying felony are submitted, this instruction is not to be given. If there are charges other than the felony murder and underlying felony, this instruction may be modified or not submitted.

**Committee commentary.** — This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.02.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

## 14-6005. Multiple counts; multiple defendants.

Each crime charged in the [indictment] [information] should be considered separately as to each defendant charged with that crime.

USE NOTE

If charge of felony murder and the underlying felony are submitted, this instruction is not to be given. If there are charges other than the felony murder and underlying felony, this instruction may be modified or not submitted.

**Committee commentary.** — This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.03.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1331, 1438, 1439.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

## 14-6006. Jury sole judge of facts; sympathy or prejudice not to influence verdict.

You are the sole judges of the facts in this case. It is your duty to determine the facts from the evidence produced here in court. Your verdict should not be based on speculation, guess or conjecture. Neither sympathy nor prejudice should influence your verdict. You are to apply the law as stated in these instructions to the facts as you find them, and in this way decide the case.

USE NOTE

This is a proper instruction to be given in all cases.

**Committee commentary.** — This instruction was derived from and is identical to UJI 13-2005.

**ANNOTATIONS**

**Prediction of effects of conviction inconsistent with instruction.** — Defense counsel's prediction of effects of conviction on defendant's family and career was a violation of this provision. *State ex rel. Schiff v. Madrid*, 101 N.M. 153, 679 P.2d 821 (1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75A Am. Jur. 2d Trial §§ 1208 to 1212; 75B Am. Jur. 2d Trial §§ 1295, 1457.

Sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 547.

88 C.J.S. Trial §§ 280 to 282, 382.

## 14-6007. Jury must not consider penalty.

You must not concern yourself with the consequences of your verdict.

USE NOTE

This is a proper instruction to be given in every case. In a capital case it is proper for the state or court in the voir dire or in the court's opening or closing remarks to tell the jury that the state will not seek the death penalty.

**Committee commentary.** — The language of this instruction is derived from California Jury Instructions Criminal, 17.42. The disposition of the defendant, after a verdict of not guilty by reason of insanity, is not a matter for consideration by the jury. *State v. Chambers,* 84 N.M. 309, 502 P.2d 999 (1972). *See also* Annot., 11 A.L.R.3d 737, 745 (1967).

Prior to 1972, it was common practice to instruct the jury that it could recommend clemency. *See, e.g., State v. Brigance,* 31 N.M. 436, 246 P. 897 (1926). The basis for the instruction was a statute allowing the jury to recommend clemency to the court when it found the defendant guilty. N.M. Laws 1891, ch. 80, § 10, compiled as § 41-13-2 NMSA 1953 Comp. The statute was repealed in 1972. *See* N.M. Laws 1972, ch. 71, § 18.

## ANNOTATIONS

**Sentencing is not normally within the jury's province in noncapital crimes,** and it has long been settled in New Mexico that the jury's function is to determine guilt or innocence, not to participate in the imposition of punishment; therefore, the instructions tendered by the trial court contained all the necessary elements of the offense including the requisite intent, and there was no error in refusing to give the defendant's requested instruction concerning possible sentences. *State v. Evans,* 85 N.M. 47, 508 P.2d 1344 (Ct. App. 1973).

**And not error to refuse to instruct.** — The refusal to give an instruction as to the disposition of defendant if found guilty is not reversible error, and certainly not fundamental error. *State v. Victorian,* 84 N.M. 491, 505 P.2d 436 (1973).

**Recommendation of clemency by the jury is advisory in nature** and not binding on the trial court's final determination of sentence. *State v. Evans,* 85 N.M. 47, 508 P.2d 1344 (Ct. App. 1973).

**Capital case jurors may be told state will not seek death penalty.** — In a capital case it is proper, as the use note states, for the state or court in the voir dire or in the court's opening or closing remarks to tell the jury that the state will not seek the death penalty. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

The prosecutor did not err in noting during voir dire that the state was not seeking the death penalty. *State v. Baca,* 1997-NMSC-059, 124 N.M. 333, 950 P.2d 776.

**Life sentence request.** — Although it is proper to inform the jury panel that the state was not seeking the death penalty, "fairness" does not require the court to inform the jury that the state was seeking a sentence of life imprisonment. *State v. Fero,* 105 N.M. 339, 732 P.2d 866 (1987), aff'd, 107 N.M. 369, 758 P.2d 783 (1988).

**Modification describing consequences impermissible.** — A judge-crafted modification to this instruction describing the consequences of a conviction for assault is

improper and impermissible. *State ex rel. Schiff v. Madrid,* 101 N.M. 153, 679 P.2d 821 (1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial § 1442.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed, 35 A.L.R.2d 769.

Prejudicial effect of statement or instruction of court as to possibility of pardon or parole, 12 A.L.R.3d 832.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

## 14-6008. Duty to consult.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agrees. Your verdict must be unanimous.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a verdict.

You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

USE NOTE

This instruction must be given in every case. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given.

**Committee commentary.** — The language of this instruction was derived from a suggested jury instruction for federal criminal cases. *See* 27 F.R.D. 39, 97-98 (1961). The use of a mandatory, duty to consult, instruction in every case before the jury retires, takes the place of the so-called shotgun instruction. *See* commentary to UJI 14-6030. *See also* American Bar Association Standards Relating to Trial by Jury, § 5.4 (approved draft 1968).

**ANNOTATIONS**

**Judge's action when jury unable to arrive at verdict.** — When a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge not only can, but should, communicate with the jury, but should only do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it may consider further deliberations, but not that it must consider further deliberations. *State v. McCarter,* 93 N.M. 708, 604 P.2d 1242 (1980).

The court's actions did not amount to an improper "shotgun" instruction to a deadlocked jury where jurors were given this instruction, there was no time limit imposed on deliberations, the court did not attempt to target holdout jurors or determine which way the votes fell, an unsolicited note from an undecided juror was not disclosed, and no further instructions were given; the lack of coercion was demonstrated by the fact that the jurors deliberated for two more hours and returned a "not guilty" verdict on one count. *State v. Laney,* 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

**Interference with deliberation.** — Jurors are encouraged to consult with one another before reaching a conclusion, and the court is not permitted to interfere with the jury's discretion to deliberate. *State v. Chamberlain,* 112 N.M. 723, 819 P.2d 673 (1991).

**Jury instruction proper.** — *See State v. Vigil,* 110 N.M. 254, 794 P.2d 728 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1382 to 1384, 1386, 1437, 1453, 1455, 1580 et seq.

# Part B
# Verdict Forms

## 14-6010. General verdict; no insanity or mental illness issue; no lesser included offenses.

In this case, there are two possible verdicts [as to each crime charged] [as to each defendant]:

(1) guilty; and

(2) not guilty.

Only one of the possible verdicts may be signed by you [as to each charge] [as to each defendant]. If you have agreed upon one verdict [as to a particular charge] [as to a defendant], that form of verdict is the only form to be signed [as to that charge] [as to that defendant]. The other form [as to that charge] [as to that defendant] is to be left unsigned.

[As amended, effective August 1, 2001.]

**Committee commentary.** — These instructions explain the multiple verdict forms. The purpose is to aid the jury and possibly prevent a violation of the fundamental rights of the defendant. *See State v. Cisneros*, 77 N.M. 361, 423 P.2d 45 (1967). The use of these instructions may also alert the defendant to the need to preserve error by making a timely objection if the court omits a verdict form. *See State v. Duran*, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added the phrase "or mental illness" to the description.

**The court has a duty to inform the jury regarding the option of ceasing deliberations.** — If the jury reveals that it is having difficulty arriving at a unanimous verdict, and the jury is under the mistaken impression that it is required to continue its deliberations indefinitely until a unanimous verdict is achieved, the trial court has a mandatory duty to inform the jury that it may cease deliberations and not arrive at a unanimous verdict if it is indeed deadlocked. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**Failure to answer jury's question regarding the option of a hung jury.** — Where the trial court instructed the jury pursuant to UJI 14-6101 NMRA; after the jury had began deliberations, the jury asked the court whether a non-verdict or a hung jury was an option and indicated that a non-verdict or a hung jury was not an option under the general verdict instruction; the court never responded to the jury's question, even though the court had promptly responded to all other inquiries from the jury; the jury did not report that it was deadlocked or reveal the status of its deliberations in terms of numerical division; and the jury returned a guilty verdict, the court's failure to issue a supplementary instruction in answer to the jury's instruction coerced the jury into reaching a verdict, requiring a new trial. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1436, 1750, 1751, 1835, 1836, 1855, 1859.

Haste or shortness of time in which jury reached verdict in criminal case, 91 A.L.R.2d 1238.

## 14-6011. Use of multiple verdict forms; insanity.1

In this case, there are four/f possible verdicts as to the defendant _____ *(name of defendant)*[2] [for each crime charged][2]:

(1) not guilty;

(2) not guilty by reason of insanity;

(3) guilty, but mentally ill; and

(4) guilty.

Only one of the possible verdicts may be signed by you [as to any particular charge][2]. If you have agreed upon one verdict [as to a particular charge][2], that form of verdict is the only form to be signed [as to that charge][2]. The other forms are to be left unsigned.

USE NOTE

1. For use with UJI 14-5101.

2. Use this bracketed phrase if there is more than one offense charged.

[As amended, effective August 1, 2001.]

**Committee commentary.** — *See* committee commentary under UJI 14-6010.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted "four" for "three" and "defendant" for "defendant[s]"in the introductory sentence; added Subsection (3) concerning metal illness, and redesignated former Subsection (3) as (4); added Use Note 1, redesignated former Use Note 1 as 2, and substituted "is more than one offense charged" for "are multiple defendants, but the defense of not guilty by reason of insanity is not applicable to all defendants" in Use Note 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1788 to 1834.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

## 14-6012. Multiple verdict forms; lesser included offenses.1

In this case, as to the charge of _____[2] [contained in Count _____], there are three possible verdicts [as to each defendant] [as to the defendant[s] _____ *(name)*]

(1) guilty of _____[2];

(2) guilty of _____[3];

(3) not guilty;

Only one of the possible verdicts may be signed by you [as to each defendant] [as to the defendant[s] _____ *(name)*.

You must consider each of these crimes. You should be sure that you fully understand the elements of each crime before you deliberate further.

You will then consider whether [the] [a] defendant is guilty of the crime of _____ [2]. If you find him guilty of that crime, then that is the only form of verdict which is to be signed. If you have a reasonable doubt as to his guilt of that crime, you will go on to a consideration of the crime of _____ [3]. If you find him guilty of that crime, then that is the only form of verdict which should be signed. But if you have a reasonable doubt as to his guilt of the crime of _____ [3], then you should find him not guilty and sign only the not guilty form.

You may not find [the] [a] defendant guilty of more than one of the foregoing crimes. If you have a reasonable doubt as to whether [the] [a] defendant has committed any one of the crimes, you must determine that he is not guilty of that crime. If you find him not guilty of all of these crimes, [in Count _____ ] you must return a verdict of not guilty [as to this Count].

USE NOTE

1. This instruction assumes only one lesser included offense. The instruction must be modified if there is more than one lesser included offense to the crime charged. For use when the defendant's mental condition at the time of the offense is not an issue. This instruction should not be given for homicide charges or if insanity is an issue. For such charges, UJI 14-250 or UJI 14-5101 is to be given.

2. Insert name of greater offense.

3. Insert name of lesser included offense.

**Committee commentary.** — *See* committee commentary under UJI 14-6010.

**ANNOTATIONS**

**Either acquittal or conviction of lesser included offense bars further prosecution** for the greater offense. *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977).

**Possible results by jury on included offenses.** — Within the framework of these instructions, a jury may reach one of three different results as to each included offense: (1) it may unanimously find a defendant guilty of a greater offense; (2) it may unanimously vote to acquit on the greater offense; or (3) it may fail to reach agreement. If the vote is not unanimous or if the vote is unanimous for acquittal, it must then move to a consideration of the lesser offenses. *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1436, 1760.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

## 14-6013. Special verdict; [use of a firearm]1; [noncapital felony against a person sixty years of age or older].

If you find the defendant guilty of _____, then you must determine if the [crime was][1] [crimes were] committed [with the use of a firearm][1] [against a person sixty years of age or older, and that person was intentionally injured] and report your determination. You must complete the special form to indicate your finding. [With respect to any crime,][2] For you to make a finding of "yes," the state must prove to your satisfaction beyond a reasonable doubt that that crime was committed [with the use of a firearm][1] [against a person sixty years of age or older, and that person was intentionally injured].

USE NOTE

1. Use the applicable bracketed alternative.

2. Use the bracketed phrase if more than one crime committed.

**Committee commentary.** — This instruction, together with the special interrogatory, UJI 14-6014, is required by Section 31-18-16 NMSA 1978. Special sentencing provisions apply if the jury finds that a firearm was used in the commission of any felony, other than a capital felony. *State v. Wilkins,* 88 N.M. 116, 537 P.2d 1012 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975). *See also, State v. Ellis,* 88 N.M. 90, 537 P.2d 207 (Ct. App. 1975) and *State v. Gabaldon,* 92 N.M. 230, 585 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 230, 585 P.2d 1352 (1978). The use of this instruction and the interrogatory is based on the assumption that the defendant was put on notice that he must defend against a crime committed with a firearm. *State v. Barreras,* 88 N.M. 52, 536 P.2d 1108 (Ct. App. 1975).

The use of a firearm is not limited to situations where the defendant was the user of the firearm; it also applies where the defendant was only an accessory. Section 31-18-16 NMSA 1978 (former Section 31-18-4 NMSA 1978) requires only that the firearm be used in the commission of the crime. *State v. Roque,* 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4 (1977).

This instruction must also be given when, under Section 31-18-16.1, the evidence shows that a person sixty years of age or older was intentionally injured during the commission of a noncapital felony.

**ANNOTATIONS**

**Determination of use of firearm beyond reasonable doubt essential.** — Proof beyond a reasonable doubt is the traditional burden which our system of criminal justice deems essential, and the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; this standard applies not only to factual determinations of guilt, but also to the factual determination that a firearm was used, because that fact is a predicate for enhancing the defendant's sentence. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**But absence of instruction constitutional where evidence uncontradicted and no complaint.** — Where the burden of proof instruction, by its wording, was applied to a determination of guilt, no reference was made to use of a firearm, and, after the guilty verdicts were returned, instructions were given submitting the use of a firearm issue to the jury without a burden of proof instruction, the jury was not instructed on the burden of proof concerning use of a firearm; however, the defendant did not complain of the absence of an instruction and the evidence was almost uncontradicted that a firearm was used as to each count; accordingly, there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1236, 1750, 1751, 1835 to 1858.

Effect of failure of special verdict or special finding to include findings of all ultimate facts or issues, 76 A.L.R. 1137.

Failure of one or more jurors to join in answer to special interrogatory or special verdict as affecting verdict, 155 A.L.R. 586.

## 14-6014. Sample forms of verdict.[1]

(style of case)

We find the defendant [_____ *(name)*][2] GUILTY of _____[3] [as charged in Count _____[4] ].

_____
FOREPERSON

(style of case)

We find the defendant [_____ *(name)*][2] NOT GUILTY of _____[3] [as charged in Count _____[4]].

_____

FOREPERSON

(style of case)

We find the defendant [_____ *(name)*][2] NOT GUILTY.[5]

_____
FOREPERSON

(style of case)

We find the defendant [_____ *(name)*][2] NOT GUILTY BY REASON OF INSANITY.

_____
FOREPERSON

(style of case)

We find the defendant [_____ *(name)*][2] GUILTY, BUT MENTALLY ILL.[6]

_____
FOREPERSON

(style of case)

Do you unanimously find beyond a reasonable doubt that a firearm was used in the commission of _____[3] [as charged in Count _____]?

_____ (Yes or No)

_____
FOREPERSON

(style of case)

Do you unanimously find beyond a reasonable doubt that _____[3] was committed against a person sixty years of age or older, and that person was intentionally injured [as charged in Count _____]?

_____ (Yes or No)

_____
FOREPERSON

(style of case)

Do you find that the defendant [_____ *(name)*][2] is competent to stand trial?

_____ (Yes or No)

_____
FOREPERSON

USE NOTE

1. A form of verdict must be submitted to the jury for each offense or lesser included offense, and each form must be typed on a separate page.

2. Use this provision and insert name of each defendant when there are multiple defendants.

3. Insert the name of the offense; do not leave blank for the jury to complete.

4. Insert the count number, if any; do not leave blank for the jury to complete.

5. This form is appropriate for lesser included offenses. *See* Instruction 14-6012.

6. This form may be submitted when a defendant has presented sufficient evidence of insanity or lack of capacity to form a specific intent to the jury. Instruction 14-5102 or 14-5103 must also be given if this instruction is submitted.

[As amended, effective August 1, 1997.]

**ANNOTATIONS**

**The 1997 amendment,** effective August 1, 1997, substituted "foreperson" for "foreman" throughout the instruction, inserted "unanimously" and "beyond a reasonable doubt" in two places, and made stylistic changes in two places near the beginning of the instruction.

**Multiple counts combined in one verdict form. —** There was no fundamental error in submitting the forms of verdicts with multiple counts combined in one verdict form, but the court does not believe it to be the better practice. There could be a serious question arising in the event of an error in the record affecting one count, and in such a case, the judgment of conviction would have to be set aside in toto. *State v. Cisneros,* 77 N.M. 361, 423 P.2d 45 (1967).

## 14-6015. Verdicts; single or multiple defendants; larceny and receiving by acquiring; insanity.1

In this case [in connection with the charges of larceny and receiving (by acquiring)[2] stolen goods][3], there are [three][4] [four] possible verdicts:

(1) guilty of larceny and not guilty of receiving (by acquiring)[2];

(2) guilty of receiving (by acquiring)[2] and not guilty of larceny;

(3) not guilty of larceny and not guilty of receiving (by acquiring)[2]; [and]

(4) not guilty by reason of insanity].[5]

Only one of the possible verdicts may be signed by you as to these charges [as to each defendant]. If you have agreed upon one verdict as to these charges [as to a defendant], that form of verdict is the only form to be signed as to these charges [as to that defendant]. The other forms as to these charges are to be left unsigned.

[Even if you determine from all the evidence that a defendant committed an offense, if you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity and sign only the not guilty by reason of insanity form.][5]

## USE NOTE

1. This instruction should be given if charges of larceny and charges of receiving (by acquiring) stolen property, relate to the same property. This instruction supplants UJI 14-6011; but UJI 14-6011 may be used with this instruction if counts are submitted other than larceny and receiving by acquiring. UJI 14-6004 should not be used with this instruction because the two are in contradiction. If there are other charges, to which this instruction is not applicable, UJI 14-6004 may be tailored to refer solely to those counts and may be given with this instruction.

2. Use the parenthetical phrase if the charge of receiving by keeping or receiving by disposing is also submitted. If no charge of receiving by keeping or disposing is submitted, the parenthetical phrase should be omitted.

3. Use this bracketed phrase if charges other than larceny and receiving are submitted. In some cases it also may be necessary to identify the counts, such as cases in which there are other charges of larceny or receiving to which this instruction is not applicable. If the only charges that are submitted are larceny and receiving by acquiring, of the same property, then this bracketed phrase should be omitted.

4. Use appropriate bracketed alternative.

5. Use these bracketed provisions if the issue of not guilty by reason of insanity is submitted to the jury.

**Committee commentary.** — This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. *See State v. Mares*, 79 N.M. 327, 329, 442 P.2d 817 (Ct. App. 1968). For the substantive law of receiving, *see* the commentary to UJI 14-1650.

The general rule is that the thief cannot be guilty of receiving the stolen goods, because one cannot receive from oneself. *Territory v. Graves,* 17 N.M. 241, 125 P. 604 (1912). The statute has been changed since the *Graves* case, and under the present statute the thief cannot be guilty of receiving (by acquiring) stolen goods, but the thief can be guilty of receiving (by disposing of) the stolen goods. *State v. Tapia,* 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976). *See also State v. Rogers,* 90 N.M. 673, 568 P.2d 199 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 604, 566 P.2d 1142 (1977). The thief may also be convicted of receiving (by retaining). UJI 14-1650. Contra, dicta in the *Tapia* case.

The general rule bars a conviction of larceny and receiving (by acquiring) of the same goods. Moreover, it extends to bar a conviction of burglary and receiving (by acquiring) in cases in which the burglary charge is based on an intent to steal and in fact there is a theft by the accused of the same property which is the subject of the receiving charge. *State v. Gleason,* 80 N.M. 382, 456 P.2d 215 (Ct. App. 1969).

Even though a defendant cannot be convicted of larceny and receiving, or burglary and receiving, it is proper to charge both or all of such offenses. *State v. Mitchell,* 86 N.M. 343, 524 P.2d 206 (Ct. App. 1974). *Compare United States v. Gaddis,* 424 U.S. 544, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976). Therefore, a defendant may be charged with burglary, larceny and receiving (by acquiring). In such case, the jury may be instructed on all three offenses. If the jury convicts of burglary, they cannot convict of receiving (by acquiring). If the jury convicts of receiving (by acquiring) they cannot convict of burglary. The same rule holds for larceny and receiving (by acquiring). Since burglary, larceny and receiving all carry the same penalty (except where the goods are of a value of over $2500), there is no need to require the jury to consider any particular charge first, as is required when one of the offenses has a more severe penalty than the other. *See United States v. Gaddis*, supra.

If a charge of receiving the same or other property by keeping it or disposing of it is submitted to the jury, then the phrase "by acquiring" should be used in this instruction. It is necessary to distinguish between the different ways of committing the offense of receiving stolen property because the rule that the thief cannot be guilty of receiving applies only to receiving by acquiring.

If a charge of receiving by keeping or disposing is submitted, separate verdict forms are required for such charge. In that way, if there is a conviction of receiving it can be determined whether the defendant was convicted of receiving by acquiring or receiving by another means.

If insanity is in issue, there are four possible verdicts as to each defendant. In such cases, the bracketed clause, "not guilty by reason of insanity," should be given, and the final, bracketed paragraph should be given.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Larceny § 180 et seq.; 66 Am. Jur. 2d Receiving Stolen Property § 33; 75B Am. Jur. 2d Trial §§ 1436 to 1440, 1793 to 1797.

Failure of verdict on conviction of larceny or embezzlement to state value of property, 79 A.L.R. 1180.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

23A C.J.S. Criminal Law §§ 1393, 1402; 52A C.J.S. Larceny §§ 142, 155; 76 C.J.S. Receiving Stolen Goods § 1 et seq.; 88 C.J.S. Trial §§ 298, 322; 89 C.J.S. Trial §§ 492, 496, 510, 521.

## 14-6016. Verdicts; single or multiple defendants; burglary and receiving by acquiring; insanity.1

In this case [in connection with the charges of burglary and receiving (by acquiring)[2] stolen goods][3], there are [three][4] [four] possible verdicts:

(1) guilty of burglary and not guilty of receiving (by acquiring)[2];

(2) guilty of receiving (by acquiring)[2] and not guilty of burglary;

(3) not guilty of burglary and not guilty of receiving (by acquiring)[2]; [and]

[(4) not guilty by reason of insanity].[5]

Only one of the possible verdicts may be signed by you as to these charges [as to each defendant]. If you have agreed upon one verdict as to these charges [as to a defendant], that form of verdict is the only form to be signed as to these charges [as to that defendant]. The other forms as to these charges are to be left unsigned.

