UNANNOTATED

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.

Bryon Caton

John R. Cooney

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The Hon. Edwin L. Felter

Warren O.F. Harris

Frederick M. Hart, Chairman

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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 should be used without substantive modification or substitution. No instruction shall be given on a subject which a use note directs that no instruction be given. To avoid fundamental error, it is the duty of the court to properly instruct the jury on the law. Thus, an elements instruction may only be altered when the alteration is adequately supported by binding precedent or the unique circumstances of a particular case, and where the alteration is necessary in order to accurately convey the law to the jury. 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 that 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 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.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

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 that 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 that substantially follow the language of the statute or use equivalent language are normally sufficient. *See State v. Caldwell*, 2008-NMCA-049, ¶ 25, 143 N.M. 792, 182 P.3d 775 (citing *State v. Doe*, 1983-NMSC-096, ¶ 10, 100 N.M. 481, 672 P.2d 654); *State v. Rushing*, 1973-NMSC-092, ¶ 20, 85 N.M. 540, 514 P.2d 297 (“Instructions . . . are sufficient if they fairly and correctly state the applicable law.”).

Nevertheless, “[t]he 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*, 1983-NMSC-098, ¶ 6, 100 N.M. 487, 672 P.2d 660. Thus, even where a UJI exists, if it is inadequate to convey the legal questions of the case or has been rendered obsolete by a change in the law, modification may be necessary to avoid fundamental error. *See State v. Cabezuela*, 2011-NMSC-041, ¶ 36, 150 N.M. 654, 265 P.3d 705.

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*, 1960-NMSC-005, 66 N.M. 397, 349 P.2d 118. However, any question of venue may be waived by proceeding to trial. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444. 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.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

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] You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the trial, because ordinarily transcripts of the witnesses testimony will not be provided to you.

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 stipulations or 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 the question and your name 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. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. 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, including your family and friends, 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 are not to discuss or provide any information to anyone about this case through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this case until I have accepted your verdict and this case is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing or exchanging information through social media.

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 sympathy, bias or prejudice. Therefore, 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.

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 NOTES

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; as amended by Supreme Court Order No. 21-8300-011, effective for all cases filed or pending on or after December 31, 2021.]

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.]

14-101A. Use of interpreter.[1]

No matter what language people speak, they have a right to have their testimony heard and understood. You are about to hear a trial in which a court-certified interpreter will interpret for one or more of the [witnesses]. The interpreter is required to remain neutral. The interpreter is required to interpret what is spoken, or translate documents, between English and _____ (*specify other language*) accurately and fairly to the best of the interpreter's skill and judgment.

Some of you may speak or understand _____ (*specify other language*). Ordinarily because the court-certified interpreters must abide by an oath and with standards and the ethics of their profession, their interpretation is presumed to be accurate. However, if based on your understanding of _____ (*specify other language*), you firmly believe that the interpreter has incorrectly interpreted either a question or a witness's response to the question, you may give the bailiff a note before the witness leaves the stand stating your concern. I will decide whether and how to address your concern.

If I decide to leave the interpretation as expressed by the interpreter you must only consider the interpreter's English interpretation, even if you still disagree with the interpreter's interpretation. What the witness(es) may have said in _____ (*specify other language*), before the interpreter's interpretation, is not evidence and may not be used by you in any way in your deliberations.

You must evaluate the interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's interpreted testimony even if you think the witness speaks some English.

USE NOTES

1. This instruction is to be used whenever a witness interpreter is necessary. The instruction may be adapted for use with signed language or other types of interpreters.

[Adopted by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

14-110. Recompiled.

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. 08-8300-060, effective February 2, 2009.]

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 NOTES

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 NOTES

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 NOTES

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.

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 NOTES

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 NOTES

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.

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 NOTES

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 No. 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.

14-121A. 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 NOTES

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 No. 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.

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.

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 NOTES

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).

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 NOTES

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."

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 NOTES

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.

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 NOTES

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 NOTES

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.

14-135. “Use” of a deadly weapon; defined.

“Use” of a deadly weapon during an assault means the following:

1. A deadly weapon was present at some point during the encounter;

2. _____ (*name of victim*) knew, or based on the defendant's words or actions, _____ (*name of victim*) had reason to know that the defendant had a deadly weapon; and

3. The defendant intentionally used the presence of the weapon to facilitate the assault.

USE NOTES

Use with UJI 14-305 NMRA, UJI 14-306 NMRA, UJI 14-355 NMRA, UJI 14-356 NMRA, UJI 14-375 NMRA, UJI 14-376 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — In *State v. Zachariah G*., 2022-NMSC-003, ¶ 3, 501 P.3d 451, the Supreme Court held "that a defendant *uses* a deadly weapon to commit assault where a defendant makes *facilitative use* of the deadly weapon." In the context of assault by use of a deadly weapon by threat, facilitative use of a deadly weapon is "distinct from incidental exposure or mere possession" and "may be found where (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used to facilitate the commission of the assault." *Id*. ¶ 19.

The *Zachariah G*. Court did not specifically address the applicability of this definition of facilitative use for crimes involving the use of a deadly weapon that constitutes an express or implied threat, outside the context of assault. Committee commentary to UJI 14-914 NMRA discusses the meaning of "armed with a deadly weapon" in the context of criminal sexual penetration, criminal sexual contact, or criminal sexual contact of a minor.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

Part D
General Instructions

14-140. Elements of uncharged crimes.

In addition to the other elements of _____ (*identify charged crime or crimes*), you must consider whether the defendant's acts related to the commission of _____ (*identify uncharged crime*). The defendant is not charged with

_____ (*identify uncharged crime*). However, the law declares that to be a crime when:

1. [insert elements replacing references to “the defendant” with “a person” or “that person” as needed for clarity].

USE NOTES

This instruction must be used with every crime that incorporates another crime by reference—either by requiring the “intent to commit” another crime or by describing an act done with the purpose of committing another crime—unless the referenced crime is separately charged and instructed. This instruction may omit the element specifying jurisdiction and date of offense or any other elements not relevant to consideration of the charged offense and whose inclusion would cause juror confusion. The phrasing of this instruction may be adapted to account for the particular context in which it is used.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — This instruction provides a template for instructing on the elements of an uncharged offense in a manner that informs the jury of the elements without giving the impression that the jury must find the defendant committed the uncharged offense. It is to be used any time the legal definition of an uncharged offense is necessary to determining the elements of a charged offense. *See, e.g., State v. Catt*, 2019-NMCA-013, ¶¶ 13-14, 435 P.3d 1255 (“[I]t is necessary that the jury is instructed on the essential elements of the alleged predicate acts upon which racketeering is based. . . . Because the instructions permitted the jury to convict Defendant for racketeering based on predicate offenses for which the jury had no elements, the instructions were erroneous.”); *State v. Segura*, 2002-NMCA-044, ¶ 16, 132 N.M. 114, 45 P.3d 54 (reversal was “required because the district court and the State did not set out the initiatory crime of attempt in the jury instructions in a manner to insure all elements of the underlying crime were properly placed within the context of the initiatory crime of attempt”); *State v. Armijo*, 1999-NMCA-087, ¶¶ 3-4, 127 N.M. 594, 985 P.2d 764 (finding fundamental error where “[t]he district court instructed the jury on the elements of aggravated assault with intent to commit felony aggravated battery, but failed to instruct the jury on the essential elements of felony aggravated battery”); *State v. Gardner*, 1991-NMCA-058, ¶ 17, 112 N.M. 280, 814 P.2d 458 (in a prosecution for conspiracy to harbor a felon, “where defendant contests the charge and asserts that a felony has in fact not been committed . . . the defendant is entitled to have the jury instructed on the elements of the predicate felony or felonies the state alleges were committed”).

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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 NOTES

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*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088; *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916. The adoption of the instruction also supersedes dicta in *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, 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 Gunzelman*, 1973-NMSC-055, *with State v. Mazurek*, 1975-NMCA-066, 88 N.M. 56, 537 P.2d 51.

[Amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 NOTES

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 [withdrawn] 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.

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. The defendant did not act as a result of sufficient provocation];[6]

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

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

6. This element is to be given only when provocation is an issue. In that circumstance UJI 14-221A NMRA, voluntary manslaughter; lesser included offense of felony murder, should be given.

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as

amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Felony murder consists of a second-degree murder committed in the course of a dangerous felony. NMSA 1978, § 30-2-1(A)(2) (1994); *see State v. Montoya*, 2013-NMSC-020, ¶ 15, 306 P.3d 426, *see also State v. Nieto*, 2000-NMSC-031, ¶¶ 13-14, 129 N.M. 688, 12 P.3d 442 (citing *State v. Campos*, 1996-NMSC-043, ¶ 17, 122 N.M. 148, 921 P.2d 1266).

See Section 30-2-1A(2). Proof of malice aforethought or deliberate intention is not required as an element of felony murder. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211. 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* UJI 14-5110 NMRA. 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* UJI 14-5111 NMRA.

Before a defendant can be convicted of felony murder, he or she 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 the defendant to prepare a defense. *State v. Stephens*, 1979-NMSC-076, ¶ 10, 93 N.M. 458, 601 P.2d 428; *State v. Hicks*, 1976-NMSC-069, ¶ 8, 89 N.M. 568, 555 P.2d 689. Rule 5-303 NMRA 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*, 1976-NMSC-034, ¶ 8, 89 N.M. 458, 553 P.2d 1265. Felony murder may be charged as part of an open count of murder by also charging the underlying felony. *Stephens*, 1979-NMSC-076, ¶ 11. However, when a jury convicts a defendant of both felony murder and the same felony upon which the felony murder conviction is predicated, the predicate felony is vacated because it is subsumed within the felony murder conviction. *State v. Torrez*, 2013-NMSC-034, ¶ 15, 305 P.3d 944.

"In New Mexico, the underlying felony must be a first degree felony, an inherently dangerous lesser degree felony, or a lesser degree felony committed under inherently dangerous circumstances." *State v. Smith*, 2001-NMSC-004, ¶ 12, 130 N.M. 117, 19 P.3d 254 (citing *State v. Harrison*, 1977-NMSC-038, ¶ 14, 90 N.M. 439, 564 P.2d 1321). There is a presumption of inherent dangerousness "in a felony murder case where the predicate felony is a first-degree felony, but not where the felony is of a lesser degree." *State v. Mora*, 1997-NMSC-060, ¶ 21, 124 N.M. 346, 950 P.2d 789, *overruled on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1. For lesser felonies, "both the nature of the felony and the circumstances surrounding its commission may be considered to determine whether it was inherently dangerous to human life." *Smith*, 2001-NMSC-004, ¶ 12. This is a factual matter "for the jury to decide in each case, subject to review by the appellate courts." *Id.*

In *Harrison*, the Court made it clear that New Mexico follows the general rule that the felony must be independent of or collateral to the homicide. 1977-NMSC-038, ¶ 9.

"[T]o charge felony murder for a killing in the commission of or attempt to commit a felony, the felony must be either a first degree felony (in which case the 'res gestae' test must be used) or the lesser degree felony must be inherently dangerous or committed under circumstances that are inherently dangerous." *State v. Ortega*, 1991-NMSC-084, ¶ 17, 112 N.M. 554, 817 P.2d 1196, *abrogated on other grounds by Frazier*, 2007-NMSC-032, ¶ 1. "[F]or the homicide to come within the res gestae, the felony and the homicide must be part of one continuous transaction and closely connected in point of time, place and causal connection. . . . [C]ausation must be the acts of defendant leading to the homicide without an independent force intervening." *State v. Martinez*, 1982-NMCA-053, ¶ 17, 98 N.M. 27, 644 P.2d 541 (citing *Harrison*, 1977-NMSC-038, ¶ 11). 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, UJI 14-251 NMRA.

In a felony murder prosecution where the evidence supports a conviction for either second-degree murder or voluntary manslaughter, the felony murder essential elements jury instruction must include the defining requirement that the accused did not act in the heat of passion as a result of the legally adequate provocation that would reduce murder to manslaughter. *See Montoya*, 2013-NMSC-020, ¶ 3.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-25, effective for all cases pending or filed on or after December 31, 2021.]

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 the 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.

USE NOTES

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.

[As amended by Supreme Court Order No. 08 8300 060, effective February 2, 2009; as amended by Supreme Court Order No. 19 8300 016, effective for all cases pending or filed on or after December 31, 2019.]

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 Aoutrageously 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*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922. A[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, Adepraved mind murder convictions have been limited to acts that are dangerous to more than one person.@ *Reed*, 2005-NMSC-031, & 22. ASuch 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*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174. Other types of conduct that have been held to involve a Avery high degree of unjustifiable homicidal danger@ include Astarting 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 Adriving a car at very high speeds along a main street.@ 2 Wayne R. LaFave, *Substantive Criminal Law* ' 14.4, at 440 (2d ed. 2003). LaFave cites additional examples imaginable, including Athrowing stones from the roof of a tall building onto the busy street below@ and Apiloting a speedboat through a group of swimmers.@ *Id*. at 441.

AIn 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*, 1984-NMSC-005, & 9, 100 N.M. 671, 675

P.2d 120. AThe 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. A>[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). A[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)). AObviously, mere negligence or recklessness will not do.@ *Reed*, 2005-NMSC-031, & 23.

Therefore, this instruction sets forth a subjective test for depraved mind murder. AThe defendant must know his act is greatly dangerous to the lives of others.@ *Johnson*, 1985-NMCA-074, & 11. But, A[a] defendant does not have to actually know that his victim will be injured by his act.@ *Ibn Omar-Muhammad*, 1985-NMSC-006, & 21; *see also McCrary*, 1984-NMSC-005, && 9-10. In *McCrary*, the defendant had attended a carnival in Hobbs and felt he was cheated out of sixty-four dollars. *Id*. & 2. He and a co-defendant claimed that they decided to get revenge by shooting the tires of the carnival trucks. *Id*. They discharged about twenty-five shots into several tractor-trailers and cabs. Not a single tire was shot. *Id*. & 11. The victim was in a sleeper cab of one of the trucks and was killed by one of these bullets. *Id*. & 3. The Court stated, ADefendants 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*. & 9. 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. *Id*. & 11. 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. *Id*. 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. *Id*. & 11.

The Supreme Court has held that Aa 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*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128. 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, ABy 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*. & 9.

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.

2 LaFave, *supra*, ' 14.4, at 439. As said in a simpler way, Athe extent of the defendant=s knowledge of the surrounding circumstances and the social utility of his conduct@ are to be considered. *Id*.

[As amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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] [her] 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 NOTES

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 [withdrawn], jury procedure for various degrees of homicide.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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*, [1985-NMCA-074, ¶¶ 10-20,] 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.

The mens rea constitutes a subjective rather than objective knowledge requirement. *State v. Suazo*, 2017-NMSC-011, ¶¶ 22-25, 390 P.3d 674 (rejecting the notion that prior precedent supported an objective "should have known" mens rea (citing *State v. Brown*, 1996-NMSC-073, ¶ 16, 122 N.M. 724, 931 P.2d 69)). *Suazo* held that a second-degree murder conviction requires more than "that a defendant should have known of the risk of his or her conduct without anything more, because that is essentially a civil negligence standard." *Id*. ¶ 23. Furthermore, it would blur the line between second-degree murder and involuntary manslaughter. *Id*. ¶ 24.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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] [her] 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 NOTES

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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. The second-degree murder statute is designed to discourage and punish the unlawful killing of people. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727.

Although 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. *See State v. Aguilar*, 1994-NMSC-046, ¶ 17, 117 N.M. 501, 873 P.2d 247.

Under New Mexico's statutory scheme, murder consists of two categories of intentional killings: those that are willful, deliberate, and premeditated; and those that are committed without such deliberation and premeditation but with knowledge that the killer's acts create a strong probability of death or great bodily harm. *State v. Garcia*, 1992-NMSC-048, 114 N.M. 269, 837 P.2d 862. The mens rea constitutes a subjective rather than objective knowledge requirement. *State v. Suazo*, 2017-NMSC-011, ¶¶ 22-25, 390 P.3d 674 (rejecting the notion that prior precedent supported an objective "should have known" mens rea (citing *State v. Brown*, 1996-NMSC-073, ¶ 16, 122 N.M. 724, 931 P.2d 69)). *Suazo* held that a second-degree murder conviction requires *more* than "that a defendant should have known of the risk of his or her conduct without anything more, because that is essentially a civil negligence standard." *Id*. ¶ 23. Furthermore, it would blur the line between second-degree murder and involuntary manslaughter. *Id*. ¶ 24.

Regarding transferred intent, to be guilty of second-degree murder, it is sufficient that the defendant have the necessary mens rea with respect to the individual toward whom the defendant’s lethal act was directed; it is not necessary, however, that the defendant have this mens rea with respect to the actual victim of that act. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017; *see also* UJI 14-251 NMRA.

Regarding evidence that 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, *see State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-212. Second degree murder; lesser included offense felony 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. The defendant did not cause the death of _____ (*name of victim*) during [the commission of][5] [the attempt to commit] _____ (*name of felony*);

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

USE NOTES

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. Use applicable alternative or alternatives. The same alternative or alternatives should be used as provided in the felony murder instruction.

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

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See State v. Montoya*, 2013-NMSC-020, 306 P.3d 426; *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88; Committee Commentary to UJI 14-211 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-213. Second degree murder; lesser included offense of felony murder; or 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 cause the death of _____ (*name of victim*) during [the commission of][4] [the attempt to commit] _____ (*name of felony*)[5];

4. The defendant did not act as a result of sufficient provocation;[6]

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

USE NOTES

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. Use applicable alternative or alternatives. The same alternative or alternatives should be used as provided in the felony murder instruction.

5. 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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

6. 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.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88; Committee Commentary to UJI 14-212 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

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. The defendant acted as a result of sufficient provocation;

4. 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 NOTES

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.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-2-3A. 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*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594; *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, *cert. denied*, 81 N.M. 668, 472 P.2d 382.

For cases discussing provocation, *see State v. Kidd*, 1971-NMSC-056, 24 N.M. 572, 175 P. 772. As a matter of law, mere words are not sufficient to establish provocation. *State v. Nevares*, 1932-NMSC-007, ¶ 12, 36 N.M. 41, 7 P.2d 933. *See generally*, Perkins, supra at 61.

There must be evidence that the defendant acted immediately or soon after the provocation. In *State v. Trujillo*, 1921-NMSC-111, 27 N.M. 594, 203 P. 846, 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*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, *cert. denied*, 393 U.S. 1028 (1968), *abrogated on other grounds by State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844; *State v. Burrus*, 1934-NMSC-036, 38 N.M. 462, 35 P.2d 285. 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*, 1979-NMSC-085, 89 N.M. 770, 558 P.2d 39.

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.

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." In *State v. Smith*, 1976-NMCA-048, 89 N.M. 777, 558 P.2d 46, *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.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

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 NOTES

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. — The difference between second degree murder and voluntary manslaughter is that voluntary manslaughter requires sufficient provocation. *State v. Gaitan*, 2002-NMSC-007, ¶ 11, 131 N.M. 758, 42 P.3d 1207. As explained in the commentary to UJI 14-220 NMRA, 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.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-221A. Voluntary manslaughter; lesser included offense of felony murder.[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. The defendant did not cause the death of _____ (*name of victim*) during [the commission of][4] [the attempt to commit] _____ (*name of felony*);[5]

4. The defendant acted as a result of sufficient provocation;

5. 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.[6]

USE NOTES

1. This instruction should immediately follow the second degree murder instruction as lesser included offense of felony murder.

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. Use applicable alternative or alternatives. The same alternative or alternatives should be used as provided in the previous murder instructions.

5. 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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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.

Part D
Involuntary Manslaughter

14-230. Withdrawn.

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 NOTES

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.*

Part E
Vehicle Homicide

14-240. Withdrawn.

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 NOTES

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.]

14-240B. Homicide by vehicle; driving under the influence; essential elements.

For you to find the defendant guilty of causing death by driving under the influence [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];]

2. The defendant's driving while under the influence of [liquor][4] [or] [drugs] caused[6] the death of _____ (*name of victim*);

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

USE NOTES

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

2. If they are in issue, *see* Section 66-1-4.11 NMSA 1978, for the definition of a motor vehicle and UJIs 14-4511 and 14-4512 for definitions of "operating" and "actual physical control."

3. UJI 14-243 NMRA, 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. UJI 14-245 NMRA, the definition of under the influence of a drug, must be given if this element is given.

6. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must be given.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 66-8-101 (2016).

Section 66-8-101 was amended in 2016 to create greater penalties for death caused by driving under the influence of alcohol or drugs ("DUI") than for death caused by reckless driving. *See* 2016 N.M. Laws, ch. 16, § 1 (eff. July 1, 2016). In so doing, the statute

retains an internal enhancement for prior DUI convictions applicable only to DUI violations of Section 66-8-101. *See* § 66-8-101(F). The new version of the statute also separates the penalty provision for great bodily harm by any means.

Because the penalties now differ based on method and resulting harm, the theories can no longer be instructed as alternatives within a single elements instruction or a general verdict form, as the chosen alternative theories must be unanimous to incur heightened penalties. *Compare State v. Godoy*, 2012-NMCA-084, ¶ 6, 284 P.3d 410 ("[W]here alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt.") *with Apprendi v. New Jersey*, 530 U.S. 466 (2000) (requiring jury findings of facts necessary to elevate punishment). Thus, the Committee has separated UJI 14-240 into three separate instructions. If multiple theories are pursued, separate instructions and verdict forms must be submitted. *See also* UJI 14-6012 NMRA (Multiple verdict forms; lesser included offenses).

Our Supreme Court has made clear that "[t]he mental state required for vehicular homicide is that of conscious wrongdoing." *State v. Omar-Muhammad*, 1985-NMSC-006, ¶ 20, 102 N.M. 274, 694 P.2d 922 (citing *State v. Jordan*, 1972-NMCA-033, 83 N.M. 571, 494 P.2d 984 (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")). "Conscious wrongdoing has been defined as the purposeful doing of an act that the law declares to be a crime." *Id.* "Thus, the mental state required for vehicular homicide (conscious wrongdoing) requires only that a defendant purposefully engage in an unlawful act." *Id.* This mens rea is defined by UJI 14-141, General criminal intent. If homicide or great bodily harm by vehicle are charged under a DUI theory, the corresponding instructions must be provided. *See* Use Note 2.

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*, 1963-NMSC-098, 72 N.M. 178, 381 P.2d 963; *see generally*, Annot., 21 A.L.R.3d 116 (1968).

Driving under the influence must be the direct and proximate cause of the death when the homicide is based on that provision. *See State v. Neal*, 2008-NMCA-008, 143 N.M. 341, 176 P.3d 330; *State v. Sisneros*, 1938-NMSC-049, ¶ 14, 42 N.M. 500, 82 P.2d 274. *State v. Myers*, 1975-NMCA-055, 88 N.M. 16, 536 P.2d 280.

The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. *See State v. Yarborough*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131, *aff'g*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

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 vehicular homicide. *See Omar-Muhammad*, 1987-NMSC-043.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-240C. Homicide by vehicle; reckless driving; essential elements.

For you to find the defendant guilty of causing death by reckless 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] in a reckless manner[3];

2. The defendant's reckless driving caused[4] the death of _____ (*name of victim*);

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

USE NOTES

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

2. If it is in issue, *see* Section 66-1-4.11 NMSA 1978, for the definition of a motor vehicle.

3. UJI 14-241 NMRA, the definition of driving a motor vehicle in a reckless manner, must be given.

4. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must be given.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 66-8-101 (2016). *See* commentary for UJI 14-240 NMRA.

If a reckless driving theory is pursued, in addition to the general intent to drive, "[the jury] must find that [the defendant] drove with willful disregard of the rights or safety of others and in a manner which endangered any person or property." *State v. Yarborough*, 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131 (rejecting ordinary negligence shown by "careless driving" for vehicular homicide liability).

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-240D. Great bodily injury by vehicle; essential elements.

For you to find the defendant guilty of causing great bodily injury[1] by 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 operated a motor vehicle[3]

[while under the influence of intoxicating liquor[4]][5] [or]

[while under the influence of _____, a drug][6] [or]

[in a reckless manner];[7]

2. The defendant's [driving while under the influence of [liquor][5] [or] [drugs]] [or] [reckless driving] caused[8] the great bodily injury[1] to _____ (*name of victim*);

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

USE NOTES

1. The definition of great bodily harm, UJI 14-131 NMRA, must be given with the word "injury" substituted for "harm."

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

3. If they are in issue, *see* Section 66-1-4.11 NMSA 1978, for the definition of a motor vehicle and UJIs 14-4511 and 14-4512 for definitions of "operating" and "actual physical control."

4. UJI 14-243 NMRA, the definition of under the influence of intoxicating liquor, must be given if this element is given.

5. Use only applicable alternative or alternatives.

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

7. UJI 14-241 NMRA, the definition of driving a motor vehicle in a reckless manner, must be given.

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

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 66-8-101 (2016).

See commentary for UJI 14-240 NMRA. The penalties for great bodily harm by vehicle are the same for all alternative means, except that conviction by means of DUI is subject to enhancements for prior DUI convictions. *See* § 66-8-101(F).

If a reckless driving theory is pursued, in addition to the general intent to drive, "[the jury] must find that [the defendant] drove with willful disregard of the rights or safety of others and in a manner which endangered any person or property." *State v. Yarborough*, 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131 (rejecting ordinary negligence shown by "careless driving" for vehicular homicide liability).

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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 NOTES

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.

14-242. Withdrawn.

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 NOTES

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).

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 willfully 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 NOTES

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.]

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 NOTES

This instruction may be given immediately after UJI Criminal 14-240.

[Adopted, effective May 1, 1997.]

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 NOTES

Upon request the applicable definition may be given immediately after UJI Criminal 14-240A.

[Adopted, effective May 1, 1997.]

Part F
General Homicide Instructions

14-250. Withdrawn.

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 _____;[3]

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.][4]

USE NOTES

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. Describe the act alleged to be the cause of the death.

4. 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; as amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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.

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*). An issue in this case is whether 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 or constitutes an intervening cause that breaks the foreseeable chain of events, then the defendant is not guilty of the offense of _____ (*name of offense*).

USE NOTES

For use in conjunction with UJI 14-251 NMRA 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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143; *State v. Romero*, 1961-NMSC-139, ¶ 10, 69 N.M. 187, 365 P.2d 58 (contrasting contributory negligence in civil and criminal cases and holding "if the culpable negligence of the defendant is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not." (internal quotation marks and citation omitted)); *State v. Myers*, 1975-NMCA-055, 88 N.M. 16, 536 P.2d 280 (requiring proof that defendant's conduct is a proximate cause of death for vehicular homicide conviction).

Munoz clarified that a victim's own negligence does not negate the defendant's culpability so long as the defendant is a "significant link" in the causal chain and acknowledged the difference between but-for and proximate causes. *Munoz*, 1998-NMSC-041, ¶¶ 19-22. Because there can be more than one "significant cause" of death, this instruction, along with the "proximate cause" definition in UJI 14-251 NMRA, explains the role of third-party negligence in criminal cases, which may negate a defendant's culpability if it is an intervening event that breaks the causal chain. *See* UJI 14-251 ("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 . . . .”). *Cf*. UJI 13-306 NMRA (“An intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.”).

The defendant is entitled to an instruction on the theory of the case if there is evidence to support it. *See State v. Benavidez*, 1980-NMSC-097, 94 N.M. 706, 616 P.2d 419; *State v. Lujan*, 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶ 9, 98 N.M. 786, 653 P.2d 162.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-253. Withdrawn.

14-254. Withdrawn.

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 NOTES

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).

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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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

USE NOTES

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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-3-1(A) and (B). Although assault is a petty misdemeanor, instructions on assault are included in the Uniform Jury Instructions - Criminal because they may be given to the jury as a necessarily included offense to an aggravated assault. *See, e.g., State v. Mitchell*, 1939-NMSC-007, ¶ 9, 43 N.M. 138, 87 P.2d 432; *Chacon v. Territory*, 1893-NMSC-024, ¶ 4, 7 N.M. 241, 34 P. 448.

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.

An assault by an attempted battery requires an intent to commit the battery. *See generally* NMSA 1978, § 30-28-1. Proof of the intent to commit a battery may require an actual possibility or present ability to carry out the attempt. *See* Perkins, *Criminal Law* 121 (2d ed. 1969); LaFave & Scott, Criminal Law 609-10 (1972). UJI 14-301 and UJI 14-303 contain the elements of statutory battery to accurately define the attempted act constituting assault. *See* NMSA 1978, § 30-3-4; UJI 14-2801 NMRA.

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, *supra*, at 116-18. 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, *supra*, at 611.

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* § 30-3-1(C). 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*, 1983-NMCA-084, 100 N.M. 152, 667 P.2d 459. 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 seeks to prove a simple assault by insulting language, etc., a special instruction must be drafted.

[As amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 NOTES

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.

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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner;[4]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 NOTES

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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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.

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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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

USE NOTES

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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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.

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[1] 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. 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 used[1] 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]

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

USE NOTES

1. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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. 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.

[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; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

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.

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[2] of a deadly weapon [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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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;[5]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant used[2] 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] and

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

USE NOTES

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. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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. 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 a "deadly weapon" which is specifically listed in Section 30-1-12(B) 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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — *See* committee commentary following UJI 14-304 NMRA.

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 NOTES

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.

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 intended to commit the crime of battery against _____ (*name of victim*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner[4].