[Even if you determine from all the evidence that a defendant committed an offense, if you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity and sign only the not guilty by reason of insanity form.][5]

USE NOTE

1. This instruction should be given if charges of burglary and charges of receiving (by acquiring) stolen property, relate to the same property. This instruction supplants UJI 14-6011; but UJI 14-6011 may be used with this instruction if counts are submitted other than burglary and receiving by acquiring. UJI 14-6004 should not be used with this instruction because the two are in contradiction. If there are other charges, to which this instruction is not applicable, UJI 14-6004 may be tailored to refer solely to those counts and may be given with this instruction.

2. Use the parenthetical phrase if the charge of receiving by keeping or receiving by disposing is also submitted. If no charge of receiving by keeping or disposing is submitted, the parenthetical phrase should be omitted.

3. Use this bracketed phrase if charges other than burglary and receiving are submitted. In some cases it also may be necessary to identify the counts, such as cases in which there are other charges of burglary or receiving to which this instruction is not applicable. If the only charges that are submitted are burglary and receiving by acquiring, then this bracketed phrase should be omitted.

4. Use appropriate bracketed alternative.

5. Use these bracketed provisions if the issue of not guilty by reason of insanity is submitted to the jury.

**Committee commentary. —** This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. *See* committee commentary to UJI 14-6015.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 13 Am. Jur. 2d Burglary §§ 67 to 73; 66 Am. Jur. 2d Receiving Stolen Property § 33; 75B Am. Jur. 2d Trial §§ 1436 to 1440, 1793 to 1797.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

12A C.J.S. Burglary §§ 127 et seq.; 23A C.J.S. Criminal Law §§ 1393, 1402; 76 C.J.S. Receiving Stolen Goods § 1 et seq.; 88 C.J.S. Trial §§ 298, 322; 89 C.J.S. Trial §§ 492, 496, 510, 521.

## 14-6017. Verdicts; single or multiple defendants; burglary, larceny and receiving by acquiring; insanity.[1]

In this case [in connection with the charges of burglary, larceny and receiving (by acquiring)[2] stolen goods][3], there are [five][4] [six] possible verdicts:

(1) guilty of burglary, guilty of larceny and not guilty of receiving (by acquiring)[2];

(2) guilty of burglary, not guilty of larceny and not guilty of receiving (by acquiring)[2];

(3) guilty of larceny, not guilty of burglary and not guilty of receiving (by acquiring)[2];

(4) guilty of receiving (by acquiring)[2], not guilty of burglary and not guilty of larceny;

(5) not guilty of burglary, not guilty of larceny and not guilty of receiving (by acquiring)[2];

[(6) not guilty by reason of insanity.[5]

Only one of the possible verdicts may be signed by you as to these charges [as to each defendant]. If you have agreed upon one verdict as to these charges [as to a defendant], that form of verdict is the only form to be signed as to these charges [as to that defendant]. The other forms as to these charges are to be left unsigned.

[Even if you determine from all the evidence that a defendant committed an offense, if you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity and sign only the not guilty by reason of insanity form.][5]

## USE NOTE

1. This instruction should be given if charges of burglary, larceny and of receiving (by acquiring) stolen property, relate to the same property. This instruction supplants UJI 14-6011; but UJI 14-6011 may be used with this instruction if counts are submitted other than burglary, larceny and receiving by acquiring. UJI 14-6004 should not be used with this instruction because the two are in contradiction. If there are other charges to which this instruction is not applicable, UJI 14-6004 may be tailored to refer solely to those counts and may be given with this instruction.

2. Use the parenthetical phrase if the charge of receiving by keeping or receiving by disposing is also submitted. If no charge of receiving by keeping or disposing is submitted, the parenthetical phrase should be omitted.

3. Use this bracketed phrase if charges other than burglary, larceny and receiving are submitted. In some cases it also may be necessary to identify the counts, such as cases in which there are other charges of burglary, larceny or receiving to which this instruction is not applicable. If the only charges that are submitted are burglary, larceny and receiving by acquiring, then this bracketed phrase should be omitted.

4. Use appropriate bracketed alternative.

5. Use these bracketed provisions if the issue of not guilty by reason of insanity is submitted to the jury.

**Committee commentary.** — This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. *See* commentary to UJI 14-6015.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary §§ 67 to 73; 50 Am. Jur. 2d Larceny § 180 et seq.; 66 Am. Jur. 2d Receiving Stolen Property § 33; 75B Am. Jur. 2d Trial §§ 1436 to 1440, 1793 to 1797.

Failure of verdict on conviction of larceny or embezzlement to state value of property, 79 A.L.R. 1180.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

12A C.J.S. Burglary §§ 127 et seq.; 23A C.J.S. Criminal Law §§ 1393, 1402; 52A Larceny §§ 142, 155; 76 Receiving Stolen Goods §§ 21, 22; 88 C.J.S. Trial §§ 298, 322; 89 C.J.S. Trial §§ 492, 496, 510, 521.

## 14-6018. Special verdict; kidnapping.[1]

If you find the defendant guilty of kidnapping [as charged in Count _____][2], then you must determine whether the defendant [voluntarily freed _____ (*name of victim*) in a safe place] [and] [whether the defendant inflicted physical injury upon _____ (*name of victim*)] [and] [whether a sexual offense was committed][3]. You must complete the special [form] [forms] to indicate your findings.

[For you to make a finding of "yes," [to the first question,][4] the state must prove to your satisfaction beyond a reasonable doubt that the defendant did not voluntarily free _____ (*name of victim*) in a safe place.]

[For you to make a finding of "yes," [to the second question,][4] the state must prove to your satisfaction beyond a reasonable doubt that the defendant inflicted physical injury upon _____ (*name of victim*).]

[For you to make a finding of "yes," [to the third question,][4] the state must prove to your satisfaction beyond a reasonable doubt that the defendant committed a sexual offense upon _____ (*name of victim*).]

(style of case)

QUESTION [1][4]

Do you unanimously find beyond a reasonable doubt that the defendant did not voluntarily free _____ (*name of victim*) in a safe place?

_____ (Yes or No)

_____

FOREPERSON

(style of case)

QUESTION [2][4]

Do you unanimously find beyond a reasonable doubt that the defendant inflicted physical injury upon _____ (*name of victim*)?

_____ (Yes or No)

_____

FOREPERSON

(style of case)

QUESTION [3][4]

Do you unanimously find beyond a reasonable doubt that the defendant committed a sexual offense upon _____ (*name of victim*)?[5]

_____ (Yes or No)

_____

FOREPERSON

USE NOTE

1. This instruction is to be used if there is an issue as to whether the defendant voluntarily freed the victim in a safe place or as to whether the defendant inflicted physical injury on the victim or as to whether the defendant committed a sexual offense upon the victim. Kidnapping is a second degree offense unless the state meets its burden under Section 30-4-1(B) of proving that the defendant did not voluntarily free the victim in a safe place or inflicted physical injury or a sexual offense upon the victim. The defendant may be found guilty of first degree kidnapping if the jury answers any or all of the above questions, "yes." If none of the questions is answered "yes," the defendant is guilty of second degree kidnapping.

2. Insert the count number if more than one count is charged.

3. Use applicable alternative or alternatives.

4. For use if more than one question is given to the jury.

5. Unless the court has instructed on the essential elements of the sexual offense, these elements must be given in a separate instruction, generally worded as follows: "For you to find that the defendant committed _____, the state must prove to your satisfaction beyond a reasonable doubt that _____." (*Add elements of the sexual offense unless they are set out in another essential elements instruction.*) [Effective for crimes occurring after February 3, 2004.]

[Adopted, effective August 1, 1997; as amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009; by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

**Committee commentary.** — The uniform jury instructions do not include any definition of "physical injury" because the term is not defined by statute or case law.

[As adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

**Cross references.** — *See* Subsection B of Section 30-4-1 NMSA 1978.

**The 2009 amendment,** approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, in the first paragraph, after "whether the defendant inflicted", deleted "great bodily harm on" and inserted "physical injury upon", and after "*(name of victim)*", inserted "[and] [whether a sexual offense was committed]"; in the third paragraph, after "beyond a reasonable doubt that the defendant inflicted", deleted "great bodily harm on" and inserted "physical injury upon"; added the fourth paragraph; in "Question [2]", after "reasonable doubt that the defendant inflicted", deleted "great bodily harm on" and inserted "physical injury upon"; and added "Question [3]".

**The 2010 amendment**, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 1, in the second sentence, before "a sexual offense upon the victim", deleted "All kidnapping is first degree kidnapping unless the defendant voluntarily frees the victim and does not inflict physical injury upon the victim and does not commit"; and added the current language.

**Failure to provide use instructions for special verdict forms.** — Where defendant's spouse had a series of affairs with the victim; defendant entered the estranged spouse's apartment, confronted the victim with a gun, bound the victim with duct tape, and after defendant and the victim had a conversation, defendant cut the duct tape from the victim and drove the victim to defendant's motel where defendant killed the victim; defendant subsequently kidnapped the spouse; defendant was charged with first degree kidnapping; because defendant claimed that defendant voluntarily released the victim in

a safe place without inflicting physical harm, the trial court provided the jury with special verdict forms asking Questions 1 and 2 according to UJI 14-6018 NMRA; the trial court inadvertently failed to provide the use instructions that precede the special verdict questions; at trial, defendant did not object to the failure to provide the instructions; the prosecutor discussed the special verdict forms in closing argument and explained that the jury would decide whether defendant voluntarily freed the victim; the questions on the special verdict forms were self-explanatory; and the jury understood the forms well enough to distinguish between the kidnapping of the victim and the spouse because the jury found that defendant had not voluntarily freed the victim but had voluntarily freed the spouse; the failure to provide the jury with the use instructions did not constitute fundamental error. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-002.

## 14-6019. Special verdict; tampering with evidence.[1]

Do you unanimously find beyond a reasonable doubt that _____ (*name of defendant*) committed tampering with evidence related to _____ (*identify crime or violation*)[2]?

_____ (Yes or No)

_____
FOREPERSON

USE NOTE

1. Insert the name of the offense or offenses that fit within one category of crimes as defined in Section 30-22-5(B) NMSA 1978. A form of verdict must be submitted to the jury for each category of crime for which tampering with evidence is alleged to have been committed in order for the sentencing court to determine the permissible range of punishment under Section 30-22-5 NMSA 1978.

2. Insert the name of the offense. Do not leave blank for the jury to complete. If a violation for probation or parole is at issue, the instruction must identify the underlying offense for which the defendant was serving probation or parole. *See State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754 (upholding tampering with evidence conviction for tampering with urine specimen required under terms of defendant's probation).

[Adopted by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013.]

# Part C
# Final Instruction

## 14-6020. Final instruction.1

I will now ask you to retire to the jury room to begin your deliberations. You will be provided a copy of the jury instructions and the exhibits introduced as evidence [will be made available to you].[2]

Prior to beginning your deliberations you will need to select one of you to act foreperson. That person will preside over your deliberations and will speak for the jury here in court.

Forms of verdict have been prepared for your use.[3]

You will take these forms to the jury room; when you have reached unanimous agreement as to your verdict, the foreperson will sign the forms which express your verdict. You will then return all forms of verdict, these instructions and any exhibits to the courtroom.

_____ and _____ (name of each alternate juror) are alternate jurors in this case and therefore will need to remain in the courtroom.

USE NOTE

1. This instruction must be given in every case.

2. The bracketed language may be used if the exhibits will not be sent to the jury room.

3. Forms should be read at this time. The forms should be grouped according to defendants and counts. Lesser included offenses should be given in sequence after the greater offense.

[UJI Crim. 50.20; approved, effective September 1, 1975; as amended, effective November 1, 2003.]

**Committee commentary.** — This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.09.

**ANNOTATIONS**

**The 2003 amendment,** effective November 1, 2003, added the first and last paragraphs and substituted "prior to beginning your deliberations you will need to" for "you will now retire to the jury room and" and "foreperson" for "foreman" in the first sentence of the second paragraph, "use" for "convenience" in the third paragraph, and "foreperson" for "foreman" in the first sentence of the fourth paragraph. The amendment also inserted Use Note 2 and redesignated former Use Note 2 as present Use Note 3.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1437, 1448 to 1458, 1503, 1573 to 1579, 1647 et seq.

Verdict as affected by agreement in advance among jurors to abide by less than unanimous vote, 73 A.L.R. 93.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 A.L.R. 899.

Permitting dying declarations to be taken into jury room, 114 A.L.R. 1519.

Permitting or refusing to permit jury in criminal case to examine or take into jury room the indictment or information or other pleading or copy thereof, 120 A.L.R. 463.

Propriety of instruction in criminal case as to the importance of enforcement of law, or duty of jury in that regard, 124 A.L.R. 1133.

Propriety of permitting jury to take x-ray picture, introduced in evidence, with them into jury room, 10 A.L.R.2d 918.

Requirement of unanimity of verdict in proceedings to determine sanity of one accused of crime, 42 A.L.R.2d 1468.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 A.L.R.2d 1288, 15 A.L.R.4th 1127, 88 A.L.R.4th 711.

Haste or shortness of time in which jury reached verdict, 91 A.L.R.2d 1238.

Inconsistency of criminal verdict with verdict on another indictment or information tried at the same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Propriety of reference, in instruction in criminal case, to juror's duty to God, 39 A.L.R.3d 1445.

Validity and efficacy of accused's waiver of unanimous verdict, 97 A.L.R.3d 1253.

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

23A C.J.S. Criminal Law § 1391; 88 C.J.S. Trial §§ 297, 324, 343; 89 C.J.S. Trial §§ 468, 494.

## 14-6021. Pre-deliberation oath to interpreter.

Do you solemnly swear or affirm that you will not interfere with the jury's deliberations in any way by expressing any ideas, opinions or observations that you may have during deliberations and that you will strictly limit your role during deliberations to interpreting?

USE NOTE

This instruction must be read before deliberations whenever a non-English speaking juror or hearing-impaired juror is serving on the jury.

[Approved by Supreme Court Order 07-8300-31, effective December 17, 2007.]

**Committee commentary.** — This instruction is modeled on Appendix A to *State v. Pacheco*, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

**ANNOTATIONS**

**Cross references.** — For the court interpreter code of professional responsibility, *see* 23-111 NMRA.

## 14-6022. Pre-deliberation instruction to jury.1

Ladies and gentlemen, we have at least one [non-English speaking] [hearing-impaired][2] juror who is participating in this case. New Mexico law permits all citizens to serve on a jury whether or not [English is their first language] [they are hearing-impaired].[2] You must include [this juror] [these jurors] in all deliberations and discussions on this case. To help you communicate, the [juror] [jurors] will be using the services of the official court interpreter. The following rules govern the conduct of the interpreter and the jury:

1. The interpreter's only function in the jury room is to interpret between [English and the non-English-speaking (juror) (jurors') native language] [speech and sign language].[2]

2. The interpreter is not permitted to answer questions, express opinions, have direct conversations with other jurors or participate in your deliberations.

3. The interpreter is only permitted to speak directly to a member of the jury to ensure that the interpreter's equipment is functioning properly and to advise the jury foreperson if a specific interpreting problem arises that is not related to the factual or legal issues in the case.

4. No gesture, expression, sound or movement made by the interpreter in the jury room should influence you opinion or indicate how you should vote.

5. If you can speak both English and [the language of the non-English speaker] [read sign language],[2] you must speak only English in the jury room so the rest of the jury is not excluded from any conversation.

6. Leave all interpretations to the official court interpreter. The interpreter is the only person permitted to interpret conversations inside the jury room and testimony in the courtroom.

7. You must immediately report any deviation from these rules by submitting a note identifying the problem to the judge or court personnel.

USE NOTE

1. This instruction must be read before deliberations whenever a non-English speaking juror or hearing-impaired juror is serving on the jury.

2. Use only the applicable alternative or alternatives.

[Approved by Supreme Court Order 07-8300-31, effective December 17, 2007.]

**Committee commentary.** — This instruction is modeled on Appendix B to *State v. Pacheco*, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

# Part D
# Shotgun Instruction

## 14-6030. Shotgun instruction.

It is your duty, as jurors, to consult with one another, and to deliberate with a view of reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

I hope that after further deliberation you may be able to agree upon a verdict. That is why we try cases, to try to dispose of them and to reach a common conclusion, if you can do so, consistent with the conscience of the individual members of the jury. The

court suggests that in deliberating you each recognize that you are not infallible, that you hear the opinion of the other jurors, and that you do it conscientiously with a view to reaching a common conclusion, if you can.

USE NOTE

No instruction on this subject shall be given.

**Committee commentary.** — The language of this instruction was derived from and is identical with UJI 13-1904. It was the approved shotgun instruction for criminal cases. *State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). The use of the instruction has continued to generate appellate issues. *See*, e.g., *State v. Padilla,* 86 N.M. 695, 526 P.2d 1288 (Ct. App. 1974); *State v. Romero,* 86 N.M. 674, 526 P.2d 816 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974); *State v. Cruz,* 86 N.M. 341, 524 P.2d 204 (Ct. App. 1974).

In other jurisdictions, the use of this type of instruction has been questioned as coercive and generative of appeals. *State v. Thomas,* 86 Ariz. 161, 342 P.2d 197 (1959); *State v. Randall,* 137 Mont. 534, 353 P.2d 1054, 100 A.L.R.2d 171 (1960). *See* Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge, 31 U. Chi. L. Rev. 386 (1963). *See* generally Annot., 100 A.L.R.2d 177 (1965). The committee believed that the use of the shotgun instruction was counterproductive and that the duty to consult instruction should be sufficient. *See* UJI 14-6008.

**ANNOTATIONS**

**Shotgun instruction.** — Where the foreperson of the jury in the presence of the defendant and all counsel, but not in the presence of the jury, informed the court of the jury's numerical split with a minority favoring a not guilty verdict, and the court instructed the foreperson to "read the jury instructions and consider the matter after you have read the instructions together, and let me know at that point. I don't want to force you to do anything if it is not going to be fruitful, but I do want you to read the instructions to the jury together, and then discuss it again and see where you end up", the instruction was a prohibited shotgun instruction. *State v. Cortez*, 2007-NMCA-054, 141 N.M. 623, 159 P.3d 1108, cert. granted, 2007-NMCERT-005.

**Grounds for relief on fundamental error not established by "shotgun" instruction.** — "A shotgun" or supplementary instruction given by the court some time after the jury had received the case for its deliberations and had failed to reach a verdict does not establish grounds for relief on fundamental error. *State v. Travis,* 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968).

**Nor abuse of court discretion.** — The trial court did not abuse its discretion in giving a shotgun instruction after the jury had been out three hours, and where the trial was short, the issues were relatively simple and the objection made by counsel did not raise the question of timeliness. *State v. Hatley,* 72 N.M. 377, 384 P.2d 252 (1963).

**But greatest caution should be exercised.** — While the appropriateness of a "shotgun" instruction is largely within the discretion of the trial court, certainly the greatest caution should be exercised in avoiding an abuse of that discretion. *State v. White,* 58 N.M. 324, 270 P.2d 727 (1954).

**And coercive conduct requires reversal.** — An inquiry as to numerical division followed by the shotgun instruction was found to be coercive conduct requiring reversal. *See State v. Aragon,* 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

**Actual deliberation time is one of various factors trial court must weigh** in determining whether to give the shotgun instruction. *State v. Romero,* 86 N.M. 674, 526 P.2d 816 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

**And instruction is appropriate after the jury has deliberated for some time** without reaching a verdict, but it is improper to unduly hasten a jury in its consideration of the case or coerce the jury into an agreement. *State v. Lucero,* 88 N.M. 441, 541 P.2d 430 (1975).

**Judge's proper action when jury unable to arrive at verdict.** — When a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge not only can, but should, communicate with the jury, but should only do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it may consider further deliberations, but not that it must consider further deliberations. *State v. McCarter,* 93 N.M. 708, 604 P.2d 1242 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75B Am. Jur. 2d Trial §§ 1437, 1448 to 1458, 1647 et seq., 1580 et seq.

Threat to dismiss jury in criminal case for term, unless they could agree on verdict as coercion, 10 A.L.R. 421.

Comments and conduct of judge calculated to coerce or influence jury to reach verdict in criminal case, 85 A.L.R. 1420.

Right of jurors to sustain their verdict by affidavits or testimony to effect that they were not influenced by improper matters which came before them, 93 A.L.R. 1449.

Haste or shortness of time in which jury reached verdict, 91 A.L.R.2d 1238.

Time jury may be kept together on disagreement in criminal case, 93 A.L.R.2d 627.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge) - modern cases, 97 A.L.R.3d 96.

23A C.J.S. Criminal Law § 1391; 88 C.J.S. Trial §§ 297, 320, 343, 389; 89 C.J.S. Trial §§ 468, 481, 494.

### 14-6040. Post-trial instruction.

You have now completed your service as jurors in this case. The court thanks you for your efforts in this matter.

People may want to talk to you about your service or the jury's deliberations. You are now free to discuss the case with others, but you do not have to. It is your choice. If anyone persists after you have told them that you do not wish to talk about the case, please inform my office.

USE NOTE

This instruction is to be given in every case before the jury is discharged.

[Approved, effective October 15, 2002.]

# CHAPTER 61 to 69
# (Reserved)

# CHAPTER 70
# Sentencing Proceedings

## Part A
## Habitual Criminal

### 14-7001 to 14-7007. Withdrawn.

**Committee commentary.** — The habitual criminal instructions were drafted under prior law. Section 31-18-20 NMSA 1978 was amended by Laws 1983, Chapter 127, Section 2 to provide for a determination by the court, rather than a jury, if the defendant is the

same person who was convicted of the previous crime or crimes alleged to have been committed by the defendant.

**Withdrawals.** — Pursuant to a court order dated May 2, 1989, these instructions, the General Use Note preceding the instructions, and the Use Note and committee commentary following each instruction, were withdrawn effective for cases filed in the district courts on or after August 1, 1989.

# Part B
# Death Penalty

## 14-7010. Explanation of death penalty sentencing proceeding; single aggravating circumstance.1

**LADIES AND GENTLEMEN:**

I will outline the procedure for you to follow in deciding the defendant's sentence. The law provides that if you unanimously agree beyond a reasonable doubt that the aggravating circumstance charged by the state is present you shall decide whether the defendant will be sentenced to life imprisonment or death.

The state has charged that the following aggravating circumstance was present:[2]

[at the time of the murder _____ *(name of peace officer)* was a peace officer and was performing the duties of a peace officer];

[the murder of _____ *(name of victim)* was committed during [the commission of]/f [an attempt to commit][2] kidnapping];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual contact of a minor];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual penetration];

[the murder of _____ *(name of victim)* was committed while the defendant was attempting to escape from a penal institution];

[at the time of the murder, _____ *(name of victim)* was an inmate of a penal institution];

[at the time of the murder _____ *(name of victim)* was a person lawfully on the premises of a penal institution];

[at the time of the murder _____ *(name of victim)* was an employee of the corrections department];

[the murder of _____ *(name of victim)* was for hire];

[the murder was of a witness to a crime];

[the murder was of a person likely to become a witness to a crime];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will first decide whether this aggravating circumstance was present beyond a reasonable doubt. If you unanimously agree beyond a reasonable doubt that this aggravating circumstance was present, you must then weigh this aggravating circumstance against any mitigating circumstances.