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to commit the crime of _____;[1]

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Although the statute uses the term "unlawfully", that term has not been added to this instruction as it is covered by the addition of "unlawfully" when lawfulness is an issue. *See* Use Note 4.

See NMSA 1978, § 30-3-2(C) (1963). The felony intended must be other than a violent felony as defined in NMSA 1978, § 30-3-3 (1977). *See* UJIs 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*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731 (aggravated battery is a lesser included offense of attempted murder); and *State v. DeMary*, 1982-NMSC-144, ¶¶ 9-13, 99 N.M. 177, 655 P.2d 1021 (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.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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* UJIs 14-5181 to 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.08 NMSA 1978; UJI 14-309 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary for UJI 14-308 NMRA.

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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 also intended to commit the crime of _____;[2]

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

USE NOTES

1. This instruction combines the essential elements in UJI 14-308 NMRA and UJI 14-309 NMRA.

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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 NMRA to UJI 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.09 NMSA 1978; UJI 14-310 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary for UJI 14-308 NMRA.

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 intended to commit the crime of battery against _____ (*name of victim*) by _____[4];

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner[5].

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to [kill] [or][1] [commit _____[2]] on _____ (*name of victim*);

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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* UJIs 14-5181 to 14-5184 NMRA.

[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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* NMSA 1978, § 30-3-3 (1977). *See also* committee commentaries to UJIs 14-301 and 14-304 NMRA.

UJIs 14-311, 14-312, and 14-313 NMRA 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*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768, 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, NMSA 1978, § 30-2-1 (1994), 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*, 1926-NMSC-028, 31 N.M. 485, 247 P. 828, 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*, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972 (conviction of both assault with intent to commit a violent felony, murder, NMSA 1978, § 30-3-3 (1977), and for aggravated battery with a deadly weapon, NMSA 1978, § 30-3-5(C) (1969)); *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[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; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary to UJI 14-308 NMRA and UJI 14-311 NMRA.

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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 also intended to [kill] [or][2] [commit _____[3]] on _____ (*name of victim*);

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

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-311 NMRA and UJI 14-312 NMRA, 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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary — This instruction combines UJI 14-311 NMRA and UJI 14-312 NMRA. *See* committee commentary for UJI 14-311 NMRA.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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 NOTES

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.

14-315. Withdrawn.

14-316. Recompiled.

14-317. Recompiled.

14-318. Criminal damage to property; household member; essential elements.

For you to find the defendant guilty of criminal damage to property of a household member [household member's interest in excess of $1,000.00][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 [real] [personal] [community] [or] [jointly owned][4] property of _____ (*name of victim*);

2. The defendant intended to [intimidate] [threaten] [or] [harass][4] (*name of victim*);

[3. The defendant did not have the _____'s (*name of victim*) permission to damage the property];[5]

[4. The damage to the _____'s (*name of victim*) interest in the property was more than $1,000.00];[1]

5. _____ (*name of victim*) was a household member of the defendant;[6]

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

USE NOTES

1. Bracketed language is to be used if the amount of damage to the household member's interest in the property exceeds $1,000.00. 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 NMRA, general criminal intent, must also be given.

4. Use only the applicable bracketed element established by the evidence.

5. Use this alternative only if sufficient evidence has been introduced to raise an issue of permission.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — This instruction pertains to criminal damage to property of a household member. *See* NMSA 1978, Section 30-3-18 (2009). Therefore, the instruction is not implicated by the Court of Appeals' holding in *State v. Earp*, 2014-NMCA-059, ¶ 1 (holding that an equitable owner in a residential property cannot be charged with criminally damaging that property under NMSA 1978, Section 30-15-1 (1963)).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-319. Deprivation of property; household member; essential elements.

For you to find the defendant guilty of deprivation of property of a household member [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[2] deprived _____ (*name of victim*) of the use of [separate] [community] [or] [jointly owned][3] personal property of _____ (*name of victim*);

2. The defendant intended to [intimidate] [threaten][3] _____ (*name of victim*);

3. _____ (*name of victim*) was a household member of the defendant;[4]

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

USE NOTES

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

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

3. Use only the applicable bracketed element established by the evidence.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — The replacement cost of irreparable items is an appropriate measure of the value of the items. *See State v Cobrera*, 2013-NMSC-012, 300 P.3d 729.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

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 NOTES

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).

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 NOTES

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).

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 NOTES

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).

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 NOTES

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.

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 NOTES

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

2. Use only the applicable bracketed alternatives.

[Adopted, effective February 1, 1995.]

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 knowingly pursued a pattern of conduct by, on more than one occasion, [directly or indirectly] [or] [using a third party[2]][3] engaging in any of the following acts:

[(a) following _____ (*name of person*)]

[(b) monitoring _____ (*name of person*)]

[(c) placing _____ (*name of person*) under surveillance]

[(d) threatening _____ (*name of person*)]

[(e) communicating [to] [or] [about] _____ (*name of person*)];[3]

[2. In pursuing the pattern of conduct the defendant was not acting within the scope of [lawful employment] [or] [constitutionally protected activity,][3]][4]

3. [Although some of the acts constituting the pattern of conduct were directed at other people, the] [The][3] overall pattern of conduct was directed at _____ (*name of victim*);

4. The defendant intended

[to place _____ (*name of victim*) in reasonable apprehension of [death] [bodily harm] [sexual assault] [confinement or restraint]]

[or]

[to cause _____ (*name of victim*) to reasonably fear the [death] [bodily harm] [sexual assault] [confinement or restraint] of _____ (*name(s) of other individual(s)*)].[3, 5]

5. This happened in New Mexico [between] [on or about] the _____ day of _____, _____ [and the _____ day of _____, _____].[3, 6]

USE NOTES

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

2. Use when the evidence establishes that one or more third parties committed the acts constituting the pattern of conduct.

3. Use only the applicable bracketed alternatives.

4. Insert when there is any evidence the defendant acted with lawful authority, as defined in Section 30-3A-3(B)(1) NMSA 1978.

5. The victim may be afraid for the victim, other individuals, or both.

6. The pattern of conduct must involve more than one occasion, but may or may not occur on more than one date.

[Adopted, effective February 1, 1995; as amended, effective July 1, 1998; as amended by Supreme Court Order No. 21-8300-010, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — *See* NMSA 1978, § 30-3A-3 (2009) (changing essential elements of stalking and defining "lawful authority"); NMSA 1978, § 30-3A-4 (1997) (providing specific exemptions to the provisions of the Harassment and Stalking Act for picketing and public demonstrations arising out of labor disputes and for peace officers in performance of their duties). These exemptions were not repealed or changed when the 2009 amendments added the more general definitions of lawful authority.

The Committee believes that UJI 14-132 NMRA (Unlawfulness as an element) is a general instruction not directly applicable to the stalking statute, which has a specific definition of "lawful authority" as "within the scope of lawful employment or constitutionally protected activity." Section 30-3A-3(B)(1). The original 1997 exceptions to the stalking statute are specific, affirmative, categorical exceptions to what otherwise is unlawful conduct.

By inserting "without lawful authority" into the 2009 revision of Section 30-3A-3, the Legislature appears to have both expanded the range of conduct and, when there is evidence on the issue, made proof of acting without lawful authority an element of the offense—not an affirmative defense to be raised by the defendant. An unlawfulness instruction is not required "when there is *no evidence* of lawful behavior, and hence the element omitted from the instructions was not factually in issue[.]" *State v. Peterson*, 1998-NMCA-049, ¶ 10, 125 N.M. 55, 956 P.2d 854 (internal quotation marks and citation omitted) (emphasis added). Similarly, where there is no evidence regarding the scope of the defendant's employment or constitutionally protected activity, there is no requirement to give the bracketed second element.

The individual, enumerated acts constituting the pattern of conduct need not be directed at the victim; it is the overall pattern of conduct which must reasonably affect the victim. *See, e.g.*, *Best v. Marino*, 2017-NMCA-073, ¶¶ 2, 3 n.2, 404 P.3d 450 (affirming district court's determination that the respondent had committed stalking by, in relevant part, "posting of statements and photographs related to Petitioner on (1) Respondent's own website; (2) Respondent's own Facebook and other social media pages; and (3) third-party controlled Facebook and other social media pages"). For example, a defendant stalking his former partner might use a third party to place the victim's children under surveillance and follow them and later indirectly communicate to the victim by having a different third party send her the following text: "Those are cute twins you have going to Sunshine Elementary. It would be a shame if a car ran over them as they were walking home along Elm Street."

Because the essential element of a “pattern of conduct” requires two or more of the enumerated acts on more than one occasion, the acts which must be proven may occur on more than one date. The Committee believes that due process and double jeopardy require that the dates encompassing all of the acts constituting the alleged pattern should be presented to the jury.

[Adopted by Supreme Court Order No. 21-8300-010, effective for all cases filed or pending on or after December 31, 2021.]

14-332. Withdrawn.

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;]

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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 30-1-12(B) NMSA 1978. If the object used is not listed in Section 30-1-12(B) 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 specifically listed in Section 30-1-12(B) NMSA 1978.

[Approved, effective July 1, 1998; as amended, effective Jan. 10, 2002; as amended by Supreme Court Order No. 21-8300-010, effective for all cases filed or pending on or after December 31, 2021.]

14-334. Violation of a [temporary] order of protection.

For you to find the defendant guilty of violating a [temporary][1] order of protection [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. A [temporary][1] order of protection was filed in cause number _____;[3]

2. The [temporary][1] order of protection was valid on the _____ day of _____, _____;

3. The defendant knew about the [temporary][1] order of protection;

4. The defendant knowingly violated the [temporary][1] order of protection by _____[4];

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

USE NOTES

1. Use only if applicable.

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

3. This instruction is applicable to "an order of protection that is issued pursuant to the Family Violence Protection Act or entitled to full faith and credit." NMSA 1978, § 40-13-6(D).

4. Insert the manner in which defendant violated the order of protection.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — A violation must be knowing in two ways: a defendant must know (1) of the restraining order and (2) the underlying facts that constitute the violation, such as "the presence of the protected party within the protected zone." *State v. Ramos*, 2013-NMSC-031, ¶¶ 26, 28, 305 P.3d 921. As the instruction notes, "a restrained party has knowledge of the order when he receives personal service of the order of protection." *Id.* ¶ 26. Failure to read the contents of the order is not a defense, as knowledge of the contents will be imputed as a matter of law. *Id.* ¶ 27. Although a knowing violation does not require "that the party must act with a conscious or willful desire to defy the protective order," general intent and knowledge are "separate, not synonymous, elements," and both must be found. *Id.* ¶ 28.

New Mexico courts must enforce tribal protection orders and orders from courts of other states as provided in 18 U.S.C. § 2265 and NMSA 1978, Section 40-13-6(D). Under 18 U.S.C. § 2265, a protection order from another jurisdiction must be given full faith and credit if (1) the issuing court had jurisdiction under the laws of its state or tribe, and (2) the person subject to the order had notice and an opportunity to be heard.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

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 NOTES

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.]

14-340A. Shooting at dwelling or occupied building; resulting in injury; essential elements.

For you to find the defendant guilty of causing injury 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 injury to _____ (*name of victim*);

[4. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[4]

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

USE NOTES

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. 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 by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

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 NOTES

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.]

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 NOTES

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.]

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. The defendant caused injury to _____ (*name of victim*);

[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 NOTES

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; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

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 NOTES

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.]

14-351. Assault upon a [school employee] [health care worker]; attempted battery; essential elements.

For you to find the defendant guilty of an assault on a _____[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 battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[4]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. At the time _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

4. The defendant knew _____ (*name of victim*) was a _____;[1]

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-352. Assault on a [school employee] [sports official] [health care worker]; threat or menacing conduct; essential elements.

For you to find the defendant guilty of an assault on a _____[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 that 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. At the time, _____ (*name of victim*) was a _____[1] and was performing duties of a _____[1];[4]

5. The defendant knew _____ (*name of victim*) was a _____.[1]

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

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-353. Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements.

For you to find the defendant guilty of an assault on a _____[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 battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[4]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

5. The defendant knew _____ (*name of victim*) was a _____;[1]

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

5. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-354. Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a _____[2] by use of a deadly weapon [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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. 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]

4. At the time, _____ (*name of victim*) was a _____[2] and was performing the duties of a _____[2];[9]

5. The defendant knew _____ (*name of victim*) was a _____;[2]

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

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-355 NMRA, then UJI 14-356 NMRA should be given instead of this instruction.

2. Insert type of specially protected worker - school employee, sports official, or health care worker.

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 is given. If the

issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

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 NMSA 1978, Section 30-1-12(B).

9. “School employee” is defined in NMSA 1978, Section 30-3-9(A). “Sports official” is defined in NMSA 1978, Section 30-3-9.1(A). “Health care worker” is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-355. Aggravated assault on a [school employee] [sports official] [health care worker]; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a _____[2] by use[3] of a deadly weapon [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 _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe that 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. At the time, _____ (*name of victim*) was a _____[2] and was performing duties of a _____[2];[6]

4. The defendant knew _____ (*name of victim*) was a _____.[2]

5. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

6. The defendant used[3] a [_____][7] [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[8]];[9]

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

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-354 NMRA, then UJI 14-356 NMRA should be given instead of this instruction.

2. Insert type of specially protected worker - school employee, sports official, or health care worker.

3. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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

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 NMRA to UJI 14-5184 NMRA;

6. "School employee" is defined in Section 30-3-9(A) NMSA 1978. "Sports official" is defined in Section 30-3-9.1(A) NMSA 1978. "Health care worker" is defined in Section 30-3-9.2(A) NMSA 1978. If there is an issue about whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue about whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

7. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12(B) NMSA 1978.

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

9. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-356. Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a _____[2] by use[3] of a deadly weapon [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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 used[3] a [_____][7] [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[8]];[9]

5. At the time, _____ (*name of victim*) was a _____[2] and was performing the duties of a _____[2];[10]

6. The defendant knew _____ (*name of victim*) was a _____;[2]

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

USE NOTES

1. This instruction combines the elements of UJI 14-354 NMRA and UJI 14-355 NMRA. If the evidence supports both of the theories of assault set forth in UJIs 14-354 and 14-355, use this instruction.

2. Insert type of specially protected worker - school employee, sports official, or health care worker.

3. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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 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 NMRA.

7. 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.

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

9. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

10. "School employee" is defined in Section 30-3-9(A) NMSA 1978. "Sports official" is defined in Section 30-3-9.1(A) NMSA 1978. "Health care worker" is defined in Section 30-3-9.2(A) NMSA 1978. If there is an issue about whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue about whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozi*e, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-358. Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner[5].

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to commit the crime of _____;[2]

4. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1,6];

5. The defendant knew _____ (*name of victim*) was a _____;[1]

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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* UJIs 14-5181 to 14-5184 NMRA.

6. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-359. Aggravated assault on a [school employee] [health care worker]; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] 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 _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of victim*) was a _____[1] and was performing duties of a _____[1];[4]

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant's conduct caused _____ (*name of victim*) to believe that 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]

5. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

6. The defendant intended to commit the crime of _____;[2]

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

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 UJIs 14-5181 to 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-360. Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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;[5]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____;[2]

5. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[6]

6. The defendant knew _____ (*name of victim*) was a _____;[1]

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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* UJIs 14-5181 to 14-5184 NMRA.

6. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-361. Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. At the time _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[7]

4. The defendant knew _____ (*name of victim*) was a _____;[1]

5. The defendant also intended to [kill] [or][2] [commit _____][3] on _____ (*name of victim*);

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, see UJIs 14-5181 to 14-5184 NMRA.

7. “School employee” is defined in NMSA 1978, Section 30-3-9(A). “Health care worker” is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker’s duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-362. Assault on a [school employee] [health care worker]; 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 _____[1] 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 _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of victim*) was a _____[1] and was performing duties of a _____[1 4];

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant's conduct caused _____ (*name of victim*) to believe that 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]

5. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

6. The defendant intended to kill _____ (*name of victim*);

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

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

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* UJIs 14-5181 to 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-363. Assault on a [school employee] [health care worker]; attempted battery; 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 _____[1] 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 also intended to [kill] [or][2] [commit _____[3]] on _____ (*name of victim*);

5. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[7]

6. The defendant knew _____ (*name of victim*) was a _____;[1]

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

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

7. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-365. Battery upon a [school employee] [sports official] [health care worker]; essential elements.

For you to find the defendant guilty of a battery upon a _____[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 touched or applied force to _____ (*name of victim*) by _____;[3]

2. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant acted in a rude, insolent or angry manner;[4]

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

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105,

287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-366. Aggravated battery on a [school employee] [sports official] [health care worker]; without great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery on a _____[1] without 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 touched or applied force to _____ (*name of victim*) by _____;[3]

2. The defendant intended to injure _____ (*name of victim*);[4]

3. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

4. The defendant knew _____ (*name of victim*) was a _____;[1]

[5. _____'s (*name of victim*) injury was not likely to cause death or great bodily harm];[6]

6. The defendant caused _____ (*name of victim*) [painful temporary disfigurement] [or][7] [a temporary loss or impairment of the use of _____ (*name of organ or member of the body*)];

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

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

5. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

6. Use bracketed phrase if this is an issue. UJI 14-131 NMRA, the definition of "great bodily harm" must be given if this phrase is used.

7. Use only the applicable bracketed element established by the evidence.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-367. Aggravated battery on a [school employee] [sports official] [health care worker] with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery on a _____[1] with 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 touched or applied force to _____ (*name of victim*) 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 victim*) was a _____[1] and was performing the duties of a _____[1];[7]

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant intended[8] to injure _____ (*name of victim*);

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

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

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 NMSA 1978, Section 30-1-12(B).

7. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

8. 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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is

required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-368. Aggravated battery on a [school employee] [sports official] [health care worker]; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery on a _____[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 touched or applied force to _____ (*name of victim*) by _____[3];

2. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1]; [4]

3. The defendant knew _____ (*name of victim*) was a _____[1].

4. The defendant intended to injure _____ (*name of victim*);[5]

5. The defendant

[caused great bodily harm[6] to _____ (*name of victim*)]

[or][7]

[acted in a way that would likely result in death or great bodily harm5 to _____ (*name of victim*)];

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

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

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

7. Use only the applicable bracketed element(s) established by the evidence.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-370. "Household member"; defined.

"Household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom the person has or had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member.

"Continuing personal relationship" means a dating or intimate relationship.

USE NOTES

This instruction is given if the term "household member" is used.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — This instruction sets out the definition of household member as contained in NMSA 1978, Section 30-3-11. In 2010, the Legislature amended Section 30-3-11 deleting "or family member, including a relative" and adding "parent," "grandparent," and "grandparent-in-law." In 2008, the Legislature amended Section 30-3-11, by defining a "continuing personal relationship." *See State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295 (holding that the minor child of the accused does not fit within the definition of household member); *but see State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540 (holding that the definition of household member includes adult children of the accused and that there is no requirement of cohabitation or shared residence).

In the double jeopardy context, conviction for crimes with the "household member" element provides for a unique legislative intent from the lesser included offense for non-household members. For example, robbery and battery of a household member convictions, although relying on unitary conduct, do not result in double jeopardy because both offenses are elementally distinct. *See State v. Gutierrez*, 2012-NMCA-095, ¶¶ 12-16, 286 P.3d 608, cert. denied, 2012-NMCERT-008 (No. 30,439 Aug. 13, 2012). The Court of Appeals made clear that "The distinct policy directives and subject matter of robbery and battery against a household member, and their rare occurrence together, persuade us that the legislature intended these crimes to be punished separately, even when they occur as part of the same criminal transaction." Id. ¶ 18.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-371. Assault; attempted battery; "household member"; essential elements.

For you to find the defendant guilty of assault against a household member [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 to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. _____ (*name of victim*) was a household member of the defendant;[4]

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

USE NOTES

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 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-372. Assault; threat or menacing conduct; "household member"; essential elements.

For you to find the defendant guilty of assault against a household member [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]

2. The defendant's conduct caused _____ (*name of victim*) to believe that 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. _____ (*name of victim*) was a household member of the defendant;[4]

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

USE NOTES

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 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-373. Assault; attempted battery; threat or menacing conduct; "household member"; essential elements.[1]

For you to find the defendant guilty of assault against a household member [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 battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

OR

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[3]

2. The defendant's conduct caused _____ (*name of victim*) to believe that 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. _____ (*name of victim*) was a household member of the defendant;[5]

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

USE NOTES

1. This instruction sets forth the elements of two of the types of assault in NMSA 1978, Section 30-3-13.

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 NMRA to UJI 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-374. Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements.

For you to find the defendant guilty of aggravated assault against a household member [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 to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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. _____ (*name of victim*) was a household member of the defendant;[7]

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

USE NOTES

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 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12B.

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 30-1-12B.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-375. Aggravated assault; threat or menacing conduct with a deadly weapon; "household member"; essential elements.

For you to find the defendant guilty of aggravated assault by use[1] 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*);[3]

2. The defendant's conduct caused _____ (*name of victim*) to believe that 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 used[1] 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]

5. _____ (*name of victim*) was a household member of the defendant;[8]

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

USE NOTES

1. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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 NMRA to UJI 14-5184 NMRA. Use ordinary language to describe the touching or application of force.

5. 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.

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 30-1-12(B) NMSA 1978.

8. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

14-376. Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements.[1]

For you to find the defendant guilty of aggravated assault by use[2] of a deadly weapon against a household member [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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

OR

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[4]

2. The defendant's conduct caused _____ (*name of victim*) to believe that 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] and

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant used[2] 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]

5. _____ (*name of victim*) was a household member of the defendant;[9]

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

USE NOTES

1. This instruction sets forth the elements of two of the types of aggravated assault against a household member in Section 30-3-13 NMSA 1978.

2. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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 NMRA 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 30-1-12(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 a "deadly weapon" which is specifically listed in Section 30-1-12(B) NMSA 1978.

9. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

14-378. Aggravated assault; attempted battery with intent to commit a felony; "household member"; 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to commit the crime of _____;[1]

4. _____ (*name of victim*) was a household member of the defendant;[5]

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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* UJIs 14-5181 to 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

14-379. Aggravated assault; threat or menacing conduct with intent to commit a felony; "household member"; 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*);[3]

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 commit the crime of _____;[1]

5. _____ (*name of victim*) was a household member of the defendant;[5]

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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* UJIs 14-5181 to 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

14-380. Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member", 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 also intended to commit the crime of _____;[2]

5. _____ (*name of victim*) was a household member of the defendant;[6]

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

USE NOTES

1. This instruction combines the essential elements in UJI 14-378 NMRA and UJI 14-379 NMRA.

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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* UJIs 14-5181 to 14-5184 NMRA.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

14-381. Assault; attempted battery with intent to commit a violent felony; "household member"; essential elements.

For you to find the defendant guilty of 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 intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to [kill] [or][1] [commit _____][2] on _____ (*name of victim*);

4. _____ (*name of victim*) was a household member of the defendant;[6]

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

USE NOTES

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 against a household member 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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second, or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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* UJIs 14-5181 to 14-5184 NMRA.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

14-382. Assault; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements.

For you to find the defendant guilty of 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. _____ (*name of victim*) was a household member of the defendant;[5]

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

USE NOTES

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 against a household member 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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second, or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

14-383. Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements.[1]

For you to find the defendant guilty of 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 _____ (*describe unlawful act, threat, or menacing conduct*); _____ (*name of victim*) by _____;[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

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 also intended to [kill] [or][2] [commit _____][3] on _____ (*name of victim*);

5. _____ (*name of victim*) was a household member of the defendant;[7]

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

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-381 NMRA and UJI 14-382 NMRA, 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 against a household member 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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second, or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

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 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as

amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

14-390. Battery; "household member" essential elements.

For you to find the defendant guilty of battery against a household member [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. _____ (*name of victim*) was a household member of the defendant;[4]

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

USE NOTES

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 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-391. Aggravated battery; without great bodily harm; "household member"; essential elements.

For you to find the defendant guilty of aggravated battery without great bodily harm against a household member [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. _____ (*name of victim*) was a household member of the defendant;[6]

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

USE NOTES

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 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

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.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-392. Aggravated battery; with a deadly weapon; "household member"; essential elements.

For you to find the defendant guilty of aggravated battery with a deadly weapon against a household member [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. _____ (*name of victim*) was a household member of the defendant;[8]

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

USE NOTES

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 NMSA 1978, Section 30-1-12B.

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.

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 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

7. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

8. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-393. Aggravated battery; great bodily harm; "household member"; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm against a household member [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. _____ (*name of victim*) was a household member of the defendant;[7]

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

USE NOTES

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 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

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.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

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 NOTES

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).

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 NOTES

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.

14-403. Kidnapping; first degree; essential elements.

For you to find the defendant guilty of [first degree][1] 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] [or] [restrained] [or] [confined] [or] [transported] _____ (*name of victim*) by [force][3] [or] [intimidation] [or] [deception] [by _____ (*describe conduct*)];[4]

[2. The defendant's act was unlawful];[5]

3. The defendant intended:

[to hold _____ (*name of victim*) for ransom[6]][3]

[OR]

[to hold _____ (*name of victim*) as a [hostage][3] [or] [shield] against _____'s (*name of victim*) will

[OR]

[to inflict [death][3] [or] [physical injury] [or] [a sexual offense] on _____ (*name of victim*)]

[OR]

[to [make _____ (*name of victim*) _____ (*name specific act*)][3] [or] [keep _____ (*name of victim*) from _____ (*name specific act*)][3] against _____'s (*name of victim*) will, for the purpose of _____ (*identify benefit to defendant*)];[7]

4. The [taking][3] [or] [restraint] [or] [confinement] [or] [transportation] of _____ (*name of victim*) was not slight, inconsequential, or merely incidental to the commission of another crime (*or name of offense*)];[8]

5. [The defendant did not voluntarily free _____ (*name of victim*) in a safe place];[3]

[OR]

[The defendant inflicted physical injury upon _____ (*name of victim*) during the course of the kidnapping];

[OR]

[The defendant inflicted a sexual offense upon _____ (*name of victim*) during the course of the kidnapping];

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

USE NOTES

1. Only identify the degree if second-degree kidnapping is being instructed as a lesser-included offense. UJI 14-6002 NMRA [withdrawn], "Necessarily included offense," along with UJI 14-403A NMRA, "Kidnapping second degree," should be given.

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

3. Use applicable alternative or alternatives.

4. If a secondary offense is also charged that was committed during the course of the kidnapping, use ordinary language to describe the taking, restraint, or confinement by force, intimidation, or deception. A description of precisely what conduct constituted this actus reus assists reviewing courts to distinguish crimes committed near in time.

See State v. Montoya, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820 (finding double jeopardy violation because "[w]e are unable to determine from the record whether the jury found that the kidnaping [sic] was accomplished by the truck's confinement of Victim's vehicle or by Defendant's restraint of Victim inside the vehicle. The jury instruction supported either theory of kidnaping [sic]."); *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238 ("We conclude … that the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime.").

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is instructed, UJI 14-132 NMRA, "Unlawfulness as an element," must be given after this instruction.

6. The definition of "ransom," UJI 14-406 NMRA, should be given after this instruction.

7. Holding to service requires that the kidnapping's purpose be to make the victim perform some act or forgo performing an act, to the effect of conferring an independent assistance or benefit to the perpetrator of the crime, or another. *See* Committee commentary.

8. Use the bracketed element if the evidence raises a genuine issue of incidental conduct, whether or not a secondary offense is simultaneously charged. *See Trujillo*, 2012-NMCA-112; *see also* Committee commentary. If a particular crime is identifiable, the name of the offense may be used, and unless the court has instructed on the essential elements of that offense, these elements must be given in a separate instruction immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended, effective September 1, 1994; August 1, 1997; as amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* NMSA 1978, § 30-4-1. This instruction is for the crime of first-degree felony kidnapping. Previously, first and second-degree kidnapping relied on a single elements instruction, and the differentiating elements were instructed only through special interrogatories, leaving the court to determine the appropriate offense degree. Because this approach may lead to confusion in differentiating first and second-degree kidnapping, separate instructions were created for first and second-degree kidnapping that incorporate the distinguishing findings as essential elements. *See, e.g., State v. Dominguez*, 2014-NMCA-064, ¶¶ 13-19, 327 P.3d 1092 (noting that only second-degree kidnapping could be imposed if the interrogatories were not given, but relying on the jury's guilty verdict for separately charged sex offense to satisfy the finding that a sex offense was inflicted during the kidnapping) (citing *State v. Gallegos*, 2009-NMSC-017, ¶ 13, 146 N.M. 88, 206 P.3d 993).

In clarifying New Mexico's rejection of "incidental restraint" as a basis for kidnapping, the Court of Appeals evaluated and functionally applied various tests from other jurisdictions. *See State v. Trujillo*, 2012-NMCA-112, ¶¶ 31-39, 289 P.3d 238, *cert. quashed* 2015-NMCERT-003. Without adopting one specific test, the Court found the various tests informative and applied them to the facts in turn in order to evaluate whether the restraint in *Trujillo* was incidental to the crime of battery. *Id*. The Court applied a totality of the circumstances test including the following factors:

1. whether the conduct is necessary to the commission of another crime;

2. whether the conduct carried some significance independent of another crime in that it could make that crime substantially easier to commit or substantially lessen the risk of detection;

3. whether the conduct substantially increased the risk of harm to the victim, or was particularly terrifying or dangerous;

4. whether the defendant took, restrained, confined, or transported the victim for a longer period of time or to a greater degree than that which is necessary to commit another crime;

5. whether the defendant acted with a purpose or intent beyond the commission of another crime.

Id.; *see also State v. Tapia*, 2015-NMCA-048, ¶¶ 28-36, 347 P.3d 738 (applying *Trujillo* factors to reverse kidnapping convictions).

Element 5 provides the findings differentiating second and first-degree kidnapping. If more than one alternative for Element 5 is given, the jury need only find Element 5 satisfied and unanimity as to theory is not required to uphold the verdict. *Cf. State v. Salazar*, 1997-NMSC-044, ¶¶ 32-42, 123 N.M. 778, 945 P.2d 996 (affirming general verdict for first-degree murder without requiring unanimity as to theory of deliberate intent or depraved mind); Rule 5-611 NMRA.

In addition to the lesser-included offense of second-degree kidnapping, false imprisonment may be a lesser-included offense of kidnapping. *See State v. Fish*, 1985-NMCA-036, ¶ 17, 102 N.M. 775, 701 P.2d 374 (holding that a failure to instruct on false imprisonment as a necessarily included lesser offense of kidnapping required reversal, where there was some evidence that the defendant lacked the intent necessary for kidnapping); *State v. McGuire*, 1990-NMSC-067, ¶ 29, 110 N.M. 304, 795 P.2d 996 (noting with approval that trial court gave "an instruction on false imprisonment as a lesser included offense of kidnapping").

While false imprisonment requires subjective knowledge that the restraint is unauthorized, kidnapping requires a specific intent to do a further act, thereby distinguishing the crime of kidnapping from the crime of false imprisonment. *See* NMSA

1978, § 30-4-4; *State v. Sotelo*, 2013-NMCA-028, ¶ 12, 296 P.3d 1232; *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844. Subsequent Court of Appeals cases have reaffirmed the "intent" distinction making false imprisonment a lesser included offense of kidnapping. *See, e.g., Fish*, 1985-NMCA-036 (holding that a failure to instruct on false imprisonment as a necessarily included lesser offense of kidnapping required reversal, where there was some evidence that the defendant lacked the intent necessary for kidnapping); *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152 (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).

Previous versions of the instruction did not include the optional "unlawfulness" element, despite Section 30-4-1 requiring that "taking, restraining, transporting or confining" be done unlawfully. Recognizing that parents have a natural and legal right to the custody of their children, in the context of custodial interference, *see* NMSA 1978, Section 30-4-4, *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134, held the mere fact that a parent had taken his infant daughter to Texas with intent to keeping her there for a protracted period was insufficient to show that he knew that he had no legal right to do so. If unlawfulness is at issue for kidnapping purposes, Use Note 4 requires its instruction and definition.

In *State v. Vernon*, 1993-NMSC-070, 116 N.M. 737, 867 P.2d 407, the Supreme Court held "that the 'hold to service' element of kidnapping requires that the victim be held against his or her will to perform some act, or to forego performance of some act, for the benefit of someone or something." *Vernon* further clarified that when a victim is moved to facilitate a murder, "no 'service' is performed by the victim ... because the victim does not confer any independent assistance or benefit to the perpetrator of the crime." *Id*. That conduct is nevertheless covered by the alternative intent theory of kidnapping "with intent[] ... to inflict death." *See* § 30-4-1(A)(4); *State v. Baca*, 1995-NMSC-045, 120 N.M. 383, 902 P.2d 65 (recognizing that the 1995 amendment to Section 30-4-1 added alternative of specific intent "to inflict death.").

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases filed or pending on or after December 31, 2015.]

14-403A. Kidnapping; second degree; essential elements.

For you to find the defendant guilty of [second degree][1] 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] [or] [restrained] [or] [confined] [or] [transported] _____ (*name of victim*) by [force][3] [or] [intimidation] [or] [deception] [by _____ (*describe conduct*)];[4]

[2. The defendant's act was unlawful];[5]

3. The defendant intended:

[to hold _____ (*name of victim*) for ransom[6]][3]

[OR]

[to hold _____(*name of victim*) as a [hostage][3] [or] [shield] against _____ 's (*name of victim*) will]

[OR]

[to inflict [death][3] [or] [physical injury] [or] [a sexual offense] on _____ (*name of victim*)]

[OR]

[to [make _____ (*name of victim*) _____ (*name specific act*)][3] [or] [keep _____ (*name of victim*) from _____ (*name specific act*)] against _____ 's (*name of victim*) will for the purpose of _____ (*identify benefit to defendant*)];[7]

[4. The [taking][3] [or] [restraint] [or] [confinement] [or] [transportation] of _____ (*name of victim*) was not slight, inconsequential, or merely incidental to the commission of another crime (*or name of offense*)];[8]

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

USE NOTES

1. Only identify the degree if second-degree kidnapping is being instructed as a lesser-included offense of first-degree kidnapping. UJI 14-6002 NMRA, "Necessarily included offense," along with UJI 14-403 NMRA, "Kidnapping, first degree," should be given.

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

3. Use applicable alternative or alternatives.

4. If a secondary offense is also charged that was committed during the course of the kidnapping, use ordinary language to describe the taking, restraint, or confinement by force, intimidation, or deception. A description of precisely what conduct constituted this actus reus assists reviewing courts to distinguish crimes committed near in time. *See State v. Montoya*, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820 (finding double jeopardy violation because "[w]e are unable to determine from the record whether the jury found that the kidnaping [sic] was accomplished by the truck's confinement of

Victim's vehicle or by Defendant's restraint of Victim inside the vehicle. The jury instruction supported either theory of kidnaping [sic]."); *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238 ("We conclude . . . that the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime.").

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is instructed, UJI 14-132 NMRA, "Unlawfulness as an element," must be given after this instruction.

6. The definition of "ransom," UJI 14-406 NMRA, should be given after this instruction.

7. Holding to service requires that the kidnapping's purpose be to make the victim perform some act or forgo performing an act, to the effect of conferring an independent assistance or benefit to the perpetrator of the crime, or another.

8. Use the bracketed element if the evidence raises a genuine issue of incidental conduct, whether or not a secondary offense is simultaneously charged. *See Trujillo*, 2012-NMCA-112; *see also* Committee commentary to UJI 14-403 NMRA. If a particular crime is identifiable, the name of the offense may be used, and unless the court has instructed on the essential elements of that offense, these elements must be given in a separate instruction immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* Committee commentary to UJI 14-403 NMRA.

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

14-404. Withdrawn.

14-405. Withdrawn.

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 NOTES

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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).

14-602. Withdrawn.

14-603. Withdrawn.

14-604. Withdrawn.

14-605. Withdrawn.

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][2] [guardian] [or] [custodian] of _____ (*name of child*);

2. _____ (*name of defendant*) intentionally[3] [left][2] [or] [abandoned] _____ (*name of child*);

3. As a result of _____ (*name of defendant*) [leaving][2] [or] [abandoning] _____ (*name of child*), _____ (*name of child*) was without proper parental care and control necessary to prevent harm to _____ (*name of child*);

4. At the time that _____ (*name of defendant*) [left][2] [or] [abandoned] _____ (*name of child*), the circumstances exposed _____ (*name of child*) to a risk of harm;

[5. _____ (*name of defendant*) had the ability to provide proper parental care and control necessary for _____'s (*name of child*) well-being];[4]

6. _____'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][2] [great bodily harm to[5]] _____ (*name of child*);

7. _____ (*name of child*) was under the age of eighteen (18);

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

USE NOTES

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 [withdrawn] must also be given.

2. Use only applicable alternative or alternatives.

3. The definition of "intentionally," UJI 14-626 NMRA, must also be given immediately after this instruction.

4. Use the bracketed element if the defendant's ability to provide the proper parental care and control necessary for the child's well-being is at issue.

5. If this alternative is given, the definition of "great bodily harm," UJI 14-131 NMRA, must also be given.

[Approved, effective October 1, 1993; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-6-1(B) (2009).

The 2018 amendments to this instruction modify the essential elements of abandonment of a child resulting in great bodily harm in light of the ruling in *State v. Stephenson*, 2017-NMSC-002, 389 P.3d 272. In *Stephenson*, the Supreme Court held that NMSA 1978, § 30-6-1(B) (2009), criminalizes the intentional leaving or abandoning of a child, but only under circumstances where, at the time the parent, guardian, or custodial adult left the child, the child was exposed to a risk of harm. *Stephenson*, 2017-NMSC-002, ¶ 16. In *Stephenson*, the Supreme Court reversed the defendant's conviction for abandonment of her child, finding that the evidence adduced at trial was insufficient to show that, at the time the defendant locked her son in his room at

bedtime, he was exposed to harm. The committee added Paragraph 4 to this instruction to reflect the Supreme Court's conclusion that "the Legislature did not intend to criminalize conduct creating 'a mere possibility, however remote, that harm may result' to a child." *Id*. ¶ 28 (quoting *State v. Graham*, 2005-NMSC-004, ¶ 9, 137 N.M. 197, 109 P.3d 285).

The Supreme Court in *Stephenson* also held that there are two possible legal theories under Section 30-6-1(B). *Stephenson*, 2017-NMSC-002, ¶ 14. The state may prove either that the defendant "abandoned" the child or that the defendant "left" the child. *Id*. This is consistent with the Court's ruling that "abandonment" and "leaving" are legally distinct from one another. *Id*. ¶¶ 14, 16 ("We conclude that a principled distinction exists between 'leaving' and 'abandoning,' and therefore, to avoid rendering either word superfluous, each word must be construed consistent with the Legislature's intent, which was to create independent theories of criminal culpability for both 'leaving' and 'abandoning.'").

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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][2] [guardian] [or] [custodian] of _____ (*name of child*);

2. _____ (*name of defendant*) intentionally[3] [left][2] [or] [abandoned] _____ (*name of child*);

3. As a result of _____ (*name of defendant*) [leaving][2] [or] [abandoning] _____ (*name of child*), _____ (*name of child*) was without proper parental care and control necessary to prevent harm to _____ (*name of child*);

4. At the time that _____ (*name of defendant*) [left][2] [or] [abandoned] _____ (*name of child*), the circumstances exposed _____ (*name of child*) to a risk of harm;

[5. _____ (*name of defendant*) had the ability to provide proper parental care and control necessary for _____'s (*name of child*) well-being];[4]

6. _____ (*name of child*) was under the age of eighteen (18);

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

USE NOTES

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 [withdrawn] must also be given.

2. Use only applicable alternative or alternatives.

3. The definition of "intentionally," UJI 14-626 NMRA, must also be given immediately after this instruction.

4. Use the bracketed element if the defendant's ability to provide the proper parental care and control necessary for the child's well-being is at issue.

[Approved, effective October 1, 1993; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary for UJI 14-606 NMRA.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-610. Withdrawn.

14-611. Chart.

SECTION 30-6-1 NMSA 1978
ABUSE OF A CHILD

Harm to child	**Age of child**	***Mens rea* of defendant**	**UJI**
No death or great bodily harm	Under 18	Intentional or reckless disregard	14-612
Great bodily harm	Under 18	Intentional or reckless disregard	14-615
Death	At least 12 but less than 18	Intentional or reckless disregard	14-621
	Under 12	Reckless disregard	14-622
	Under 12	Intentional	14-623

	Under 12 (step-down instruction)	N/A	14-625 [withdrawn]

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

14-612. Child abuse not resulting in death or great bodily harm; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse, [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*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*)];[4]

[OR]

[to be exposed to inclement weather];

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]];

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*);[6]

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare];[7]

5. _____ (*name of child*) was under the age of eighteen (18);

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

USE NOTES

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

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. This paragraph sets forth the minimum level of culpability required to sustain a conviction for child abuse. *Cf. State v. Consaul*, 2014-NMSC-030, ¶ 23, 332 P.3d 850 ("[T]he punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, negligently, or recklessly, is the same." (emphasis omitted)). In most cases, evidence that a defendant acted knowingly or intentionally will satisfy the standard set forth in this paragraph, and thus separate instructions for knowing and intentional conduct are not provided. *See State v. Montoya*, 2015-NMSC-010, ¶ 33, ___ P.3d ___ ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

7. Use this element only when there is evidence that the defendant permitted child abuse.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1. The child abuse instructions were substantially revised in 2015 to reflect amendments to the child abuse statute, 2005 N.M. Laws, ch. 59, § 1, and recent holdings of New Mexico's appellate courts *see, e.g., State v. Montoya*, 2015-NMSC-010, ___ P.3d ___; *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850.

Reckless disregard

The New Mexico Supreme Court has held that recklessness is the minimum level of culpability required for the crime of child abuse. *See Consaul*, 2014-NMSC-030, ¶ 38. The Court stated:

[T]he Legislature did not mean to punish ordinary acts of negligence when it amended the child abuse statute to require proof of recklessness . . . The Legislature intended to punish acts done with a reckless state of mind consistent with its objective of punishing morally culpable acts and not mere inadvertence.

Id. ¶ 36. The third elements of UJIs 14-612, -615, and -621 NMRA are consistent with the recklessness standard set forth by the legislature. *Compare* UJI 14-612, ¶ 3, *with* NMSA 1978, § 30-6-1(A)(3) (defining criminal negligence as having knowledge of the danger involved and acting "with a reckless disregard for the safety or health of the child."). *See also Consaul*, 2014-NMSC-030, ¶ 37 ("Typical definitions of recklessness require an actor to consciously disregard a substantial and unjustifiable risk of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

Separate instructions

The punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, or with reckless disregard, is the same. *See Consaul*, 2014-NMSC-030, ¶ 23; Section 30-6-1(E) ("If the abuse results in great bodily harm to the child, the person is guilty of a first degree felony."). The same is true for child abuse not resulting in death or great bodily harm and for child abuse resulting in the death of a child at least twelve but less than eighteen years of age. *See* NMSA 1978, § 30-6-1(E) ("A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony and for second and subsequent offenses is guilty of a second degree felony."); § 30-6-1(F), (G) (providing that child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age, whether committed intentionally or with reckless disregard, is a first degree felony). As a result, UJIs 14-612, -615, and -621 require that the State prove that the defendant acted with a minimum of reckless disregard. Separate instructions for intentional child abuse, with the exception of abuse resulting in the death of a child under twelve, are not provided because evidence that the defendant's conduct was knowing or intentional will meet the reckless disregard standard. *See Montoya*, 2015-NMSC-010, ¶ 33 ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to

provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

Nevertheless, "child abuse . . . will sometimes also require separate jury instructions . . . [w]hen two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child's injuries occurred[.]" *Consaul*, 2014-NMSC-030, ¶ 23. "[T]he jury must make an informed and unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished." *Id*. Therefore, the child abuse instructions require the jury to agree on the conduct or course of conduct alleged to have been child abuse.

For a discussion of child abuse resulting in the death of a child under twelve years of age, see the commentary to UJI 14-622 NMRA.

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

14-615. Child abuse resulting in great bodily harm; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse 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*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*)];[4]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]];

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*);[6]

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare];[7]

5. _____ (*name of defendant*)'s conduct resulted in great bodily harm[8] to _____ (*name of child*);

6. _____ (*name of child*) was under the age of eighteen (18);

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

USE NOTES

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

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. This paragraph sets forth the minimum level of culpability required to sustain a conviction for child abuse resulting in great bodily harm. *See State v. Consaul*, 2014-

NMSC-030, ¶ 23, 332 P.3d 850 ("[T]he punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, negligently, or recklessly, is the same." (emphasis omitted)). In most cases, evidence that a defendant acted knowingly or intentionally will satisfy the standard set forth in this paragraph, and thus separate instructions for knowing and intentional conduct are not provided. *See State v. Montoya*, 2015-NMSC-010, ¶ 33, ___ P.3d ___ ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

7. Use this element only when there is evidence that the defendant permitted child abuse.

8. The definition of "great bodily harm," UJI 14-131 NMRA, must also be given.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

14-621. Child abuse resulting in death; child at least 12 but less than 18; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age, [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*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*);][4]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]]

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*)[6];

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare;][7]

5. _____ (*name of defendant*)'s conduct resulted in the death of _____ (*name of child*);

6. _____ (*name of child*) was at least twelve (12), but less than eighteen (18) years of age;

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

USE NOTES

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

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is an issue, this bracketed alternative must be given if requested.

6. This paragraph sets forth the minimum level of culpability required to sustain a conviction for child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age. *See* NMSA 1978, § 30-6-1(F), (G) (providing that child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age, whether committed intentionally or with reckless disregard, is a first degree felony); *Cf. State v. Consaul*, 2014-NMSC-030, ¶ 23, 332 P.3d 850 ("[T]he punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, negligently, or recklessly, is the same." (emphasis omitted)). In most cases, evidence that a defendant acted knowingly or intentionally will satisfy the standard set forth in this paragraph, and thus separate instructions for knowing and intentional conduct are not provided. *See State v. Montoya*, 2015-NMSC-010, ¶ 33, ___ P.3d ___ ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

7. Use this element only when there is evidence that the defendant permitted child abuse.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

14-622. Child abuse resulting in death; reckless disregard; child under 12; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse with reckless disregard resulting in death of a child under twelve (12) years of age, [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*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*);][4]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]]

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*);

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare;][6]

5. _____ (*name of defendant*)'s conduct resulted in the death of _____ (*name of child*);

6. _____ (*name of child*) was under the age of twelve (12);

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

USE NOTES

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

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is an issue, this bracketed alternative must be given if requested.

6. Use this element only when there is evidence that the defendant permitted child abuse.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

Separate instructions are provided for intentional child abuse resulting in death of a child under 12 years of age and for child abuse with reckless disregard resulting in death of a child under 12 years of age because the Legislature has defined the offenses separately and provided different punishments for each offense. *See State v. Consaul*, 2014-NMSC-030, ¶¶ 21-22 (noting that "the Legislature meant to punish only the most deliberate and reprehensible forms of child abuse" as intentional child abuse resulting in the death of a child under 12 years of age). When appropriate, a jury instructed under UJI 14-623 NMRA (Child abuse resulting in death; intentional act; child under 12; essential elements) may also be instructed under UJI 14-622 NMRA (Child abuse resulting in death; reckless disregard; child under 12; essential elements) provided that UJI 14-625 NMRA [withdrawn] (Jury procedure for various degrees of child abuse resulting in death of a child under twelve years of age) is also given. *See State v. Montoya*, 2015-NMSC-010, ¶¶ 41-42, ___ P.3d ___ (holding that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under 12 and that the use of a step-down instruction therefore is appropriate).

[Adopted by Supreme Court Order No.15-8300-001, effective April 3, 2015.]

14-623. Child abuse resulting in death; intentional act; child under 12; essential elements.

For you to find _____ (*name of defendant*) guilty of intentional child abuse resulting in death of a child under twelve (12) years of age, [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*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) caused _____ (*name of child*)

[to be placed in a situation that 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]]

3. _____ (*name of defendant*) acted intentionally[3] [and without justification];[4]

4. _____ (*name of defendant*)'s conduct resulted in the death of _____ (*name of child*);

5. _____ (*name of child*) was under the age of twelve (12);

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

USE NOTES

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

2. Use only applicable alternative or alternatives.

3. The definition of "intentionally," UJI 14-626 NMRA, must also be given with this instruction.

4. If "justification" is an issue, this bracketed alternative must be given if requested.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

Separate instructions are provided for intentional child abuse resulting in death of a child under 12 years of age and for child abuse with reckless disregard resulting in death of a child under 12 years of age because the Legislature has defined the offenses separately and provided different punishments for each offense. *See State v. Consaul*, 2014-NMSC-030, ¶¶ 21-22, 332 P.3d 850 (noting that "the Legislature meant to punish only the most deliberate and reprehensible forms of child abuse" as intentional child abuse resulting in the death of a child under 12 years of age). When appropriate, a jury instructed under UJI 14-623 NMRA (Child abuse resulting in death; intentional act; child under 12; essential elements) may also be instructed under UJI 14-622 NMRA (Child abuse resulting in death; reckless disregard; child under 12; essential elements) provided that UJI 14-625 NMRA [withdrawn] (Jury procedure for various degrees of child abuse resulting in death of a child under twelve years of age) is also given. *See State v. Montoya*, 2015-NMSC-010, ¶¶ 41-42, ___ P.3d ___ (holding that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under 12 and that the use of a step-down instruction therefore is appropriate).

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

14-625. Withdrawn.

14-626. Intentionally, defined for crimes against children.

To find that the defendant [acted intentionally[1]] [2] [intentionally left or abandoned the child [3]] you must find that it was the defendant's conscious objective to [leave or abandon][2] [endanger] [torture, cruelly confine, or cruelly punish] [or] [expose to the inclemency of the weather] the child.

USE NOTES

1. This phrase tracks Element 3 in UJI 14-623 NMRA.

2. Choose applicable alternative or alternatives.

3. This phrase tracks the language in UJIs 14-606 and 14-607 NMRA for crimes of abandonment.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See State v. Granillo*, 2016-NMCA-094, ¶ 17, 384 P.3d 1121. Where *Granillo* interpreted the meaning of "intentional" in NMSA 1978, Section 30-6-1 (2009), this definition should be given in cases charged under that statute that

require an intentional mens rea. This includes child abandonment cases instructing with UJI 14-606 and 14-607 NMRA, if at issue, as well as intentional child abuse. The committee notes that UJI 14-623 NMRA (intentional abuse resulting in death) is the only elements instruction specific to an intentional theory of child abuse. Because the penalty for all other forms of child abuse is the same whether committed recklessly or intentionally, all other child abuse instructions were drafted in terms of recklessness. Nevertheless, under the statute, it is possible to commit any form of child abuse either recklessly or intentionally. This definition instruction would be applicable to any intentional abuse charge.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-631. Sexual exploitation of children; possession.

For you to find the defendant guilty of sexual exploitation of children (possession) [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 possessed a visual or print medium[2];

2. The medium depicts a prohibited sexual act[2] [or simulation of such an act][3];

3. The defendant knew or had reason to know that medium depicts prohibited sexual act [or simulation of such act][3];

4. The defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age;

[5. The depictions are obscene;[4]][3]; and

6. This happened in New Mexico on or about _____, 20__.

USE NOTES

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

2. If in issue, UJI 14-130 NMRA, "'Possession' defined," definitions of "visual or print medium" and/or "prohibited sex act" shall be given. *See* NMSA 1978, § 30-6A-2.

3. Instruct with bracketed language only if in issue.

4. Use bracketed material if obscenity is in issue. If this element is instructed a definition of "obscene" shall also be given. *See* NMSA 1978, § 30-6A-2.

5. If the consensual possession defense defined in NMSA 1978, Section 30-6A-3(B) is in issue, UJI 14-634 NMRA must be given.

6. To invoke the sentencing enhancement defined in Section 30-6A-3(A), special interrogatory UJI 14-6019C NMRA must be given.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00109, effective for all cases pending or filed on or after December 31, 2024.]

Committee commentary. — *See* NMSA 1978, § 30-6A-3(A) (2016).

"The [First Amendment] test for child pornography is separate from the obscenity standard enunciated in *Miller* [*v. California*, 413 U.S. 15 (1973)]." *State v. Myers*, 2009-NMSC-016, ¶ 26, 146 N.M. 128, 207 P.3d 1105 (quoting *New York v. Ferber*, 458 U.S. 747, 764 (1982)). Nevertheless, where New Mexico provides a statutory definition of the term obscene, that definition governs the State's burden of proof for conviction in New Mexico. *Id*. ¶¶ 34-40 ("[A]lthough we agree with the Court of Appeals that the challenged material must do more than "'merely depict a naked child'" to run afoul of the contemporary community standard, we disagree that it 'must be identifiable as hard-core child pornography.'" (quoting *State v. Myers*, 2008-NMCA-047, ¶ 12, 143 N.M. 710, 181 P.3d 702 (quoting *State v. Rendleman*, 2003-NMCA-150, ¶ 44, 134 N.M. 744, 82 P.3d 554))).

Section 30-6A-3(A) defines the crime of child pornography possession. To commit the crime intentionally, the possession concepts applicable to any contraband material are applicable, and thus UJI 14-130 NMRA should be instructed when intentional possession is in issue. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including "visual or print medium," "prohibited sex act," and "obscene."

While the act of possession itself must be done "intentionally," the Court of Appeals held that "the scienter requirement in Section 30-6A-3(A) that a person 'knows or has reason to know' that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient." *State v. Adamo*, 2018-NMCA-013, ¶ 34, 409 P.3d 1002. The Court found sufficient evidence of intentional possession when images were downloaded but later deleted. *Id*. ¶¶ 14-18.

In 2014, the New Mexico Supreme Court held the unit of prosecution for possession offenses under Section 30-6A-3(A) was ambiguous and thus, under the rule of lenity, further held that only one count may be punished for multiple images possessed unitarily. *State v. Olsson*, 2014-NMSC-012, ¶¶ 23, 31, 43-47, 324 P.3d 1230. However, the Court of Appeals held that convictions for possession and manufacture-by-recording do not violate double jeopardy if distinct evidence can support a continuing knowing

possession after the manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, 41 P.3d 1157.

The Legislature amended Section 30-6A-3(A) in 2016, adding the one-year sentence enhancement for depictions of children under the age of 13, and adding Subsection B, an affirmative defense for consensual possession among teenagers. The unit of prosecution was not altered. 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016).

In 2016, the Legislature also amended the basic sentence from a "fourth-degree felony" to a "fourth-degree felony for sexual exploitation of children" and added new subsections for felonies "for sexual exploitation of children" to NMSA 1978, Section 31-18-15 (2016) (defining basic sentences). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-632. Sexual exploitation of children; distribution.

For you to find the defendant guilty of sexual exploitation of children (distribution) [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 distributed a visual or print medium[2];

2. The medium depicted a prohibited sexual act[2] [or simulation of such an act][3];

3. The defendant knew or had reason to know that medium depicts prohibited sexual act [or simulation of such act][3];

4. The defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age;

[5. The depictions are obscene[4];][3] and

6. This happened in New Mexico on or about _____, 20__.

USE NOTES

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

2. If in issue, definitions of Avisual or print medium@ and/or Aprohibited sex act@ shall be given. *See* NMSA 1978, ' 30-6A-2.

3. Instruct with bracketed language only if in issue.

4. If this element is instructed, a definition of Aobscene@ shall be given. *See* NMSA 1978, ' 30-6A-2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(C) (2016).

Section 30-6A-3(C) defines the crime of child pornography distribution. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including Avisual or print medium,@ Aprohibited sex act,@ and Aobscene.@ While the act of distribution itself must be done Aintentionally,@ the Court of Appeals held that the additional scienter requirement Athat a person >knows or has reason to know= that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient.@ *State v. Adamo*, 2018-NMCA-013, && 28-34, 409 P.3d 1002. Because that element is identical for possession and distribution offenses, the holding in *Adamo* is applicable to that particular element of distribution as well.

Distribution may be committed by possessing files in a shared location, but the distribution does not occurCand the crime is not completeCuntil a third party downloads a file. *See United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012) (AWhen an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred.@ (citing *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007))). In *Shaffer*, the Tenth Circuit was able to point to extensive evidence of intent in the factual record. 472 F.3d at 1222-24. First, the defendant himself explained that the particular file sharing program he used provided incentive rewards Acorresponding to how many images other users downloaded from his computer,@ and admitted that he stored his possessed images in the shared folder specifically to receive the incentive rewards. *Id*. at 1222. Moreover, the defendant admitted that he subjectively knew that Aother people had downloaded child pornography from his shared folder.@ *Id*. at 1224. Thus, the Tenth Circuit concluded he had Aopenly invited [others] to take, or download, those items.@ *Id*. at 1223.

In 2016, the New Mexico Court of Appeals held the unit of prosecution for distribution offenses under Section 30-6A-3 may be ambiguous if committed by shared possession in a peer-to-peer program, noting the lack of a statutory definition for Adistribute.@ *State v. Sena*, 2016-NMCA-062, && 9-19, 376 P.3d 887 (ANotably, Section 30-6A-3(D) defines manufacture somewhat differently than possession and distribution, and Section 30-6A-2(D) provides a more specific and detailed definition for the word >manufacture.=@). Thus, the Court held that if a defendant=s distribution conduct is not itself distinct, only one count may be punished for multiple images acquired from the defendant by third parties. *Id*. && 15-16 (citing *State v. Olsson*, 2014-NMSC-012, && 20-29, 32, 324 P.3d 1230 and *State v. Leeson*, 2011-NMCA-068, & 17, 149 N.M. 823, 255 P.3d 401).

The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as Subsection C. *See* 2016 N.M. Laws Ch. 2, ' 1 (eff. Feb. 25, 2016). The Legislature also amended the basic sentence from a Athird-degree felony@ to a Athird-degree felony for sexual exploitation of children,@ and added new subsections for felonies Afor sexual exploitation of children@ to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, '' 1, 2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-633. Sexual exploitation of children; manufacture.

For you to find the defendant guilty of sexual exploitation of children (manufacture) [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 manufactured a visual or print medium[2];

2. The medium depicts a prohibited sexual act[2] [or simulation of such act][3];

3. One or more of the participants in that act is a child under eighteen (18) years of age;

[4. The depictions are obscene[4];][3] and

5. This happened in New Mexico on or about _____, 20__.

USE NOTES

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

2. If in issue, the statutory definitions of Amanufacture,@ Avisual or print medium@ and/or Aprohibited sex act@ shall be given. *See* NMSA 1978, ' 30-6A-2.

3. Instruct with bracketed language only if in issue.

4. If this element is instructed, a definition of Aobscene@ shall be given. *See* NMSA 1978, ' 30-6A-2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(E) (2016).