In determining whether or not this aggravating circumstance exists you must not consider anything you may have read or heard about the case outside the courtroom.

You may give testimony of any witness whatever weight you believe it deserves. It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful.

[You are not permitted to take notes during the trial. In your deliberations you must rely on your individual memories of the evidence in the case.][3]

[You are permitted to take notes during trial, and the court will provide you with note taking material if you wish to take them. However, if you choose to take notes, be sure that your note taking does not interfere with your listening to and considering all the evidence. It is difficult to take notes and at the same time pay attention to what a witness is saying. In your deliberations you should rely on your own memory of the evidence rather than on the written notes of another juror. Do not take your notes with you at the end of the day or discuss them with anyone before you begin your deliberations.][4]

If an exhibit is admitted in evidence, you should examine it yourself and not talk about the exhibit with other jurors until you retire to deliberate.

Ordinarily the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question unanswered after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to me. Your name as juror should appear below the question. I must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if I deem the question to be proper.

No statement, ruling, remark or comment which I make during the course of the proceeding is intended to indicate my opinion as to how you should decide the issue or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment without regard to any biases or prejudices that you may have.

The prosecuting attorney will now make an opening statement if [he] [she] desires. The defendant's attorney may make an opening statement if [he] [she] desires or may wait until later in the proceeding to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [he] [she] expects the evidence to show.

USE NOTE

1. This instruction may only be used in death penalty sentencing proceedings where defendant has been convicted of a single murder and a single aggravating circumstance has been charged. It is to be given before opening statements. This instruction does not go to the jury room. If the defendant has been convicted of more than one capital offense, use UJI 14-7011. If more than one aggravating circumstance is charged for the same murder, use UJI 14-7011. This instruction may be modified as appropriate in a bifurcated sentencing proceeding.

2. Use only the applicable alternative.

3. This instruction leaves it to the discretion of the judge as to whether or not jurors will be permitted to take notes during the proceeding.

4. If the court permits the taking of notes, the court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations.

[As amended, effective August 1, 2001.]

**Committee commentary.** — This instruction may only be used in death penalty sentencing proceedings where the state has charged a single aggravating circumstance is present. It is to be used instead of using UJI 14-101.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, in the first paragraph substituted "unanimously agree beyond a reasonable doubt that" for "find," substituted "the defendant" for "he"; in the list of aggravating circumstances, deleted the phrase "[the murder was of a peace officer who was performing his duties]," added the clause beginning "[at the time of the murder _____ (name of peace officer)," inserted " _____ (name of victim)" throughout; deleted the word "of" before "a person" throughout; added "the murder of" before the name of victim; added the phrase "beyond a reasonable doubt" in the first sentence after the list of aggravating circumstances; substituted "whether or not this aggravating circumstance exists" for "the sentence" after "In determining"; rewrote the paragraph beginning "You are not permitted to take notes"; added the paragraph beginning "You are permitted to take notes during the trial"; deleted the phrase "representing the parties" after "attorneys," substituted "pertinent evidence" for "the evidence relative to sentencing," substituted "find himself or herself with a question unanswered" for "have a question," substituted "me" or "I" for "the court"; deleted the phrase "impartially and" before "without regard"; substituted "[he] [she]" for "[he]" after "the prosecuting attorney," added the phrase "or may wait until later in the proceeding to do so"; substituted "expects the evidence to show" for "intends to prove"; added the final sentence of Use Note 1; substituted "alternative" for "bracketed alternative" in Use Note 2; added Use Notes 3 and 4; deleted from the committee commentary "At the court's discretion and in accordance with Rules 11-401 and 11-402 NMRA, evidence admitted during the trial in which the defendant was found guilty of murder may be admitted during the sentencing proceeding"; and made stylistic changes.

**No requirement that aggravating circumstances outweigh mitigating circumstances beyond reasonable doubt.** — There is no requirement in the Capital Felony Sentencing Act or the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State v. Finnell,* 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

## 14-7011. Explanation of death penalty sentencing proceeding; multiple aggravating circumstances.1

**LADIES AND GENTLEMEN:**

I will outline the procedure for you to follow in deciding the defendant's sentence. The law provides that if you unanimously agree beyond a reasonable doubt that one or more of the aggravating circumstances charged by the state are present you shall decide whether the defendant will be sentenced to life imprisonment or death.

The state has charged that the following aggravating circumstances were present:

[at the time of the murder _____ *(name of peace officer)* was a peace officer and was performing the duties of a peace officer][2];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] kidnapping];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual contact of a minor];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual penetration];

[the murder of _____ *(name of victim)* was committed while attempting to escape from a penal institution];

[at the time of the murder, _____ *(name of victim)* was an inmate of a penal institution];

[at the time of the murder, _____ *(name of victim)* was lawfully on the premises of a penal institution];

[at the time of the murder of _____ *(name of victim)* was an employee of the corrections department];

[the murder of _____ *(name of victim)* was for hire];

[the murder was of a witness to a crime];

[the murder was of a person likely to become a witness to a crime];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will first consider each of the aggravating circumstances separately. You will then decide whether or not each one of the aggravating circumstances is present beyond a reasonable doubt. If you unanimously agree beyond a reasonable doubt that one or more of these aggravating circumstances were present, you must then weigh such aggravating circumstances against any mitigating circumstances.

In determining whether or not an aggravating circumstance exists, you must not consider anything you may have read or heard about the case outside the courtroom.

You may give the testimony of any witness whatever weight you believe it deserves. It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful.

[You are not permitted to take notes during the sentencing proceeding. In your deliberations you must rely on your individual memories of the evidence in the case.][3]

[You are permitted to take notes during the sentencing proceeding, and the court will provide you with note taking material if you wish to take them. However, if you choose to take notes, be sure that your note taking does not interfere with your listening to and considering all the evidence. It is difficult to take notes and at the same time pay attention to what a witness is saying. In your deliberations you should rely on your own memory of the evidence rather than on the written notes of another juror. Do not take your notes with you at the end of the day or discuss them with anyone before you begin your deliberations.][4]

If an exhibit is admitted in evidence, you should examine it yourself and not talk about the exhibit with other jurors until you retire to deliberate.

Ordinarily the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to me. Your name as juror should appear below the question. I must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if I deem the question to be proper.

No statement, ruling, remark or comment which I make during the course of the proceeding is intended to indicate my opinion as to how you should decide the issue or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment without regard to any biases or prejudices that you may have.

The prosecuting attorney will now make an opening statement if [he] [she] desires. The defendant's attorney may make an opening statement if [he] [she] desires or may wait until later in the proceeding to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [he] [she] expects the evidence to show.

USE NOTE

1. This instruction may only be used in death penalty sentencing proceedings when the defendant has been convicted of multiple murders or when the state has charged that multiple aggravating circumstances were present during a single murder. It is to be given before opening statements. This instruction does not go to the jury room. There must be an independent factual basis for each aggravating circumstance. *See State v.*

*Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728. Aggravating circumstances to be given to the jury should be consecutively numbered. If the judge decides to bifurcate the process by having the jury find the presence of an aggravating circumstance before considering any mitigating circumstances, this instruction may be modified as appropriate.

2. Use only the applicable alternative.

3. This instruction leaves it to the discretion of the judge as to whether or not jurors will be permitted to take notes during the proceeding.

4. If the court permits the taking of notes, the court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations.

[As amended, effective August 1, 2001.]

**Committee commentary.** — This instruction is to be used only in death penalty sentencing proceedings where the state has charged multiple aggravating circumstances are present. It is to be used instead of using UJI 14-101.

Although this procedure is not recognized in any court rule, the committee recognizes that some judges are bifurcating the penalty phase.

## ANNOTATIONS

**The 2001 amendment,** effective August 1, 2001, in the first paragraph substituted "unanimously agree beyond a reasonable doubt that" for "find," substituted "the defendant" for "he"; in the list of aggravating circumstances, deleted the phrase "[with respect to the murder of _____ (name of victim), the murder was of a peace officer who was performing his duties]," added the clause beginning "[at the time of the murder _____ (name of peace officer)," inserted " _____ (name of victim)" throughout; substituted "victim" for "deceased" throughout; deleted the phrase "with respect to" throughout; added "the murder of" before name of victim, and deleted "the murder" after name of victim; deleted the word "AND" before successive items in the list of aggravating circumstances; substituted "consider each" for "decide whether one or more" after "first," and added the phrase beginning "separately" through "reasonable doubt"; substituted "whether or not this aggravating circumstance exists" for "the sentence" after "In determining"; rewrote the paragraph beginning "You are not permitted to take notes"; added the paragraph beginning "You are permitted to take notes during the trial"; deleted the phrase "representing the parties" after "attorneys," substituted "pertinent evidence" for "the evidence relative to sentencing," substituted "find himself or herself with a question unanswered" for "have a question," substituted "me" or "I" for "the court"; deleted the phrase "impartially and" before "without regard"; substituted "[he] [she]" for "[he]" after "the prosecuting attorney," added the phrase "or may wait until later in the proceeding to do so"; substituted "expects the evidence to

show" for "intends to prove"; added the sentences beginning "There must be an independent factual basis" through the end of Use Note 1; substituted "alternative" for "bracketed alternative" in Use Note 2; added Use Notes 3 and 4; deleted from the committee commentary "At the court's discretion and in accordance with Rules 11-401 and 11-402 NMRA, evidence admitted during the trial in which the defendant was found guilty of murder may be admitted during the sentencing proceeding"; added the sentence "Although this procedure is not recognized in any court rule, the committee recognizes that some judges are bifurcating the penalty phase"; and made stylistic changes.

**No requirement that aggravating circumstances outweigh mitigating circumstances beyond reasonable doubt. —** There is no requirement in the Capital Felony Sentencing Act or the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State v. Finnell,* 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

## 14-7012. Death penalty sentencing proceeding; consideration of evidence.[1]

**LADIES AND GENTLEMEN:**

You have heard all of the evidence that is to be presented for this sentencing proceeding. In deciding the sentence you shall consider all of the evidence admitted during the trial[2] [and all of the evidence admitted during this sentencing proceeding][3].

Now the lawyers will address you. What the lawyers say is not evidence. It is an opportunity for the lawyers to discuss the evidence and the law as I have instructed you. The state has the right to speak first; the defense may then speak; the state may then reply[4].

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding after all the evidence has been completed. This instruction may be modified as appropriate if the judge decides to bifurcate the sentencing process by having the jury find the presence of an aggravating circumstance before proceeding further.

2. Upon request of a party, the court may modify this instruction when evidence has been admitted for a limited purpose during the trial. A separate additional instruction may be necessary to explain how this evidence is to be considered during the sentencing proceeding.

3. Use bracketed phrase if additional evidence was admitted during the sentencing proceeding.

4. If the sentencing proceeding has been bifurcated, this instruction must be given at each phase and may need to be modified.

[As amended, effective August 1, 2001.]

**Committee commentary.** — The second phase of a bifurcated proceeding involves a weighing process. Specifically, the jury is charged with balancing the aggravating and mitigating circumstances. The state does not necessarily, therefor, have the right to speak first. As a result some trial courts in New Mexico have varied the order of argument in this second phase of a bifurcated sentencing proceeding.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted "consideration of evidence" for "issue of guilt" in the description; substituted "shall" for "must"; substituted "what the lawyers say" for "what is said"; added the sentence beginning "This instruction may be modified" through the end of Use Note 1; added Use Note 2; redesignated former Use Note 2 as 3; added Use Note 4.

## 14-7013. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances, is withdrawn, effective August 1, 2001.

## 14-7014. Death penalty sentencing proceeding; aggravating circumstances; murder of a peace officer; essential elements.

The state has charged the aggravating circumstance of murder of a peace officer. Before you may find the aggravating circumstance of murder of a peace officer, you must find that the state has proved to your satisfaction beyond a reasonable doubt that at the time _____ *(name of victim)* was murdered, _____ *(name of victim)*:

1. was a peace officer;

2. was performing the duties of a peace officer;

3. the defendant knew or should have known that _____ *(name of victim)* was a peace officer; [A peace officer is a public employee whose employment duties include maintaining the public order;][2] and

4. the defendant intended to kill or acted with a reckless disregard for human life and knew that [his] [her] acts carried a grave risk of death.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. If there is an issue as to whether or not the victim was a "peace officer" the bracketed definition is given.

[As amended, effective August 1, 2001.]

**Committee commentary.** — "Peace officer" is defined in Section 30-1-12 NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. *See State v. Rhea*, 94 N.M. 168, 608 P.2d 164 (1980). The question of whether the peace officer was lawfully discharging the duties of a peace officer is also normally a question of law to be decided by the court. *See* committee commentary to UJI 14-2201.

The committee anticipates the defense of a peace officer not being in the lawful discharge of duty being raised. As there are a number of ways and situations in which this defense may be raised, it was not feasible to draft an essential elements instruction on this issue. *See State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978) for a discussion of "lawful discharge of duties".

The requirement that the defendant intended to kill or acted with reckless disregard has been added to this instruction to be consistent with *Tison v. Arizona*, 481 U.S. 131, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

*See also* committee commentary to UJI 14-7013.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-20A-5A NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, added the first sentence; added Paragraphs 3 and 4; added Use Note 2; in the committee commentary substituted "the duties of a peace officer" for "his duties," deleted "and Reporter's Addendum Number 2. In the event that there is a question of fact as to whether the victim in fact a peace officer or in the lawful discharge of his duties, a special instruction should be drafted." after the reference to UJI 14-2201 in the first paragraph; deleted "No intent to kill nor knowledge that victim was a peace officer is required to impose the death penalty where a peace officer is murdered" after the phrase "lawful discharge of duties"; and added the sentence beginning "The requirement that the defendant intended to kill," and deleted "A defendant who was not 18 years of age or older at the time of the commission of the capital felony may not be punished by death. Section 31-18-14 NMSA 1978" after that sentence.

## 14-7015. Death penalty sentencing proceeding; aggravating circumstances; murder in the commission of kidnapping; essential elements.1

The state has charged the aggravating circumstance of murder in [the commission of][2] [an attempt to commit] a kidnapping. Before you may find the aggravating circumstance of murder in [the commission of][2] [an attempt to commit] kidnapping, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of][2] [an attempt to commit] kidnapping was committed;

2. _____ *(name of victim)* was murdered while _____ *(name of defendant)* was [committing][2] [or] [attempting to commit] kidnapping; and

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140, Underlying felony offense; sample instruction. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001.]

**Committee commentary.** — The penalty of death may be imposed if the defendant committed murder while committing or attempting to commit one of three felonies: kidnapping, criminal sexual contact of a minor or criminal sexual penetration. Even if the jury has found the defendant guilty of a felony murder in the commission of a kidnapping, it must also find that the murder was committed with an intent to kill in order to find this aggravating circumstance.

If the sentencing jury has not previously been instructed pursuant to UJI 14-404, Kidnapping and UJI 14-2801, Attempt to Commit a Felony; UJI 14-921 to 14-936, Criminal Sexual Contact of a Minor; or UJI 14-941 to 14-961, Criminal Sexual Penetration, the appropriate instruction must be given.

If UJI 14-7016 or 14-7017 are to be given with this instruction, there must be evidence of an independent factual basis for each of the offenses. Unless there is an independent separate factual basis that each offense has been committed, UJI 14-7015A must be

given. For example, the evidence may create a jury issue regarding the existence of a factually separate aggravating factor of murder during the course of a kidnapping.

*See also* committee commentary to UJI 14-7013 [withdrawn] and 14-7014.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-20A-5(B) NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, added the first sentence; substituted "defendant had" for "murder was committed with" in Paragraph 3; and added the paragraph beginning "If UJI 14-7016 or 14-7017 are to be given with this instruction" in committee commentary.

## 14-7016. Death penalty sentencing proceeding; aggravating circumstances; murder in the commission of criminal sexual contact of a minor; essential elements.

The state has charged the aggravating circumstance of murder in the [commission of][2] [an attempt to commit] criminal sexual contact of a minor. Before you may find the aggravating circumstance of murder in [the commission of][2] [an attempt to commit] criminal sexual contact of a minor, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of][2] [an attempt to commit] criminal sexual contact of a minor was committed;

2. _____ *(name of victim)* was murdered while _____ *(name of defendant)* was [committing]*2* [or] [attempting to commit] criminal sexual contact of a minor; and

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140, "Underlying felony offense; sample instruction". Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001.]

**ANNOTATIONS**

**Cross references.** — *See* Section 31-20A-5(B) NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, added the first sentence; added "_____ (name of" before "defendant"; and substituted "defendant had" for "murder was committed with" in Paragraph 3.

## 14-7017. Death penalty sentencing proceeding; aggravating circumstances; murder in the commission of criminal sexual penetration; essential elements.

The state has charged the aggravating circumstance of murder in the [commission of][2] [an attempt to commit] criminal sexual penetration.

Before you find the aggravating circumstance of murder in [the commission of][2] [an attempt to commit] criminal sexual penetration, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of][2] [an attempt to commit] criminal sexual penetration was committed;

2. _____ *(name of victim)* was murdered while defendant was [committing][2] [or] [attempting to commit] criminal sexual penetration; and

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140, "Underlying felony offense; sample instruction". Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001.]

**ANNOTATIONS**

**Cross references.** — *See* Section 31-20A-5(B) NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, added the first sentence, and substituted "defendant had" for "murder was committed with" in Paragraph 3.

## 14-7018. Death penalty sentencing proceeding; aggravating circumstances; murder during attempt to escape from penal institution; essential elements.1

The state has charged the aggravating circumstance of murder with the intent to attempt to escape from a penal institution. Before you may find the aggravating circumstance of murder while attempting to escape from a penal institution, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. While attempting to escape from _____ *(name of penal institution)*, the defendant committed the murder of _____ *(name of victim)*;[2] and

2. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140, Underlying felony offense; sample instructions. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001.]

**Committee commentary.** — Subsection C of Section 31-20A-5 NMSA 1978 provides that it is an aggravating circumstance if the defendant committed the murder while attempting to escape from a penal institution. A penal institution includes penitentiary or jail. 31-18-9 NMSA 1978 (repealed by Laws 1977, Chapter 216, Section 17). The jury may have been instructed previously pursuant to UJI 14-2222, Escape From the Penitentiary, UJI 14-2221, Escape From Jail or UJI 14-202, Felony Murder. If not, the applicable escape instruction must be given along with any other instructions required by the essential elements instruction, including definitions. *See* committee commentary to UJI 14-2221 and 14-2222.

Escape from the penitentiary includes escape from other facilities under the department of corrections. *See* committee commentary to UJI 14-2222. This aggravating circumstance requires that the defendant must have intended to kill the victim.

*See also* committee commentary to UJI 14-7013 [withdrawn] and 14-7016.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added the first sentence; substituted "committed the murder of" for "murdered" in Paragraph 1; substituted "defendant had" for "murder was committed with" in Paragraph 2; and deleted "and Reporter's Addendum Number 2" after the reference to UJI 14-2221 and 14-2222 in the committee commentary.

## 14-7019. Death penalty sentencing proceeding; aggravating circumstances; murder by an inmate of another inmate, a person lawfully on the premises of a penal institution or an employee of the corrections department; essential elements.1

The state has charged the aggravating circumstance of murder of a person who was at the time [incarcerated in a penal institution][2] [or] [lawfully on the premises of a penal institution] [or] [an employee of the state corrections department].

Before you may find the aggravating circumstance of murder of [an inmate of a penal institution][2] [or] [a person lawfully on the premises of a penal institution] [or] [murder of an employee of the state corrections department], you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. At the time defendant committed the murder of _____ *(name of victim)* the _____ *(name of defendant)* was incarcerated in _____[3] *(name of penal institution)*;

2. At the time _____ *(name of victim)* was murdered _____ *(name of victim)*, was

[incarcerated in _____ *(name of penal institution)*;][2] [or]

[lawfully on the premises of _____ *(name of penal institution)*;]

[an employee of the state corrections department];

and

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is only to be used in death penalty sentencing proceedings when the victim was an inmate, a person who was lawfully on the premises of the penal institution or an employee of the state corrections department.

2. Use applicable alternatives.

3. Insert the name of the penal institution. "Penal institution" includes facilities under the jurisdiction of the state corrections department and county and municipal jails.

[Approved, effective August 1, 2001.]

**Committee commentary.** — The law requires that a capital jury's sentencing discretion be meaningfully narrowed and channeled in a way that reserves the death penalty for the most heinous of murders. "The eighth amendment mandates that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *State v. Henderson*, 109 N.M. 655, 663, 789 P.2d 603, 611 (1990) (*quoting Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976)).

One implication of the principle that the jury's sentencing discretion must be narrowed and channeled is the prohibition against "double counting", *e.g.*, in the submission of jury instructions suggesting to the jury the same set of facts constitutes more than one aggravating factor. "[D]ouble counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996); *see also Henderson*, 109 N.M. at 655, 789 P.2d at 613 (Ransom, J., concurring in part, dissenting in part, reasons that aggravating factor of murder in the course of a kidnapping and murder in the course of a sexual assault amounted to double counting under facts of case), cited with approval in *State v. Allen*, 2000-NMSC-002, P74, 128 N.M. 482, 509, 994 P.2d 728, 755. "[S]imply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven." *Henderson*, 109 N.M. at 661, 789 P.2d at 609.

The problem of double counting thus may arise when two distinct statutory aggravators overlap under the facts of a particular case. *Cf. Henderson*. In some instances, the capital felony sentencing statute appears to create situations in which one set of facts, if found by the jury, would automatically fit within multiple statutory aggravators.

For example Section 31-20A-5(D) NMSA 1978 allows the jury to consider

while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico.

Facts that would prove the existence of this aggravator also would seem to describe Section 31-20A-5(E) NMSA, which allows the jury to consider whether,

while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department].

In most cases, murder by an inmate of an employee of the corrections department automatically will constitute the murder of a person "lawfully on the premises of a penal institution in New Mexico". The committee has addressed this problem by creating a single instruction for these aggravators. The use notes provide that in an individual case the court should select the applicable alternative.

In appropriate cases, a jury question also may exist whether two alleged aggravating factors, if supported by the evidence, are factually distinct from one another under the facts found by the jury. For example, the evidence may create a jury issue regarding the existence of a factually separate aggravating factor of murder during the course of a kidnapping. In such instances, the court may need to draft jury instructions to insure a separate factual basis exists for any finding of multiple aggravators by the jury. *Cf. Allen*, 2000-NMSC-002, P76 (failure to provide definition instruction did not amount to fundamental error).

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted this instruction instead of UJI Criminal 14-7019, 14-7020 and 14-7021, and withdrew the latter two; added the introductory paragraph, and added the provisions concerning the victim being lawfully on the premises or an employee of the institution to Paragraph 2; added the phrase "Use applicable alternatives" as Use Note 2, but failed to redesignate or incorporate the existing Use Note 2, leaving two notes labeled Use Note 2; referenced Sections 31-20A-5(D) and (E) NMSA 1978; and inserted the committee commentary in place of that formerly appearing under 14-7021.

## 14-7020. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of person at penal institution while incarcerated in penal institution; essential elements, was withdrawn, effective August 1, 2001.

## 14-7021. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of employee of corrections department; essential elements, was withdrawn, effective August 1, 2001.

## 14-7022. Death penalty sentencing proceeding; aggravating circumstances; murder for hire; essential elements.

The state has charged the aggravating circumstance of murder for hire.

Before you may find the aggravating circumstance of murder for hire, you must find that the state has proved to your satisfaction beyond a reasonable doubt that:

1. The murder of _____ *(name of victim)* was committed for hire; and

2. The defendant had the intent to kill.

USE NOTE

This instruction is to be used only in a death penalty sentencing proceeding.

[As amended, effective August 1, 2001.]

**Committee commentary.** — The phrase "murder for hire" are words of common knowledge and normally requires no separate instruction.

*See* committee commentary to UJI 14-7014.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-20A-5(F) NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, added the introductory sentence, added Paragraph 2; in the Committee Comment substituted "normally requires" in place of "require," deleted the word "also" after "See," deleted the reference to "UJI and apparently mistakenly deleted the phrase "definition in the essential elements instruction" after "normally requires no separate."

## 14-7023. Death penalty sentencing proceeding; aggravating circumstances; murder of a witness; essential elements.1

The state has charged the aggravating circumstance of [murder of a witness to a crime] [or] [murder of any person likely to become a witness to a crime][2] [for the purpose of preventing the reporting of a crime][2] [or] [for the purpose of preventing testimony in a criminal proceeding] [or] [murder in retaliation for having testified in a criminal proceeding].

Before you find the aggravating circumstance of [murder of a witness to a crime][2] [or] [murder of any person likely to become a witness to a crime] [or] [murder in retaliation for having testified in a criminal proceeding], you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. _____ *(name of victim)* [was a witness to the [crime] [crimes__ [or] [was likely to become a witness to the [crime] [crimes__ of _____ *(name of separate crime or crimes)* [has testified in a criminal proceeding][3]; and

2. _____ *(name of defendant)* committed the murder of _____ *(name of victim)*

[with the motive to prevent _____ *(name of victim)* from reporting _____ *(name of crime)*, and _____ *(name of crime)* was a separate crime from the murder of _____ *(name of victim)*;][2]

[OR]

[with the motive to prevent _____ *(name of victim)* from testifying in a criminal proceeding regarding the crime of _____ *(name of crime)* and _____ *(name of crime)* was a separate crime from the murder of _____ *(name of victim)*;]

[OR]

[with the motive of retaliation for _____ *(name of victim)* having testified in a criminal proceeding.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding. This instruction may be used only if the motive for the murder was to prevent the victim from testifying or for having testified in any criminal proceeding. *See Clark v. Tansy*, 118 N.M. 486, 494, 882 P.2d 527, 535 (1995).

2. Use only applicable alternative or alternatives.

[As amended, effective August 1, 2001.]

**Committee commentary.** — Subsection G of Section 31-20A-5 NMSA 1978 has been broken into three alternatives: murder of a witness to prevent the report of a crime, murder of a witness to prevent testimony in a criminal proceeding and murder of a witness in retaliation for the witness having testified in a criminal proceeding. For a discussion of "a person likely to become a witness to a crime", *see State v. Bell*, 78 N.M. 317, 431 P.2d 50 (1967).

In those cases where the defendant intended only to intimidate the witness and not to kill him, it will be necessary to instruct on intimidation of a witness. As there is no essential elements instruction on intimidation of a witness, it will be necessary to draft

an appropriate instruction. *See* 30-24-3 NMSA 1978 for the essential elements. If the jury was instructed on this subject previously, it is not necessary to give such an instruction during this sentencing proceeding.

*See State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728; *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851; *State v. Clark*, 108 N.M. 288, 772 P.2d 322 (1989) (Clark I); *Clark v. Tansy*, 118 N.M. 486, 882 P.2d 527 (1994) (Clark II); *Clark v. Tansy*, 13 F.3d 1407 (10th Cir., 1993); *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793 (Clark III); *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990).

*See also* committee commentary to UJI 14-7013 [withdrawn] and 14-7014.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added the first paragraph; added the phrase beginning "[or] [murder of any person likely" through "in a criminal proceeding]" in the second paragraph; in Paragraph 1, substituted "the" for "a", added the phrase beginning "[crimes] [or likely to become a witness" through "criminal proceeding]"; in Paragraph 2 added "_____ (name of defendant) committed the murder of" before "(name of victim)," deleted the phrase "was murdered" after "(name of victim)," added the phrase "with the motive" before "to prevent (name of victim) from reporting," added the proviso concerning the crime being a separate crime from the murder, added the phrase "with the motive to prevent (name of victim) from testifying" through the end of the subsection; added to Use Note 1 the text after the first sentence; added in Use Note 2 the phrase "or alternatives"; in the Committee Comment noted that Subsection G of Section 31-20A-5 NMSA 1978 is now three alternatives and identified them; deleted the paragraph which read "The legislature intended to provide for the protection of a witness in any case. Therefore, an intent to kill is not required, and there can be transferred intent in this aggravating circumstance. In some cases a person could be killed during the commission of a crime, and the defendant could be prosecuted for having killed a person likely to become a witness to a crime. In such cases there must be some specific evidence independent of crime. This is a matter of proof as to motive."; added the references starting "See State v. Allen" to the end of the paragraph; and inserted the phrase "[or] [any person likely to become a witness to a crime]" in the Explanatory note.

## 14-7024. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of a person likely to be a witness; essential elements, was withdrawn, effective August 1, 2001.

## 14-7025. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of a person in retaliation for his having testified in a criminal proceeding; essential elements, was withdrawn, effective August 1, 2001.

## 14-7026. Death penalty sentencing proceeding; reasonable doubt; burden of proof.1

The burden is always on the state to prove beyond a reasonable doubt that [the aggravating circumstance was present][2] [one or more of the aggravating circumstances were present].

It is not required that the state prove the existence of an aggravating circumstance beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

USE NOTE

1. This instruction must be given in all death penalty sentencing proceedings.

2. Use applicable alternative.

[As amended, effective August 1, 2001.]

**Committee commentary.** — This instruction must be given in death penalty sentencing proceedings instead of UJI 14-5060.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. *See* Section 31-20A-3 NMSA 1978; *State v. Allen*, 2000-NMSC-002, P61, 128 N.M. 482, 994 P.2d 728; *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added the phrase in the singular to allow for one or more aggravating circumstances and made stylistic changes for grammatical correctness in the first paragraph; added Use Note 2; in the committee commentary added the reference to *State v. Allen,* added the L. Ed. 2d reference for *Gregg v. Georgia,* and deleted the explanatory comment that formerly followed the reference to Gregg.

**Specific standard for instructing jury on aggravating or mitigating circumstances not required.** — Although New Mexico has adopted the standard that a defendant cannot be sentenced to death if the mitigating circumstances outweigh the aggravating circumstances, the constitution does not require the adoption of a specific standard for instructing the jury in its consideration of aggravating and mitigating circumstances.

*State v. Cheadle,* 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

## 14-7027. Death penalty sentencing proceeding; jury procedure for consideration of each aggravating circumstance.1

In this case, as to the aggravating circumstance of _____ *(insert the aggravating circumstance)*, there are three possible verdicts:

(1) finding beyond a reasonable doubt that the aggravating circumstance exists;

(2) finding that the aggravating circumstance does not exist; or

(3) being unable to reach an agreement.

You must first consider whether the aggravating circumstance charged was present in this case. In order to find the aggravating circumstance, you must agree unanimously. You may consider the penalty to be imposed only if you have found that [the aggravating circumstance has][2] [one or more aggravating circumstances have] been proven beyond a reasonable doubt.

A special form has been prepared for [the][2] [each] aggravating circumstance charged. If you unanimously find the state has proved beyond a reasonable doubt that the aggravating circumstance was present, you shall complete the form indicating your finding, and have the foreperson sign this part. [You will then consider any other aggravating circumstances.][3]

If you unanimously find that the aggravating circumstance was not present, your finding shall be that the state has not proved beyond a reasonable doubt the aggravating circumstance. If you are unable to reach a unanimous agreement either way, the foreperson shall sign this part of the finding form.

[You will then consider any other aggravating circumstances until you have separately considered each aggravating circumstance. You must complete a form for each aggravating circumstance before returning to the court.][3]

If you do not find an aggravating circumstance beyond a reasonable doubt, then return to the courtroom.

[If you unanimously find beyond a reasonable doubt that an aggravating circumstance was present, you shall then consider the penalty to be imposed.][4]

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding for each aggravating circumstance to be given to the jury. It is to be given immediately prior to UJI 14-7032 and 14-7033, sample forms of findings.

2. Use only applicable alternative.

3. This alternative is to be given if more than one aggravating circumstance is to be given.

4. This sentence is given unless the court has bifurcated the sentencing proceeding.

[As amended, effective August 1, 2001.]

**Committee commentary.** — At least one aggravating circumstance must be proved beyond a reasonable doubt to impose the death penalty. *State v. Allen*, 2000-NMSC-002, P61, 128 N.M. 482, 994 P.2d 728; *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Section 31-20A-3 NMSA 1978.

This instruction provides the procedure for finding an aggravating circumstance and for completing the form in UJI 14-7032 as to the presence of one or more aggravating circumstances.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added alternative phrasing for both single and multiple aggravating circumstances, made related changes throughout, and clarified the conditional language; substituted "foreperson" for "foreman"; substituted "immediately prior to" for "with" in Use Note 1; and added Use Notes 2, 3 and 4.

**Specific standard for instructing jury on aggravating or mitigating circumstances not required.** — Although New Mexico has adopted the standard that a defendant cannot be sentenced to death if the mitigating circumstances outweigh the aggravating circumstances, the constitution does not require the adoption of a specific standard for instructing the jury in its consideration of aggravating and mitigating circumstances. *State v. Cheadle*, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

**No requirement that aggravating circumstances outweigh mitigating circumstances beyond reasonable doubt.** — There is no requirement in the Capital Felony Sentencing Act or the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State v. Finnell*, 101 N.M. 732, 688 P.2d 769 (1984), cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

## 14-7028. Withdrawn.

## ANNOTATIONS

**Withdrawals.** — This instruction, pertaining to death penalty sentencing proceeding; jury procedure for consideration of multiple aggravating circumstances, is withdrawn, effective August 1, 2001.

# 14-7029. Death penalty sentencing proceeding; mitigating circumstances.1

[If you unanimously find an aggravating circumstance, each of you must consider all mitigating circumstances.][2] [You have found an aggravating circumstance. You must now consider any and all mitigating circumstances.][3] A mitigating circumstance is any conduct, circumstance or thing which would lead you individually or as a jury to decide not to impose the death penalty. You are not required to reach unanimous agreement on the existence of any of the mitigating circumstances. Instead, if any one of you, individually, believes that a mitigating circumstance exists, you may consider it in the weighing process.

[Each of you must consider any and all of the following mitigating circumstances][4]:[5]

[the defendant did not have any significant history of prior criminal activity;]

[the defendant acted under duress or under the domination of another person;]

[the defendant's capacity to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was impaired;]

[the defendant was under the influence of mental or emotional disturbance;]

[the victim was a willing participant in the defendant's conduct;]

[the defendant acted under circumstances which tended to justify, excuse or reduce the crime;]

[the defendant is likely to be rehabilitated;]

[cooperation by the defendant with authorities;]

[the defendant's age;]

the circumstances of the offense which are mitigating; and anything else which may lead you to believe that the death penalty should not be imposed.

[You must also consider the (character), (emotional history) (and) (family history) of the defendant which are mitigating.][6]

[You must also consider _____.][7]

You need not unanimously agree on the existence of a mitigating circumstance.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use this bracketed sentence unless the court has bifurcated the sentencing proceeding.

3. Use the bracketed sentence only if the court has bifurcated the sentencing proceeding.

4. Use this phrase only if there is one or more statutory mitigating circumstance.

5. Use the following bracketed mitigating circumstances for which there is evidence, but do not add other specific circumstances. *See* Section 31-20A-6 NMSA 1978 for statutory mitigating circumstances.

6. Use bracketed phrase and applicable words or phrases set forth in parentheses if requested by defendant.

7. Include any non-statutory mitigating circumstances about which evidence has been presented.

[As amended, effective August 1, 2001.]

**Committee commentary.** — Section 31-20A-2 NMSA 1978 requires the trier of fact to determine if mitigating circumstances exist and to weigh them against the aggravating circumstances. The weight to be given to the mitigating and aggravating circumstances and the burden of proof for each are not provided in the statute. Aggravating circumstances must be proven beyond a reasonable doubt.

It is not necessary for the jury to unanimously agree on any mitigating circumstance. *See Clark v. Tansy*, 118 N.M. 486, 494, 882 P.2d 527, 535. *See also State v. Henderson*, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990); *State v. Clark*, 1999-NMSC-035, P66, 128 N.M. 119, 990 P.2d 793.

Section 31-20A-2 NMSA 1978 requires the trier of fact to consider the defendant and the crime. The mitigating circumstances includes, but is not limited to the specific mitigating circumstances identified in 31-20A-6 NMSA 1978.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added the word "unanimously" and the phrase "each of" in the first sentence; added the second sentence for bifurcated sentencing proceedings; added "individually of as a jury" in the fourth sentence; added the text beginning "You are not required" through the end of the paragraph; at the beginning of the second paragraph added the phrase "Each of" and added "any and" before "all"; in the list of mitigating circumstances substituted "the defendant's" for "his" and substituted "may" for "would"; added the last two sentences of the section; added Use Notes 2, 3, and 4; redesignated the following Use Notes as 5 and 6; added Use Note 7; added the word "following" before "bracketed" in Use Note 5 and added the final sentence of Use Note 5.

**Mental retardation evidence** may be introduced by defendant at sentencing and finding of mental retardation must be given conclusive mitigating effect. *State v. Flores*, 2004-NMSC-021, 135 N.M. 759, 93 P.3d 1264.

**Instruction construed. —** The instruction does not encourage the jury to impose the death penalty (a unanimous verdict) as opposed to a life sentence (non-unanimous verdict) nor can it be construed as improperly encouraging the jury or any single juror to abandon a life decision in favor of a death decision for the sole purpose of simply maintaining unanimity. The instruction merely encourages the jurors to try to unanimously agree on the existence of an aggravating circumstance and the appropriate penalty. *State v. Compton,* 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

**Length of incarceration is mitigating factor. —** Notions of fundamental fairness embodied in the Due Process Clause require that the defendant be allowed to rebut, with all relevant mitigating evidence, the prosecutor's argument that the defendant's future dangerousness is cause for the death penalty; relevant mitigating evidence includes the length of incarceration facing the defendant if he is not sentenced to death. *Clark v. Tansy,* 118 N.M. 486, 882 P.2d 527 (1994).

## 14-7030. Death penalty sentencing proceeding; weighing the aggravating circumstances against the mitigating circumstances.1

If you unanimously find [any of the aggravating circumstances that were charged][2] [an aggravating circumstance that was charged], you must weigh [that aggravating circumstance][2] [those aggravating circumstances] against any mitigating circumstances, you as an individual member of the jury, may have found in this case. After considering the aggravating [circumstance][2] [circumstances] and the mitigating circumstances weighing them against each other and considering both the defendant and the crime, you shall each determine whether the defendant should be sentenced to death or life imprisonment. Only if the aggravating [circumstance][2] [circumstances] outweigh the mitigating circumstances may the death penalty be imposed.

However, even if the aggravating [circumstance outweighs][2] [circumstances outweigh] the mitigating circumstances, you may still decide not to impose the death penalty.

If you decide not to impose the death penalty or if you do not reach a unanimous decision, a sentence of life imprisonment is imposed.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use applicable alternative.

3. The bracketed language may be given in appropriate cases upon request of the defendant.

[As amended, effective August 1, 2001.]

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added alternative phrasing for both single and multiple aggravating circumstances, made related changes throughout, and clarified the conditional language; added the word "unanimously" and the phrase "of the" after "any" in the first sentence; added the phrase "as an individual member of the jury, may" before "have"; substituted "considering" for "weighing"; clarified the conditional language by adding the phrases "Only if" and "may" and deleting the phrases "must" before "outweigh" and "before" before "the death penalty"; substituted "decide not to impose the death penalty" for "set the penalty at life imprisonment"; added the last sentence of the instruction; and added Use Notes 2 and 3.

**Instruction does not allow consideration of nonstatutory aggravating circumstances.** — This instruction is not the instruction that specifies for the jury what alleged aggravating circumstances are relied upon by the state, and use of this instruction does not allow the consideration of nonstatutory aggravating circumstances. *State v. Guzman*, 100 N.M. 756, 676 P.2d 1321, cert. denied, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984).

**Specific standard for instructing jury on aggravating or mitigating circumstances not required.** — Although New Mexico has adopted the standard that a defendant cannot be sentenced to death if the mitigating circumstances outweigh the aggravating circumstances, the constitution does not require the adoption of a specific standard for instructing the jury in its consideration of aggravating and mitigating circumstances. *State v. Cheadle*, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

## 14-7030A. Death penalty sentencing proceeding; explanation of sentence of life imprisonment.1

In New Mexico, a sentence of life imprisonment means that the defendant will not be released from prison before serving thirty (30) years in the penitentiary. After thirty (30) years in prison, the defendant may have the opportunity to have the defendant's case reviewed by the parole board. Therefore, if sentenced to life imprisonment, the defendant will have to serve at least thirty (30) years in the penitentiary with no reduction of sentence for good behavior.

[In addition, _____ *(name of defendant)* has been sentenced to additional imprisonment on other felony charges that will be served consecutively to a life sentence.][2] [_____ *(name of defendant)* will not be eligible for parole until after completion of the sentence on the other charges in addition to the life sentence. _____ *(name of defendant)* will be at least _____ years old before becoming eligible for parole.][3]

USE NOTE

1. Upon request of the defendant, this instruction must be given in a death penalty sentencing proceeding.

2. Upon request of the defendant, the bracketed sentence is used if the defendant has any other sentences to serve.

3. Upon request of the defendant, the bracketed sentence shall be given.

[Approved, effective August 1, 2001.]

## 14-7031. Death penalty sentencing proceeding; jury deliberation procedure.

You shall now retire to the jury room [and select one of you to act as foreperson][2]. You may select the foreperson from the trial portion to continue as foreperson or you may select a new foreperson for the death penalty sentencing proceeding. That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreperson on the forms that will be provided, and then you shall return with them to this courtroom.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use first bracketed phrase only when a new jury is hearing the sentencing proceeding. Use second bracketed phrase if the original jury is hearing the sentencing proceeding.

This instruction is given last.

[As amended, effective August 1, 2001.]

**Committee commentary.** — The committee amended this instruction to make it clear that the foreperson from the trial may continue or that the jury may select a new foreperson for the sentencing proceeding.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted "foreperson" for "foreman"; permitted selection of the same or a different foreperson for the sentencing procedure from the trial; added a new Use Note 1, leaving the existing Use Note 1 in place; and added the committee commentary explaining the instruction.

## 14-7032. Death penalty sentencing proceeding; sample form of findings; aggravating circumstance findings.1

*(style of case)*

You cannot consider the penalty to be imposed unless you have found that [the][2] [an][3] aggravating circumstance has been proven beyond a reasonable doubt.

Sign only one of the following findings as to the aggravating circumstance of _____ *(insert the aggravating circumstance)*. You must complete a form for each aggravating circumstance. If you signed Finding Number 1, as to any aggravating circumstance, then consider the penalty. If not, return to the courtroom.

**Finding Number 1.** We unanimously find beyond a reasonable doubt the aggravating circumstance of _____ *(set forth the aggravating circumstance)*.

_____
FOREPERSON

**Finding Number 2.** We unanimously find the aggravating circumstance of _____ *(set forth the aggravating circumstance)* has not been proven beyond a reasonable doubt.

_____
FOREPERSON

**Finding Number 3.** We are unable to reach an agreement as to the aggravating circumstance of _____ *(set forth the aggravating circumstance)*.

_____
FOREPERSON

USE NOTE

1. This instruction is to be given immediately after UJI 14-7027. This instruction is for use only in death penalty sentencing proceedings. The court is to set forth only one aggravating circumstance on this form prior to submission to the jury. A separate form is to be submitted for each aggravating circumstance to be submitted to the jury. The jury is to be given both this instruction and UJI 14-7033 when they retire to deliberate.

2. Use this alternative if only one aggravating circumstance is given.

3. Use this alternative if more than one aggravating circumstance is given.

[As amended, effective August 1, 2001.]

**Committee commentary.** — Section 31-20A-2 NMSA 1978 establishes the procedure to be followed by the jury in determining the sentence to be imposed. This instruction is the form to be used by the jury to indicate whether an aggravating circumstance charged was found, and if so, whether the defendant should be sentenced to death or life imprisonment.

If an aggravating circumstance is not found, it is not necessary for the foreperson to complete the verdict portion of the form since there would be no decision to be made as to whether or not to impose the death penalty.

The warning on the form is to prevent any jury from imposing the death penalty without finding an aggravating circumstance.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, added alternative phrasing for both single and multiple aggravating circumstances, made related changes throughout, and clarified the conditional language; substituted "foreperson" for "foreman"; in the introductory language deleted "If you sign finding number , continue to deliberate as instructed. If you sign finding number 2 or 3, return to the courtroom."; added the paragraph beginning "You must complete a form for each aggravating circumstance"; substituted "has not been proven beyond a reasonable doubt" for "is not present" in finding number 2; added the first sentence of Use Note 1 and Use Notes 2 and 3.

## 14-7033. Death penalty sentencing proceeding; sample forms of findings; death penalty findings.

*(style of case)*

DO NOT CONSIDER THIS VERDICT FORM UNLESS THE JURY HAS UNANIMOUSLY FOUND AN AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. IF THE JURY HAS NOT FOUND AN AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT, RETURN TO THE COURTROOM.

Sign only one of the following forms:

We unanimously agree that the defendant, _____ *(name of defendant)*, be sentenced to death.

_____
FOREPERSON

OR

We DO NOT unanimously agree that the defendant, _____ *(name of defendant)*, be sentenced to death.

_____
FOREPERSON

OR

We unanimously agree that the defendant not be sentenced to death and therefore a life sentence should be imposed.

_____
FOREPERSON

USE NOTE

UJI 14-7030.1 is given immediately prior to this instruction. This instruction is for use only in death penalty sentencing proceedings. The jury is to be given both this instruction and UJI 14-7032 when they retire to deliberate.

[As amended, effective August 1, 1989; August 1, 2001.]

**Committee commentary.** — The warning on the form is to prevent any jury from imposing the death penalty without finding an aggravating circumstance.

**ANNOTATIONS**

**The 1989 amendment,** effective for cases filed in the district courts on or after August 1, 1989, deleted the former first item under "style of case", relating to unanimous agreement that the defendant should be sentenced to life imprisonment and added the present last item relating to lack of unanimous agreement that the defendant should be sentenced to death.