Section 30-6A-3(E) defines the crime of child pornography manufacture. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including Amanufacture,@ Avisual or print medium,@ Aprohibited sex act,@ and Aobscene.@

The New Mexico Court of Appeals held that Acopying the information from a computer to an external drive to another computer@ falls within the statutory definition of manufacture as Acopying by any means.@ *State v. Smith*, 2009-NMCA-028, && 14-15, 145 N.M. 757, 204 P.3d 1267.

In 2011, the New Mexico Court of Appeals held that the unit of prosecution of manufacture was unambiguous so that each act of taking a photograph constituted a count of manufacture. *State v. Leeson*, 2011-NMCA-068, & 17, 149 N.M. 823, 255 P.3d 401 (AA violation of the statute occurs where a criminal defendant intentionally produces or copies a photograph, electronic image, or video that constitutes child pornography.@); *see also* ' 30-6A-2(D) (defining Amanufacture@ to include Athe production, processing, copying by any means, printing, packaging or repackaging@ of exploitation materials). The Supreme Court subsequently distinguished *Leeson* to find the units of prosecution for possession and distribution ambiguous and that only one count could be punished for multiple images if the defendant acted unitarily. *State v. Olsson*, 2014-NMSC-012, && 23, 31, 43-47, 324 P.3d 1230; *see also State v. Sena*, 2016-NMCA-062, && 3-4, 9-19, 376 P.3d 887. The Court of Appeals held that convictions for possession and manufacture-by-recording do not violate double jeopardy if distinct evidence can support a continuing knowing possession after the manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, && 12-15,417 P.3d 1157.

The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as Subsection E. *See* 2016 N.M. Laws Ch. 2, ' 1 (eff. Feb. 25, 2016). The Legislature also amended the basic sentence from a Asecond-degree felony@ to a Asecond-degree felony for sexual exploitation of children,@ and added new subsections for felonies Afor sexual exploitation of children@ to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, '' 1, 2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-634. Consensual possession defense.[1]

In evaluating the elements of sexual exploitation of children (possession) [as charged in Count ____][2], it is a defense to the crime that a teenager possessed depictions of another teenager, consensually created and consensually possessed. If you find the following elements satisfied, you must find the defendant not guilty:

1. The defendant was under the age of eighteen (18) when the defendant possessed the depiction(s);

2. The depicted child was aged fourteen (14) to eighteen (18) at the time the image was captured;

3. The depicted child knowingly and voluntarily consented to the image=s creation; and

4. The depicted child knowingly and voluntarily consented to the defendant=s possession of the image.

USE NOTES

1. For use with UJI 14-631 NMRA when the consensual possession defense defined in NMSA 1978, Section 30-6A-3(B) is in issue.

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

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(B) (2016).

The Legislature amended Section 30-6A-3 in 2016, adding Subsection B, an affirmative defense for consensual possession among teenagers. 2016 N.M. Laws ch. 2, ' 1 (eff. Feb. 25, 2016).

Under New Mexico law, consent to the image=s creation may be withdrawn at any time before the creation, and presumably consent to the possession can also be withdrawn. *Cf. State v. Pisio*, 1994-NMCA-152, & 38, 119 N.M. 252, 889 P.2d 860 (AA person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself.@); accord *State v. McCormack*, 1984-NMCA-042, & 13, 101 N.M. 349, 682 P.2d 742 (stating that criminal trespass is established if the defendant Aentered or remained without authorization or permission, knowing that consent to enter had been denied or withdrawn@).

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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

	MISDE-MEANOR	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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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. NMSA 1978, § 30-9-10(A) (2005).

The other definitions of force or coercion are contained in UJI 14-903 NMRA (threats) and UJI 14-904 NMRA (unconscious, etc.). UJI 14-905 NMRA combines UJI 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. Unlawfulness is defined in UJI 14-132 NMRA. Consent may be relevant to unlawfulness, and force or coercion may negate consent.

The committee was of the opinion that the parts of the body included in the term "primary genital area" are those set forth in NMSA 1978, Section 30-9-14 (1996) relating to indecent exposure. In 2018, the word "vagina" was removed from the use note listing body parts for all contact crimes based on the recognition that "contact" with the vagina necessarily requires "penetration" of the vulva, thus conflating the greater and lesser offenses of criminal sexual penetration and criminal sexual contact. *See State v. Tapia*, 2015-NMCA-048, ¶¶ 21, 25, 347 P.3d 738 (acknowledging "that the overlap in the language of the CSCM instruction and the sexual intercourse instruction could have

resulted in some juror confusion") (citing UJI 14-982 NMRA (defining "sexual intercourse")). Rejecting fundamental instructional error, *Tapia* concluded

that the CSCM jury instruction, even though arguably flawed from the standpoint of anatomical definitional accuracy, did not create such confusion in the jury that it would undermine the judicial process. However, as a result of any ambiguity or contradiction that may arise out of the change in the definition of 'sexual intercourse' under UJI 14-982 [NMRA], we believe that 'vagina' should be removed from the list of anatomy that can be included within the jury instructions for any criminal sexual contact.

Tapia, 2015-NMCA-048, ¶ 27. Definitions for all anatomical terms relevant to both contact and penetration offenses 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.

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). *Cf. State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781 (discussing "force or violence" in the context of robbery). 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 NMSA 1978, Section 30-3-4 (1963), relating to battery. *See* commentary to UJI 14-320 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 _____[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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*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];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. _____ (*name of victim*) was eighteen (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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____) (*name of victim or other person*)[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 _____[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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) for examples of types of threats.

5. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-906 NMRA.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*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)];

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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-906 NMRA.

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

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 eighteen (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 NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-906 NMRA.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or another*);][3]

[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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-910 NMRA.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*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);

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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-910 NMRA.

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

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))][4] (OR) (threatened to

_____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 eighteen (18) years of age or older;

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

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-910 NMRA.

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

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 eighteen (18) years of age or older;

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

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).

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant

(used threats of physical force or physical violence against _____) (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 eighteen (18) years of age or older;

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

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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 NMSA 1978, Section 30-9-12(A) (1993): (1) contact resulting in personal injury, and (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), UJI 14-914 NMRA must also be given.

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

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

	FOURTH DEGREE	THIRD DEGREE — TYPES OF CRIMINAL SEXUAL CONTACT OF A MINOR					
TYPE OF FORCE OR COERCION	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

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][4]

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13(D) (2004): 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), UJI 14-922 NMRA (threats), and UJI 14-923 NMRA (unconscious, etc.) contain separate definitions of "force or coercion." *See* NMSA 1978, § 30-9-10(A) (2005).

UJIs 14-921, 14-922, 14-923. and 14-924 NMRA are the same as UJIs 14-902, 14-903, 14-904, and 14-905 NMRA, respectively, with the additional element that the victim is a minor between the ages of thirteen and eighteen.

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 NMSA 1978, Section 30-3-4 (1963) 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 NMSA 1978, Section 30-9-13 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 NMSA 1978, Section 30-9-14 (1996) relating to indecent exposure. In 2018, the word "vagina" was removed from the use note listing body parts for all contact crimes based on the recognition that "contact" with the vagina necessarily requires "penetration" of the vulva, thus conflating the greater and lesser offenses of criminal sexual penetration and criminal sexual contact. *See State v. Tapia*, 2015-NMCA-048, ¶¶ 21, 25, 347 P.3d 738 (acknowledging "that the overlap in the language of the CSCM instruction and the sexual intercourse instruction could have resulted in some juror confusion") (citing UJI 14-982 NMRA (defining "sexual intercourse")). Rejecting fundamental instructional error, *Tapia* concluded

that the CSCM jury instruction, even though arguably flawed from the standpoint of anatomical definitional accuracy, did not create such confusion in the jury that it would undermine the judicial process. However, as a result of any ambiguity or contradiction that may arise out of the change in the definition of ‘sexual intercourse' under UJI 14-982 [NMRA], we believe that ‘vagina' should be removed from the list of anatomy that can be included within the jury instructions for any criminal sexual contact.

Tapia, 2015-NMCA-048, ¶ 27.

Definitions for all anatomical terms relevant to both contact and penetration offenses 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 "buttocks" 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.

NMSA 1978, Section 30-9-13 requires that the sexual contact be both unlawful and intentional. Unlawfulness is defined in UJI 14-132 NMRA. Consent may be relevant to unlawfulness, and force or coercion may negate consent.

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 eighteen (18). A person eighteen (18) years of age has reached majority. *See* NMSA 1978, § 28-6-1 (1973).

See commentaries to UJIs 14-902, 14-903, and 14-904 NMRA for a discussion of the definitions of "force or coercion."

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) 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. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-921 NMRA.

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

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*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];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-921 NMRA.

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

[touched or applied force to the _____[3] of _____ (*name of victim*);][4]

[OR]

[caused _____ (*name of victim*) to touch _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____) (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][6]

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

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) 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. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-921 NMRA.

14-925. Criminal sexual contact of a minor in the [third] [second] degree; child under thirteen (13); 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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13(B), (C) (2003) (defining second and third-degree criminal sexual contact of a minor).

This instruction contains the essential elements for criminal sexual contact of a child under the age of thirteen (13). If the victim is under the age of thirteen (13) years, no force or coercion is necessary.

Mistake of the defendant as to the age of a child under the age of thirteen (13) is not a defense. *Perez v. State*, 1990-NMSC-115, 111 N.M. 160, 162, 803 P.2d 249; 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* NMSA 1978, § 40-1-6(B) (2013).

This instruction was revised in 1992 to comply with the Supreme Court's opinion in *State v. Osborne*, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624. *See also State v. Orosco*, 1992-NMSC-006, ¶ 5 n.3, 113 N.M. 780, 833 P.2d 1146, in which the Supreme Court further clarified its earlier decision in *Osborne*.

In 1991, NMSA 1978, Section 30-9-13 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."

See also commentary to UJI 14-921 NMRA.

[As revised, September 10, 1993; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant was a

[(parent) (relative) (household member)[4] (teacher) (employer)][3]

[OR]

[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 position of authority[5] 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;][6]

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. If this bracketed alternative is given, UJI 14-370 NMRA, "household member defined," must be given after this instruction.

5. *See* NMSA 1978, § 30-9-10(E) (2005) for the definition of "position of authority."

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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" 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. The state is not

required to prove that the defendant, by reason of the defendant's position as a household member, was able to exercise undue influence over the child, because the Legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under NMSA 1978, Section 30-9-13 (2004). *See State v. Erwin*, 2016-NMCA-032, ¶¶ 5-9, 367 P.3d 905. Thus, for defendants in enumerated positions of authority in Element 2, the jury need not separately find that "by reason of the defendant's relationship with [the victim], [the defendant] was able to exercise under influence over [the victim]." *See id*. ¶ 16.

See also the commentary to UJI 14-921 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 _____[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 thirteen (13) but less than eighteen (18) years old;

[6. The defendant's act was unlawful;][6]

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

USE NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva."

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.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10 (A)(3) (2005) for examples of types of threats.

5. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-927 NMRA.

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

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*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];

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 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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) 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. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-927 NMRA.

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

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*)][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

[2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (caused _____ (*name of victim*) to touch the _____[3] through the use of threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10 (A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-927 NMRA.

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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13(B), (C) (defining second and third-degree criminal sexual contact of a minor).

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 30-9-10(A).

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.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][3]

[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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-931 NMRA.

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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;] _____ (*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);

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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

3. Use only the applicable alternative or alternatives.

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-931 NMRA.

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

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*)][4];

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND [_____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (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. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-931 NMRA.

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

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] 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 NOTES

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

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva."

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.

3. Use only the applicable alternative or alternatives.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

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).

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13 (B), (C) (2003) (defining second and third-degree criminal sexual contact of a minor).

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 committee commentary to UJI 14-921 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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

[touched or applied force to the _____[3] of _____ (*name of victim*);][4]

[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*)][4]

[OR]

[threatened to _____[5]]; AND [_____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (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 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 NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (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 thirteen (13) to eighteen (18) years old in the third degree in NMSA 1978, Section 30-9-13(C) (2003): (1) contact resulting in personal injury, and (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 thirteen (13) to eighteen (18) years old 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, or (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. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." 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.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, § 30-9-10(A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* NMSA 1978, § 30-9-10(D) 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. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

14-937. Withdrawn.

Part C
Criminal Sexual Penetration

14-940. Chart.

SECTION 30-9-11 NMSA 1978
CRIMINAL SEXUAL PENETRATION

Third Degree, Second Degree and First Degree

	THIRD DEGREE	SECOND DEGREE						FIRST DEGREE	
TYPE OF FORCE OR COERCION		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	Great Bodily Harm or Great Mental Anguish
1. Use of physical force or physical violence	14-941		14-946	14-950					14-958
2. Threats of force or coercion	14-942		14-947						14-959
3. Victim physically or mentally unable to consent	14-943		14-948	14-952					14-960
4. All of the above (1-3)	14-944		14-949	14-953			14-956		14-961
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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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

[caused _____ (*name of victim*) to engage in _____[2];][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)[6] (teacher) (employer)][3]

[OR]

[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 position of authority[7] to coerce _____ (*name of victim*) to submit to sexual contact;

[4. The defendant's act was unlawful;][8]

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

USE NOTES

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. 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.

3. Use only the applicable alternative or alternatives.

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 UJI 14-981 NMRA must be given after this instruction.

6. If this bracketed alternative is given, UJI 14-370 NMRA, "household member defined," must be given after this instruction.

7. *See* NMSA 1978, Section 30-9-10(E) (2005) for the definition of "position of authority."

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; 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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" 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. The state is not required to prove that the defendant, by reason of the defendant's position as a household member, was able to exercise undue influence over the child, because the Legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under NMSA 1978, Section 30-9-13 (2004). *See State v. Erwin*, 2016-NMCA-032, ¶¶ 5-9, 367 P.3d 905. Thus, for defendants in enumerated positions of authority in Element 3, the jury need not separately find that "by reason of the defendant's relationship with [the victim], [the defendant] was able to exercise under influence over [the victim]." *See id*. ¶ 16

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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[n] _____[4] into the _____[5] of _____ (*name of victim*);]

[2. The defendant's act was unlawful;][6]

3. The defendant committed the act during the commission of _____;[7]

4. The commission of _____[7] was against _____ (*name of victim*);

5. The commission of _____[7] assisted the defendant in

[causing _____ (*name of victim*) to engage in _____[3];]

[OR]

[causing the insertion, to any extent, of a[n] _____[4] into the _____[5] of _____ (*name of victim*);] and

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

USE NOTES

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 UJI 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 UJI 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.

7. Identify the felony, and give the essential elements unless they are covered in an essential element instruction for the substantive offense. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

8. Age of the victim is not an essential element of the *offense*. However, where the state has not charged a violation of Section 30-9-11(E)(1), NMSA 1978, and is seeking the mandatory three-year minimum sentence because the victim is 13 to 18, the victim’s age is an essential sentencing fact that must be determined by the jury beyond a reasonable doubt, using UJI 14-6019A NMRA. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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.

To avoid double jeopardy, the felony must be other than a violation of NMSA 1978, Sections 30-9-11 through 30-9-14. It also 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 felony must *both* be committed against the victim of the unlawful sexual penetration *and* assist in the accomplishment of the unlawful sexual penetration. *See State v. Stevens*, 2014-NMSC-011, ¶ 39, 323 P.3d 901. It is not enough that otherwise lawful sexual

activity simply occurs at the same time or has been facilitated or caused by the commission of a felony not committed against the victim; the jury must find both. *Id*. ¶ 37.

See also the commentary to UJI 14-941 NMRA.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

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 NOTES

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.

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 NOTES

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.]

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 NOTES

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 anguish[9]] 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 NOTES

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.

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 NOTES

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.

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

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.

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 NOTES

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.]

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.

14-984. Withdrawn.

14-985. Criminal sexual penetration; medical procedure.

An issue in this case is whether 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 NOTES

If there is an issue as to whether “sexual penetration,” as defined by NMSA 1978, Section 30-8-11(A) (2009), 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; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

14-990. Chart.

SECTIONS 29-11A-4 AND -4.1 NMSA 1978
SEX OFFENDER REGISTRATION AND NOTIFICATION[1]

	SORNA Versions			
	1999	**2000**	**2005 & 2007**	**2013**
Applicability: applicable to a person convicted of a sex offense who:	Convicted on or after July 1, 1999, subject to subsequent provisions of the 2000 version.	Convicted on or after July 1, 1995, and persons convicted prior to July 1, 1995, and still incarcerated or on probation or parole.	Convicted on or after July 1, 2005, and a person convicted prior to July 1, 2005, who was still incarcerated or on probation or parole.	On or after July 1, 2013, is found guilty of committing a sex offense.
Included Offenses (NMSA 1978, §§ 29-11A-3 and -5). **Period of Renewal** (NMSA 1978, § 29-11A-4).				
Attempt to commit offenses have same registration period as the actual offense (attempted solicitation not included).	same	same	same	same
CSP, 1st degree. NMSA 1978, § 30-9-13.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
CSP, 2nd degree. NMSA 1978, § 30-9-13.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
CSP, 3rd degree. NMSA 1978, § 30-9-13.	10 years, annually	10 years, annually	life, 90 days	life, 90 days
CSP, 4th degree. NMSA 1978, § 30-9-13.	10 years, annually	10 years, annually	10 years, annually	10 years, every 6 months
Aggravated CSP; 1st, 2nd, 3rd degrees. NMSA 1978, §	N/A	N/A	life, 90 days (beginning 2007)	life, 90 days

30-9-11.				
CSC, 4th degree. NMSA 1978, § 30-9-12.	10 years, annually	10 years, annually	life, 90 days	life, 90 days
CSCM, 2nd Degree. NMSA 1978, § 30-9-13.	N/A	N/A	life, 90 days	life, 90 days
CSCM, 3rd degree. NMSA 1978, § 30-9-13.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
CSCM, 4th degree. NMSA 1978, § 30-9-13.	10 years, annually	10 years, annually	life, 90 days	life, 90 days
Sexual exploitation of children. NMSA 1978, § 30-6A-3.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
Kidnapping when victim is less than 18 and offender is not the parent of victim. NMSA 1978, § 30-4-1.	N/A	20 years, annually	life, 90 days	life, 90 days
Kidnapping when committed with the intent to inflict a sexual offense. NMSA 1978, § 30-4-1.	N/A	N/A	N/A	life, 90 days[2]
Sexual Exploitation of children by prostitution. NMSA 1978, § 30-6A-4.	10 years, annually	10 years, annually	10 years, annually	10 years, every 6 months
Solicitation to commit 2nd, 3rd, or 4th degree CSCM. NMSA 1978, §§ 30-9-13 & 30-28-1. (2nd added in 2005)	10 years, annually	10 years, annually	10 years, annually	10 years, every 6 months

(attempted solicitation not included).				
False imprisonment when victim is less than 18 and offender not a parent of victim. NMSA 1978, § 30-4-3.	N/A	10 years, annually	10 years, annually	N/A[2]
False imprisonment when committed with the intent to inflict a sexual offense. NMSA 1978, § 30-4-3.	N/A	N/A	N/A	10 years, every 6 months[2]
Aggravated indecent exposure. NMSA 1978, § 30-9-14.3.	N/A	N/A	10 years, annually	10 years, every 6 months
Enticement of a Child. NMSA 1978, § 30-9-1.	N/A	N/A	10 years, annually	10 years, every 6 months
Incest when victim under 18. NMSA 1978, § 30-10-3.	N/A	N/A	10 years, annually	10 years, every 6 months
Second or subsequent sex offense. NMSA 1978, § 29-11A-4(M).	N/A	N/A	life, 90 days	life, 90 days
Child solicitation by electronic commc'n device. NMSA 1978, § 30-37-3.2.	N/A	N/A	N/A	10 years, every 6 months[3]

Trigger Registration and/or Notice	**1999**	**2000**	**2005 & 2007**	**2013**

Register from release from custody of corrections department or being placed on probation or parole. NMSA 1978, § 29-11A-4(B).	10 days	10 days	see below	see below
Register from release from custody of corrections department, municipal or county jail; or a federal, military or tribal correctional facility or detention center; or being placed on probation or parole. NMSA 1978, § 29-11A-4(B).	N/A	N/A	10 days	5 business days
Changes Residence to New Mexico. NMSA 1978, § 29-11A-4(B).	10 days	10 days	10 days	5 business days
Resident of another state, but working or employed in New Mexico. NMSA 1978, § 29-11A-4(D).	10 days	10 days	10 days	5 business days
Changes residence within county. NMSA 1978, § 29-11A-4(F).	10 days	10 days	10 days	5 business days

Changes residence to new county. NMSA 1978, § 29-11A-4(G).	10 days (both new and old county)	10 days (both new and old county)	10 days (both new and old county)	5 business days (both new and old county)
Does not have established residence (shelter, halfway house, transient); register each county temporarily living in. NMSA 1978, § 29-11A-4(H).	N/A	N/A	10 days after change in temporary location	5 business days after change in temporary location
Attending institution of higher learning. Notify: (1) local county sheriff, (2) institution's law enforcement entity, and (3) registrar. NMSA 1978, § 29-11A-4(I).	N/A	N/A	10 days from start and 10 days from any change	5 business days from start and 5 business days from change
School employment, notice to school and principal. NMSA 1978, § 29-11A-4(J).	N/A	N/A	10 days from start and 10 days from any change	5 business days from start and 5 business days from change
Notice to employer immediately (whether compensated or volunteers). NMSA 1978, § 29-11A-4(K).	N/A	N/A	Immediately	Immediately
Moves out of New Mexico. Notify county	N/A	30 days prior to move	30 days prior to move	30 days prior to move

sheriff where currently resides and identify state moving to. NMSA 1978, § 29-11A-4.1.				

Penalties	**1999**	**2000**	**2005 & 2007**	**2013**
Failure to Comply. NMSA 1978, § 29-11A-4.	willfully, misdemeanor	willfully, 4th degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony
Provides false information. NMSA 1978, § 29-11A-4.	misdemeanor	willfully, 4th degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony
Failure to provide notice of moving from New Mexico. NMSA 1978, § 29-11A-4.1.	N/A	willfully, misdemeanor	willfully, 4th degree felony	willfully, 4th degree felony

USE NOTES

1. New Mexico's Sex Offender Notification and Registration Act ("SORNA") has been amended multiple times since it first was enacted. Different versions of SORNA also impose different requirements on someone subject to its provisions. Consequently, the necessary first step in correctly instructing a jury on the essential elements of an alleged SORNA violation is to identify which version of the statute applies. This chart is to be used to determine which version of the statute applies and to provide guidance in selecting the correct elements instruction from the instructions that follow. When using the chart to determine the applicable version of SORNA, it is important to first look at when a person was convicted of a sex offense as well as when a person completed their sentence for that sex offense. Second, it is important to determine whether or not the "sex offense" was a registerable offense under the applicable version of SORNA before proceeding further.

2. In 2013, the Legislature changed the sex offense definitions for kidnapping and false imprisonment in NMSA 1978, Section 29-11A-3(I). The Legislature deleted "the victim is less than eighteen years of age and the offender is not a parent of the victim" and added "committed with the intent to inflict a sexual offense." However, these changes were not incorporated into NMSA 1978, Section 29-11A-5(D) or (E). Based on this legislative history it appears the legislative intent of the 2013 amendment was to narrow down the scope of offenders convicted of kidnapping and false imprisonment to those that committed the offense with the intent to inflict a sexual offense.

3. Child solicitation by electronic device was added in 2013 to the list of registerable sex offenses but not incorporated into NMSA 1978, Section 29-11A-5(D) or (E) for purposes of length of registration period. Previously in 2007, the Legislature added child solicitation by electronic communication device under Section 29-11A-5(E), requiring a ten (10)-year registration period, but it failed to become law. *See State v. Ho*, 2014-NMCA-038, 321 P.3d 147. Based on this legislative history it appears the legislative intent of the 2013 amendment is to require a ten (10)-year registration period.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — New Mexico's first Sex Offender Registration Act (SORA) was enacted on July 1, 1995, in response to the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Program. Under the original SORA, the legislature listed 5 offenses that would require registration: (1) criminal sexual penetration in the first, second, third or fourth degree, as provided in Section 30-9-11 NMSA 1978; (2) criminal sexual contact in the fourth degree, as provided in Section 30-9-12 NMSA 1978; (3) criminal sexual contact of a minor in the third or fourth degree, as provided in Section 30-9-13 NMSA 1978; (4) sexual exploitation of children, as provided in Subsection A, B or C of Section 30-6A-3 NMSA 1978; and (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978.

Subsequent amendments were made to SORA and in 1999, the Legislature amended SORA to what has now become SORNA—Sex Offender Registration and Notification Act. Major changes again were made in 2000, 2005, 2007, and 2013.

Laws 1999, Chapter 19, Section 11 provided that "Sections 1 through 9 of this act apply to persons convicted of a sex offense committed on or after July 1, 1999. As to persons convicted of a sex offense committed prior to July 1, 1999, the laws with respect to registration requirements for sex offenders in effect at the time the sex offense was committed shall apply." The changes went into effect on July 1, 1999. Due to the changes of applicability in the 2000 version, expressly allowing for retroactivity, the 1999 version has been superseded by the 2000 version. *See State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223.

Laws 2000, Chapter 8, Section 9 provided that "the provisions of this 2000 version of the Sex Offender Registration and Notification Act apply to: A. persons convicted of a sex offense on or after July 1, 1995; and B. persons convicted of a sex offense prior to July 1, 1995 and who, on July 1, 1995, were incarcerated, on probation or on parole." The changes went into effect on July 1, 1999. Based on the applicable statute, any person who completed their sentence, including probation and parole, prior to July 1, 1995 has no registration obligation.

Laws 2005, Chapter 279, Section 14 provided that "the provisions of this 2005 version of the Sex Offender Registration and Notification Act are applicable to: A. a person convicted of a sex offense on or after July 1, 2005; and B. a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense." The changes went into effect on July 1, 2005.

In 2007, there was a change to Section 29-11A-3 to add "aggravated criminal sexual penetration," which became a new offense pursuant to Section 30-9-11. Laws 2007, Chapter 69, Section 8 provided that "the provisions of Section 5 of this act are applicable to: A. a person convicted of a sex offense on or after July 1, 1995; and B. a person convicted of a sex offense prior to July 1, 1995 and who, on July 1, 1995, was still incarcerated, on probation or on parole for commission of that sex offense." Since Chapter 69, Section 5, only deals with Section 29-11A-3 – Definitions and adds "aggravated criminal sexual penetration," this doesn't affect the prior applicability of the 2005 version. Therefore, the Chart reflects the 2005 and 2007 versions of SORNA in the same column.

Laws 2013, Chapter 152, Section 5 provided that "the provisions of these 2013 amendments to the Sex Offender Registration and Notification Act are applicable to a person who, on or after July 1, 2013, is found guilty of committing a sex offense." The changes went into effect on July 1, 2013. The application of the 2013 version was not made retroactive to those offenders who were still serving their sentence or on probation or parole. Therefore, those offenders convicted prior to July 1, 2013, would still fall under one of the prior versions of SORNA.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-991. Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements.[1]

For you to find the defendant guilty of failure to register as a sex offender [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 convicted of [_____][3];

2. The defendant was [residing] [employed] [attending school][4] in New Mexico between _____, _____ and _____, _____[5];

3. The defendant [*triggering event*] on [*date*][6];

4. The defendant did not register with the county sheriff prior to _____[7];

5. The defendant willfully failed to register; and

6. This happened in New Mexico between _____, _____ and _____, _____.

USE NOTES

1. For use for offenders required to register under the 1999 and 2000 versions of SORNA. Threshold questions of law must be determined before the jury may be instructed. The chart included as UJI 14-990 NMRA is a tool to aid in determining which version of the statute, and thus which UJI, applies.

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

3. If there is a stipulation that the offense was a registrable offense under SORNA, insert "a sex offense on _____ (*date*)." If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Use applicable alternative or alternatives.

5. Enter relevant dates. Once the applicable statute is identified, calculating the dates triggering registration obligations vary, so that the date of an actual registration requirement involves a threshold legal determination based on the completion of sentence or release from physical custody.

6. Describe event triggering registration or notice requirement (Ex: changing residence); and include date triggering registration or notice requirement. *See* Use Notes 1, 5; UJI 14-990 (Chart).

7. Enter date defendant registration is alleged to have been required. *See* Use Notes 1, 5; UJI 14-990 (Chart).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — As outlined in Use Note 1, many of the statutory elements of Failure to Register are legal questions, such as whether registration was required in the first place. The Committee determined that the jury is ill-equipped to make such legal determinations, and therefore provided as many resources as possible to aid

parties and judges in correctly determining both the applicable version of SORNA, and the defendant's specific legal obligations in a particular case. For jury instruction purposes, the Committee identified the following primary factual findings in element one: (1) the identity of the crime of conviction, (2) when the defendant was convicted, and (3) when the defendant completed serving the underlying sentence.

The relevant legal questions include (1) whether the underlying sex offense carries a registration requirement at all, (2) whether the "triggering" event creates a registration requirement under the applicable statute; (3) the duration of the registration obligation (and thus whether that requirement was still in effect at the time of the alleged failure), and (4) the frequency of the registration requirement (as it informs the applicable registration deadline). While these determinations will require judicial fact-finding, because they are threshold questions of law, they must be determined before submitting a charge to the jury, and indeed, directly determine the elements contained in the jury instructions.

The requisite jury findings informing the legal determination are included in elements 1, 2, and 3. However, the court must ultimately determine whether, legally, the defendant has been convicted of a valid sex offense requiring registration.

Instructions regarding the underlying sex offense.

The name of the prior felony conviction is not necessary. If the defendant stipulates to the commission of the underlying offense, evidence of the nature of defendant's predicate felony convictions is irrelevant and prejudicial under evidence Rule 11-403 NMRA. *See State v. Tave*, 1997-NMCA-056, 122 N.M. 29, 919 P.2d 1094; *accord, Old Chief v. United States*, 519 U.S. 172 (1997).

If the defendant does not stipulate to the prior offense, the state may prove the prior offense by documentary or other evidence which satisfies the rules of evidence. Under NMSA 1978, Section 29-11A-3, the definition of "conviction" requires that the defendant must have been sentenced for the predicate sex offense including a suspended or deferred sentence, but does not include a conditional discharge. *See State v. Brothers*, 2002-NMCA-110, ¶¶ 9-10, 133 N.M. 36, 59 P.3d 1268 (declining to find deferred sentence results in eradication of conviction for purposes of sex offender registration, in part, because to do so would make deferred sentence no different than a conditional discharge); *State v. Herbstman*, 1999-NMCA-014, ¶ 11, 126 N.M. 683, 974 P.2d 177 (finding conditional discharge is not a conviction for purposes of sex offender registration).

Determining equivalency of sex offenses

An offense is "equivalent" to a New Mexico offense, for purposes of the New Mexico Sex Offender Registration and Notification Act, if the defendant's actual conduct that gave rise to the out-of-state conviction would have constituted one of the enumerated offenses requiring registration pursuant to the Act. *See State v. Hall*, 2013-NMSC-001,

294 P.3d 1235 (outlining methods of proving underlying conduct aligning with a New Mexico statutory offense); *see also, State v. Orr*, 2013-NMCA-069, 304 P.3d 449 (remanding to trial court to determine under *Hall* whether defendant's conduct associated with a North Carolina conviction for taking indecent liberties with children was equivalent to any of the enumerated offenses under SORNA.).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-992. Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements.[1]

For you to find the defendant guilty of failure to register as a sex offender [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 convicted of [_____][3];

2. The defendant was [residing] [employed] [attending school] [temporarily located][4] in New Mexico between _____, _____ and _____, _____[5];

3. The defendant [triggering event] on [date][6];

4. The defendant did not register with the county sheriff prior to _____[7];

5. The defendant willfully or knowingly failed to register; and

6. This happened in New Mexico between _____, _____ and _____, _____.

USE NOTES

1. For use for offenders required to register under the 2005, 2007, and 2013 versions of SORNA. Threshold questions of law must be determined before the jury may be instructed. The chart included as UJI 14-990 NMRA is a tool to aid in determining which version of the statute, and thus which UJI, applies.

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

3. If there is a stipulation that the offense was a registerable offense under SORNA, insert "a sex offense on _____ (*date*)." If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Use applicable alternative or alternatives.

5. Enter relevant date(s). Once the applicable statute is identified, calculating the dates triggering registration obligations vary, so that the date of an actual registration requirement involves a threshold legal determination based on the completion of sentence or release from physical custody.

6. Describe event triggering registration or notice requirement (Ex: changing residence); and include date triggering registration or notice requirement. *See* Use Notes 1, 5; UJI 14-990 (Chart).

7. Enter date defendant registration is alleged to have been required. *See* Use Notes 1, 5; UJI 14-990 (Chart).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* UJI 14-991 NMRA committee commentary.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-993. Providing false information when registering as a sex offender; essential elements.[1]

For you to find the defendant guilty of providing false information when registering as a sex offender [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 convicted of [_____][3];

2. The defendant [willfully][or] [knowingly][4] provided false information when registering as a sex offender on _____;[5] and

3. This happened in New Mexico [on _____, _____] [between _____, _____ and _____, _____].

USE NOTES

1. Applicable to all versions of SORNA.

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

3. If there is a stipulation that the offense was a registerable offense under SORNA, insert “a sex offense on _____ (*date*).” If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Use applicable alternative or alternatives depending on the applicable version of SORNA. The chart included as UJI 14-990 NMRA is a tool to aid in determining which version of the statute applies.

5. Insert date of registration depending on the applicable version of SORNA.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-994. Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements.[1]

For you to find the defendant guilty of failing to notify county sheriff of intent to move from New Mexico to another 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 convicted of [_____][3];

2. The defendant moved to _____[4] on _____;[5]

3. Prior to moving, the defendant resided in _____ County;

4. Defendant willfully failed to [notify the county sheriff of his or her intent to move to another state][6] [or] [provide written notice to the county sheriff identifying the state to which defendant intended to move] at least thirty (30) days prior to moving; and

5. This happened in New Mexico between _____, _____ and _____, _____.

USE NOTES

1. For use for defendants required to register under the 2000 version of SORNA and forward.

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

3. If there is a stipulation that the offense was a registerable offense under SORNA, insert “a sex offense on _____ (*date*).” If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Insert state to which defendant moved.

5. Insert date defendant moved.

6. Use applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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 that the defendant did not have permission to enter;

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

USE NOTES

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

2. Use bracketed phrase if entry is in issue.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-14-1 (1995); NMSA 1978, § 30-20-13 (1981). UJI 14-1401 NMRA is limited to criminal 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. UJI 14-2001 NMRA should be used instead of UJI 14-1401 NMRA 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.

In 1975, the Legislature amended NMSA 1978, Sections 30-14-1 and 30-20-13 to make both sections applicable to property owned or under the control of the state or its political subdivisions. These two sections create separate offenses, with NMSA 1978, Section 30-20-13 requiring an additional element of willfully impeding or interfering. *See* NMSA 1978, § 30-20-13 (B)-(D).

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. NMSA 1978, Section 12-6-2 (2009) defines "political subdivisions." "State" generally includes all three branches of government. *See id.*

"Lands" as used in NMSA 1978, Section 30-14-1 includes buildings and fixtures. *See State v. Ruiz*, 1980-NMCA-123, ¶ 45, 94 N.M. 771, 617 P.2d 160. A criminal trespass may be a lesser-included offense of the crime of burglary of a dwelling house. *See id.* ¶ 50; *see also State v. Romero*, 1998-NMCA-057, ¶¶ 18, 21, 125 N.M. 161, 958 P.2d 119 (concluding that criminal trespass could be a lesser included offense of aggravated burglary where the facts supported a trespass based solely on unlawful entry and not on unlawfully remaining without permission).

The mens rea required for criminal trespass is actual, subjective knowledge that permission to enter or remain had been denied or withdrawn. *See State v. Ancira*, 2022-NMCA-053, ¶¶ 18-20, ___ P.3d ___ (holding the plain language of NMSA 1978, Section 30-14-1(B) requires proof of not what a reasonable person would have understood, but actual knowledge that permission to enter had been denied).

[As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

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 that permission to enter or remain had been [denied][2] [withdrawn];

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

USE NOTES

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 NMRA, Custodian; definition.

3. Use bracketed phrase if entry is in issue.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-14-1 (1995); NMSA 1978, § 30-20-13 (1981). UJI 14-1402 NMRA 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 NMRA should be used instead of UJI 14-1402 NMRA 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.

The mens rea required is actual, subjective knowledge that permission to enter or remain had been denied or withdrawn. *See State v. Ancira*, 2022-NMCA-053, ¶¶ 18-20, ___ P.3d ___ (holding the plain language of NMSA 1978, Section 30-14-1(B) requires proof of not what a reasonable person would have understood, but actual knowledge that permission to enter had been denied).

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. NMSA 1978, Section 12-6-2 (2009) defines “political subdivisions.” “State” generally includes all three branches of government. *See id*.

[As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

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 NOTES

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).

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. The defendant knew the entry was without permission;[6]

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

USE NOTES

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.

6. *See* Committee commentary.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-14-8 (1981).

New Mexico’s breaking and entering statute is “grounded in common law burglary” and is “a type of statutory burglary.” *State v. Holt*, 2016-NMSC-011, ¶ 15, 368 P.3d 409 (internal quotation marks and citations omitted). It protects the “right to exclude” and “entry” constitutes any penetration of the interior space, however slight. *Id.* ¶¶ 16-19 (holding putting one’s fingers behind a window screen is an entry).

Although the statute uses the phrase “unauthorized entry,” this instruction’s use of “without permission” is a longstanding, permissible variation. *See State v. Rubio*, 1999-NMCA-018, ¶¶ 4-7, 126 N.M. 579, 973 P.2d 256.

Where entry is obtained by fraud, deceit, or pretense, the entry is unauthorized. *See State v. Ortiz*, 1978-NMCA-074, ¶¶ 6, 13-15, 92 N.M 166, 584 P.2d 1306 (upholding a burglary conviction and the trial court’s instructing the jury that entry by fraud, deceit, or pretense constitutes entry without authorization or permission). Where entry was made by fraud or deceit, a similar instruction about lack of permission may be appropriate.

“[T]he mental state which accompanies the ‘without permission’ element of breaking and entering is knowledge of the lack of permission.” *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142 N.M. 518, 167 P.3d 966. The “knowledge” mens rea required is actual, subjective knowledge that permission to enter has not been granted. *See State v. Ancira*, 2022-NMCA-053, ¶¶ 28-31, ___ P.3d ___ (concluding that failure of UJI 14-1410 NMRA to require the State to prove defendant’s actual knowledge of lack of permission was an error but not fundamental error).

[As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Cross references. — *See* NMSA 1978, § 30-14-8 (1981).

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 NOTES

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.

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 NOTES

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.]

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 NOTES

This instruction is to be used with UJI 14-1501.

[Approved, effective October 1, 1992.]

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 NOTES

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).

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 NOTES

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).

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 NOTES

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).

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 NOTES

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.

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 NOTES

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.

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 NOTES

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).

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 NOTES

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).

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][2] [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 NOTES

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 NMRA 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 if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. S-1-RCR-2024-00109, effective for all cases pending or filed on or after December 31, 2024.]

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 [withdrawn].

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).

14-1631. Burglary; "dwelling house"; defined.

A "dwelling house" is any structure, any part of which is customarily used as living quarters.

USE NOTES

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).

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 NOTES

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 if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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).

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*);

2. _____ (*name of tools or devices*) [is] [are] designed for or commonly used in the commission of a burglary;

3. The defendant intended that the _____ (*tools or devices*) be used for the purpose of committing a burglary;

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

USE NOTES

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

2. See UJI 14-130 NMRA for definition of "possession," if the question of possession is in issue.

3. The jury should be instructed on the elements of burglary following this instruction. *See* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-16-5. No New Mexico appellate decision defines burglary tools. *See generally* Annot., 33 A.L.R.3d 798 (1970).

Possession of burglary tools is a separate offense from the crime of burglary. A defendant does not need to be convicted of the crime of burglary in order be held liable for possession of burglary tools. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

An individual can be "exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary." *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983. The statute is therefore not void for vagueness. *Id.*

Whether an item is commonly used for burglaries is a factual determination for a jury. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882.

Constructive possession is sufficient for conviction of possession of burglary tools. *State v. Langdon*, 1942-NMSC-034, 46 N.M. 277, 127 P.2d 875; *see also, State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767 (burglary tools do not have to be on the person of the defendant in order to be possessed).

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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 NOTES

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 NMRA 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; as amended by Supreme Court Order No. 21-8300-015, effective for all cases pending or filed on or after December 31, 2021.]

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*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435. *See also* Perkins, *Criminal Law* 297 (2d ed. 1969). To establish reliance, the state must prove (1) that a particular misrepresentation of fact (2) caused the victim to act in a way the victim would not have otherwise acted. *See State v. Garcia*, 2016-NMSC-034, ¶¶ 18-20, 384 P.3d 1076 (concluding that there was sufficient evidence of reliance based on the defendant's misrepresentation that she was the victim's "girlfriend or loving partner").

Fraudulent intent must exist at the time the defendant obtains the property or the crime is embezzlement. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260.

[As amended by Supreme Court Order No. 21-8300-015, effective for all cases pending or filed on or after December 31, 2021.]

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 NOTES

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.]

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],[3] intending to wrongfully[4]

   [obtain anything of value from _____ (*name of victim*)][5]

   [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 NOTES

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

2. Use applicable threatening acts.

3. If a threatened kidnapping is alleged, the essential elements of kidnapping as determined in UJI 14-403A NMRA must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. If there is a specific issue of wrongfulness of an act, a specific definition may need to be prepared.

5. Use the applicable element.

[UJI Criminal 16.32; UJI 14-1642 SCRA 1986; UJI 14-1642 NMRA; as amended, effective July 1, 1998; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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).

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 NOTES

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.]

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 NOTES

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).

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 NOTES

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

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

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 NOTES

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.]

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 NOTES

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

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

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 NOTES

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

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

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 NOTES

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.]

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 NOTES

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 NOTES

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).

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 NOTES

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.]

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 NOTES

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.

14-1671. Withdrawn.

14-1672. Withdrawn.

14-1673. Defense of notice to payee that check is worthless.[1]

An issue you must consider [in Count _____][2] is whether _____[3] was on notice that the check was an insufficient funds check when _____[3] accepted the 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 NOTES

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.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

14-1674. Check; definition.

A check is a written order to a bank or other depository for the payment of money.

USE NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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."

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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 NMRA.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680; *see also* State v. Castillo, 2011-NMCA-046, ¶¶ 7-12, 149 N.M. 536, 252 P.3d 760 (discussing definition of "credit card" and concluding that a debit card does not fall within the statutory definition of "credit card").

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 NMRA.

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 NMRA.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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;

3. The defendant caused over $_____[3] in damage to the property; and

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

USE NOTES

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

2. Use applicable bracketed phrase.

3. 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; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-17-5. 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, 1969-NMCA-036, 80 N.M. 262, 454 P.2d 276. 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; as amended for stylistic compliance by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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 NOTES

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.]

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 NOTES

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.

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).

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 NOTES

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 NOTES

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.

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 NOTES

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 NOTES

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.

CHAPTER 21
(Reserved)

CHAPTER 22
Custody; Confinement; Arrest

Part A
Assault and Battery Against Peace Officers; Essential Elements

14-2200. Assault on a peace officer; attempted battery; essential elements.[1]

For you to find the defendant guilty of assault on a peace officer [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 battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner[4].

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[5];

4. The defendant knew _____ (*name of peace officer*) was a peace officer.

5. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);][6]

[or]

[challenged the authority of _____ (*name of peace officer*);]

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

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2200A NMRA, then UJI 14-2200B 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. 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 or 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 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.

6. Use only applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-21(A)(1).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-2200A. Assault on a peace officer; threat or menacing conduct; essential elements.[1]

For you to find the defendant guilty of assault on a peace officer [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 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];

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[4];

5. The defendant knew _____ (*name of peace officer*) was a peace officer.

6. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);][5]

[or]

[challenged the authority of _____ (*name of peace officer*);]

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

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2200 NMRA, then UJI 14-2200B 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 or 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 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.

5. Use only applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-21(A)(2).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-2200B. Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements.1

For you to find the defendant guilty of assault on a peace officer [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 battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner[4].

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. 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. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[5];

5. The defendant knew _____ (*name of peace officer*) was a peace officer.

6. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);][6]

[or]

[challenged the authority of _____ (*name of peace officer*);]

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

USE NOTES

1. This instruction combines the elements of UJI 14-2200 and 14-2200A NMRA. If the evidence supports both of the theories of assault set forth in UJI 14-2200 and 14-2200A 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 or 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 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.

6. Use only applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-21(A).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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 intended to commit the crime of battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner[4].

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. 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];

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[8];

5. The defendant knew _____ (*name of peace officer*) was a peace officer;

6. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);]

[or][9]

[challenged the authority of _____ (*name of peace officer*);]

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

USE NOTES

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. 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. 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 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 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.

9. Use only applicable alternative or alternatives.

[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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, *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*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464 for a discussion of “lawful discharge of duties.”

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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[2] of a deadly weapon [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. 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. The defendant's conduct[4]

[threatened the safety of _____ (*name of peace officer*);]

[or][5]

[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[2] 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 NOTES

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. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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

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. 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. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue about whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue about 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; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

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.]

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[2] of a deadly weapon [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 intended to commit the crime of battery against _____ (*name of peace officer*) by _____[4];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. 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. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[6];

5. The defendant knew _____ (*name of peace officer*) was a peace officer.

6. The defendant's conduct[5]

[threatened the safety of _____ (*name of peace officer*);][6]

[or][7]

[challenged the authority of _____ (*name of peace officer*);]

7. The defendant [used] used[2] a [_____][7] [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[9]][10];

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

USE NOTES

1. This instruction combines the elements of UJI 14-2201 NMRA and 14-2202 NMRA. If the evidence supports both of the theories of assault set forth in UJI 14-2201 NMRA and 14-2202 NMRA, use this instruction.

2. If use of the weapon is in issue, UJI 14-135 NMRA, the definition of "use," must also be given.

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. 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. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue about whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue about 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.

7. Use only applicable alternative or alternatives.

8. 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.

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

10. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

[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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or

after December 31, 2016; as amended by Supreme Court Order No. 21-8300-031, effective for all cases pending or filed on or after December 31, 2021; as amended by Supreme Court Order No. S-1-RCR-2023-00030, effective for all cases pending or filed on or after December 31, 2023.]

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.]

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 intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to commit the crime of _____;[1]

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;[5]

5. The defendant knew _____ (*name of peace officer*) was a peace officer;

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.]

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.]

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 intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. 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]

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____;[2]

5. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;[6]

6. The defendant knew _____ (*name of peace officer*) was a peace officer.

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.]

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] [or][1] [commit _____][2] [as charged in Count _____[1]],[3] 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 battery against _____ (*name of peace officer*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;

3. The defendant also intended to [kill] [or][1] [commit _____][2] on _____ (*name of peace officer*);

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;[6]

5. The defendant knew _____ (*name of peace officer*) was a peace officer;

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

USE NOTES

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 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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 22.06 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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.]

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 NOTES

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.]

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] [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 intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[6]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to complete the battery;

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. 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;[6]

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. The defendant also intended to [kill] [or][2] [commit _____][3] on _____ (*name of peace officer*);

5. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer;[7]

6. The defendant knew _____ (*name of peace officer*) was a peace officer;

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

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-2207 and 14-2208 NMRA.

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 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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 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. "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; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.]

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 NOTES

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.]

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 touched or applied force to _____ (*name of peace officer*) by _____[2];

[2. The defendant's act was unlawful;][3]

3. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer;

4. The defendant knew _____ (*name of peace officer*) was a peace officer[4];

5. The defendant's conduct caused

[an actual injury to _____ (*name of peace officer*)][5];

[or]

[an actual threat to the safety of _____ (*name of peace officer*)];

[or]

[a meaningful challenge to the authority of _____ (*name of peace officer*)];

6. The defendant acted in a rude, insolent, or angry manner;

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

USE NOTES

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. In addition to the harm component of Element 5, the underlying battery must also be Aunlawful.@ If the unlawfulness of the act is at issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of Alawfulness@ involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. APeace officer@ is defined in NMSA 1978, Section 30-1-12(C). If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines Apeace 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 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.

5. Use only applicable alternative or alternatives.

[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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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.

In State v. Padilla, 1997-NMSC-022, && 2, 11, 123 N.M. 216, 937 P.2d 492, the Supreme Court held that to satisfy the Section 30-22-24 requirement that the act be Aunlawful@ the state must prove Ainjury or conduct that threatens an officer=s safety or meaningfully challenges his or her authority.@ *See also State v. Jones*, 2000-NMCA-047, & 1, 129 N.M. 165, 3 P.3d 142 (although sufficient for conviction under the factual circumstances, whether spitting on an officer constitutes a Ameaningful challenge to authority@ in a particular case is a jury question). The separate Aunlawfulness@ requirement may be placed in issue under a justification defense or evidence implicating the scenarios discussed in UJI 14-132 NMRA. *See, e.g.*, *State v. Padilla*, 1983-NMCA-096, & 15, 101 N.M. 78, 678 P.2d 706 (AIn New Mexico, simple battery is a lesser included offense of peace officer battery; defendant is entitled to an instruction on simple battery if the evidence raises a factual issue of whether the peace officer used excessive force so as to take him out of the scope of his lawful duties.@ (*citing State v. Gonzales*, 1982-NMCA-043, && 9-11, 97 N.M. 607, 642 P.2d 210 (recognizing the right of self defense against a peace officer using excessive force, thus negating the lawful discharge of the officer=s duties))), *rev=d on other grounds*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686.

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.

This instruction was amended in 2010 by adding a subjective knowledge element in accordance 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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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. 08-8300-060, 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. 08-8300-060, effective February 2, 2009; by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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. 11-8300-004, effective March 21, 2011.]

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 NOTES

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.]

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 or could have 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 authorized emergency vehicle;

4. The defendant knew that a law enforcement officer had given the defendant an audible or visual signal to stop;

[5. The defendant caused injury to _____ (*name of victim*)];[2]

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

USE NOTES

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

2. Insert when a violation of Section 30-22-1.1(C) NMSA 1978, injury to another person, is charged.

[Adopted by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as amended by Supreme Court Order No. 22-8300-032, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00031, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — *See* NMSA 1978, § 30-22-1.1 (2022).

This instruction has been modified to comport with the holding in *State v. Vest*, 2021-NMSC-020, ¶¶ 13, 19, 28, 39, 488 P.3d 626, which interprets the aggravated fleeing statute to focus on the social harm from a defendant's conduct, rather than the particular result of the conduct. *Vest* clarifies aggravated fleeing requires "only that a defendant willfully and carelessly drove so dangerously that the defendant created a risk of harm, a risk that could have endangered someone in the community," and "does not require that an identifiable person was actually endangered as a result of the defendant's flight from law enforcement." *Id*. ¶¶ 13, 19.

Some language in *Vest* could be interpreted as expanding liability to causing a risk of harm to the community other than death. *See Vest*, 2021-NMSC-020, ¶ 39. The Committee believes the holding of *Vest* does not relax the statutory requirement that the risk to the community be life-threatening: "A defendant is guilty of aggravated fleeing if he or she fled police by driving in a way that threatened the lives of people in the community." *Id*. ¶ 19.

In 2022, the Legislature codified the distinction between aggravated fleeing producing a generalized risk of harm to the community and aggravated fleeing actually resulting in harm to a victim, by leaving the former a fourth-degree felony and increasing the penalty for the latter to third degree. *See* NMSA 1978, Section 30-22-1.1(B), (C). In apparent response to *State v. Montano*, 2020-NMSC-009, 486 P.3d 838, the Legislature amended the statute to require that the pursuit be in an authorized emergency vehicle under NMSA 1978, Section 66-7-6 (1989).

Although the statute requires that the pursuit be conducted "in accordance with" the Law Enforcement Safe Pursuit Act, NMSA 1978, §§ 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.

[Adopted by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as amended by Supreme Court Order No. 22-8300-032, effective for all cases pending or

filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00031, effective for all cases pending or filed on or after December 31, 2023.]

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 NOTES

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.

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 NOTES

1. *See* NMSA 1978, § 30-22-8 (1963). If the escape is from a jail initiated prisoner-release program, established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. If the escape is from a community custody release program, NMSA 1978, § 30-22-8.1 (1999), use UJI 14-2228C NMRA.

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

3. “Committed” means being physically placed in custody, with or without an order of confinement.

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; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-8 (1963).

Before a defendant can be charged and convicted with escape, the defendant "must first have undergone some moment of actual custody." *See State v. Pearson*, 2000-NMCA-102, ¶ 13, 129 N.M. 762, 13 P.3d 980 (construing escape from prison under NMSA 1978, Section 30-22-9 (1963)). A defendant is "committed" when placed in custody with or without an order of confinement. *See State v. Garcia*, 1968-NMCA-007, ¶¶ 3-8, 78 N.M. 777, 438 P.2d 521. Physical confinement at the time of escape is not required; escape from constructive custody while assigned to a work detail or failure to return from furlough constitutes an escape. *See State v. Gilman*, 1981-NMCA-123, ¶ 7, 97 N.M. 67, 636 P.2d 886; *State v. Hill*, 1994-NMCA-069, ¶ 5, 117 N.M. 807, 877 P.2d 1110.

Although both offenses are fourth-degree felony violations of Section 30-22-8, the elements of escape from jail are not the same as the elements of escape from a jail initiated prisoner-release program; the latter is a more specific—and limited—sub-set of the former. *Compare* NMSA 1978, § 33-3-24 (1981) (establishing jail release program requirements and limiting applicability to NMSA 1978, §§ 33-2-43 (1969), *and* 33-2-44 (1971)), *with* § 30-22-8 (escape from jail is a fourth degree felony and has different elements), *and State v. Najar*, 1994-NMCA-098, ¶¶ 3, 6, 118 N.M. 230, 880 P.2d 327 (explaining that escape from a jail initiated prisoner-release program is a fourth degree felony). The Court of Appeals has held that it was fundamental error to use UJI 14-2221 NMRA (escape from jail) and (former) UJI 14-2228 NMRA (escape from an inmate release program) interchangeably. *See State v. Grubb*, 2020-NMCA-003, ¶¶ 10-17, 455 P.3d 877.

[Amended November 12, 1998; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

14-2228. Withdrawn.

14-2228A. Escape; jail release program; essential elements.[1]

For you to find the defendant guilty of escape from a jail 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 to _____ (*identify institution*);

2. The [sheriff] [jail administrator][3] of _____ (*identify institution*), with the approval of the [board of county commissioners of _____ (*name of county*)] [governing body of _____ (*name of municipality*)] had established a release program to allow prisoners to [attend school] [or] [be employed];

3. The defendant was released from _____ (*identify institution*) to _____ (*describe purpose for release*);

4. The defendant failed to return to confinement within the time fixed for the defendant's return;

5. The defendant's failure to return was willful, without sufficient justification or excuse;[4]

6. The defendant intended not to return within the time fixed;[4]

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

USE NOTES

1. This instruction is to be used when a prisoner escapes from a prisoner-release program established in a county or municipal jail or detention center under NMSA 1978, Section 33-3-24 (1981). For escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999), use UJI 14-2228C NMRA. For escape from a penitentiary inmate-release program under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980), use UJI 14-2228B NMRA.

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

3. Use only the applicable alternatives.

4. This element is necessary to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-8 (1963); NMSA 1978, § 33-3-24 (1981); *see also* NMSA 1978, §§ 33-2-43 (1969) and 33-2-44 (1971) (penitentiary inmate-release program provisions incorporated into Section 33-3-24); NMSA 1978, § 30-22-8.1 (1999) (escape from a community custody release program); UJI 14-2228B NMRA (escape from a penitentiary release program); UJI 14-2228C NMRA (escape from a community custody release program).

This instruction is to be used when a defendant is charged with escape from a prisoner-release program initiated in a jail or detention center; it is not to be used when the defendant is charged with other types of escape from jail, § 30-22-8, escape from a penitentiary inmate-release program, NMSA 1978, § 33-2-46, or escape from a community custody release program, § 30-22-8.1. *See State v. Grubb*, 2020-NMCA-003, ¶¶ 12-16, 455 P.3d 877 (stating UJI 14-2221 NMRA (escape from jail) and UJI 14-2228 NMRA (escape from an inmate-release program)—withdrawn and replaced with UJIs 14-2228A, 14-2228B, and 14-2228C NMRA in response to *Grubb*—cannot be used interchangeably); *see also Grubb*, 2020-NMCA-003, ¶ 16 (concluding that the 1999 version of "UJI 14-2228 was intended to be used when a prisoner escapes from a release program initiated in a jail rather than a penitentiary"); *but see State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (concluding that the 1997 version of UJI 14-2228 (escape; inmate-release program) used in a case where a defendant was committed to a state penitentiary, erroneously failed to require that the defendant's failure to return be willful in order to constitute a violation of Section 33-2-46).

Unlike escape from a community custody release program under Section 30-22.8.1, escape from a jail initiated prisoner-release program requires that the board of county commissioners or the governing body of a municipality approved the program established by the sheriff or jail administrator. *See* § 33-3-24; *State v. Duhon*, 2005-NMCA-120, ¶¶ 9-13, 138 N.M. 466, 122 P.3d 50 (distinguishing between a county-authorized community release program and a judicially-approved community custody release program); *compare* § 33-3-24, *with* § 30-22-8.1. Section 33-3-24 explicitly incorporates the provisions of Section 33-2-44, which provides that the release program only applies to work at paid employment in a private business or in public employment or to attend school. *See Grubb*, 2020-NMCA-003, ¶ 17 (explaining that release for "furlough purposes" was not one of the specific purposes authorized by Section 33-2-44 and there was no evidence to support instructing the jury on escape from jail using UJI 14-2228 in lieu of UJI 14-2221).

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

14-2228B. Escape; penitentiary release program; essential elements.[1]

For you to find the defendant guilty of escape from a penitentiary 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 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;[3]

5. The defendant intended not to return within the time fixed;[3]

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

USE NOTES

1. This instruction is to be used for escape from a penitentiary inmate-release program established under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980). For escape from a county or municipal jail initiated prisoner-release program established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. For escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999), use UJI 14-2228C NMRA.

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

3. This element is necessary to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 33-2-46 (1980). The penitentiary inmate-release program is described in NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980).

Escape from a penitentiary is a second-degree felony. NMSA 1978, § 30-22-9 (1963). Escape from a penitentiary inmate-release program is a third-degree felony. Section 33-2-46. The essential elements of these statutes are different. Unless the prisoner was released for one of the specific limited purposes set out in Section 33-2-44, such as paid work or attending school, or Section 33-2-45, such as time to contact prospective employers or attend job or school interviews, UJI 14-2222 NMRA must be used instead of this instruction. *See State v. Grubb*, 2020-NMCA-003, ¶ 17, 455 P.3d 877 (stating that only the specific statutory purposes for release reduce the more serious offense of escape from a penitentiary to escape from an inmate-release program).