**The 2001 amendment,** effective August 1, 2001, added the instruction paragraph at the beginning; added the instruction to sign only one form; deleted the word "should" after "name of defendant"; substituted "foreperson" for "foreman"; deleted the instruction not to sign absent an aggravating circumstance on form one; added the first sentence of Use Note 1; and added the committee commentary.

## 14-7034. Sentencing proceeding; duty to consult.

Your findings must represent the considered judgment of each juror.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after a thorough review of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a finding.

USE NOTE

This instruction must be given in every death penalty proceeding. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given.

[As amended, effective August 1, 2001.]

**Committee commentary.** — This instruction is almost identical to UJI 14-6008 and UJI 14-7043 [withdrawn]. It has been modified for use in death penalty sentencing proceedings.

# Part C
# General Explanatory Matters

## 14-7040. Sentencing proceeding; credibility of witnesses.

You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account the witness's truthfulness or untruthfulness, the witness's ability and opportunity to observe, the witness's memory, the witness's

manner while testifying, any interest, bias or prejudice the witness may have and the reasonableness of the witness's testimony considered in the light of all the evidence in the case.

USE NOTE

This is a basic instruction and may be given in all habitual criminal and death penalty sentencing proceedings.

[As amended, effective August 1, 2001.]

**Committee commentary.** — This instruction was taken from UJI 14-5020. *See* committee commentary to UJI 14-5020. This instruction may be used in either a habitual criminal or death penalty sentencing proceeding.

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted "the witness's" for "his" and "the witness" for "he" throughout.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Instructions to jury as to credibility of child's testimony in criminal case, 32 A.L.R.4th 1196.

## 14-7041. Sentencing proceeding; defendant not testifying; no inference of guilt.

You must not draw any inference of admission from the fact that the defendant did not testify in this sentencing proceeding, nor should this fact be discussed by you or enter into your deliberations in any way.

USE NOTE

This instruction must be given on request of a defendant who does not testify in a habitual criminal or death penalty sentencing proceeding and must not be given if the defendant objects.

**Committee commentary.** — This instruction is almost identical to UJI 14-5031. *See* committee commentary to UJI 14-5031.

## 14-7042. Sentencing proceeding; duty to follow instructions.

The law governing this case is contained in these instructions, and it is your duty to follow that law. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction or instructions and disregard others.

USE NOTE

This is a proper instruction to be given in all habitual criminal and death penalty sentencing proceedings.

**Committee commentary.** — This instruction is the same as UJI 14-6001. It has been included with this chapter in order to assure that it will be given in both habitual criminal and death penalty sentencing proceedings.

### 14-7043. Withdrawn.

**ANNOTATIONS**

**Withdrawals.** — This instruction, pertaining to sentencing proceeding; duty to consult, is withdrawn, effective August 1, 2001.

# CHAPTER 71 to 79
# (Reserved)

# CHAPTER 80
# Grand Juries

# Part A
# General Proceedings

### 14-8001. Grand jury proceedings; explanation of proceedings.[1]

**LADIES AND GENTLEMEN OF THE GRAND JURY:**

**Function of Grand Jury.**

You have been summoned to serve as members of the grand jury for _____ County to investigate _____[2]. An order by the court filed on the _____ day of _____, _____, convened this grand jury. You have been qualified as members of such grand jury, and it is my duty as judge to instruct you as to your duties, authority and special responsibilities as members of the grand jury.

I will guide you to assure that your actions are within your legal authority. At any time, it is appropriate for any grand juror to seek advice and guidance from me as to the scope and propriety of the grand jury's acts and investigations. The grand jury, however, is subject to no other supervision or control from any person, office or body.

Your purpose as grand jurors is to investigate the matter for which this grand jury was called and to determine from the evidence if there is probable cause to believe an offense has been committed.

**Evidence.**

The grand jury has the power to order the attendance of witnesses and to cause the production of public and private records or other evidence relative and relevant to its investigations. It has the authority of this court to subpoena witnesses and to obtain execution of subpoenas by any public officers charged with such duties. If you have reason to believe that evidence not presented to you is available that may excuse or disprove a charge or accusation or that would make an indictment unjustified, then you may order that evidence produced and presented to you.

In the course of your investigation and the presentation of charges by the prosecutor, you shall consider the evidence presented to you. Evidence means the oral testimony of witnesses under oath and any documentary or other physical evidence.

You must decide the case solely upon the evidence received during these proceedings. It is for you to decide whether that evidence is true or false. You may give the evidence whatever weight you believe it deserves. You must not consider anything you may have read or heard about the case except as a part of your inquiry as members of the grand jury.

In the course of your investigation, it is your duty to protect citizens against unfounded accusations, whether they come from the government or others, and to prevent anyone from being indicted through malice, hatred or ill will.

**Probable Cause.**

For you to return an indictment, you must find probable cause. "Probable cause" means the evidence presented would cause a reasonable person to believe that an offense has been committed and that the accused committed the offense. Probable cause does not require proof beyond a reasonable doubt.

Indictments will often contain more than one charge. You must decide whether there is probable cause for each charge separately. In finding probable cause on each charge, you must find that there is probable cause for every element of that crime.

**Limits of Investigation.**

The indiscriminate summoning of witnesses, on the mere chance that some crime may be discovered, is forbidden. The grand jury has no right to conduct an investigation into the personal affairs of citizens, nor the function, operation and housekeeping of any branch of government, except as may be necessary in the course of investigating criminal offenses.

Witnesses brought before the grand jury shall not be harassed nor subjected to unreasonable repeated appearances before the grand jury or the prosecuting attorney. This does not mean, however, that witnesses may not be brought before you on more than one occasion if either you or the prosecuting attorney shall so require.

**Assistance for Grand Jury.**

The court shall assign a clerk to you, as all testimony must be recorded. The court may also assign to you a bailiff, interpreter or others necessary to carry out your duties, but no one except members of the grand jury and court appointed interpreters may be present during your deliberations or upon your taking of a vote.

The district attorney's office will assist you, examine witnesses, prepare indictments and reports at your request, and provide your foreperson with a form of oath to be administered by the foreperson to the witnesses who appear before you. The district attorney will advise you of the essential elements of any offense which is to be considered. The district attorney will answer, on the record, any questions you may have, if allowed by law.

The statutes of New Mexico will be available to you, and the district attorney can, at your request, explain our criminal laws to you. You will have a copy of this and other instructions for your guidance and information.

You may call upon this court for assistance and advice [and you may request this court to call upon the attorney general of the state to aid you][3]. If necessary, you may ask this court for legal or other assistance in your inquiry.

**Secrecy of Grand Jury Proceedings.**

If any person attempts to contact you with respect to any of your duties as a grand juror, advise that person that you cannot discuss any matter pertaining to your duties as a grand juror, obtain the person's name and address, if possible, and report the matter to the court without delay.

The law requires that all that you hear, see, say or vote upon shall be kept secret and shall not be revealed to anyone outside of the grand jury room except in your official reports, indictments and no-bills.

No grand juror shall, except in the performance of [his] official duty, disclose the fact that an indictment has been found against any person for any offense. You will not allow any unauthorized person into the grand jury room during your deliberations. You will not consult with anyone other than members of the grand jury as to how you should vote on any matter.

No one should have any advance information as to the activities of the grand jury or as to any activities which are planned by the grand jury.

As a grand juror, you may not be questioned about anything you say or any vote you cast relative to a matter legally pending before the grand jury except in prosecutions for violations of laws governing grand juries. You must strictly obey this requirement of secrecy in all matters before you. You will be asked to take an oath before serving as a grand juror. If you violate this oath, you may be prosecuted.

Although all proceedings in the grand jury room will be reported verbatim, your deliberations will not be reported.

If you learn of any violation of any rule governing these proceedings, you should report that violation to the court immediately. The court will address such violations appropriately.

**Foreperson of Grand Jury.**

The foreperson of the grand jury shall convene the grand jury during the regular hours of this court. The foreperson may appoint a clerk from among you to aid in keeping your records of votes during secret sessions when other persons are not able to be present. The foreperson shall sign all indictments and reports and shall swear all witnesses before you. The clerk must preserve the minutes of your deliberations, but no record shall be kept of the votes of the individual members of the grand jury on an indictment or on any other matter voted upon by the grand jury. You will be guided by the orders of your foreperson, who shall preside over the sessions of the grand jury. The foreperson may recess the sessions of the grand jury and reconvene them. The foreperson, for good cause, may request the court to excuse or discharge individual grand jurors and to replace them with alternate grand jurors as necessary to continue the work of the grand jury.

**Instructions by the Court.**

It is your duty to follow the law described in these instructions and any other instructions you receive. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction and disregard others.

The clerk will now administer the oath and give you a copy of these opening instructions[4].

_____

District Judge

USE NOTE

1. This instruction may be used before the grand jury hears any testimony or is addressed by the prosecuting attorney. If it is used, the instruction may be sent into the grand jury room for its guidance. In *District Court v. McKenna*, 118 N.M. 402, 881 P.2d

1387 (1994), the Supreme Court set forth the procedures to be followed before convening a grand jury on a citizen's petition.

2. Insert the reason for which the grand jury has been convened; e.g., offenses presented for consideration and indictment, special inquiry or investigation of a public officer regarding removal on a ground specified in 10-4-2 NMSA 1978 (1909).

3. The bracketed phrase is not to be given if the attorney general has already been asked to assist the grand jury.

4. If used, UJI 14-8002 NMRA is to be given by the clerk of the court immediately after this instruction is given.

**STATE OF NEW MEXICO**

**COUNTY OF _____**

**IN THE DISTRICT COURT**

**IN THE MATTER OF THE CONVENING**

**OF A GRAND JURY**

**ORDER**

The court, being advised in the premises and deeming it necessary, finds that a grand jury should be convened for the purpose of considering [criminal cases which may be presented to it] [_____ (*state specific inquiry which petition charges the grand jury to investigate*)] [the removal of _____ (*name of public officer*) for _____ (*reason for removal of officer*)].

IT IS THEREFORE ORDERED that a grand jury in _____ County, New Mexico, be convened to meet at _____ o'clock a.m. on _____, the _____ day of _____, _____, to consider _____.

IT IS FURTHER ORDERED that the names of _____ (*state number*) potential jurors be selected and from the lists of said persons, twelve grand jurors and _____ alternates be chosen and qualified in open court prior to the convening of the grand jury on the _____ day of _____, _____.

District Judge

[As amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

**Committee commentary. —**

*Convening the grand jury.*

A grand jury is convened upon order of a judge empowered to try capital, felony and infamous crimes, or convened by such judge upon petition of 200 or five percent of resident taxpayers of the county, whichever is less. N.M. Const., art. 2, § 14 prohibits a person to be held for a felony, capital or infamous crime, unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general.

The district judge convening a grand jury is required to charge it to inquire into:

a. any public offense against the state committed and triable in the county which is not barred from prosecution by the statute of limitations and upon which no valid indictment or information has previously been filed;

b. the condition of every person imprisoned in the county not lawfully committed by a court and not indicted or informed against; and

c. the condition and management of every public jail or prison within the county. 31-6-9 NMSA 1978.

The district judge is also required to direct the grand jury as to any special inquiry into violations of law which he wishes them to make. 31-6-9 NMSA 1978. The district judge shall "call to the attention of grand jurors," the provisions of 23-1-5, 23-1-6 and 23-1-7 NMSA 1978 regarding the indebtedness of a state institution exceeding the appropriations for such institution. 23-1-8 NMSA 1978. Offenses known to individual grand jurors may be brought before the grand jury but only in conformance with established procedures. *Clinton v. Superior Court* in and for Los Angeles County, 73 P.2d 252 (Cal. App. 1937).

The grand jury may present an accusation, in writing, for removal of any county, precinct, district, city, town or village officer elected by the people, and of any officer appointed to fill out the unexpired term of any such officer, to the district court of the county in or for which the officer accused is elected for any of the following causes:

a. conviction of any felony or of any misdemeanor involving moral turpitude;

b. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

c. knowingly demanding or receiving illegal fees as such officer;

d. failure to account for money coming into his hands as such officer;

e. gross incompetency or gross negligence in discharging the duties of the office; or

f. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office. 10-4-1 through 10-4-4 NMSA 1978.

The grand jury may make a presentment for the removal of a local, elected officer, but if it does not do so, it shall not denigrate that person's moral fitness to hold public office. 31-6-10 NMSA 1978.

*Territorial jurisdiction.*

The grand jury is restricted to the investigation of criminal offenses committed or triable within the county in which the panel is sitting or within the jurisdiction of the court to which it is attached. The National Association of Attorneys General, Committee on the Office of Attorney General, Statewide Grand Juries at p. 16; 31-6-9 NMSA 1978. At least six states have enacted statutes permitting empaneling of statewide grand juries. N.J. Rev. Stat. § 2A:73A-1 et seq.; Col. Rev. Stat. § 13-73-101 et seq.; Fla. Stat., § 905.31 et seq.; Wyo. Stat. Ann. § 7-5-301 et seq., R.I. Gen. Laws § 12-11.1-1 et seq.; Ariz. Rev. Stat. Ann. § 21-421 et seq. However, it has been held that the grand jury may inquire into occurrences outside the county in order to determine if a crime has been committed within the county wherein the grand jury is sitting. *People v. Conzo*, 23 N.E.2d 210 (Ill. App. 1939). Unless a statute provides for removal of an indictment by a grand jury outside the county where the crime occurred to the county wherein the crime occurred, it will be quashed. *State v. Mitchen*, 163 S.E. 581 (N.C. 1932).

The grand jury has no authority to act in civil matters. 120 A.L.R. 437.

*Selection of the grand jury.*

Section 38-5-3 NMSA 1978 provides that the clerk select five percent of the number of voters' names contained in the poll books (but not less than 150 names) as potential jurors to serve during the following two-year period. This is the master jury wheel. From this master jury wheel the clerk selects the number of jurors required. Section 38-5-9 NMSA 1978 [repealed]. The judge then selects and qualifies as a panel for the grand jury the number he deems necessary. Section 31-6-1 NMSA 1978.

*Term of grand jury.*

The grand jury is convened as provided for in N.M. Const., art. 2, § 14 and discharged at such time as the court determines the business of the grand jury is completed, but not later than three months after it was convened. *State v. Raulie*, 35 N.M. 135, 290 P. 789 (1930); Section 31-6-1 NMSA 1978. Moreover, the court may discharge the grand jury at any time even before it has completed its business. *United States v. Smyth*, 104 F. Supp. 283, 292 (D.C.N.D. Cal. 1952).

*Function of the court.*

It is the function of the court to charge the grand jury before it begins its duties as to its obligations and powers, and the jury may properly request the court, at any time thereafter, for further instructions to assist it to intelligently pursue its investigation. *Attorney General v. Pelletier*, 134 N.E. 407 (Mass. 1922). Technically, however, the jury may be considered charged when it is sworn. *State v. Lawlar*, 267 N.W. 65 (Wis. 1936). Failure of the court to charge the grand jury as required by statute does not vitiate the proceeding or constitute grounds for reversal of a conviction under an indictment found by a grand jury where the failure did not prejudice the defendant. *Porterfield v. Commonwealth*, 22 S.E. 352 (Va. 1895). *See also Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981).

*Assistance for grand jury.*

The court is required to assign court reporters, security officers, interpreters, clerks or other persons as needed to aid the grand jury in carrying out their duties. Security personnel may be present only by special leave of the court and only if they are not potential witnesses or interested parties. If requested by the court, the attorney general is also available for assistance. Sections 31-6-4 and 31-6-7 NMSA 1978.

The duty of the district attorney is to attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury. Section 31-6-7 NMSA 1978. The district attorney should also advise the grand jury, on the record, of the essential elements of any offense which is considered by the grand jury. It is recommended that this be done by using Uniform Jury Instructions Criminal, where available, and the criminal statutes if no instruction is available. The district attorney will answer, on the record, any questions which the grand jury may have. The district attorney will not, however, guide or otherwise influence the grand jury. If requested by the grand jury, the district attorney should also explain a statute to the grand jury.

*Evidence.*

Evidence before the grand jury is the oral testimony of witnesses and documentary or physical evidence, and the grand jury has the duty to order evidence produced if it believes that there is competent direct evidence available that may explain away or disprove a charge or accusation or that would make an indictment unjustified. The sufficiency or competency of the evidence upon which an indictment is returned will not be subject to review absent a showing of bad faith on the part of the prosecutor assisting the grand jury. Section 31-6-11 NMSA 1978; *Buzbee v. Donnelly*, supra; *State v. Chance*, 29 N.M. 34, 221 P. 183 (1923). The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. Section 31-6-12 NMSA 1978.

*Exculpatory evidence.*

In *Buzbee,* supra, the New Mexico Supreme Court overruled the holding in several court of appeals decisions dealing with the concepts of due process and exculpatory evidence. The court specifically overruled *State v. Payne*, 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981); *State v. Gonzales*, 95 N.M. 636, 624 P.2d 1033 (Ct. App. 1981); *State v. Sanchez*, 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980); *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (Ct. App. 1980); *State v. Harge*, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979); and *State v. Herrera*, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

Relying on *Costello v. United States*, 350 U.S. 359 (1956), the New Mexico Supreme Court did not perceive a due process question when the only misconduct asserted was a withholding of exculpatory evidence from the grand jury. In so doing, the court implicitly rejected the dictum in *State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976), which assumed the prosecutor could violate due process in withholding some evidence from the grand jury. *See also* Note, "Grand Jury; A Prosecutor Need Not Present Exculpatory Evidence," 38 Wash. & Lee L. Rev. 110, 123 (1981).

Because the function of the grand jury is merely to find probable cause for bringing a defendant to trial, the court reasoned that a stricter test of materiality should be placed on evidence withheld from the grand jury. Before remedial action by a reviewing court is justified, the quantum and materiality should be great. The court held that a prosecutor under Section 31-6-11 NMSA 1978 is required to present direct exculpatory evidence, but need not present circumstantial exculpatory evidence. The court further reaffirmed its 1923 holding in *State v. Chance*, supra, that absent clear statutory authority the court will not review the legality or competency of evidence unless there is a violation of due process.

The court did emphasize, however, that the prosecutor has a statutory duty, under Section 31-6-7 NMSA 1978, to conduct himself in a fair and impartial manner. The fact that *Gonzales* and *Harge,* supra, were overruled is instructive in this area. Those cases held that the prosecutor did not violate due process and upheld the indictments. The supreme court in *Buzbee* seems to be saying that even in those cases the court of appeals was not presented with a claim that would have justified the inquiry into a due process violation.

*Buzbee* explains what is meant by "evidence that directly negates the guilt." 31-6-11B NMSA 1978. Such evidence must be admissible at trial. Thus the prosecutor properly excluded self-serving declarations of innocence by the targets. The court held that the legislature intended only evidence which directly negates guilt, evidence not requiring the aid of inferences or presumptions to suggest the innocence of the targets.

Finally, the court reaffirmed its holding in *Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979). Prosecutors must not use inadmissible evidence when they seek an indictment. They should avoid perjury, deceit or malicious overreaching. A prosecutor's conduct should not significantly impinge on the ability of the grand jury to exercise its independent judgment.

*Buzbee* did not overrule *Davis v. Traub,* 90 N.M. 498, 565 P.2d 1015 (1977) which held that the prosecutor "must abide by the letter and spirit of the laws." It is the opinion of the committee that although the court did not find that the facts in *Buzbee* required remedial action, a prosecutor in like circumstances is well advised to be diligent in presenting direct exculpatory evidence to the grand jury. As a practical matter, when the evidence for the defense is substantial, a no-bill by the grand jury alleviates embarrassing acquittals later.

*Target witnesses.*

A target witness shall be notified of his target status unless the prosecutor determines that notification may result in flight, may endanger other persons or may obstruct justice or unless the prosecutor is unable, with reasonable diligence, to notify the witness. A showing of reasonable diligence is not required unless the witness establishes actual and substantial prejudice due to a failure to be notified. 31-6-11 NMSA 1978.

*Reports.*

The law, generally, prohibits the grand jury from making reports, except those specifically provided by statute, to recommend removal if permitted by statute or to indict for crime. 63 A.L.R.3d 586. In the absence of statute, reports criticizing individuals are prohibited. Meyer, "Grand Jury Reports: An Examination of the Law in Texas and Other Jurisdictions," 7 St. Mary's L.J. 374 (1975). It has been held that where a statute grants authority to the grand jury to examine the books, records and accounts of all officers of the county and to make reports thereon, including the needs of county officers and the desirability of abolishing or creating county offices and determining the adequacy of the existing methods used in operating the offices, the grand jury is under the control of the court, is a judicial body and even without statutory authority, it is implicit that the court has authority to refuse to file grand jury reports which exceed the grand jury's statutory authority. *People v. Superior Court,* 531 P.2d 761 (Ca. 1975). *See* dissent in *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973) for discussion on court's authority.

**Committee commentary. —**

**Convening the grand jury.**

Article 2, Section 14 of the New Mexico Constitution provides that:

A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

Article 2, § 14 of the New Mexico Constitution prohibits holding a person to answer for a felony, capital or infamous crime, unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general.

The grand jury may present an accusation, in writing, for removal of any county, precinct, district, city, town or village officer elected by the people, and of any officer appointed to fill out the unexpired term of any such officer, to the district court of the county in or for which the officer accused is elected for any of the following causes:

a. conviction of any felony or of any misdemeanor involving moral turpitude;

b. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

c. knowingly demanding or receiving illegal fees as such officer;

d. failure to account for money coming into his or her hands as such officer;

e. gross incompetency or gross negligence in discharging the duties of the office; or

f. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office. §§ 10-4-1 to 10-4-4 NMSA 1978.

The grand jury may make a presentment for the removal of a local, elected officer, but if it does not do so, it shall not denigrate that person's moral fitness to hold public office. § 31-6-10 NMSA 1978 (1979).

**Territorial jurisdiction.**

**Selection of the grand jury.**

Section 38-5-3 NMSA 1978 (2005) describes the procedure used to compile the random jury list for the selection of grand jurors. The names of jurors summoned for grand jury duty are drawn from the random jury list. § 31-6-1 NMSA 1978 (1983). The district judge then qualifies a grand jury panel comprised of twelve regular jurors and a sufficient number of alternates to ensure the continuity of the inquiry and the taking of testimony. § 31-6-1 NMSA 1978 (1983).

**Term of grand jury.**

The grand jury is convened as provided for in N.M. Const., art. 2, § 14 and discharged at such time as the court determines the business of the grand jury is completed, but not later than three months after it was convened. § 31-6-1 NMSA 1978 (1983); *State v. Raulie*, 35 N.M. 135, 290 P. 789 (1930). Function of the court.

"The district judge convening the grand jury shall charge it with its duties and direct it as to any special inquiry into violations of law that he wishes it to make." § 31-6-9 NMSA 1978 (1993).

In *District Court v. McKenna*, 118 N.M. 402, 407–408, 881 P.2d 1387, 1393–94 (1994), the Supreme Court set forth the duties of the district court prior to convening a grand jury upon a citizen's petition.