The penitentiary inmate-release enabling statute states that the program applies to prisoners "under sentence of confinement in the penitentiary." Section 33-2-43. Since its inception, Element 1 of UJI 14-2228 NMRA (now withdrawn) has used the term "committed." The Committee believes that decades-used term adequately informs the

jury, without the possibility of distracting the jury to consider or speculate about the defendant's prior sentence and without injecting sympathy or prejudice into the current case. *See, e.g.*, *State v. Brown*, 1997-NMSC-029, ¶¶ 12-13, 123 N.M. 413, 941 P.2d 494 (reiterating that information about the consequences of a current verdict invites jurors to "ponder matters that are not within their province" and may improperly inject sympathy and prejudice into the jurors' decision making (internal quotation marks and citation omitted)).

In 1999, the Committee added Element 4 of UJI 14-2228 (now withdrawn) to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (holding instruction at trial of penitentiary work release inmate convicted under NMSA 1978, Section 33-2-46 was defective by not requiring a finding that the defendant's failure to return on time was willful as well as intentional). That element is retained in this instruction. Element 5 is also required by the conclusion in *Rosaire*, 1997-NMSC-034, ¶¶ 11-12, that Section 33-2-46 requires both a willful failure to return and an intent not to return within the time prescribed.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

14-2228C. Escape; community custody release program; essential elements.[1]

For you to find the defendant guilty of escape from a community custody 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 charged with a [misdemeanor] [felony][3] offense[4];

2. The defendant was not on probation or parole;[4]

3. The defendant was committed to a judicially approved community custody release program;

4. Under the procedures and conditions of the program, the defendant was required to _____ (*describe the program requirement(s) allegedly violated*);

5. The defendant [failed to comply] [attempted to avoid complying][3] with the requirement to _____ (*describe the program requirement*) [by _____ (*describe the substantial step toward attempting to escape*)][5];

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

USE NOTES

1. This instruction is to be used for escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999). For escape from a county or municipal jail-initiated prisoner-release program established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. For escape from a penitentiary inmate-release program established under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980), use UJI 14-2228B NMRA.

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

3. Use the applicable alternative.

4. Essential element, but rarely at issue; *see* Committee commentary.

5. For attempts to escape, specify the act(s) allegedly constituting a substantial step toward escape and give UJI 14-2801 NMRA following this instruction. For completed offenses, UJI 14-141 NMRA must be given following this instruction.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-8.1 (1999); *see also* NMSA 1978, § 30-22-8 (1963) (escape from jail); NMSA 1978, § 33-2-46 (1980) (escape from a penitentiary inmate release program); NMSA 1978, § 33-3-24 (1981) (jail operated prisoner release program).

The charge pending against the defendant placed in the community custody release program controls the statutory punishment for escape from the program. *See* § 30-22-8.1(B), (C). Because Section 30-22-8.1 does not specify the degree or punishment for misdemeanor or felony escape, misdemeanor violations are punished as petty misdemeanors and felony violations are punished as fourth-degree felonies. *See* NMSA 1978, § 31-18-13 (1993). The fact the defendant faced a felony charge is an essential element of the offense. *State v. Sanchez*, 2019-NMCA-006, ¶ 10, 458 P.3d 428 ("For a defendant to be found guilty of felony escape from [a community custody release program] the state must show that a felony charge led to the defendant's commitment to the program."). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also State v. Radosevich*, 2018-NMSC-028, ¶¶ 15-27, 419 P.3d 176 (applying *Apprendi* and holding that New Mexico's tampering with evidence statute cannot be constitutionally applied to impose greater punishment for committing tampering where the underlying crime is indeterminate than the punishment for committing tampering where the underlying crime is a misdemeanor).

The jury should not be told the nature of the predicate charge leading to the defendant's placement in the community custody release program. *See State v. Tave*, 1996-NMCA-056, ¶¶ 13-18, 122 N.M. 29, 919 P.2d 1094 (concluding that the trial court erred in admitting, as proof of felon in possession charge, the name and details of the prior felony), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110; *see also State v. Rackley*, 2000-NMCA-027, ¶ 19, 128 N.M. 761, 998 P.2d 1212 ("In an apparent effort to reduce the potential impact of evidence revealing the nature of his prior felonies [in a felon in possession trial], [the d]efendant stipulated to the fact of a prior, unidentified felony conviction.").

The Committee believes the requirement that the defendant not be on probation or parole when placed in a community correction release program is jurisdictional; the enabling statute specifically "exclud[es] a person on probation or parole." Section 30-22-8.1(A).

Section 30-22-8.1's requirement that the defendant was "lawfully committed" appears in other escape statutes. Section 30-22-8 (escape from jail); NMSA 1978, § 30-22-9 (1963) (escape from penitentiary). Since adoption of corresponding UJI 14-2221 NMRA (escape from jail) and UJI 14-2222 NMRA (escape from the penitentiary, UJI 14-2228 NMRA (escape; inmate-release program, which has been withdrawn and reconfigured in response to *State v. Grubb*, 2020-NMCA-003, 455 P.3d 877, has used the term "committed." The Committee believes that challenges to prima facie proof of lawful commitment are likely to be rare and that "committed" remains the appropriate term. *See Grubb*, 2020-NMCA-003, ¶ 19 (finding sufficient evidence for retrial where the state had presented a certified copy of an order revoking probation committing the defendant to the penitentiary and granting the defendant furlough—from which the jury "could reasonably conclude that [the d]efendant was committed to the [detention center] for transport to the Department of Corrections" (internal quotation marks omitted)); *see also State v. Starr*, 1917-NMSC-092, ¶¶ 15-16, 24 N.M. 180, 173 P. 674 (finding no error in admitting jail records and commitments showing the prisoners charged with escape had been lawfully committed to the county jail).

Unlike a jail prisoner release program under Section 33-3-24, a community custody release program under Section 30-22-8.1 does not require formal adoption by the board of county commissioners; it may simply be a set of defined procedures and conditions, "judicially approved" on a case-by-case basis by the judge setting terms of release. *See State v. Duhon*, 2005-NMCA-120, ¶ 11, 138 N.M. 466, 122 P.3d 50.

Escape from a community custody release program includes but is not limited to a day detention or reporting program, an electronic monitoring program, or a community tracking program. *See* § 30-22-8.1(A). The particular release program requirements imposed on the defendant and the defendant's alleged acts or omissions should be described in ordinary terms, with sufficient specificity to preclude double jeopardy.

Section 30-22-8.1(A) does not contain an intent requirement: "Escape from a community custody release program consists of a person . . . escaping or attempting to

escape from the community custody release program." Absent explicit language negating a mental state, the Legislature is presumed not to have intended strict liability. Criminal intent is presumed an essential element, especially where the punishment is a third- or fourth-degree felony. *See State v. Nozie*, 2009-NMSC-018, ¶¶ 25-26, 30, 146 N.M. 142, 207 P.3d 1119 (holding that third-degree aggravated assault on a peace officer and fourth-degree battery on a peace officer require knowledge that the victim was a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15-16, 287 P.3d 372 (applying the *Nozie* requirement to battery on a health care worker where a misdemeanor battery charge is elevated to a fourth-degree felony). The Committee believes that this presumption against strict liability requires the jury to be instructed on general criminal intent using UJI 14-141 NMRA for completed escapes and attempt to commit a felony using UJI 14-2801 NMRA for attempts to escape.

Escape from a penitentiary inmate-release program requires that the prisoner "willfully" failed to return to confinement and also had "the intent not to return." Section 33-2-46. Neither of these requirements appear in escape from the community custody release program. Section 30-22-8.1. Unlike escape from a penitentiary release program, the courts have not addressed whether the community custody release statute requires proving the defendant's actions were without excuse or justification. *Cf. State v. Rosaire*, 1997-NMSC-034, ¶ 7, 123 N.M. 701, 945 P.2d 66 (finding that Section 33-2-46's explicit requirement of willfully "denotes the doing of an act without just cause or lawful excuse" (internal quotation marks and citation omitted)).

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

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] [a probation revocation proceeding][2] in a criminal action related to a [misdemeanor or petty misdemeanor] [felony][2] offense 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 NOTES

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

2. Use applicable alternative.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.29 NMSA 1978; UJI 14-2229 SCRA; as amended, effective January 1, 1999; as amended by Supreme Court Order No. 22-8300-035, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 31-3-9 (1999).

Section 31-3-9, 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.

The pending charge or conviction on which the defendant was released controls the statutory punishment for failure to appear. *See* § 31-3-9(A) (fourth degree felony), (B) (petty misdemeanor). Whether the defendant was released in connection with a felony proceeding or a misdemeanor or petty misdemeanor proceeding is an element for the jury to determine. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also State v. Radosevich*, 2018-NMSC-028, ¶¶ 29-30, 419 P.3d 176 (instructing the district court to sentence for tampering with evidence of an indeterminate offense because the jury did not find beyond a reasonable doubt the level of the underlying offense); *State v. Sanchez*, 2019-NMCA-006, ¶ 10, 458 P.3d 428 ("For a defendant to be found guilty of felony escape from [a community custody release program] the state must show that a felony charge led to the defendant's commitment to the program.").

The jury does not need to know the specific charge or conviction connected to the defendant's failure to appear. *See State v. Tave*, 1996-NMCA-056, ¶¶ 14-17, 122 N.M. 29, 919 P.2d 1094 (concluding that there was error in admission of the name and details of the prior felony as proof of the charge of felon in possession of a firearm), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *State v. Rackley*, 2000-NMCA-027, ¶¶ 18-19, 128 N.M. 761, 998 P.2d 1212 ("In an apparent effort to reduce the potential prejudicial impact of evidence revealing the nature of his prior felonies [in a felon in possession of a firearm trial], [the d]efendant stipulated to the fact of a prior, unidentified felony conviction.").

[Amended November 12, 1998; as amended by Supreme Court Order No. 22-8300-035, effective for all cases pending or filed on or after December 31, 2022.]

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. _____ (*name of defendant*) was a not a husband or wife, parent or grandparent, child or grandchild, or brother or sister, by consanguinity or affinity, of _____ (*name of felon*)];[2]

2. _____ (*name of felon*) committed the crime of _____;[3]

3. _____ (*name of defendant*) knew that _____ (*name of felon*) had committed the crime of _____;[3]

4. The defendant [concealed][4] [gave aid to] _____ (*name of felon*), with the intent that _____ (*name of felon*) [escape][4] [avoid arrest, trial, conviction or punishment] for the crime of _____;[3]

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

USE NOTES

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

2. This bracketed element should only be given if there is a factual issue as to the defendant's relationship to the felon. *See* NMSA 1978, § 30-22-4 (1963) (exempting certain relatives from criminal liability for harboring or aiding a felon).

3. Identify the felony committed. If the jury has not already been given the instruction pertaining to the felony committed, the essential elements of applicable offense must be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-22-4 (1963). "[Section 30-22-4] requires that the state prove that a specific felony has been committed, whether or not the perpetrator has been arrested, prosecuted, or tried." *State v. Gardner*, 1991-NMCA-058, ¶ 14, 112 N.M. 280, 814 P.2d 458. Therefore, "in a prosecution for harboring a felon, the State may even be required to conduct a trial-within-a trial in order to establish that the person harbored was a felon." *State v. Maes*, 2003-NMCA-054, ¶ 6, 133 N.M. 536, 65 P.3d 584 (citing *Gardner*, 1991-NMCA-058). 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*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Section 30-22-4 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 Lucero*, 1975-NMSC-061, ¶ 19.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

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][2] [changed] [hid] [fabricated] [placed] _____ (*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*)[3], [4]][2] [create the false impression that _____ (*name*) had committed the crime of _____ (*identify crime*)[4]];

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

You must complete the special verdict [form][2] [forms] to indicate your findings and report your determination.[3]

USE NOTES

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, list all crimes. If the defendant is charged with tampering with evidence of crimes that fit into more than one category as defined in NMSA 1978, Section 30-22-5(B), the special verdict in UJI 14-6019 NMRA must be repeated for each category of offense. 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.

[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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, § 30-22-5. 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 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).

To comport with *Apprendi*, New Mexico cases previously provided that, where no special verdict clarified the associated crime, the "indeterminate crime" provision from Section 30-22-5(B)(4) applied, rendering the tampering penalty a fourth-degree felony. *See State v. Alvarado*, 2012-NMCA-089, __ P.3d __, *overruled by State v. Radosevich*, 2018-NMSC-028, ¶ 34, 419 P.3d 176. However, in *Radosevich*, this approach was repudiated because the associated crime in that case could well have been a misdemeanor offense and no special verdict form was submitted to the jury. *See* 2018-NMSC-028, ¶¶ 2-6, 20 (discussing the tension between constitutional principles and prior precedent).

Under Section 30-22-5(B)(3), tampering with evidence of a misdemeanor is punishable only as a petty misdemeanor. As a result, the Supreme Court found that application of the "indeterminate crime" provision to impose felony liability would violate *Apprendi* and due process. *Radosevich*, 2018-NMSC-028, ¶ 24. In cases where the associated crime

is indeed “indeterminate,” *Radosevich* limited tampering punishment to a petty misdemeanor. *Id*. ¶ 30 (overruling *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754).

Thus, under *Radosevich*, felony liability for tampering may only be accomplished through proper use of UJI 14-6019 to ensure express jury findings supporting the felony tampering provisions. *See* UJI 14-2241, Use Note 3. For tampering with evidence of a probation violation, *Radosevich* held that the penalty tracks the highest “offense of conviction for which the defendant is on probation.” *Id*. ¶ 31. *Accord* UJI 14-2241, Use Note 4.

[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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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 NOTES

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 NOTES

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 NOTES

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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).

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.]

Part B
Conspiracy

14-2810. Conspiracy; single or multiple objectives; essential elements.

For you to find the defendant guilty of conspiracy to commit _____[1] [or _____ [or _____]],[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 and another person by words or acts agreed together to commit _____;[1] [or _____ [or _____]];[2]

[2. That other person was not a state or federal agent acting in the agent's official capacity at the time];[4]

[3. The conspiracy alleged in this Count must be separate, distinct, and not a continuation of Count _____];[5]

4. The defendant and the other person intended to commit _____[1] [or _____ [or _____]];[2]

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

USE NOTES

1. For a conspiracy with a single objective, insert the name of the felony. Unless the court has instructed on the essential elements of the named felony, give the essential elements of the named felony, other than venue, immediately after this instruction.

2. For a conspiracy to commit multiple felonies, insert the names of the felonies in the alternative. Unless the court has instructed on the essential elements of the named felonies, give the essential elements of the named felonies, other than venue, immediately after this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. Where the state charges multiple objectives, the jury must unanimously agree about which of the named felonies, if any, was the object of the conspiracy and the unanimity and special verdict instructions, UJI 14-2810A NMRA and UJI 14-6019B NMRA, must be given.

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

4. Insert bracketed language if the co-conspirator's status as a governmental agent is an issue.

5. Insert bracketed language if multiple conspiracy counts are charged and identify all other conspiracy counts. UJI 14-2810B NMRA must also be given.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-28-2.

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. In New Mexico, as at common law, no overt act in furtherance of the conspiracy need be proved. 4 *Wharton's Criminal Law* § 681 (15th ed. 2014); Perkins, *Criminal Law* 616 (2d ed. 1969); *see State v. Gallegos*, 2011-NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655 (citing *State v. Lopez*, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 (no overt act required) and *State v. Villalobos*, 1995-NMCA-105, ¶ 11, 120 N.M. 694, 905 P.2d 732 ("conspiracy is complete when the agreement is reached")).

Because Section 30-28-2 links the penalty for conspiracy to the penalty for the felony object(s) of the conspiracy, when the State charges multiple objectives that would result in differing penalties, the general verdict form, UJI 14-6014 NMRA, is not sufficient. Instead, UJI 14-2810A NMRA and a special verdict, UJI 14-6019B, should be used to ensure jury unanimity beyond a reasonable doubt regarding *which* felonies, if any, the defendant agreed to commit. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts—other than prior convictions—that increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt); *Gallegos*, 2011-NMSC-027, ¶ 53 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed.)

New Mexico law appears to accept that a defendant cannot be found guilty of conspiracy where the agreement is solely with an agent of the State, such as an undercover officer, an informant, or a person who is a de facto agent, despite ostensible private status (*e.g*. parcel service deliverer who routinely is rewarded for opening suspicious packages for law enforcement purposes). *See Villalobos*, 1995-NMCA-105, ¶¶ 20-27 (assuming without deciding that New Mexico law follows *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985), which held that a defendant cannot be convicted of conspiring with only government agents or informers and supported defendant's tendered instruction that he could not be convicted of conspiracy with government agents); *see also State v. Dressel*, 1973-NMCA-113, ¶ 3, 85 N.M. 450, 513 P.2d 187 ("It takes at least two persons to effect a conspiracy. The essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means." (internal citations omitted)). Where there is some evidence to support a defendant's theory that the only other alleged co-conspirator was

a de jure or de facto state agent, the additional phrase in element 2 should be included. *See Villalobos*, 1995-NMCA-105, ¶¶ 20-27; *see also State v. Privett*, 1986-NMSC-025, ¶ 20, 104 N.M. 79, 717 P.2d 55 (defendant's requested instruction on intoxication requires "some evidence"; the court does not weigh that evidence but merely determines whether it exists).

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*, 1964-NMSC-062, ¶ 5, 74 N.M. 87, 390 P.2d 966; *State v. Sellers*, 1994-NMCA-053, ¶ 17, 117 N.M. 644, 875 P.2d 400.

A defendant may be charged with conspiracy to commit a single felony or multiple felonies. However, a single *agreement* to commit two felonies constitutes only a single conspiracy. *State v. Ross*, 1974-NMCA-028, ¶ 17, 86 N.M. 212, 521 P.2d 1161 ("'Whether the object of a single *agreement* is to commit one or many crimes, it is in either case the agreement which constitutes the conspiracy which the statute punishes.'" (emphasis added) (quoting *Braverman v. United States*, 317 U.S. 49, 54 (1942))); *see also Gallegos*, 2011-NMSC-027, ¶ 38 (accepting *Braverman* that the number of prosecutable conspiracies is based on the number of agreements), ¶ 49 (cautioning against conflating the existence of multiple objectives in a single conspiracy with multiple conspiracies). If the single conspiracy is alleged to be for the purpose of committing more than one felony, the essential elements of each felony must be given.

There is a "rebuttable presumption" that despite the commission of multiple crimes, there is only one, overarching, conspiratorial agreement and thus only one count of conspiracy. *Gallegos*, 2011-NMSC-027, ¶ 55. Nevertheless, distinct from a single conspiracy count alleging multiple objectives, a defendant may be charged with more than one count of conspiracy, with each count alleging a separate agreement to commit one or more felonies. Where the defendant is charged with more than one conspiracy, UJI 14-2810B NMRA must be given.

In a multi-defendant trial, evidence may be admitted regarding only one or fewer than all of the defendants. Where certain evidence—such as co-conspirators' statements—is admitted as to only a particular defendant, an appropriate limiting instruction should be given. *See* UJIs 14-5007, 14-5008 NMRA.

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*, 1969-NMSC-008, ¶ 9, 79 N.M. 765, 449 P.2d 781.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-2810A. Conspiracy; multiple objectives; unanimity.[1]

For you to find [the][2] [a] defendant guilty of conspiracy to commit more than one crime [as charged in Count _____][3], it is not necessary for the State to prove a conspiracy to commit [both][2] [all] of those crimes. It would be sufficient if the State proves beyond a reasonable doubt a conspiracy to commit any one of those crimes.

But if you do not agree that the State has proven conspiracy to commit [both][2] [all] of those crimes, in order to return a verdict of guilty, you must unanimously agree upon which of the [two][2] [three, etc.] crimes, if any, was the subject of the conspiracy. If you are unable to unanimously identify at least one (1) of the specified crimes as the subject of a conspiracy, you must find the defendant not guilty of conspiracy.

In this case, you must record your unanimous verdict[s] on the form[s][4] provided.

USE NOTES

1. For use where the defendant is charged with a single conspiracy with multiple objectives.

2. Use applicable alternative.

3. Where the defendant is charged with more than one conspiracy and at least one conspiracy alleges multiple objectives, this instruction should be given for each conspiracy count alleging multiple objectives.

4. Use the special verdict form, UJI 14-6019B NMRA, to determine whether there is unanimity on each criminal objective.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* Eighth Circuit Manual of Model Criminal Jury Instructions 5.06F (rev. ed. 2013) (general requirement for jury unanimity regarding the criminal object of the conspiracy); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts—other than prior convictions—that increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt).

The instruction serves two distinct purposes: (1) ensuring unanimity that there was an agreement to commit at least one of the specific objects of the conspiracy charged, regardless of the penalties for committing the offenses; and (2) identifying the highest crime conspired to, to determine the penalty under *Apprendi*.

This instruction and the special verdict form, UJI 14-6019B NMRA, should be used to ensure jury unanimity regarding defendant's agreement to commit which felonies, if any, have been proven beyond a reasonable doubt. *See also State v. Gallegos*, 2011-NMSC-027, ¶ 53, 149 N.M. 704, 254 P.3d 655 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed).

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-2810B. Multiple conspiracies; distinct agreements.[1]

The Defendant[s] [_____, and _____] [is][2] [are] charged in Counts _____ and _____ with _____ separate conspiracies. Each of these Counts requires a separate verdict and must be considered separately.

For you to find [the][2] [a] Defendant[s] guilty of one or more conspiracies, as charged in Counts _____ and _____, the State must prove to your satisfaction beyond a reasonable doubt that [the][2] [a] Defendant entered into an agreement to commit [one or more of] the crime[s] alleged in that specific count.

It is not enough to return a verdict of guilty on a particular count for you to find [the][2] [a] Defendant is guilty of some other conspiracy count or entered into some other agreement to commit a crime not charged in that specific count of the indictment. Each conspiracy count must be considered separately. Each verdict of guilty must be supported by evidence—beyond a reasonable doubt—of a separate and distinct agreement to commit the crime[s] alleged in that specific count and not a continuation of Count ____ . Otherwise you must find the defendant not guilty of that count, regardless of your verdict on other counts of the indictment.

If you conclude that [the][2] [a] Defendant conspired and agreed to commit more than one (1) crime, to assist you in determining whether the defendant entered into two (2) or more separate agreements with different criminal objects, or whether [the][2] [a] Defendant entered into only a single conspiracy agreement to commit multiple crimes, you may consider all the evidence [that I have admitted with regard to Count ___ and Defendant[s] [_____, and _____][3]] and the totality of the circumstances.

USE NOTES

1. Use when the evidence indicates the defendant participated in more than one conspiracy agreement. If not supported, UJI 14-2810 NMRA should be given instead.

2. Use applicable alternative.

3. Use when the Court has limited evidence regarding a particular count and/or defendant. *See* UJIs 14-5007, 14-5008 NMRA.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See State v. Gallegos*, 2011-NMSC-027, ¶¶ 48-49, 149 N.M. 704, 254 P. 3d 655 (jury must be instructed that separate/multiple conspiracy convictions must be supported by evidence beyond a reasonable doubt of

separate/multiple agreements); *see also* Tenth Circuit Criminal Pattern Jury Instruction 2.20 (2011) (proof of separate conspiracies is not proof of a single, overall, conspiracy; proof of involvement in some other conspiracy not enough to convict on the charged conspiracy); Eighth Circuit Manual of Modern Criminal Jury Instructions, 5.06D (rev. ed. 2013) (same).

A defendant may be charged with more than one count of conspiracy, with each count alleging agreement to commit one or more felonies. Conviction of multiple conspiracies—as opposed to a single conspiracy with multiple objectives—requires the Court to conduct a double jeopardy analysis, de novo, as a matter of law. *Gallegos*, 2011-NMSC-027, ¶¶ 50-51.

To avoid the risk of conflating the existence of multiple conspiracies with the existence of multiple objects in a single conspiracy, the jury must be instructed that conviction for multiple conspiracies requires finding beyond a reasonable doubt that the defendant distinctly agreed to (one or more of) the objective(s) of each separate conspiracy charged. *See id*. ¶¶ 48-49; *see also State v. Sanders*, 1994-NMSC-043, ¶ 16, 117 N.M. 452, 872 P.2d 870 (citing *State v. Hernandez*, 1986-NMCA-040, ¶ 40, 104 N.M. 268, 720 P.2d 303, which states that “determination of number of conspiracies is a fact question for the jury”). Where the indictment charges more than one conspiracy, regardless of the number of objectives, use this instruction.

In *Gallegos*, the New Mexico Supreme Court communicated the need for explicitly instructing the jury that "multiple conspiracy convictions require multiple agreements." 2011-NMSC-027, ¶ 49. In determining whether there are two (or more) agreements or only one, the Court noted the majority of the federal circuits’ practice of using a five-factor totality of the circumstances test that considers (1) location, (2) temporal overlap, (3) overlap of participants, (4) similarity of overt acts charged, and (5) similarity of roles played by the defendant. *See Gallegos*, 2011-NMSC-027, ¶ 42; *see also, e.g*., Eighth Circuit Manual of Model Criminal Jury Instructions, 5.06B, p. 158 (2014).

However, the Court stopped short of adopting particular factors for the jury's consideration and noted that the Tenth Circuit does not use such a test. *Gallegos*, 2011-NMSC-027, ¶ 42 (citing *United States v. Sasser*, 974 F.2d 1544, 1549 n.4 (10th Cir. 1992)). Nor does the Ninth Circuit. *See* Ninth Circuit *Manual of Model Criminal Jury Instructions*, 8.22, p. 142 (2010; updated electronically through June 2018) *available at* http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2018_6.pdf.

For these reasons, the Committee recommends that trial courts conduct a preliminary analysis consistent with *Gallegos* and only permit the jury to consider multiple conspiracies upon finding sufficient evidence thereof. *See Gallegos*, 2011-NMSC-027, ¶ 50. If the trial court finds sufficient evidence, this instruction should be given. If not, UJI 14-2810 NMRA should be given.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Use applicable alternative.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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 the defendant did not do the acts constituting the attempt, if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant intended that another person commit the crime;

2. Another person attempted to commit the crime; and

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 NOTES

1. For use if the evidence supports liability of the defendant as an aider or abettor 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.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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.

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 each of the following elements:

1. The defendant _____ (*name of defendant*) intended that another person commit the felony of _____ (*name of felony*);

2. Another person committed [or] [attempted][3] the felony of _____ [under circumstances or in a manner dangerous to human life];[3]

3. The defendant _____ (*name of defendant*) helped, encouraged, or caused the felony of _____[4] (*name of felony*) to be committed [or attempted];

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 the defendant was helping to create a strong probability of death or great bodily harm; and

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

USE NOTES

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. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.

14-2822. Aiding or abetting; accessory to crime other than attempt and felony murder.[1]

The defendant may be found guilty of a crime even though the defendant did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant intended that another person commit the crime;

2. Another person committed the crime;

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 NOTES

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.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-1-13 (1972).

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*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

"[A]n accessory must share the criminal intent of the principal." *See State v. Jim*, 2014-NMCA-089, ¶ 10, 332 P.3d 870 (quoting *State v. Carrasco*, 1997-NMSC-047, ¶ 7, 124 N.M. 64, 946 P.2d 1075); *see also State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609. While a shared criminal intent for accomplice liability may be proved by circumstances "as broad and varied as are the means of communicating thought from one individual to another, . . . [m]ere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient." *State v. Johnson*, 2004-NMSC-029, ¶ 34, 136 N.M. 348, 98 P.3d 998 (quoting *Ochoa*, 1937-NMSC-051, ¶ 31).

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 that person's own acts and intent, and not on the intent of the other, entertained without knowledge of the aider and abettor. *State v. Wilson*, 1935-NMSC-044, ¶ 11, 39 N.M. 284, 46 P.2d 57; *accord State v. Gaitan*, 2002-NMSC-007, ¶ 19, 131 N.M. 758, 42 P.3d 1207 (procuring a beating that inadvertently results in death satisfies accessory intent that a crime be committed, but "amount[s] to the lesser included offense of accessory to involuntary manslaughter.") (citing *State v. Holden*, 1973-NMCA-092, ¶¶ 11-14, 85 N.M. 397, 512 P.2d 970 (upholding conviction for accessory to involuntary manslaughter for procuring a misdemeanor battery by a third party who instead shot and killed the victim and was convicted of voluntary manslaughter)). Where "the intent required for conviction as an accessory is the same level of intent contained in the element instruction for the underlying crime, . . . 'we presume that the jury looked to the element instruction for each crime in order to determine the intent required for the

underlying crime.'" *Jim*, 2014-NMCA-089, ¶ 10 (quoting *Carrasco*, 1997-NMSC-047, ¶¶ 45-56).

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 NMRA covers the attempts; and UJI 14-2821 NMRA covers felony murder.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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 [withdrawn] 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.

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 NOTES

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.

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 NOTES

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.

14-3106. Possession of a dangerous drug.