When appropriate, the district judge shall "call to the attention of grand jurors," the provisions of §§ 23-1-5, 23-1-6 and 23-1-7 NMSA 1978 regarding the indebtedness of a state institution exceeding the appropriations for such institution. § 23-1-8 NMSA 1978 (1953).

**Assistance for grand jury.**

The court is required to assign court reporters, security officers, interpreters, clerks or other persons as needed to aid the grand jury in carrying out their duties. Security personnel may be present only by special leave of the court and only if they are not potential witnesses or interested parties. §§ 31-6-4(C) and 31-6-7 (A) NMSA 1978 (2003).

A prosecuting attorney attending a grand jury shall act fairly and impartially at all times during grand jury proceedings. § 31-6-7(A) NMSA 1978 (2003). The duty of the prosecuting attorney is to attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury. § 31-6-7(A) NMSA 1978 (2003). The prosecuting attorney shall also advise the grand jury, on the record, of the essential elements of any offense which is considered by the grand jury. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546). This shall be done by using Uniform Jury Instructions Criminal, where available, and the criminal statutes if no uniform instructions are available. The district attorney will answer, on the record, any questions which the grand jury may have. The prosecuting attorney will not, however, guide or otherwise influence the grand jury. If requested by the grand jury, the prosecuting attorney should also explain a statute to the grand jury.

**Evidence.**

Evidence before the grand jury is the oral testimony of witnesses and documentary or physical evidence, and the grand jury has the duty to order evidence produced if it believes that there is lawful, competent, and relevant evidence available that may explain away or disprove a charge or accusation or that would make an indictment unjustified. § 31-6-11(A), (B) NMSA 1978 (2003). The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. § 31-6-12(A) NMSA 1978 (1979).

The sufficiency or competency of the evidence upon which an indictment is returned will not be subject to review absent a showing of bad faith on the part of the prosecutor assisting the grand jury. § 31-6-11 NMSA 1978 (2003); *Buzbee v. Donnelly*, supra; *State v. Chance*, 29 N.M. 34, 221 P. 183 (1923).

In Buzbee, the New Mexico Supreme Court overruled the holding in several court of appeals decisions regarding due process and exculpatory evidence. The court specifically overruled *State v. Payne*, 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981); *State v. Gonzales*, 95 N.M. 636, 624 P.2d 1033 (Ct. App. 1981); *State v. Sanchez*, 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980); *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (Ct. App. 1980); *State v. Harge*, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979); and *State v. Herrera*, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

Relying on *Costello v. United States*, 350 U.S. 359 (1956), the New Mexico Supreme Court did not perceive a federal due process violation when the only misconduct asserted was a withholding of exculpatory evidence from the grand jury. In so doing, the court implicitly rejected the dictum in *State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976), which assumed the prosecutor could violate due process in withholding some evidence from the grand jury.

Because the function of the grand jury is merely to find probable cause for bringing a defendant to trial, the court reasoned that a stricter test of materiality should be placed on evidence withheld from the grand jury. Before remedial action by a reviewing court is justified, the quantum and materiality should be great. The court held that § 31-6-11 NMSA 1978 requires a prosecutor to present direct exculpatory evidence, but does not require the prosecutor to present circumstantial exculpatory evidence. The court also reaffirmed its 1923 holding in *State v. Chance*, supra, that absent clear statutory authority the court will not review the legality or competency of evidence unless there is a violation of due process. The court did emphasize, however, that the prosecutor has a statutory duty, under § 31-6-7 NMSA 1978 (2003), to conduct himself in a fair and impartial manner.

Finally, the court reaffirmed its holding in *Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979): Prosecutors must not use inadmissible evidence when they seek an indictment. They should avoid perjury, deceit or malicious overreaching. A prosecutor's conduct should not significantly impinge on the ability of the grand jury to exercise its independent judgment.

In 2003, the legislature amended § 31-6-11(B) NMSA 1978 (2003). The amended statute no longer requies the grand jury to consider "evidence that directly negates the guilt" of the target. It now states:

It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before

grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.

Interpreting the amended statute, the Court of Appeals held that § 31-6-11 does not authorize "judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *State v. Romero*, 2006-NMCA-105, 140 N.M. 281, cert. granted, 2006-NMCERT-008, 140 N.M. 423, cert. quashed, 2007-NMCERT-002, 141 N.M. 339. In *Romero*, the Court rejected challenges to indictments on the grounds that the prosecutor (1) failed to present evidence that disproved or reduced a charge or that made indictments unjustified and (2) presented inadmissible hearsay to the grand jury.

The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. § 31-6-12 NMSA 1978 (1979).

**Targets.**

In 2003, the legislature amended § 31-6-11 NMSA 1978 (2003), which now states:

A district attorney shall use reasonable diligence to notify a person in writing that the person is the target of a grand jury investigation. Unless the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person, the target of a grand jury investigation shall be notified in writing of the following information:

(1) that he is the target of an investigation;

(2) the nature of the alleged crime being investigated and the date of the alleged crime and any applicable statutory citations;

(3) the target’s right to testify no earlier than four days after receiving the target notice if he is in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(4) the target's right to testify no earlier than ten days after receiving the target notice if he is not in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(5) the target's right to choose to remain silent; and

(6) the target's right to assistance of counsel during the grand jury investigation.

## ANNOTATIONS

**The 2008 amendment,** approved by Supreme Court Order 08-8300-08, effective March 21, 2008, in the Evidence Section: substituted "your legal authority" for "authority conferred upon you by law" and "At any time, it is appropriate for any grand juror" for "Any grand juror any time, with propriety", and deleted "In addition to this matter, you shall also consider the conditions of the jails or prisons in this county" from the Function of the Grand Jury section; added "and present to you" at the end of Paragraph one of the Evidence section; added "the evidence present to you. Evidence means" and deleted "exhibited to the grand jury" from the end of Paragraph two; deleted the previous Paragraph three, which read "It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits"; and substituted the word "deserves" for the word "merits" in the second sentence of the current Paragraph three. In the Probable Cause section, added the second Paragraph. In Limits of Investigation section, rewrote the third sentence that previously read "It may not investigate the function, operation and housekeeping of any branch of government, except the jails or prisons within the county. It is not a function of the grand jury to criticize or regulate agencies of government or private persons or institutions except jails or prisons". In Assistance for Grand Jury section: added the phrase "and court appointed interpreters" to Paragraph one and deleted "You must carefully consider these elements prior to returning an indictment"; added "if allowed by law" to Paragraph two; and rewrote Paragraph three that read "The statutes of New Mexico will be available to you and the district attorney can explain at your request our criminal laws to you. A copy of this and other instructions will be placed in your hands for further guidance and information". In the Secrecy of Grand Jury Proceedings section: rewrote Paragraph three that previously read "No grand juror shall, except in the performance of his official duties, disclose the fact that an indictment has been found against any person for any offense. You will allow no one in the grand jury room during your deliberations, nor will you consult with anyone other than members of the grand jury as to how you should vote on any matter"; rewrote Paragraph five that previously read "A grand juror may not be questioned for anything he may say or any vote he may give relative to a matter legally pending before the grand jury except in the trial or prosecution of a witness for perjury before the grand jury. The institution of the grand jury and its requirements in the due administration of the criminal law require that grand jurors observe and obey strictly this requirement as to the secrecy of all matters transacted before them. Any person found to have violated this oath as a grand juror is guilty of a misdemeanor"; and substituted Paragraph seven for "Any violation of the orders of the court by a person committed in the presence of the grand jury should be reported to the court at once by any grand juror with knowledge thereof, and any public activity which violates this rule will be dealt with by the court in an appropriate manner". In Use Note 1, added the sentence containing the citation to *District Court v. McKenna* to and substantially rewrote the committee commentary.

**Instruction in accord with general law prohibiting criticism of individuals or agencies.** — This instruction to the grand jury sets limitations in accord with the general law prohibiting criticism of individuals or governmental agencies. 1982 Op. Att'y Gen. No. 82-14.

**Advisement of elements of crime charged. —** The practice of simply providing the grand jury with a written manual containing UJI instructions and not indicating on the record that the jury has been at least referred to the appropriate sections of the manual for each crime listed on indictments does not comply with this instruction, 31-6-8 and 31-6-10 NMSA 1978, or Rule 5-506(B) NMRA. *State v. Ulibarri,* 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, aff'd, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818.

## 14-8002. Grand jury proceedings; oath to grand jurors.[1]

You will now stand and repeat the following oath:

Do you, as members of this grand jury, swear or affirm that:

you will conscientiously inquire into _____ (*state reason for which grand jury called*);

you will in returning any indictment or making any report or undertakings present the truth according to the best of your skill and understanding;

you will refrain from indicting any person through malice, hatred or ill will or not indicting any person through fear, favor or affection or for any reward or the hope or promise thereof;

you will forever keep secret whatever you or any other juror may have said or voted on during any matter you consider; and

you will keep secret the testimony of any witness heard by you unless ordered to disclose the same in the trial or prosecution of the witness for perjury before the grand jury?

You are now impaneled and sworn as grand jurors comprising the grand jury, drawn by the district court of the _____ judicial district of New Mexico within and for the county of _____.

You shall select one of your number as foreperson as your first order of business. After you have selected your foreperson, notify the court of your selection.

Your term as members of the grand jury expires _____[2] unless you are discharged or excused by the court prior to this time.

If you have any questions at any time, please do not hesitate to ask the court or any other district judge. You may now begin serving as grand jurors.

USE NOTE

1. This oath or affirmation or any other oath or affirmation which generally complies with 31-6-6 NMSA 1978 (1979) and Rule 11-603 NMRA must be administered prior to qualification of members of the grand jury.

2. Members of a grand jury may not serve for a period longer than three months. § 31-6-1 NMSA 1978 (1983).

[As amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

**Committee commentary.** — Section 31-6-6 NMSA 1978 (1979) prescribes the oath to be administered by the district judge to the grand jurors and other participants in grand jury proceedings. Although the statute states in part: "the following oaths shall be administered by the district judge to jurors, officers of the court or others assigned to assist the grand jury, . ," the oath in UJI 14-8002, 14-8003, and 14-8004 does not follow the oath prescribed by the statute verbatim. No case has been found where a court considered the precise question of whether an oath, administered in court, was a matter of procedure or of substantive law. The committee is of the view that the actual oath given is a matter of procedure.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-6-6 NMSA 1978.

**The 2008 amendment,** approved by Supreme Court Order 08-8300-08, effective March 21, 2008, made non-substantive changes.

## 14-8003. Grand jury proceedings; oath for officer or other person.

Do you swear or affirm that you will keep secret all proceedings occurring in your presence or of which you may learn as a result of your service in aid of the grand jury?

USE NOTE

This oath may be administered to each officer of the court, bailiff, security officer, clerk or other person authorized to assist the grand jury by 31-6-4 or 31-6-7 NMSA 1978.

**Committee commentary.** — *See* committee commentary under UJI 14-8002.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-6-6 NMSA 1978.

## 14-8004. Grand jury proceedings; oath for witness.

Do you swear or affirm that the testimony which you are about to give will be the truth, the whole truth and nothing but the truth, under penalty of law?

USE NOTE

This oath may be administered to each witness prior to his testimony before the grand jury.

**Committee commentary.** — *See* committee commentary under UJI 14-8002.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-6-6 NMSA 1978.

## 14-8005. Grand jury proceedings; sample instructions.[1]

**Burglary; essential elements.**

For you to return an indictment against the accused for the crime of burglary, you must find that there is probable cause[2] to believe each of the following elements of the crime:

1. The accused entered _____ (*identify structure*)[3] without authorization or permission; [the least intrusion constitutes an entry;][4]

2. When the accused entered the _____ (*name of structure*), intended to commit [a theft] [or] _____ (*name of felony*)][5] inside;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. This instruction and any other applicable instruction shall be given. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546).

2. UJI 14-8006 NMRA, which defines probable cause, shall be given with the essential elements instruction(s). If the prosecutor gives essential elements instructions for more than one offense, the prosecutor is not required to give the probable cause instruction more than once.

3. If the charge is burglary of a dwelling house, UJI 14-1631 NMRA shall be given with this instruction. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546).

4. Use bracketed phrase if entry is an issue.

5. If this instruction is used, it is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony should be given with this instruction.

[As amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

**Committee commentary.** — Applicable uniform jury instructions giving the essential elements of an offense shall be prepared and presented by the district attorney when the offense is being considered by the grand jury. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546). Any other instructions, such as definitions, which are to be given with the essential elements instruction, shall also be prepared for the grand jury as required by law.

If no uniform essential elements instruction is available for an offense, the prosecutor shall instruct the grand jury based on the applicable statute and shall give a copy of the statute or a written instruction derived from the statute to the grand jury for their consideration.

As it is not necessary for the grand jury to find beyond a reasonable doubt the essential elements of the offense, but only that there is probable cause to believe each of the elements, it is necessary to modify the existing uniform jury instructions. UJI 14-8005 is a sample of such a modification.

**ANNOTATIONS**

**The 2008 amendment,** approved by Supreme Court Order 08-8300-08, effective March 21, 2008, deleted the definition of probable cause from Paragraph 3; in Use Notes 1 and 3, added the citation to State v. Ulibarri; added a new Use Note 2; and amended the committee commentary.

## 14-8006. Grand jury proceedings; definition of probable cause.

"Probable cause" means the evidence presented would cause a reasonable person to believe that an offense has been committed and that the accused committed the offense. Probable cause does not require proof beyond a reasonable doubt.

USE NOTE

This instruction shall be given with the essential elements instruction(s). If the prosecutor gives essential elements instructions for more than one offense, the prosecutor is not required to give the probable cause instruction more than once.

[Approved by Supreme Court Order 08-8300-08, effective March 21, 2008.]

# Part B
# Findings

## 14-8020. Grand jury proceedings; findings.

I hereby certify that at least eight members of the grand jury have found that there is probable cause to accuse _____ (*person accused*) of _____ (*name of offense*) and to return an indictment against _____ (*person accused*).

Foreperson

USE NOTE

If this instruction is used, a separate findings form should be used for each offense charged. An indictment, a "true bill," will then be returned by the grand jury for any offenses for which probable cause is found within twenty-four hours following the day upon which the indictment is voted. The indictment shall be filed with the district court clerk. If probable cause is found for one or more offenses, the district attorney will complete Rule 9-204 NMRA and present it to the grand jury for signing. If this instruction is used, it is not to be included in the district court file. It has been included as an aid to the district attorney in performing the duty of assisting the grand jury.

[Amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

**Committee commentary.** — An indictment is a written accusation or charge of crime against one or more persons, presented upon oath by a grand jury. A presentment . . . is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment being laid before them . . . speaking generally, however, the words 'presentment' and 'indictment' have come to be used as substantially interchangeable terms, and it has been said that this seems to have been the interpretation given to the Fifth Amendment to the Federal Constitution.

41 Am. Jur. 2d Indictment and Informations § 1.

The grand jury must find sufficient facts to support the following allegations in the indictment:

1. the designated offense of which the defendant is accused;

2. the identity of the county wherein the offense charged was committed;

3. the date or period of time when the offense was committed; and

4. a factual statement to support every element of the offense charged so as to apprise the defendant of the conduct which is the subject of the accusation.

B.J. George, Criminal Procedure Sourcebook, Vol. 1, p. 588 (1976).

In returning an indictment, if the grand jury is comprised of twelve members, eight members must concur. If there are more than twelve members, concurrence shall be as provided by law but not less than a majority. 31-6-10 NMSA 1978; N.M. Const., art. 2, § 14.

The indictment must be signed by the foreman of the grand jury. 31-6-2 NMSA 1978.

UJI 14-8020 and 14-8021, if used, are not to be included in the district court file. They have been included as an aid to the district attorney in his duty of assisting the grand jury.

Once the grand jury has made its presentment or indictment, the court is without power to review the evidence before the grand jury to determine whether it is lawful or sufficient to support the indictment. *State v. Chance*, 29 N.M. 34 (1923); *State v. Ergenbright*, 84 N.M. 662 (1973); *State v. Elam*, 86 N.M. 595 (Ct. App. 1974); *State v. Herrera*, 90 N.M. 306 (Ct. App. 1977); *Maldonado v. State*, supra. The court in *Maldonado* indicated, citing *Davis v. Traub*, 90 N.M. 498 (1977), that it would look behind the indictment if the law was not followed by the grand jury in its proceedings. In *Maldonado* the issue was evidence presented which would not have been admissible at trial; in *Davis,* unauthorized persons present during the proceedings was the issue raised. An indictment shall be dismissed if exculpatory evidence is not presented to the grand jury by the prosecutor. *State v. Sanchez,* 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980).

The grand jury is prohibited from naming persons as unindicted coconspirators in indictments, 31-6-5 NMSA 1978, and the court may expunge such unauthorized action from the indictment. *U.S. v. Briggs,* 514 F.2d 794 (5th Cir. 1975).

Notwithstanding the lack of power of the court to review the evidence to support the indictment, the court has power to quash an indictment if the grand jury proceedings fail to comply with statutory requirements. *Davis v. Traub*, supra. The court may also expunge unauthorized grand jury action.

**Committee commentary.** — Eight grand jurors must concur in order to return an indictment. N.M. Const., art. 2, § 14; § 31-6-10 NMSA 1978 (1979).

The indictment must be signed by the foreperson of the grand jury. § 31-6-2 NMSA 1978 (1979).

In 2003, the legislature amended § 31-6-11 NMSA 1978 (2003), which governs evidence before the grand jury. Interpreting the amended statute, the Court of Appeals

held that § 31-6-11 NMSA 1978 does not authorize "judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *State v. Romero*, 2006-NMCA-105, 140 N.M. 281, cert. granted, 2006-NMCERT-008, 140 N.M. 423, cert. quashed, 2007-NMCERT-002, 141 N.M. 339. In *Romero*, the Court rejected challenges to indictments on the grounds that the prosecutor (1) failed to present evidence that disproved or reduced a charge or that made indictments unjustified and (2) presented inadmissible hearsay to the grand jury. The Court held that § 31-6-11(A) NMSA 1978 "is directory and for the guidance of the grand jury," and that "the Legislature has not authorized judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *Romero*, 2006-NMCA-105, ¶ 5, 140 N.M. at 282.

Notwithstanding the lack of power of the court to review the evidence to support the indictment, the court has power to quash an indictment if the grand jury proceedings fail to comply with statutory requirements. *Davis v. Traub*, 90 N.M. 498 (1977). The court may also expunge unauthorized grand jury action.

The grand jury is prohibited from naming persons as unindicted coconspirators in indictments. § 31-6-5 NMSA 1978 (2003).

**ANNOTATIONS**

**Compiler's notes. —** *State v. Sanchez*, cited in the last sentence in the sixth paragraph of the committee commentary, may have been at least partially overruled by *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981).

**The 2008 amendment,** approved by Supreme Court Order 08-8300-008, effective March 21, 2008, added the last sentence to Use Note 1 and rewrote the committee commentary.

## 14-8021. Grand jury proceedings; findings.

I hereby certify that the members of the grand jury have found that there is no probable cause to accuse _____ of _____.

Foreperson

[Amended by Supreme Court Order 08-8300-08, effective March 21, 2008.]

USE NOTE

If this instruction is used, a separate findings form should be used for each offense charged. For all offenses for which no indictment is returned, a "no-bill" shall be

returned and filed under seal with the district court clerk. If this instruction is used, it is not to be included in the district court file.

**Committee commentary.** — *See* committee commentary under UJI 14-8002 NMRA.

**ANNOTATIONS**

**Cross references.** — *See* Section 31-6-5 NMSA 1978.

**The 2008 amendment,** approved by Supreme Court Order 08-8300-08, effective March 21, 2008, made non-substantive changes.

# CHAPTER 81 to 89
# (Reserved)

# CHAPTER 90
# Children's Courts

## 14-9001. Children's court; general use note.

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 shall be modified and used in the children's court for delinquent acts. In no event may an elements instruction be altered other than as required for use in the children's court. An instruction shall not be given on a subject for which a use note directs that no instruction be given. In all instructions, the word "child" should be substituted for the word "defendant." 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.

For a delinquent act 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.

The printed version of these instructions varies the use of pronouns in referring to the defendant, witnesses or victims. When an instruction is prepared for use, it must fit the situation.

Many of the instructions contain alternative provisions. When the instructions are prepared for use, only the alternative or alternatives supported by the evidence in the case may be used. The word "or" should be used to connect alternatives, regardless of whether the word is bracketed in the printed version of the instruction.

## 14-9002. Children's court; explanation of trial procedure.

**LADIES AND GENTLEMEN:**

This is a children's court proceeding in which the State of New Mexico has filed a petition against the respondent _____ *(name of child)* alleging that _____ *(child)* has committed a delinquent act.

In children's court, the respondent is referred to as a child. A child is any person under the age of eighteen (18) years. Persons under eighteen (18) years are not charged with crimes, but rather delinquent acts.

A delinquent act is any act that would be a crime if committed by an adult. The child in this case _____ *(name of child)* is alleged to have committed the delinquent act of _____ *(common name of crime)*. _____ *(name of child)* has denied committing the delinquent act. The child is presumed to be innocent. The state has the burden to prove beyond a reasonable doubt that _____ *(name of child)* committed the delinquent act charged in the petition.

What I say now is an introduction to the trial of this case.

The children's court proceeding generally begins with the lawyers telling you what they expect the evidence to show. Next, the evidence will be presented to you. The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the lawyers. After you have heard all the evidence, I will instruct you on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a verdict.

Your purpose as jurors is to find and determine the facts in this case from the evidence. It is my duty to decide what evidence you may consider.

It is the duty of a lawyer to object to evidence the lawyer believes may not be proper, and you must not hold such objection against the state or the respondent [because of such objections]. I will sustain objections if it is improper for you to consider the evidence. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence which I have told you to disregard. You must not speculate about what would be the answer to a question which I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits.

You must decide the case solely upon the evidence received in court. You must not consider anything you may have read or heard about the case outside the courtroom.

During the trial and your deliberations, you must avoid news accounts of the trial, whether they be on radio or television or in the newspaper or other written publications. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the case.

Until you retire to deliberate the case, you must not discuss this case or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to any biases or prejudices that you may have.

[You are not permitted to take notes during the trial. In your deliberations you must rely on your individual memories of the evidence in the case.][2]

[You are permitted to take notes during trial, and the court will provide you with note taking material if you wish to take them. However, if you choose to take notes, be sure that your note taking does not interfere with your listening to and considering all the evidence. It is difficult to take notes and at the same time pay attention to what a witness is saying. In your deliberations you should rely on your own memory of the evidence rather than on the written notes of another juror. Do not take your notes with you at the end of the day or discuss them with anyone before you begin your deliberations.][3]

If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

Ordinarily the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question unanswered after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to me. Your name as juror should appear below the question. I must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if I deem the question to be proper.

No statement, ruling, remark or comment which I make during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

The prosecuting attorney will now make an opening statement if [he] [she] desires. The child's attorney may make an opening statement if [he] [she] desires or may wait until later in the trial to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [he] [she] expects the evidence to show.

USE NOTE

1. For use after the jury is sworn and before opening statements. This instruction does not go to the jury room.

2. This instruction leaves it to the discretion of the trial judge as to whether or not jurors will be permitted to take notes during the trial.