For you to find the defendant guilty of possession of a dangerous drug [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 drug called _____[3];

2. _____[3] [has been determined to be a dangerous drug by the New Mexico Board of Pharmacy;][4]

[OR]

[only may be used under the supervision of a practitioner licensed by law to administer or prescribe the drug under federal law;]

[OR]

[Is dispensed bearing the legend [“Caution: federal law prohibits dispensing without a prescription”][4] [or] [“Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian”] [or] [“RX only”];]

3. The defendant knew it was _____[3] [or believed it to be _____[3]];

[4. The defendant knew that _____[3] [has been determined to be a dangerous drug by the New Mexico Board of Pharmacy;][4] [OR] [only may be used under the supervision of a practitioner licensed by law to administer or prescribe the drug under federal law;] [OR] [Is dispensed bearing the legend [“Caution: federal law prohibits dispensing without a prescription”][4] [or] [“Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian”] [or] [“RX only”];];][5]

[5. The defendant [did not have a valid prescription for _____[3];][4] [or] [was not licensed] [or] [was not legally authorized to possess a dangerous drug because _____[6];]]

6. This happened in New Mexico, on or about _____[7].

USE NOTES

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

2. UJI 14-130 NMRA, the definition of possession in controlled substance cases, should be given if possession is in issue.

3. Use chemical name for drug.

4. Use applicable alternative or alternatives.

5. Element 4 distinguishes the penalties as defined in NMSA 1978, Section 26-1-26(A) and (B). Thus, this instruction may be used to instruct on the lesser-included offense defined in Section 26-1-26(B) by removing element 4. *See* Committee commentary.

6. If evidence is presented that possession of the drug was legal under NMSA 1978, Section 26-1-18, describe the factual basis for the claim. *See* Committee commentary.

7. Insert date on which offense occurred.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — NMSA 1978, Section 26-1-2(F) defines a "dangerous drug" to mean "a drug, other than a controlled substance enumerated in Schedule I of the Controlled Substances Act, that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot be prepared." Therefore, a charge of unlawfully possessing a dangerous drug presupposes the substance is not enumerated in Schedule I. *See State v. Reams*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

The Legislature created three levels of penalties for illegal possession of a dangerous drug, stating that a person who "knowingly" violates Section 26-1-16, the prohibition against possession of a dangerous drug, "is guilty of a fourth degree felony and shall be punished by a fine of not less than one thousand dollars ($1,000) or more than five thousand dollars ($5,000) or by imprisonment for not less than one year or both." NMSA 1978, § 26-1-26(A). Meanwhile, all other violations of the Drug, Device, and Cosmetic Act, including Section 26-1-16, are punishable as a misdemeanor for the first offense and for second and subsequent offenses as a basic fourth degree felony. NMSA 1978, § 26-1-26(B).

UJI 14-3106, element 4, includes the requisite knowledge for Section 26-1-26(A) and instruction without element 4 therefore only supports the penalty defined in Section 26-1-26(B). New Mexico has long recognized a two-tiered knowledge requirement for drug possession crimes, as captured by UJIs 14-3102 and -3130 (requiring knowledge that "it is on his person or in his presence," and knowledge or belief that it was the particular substance charged). The Committee seeks to give meaning to the Legislature's separate inclusion of "knowledge" for the heightened felony penalty in Section 26-1-26(A), while avoiding strict liability for the misdemeanor and basic felony penalties contained in Section 26-1-26(B), by requiring the violation itself to be knowing to incur the heightened penalty. *See State v. Nozie*, 2009-NMSC-018, ¶¶ 25-26, 146 N.M. 142,

207 P.3d 1119 (New Mexico seeks to avoid strict liability crimes by imputing a knowledge requirement). Thus, a knowing *possession*, even without subjective knowledge that such possession violates Section 26-1-16, constitutes a lesser-included offense under Section 26-1-26(B).

Section 26-1-2(F) further provides a "drug shall be dispensed only upon the prescription or drug order of a practitioner licensed by law to administer or prescribe the drug if it:

(1) is a habit-forming drug and contains any quantity of a narcotic or hypnotic substance or a chemical derivative of such substance that has been found under the federal act and the board to be habit forming;

(2) because of its toxicity or other potential for harmful effect or the method of its use or the collateral measures necessary to its use is not safe for use except under the supervision of a practitioner licensed by law to administer or prescribe the drug;

(3) is limited by an approved application by Section 505 of the federal act to the use under the professional supervision of a practitioner licensed by law to administer or prescribe the drug;

(4) bears the legend: "Caution: federal law prohibits dispensing without prescription.";

(5) bears the legend: "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."; or

(6) bears the legend "RX only."

Subsections (3) through (6) of this definition refer to the type of factual elements that traditionally have been within the province of a jury. However, in the Committee's judgment subsections (1) and (2) set forth criteria to be used by the Board of Pharmacy in determining whether a particular drug should be expressly regulated as a dangerous drug pursuant to Section 26-1-18(B) (providing that the Board "shall, by regulation, declare a substance a 'dangerous drug' when necessary, and notification shall be sent to all registered pharmacies in the state within sixty days of the adoption of the regulation").

Indeed, Subsection (1) directly requires administrative action by the Board. Subsection (2) requires a determination that use of the drug "is not safe ... except under the supervision of a practitioner." In the Committee's view, this is a policy determination that lies within the delegated authority and expertise of the Board. Conversely, were this provision interpreted instead to create a self-effecting element of a criminal offense of unlawful possession it might be subject to constitutional challenge for vagueness. A person of common intelligence would have little means of ascertaining before the fact whether a lay jury would find a particular drug sufficiently dangerous to require the supervision of a practitioner. *See generally State v. Laguna*, 1999-NMCA-152, ¶¶ 25-26,

128 N.M. 345, 992 P.2d 896 (two arms of vagueness test are whether the statute provides a person of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited and whether it the statute has no standards or guidelines and therefore allows, if not encourages, subjective and ad hoc application); *see also Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.").

For this reason, element 2 of UJI 14-3106 contains, as an alternative element of the crime of unlawful possession of a dangerous drug, the language that the substance "has been determined to be a dangerous drug by the New Mexico Board of Pharmacy." *See* § 26-1-2(F)(1), (2). The remaining alternatives track the statutory language of subsections (3) through (6) inclusive.

Element 3 and Use Note 5 contain a list of possible exceptions to the prohibition against possessing a dangerous drug and the jury should be instructed on these exceptions when the evidence creates a jury issue. NMSA 1978, Section 26-1-16 provides, generally, that possession of a dangerous drug requires a prescription or that the drug be dispensed by a licensed practitioner who has a valid practitioner-patient relationship with the person possessing the drug. Section 26-1-16(E). This Section also, however, contains exemptions for entities and individuals licensed by the Board to possess or dispense dangerous drugs. These include manufacturers, wholesalers or distributors, hospitals, nursing homes, clinics or pharmacies, the University of New Mexico College of Pharmacy or a public health laboratory, and licensed practitioners. Section 26-1-16(A), (B). Subsection (H) creates an exception livestock owners, employees, and consignees of livestock.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-3107. Drug paraphernalia; possession; essential elements.

For you to find the defendant guilty of possession of drug paraphernalia, [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 or her possession[3];

2. The defendant intended to use the _____[2] to [plant, propagate, cultivate, grow, harvest][,] [manufacture, compound, convert, produce, process, prepare, test, analyze][,] [pack, repack, store, contain, conceal][,] [or] [inject, ingest, inhale or otherwise introduce into the human body][4] a controlled substance;

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

USE NOTES

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

2. Identify the items of alleged drug paraphernalia.

3. UJI 14-130 NMRA, the definition of possession, should be given if possession is in issue.

4. Choose applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-31-25.1.

The Legislature did not intend to punish a defendant for possession of a controlled substance and possession of paraphernalia when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance. Where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant's conviction of possession of drug paraphernalia violated double jeopardy. *State v. Almeida*, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

Where police officers testified that they found a glass pipe containing a white substance in the center console of the vehicle the defendant was driving and subsequent forensic testing revealed that the substance was methamphetamine, the circumstantial evidence was sufficient (1) to establish that the defendant possessed or constructively possessed the methamphetamine and the pipe, and (2) to permit the jury to infer that the defendant knew the substance was methamphetamine and that the defendant intended to use the pipe to inhale methamphetamine. *State v. Lopez*, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361.

Sufficient evidence supported the defendant’s conviction for possession of drug paraphernalia where a reasonable jury could infer that the defendant had knowledge of and control over drug paraphernalia based on evidence that a glass pipe similar to those used to ingest methamphetamine was found in the defendant's vehicle and methamphetamine was found on the defendant’s person. *State v. Howl*, 2016-NMCA-084, 381 P.3d 684.

In cases where drug possession is premised on the drugs contained within an item of paraphernalia, paraphernalia possession may be a lesser-included offense of drug possession. *State v. Darkis*, 2000-NMCA-085, ¶¶ 12, 21, 129 N.M. 547, 10 P.3d 871 (noting the defendant "could not have committed possession of cocaine without also

committing possession of drug paraphernalia," and the court should have instructed on a lesser offense of paraphernalia possession).

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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).

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 NOTES

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.

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 NOTES

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.

CHAPTER 32 to 41
(Reserved)

CHAPTER 42
Money Laundering

14-4201. Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements.

For you to find the defendant guilty of money laundering [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 [conducted] [structured] [engaged in] [participated in][2] a financial transaction[3] by _____ (*describe the financial transaction*);

2. The defendant knew that the property[4] involved in the financial transaction [was] [was represented to be][2] the proceeds of _____ (*name the specified unlawful activity*)[5];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][6]

4. The defendant knew that the financial transaction was designed, in whole or in part, to [[conceal][2] [or] [disguise] the nature, location, source, ownership, or control of the property][2]

[OR]

[avoid a transaction reporting requirement under state or federal law];

[5. The financial transaction involved over $ _____[7];] and

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

USE NOTES

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

2. Use the applicable alternative or alternatives.

3. Unless the parties stipulate that the transaction was a "financial transaction," give the definitions in UJI 14-4205(D) & (E) NMRA.

4. Unless the parties stipulate that the transaction involved "property," give the definition in UJI 14-4205(F) NMRA.

5. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

6. Rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

7. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 5.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-4(A)(1) (1998).

This instruction sets forth the essential elements of two distinct prongs of the first of four methods of violating New Mexico's money laundering statute. It is similar, but not

identical, to 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 1956(a)(1)(B)(ii), respectively. Although not directly instructive, reference to the analogous Tenth Circuit and Eighth Circuit instructions and committee commentary, as well as to the Department of Justice's money laundering guidance to federal prosecutors, may be useful.

Unlike the federal money laundering statute, 18 U.S.C. § 1956, in the New Mexico Money Laundering Act, NMSA 1978, Sections 30-51-1 to -5, there is no explicit prohibition on attempts. *See* § 30-51-4(A).

Unlike 18 U.S.C. § 1956(a)(3), there is no separate "sting" provision, *i.e*., a deception operation where a law enforcement agent or person acting under the agent's authority falsely represents money or property to be proceeds of an unlawful activity. Instead, Section 30-51-4(A) directly addresses representation of property to be proceeds from specified unlawful activity.

Also unlike the federal statute, New Mexico does not distinguish between "unlawful activity" and "specified unlawful activity." *Cf.* § 30-51-2(G) *with* 18 U.S.C. §§ 1956(a)(1) and (c)(7).

There is no definition of "structured" in the New Mexico Money Laundering Act. *See* § 30-51-2. Nor is the term defined in the federal money laundering statute, 18 U.S.C. § 1956. *See* Commentary to UJI 14-4205 NMRA (Definitions).

Because under Section 30-51-2(B)(1)-(4) the statutory maximum penalty is controlled by the amount of the illegal transaction, the amount is a sentencing fact which must be found beyond a reasonable doubt by the jury. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901 (Sixth Amendment right to trial by jury guarantees that all facts essential to a defendant's sentence must be determined by a jury); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Where the property involved in the financial transaction is currency or checks, the face value constitutes the amount involved and the state need not prove that its value is something else. *See, e.g., Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583 (currency); *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226 (checks).

The Legislature did not include in the Money Laundering Act that each financial transaction is a separate and distinct offense. *Cf. State v. Faubion*, 1998-NMCA-095, ¶ 11, 125 N.M. 670, 964 P.2d 834 (following *State v. Brooks*, 1994-NMSC-062, 117 N.M. 751, 877 P.2d 557, the Legislature amended the embezzlement statute to exclude the single larceny doctrine to make each incident a separate and distinct offense, thereby overruling the prior practice permitting a series of takings from a single victim to be treated as a single offense).

UJI 14-4205 (Definitions) contains multiple terms of art incorporated in this instruction. In many cases, the jury will not require a specific definition: A term or description in layman's language also satisfies the detailed - and often expansive - legal definition. For

example, in most cases there will be no question or confusion about whether the transfer of U.S. currency was a "financial transaction" which involved "property." *See* UJI 14-4205(D) & (F). However, where the applicability is neither obvious nor stipulated - such as "proceeds" (*see* UJI 14-4205(G)) that are property "delivered," "indirectly," "by an . . . omission," the jury may require more guidance.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4202. Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements.

For you to find the defendant guilty of money laundering [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 [conducted] [structured] [engaged in] [participated in][2] a financial transaction[3] by _____ (*describe the financial transaction*);

2. The defendant knew that the property[4] involved in the financial transaction [was] [was represented to be][2] the proceeds of _____ (*name the specified unlawful activity*)[5];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][6]

4. The defendant _____ (*name the action(s) from Element 1*) the financial transaction for the purpose of [committing] [or] [furthering the commission of][2] _____ (*name the specified unlawful activity*)[7];

[5. The financial transaction involved over $_____[8];] and

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

USE NOTES

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

2. Use the applicable alternative or alternatives.

3. Unless the parties stipulate that the transaction was a "financial transaction" give the definitions in UJI 14-4205(D) and (E) NMRA.

4. Unless the parties stipulate that the transaction involved "property," give the definition in UJI 14-4205(F) NMRA.

5. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony offense(s) should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

6. This element is rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

7. If the object of the financial transaction was a specified unlawful activity different from element 2, *supra*, unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

8. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 5.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-4(A)(2) (1998).

This instruction sets forth the essential elements of the second of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(1)(A)(I). *See* commentary to UJI 14-4201 NMRA (concealing or disguising).

It is possible that the property involved in the financial transaction derived (or represented to be the proceeds) from one form of specified unlawful activity, *e.g*., human trafficking is used to further a different specified unlawful activity, *e.g*., drug trafficking. Note 7, *supra*, alerts to the requirement that the jury must be instructed on the essential elements of all alleged specified unlawful activities.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4203. Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements.

For you to find the defendant guilty of money laundering [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 transported property, that is _____ (*name the monetary instrument*)[2];

2. The defendant knew that the _____ (*name the monetary instrument*) [was] [was represented to be][3] the proceeds of _____ (*name the specified unlawful activity*)[4];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][5]

4. The defendant knew that the transport was designed, in whole or in part, to [[conceal] [or] [disguise][3] the nature, location, source, ownership or control of the monetary instrument]

[OR]

[avoid a transaction reporting requirement under state or federal law][3];

5. The defendant transported the _____ (*name the monetary instrument*) with the intent to further _____ (*name the specified unlawful activity*)[4];

[6. The _____ (*name the monetary instrument*) involved over $_____[6];] and

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

USE NOTES

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

2. *See* UJI 14-4205(D) and (G) NMRA.

3. Use applicable alternative or alternatives.

4. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

5. This element is rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

6. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If

the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 6.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-4(A)(3) (1998).

This instruction sets forth the essential elements of the two distinct prongs of the third of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(2)(B). *See* commentary to UJI 14-4201 NMRA.

Although in all but one place Section 30-51-4(A)(3) speaks of transporting "property," the concluding reference to "the monetary instrument" appears to restrict the prohibition on transporting the large class of items defined as "property" to the more limited – but still broad – definition of "monetary instrument." *Cf.* NMSA 1978, § 30-51-2(F)(1998) *with* § 30-51-2(C). The analogous federal statute, 18 U.S.C. § 1956(a)(2), penalizes transportation etc., of "a monetary instrument or funds."

The specified unlawful activity of which the monetary instrument is proceeds will often, but not always be the same type of specified unlawful activity which the transportation is intended to further. Use Notes 3 and 5 alert to the requirement that, where different, the jury must be instructed on the essential elements of both the specified unlawful activity from which the monetary instrument was derived and the specified unlawful activity that the transportation is designed to further.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4204. Money laundering; making property available to another by financial transaction OR transporting; essential elements.

For you to find the defendant guilty of money laundering [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 property, that is _____ (*name the property*)[2], available to another person, [that is _____][3] by means of [a financial transaction[4]]

[OR]

[transporting the property][5];

2. The defendant knew that the _____ (*name the property*) [was] [was represented to be][5] the proceeds of _____ (*name the specified unlawful activity*)[6];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][7]

4. The defendant knew that the other person, [that is _____][3] intended to use _____ (*name the property*) to [commit] [or] [further the commission of][5] _____ (*name the specified unlawful activity*)[8];

[5. The [financial transaction] [or] [transported property][5] involved over $_____[9];] and

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

USE NOTES

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

2. Unless the parties stipulate that the transaction or transporting involved "property," give the definition in UJI 14-4205(F) NMRA.

3. Name the person(s), if known.

4. Unless the parties stipulate that the transaction was a "financial transaction," give the definitions in UJI 14-4205(D) and (E) NMRA.

5. Use applicable alternative or alternatives.

6. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

7. Rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

8. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony must also be given immediately following this instruction.

9. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If

the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 5.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978 § 30-51-4(A)(4) (1998).

This instruction sets forth the essential elements of the two prongs of the fourth of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(2)(A). *See* commentary to UJI 14-4201 NMRA.

The Committee recommends the identity of the "another person" to whom the property is made available, by financial transaction or transporting, be set out if known and supported by the evidence. However, the statute does not specifically require that identification. The Committee believes the statute is satisfied as long as there is evidence beyond a reasonable doubt that the property was made available to "another person" – as broadly defined by Section 30-51-2(D).

Also unlike Section 30-51-4(A)(3), which also applies to transporting "property," Section 30-51-4(A)(4) does not contain an explicit limitation to "property" which meets the more limited definition of "monetary instrument." Because the Legislature passed both sections in one act, the presumption is that it intended to use "monetary instrument" in the former section but not the latter. However, unless the parties stipulate that Section 30-51-4(A)(4) applies to the property made available to another, the court should make a pretrial legal determination of the issue.

The specified unlawful activity of which the property is or is represented to be proceeds will often, but not always be the same type of specified unlawful activity which the property made available is intended by another person to further. Use Notes 5 and 7 alert to the requirement that, where different, the jury must be instructed on the essential elements of both the specified unlawful activity from which the property was derived and the specified unlawful activity that the financial transaction or transportation is designed to further.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4205. Money laundering; definitions.[1]

A. **"Person"** means an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, unincorporated organization or group, or other entity.[2]

B. **"Conducted"** means initiating, concluding, or participating in initiating or concluding a "financial transaction."[3]

C. **"Structured"** means a series of transactions conducted in a specific pattern that could have been conducted as one transaction.

D. **"Financial transaction"**[4]means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of

[any "monetary instrument"]

[OR]

[the movement of funds by wire or other means].

E. **"Monetary instrument"** means coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in bearer form or in such other form that title passes on delivery of the security and negotiable instruments in bearer form or in such other form that title passes on delivery of the instrument.[5]

F. **"Property"** means anything of value, including real, personal, tangible, or intangible property.[6]

G. **"Proceeds"** means property that is acquired, delivered, produced or realized, whether directly or indirectly, by an act or omission.[7]

H. **"Specified unlawful activity"** means an act or omission, including any initiatory, preparatory, or completed offense or omission, committed for financial gain that is punishable as a felony under the laws of New Mexico or, if the act occurred outside New Mexico, would be punishable as a felony under the laws of the state in which it occurred and under the laws of New Mexico.[8]

I. **"Transaction reporting requirement"** includes _____ (*brief description of the requirement, e.g., under 31 U.S.C. § 5316 (a)(1), "Knowingly transporting more than $10,000 at one time from a place within the United States to a place outside the United States."*).[9]

J. **"Financial institution"** includes _____ (*applicable definition(s) from NMSA 1978, § 30-51-2 A(1)-(17)*).[10]

USE NOTES

1. Give each of the applicable definitions after the money laundering charge to which they pertain. Additional definitions may also be required under the facts of the case.

2. Section 30-51-2(D) NMSA 1978. Use as necessary to instruct on whether a person engaged in a transaction to avoid a transaction reporting requirement under

state law, Section 30-51-2(A) NMSA 1978, or whether a person fails to properly report a financial transaction, Section 30-51-3(B) NMSA 1978.

3. Use applicable alternatives. *See* Section 30-51-2(B) NMSA 1978; *see also* 18 U.S.C. § 1956(c)(2) (defining "conducts") and 18 U.S.C. § 1956(c)(3) (defining "transaction" as substantially the same as New Mexico's definition of "financial transaction").

4. Section 30-51-2(B) NMSA 1978.

5. Section 30-51-2(C) NMSA 1978.

6. Section 30-51-2(F) NMSA 1978.

7. Section 30-51-2(E) NMSA 1978.

8. Section 30-51-2(G) NMSA 1978. It is for the court, as a question of law, to decide and, if requested, instruct the jury whether a particular New Mexico statute or statute from another state meets the legal definition of "specified unlawful activity." (SUA). If there is no question requiring the court to instruct the jury regarding whether alleged conduct is a felony under New Mexico or other state law, do not instruct on specified unlawful activity; instead instruct on the essential elements of the alleged felony.

Unless the money laundering defendant is also charged with the substantive, predicate SUA, the uniform instruction on the essential elements of the SUA should be modified to inform the jury that it does not need to determine *who* committed the SUA - but only beyond a reasonable doubt that *someone* committed the predicate offense.

Because whether the act was committed for financial gain is a jury question of fact, in the infrequent cases where a specified unlawful activity does not exist without that motive, an optional factual element should be added to the substantive instruction.

9. "Transaction reporting requirement" is not defined in Section 30-51-2 NMSA 1978. If there is no stipulation by the parties, the court should give a definition tailored to the facts in evidence.

10. Section 30-51-2(A)(1)-(17) NMSA 1978. Use as necessary to instruct on whether a financial institution failed to properly report a financial transaction or whether a person engaged in a transaction to avoid a transaction reporting requirement under state law. If there is no stipulation by the parties, instruct as a matter of law whether a particular entity meets the statutory definition.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-2(A)-(G)(1998).

New Mexico's money laundering statutory definitions include some, but not all, of the terms found in the federal money laundering statutes, *e.g.*, 18 U.S.C.§ § 1956 (a)(1) and (3), (c)(1)-(9); 1957(f); 31 U.S.C. §§ 5312(a)-(c); 31 U.S.C. § 5313(e)(2) and (g); 31 U.S.C. § 5316(d); 31 U.S.C. § 5330(d); 31 U.S.C. § 5331(d); 31 U.S.C. § 5340. Even where the terms are identical, their definitions may vary.

One critical difference is the definition of "financial transaction." Under 18 U.S.C. § 1956(c)(4), a financial transaction includes transactions involving (i) movement of funds by wire or other means, (ii) one or more monetary instruments, or (iii) transfer of title to any real property, vehicle, vessel, or aircraft. Under Section 30-51-2(B), the definition is limited to the first two categories (monetary instruments or the movement of funds) and does not include the much broader category of real property, vehicles, vessels, and aircraft. This would appear to exclude "barter" transactions such as an exchange of drugs for firearms.

Further, many of the federal definitions have been modified and expanded over time. Therefore, while federal case law may prove useful and persuasive, close attention should be paid to the precise definition in force.

Because of multiple changes in not just federal statutes but also Treasury Department reporting requirements over time, charges of money laundering to avoid a transaction reporting requirement under federal law require especially careful review of the statutory and regulatory requirements in effect on a given date.

Although New Mexico statutes do not define "structured," an explanation of what constitutes a financial transaction involving the proceeds of specified unlawful activity, found in 18 U.S.C. § 1956(a)(1), refers to "part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement." Thus, under the federal statute there is no requirement to prove that all of the property is criminal proceeds; the gravamen is a transaction involving any criminal proceeds which are part of a common plan or arrangement. Further federal explanation of structuring is found in 31 U.S.C. § 5324, 31 CFR § 1010.100 (xx), and the 2016 IRS Manual 4.26.13. 1, as well as at https://www.fincen.gov/financial_institutions/msb/materials/en/bank_reference.html. The Committee believes that the concept of transactions in support of a single plan to avoid the creation of records or reporting requirements appropriately defines a "structured" transaction.

A defendant can be found guilty of money laundering without having personally committed the SUA - as long as the jury finds beyond a reasonable doubt that *someone* committed the predicate offense. *See, e.g., United States v. Martinelli*, 454 F.3d 1300 (11th Cir. 2006); *United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997). The court should instruct on the elements of the SUA.

Under federal statutes and Treasury regulations, transaction reporting requirements are numerous and have frequently changed over the years. Whether a particular transaction

is or was at the time of the alleged offense reportable under New Mexico of federal law or regulation is a question of law; however, the underlying facts of the transaction making the transaction subject to the reporting requirement are for the jury to determine.

In addition to penalizing transactions which are designed to prevent a transaction reporting requirement, under NMSA 1978, Section 30-51-4, New Mexico's money laundering statutes also penalize knowing failure to file a transaction report by "financial institutions" and "certain persons" under NMSA 1978, Section 30-51-3. The statutory definition of "financial institution" is broad – with 17 distinct types – and not necessarily intuitive to a juror. Unless the parties stipulate whether a particular entity was a "financial institution," the court should make the determination as a matter of law and so instruct the jury.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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][or][sale of][1] 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] [or] [sold][1] a security;[3]

2. The security was required by the New Mexico Uniform Securities Act to be registered with the State of New Mexico prior to the [sale] [or] [offer for sale];[1, 4]

3. The security was not registered as required under the New Mexico Uniform Securities Act;

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

USE NOTES

1. Use only the applicable alternatives.

2. Insert the Count Number if more than one count is charged.

3. UJI 14-4310 NMRA, 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 NMRA 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 NMRA must be given.

5. UJI 14-141 NMRA, General criminal intent, must also be given with this instruction.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

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."

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] [sold] [offered to purchase] [or] [purchased][2] a security;[3]

2. In connection with the [offer to sell] [sale] [offer to purchase] [or] [purchase][2] 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 NOTES

1. Insert the Count Number if more than one count is charged.

2. Use only the applicable alternatives.

3. UJI 14-4310 NMRA, the definition of "security", must also be given immediately after this instruction.

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

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Unlike general "criminal fraud", the fraudulent sale of securities is not a specific intent crime. *State v. Ross*, 1986-NMCA-015, ¶¶ 14-18, 104 N.M. 23, 715 P.2d 471. UJI 14-141 NMRA, 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 NMRA.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

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] [receipt for] [guarantee of][2] the right to purchase a security.]

[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.]

[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]

[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] [call] [straddle] [or] [option][5] entered into on a national securities exchange relating to foreign currency.]

[[put] [call] [straddle] [or] [option][5] on any [security] [group or index of securities including any interest therein or based on the value thereof].[2]]

[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 NOTES

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 Uniform Securities Act to describe a security. If a term is not provided in this instruction or Section 58-13C-102(DD) of the Act, 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 NMRA 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; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

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.

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 a 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 NOTES

The definitions in this Instruction may be used with the definitions set forth in UJI 14-4310 NMRA.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

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*, 1986-NMCA-136, 105 N.M. 366, 732 P.2d 1389; *see also State v. Sheets*, 1980-NMCA-041, 94 N.M. 356, 610 P.2d 760 for the definition of “isolated sale”.

White v. Solomon, supra, adopts the sale of business doctrine. The New Mexico Court of Appeals relies upon the United States Supreme Court decision of *Tcherepnin v. Knight*, 389 U.S. 332 (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 (1985). *See* committee commentary to UJI 14-4301 NMRA for a discussion of the *Tcherepnin* and *Landreth* decisions.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Part C
Defenses

14-4320. Defense; exempt security.[1]

An issue in this case is whether the security which was [sold] [offered for sale][2] [as charged in Count _____][3] was an exempt security and was not required to be registered under the New Mexico Uniform Securities Act. A security which is

[issued by] [insured by] [guaranteed by][2] a _____,[4]][2]

[an option issued by _____,[4]] [a _____,[4]]

is an exempt security and is not required to be registered under the New Mexico Uniform Securities Act.

If you find that the security was

[[issued by] [insured by] [guaranteed by][2] 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] [offered for sale][2] was not an exempt security.

USE NOTES

1. For use if there is an issue that the sale or offer for sale was an exempt security under the New Mexico Uniform Securities Act, Section 58-13C-201 NMSA 1978.

2. Use only the applicable alternative.

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

4. *See* Section 58-13C-201 NMSA 1978 for the types of exempt securities. Many of the terms set forth in Section 58-13C-201 NMSA 1978 have been defined in UJIs 14-4310 and 14-4311 NMRA.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

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*, 1985-NMCA-018, 102 N.M. 629, 698 P.2d 902.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

14-4321. Defense; exempt transaction.[1]

An issue in this case is whether the security which was [sold] [offered for sale][2] [as charged in Count _____][3] was an exempt transaction and was not required to be registered under the New Mexico Uniform Securities Act.

[An isolated transaction,[4]][2]

[OR]

[A transaction [by] [between] [in][2] _____,[5]]

is an exempt transaction which is not required to be registered under the New Mexico Uniform Securities Act.

If you find that the [sale] [offer to sell][2] of the unregistered security was

[an isolated transaction,][2]

[OR]

[a transaction [by] [between] [in][2] _____,[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] [offered for sale][2] was not an exempt transaction.