3. If the court permits the taking of notes, the court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations.

[As amended, effective August 1, 1989; August 1, 2001.]

**ANNOTATIONS**

**The 1989 amendment,** effective for cases filed in the district courts on or after August 1, 1989, in the fourth paragraph from the end of the instruction, substituted "and ask the bailiff to give it to me" for "and give it to the bailiff " and, at the end of the last paragraph of the instruction, substituted "what he expects the evidence to show" for "what he intends to prove".

**The 2001 amendment,** effective August 1, 2001, added the phrase "of trial procedure" in the title; substituted "The child is presumed to be innocent" for "It is presumed that he did not commit the act charged in the petition," and "The state has the" for "It is the state's"; substituted "Next" for "Then"; added the sentence "The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the lawyers"; substituted "you may consider" for "will be admitted for your consideration. The evidence will the testimony of witnesses, exhibits and any facts agreed to by the lawyers"; deleted the word "which" after "evidence"; substituted "hold such objection" for "be prejudiced," "it is" for "I conclude that it would be legally" before "improper"; substituted "the" for "such" before "evidence"; added the sentence beginning "During the trial and your deliberations, you must avoid" through "publications"; substituted "In your deliberations you" for "You"; deleted the word "upon" after "must rely"; added the paragraph beginning "You are permitted to take notes"; deleted the phrase "If you have any question during the trial," and substituted the sentences from "Ordinarily the attorneys" through "you may"; deleted the phrases "sign it" and "give it to me," and added the sentences beginning "hand it to me. Your name as juror" through "proper"; substituted "[he] [she]" for "he"; and added Use Notes 2 and 3.

## 14-9003. Children's court; sample instruction.

**Burglary; essential elements.**

For you to find the child committed the delinquent act of burglary [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the act:

1. The child entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization [the least intrusion constitutes an entry;][3]

2. The child entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [ _____ *(name of felony)*][4], once inside;

3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the charge is burglary of a dwelling house, UJI 14-1631 should be given.

3. Use bracketed phrase if entry is in issue.

4. It is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony must be given.

[As amended, effective August 1, 2001.]

**ANNOTATIONS**

**Cross references. —** *See* Section 30-16-3 NMSA 1978.

**The 2001 amendment,** effective August 1, 2001, substituted "committed the delinquent act" for "guilty"; deleted "_____ (identify structure)" and "_____ (name of structure)" and replaced it with a list of structures to select among; deleted the phrase "or permission" after "authorization"; and substituted "once" for "when he got."

## 14-9004. Children's court; sample forms of verdict.1

(style of case)

We find the child [_____][2] (name) COMMITTED the act of _____[3] *(name of act)* [as charged in Count _____[4]].

_____
FOREPERSON

(style of case)

We find the child [ _____][2] *(name)* DID NOT COMMIT the act of _____[3] *(name of act)* [as charged in Count _____[4]].

_____
FOREPERSON

(style of case)

We find the child [_____][2] *(name)* DID NOT COMMIT any delinquent act.[5]

_____
FOREPERSON

(style of case)

We find the child [_____][2] *(name)* BY REASON OF INSANITY DID NOT COMMIT any delinquent act.

_____
FOREPERSON

(style of case)

Do you find that the child [_____][2] *(name)* is competent to stand trial?

_____ (Yes or No).

_____
FOREPERSON

USE NOTE

1. A form of verdict must be submitted to the jury for each delinquent act or lesser included offense, and each form must be typed on a separate page. This form is modified as needed. It is not exhaustive. *See* UJI 14-6010 to 14-6018.

2. Use this provision and insert name of each child when there are multiple respondents.

3. Insert the name of the delinquent act; do not leave blank for the jury to complete.

4. Insert the count number, if any; do not leave blank for the jury to complete.

5. This form is appropriate for lesser included offenses. *See* UJI 14-6012.

[As amended, effective August 1, 2001.]

**ANNOTATIONS**

**The 2001 amendment,** effective August 1, 2001, substituted "foreperson" for "foreman" throughout; in Use Note 1 added "or lesser included offense" after "delinquent act" and added the sentences beginning "This form is modified" to the end of Use Note 1.

## Juror Handbook.

TABLE OF CONTENTS

Juror Conduct

Deliberations of Jury

Verdict of Jurors

Questions During Deliberation

Time Spent Waiting

Civic Duty

Some Terms You Will Hear in Court and Their Meaning

**Right to a Jury Trial.**

The Constitutions of the United States and the State of New Mexico guarantee the right of trial by jury. Juries consist of six or twelve members depending on the court and type of case.

**Who May Serve.**

Any person who is qualified to vote may be summoned for service as a juror.

**Selection of Jurors.**

Jurors are selected by the clerk of the district court, at random, by

*(set forth method used to select jurors)*.

**Exemption from Service.**

The following persons may be exempted from jury service:

persons incapable of serving because of physical or mental illness or infirmity;

persons exempted from jury service at the discretion of the district court;

persons who have served as members of a petit jury panel or a grand jury in either the courts of the United States or the State of New Mexico, within the preceding thirty-six (36) months are exempt from jury service in the courts of the state at the juror's option; and

persons exempted from jury duty by the judge upon satisfactory evidence presented to him, although the person requesting to be excused need not be personally present in court when making the request.

The clerk of the court will provide a juror with a form which must be completed in order to claim an exemption from jury service because of physical or mental illness or infirmity or to express a claim for exemption for other reason.

**Length of Service.**

A person is not required to remain a member of a jury panel for longer than _____ *(set forth the number)* months.

**Obligation of Employers.**

Employers who deprive their employees of employment or threaten or coerce them with respect to jury duty, upon conviction, are guilty of a petty misdemeanor.

**Emergency.**

If illness or other emergency requires that you be delayed or absent, telephone _____, promptly.

**Failure to Appear.**

Willful failure to appear as a juror is a criminal offense.

**Compensation.**

Jurors may be reimbursed for mileage for traveling to and from their place of residence to the court at the rate of _____ *(set forth rate)* cents ($. ) per mile. In addition a juror may receive compensation for each hour in attendance and service as jurors at the prevailing minimum wage rate for New Mexico of _____ *(set forth minimum wage)*.

**Meals.**

The court may provide meals to jurors who are serving on a case. You are not required to eat with other jurors except when you are in deliberation or otherwise restricted by the judge.

**Function of Jurors.**

Jurors judge the facts in both criminal and civil cases. In a criminal case a jury determines the guilt or innocence of a person accused of committing a criminal offense. In a civil case a jury determines disputes involving money, property and other things of value.

**Juror Responsibilities.**

Members selected must not have personal knowledge regarding the facts of the particular case which might influence their decision. In order to reach this objective, the judge or attorneys question the jurors concerning their family relationship with or their personal knowledge of the parties or the attorneys and their personal knowledge of the facts of the case. This is called the "voir dire", meaning "to tell the truth". If the relationship or knowledge would tend to influence the juror's decision in the case, the juror is disqualified from serving in the case.

**Disqualification of Jurors.**

The qualification of jurors is one of the most important aspects of any trial, thus making the honest and forthright answers to the questions of the judge and attorneys unusually important. Jurors may be selected or rejected for many and various reasons, none of which reflect upon the individual juror. Jurors should not take it as a personal insult if they are not selected to serve. In the event that the questions asked by the judge or attorneys become offensive, a juror may request permission of the court to refuse to answer.

**Juror Oath.**

Once a jury has been selected, each juror selected is required to take an oath or affirmation that he will return a verdict according to the law and evidence as presented in court.

**Types of Cases.**

Jurors are called upon to hear both criminal and civil cases. Criminal cases are brought by the State of New Mexico, or in some cases, by a city or county, against an individual charged with a crime. The individual is not guilty until the jury unanimously makes that determination.

Civil cases vary somewhat from criminal cases in that the dispute is between individuals, business organizations or governmental entities, such as the state, a county or a municipality. Ordinarily, one party, called the plaintiff, will be making a claim for damages against another party called the defendant. In some instances, the defendant will also make a claim for damages against the plaintiff, called a counterclaim. A third party, called a third-party defendant, may also be a party in the action and damages or other relief may be requested from this party. In civil cases the jury determines the amount of money or other damages to be awarded.

In both civil and criminal cases after the evidence has been presented, an explanation of the law applicable to the case and other instructions to the jury are given. This is usually followed by closing arguments or statements by the lawyers. The jury is then asked to deliberate and reach a verdict in the manner described by the court.

**Evidence.**

Evidence is usually presented in the courtroom by question and answer. The attorneys or a party will question the witnesses and the answers become the evidence which you consider.

At times, the court will prohibit a witness from answering to avoid the jury from hearing improper evidence. The lawyers may object to certain evidence and the judge will then decide if the evidence may be presented to the jury. The jury should not consider as evidence any statement made by a witness or a lawyer which the judge has ruled to be improper evidence.

In listening to testimony, the jury should consider whether or not a witness is truthful. It is important that a jury's decision or verdict not be based upon false evidence.

Any documents, photographs or objects admitted into evidence are to be considered equally with the testimony of witnesses. The jury may also be asked to consider evidence in the form of depositions which are statements made by witnesses prior to trial. These will be read by the parties or attorneys and are just as important as other evidence.

**Juror Conduct.**

Jurors remain seated throughout the proceedings in court except when requested by the bailiff to stand.

The attitude and conduct of each juror throughout the trial is equally as important as that of the judge, parties, attorneys and witnesses. Because the jury has the important duty of deciding the true facts and applying those facts to the law applicable to the particular case, it is important that each juror understand the facts and apply the applicable law in order to reach a proper result.

It is important that jurors arrive at the time scheduled for the case to begin.

Jurors must remain alert throughout the trial. IF A JUROR IS UNABLE TO HEAR OR SEE THE EVIDENCE PRESENTED, IT IS THE JUROR'S DUTY TO MAKE THIS KNOWN TO THE JUDGE SO THAT APPROPRIATE ARRANGEMENTS CAN BE MADE.

Jurors may not discuss the case with anyone including the other jurors and if anyone attempts to discuss the case with a juror, it is the juror's duty to report this to the judge through the bailiff. Discussions concerning the evidence, witnesses or any aspect of the case with family members or friends is prohibited.

Jurors must avoid news accounts of the trial, whether they be on radio or television or in the newspaper or other written publications.

Jurors may not inspect the scene of the occurrence which is the subject of the trial unless the court specifically makes provision for a view of the scene. This is important because the place where the incident occurred may be entirely changed from what it was at the time of the occurrence.

Only in rare cases are members of the jury kept away from their home continuously during the trial. They can leave to go home at night, but they cannot discuss the case with anyone, not even a member of their family.

Jurors should dress comfortably and conservatively in order to avoid distracting others by their attire.

Jurors may not take notes or draw pictures, diagrams or other memoranda to remind them of the facts, but must rely entirely upon their memory. This is to avoid overemphasizing some facts and de-emphasizing others.

**Deliberations of Jury.**

After the judge has provided the jury with the law applicable to the case, it is the juror's sworn duty to follow the law as explained by the judge and apply it to the facts presented in court.

The manner in which the jury deliberates in the jury room is completely within the jury's control. The jurors should first select a foreman. The foreman may be either a woman or a man. Once a foreman of the jury is selected by the jurors, it is advisable that the foreman act as chairperson for the procedural guidance of the jury during its deliberations. The foreman has only one vote and should not be permitted to influence the other jurors any more than any other juror.

Each juror's vote should reflect the juror's opinion. No juror should permit himself to be pressured or pushed into a decision. Each juror should carefully consider the opinions and reasons of other jurors and avoid a stubborn attitude in order to prove a point. A juror may not agree with the law as explained by the judge in the instructions to the jury. Any disagreement as to the law should have no effect on the decision of the juror. The jury is not deciding the law, but is determining the true facts. The juror's duty is to carefully listen to the judge, witnesses and lawyers, to deliberate, and deliberate calmly and fairly, and to decide intelligently and justly.

**Verdict of Jurors.**

In criminal cases, the agreement of all jurors is required to reach a verdict.

In civil cases, if the jury consists of twelve persons, ten or more must concur in a verdict. If the jury consists of six persons, five or more must concur in a verdict.

After a verdict is reached by the jury, the foreman should notify the bailiff that the jury is ready to report to the judge.

**Questions During Deliberation.**

Jurors' questions that cannot be resolved among the jurors may be submitted by a note to the judge setting forth the question. The note should be folded so that it cannot be seen by anyone. It is delivered to the bailiff for delivery to the judge. Jurors should make every effort possible to resolve all questions among themselves in order to avoid any outside influence from anyone including the judge.

**Time Spent Waiting.**

Jurors may be required to sit and wait for periods of time prior to and during a trial. This time is usually spent by the judge and attorneys considering legal matters necessary for a fair determination of the rights of the persons involved or to save time later on in the proceedings. Oftentimes, however, the judge may be called upon to consider emergency matters.

Conflicts in schedules may sometimes develop which result in delays. The courts are constantly searching for and implementing new ways to eliminate or avoid jurors having to spend unnecessary waiting time.

The courts will appreciate any suggestions on how the process may be improved.

**Civic Duty.**

You have been summoned to render an important service as a juror. As a juror, you will serve as an officer of the court, along with the lawyers and the judges.

Trial by jury has long been one of the cornerstones of judicial administration. The right has survived through the centuries as a vigorous and necessary force in the lives of free men and women.

The decisions of the jury affect the property rights, and even the life and the liberty of those whose cases come before it. Those chosen for jury service should take pride in performing this most important duty to their country and to their fellow men.

The proper and efficient functioning of the jury system requires that each juror exercise intelligence, integrity, sound judgment and complete impartiality in the performance of his duty.

When you give to the performance of jury service the best combined efforts of your mind, heart and conscience, you will feel that you are making a substantial contribution to the stability and perpetuation of an institution which must be preserved if freedom under a democratic government is to endure.

# SOME TERMS YOU WILL HEAR IN COURT AND THEIR MEANING

Action, Case, Suit, Lawsuit:

These words mean the same thing. They all refer to a legal dispute brought into court for trial.

Answer:

The paper in which the defendant answers the claims of the plaintiff.

Bailiff:

The bailiff is an officer of the court who waits upon the court and the jury and maintains order in the court.

Civil Case:

A lawsuit is called a "civil case" when it is between persons in their private capacities or relations, or when the government, whether federal, state or local, or some department thereof, sues an individual under the law, as distinguished from prosecuting a criminal charge. It results generally in a verdict for the plaintiff or the defendant and, in many cases, involves the giving or denying of damages.

Clerk:

The clerk sits at the desk in front of the judge during selection of the jury, is an officer of the court and keeps a record of papers filed. The clerk has custody of the pleadings and records of the trial of the case, orders made by the court during the trial and the verdict at the end of the trial.

Complaint:

The document or legal pleading in which the person who brings the lawsuit sets forth allegations, accusations or charges against another person.

Court Reporter:

The court reporter takes down in shorthand or on a machine everything that transpires which constitutes the stenographic record in the case. The notes so made are subject to transcription later, should occasion, such as an appeal, require it.

Criminal Case:

A lawsuit is called a "criminal case" when it is between the state on one side, as plaintiff, and a person on the other side, as defendant, charging the defendant with committing a crime, the verdict usually being "guilty" or "not guilty".

Cross Examination:

The questions asked by a lawyer to the opposing party or witnesses of the opposing party.

Defendant:

In a civil case, the defendant is the person against whom the lawsuit is brought. In a criminal case, the defendant is the person charged with an offense.

Deposition:

Testimony taken under oath in the same manner as during a trial. This is ordinarily done because of illness or absence of a party, or to determine prior to trial how a witness will testify at trial.

Examination, Direct Examination:

The questions which the lawyer asks the lawyer's client or the client's own witnesses.

Exhibits:

Objects including pictures, books, letters and documents which are produced as evidence in a case. These are called "exhibits".

Instructions or "Charge" to Jury:

The outline of the rules of law which the jury must follow in their deliberations in deciding the factual issues submitted to them.

Issue:

A disputed question of fact is referred to as an "issue". It is sometimes spoken of as one of the "questions" which the jury must answer in order to reach a verdict.

Jury Panel:

The whole number of prospective jurors from which the trial jury is chosen.

Objection:

A reason or argument by a lawyer that a question asked or statement made was not proper or in accordance with the law.

Objection Overruled:

This term means that, in the judge's opinion, the lawyer's objection is not proper or correct under the rules of law. The judge's ruling, so far as a juror is concerned, is final and may not be questioned.

Objection Sustained:

When a lawyer objects to a question or the form of a question, the judge may say "objection sustained". This means that the judge agrees that under the rules of the law, the lawyer's objection to a statement or a question is proper. This ruling likewise is not subject to question by the jurors.

Opening Statement:

Before introducing any evidence for their side of the case, lawyers are permitted to tell the jury what the case is about and with what evidence they intend to prove their side of the case. This is called the "opening statement".

Parties:

The plaintiff and defendant in the case. They are also sometimes called the "litigants".

Plaintiff:

The person who starts a lawsuit.

Pleadings:

The parties in a lawsuit must file in court papers stating their claims against each other. In a civil case, these usually consist of a complaint filed by the plaintiff, an answer filed by the defendant and, oftentimes, a reply filed by the plaintiff. These are called the "pleadings".

Record:

This refers to the pleadings, the exhibits and the word-for-word record made by the court of all the proceedings at the trial.

Rests:

This is a legal phrase which means that the party has concluded the evidence he/she wants to introduce in that stage of the trial.

Striking Testimony:

On some occasions, after a witness has testified, the judge will order certain evidence deleted from the record and will direct the jury to disregard it. When this is done, the jury will treat this evidence as though it had never been given and will wholly disregard it.

Subpoena:

The document which is issued for service upon a witness to compel the witness to appear in court.

Verdict:

The finding made by the jurors on the issues submitted to them is the "verdict".

[Approved, effective September 1, 1981.]

## Table Of Corresponding Instructions

The first table below reflects the disposition of the former Uniform Jury Instructions - Criminal. The left-hand column contains the former instruction number, and the right-hand column contains the corresponding present instruction.

The second table below reflects the antecedent provisions in the former Uniform Jury Instructions - Criminal (right-hand column) of the present instructions (left-hand column).

| Former Instruction | UJI | Former Instruction | UJI |
|---|---|---|---|
| 1.00 | 14-101 | 3.12 | 14-313 |
| 1.01 | None | 3.13 | 14-314 |
| 1.02 | 14-102 | 3.14 | 14-315 |
| 1.03 | 14-103 | 3.50 | 14-320 |
| 1.04 | 14-104 | 3.51 | 14-321 |
| 1.05 | 14-105 | 3.52 | 14-322 |
| 1.06 | 14-106 | 3.53 | 14-323 |
| 1.07 | 14-107 | 4.00 | 14-401 |
| 1.08 | 14-108 | 4.01 | 14-402 |
| 1.09 | 14-120 | 4.02 | 14-403 |

| | | | |
|---|---|---|---|
| 1.10 | 14-121 | 4.03 | 14-404 |
| 1.11 | 14-122 | 4.04 | 14-405 |
| 1.12 | 14-123 | 4.05 | 14-406 |
| 1.13 | 14-109 | 6.10 | 14-601 |
| 1.20 | 14-130 | 7.00 | 14-701 |
| 1.21 | 14-131 | 7.01 | 14-702 |
| 1.30 | 14-140 | 7.02 | 14-703 |
| 1.50 | 14-141 | 7.03 | 14-704 |
| 2.00 | 14-201 | Chart 1 | 14-901 |
| 2.01 | None | Chart 2 | 14-920 |
| 2.02 | None | Chart 3 | 14-940 |
| 2.03 | None | 9.00 | 14-902 |
| 2.04 | 14-202 | 9.01 | 14-903 |
| 2.05 | 14-203 | 9.02 | 14-904 |
| 2.10 | 14-210 | 9.03 | 14-905 |
| 2.11 | 14-211 | 9.04 | 14-906 |
| 2.20 | 14-220 | 9.05 | 14-907 |
| 2.21 | 14-221 | 9.06 | 14-908 |
| 2.22 | 14-222 | 9.07 | 14-909 |
| 2.30 | 14-230 | 9.08 | 14-910 |
| 2.31 | 14-231 | 9.09 | 14-911 |
| 2.40 | 14-250 | 9.10 | 14-912 |
| 2.50 | 14-251 | 9.11 | 14-913 |
| 2.51 | 14-252 | 9.12 | 14-914 |
| 2.52 | 14-253 | 9.13 to 9.15 | None |
| 2.53 | 14-254 | 9.16 | 14-915 |
| 2.54 | 14-255 | 9.20 | 14-921 |
| 2.60 | 14-240 | 9.21 | 14-922 |
| 2.61 | 14-241 | 9.22 | 14-923 |
| 2.62 | 14-242 | 9.23 | 14-924 |
| 2.63 | 14-243 | 9.24 | 14-925 |
| 3.00 | 14-301 | 9.25 | 14-928 |
| 3.01 | 14-302 | 9.26 | 14-927 |
| 3.02 | 14-303 | 9.27 | 14-928 |
| 3.03 | 14-304 | 9.29 | 14-930 |
| 3.04 | 14-305 | 9.30 | 14-931 |
| 3.05 | 14-306 | 9.31 | 14-932 |
| 3.06 | 14-307 | 9.32 | 14-933 |

| | |
|---|---|
| 3.07 | 14-308 |
| 3.08 | 14-309 |
| 3.09 | 14-310 |
| 3.10 | 14-311 |
| 3.11 | 14-312 |

| Former Instruction | UJI |
|---|---|
| 9.33 | 14-934 |
| 9.34 | 14-935 |
| 9.35 to 9.37 | None |
| 9.38 | 14-936 |
| 9.40 | 14-941 |

| Former Instruction | UJI |
|---|---|
| 9.41 | 14-942 |
| 9.42 | 14-943 |
| 9.43 | 14-944 |
| 9.44 | 14-945 |
| 9.45 | 14-946 |
| 9.46 | 14-947 |
| 9.47 | 14-948 |
| 9.48 | 14-949 |
| 9.49 | 14-950 |
| 9.50 | 14-951 |
| 9.51 | 14-952 |
| 9.52 | 14-953 |
| 9.53 | 14-954 |
| 9.54 | 14-955 |
| 9.55 | 14-956 |
| 9.56 | 14-957 |
| 9.57 | 14-958 |
| 9.58 | 14-959 |
| 9.59 | 14-960 |
| 9.60 | 14-961 |
| 9.70 | 14-970 |
| 9.72 | 14-971 |
| 9.80 | 14-980 |
| 9.81 | None |
| 9.82 | 14-981 |
| 9.83 | None |
| 9.84 | 14-982 |
| 9.85 | None |
| 9.86 | 14-983 |
| 14.00 | 14-1401 |
| 14.01 | 14-1402 |

| | |
|---|---|
| 16.74 | 14-1684 |
| 16.75 | 14-1685 |
| 16.76 | 14-1686 |
| 16.77 | 14-1687 |
| 16.78 | 14-1688 |
| 16.79 | 14-1689 |
| 16.80 | 14-1690 |
| 16.81 | 14-1691 |
| 16.82 | 14-1692 |
| 16.83 | 14-1693 |
| 16.84 | 14-1694 |
| 16.85 | 14-1695 |
| 16.86 | 14-1696 |
| 16.87 | 14-1697 |
| 17.00 | 14-1701 |
| 17.01 | 14-1702 |
| 17.02 | 14-1703 |
| 17.03 | 14-1704 |
| 17.04 | 14-1705 |
| 17.05 | 14-1706 |
| 17.06 | 14-1707 |
| 20.00 | 14-2001 |
| 22.00 | 14-2201 |
| 22.01 | 14-2202 |
| 22.02 | 14-2203 |
| 22.03 | 14-2204 |
| 22.04 | 14-2205 |
| 22.05 | 14-2206 |
| 22.06 | 14-2207 |
| 22.07 | 14-2208 |
| 22.08 | 14-2209 |

| | | | |
|---|---|---|---|
| 14.02 | 14-1403 | 22.09 | 14-2210 |
| 14.03 | 14-1410 | 22.10 | 14-2211 |
| 14.10 | 14-1420 | 22.11 | 14-2212 |
| 16.00 | 14-1601 | 22.12 | 14-2213 |
| 16.01 | 14-1602 | 22.13 | 14-2214 |
| 16.02 | 14-1603 | 22.14 | 14-2215 |
| 16.05 | 14-1610 | 22.20 | 14-2220 |
| 16.06 | 14-1611 | 22.21 | 14-2221 |
| 16.10 | 14-1620 | 22.22 | 14-2222 |
| 16.11 | 14-1621 | 22.23 | 14-2223 |
| 16.20 | 14-1630 | 22.24 | 14-2224 |
| 16.21 | 14-1631 | 22.25 | 14-2225 |
| 16.22 | 14-1632 | 22.26 | 14-2226 |
| 16.23 | 14-1633 | 22.27 | 14-2227 |
| 16.30 | 14-1640 | 22.28 | 14-2228 |
| 16.31 | 14-1641 | 22.29 | 14-2229 |
| 16.32 | 14-1642 | 22.40 | 14-2240 |
| 16.33 | 14-1643 | 22.41 | 14-2241 |
| 16.34 | 14-1644 | 22.50 | 14-2250 |
| 16.40 | 14-1660 | 22.51 | 14-2251 |
| 16.41 | 14-1651 | 22.52 | 14-2252 |
| 16.42 | 14-1652 | 22.53 | 14-2253 |
| 16.50 | 14–1650 | 22.54 | 14-2254 |
| 16.60 | 14-1670 | 22.55 | 14-2255 |
| 16.61 | 14-1671 | 25.01 | 14-2501 |
| 16.62 | 14-1672 | 28.10 | 14-2801 |
| 16.63 | 14-1673 | 28.11 to 28.19 | None |
| 16.64 | 14-1674 | 28.20 | 14-2610 |
| 16.65 | 14-1675 | 28.21 | 14-2811 |
| 16.70 | 14-1630 | 28.22 | None |
| 16.71 | 14-1681 | 28.23 | 14-2812 |
| 16.72 | 14-1682 | 28.24 | 14-2813 |
| 16.73 | 14-1683 | 28.25 | 14-2814 |

| Former Instruction | UJI | Former Instruction | UJI |
|---|---|---|---|
| 28.26 | 14-2815 | 40.01 | 14-5002 |
| 28.27 | 14-2816 | 40.02 | 14-5003 |
| 28.28 | 14-2817 | 40.03 | 14-5004 |

| | |
|---|---|
| 28.30 | 14-2822 |
| 28.31 | 14-2820 |
| 28.32 | 14-2821 |
| 28.39 | 14-2823 |
| 35.01 | 14-4501 |
| 35.02 | 14-4502 |
| 35.03 | 14-4503 |
| 35.04 | 14-4504 |
| 35.05 | 14-4505 |
| 36.00 | 14-3101 |
| 36.01 | 14-3102 |
| 36.02 | 14-3103 |
| 36.03 | 14-3104 |
| 36.10 | 14-3110 |
| 36.11 | 14-3111 |
| 36.12 | 14-3112 |
| 36.13 | 14-3113 |
| 36.20 | 14-3105 |
| 36.30 | 14-3120 |
| 36.31 | 14-3121 |
| 36.32 | 14-3122 |
| 36.40 | 14-3130 |
| 36.41 | 14-3131 |
| 36.43 | 14-3140 |
| 39.00 | 14-7001 |
| 39.01 | 14-7002 |
| 39.02 | 14-7003 |
| 39.03 | 14-7004 |
| 39.04 | 14-7005 |
| 39.05 | 14-7006 |
| 39.06 | 14-7007 |
| 39.10 | 14-7010 |
| 39.11 | 14-7011 |
| 39.12 | 14-7012 |
| 39.13 | 14-7013 |
| 39.14 | 14-7014 |
| 39.15 | 14-7015 |
| 39.16 | 14-7016 |
| 40.04 | 14-5005 |
| 40.05 | 14-5006 |
| 40.06 | 14-5007 |
| 40.07 | 14-5008 |
| 40.08 | 14-5009 |
| 40.09 | 14-5010 |
| 40.10 | 14-5011 |
| 40.11 | 14-5012 |
| 40.12 | 14-5013 |
| 40.13 | 14-5014 |
| 40.14 | 14-5015 |
| 40.20 | 14-5020 |
| 40.21 | 14-5021 |
| 40.22 | 14-5022 |
| 40.23 | 14-5023 |
| 40.24 | 14-5024 |
| 40.25 | 14-5025 |
| 40.26 | 14-5026 |
| 40.27 | 14-5027 |
| 40.28 | 14-5028 |
| 40.29 | 14-5029 |
| 40.30 | 14-5030 |
| 40.31 | 14-5031 |
| 40.32 | 14-5032 |
| 40.33 | 14-5033 |
| 40.34 | 14-5034 |
| 40.35 | 14-5035 |
| 40.36 | 14-5036 |
| 40.40 | 14-5040 |
| 40.41 | 14-5041 |
| 40.45 | 14-5042 |
| 40.50 | 14-5050 |
| 40.51 | 14-5051 |
| 40.60 | 14-5060 |
| 40.61 | 14-5061 |
| 41.00 | 14-5101 |
| 41.01 | 14-5102 |
| 41.02 | 14-5103 |

| | |
|---|---|
| 39.17 | 14-7017 |
| 39.18 | 14-7018 |
| 39.19 | 14-7019 |
| 39.20 | 14-7020 |
| 39.21 | 14-7021 |
| 39.22 | 14-7022 |
| 39.23 | 14-7023 |
| 39.24 | 14-7024 |
| 39.25 | 14-7025 |
| 39.26 to 39.29 | None |
| 39.30 | 14-7026 |
| 39.31 | 14-7027 |
| 39.32 | 14-7028 |
| 39.83 | 14-7029 |
| 39.34 | 14-7030 |
| 39.35 | 14-7031 |
| 39.36 | 14-7032 |
| 39.37 | 14-7033 |
| 39.40 | 14-7040 |
| 39.41 | 14-7041 |
| 39.42 | 14-7042 |
| 39.43 | 14-7043 |
| 40.00 | 14-5001 |

| Former Instruction | UJI |
|---|---|
| 41.54 | 14-5184 |
| 41.60 | 14-5190 |
| 41.61 | 14-5191 |
| 50.00 | 14-6001 |
| 50.01 | 14-6002 |
| 50.02 | 14-6003 |
| 50.03 | 14-6004 |
| 50.04 | 14-6005 |
| 50.05 | 14-6006 |
| 50.06 | 14-6007 |
| 50.07 | 14-6008 |
| 50.10 | 14-6010 |
| 50.11 | 14-6011 |

| | |
|---|---|
| 41.03 | 14-5104 |
| 41.05 | 14-5105 |
| 41.06 | 14-5106 |
| 41.10 | 14-5110 |
| 41.11 | 14-5111 |
| 41.15 | 14-5120 |
| 41.16 | 14-5121 |
| 41.20 | 14-5130 |
| 41.21 | 14-5131 |
| 41.22 | 14-5132 |
| 41.26 | 14-5140 |
| 41.30 | 14-5150 |
| 41.35 | 14-5160 |
| 41.40 | 14-5170 |
| 41.41 | 14-5171 |
| 41.42 | 14-5172 |
| 41.43 | 14-5173 |
| 41.44 | 14-5174 |
| 41.45, 41.46 | None |
| 41.50 | 14-5180 |
| 41.51 | 14-5181 |
| 41.52 | 14-5182 |
| 41.53 | 14-5183 |

| Former Instruction | UJI |
|---|---|
| 50.16 | 14-6016 |
| 50.17 | 14-6017 |
| 50.20 | 14-6020 |
| 50.30 | 14-6030 |
| 60.00 | 14-8001 |
| 60.01 | 14-8002 |
| 60.02 | 14-8003 |
| 60.03 | 14-8004 |
| 60.04 to 60.09 | None |
| 60.10 | 14-8005 |
| 60.11 | None |
| 60.20 | 14-8020 |
| 60.21 | 14-8021 |

| | |
|---|---|
| 50.12 | 14-6012 |
| 50.13 | 14-6013 |
| 50.14 | 14-6014 |
| 50.15 | 14-6015 |

| | |
|---|---|
| 61.00 | 14-9001 |
| 61.01 | 14-9002 |
| 61.02 | 14-9003 |
| 61.03 | 14-9004 |

| UJI | Former Form |
|---|---|
| 14-101 | 1.00 |
| 14-102 | 1.02 |
| 14-103 | 1.03 |
| 14-104 | 1.04 |
| 14-105 | 1.05 |
| 14-106 | 1.06 |
| 14-107 | 1.07 |
| 14-108 | 1.08 |
| 14-109 | 1.13 |
| 14-120 | 1.09 |
| 14-121 | 1.10 |
| 14-122 | 1.11 |
| 14-123 | 1.12 |
| 14-130 | 1.20 |
| 14-131 | 1.21 |
| 14-140 | 1.30 |
| 14-141 | 1.50 |
| 14-201 | 2.00 |
| 14-202 | 2.04 |
| 14-203 | 2.05 |
| 14-210 | 2.10 |
| 14-211 | 2.11 |
| 14-220 | 2.20 |
| 14-221 | 2.21 |
| 14-222 | 2.22 |
| 14-230 | 2.30 |
| 14-231 | 2.31 |
| 14-240 | 2.60 |
| 14-241 | 2.61 |
| 14-242 | 2.62 |
| 14-243 | 2.63 |
| 14-250 | 2.40 |

| UJI | Former Form |
|---|---|
| 14-702 | 7.01 |
| 14-703 | 7.02 |
| 14-704 | 7.03 |
| 14-901 | None |
| 14-902 | 9.00 |
| 14-903 | 9.01 |
| 14-904 | 9.02 |
| 14-905 | 9.03 |
| 14-906 | 9.04 |
| 14-907 | 9.05 |
| 14-908 | 9.06 |
| 14-909 | 9.07 |
| 14-910 | 9.08 |
| 14-911 | 9.09 |
| 14-912 | 9.10 |
| 14-913 | 9.11 |
| 14-914 | 9.12 |
| 14-915 | 9.16 |
| 14-920 | None |
| 14-921 | 9.20 |
| 14-922 | 9.21 |
| 14-923 | 9.22 |
| 14-924 | 9.23 |
| 14-925 | 9.24 |
| 14-926 | 9.25 |
| 14-927 | 9.26 |
| 14-928 | 9.27 |
| 14-929 | 9.28 |
| 14-930 | 9.29 |
| 14-931 | 9.30 |
| 14-932 | 9.31 |
| 14-933 | 9.32 |

| | |
|---|---|
| 14-251 | 2.50 |
| 14-252 | 2.51 |
| 14-253 | 2.52 |
| 14-254 | 2.53 |
| 14-255 | 2.54 |
| 14-301 | 3.00 |
| 14-302 | 3.01 |
| 14-303 | 3.02 |
| 14-304 | 3.03 |
| 14-305 | 3.04 |
| 14-306 | 3.05 |
| 14-307 | 3.06 |
| 14-308 | 3.07 |
| 14-309 | 3.08 |
| 14-310 | 3.09 |
| 14-311 | 3.10 |
| 14-312 | 3.11 |
| 14-313 | 3.12 |
| 14-314 | 3.13 |
| 14-315 | 3.14 |
| 14-320 | 3.50 |
| 14-321 | 3.51 |
| 14-322 | 3.52 |
| 14-323 | 3.53 |
| 14-401 | 4.00 |
| 14-402 | 4.01 |
| 14-403 | 4.02 |
| 14-404 | 4.03 |
| 14-405 | 4.04 |
| 14-406 | 4.06 |
| 14-601 | 6.10 |
| 14-701 | 7.00 |

| UJI | Former Form |
|---|---|
| 14-1402 | 14.01 |
| 14-1403 | 14.02 |
| 14-1410 | 14.03 |
| 14-1420 | 14.10 |

| | |
|---|---|
| 14-934 | 9.33 |
| 14-935 | 9.34 |
| 14-936 | 9.38 |
| 14-940 | None |
| 14-941 | 9.40 |
| 14-942 | 9.41 |
| 14-943 | 9.42 |
| 14-944 | 9.43 |
| 14-945 | 9.44 |
| 14-946 | 9.45 |
| 14-947 | 9.46 |
| 14-948 | 9.47 |
| 14-949 | 9.48 |
| 14-950 | 9.49 |
| 14-951 | 9.50 |
| 14-952 | 9.51 |
| 14-953 | 9.52 |
| 14-954 | 9.53 |
| 14-955 | 9.54 |
| 14-956 | 9.55 |
| 14-957 | 9.56 |
| 14-958 | 9.57 |
| 14-959 | 9.58 |
| 14-960 | 9.59 |
| 14-961 | 9.60 |
| 14-970 | 9.70 |
| 14-971 | 9.72 |
| 14-980 | 9.80 |
| 14-981 | 9.82 |
| 14-982 | 9.84 |
| 14-983 | 9.86 |
| 14-1401 | 14.00 |

| UJI | Former Form |
|---|---|
| 14-2209 | 22.08 |
| 14-2210 | 22.09 |
| 14-2211 | 22.10 |
| 14-2212 | 22.11 |

| | | | |
|---|---|---|---|
| 14-1601 | 16.00 | 14-2213 | 22.12 |
| 14-1602 | 16.01 | 14-2214 | 22.13 |
| 14-1603 | 16.02 | 14-2215 | 22.14 |
| 14-1610 | 16.05 | 14-2220 | 22.20 |
| 14-1611 | 16.06 | 14-2221 | 22.21 |
| 14-1620 | 16.10 | 14-2222 | 22.22 |
| 14-1621 | 16.11 | 14-2223 | 22.23 |
| 14-1630 | 16.20 | 14-2224 | 22.24 |
| 14-1631 | 16.21 | 14-2225 | 22.25 |
| 14-1632 | 16.22 | 14-2226 | 22.26 |
| 14-1633 | 16.23 | 14-2227 | 22.27 |
| 14-1640 | 16.30 | 14-2228 | 22.28 |
| 14-1641 | 16.31 | 14-2229 | 22.29 |
| 14-1642 | 16.32 | 14-2240 | 22.40 |
| 14-1643 | 16.33 | 14-2241 | 22.41 |
| 14-1644 | 16.34 | 14-2250 | 22.50 |
| 14-1650 | 16.40 | 14-2251 | 22.51 |
| 14-1651 | 16.41 | 14-2252 | 22.52 |
| 14-1652 | 16.42 | 14-2253 | 22.53 |
| 14-1660 | 16.50 | 14-2254 | 22.54 |
| 14-1670 | 16.60 | 14-2255 | 22.55 |
| 14-1671 | 16.61 | 14-2501 | 25.01 |
| 14-1672 | 16.62 | 14-2801 | 28.10 |
| 14-1673 | 16.63 | 14-2810 | 28.20 |
| 14-1674 | 16.64 | 14-2811 | 28.21 |
| 14-1675 | 16.65 | 14-2812 | 28.23 |
| 14-1680 | 16.70 | 14-2813 | 28.24 |
| 14-1681 | 16.71 | 14-2814 | 28.25 |
| 14-1682 | 16.72 | 14-2815 | 28.26 |
| 14-1683 | 16.73 | 14-2816 | 28.27 |
| 14-1684 | 16.74 | 14-2817 | 28.28 |
| 14-1685 | 16.75 | 14-2820 | 28.31 |
| 14-1686 | 16.76 | 14-2821 | 28.32 |
| 14-1687 | 16.77 | 14-2822 | 28.30 |
| 14-1688 | 16.78 | 14-2823 | 28.39 |
| 14-1689 | 16.79 | 14-3101 | 36.00 |
| 14-1690 | 16.80 | 14-3102 | 36.01 |
| 14-1691 | 16.81 | 14-3103 | 36.02 |

| | |
|---|---|
| 14-1692 | 16.82 |
| 14-1693 | 16.83 |
| 14-1694 | 16.84 |
| 14-1695 | 16.85 |
| 14-1696 | 16.86 |
| 14-1697 | 16.87 |
| 14-1701 | 17.00 |
| 14-1702 | 17.01 |
| 14-1703 | 17.02 |
| 14-1704 | 17.03 |
| 14-1705 | 17.04 |
| 14-1706 | 17.05 |
| 14-1707 | 17.06 |
| 14-2001 | 20.00 |
| 14-2201 | 22.00 |
| 14-2202 | 22.01 |
| 14-2203 | 22.02 |
| 14-2204 | 22.03 |
| 14-2205 | 22.04 |
| 14-2206 | 22.05 |
| 14-2207 | 22.06 |
| 14-2208 | 22.07 |

| UJI | Former Form |
|---|---|
| 14-5006 | 40.05 |
| 14-5007 | 40.06 |
| 14-5008 | 40.07 |
| 14-5009 | 40.08 |
| 14-5010 | 40.09 |
| 14-5011 | 40.10 |
| 14-5012 | 40.11 |
| 14-5013 | 40.12 |
| 14-5014 | 40.13 |
| 14-5015 | 40.14 |
| 14-5020 | 40.20 |
| 14-5021 | 40.21 |
| 14-5022 | 40.22 |
| 14-5023 | 40.23 |

| | |
|---|---|
| 14-3104 | 36.03 |
| 14-3105 | 36.20 |
| 14-3110 | 36.10 |
| 14-3111 | 36.11 |
| 14-3112 | 36.12 |
| 14-3113 | 36.13 |
| 14-3120 | 36.30 |
| 14-3121 | 36.31 |
| 14-3122 | 36.32 |
| 14-3130 | 36.40 |
| 14-3131 | 36.41 |
| 14-3140 | 36.43 |
| 14-4501 | 35.01 |
| 14-4502 | 35.02 |
| 14-4503 | 35.03 |
| 14-4504 | 35.04 |
| 14-4505 | 35.05 |
| 14-5001 | 40.00 |
| 14-5002 | 40.01 |
| 14-5003 | 40.02 |
| 14-5004 | 40.03 |
| 14-5005 | 40.04 |

| UJI | Former Form |
|---|---|
| 14-6003 | 50.02 |
| 14-6004 | 50.03 |
| 14-6005 | 50.04 |
| 14-6006 | 50.05 |
| 14-6007 | 50.06 |
| 14-6008 | 50.07 |
| 14-6010 | 50.10 |
| 14-6011 | 50.11 |
| 14-6012 | 50.12 |
| 14-6013 | 50.13 |
| 14-6014 | 50.14 |
| 14-6015 | 50.15 |
| 14-6016 | 50.16 |
| 14-6017 | 50.17 |

| | |
|---|---|
| 14-5024 | 40.24 |
| 14-5025 | 40.25 |
| 14-5026 | 40.26 |
| 14-5027 | 40.27 |
| 14-5028 | 40.28 |
| 14-5029 | 40.29 |
| 14-5030 | 40.30 |
| 14-5031 | 40.31 |
| 14-5032 | 40.32 |
| 14-5033 | 40.33 |
| 14-5034 | 40.34 |
| 14-5035 | 40.35 |
| 14-5036 | 40.36 |
| 14-5040 | 40.40 |
| 14-5041 | 40.41 |
| 14-5042 | 40.45 |
| 14-5050 | 40.50 |
| 14-5051 | 40.51 |
| 14-5060 | 40.60 |
| 14-5061 | 40.61 |
| 14-5101 | 41.00 |
| 14-5102 | 41.01 |
| 14-5103 | 41.02 |
| 14-5104 | 41.03 |
| 14-5105 | 41.05 |
| 14-5106 | 41.06 |
| 14-5110 | 41.10 |
| 14-5111 | 41.11 |
| 14-5120 | 41.15 |
| 14-5121 | 41.16 |
| 14-5130 | 41.20 |
| 14-5131 | 41.21 |
| 14-5132 | 41.22 |
| 14-5140 | 41.26 |
| 14-5150 | 41.30 |
| 14-5160 | 41.35 |
| 14-5170 | 41.40 |
| 14-5171 | 41.41 |
| 14-6020 | 50.20 |
| 14-6030 | 50.30 |
| 14-7001 | 39.00 |
| 14-7002 | 39.01 |
| 14-7003 | 39.02 |
| 14-7004 | 39.03 |
| 14-7005 | 39.04 |
| 14-7006 | 39.05 |
| 14-7007 | 39.06 |
| 14-7010 | 39.10 |
| 14-7011 | 39.11 |
| 14-7012 | 39.12 |
| 14-7013 | 39.13 |
| 14-7014 | 39.14 |
| 14-7015 | 39.15 |
| 14-7016 | 39.16 |
| 14-7017 | 39.17 |
| 14-7018 | 39.18 |
| 14-7019 | 39.19 |
| 14-7020 | 39.20 |
| 14-7021 | 39.21 |
| 14-7022 | 39.22 |
| 14-7023 | 39.23 |
| 14-7024 | 39.24 |
| 14-7025 | 39.25 |
| 14-7026 | 39.30 |
| 14-7027 | 39.31 |
| 14-7028 | 39.32 |
| 14-7029 | 39.33 |
| 14-7030 | 39.34 |
| 14-7031 | 39.35 |
| 14-7032 | 39.36 |
| 14-7033 | 39.37 |
| 14-7040 | 39.40 |
| 14-7041 | 39.41 |
| 14-7042 | 39.42 |
| 14-7043 | 39.43 |
| 14-8001 | 60.00 |

| | |
|---|---|
| 14-5172 | 41.42 |
| 14-5173 | 41.43 |
| 14-5174 | 41.44 |
| 14-5180 | 41.50 |
| 14-5181 | 41.51 |
| 14-5182 | 41.52 |
| 14-5183 | 41.53 |
| 14-5184 | 41.54 |
| 14-5195 | 41.60 |
| 14-5196 | 41.61 |
| 14-6001 | 50.00 |
| 14-6002 | 50.01 |
| 14-8002 | 60.01 |
| 14-8003 | 60.02 |
| 14-8004 | 60.03 |
| 14-8005 | 60.10 |
| 14-8020 | 60.20 |
| 14-8021 | 60.21 |
| 14–9001 | 61.00 |
| 14–9002 | 61.01 |
| 14–9003 | 61.02 |
| 14–9004 | 61.03 |

—