USE NOTES

1. For use if there is an issue that the sale or offer for sale was an exempt transaction. *See* Section 58-13C-202 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 NMRA, is to be given immediately following this alternative.

5. Set forth the elements of the exempt transaction. *See* Section 58-13C-202 NMSA 1978 for the type of exempt securities transactions.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 2020-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Although the sale of all of the stock of a business is a transaction subject to the New Mexico Uniform Securities Act, apparently 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*, 1986-NMCA-136, 105 N.M. 366, 732 P.2d 1389. *See also* the Committee commentaries to UJIs 14-4301 and 14-4312 NMRA.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

CHAPTER 44
Medicaid Fraud & Criminal Corporate Responsibility

14-4401. Definitions for medicaid fraud instructions.

"Benefit" means money, treatment, services, goods or anything of value authorized under the program.

"Claim" means any communication, whether oral, written, electronic or magnetic, that identifies a treatment, good or service as reimbursable under the program.

“Department” means the human services department.

“Health care official” means 1) an administrator, officer, trustee, fiduciary, custodian, counsel agent or employee of a managed care health plan; 2) an officer, counsel, agent or employee of an organization that provides, proposes to or contracts to provide services to a managed health care plan; or 3) an official, employee or agent of a state or federal agency with regulatory or administrative authority over a managed health care plan.

“Managed health care plan” means a government-sponsored health benefit plan that requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with or employed by a health care insurer or provider service network. A “managed health care plan” includes the health care services offered by a health maintenance organization, preferred provider organization, health care insurer, provider service network, entity or person that contracts to provide or provides goods or services that are reimbursed by or are a required benefit of a state or federally funded health benefit program, or any person or entity who contracts to provide goods or services to the program.

“Program” means the medical assistance program authorized under Title XIX of the federal Social Security Act, 42 U.S.C. § 1396, et seq., and implemented under Section 27-2-12, NMSA 1978.

“Provider” means any person who has applied to participate or who participates in the program as a supplier of treatment, services or goods.

“Recipient” means any individual who receives or requests benefits under the program.

“Records” means any medical or business documentation, however recorded, relating to the treatment or care of any recipient, to services or goods provided to any recipient or to reimbursement for treatment, services or goods, including any documentation required to be retained by regulations of the program.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, Section 30-44-2 (1997) for a comprehensive list of terms utilized in the Medicaid Fraud Act, NMSA 1978, Sections 30-44-1 to -8.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4402. Falsification of documents.

For you to find the defendant guilty of falsification of documents as charged in Count ____, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly

[made or caused to be made a misrepresentation of a material fact required to be furnished under the program. A material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [unnecessary services] [services not provided in the stated quality or amount] [or] [services to a person not authorized to receive them.]

[or]

[failed or caused the failure to include a material fact required to be furnished under the program in any record required to be retained in connection with the program. A material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [unnecessary services] [services not provided in the stated quality or amount] [or] [services to a person not authorized to receive them.]

[or]

[submitted or caused to be submitted false or incomplete information for the purpose of receiving benefits or qualifying as a provider][1].

2. This happened in New Mexico on or about the _____ day of _____, _____[2].

USE NOTES

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

2. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 22-8300-034, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-44-4 (1989).

The Medicaid Fraud Act, NMSA 1978, §§ 30-44-1 to 30-44-8 (1989, as amended through 2004), delegates to the Human Services Department the authority to establish broad and detailed record and reporting requirements by regulation—enforceable by civil and criminal penalties. *See, e.g.*, § 30-44-5(A)(4); § 30-44-8(F). Section 30-44-4(A)

has two distinct provisions for falsification of documents: Section 30-44-4(A)(1) explicitly requires that the fact in question be "material." Section 30-44-4(A)(2) does not require that the false or incomplete information be "material." The Committee believes that this distinction was intentional because under Section 30-44-4(A)(2), in addition to the requirement that a defendant act knowingly, the Legislature also required a showing that the false or incomplete information was submitted for "the purpose of receiving benefits or qualifying as a provider."

Both subsections require knowing conduct, i.e., conscious behavior between general criminal intent and specific intent. *See State v. Ramos*, 2013-NMSC-031, ¶ 28, 305 P.3d 921 (discussing scienter required for violating an order of protection); *see also State v. Hernandez*, A-1-CA-32109, mem. op. ¶ 25 (N.M. Ct. App. Nov. 19, 2014) (nonprecedential) (construing *Ramos*, 2013-NMSC-031, in the context of Medicaid false document charge).

The Fifth and Sixth Amendments to the United States Constitution require trial courts to submit the issue of materiality to the jury. *United States v. Gaudin*, 515 U.S. 506, 508, 511, 522-23 (1995) (reviewing conviction of making false statements on loan documents); *State v. Benavidez*, 1999-NMCA-053, ¶¶ 14-16, 127 N.M. 189, 979 P.2d 234 (following *Gaudin* and holding materiality of a false statement is a mixed question of law and fact for the jury), *rev'd on other grounds*, 1999-NMSC-041, ¶¶ 2, 5, 128 N.M. 261, 992 P.2d 274.

The touchstone of materiality is whether the statement or omission "has a natural tendency to influence" the decision of the relevant agency or tribunal. *See, e.g.*, *State v. Silva*, 2007-NMCA-117, ¶ 16, 168 P.3d 1110 (quoting *Benavidez*, 1999-NMCA-053, ¶ 26), *rev'd on other grounds*, 2008-NMSC-051, 192 P.3d 1192; *State v. Watkins*, 1979-NMCA-003, ¶ 38, 92 N.M. 470, 590 P.2d 169 (citing *United States v. Abrams*, 568 F.2d 411 (5th Cir. 1978)).

The Medicaid Fraud Act does not provide a definition of "material." Sections 30-44-1 to -8; *cf.* NMSA 1978, § 30-16-29 (1971) (providing no definition of material in the offense of fraudulent taking, receiving, or transferring credit cards). Further, "not every regulatory deficiency constitutes actionable false or fraudulent conduct under the [Medicaid Fraud Act]." *State ex rel. King v. Behavioral Home Care, Inc.*, 2015-NMCA-035, ¶ 27, 346 P.3d 377.

To assist the jury in determining whether a misrepresentation or omission of fact was material, the Committee believes that, in addition to the "natural tendency" general definition of materiality, materiality in the context of the Medicaid Fraud Act requires a nexus to facts about "the nature, quality, amount, and medical necessity of services furnished to an eligible recipient" that affects payment of Medicaid funds. *See* 8.302.1.17 NMAC; *Behavioral Home Care, Inc.*, 2015- NMCA-035, ¶ 21 ("Section 30-44-7(A)(3) imposes a materiality element which requires that the false or fraudulent certification be *integral to the government's payment decision*." (emphasis added)).

Unlike the offense under the Medicaid Fraud Act of failure to retain records, § 30-44-5, or Medicaid fraud, § 30-44-7, falsification of documents (§ 30-44-4) does not predicate punishment on a dollar amount.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 22-8300-034, effective for all cases pending or filed on or after December 31, 2022.]

14-4403. Failure to retain records; rates.

For you to find the defendant guilty of failure to retain records as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received payment for treatment, services or goods under the program.

2. The defendant [intentionally failed to retain records[1] for a period of at least five years from the date payment was received] [knowingly destroyed or caused those records t o be destroyed within the five years from the date payment was received][2].

3. The records not retained were used in whole or in part to determine a rate of payment under the program.

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

USE NOTES

1. The statute identifies four applicable categories of medical and business records as records relating to: 1) the treatment or care of any recipient; 2) services or goods provided to any recipient; 3) rates paid by the department under the program on behalf of any recipient; and 4) any records required to be maintained by regulation of the department for administration of the program. *See* NMSA 1978, § 30-44-5(A)(1)-(4) (1989). This instruction pertains to records relating to rates paid by the department under the program on behalf of the recipient.

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

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-5 (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4404. Failure to retain records; treatment, services or goods and value.

For you to find the defendant guilty of failure to retain records as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received payment for treatment, services or goods under the program.

2. The defendant [intentionally failed to retain records[1] for a period of at least five years from the date payment was received] [knowingly destroyed or caused those records to be destroyed within the five years from the date payment was received][2].

3. The treatment, services or goods for which records were not retained amounts to $_____[3].[4]

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

USE NOTES

1. The statute identifies four applicable categories of medical and business records as records relating to: 1) the treatment or care of any recipient; 2) services or goods provided to any recipient; 3) rates paid by the department under the program on behalf of any recipient; and 4) any records required to be maintained by regulation of the department for administration of the program. *See* NSMA 1978, § 30-44-5(A)(1)-(4) (1989). This instruction applies to records relating to: 1) the treatment or care of any recipient or 2) services or goods provided to any recipient.

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

3. Insert monetary value.

4. Whoever commits the crime of failure to retain records is guilty of a misdemeanor if the treatment, services or goods for which records were not retained amounts to not more than one thousand dollars ($1,000.00). If the value of the treatment, services or goods for which records were not retained is more than one thousand dollars ($1,000.00), the defendant is guilty of a fourth degree felony. *See* NMSA 1978, § 30-44-5(C)(1)-(2).

5. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-5 (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4405. Obstruction of investigation; providing or withholding information.

For you to find the defendant guilty of obstruction of investigation as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly [provided false information to] [withheld information from][1] any person authorized under the Medicaid Fraud Act to investigate violations of that Act or to enforce the criminal or civil remedies of that Act.

2. The information [provided] [withheld][1] was material to the investigation or enforcement of the Medicaid Fraud Act.

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

USE NOTES

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

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-6(A)(1) (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4406. Obstruction of investigation; altering documents.

For you to find the defendant guilty of obstruction of investigation as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly altered any document or record.

2. The defendant intended the alteration to mislead an investigation.

3. The altered information was material to that investigation.

4. This happened in New Mexico on or about the _____ day of _____, _____.[1]

USE NOTES

1. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-6(A)(2) (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4407. Medicaid fraud; soliciting or receiving kickbacks in connection with medicaid or a state or federally funded health care plan.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [paid] [solicited] [offered] [received][1] _____[2] in connection with the furnishing of treatment, services or goods.

2. The treatment, services or goods were or may have been covered, in whole or in part, by the program.

3. The _____[2] was [paid] [solicited] [offered] [received][1] with the intent to influence a decision or commit a fraud affecting a state or mandated managed health care plan.

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

USE NOTES

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

2. Specify the remuneration or bribe alleged.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(a) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4408. Medicaid fraud; soliciting or receiving kickbacks in connection with medicaid or a state or federally funded health care plan to or from a health care official.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [offered] [promised] [solicited] [accepted] [paid] [received][1] _____[2], which is anything of value.

2. [The defendant made the [offer] [promise] [payment][1] to a health care official] or [The defendant was a health care official].[1]

3. The [offer] [promise] [solicitation] [acceptance] [payment] [receipt][1] was made with the intent to influence a decision or commit a fraud affecting a state or mandated managed health care plan.

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

USE NOTES

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

2. Name item.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(a) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4409. Medicaid fraud; soliciting or receiving rebate for referral of recipient.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____[1] is a provider.

2. _____[2] is a recipient.

3. The defendant [paid] [solicited] [offered] [received][3] a rebate of a fee or charge made to _____[1].

4. The rebate was [paid] [solicited] [offered] [received][3] for referring _____[2] to _____[1].

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

USE NOTES

1. List the provider's name.

2. List the recipient's name.

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

4. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(b) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4410. Medicaid fraud; receiving anything of value; precondition.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____[1], which is anything of value.

2. The defendant received _____[1] with the intent to retain it.

3. The defendant knew _____[1] was in excess of amounts authorized under the program.

4. The defendant's receipt of _____[1] was a [precondition of providing treatment, care, services or goods] [a requirement for continued provision of treatment, care, services or goods][2].

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

USE NOTES

1. Name the item(s).

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

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(c) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4411. Medicaid fraud; receiving anything of value; rates.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____[1], which is anything of value.

2. The defendant intended to retain _____[1].

3. The rates established under the program for providing treatment, services or goods are _____.[2]

4. The defendant knew the value of _____[1] was in excess of the rates established under the program for providing treatment, services or goods.

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

USE NOTES

1. Name the item(s).

2. List the established rate.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(d) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4412. Medicaid fraud; providing fraudulent claim.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly provided a claim for [treatment, services or goods that were not ordered by a treating physician] [treatment that was substantially inadequate when compared to generally recognized standards within the discipline or industry] [merchandise that was adulterated, debased, mislabeled or outdated][1].

2. The defendant provided the claim to a state or federally mandated managed health care plan.

3. The defendant intended the state or federally mandated managed health care plan to rely on the claim for the expenditure of public money.

4. This happened in New Mexico on or about the _____ day of _____, _____.[2]

USE NOTES

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

2. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(2)(a-c) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4413. Medicaid fraud; presenting excessive, multiple or incomplete claim.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [presented] [caused to be presented][1] a claim for allowance or payment.

2. The claim was a [false] [fraudulent] [excessive] [multiple] [incomplete][1] claim for furnishing treatment, services or goods.

3. The defendant knew the claim was a [false] [fraudulent] [excessive] [multiple] [incomplete][1] claim for furnishing treatment, services or goods.

4. The defendant [presented] [caused to be presented][1] the claim for allowance or payment from a state or federally mandated managed health care plan.

5. The defendant intended the state or federally mandated managed health care plan to rely on the claim for the expenditure of public money.

6. This happened in New Mexico on or about the _____ day of _____, _____.[2]

USE NOTES

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

2. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(3) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4414. Medicaid fraud; executing plan or conspiracy to execute plan to defraud state or federal health care plan by deceptive marketing.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [executed] [conspired to execute[2]][1] a plan or action to defraud a state or federally funded or mandated managed health care plan in connection with the delivery of or payment for health care benefits.

2. [The defendant's plan included engaging in any intentionally deceptive marketing practice in connection with [proposing] [offering] [selling] [soliciting] [providing][1] any health care service in a state or federally funded or mandated managed health care plan].[3]

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

USE NOTES

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

2. UJI 14-2810 NMRA should be given if conspiracy is alleged.

3. Include this element if the defendant's plan to defraud included engaging in any intentionally deceptive marking practice.

4. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(4)(a) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4415. Medicaid fraud; executing plan or conspiracy to execute plan for delivery or payment of benefits by fraud or fraudulent representation.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [executed] [conspired to execute[2]][1] a plan or action to obtain by false or fraudulent representation[4] or promise, _____[3], which is anything of value, in connection with the delivery of or payment for health care benefits.

2. The health care benefits were in whole or in part, [paid for] [reimbursed] [subsidized][1] by a state or federally funded or mandated managed health care plan.

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

USE NOTES

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

2. UJI 14-2810 NMRA should be given if conspiracy is alleged.

3. Name item.

4. *See* NMSA 1978, § 30-44-7(A)(4)(b) for a list of fraudulent representations or statements anticipated by the statute.

5. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(4)(b)(2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4420. Personal responsibility of corporate agent.

A person is responsible for conduct that person performs or causes to be performed on behalf of a corporation just as though the conduct were performed on the person's own behalf. However, a person is not responsible for the conduct of others performed on behalf of a corporation merely because that person is an officer, employee, or other agent of a corporation.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — The fact that actions are taken with the intent to further corporate business does not relieve the agent or employee of criminal responsibility for those actions. *See United States v. Wise*, 370 U.S. 405 (1962). However, a corporate employee or agent's criminal responsibility is not enlarged merely because of the employee or agent's corporate office. Corporate agents and employees are responsible for their own conduct and are responsible for the conduct of others according to the ordinary rules of accountability. This instructions does not exclude the possibility that a criminal statute may impose a special duty on corporate officers. *See United States v. Park*, 421 U.S. 659, 667-76 (1975). However, in that scenario, criminal liability attaches not because of a corporate officer's position, but because the officer acts or fails to act in conformity with the duty imposed by statute. *Id.* at 674. There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4421. Entity responsibility; scope of employment.

_____ (*name of entity*) is a [corporation] [partnership] [voluntary association][1]. A [corporation] [partnership] [voluntary association][1] may be found guilty of an offense.

A [corporation] [partnership] [voluntary association][1] acts only through its agents and employees, that is, those directors, officers, agents, employees, or other persons authorized or employed to act for it.

To sustain the charge of _____[2] against _____ (*name of entity*), the state must prove the following propositions:

First, the offense charged was committed by [an] agent[s] or employee[s] of _____ (*name of entity*);

Second, in committing the offense, the agent[s] or employee[s] intended, at least in part, to benefit _____ (*name of entity*);

Third, the acts by the agent[s] or employee[s] were committed within the authority or scope of employment.

For an act to be within the authority of an agent or the scope of employment of an employee, it must deal with a matter whose performance is generally entrusted to the agent or employee by _____ (*name of entity*).

It is not necessary that the particular act was itself authorized or directed by _____ (*name of entity*) as long as the entity has a right to control the manner in which the details of the work were to be performed at the time of the occurrence, even though the right of control may not have been exercised.

If an agent or an employee was acting within the authority or scope of employment, _____ (*name of entity*) is not relieved of its responsibility because the act was illegal, contrary to _____'s (*name of entity*) instructions, or against its general policies. You may, however, consider the existence of _____'s (*name of entity*) policies and instructions and the diligence of its efforts to enforce them in determining whether the agent[s] or employee[s] [was][were] acting with intent to benefit _____ (*name of entity*) or within the scope of employment.

USE NOTES

1. Use only applicable alternative.

2. Insert name of charge.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This instruction adopts the position of the majority of courts which have considered the question of the responsibility of a corporation for the criminal conduct of its agents. There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175. The majority view is that unless the criminal statute explicitly provides otherwise, a corporation is vicariously criminally liable for the crimes committed by its agents acting within the scope of their employment–that is, within their actual or apparent authority and on behalf of the corporation for the benefit of the corporation. *See Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962). Under this view, which simply constitutes an application of respondeat superior principles to criminal statutes, it may be irrelevant that the agent is not a high managerial official, that the corporation may have specifically instructed the agent not to engage in the proscribed conduct, or that the statute is one that requires willful or knowing violations, rather than one that imposes strict liability. The stated rationale is that the criminal statutes impose a duty upon the corporation to prevent its employees from committing the statutory violations. *See Echols v. N.C. Ribble Co.*, 1973-NMCA-038, 85 N.M. 240, 511 P.2d 566 (when an agent is acting within the scope

of authority, the principal is liable for false representations made by the agent, even if the principal was without knowledge of its agent's fraud and otherwise innocent of wrongdoing).

However, an agent acts outside the scope of employment when not acting at least in part for the benefit of the corporation. *See United States v. One Parcel of Land Located at 7326 Highway 45 N., Three Lakes*, 965 F.2d 311, 316 (7th Cir. 1992). When an employee acts to the detriment of the employer and in violation of the law, the employee's actions normally will be deemed to fall outside the scope of employment and thus will not be imputed to the employer. *See United States v. Barrett*, 51 F.3d 86, 89 (7th Cir. 1995).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4422. Entity responsibility; outside the scope of employment.

If you find that an act of an agent was not committed within the scope of the agent's employment, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act.

A corporation is legally responsible for any act or omission approved by its agents.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This instruction provides for corporate criminal liability when the corporation ratifies the conduct of an agent who acts outside the scope of the agent's employment. *See generally Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963). There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4423. Entity responsibility; independent contractor.

A corporation may be criminally liable for the acts and omissions of an apparent employee, even though there has been no actual employment and no right to control the manner of the work performed if:

1. _____ (*name of corporate defendant*), by its statements, acts or conduct led a person or entity to reasonably believe _____ (*name of apparent employee*) was the corporate defendant's employee;

2. The person or entity dealt with _____ (*name of apparent employee*) in justifiable reliance upon representations of _____ (*name of corporate defendant*);

3. At the time of the injury, _____ (*name of apparent employee*) was acting in the scope of the apparent employment of _____ (*name of corporate defendant*);

4. In committing the offense, _____ (*name of apparent employee*) intended, at least in part, to benefit _____ (*name of corporate defendant*).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This instruction provides for corporate liability when an apparent employee or an independent contractor acts criminally or fails to do some act which results in a violation of the law. There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175. Ordinarily, a corporation is not liable for the acts or omissions of an independent contractor when the corporation does not have the right to control the manner in which the details of the work are to be performed. *See Valdez v. Yates Petroleum Corp.*, 2007-NMCA-038, 141 N.M. 381, 155 P.3d 786. However, New Mexico law provides that a corporation can be liable for the acts or omissions of an independent contractor when a third party justifiably relies on the apparent relationship. *See Chevron Oil Co., v. Sutton*, 1973-NMSC-111, 85 N.M. 679, 515 P.2d 1283.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4424. Party other than an individual.

_____ (*name of corporate defendant*) must be given the same fair consideration as you would give an individual.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175; *see also De La O v. Bimbo's Restaurant, Inc.*, 1976-NMCA-115, 89 N.M. 800, 558 P.2d 69 (failing to give instruction, when requested, was held to be reversible error).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

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 NOTES

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).

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 NOTES

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.

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 vehicle[2];

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

USE NOTES

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 No. 08-8300-008, effective March 21, 2008; as amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This instruction pertains to NMSA 1978, Section 66-8-102, 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.

NMSA 1978, Section 66-8-110(C), 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* NMSA 1978, § 66-8-111(C). Therefore, Section 66-8-102(C) and Section 66-8-110 create a *per se* standard. It is not necessary for the state to prove that the defendant was driving impaired 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 NMSA 1978, Sections 66-8-102(A) and 66-8-102(C), *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.

This instruction pertains to NMSA 1978, Section 66-8-102(C)(1) (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 Section 66-8-102. The committee amended this instruction in 2016 to remove the brackets around the phrase, “and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle.” The committee determined that Section 66-8-102(C)(1) makes this an essential element in all cases and it should not be omitted from the instruction.

Section 66-8-110(C)(1) 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.” NMSA 1978, § 66-8-110(F) (2007).

Therefore, Sections 66-8-102(C) and 66-8-110 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).

For a discussion of alternative charges under Sections 66-8-102(A) and 66-8-102(C), *see* committee commentary for UJI 14-4501.

For a discussion of the meaning of the phrase “to drive,” *see* committee commentary for UJI 14-4501.

[As amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

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 NOTES

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.]

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 NOTES

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.]

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 vehicle[3];

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.

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

USE NOTES

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 No. 08-8300-008, effective March 21, 2008; as amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

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.

This instruction was amended in 2016 to remove the brackets around the phrase, "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle," because it was determined that Section 66-8-102(D)(1) makes this an essential element in all cases and it should not be omitted from the instruction.

[As amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

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.]

14-4513. Leaving the scene of an accident involving death or personal injury; essential elements.[1]

For you to find the defendant guilty of leaving the scene of an accident involving death or 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 drove a vehicle involved in an accident;

2. The defendant knew that there was an accident;

3. The accident resulted in [injury] [great bodily harm] [or] [death][3] to _____;

4. The defendant [failed to immediately stop at the scene or stop as close to the scene as possible without obstructing traffic more than necessary]

[or]

[failed to remain at the scene until defendant had:

(a) given defendant's name, address, and registration number to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][4];

(b) displayed, upon request, defendant's license to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][4]; and

(c) rendered reasonable assistance to any person injured in the accident, including by taking or making arrangements to take the injured person to a physician or hospital for medical treatment if it was apparent that such treatment was necessary or such treatment was requested by the injured person][4];

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

USE NOTES

1. For use when the defendant is charged under Subsections (B) or (D) of Section 66-7-201 NMSA 1978. For knowingly leaving the scene of an accident involving great bodily harm or death under Subsection (C) of Section 66-7-201, use UJI 14-4514 NMRA. When the defendant is charged with leaving the scene of an accident involving only damage to another vehicle driven or attended by someone else under Section 66-7-202 NMSA 1978, use UJI 14-4515 NMRA. If the defendant is charged with failing to give information or render aid following an accident involving personal injury or death or

damage to a vehicle driven or attended by another person under Section 66-7-203 NMSA 1978, use UJI 14-4516 NMRA.

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

3. Use only the applicable bracketed alternative established by the evidence. If there is dispute as to whether there is personal injury, which may establish a misdemeanor, or great bodily harm or death, which may establish a fourth-degree felony, separate instructions should be given or a special verdict form should be used to clarify the jury's finding. If great bodily harm is instructed, the definition of great bodily harm contained in UJI 14-131 NMRA should be given.

4. Use only the applicable bracketed alternative or alternatives established by the evidence.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — *See* NMSA 1978, § 66-7-201 (1989); *see also* NMSA 1978, § 66-7-202 (1978) (Accidents involving damage to vehicle); NMSA 1978, § 66-7-203 (1978) (Duty to give information and render aid); UJI 14-4514 NMRA (Knowingly leaving the scene of an accident involving great bodily harm or death); UJI 14-4515 NMRA (Leaving the scene of an accident involving damage to vehicle); UJI 14-4516 NMRA (Failing to give information and render aid).

This instruction is to be used when the defendant is charged with the misdemeanor or fourth-degree felony of leaving the scene of an accident involving personal injury or death under Subsections (B) or (D) of Section 66-7-201. If the defendant is charged with the third-degree felony of knowingly leaving the scene of an accident involving great bodily harm or death under Subsection (C) of the same statute, use UJI 14-4514.

New Mexico courts have not squarely decided whether, for purposes of Subsections (B) and (D) of Section 66-7-201, the defendant must have knowledge of an accident or of injury to another or whether some lesser awareness may suffice. *See State v. Hertzog*, 2020-NMCA-031, ¶ 9 n.2, 464 P.3d 1090 (questioning whether knowledge of the accident was a required element of the offense under Subsection (B) of Section 66-7-201 but deeming it unnecessary to decide based on the issues raised on appeal); *State v. Kuchan*, 1943-NMSC-025, ¶¶ 6-7, 47 N.M. 209, 139 P.2d 592 (declining to decide if, under a prior version of the statute, knowledge of the accident or knowledge that a person was struck or injured are elements of the crime).

However, the Committee believes that New Mexico would follow the "vast majority of courts construing these statutes" and require knowledge of the accident even in the absence of any explicit statutory language. *Pardo v. State*, 160 A.3d 1136, 1146-47 (Del. 2017); *State v. Sidway*, 431 A.2d 1237, 1239 (Vt. 1981) ("A majority of the states . . .have hit and run statutes, and many of these statutes, like ours, contain no express

requirement of knowledge on the part of the driver of the car that he was involved in an accident. Most courts, however, in interpreting the legislative intent behind these statutes, have taken the view that actual knowledge of the collision is an essential element of the offense.").

New Mexico law has long recognized that "[w]hen a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the [L]egislature intended to enact a no-fault or strict liability crime. Rather, we presume criminal intent as an essential element of the crime unless it is clear from the statute that the [L]egislature intended to omit the *mens rea* element." *State v. Ramos*, 2013-NMSC-031, ¶ 16, 305 P.3d 921 (internal quotation marks and citations omitted). Hence, New Mexico courts have repeatedly determined that knowledge of particular circumstances giving rise to or increasing criminal penalties is required even when the statutes are otherwise silent on the required mental state. *See id*. ¶ 26 (requiring a knowing violation of a protection order); *State v. Nozie*, 2009-NMSC-018, ¶ 30, 146 N.M. 142, 207 P.3d 1119 (deeming knowledge that the victim is a peace officer an element of battery on a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15, 17, 287 P.3d 372 (holding that knowledge that a victim is a health care worker is an essential element of the crime of battery on a health care worker).

In addition, the majority of other jurisdictions require knowledge of an accident or collision. *See* Marjorie A. Caner, Annotation, *Necessity and Sufficiency of Showing, in Criminal Prosecution under "Hit-And-Run" Statute, Accused's Knowledge of Accident, Injury, or Damage*, 26 A.L.R. 5th 1 (1995) ("Under most 'hit-and-run' statutes, knowledge of the occurrence of the collision, injury, or damage is a prerequisite to a conviction under the statute."); *accord* 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed.) (August 2020 Update); *but see People v. Manzo*, 144 P.3d 551, 556, 558-59 (Colo. 2006) (noting that imposing strict liability for leaving the scene of an accident with injury was constitutional despite the resulting felony conviction because the statute constitutes a public welfare offense and the penalties, including up to eight years imprisonment, "are small in comparison to many common law crimes"); *see also People v. Hernandez*, 250 P.3d 568, 573 (Colo. 2011) (*en banc*) (describing the Colorado hit-and-run statute as a "strict liability offense" (citing *Manzo*, 144 P.3d at 555, 558)).

States requiring knowledge of an accident or collision include jurisdictions with "hit-and-run statutes nearly identical to New Mexico's [statutes]." *Hertzog*, 2020-NMCA-031, ¶¶ 16-17 (deeming authority from Alaska, Arizona, and Texas persuasive because of similar statutory language); *see, e.g., Kimoktoak v. State*, 584 P.2d 25, 29-33 (Alaska 1978) (requiring knowledge of an accident and knowledge of injury or "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"); *State v. Porras*, 610 P.2d 1051, 1053-54 (Ariz. Ct. App. 1980) (requiring knowledge of an accident and knowledge of injury or "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"); *Mayer v. State*, 494 S.W.3d 844, 848-50 (Tex. Crim. App. 2016) (requiring knowledge of an accident). Given New Mexico's strong presumption against strict-liability offenses and

the consensus on this element elsewhere, the Committee believes New Mexico's statute requires knowledge of an accident as an element of the offense.

There is less agreement as to whether knowledge of injury is also required. *See Pardo*, 160 A.3d at 1146-47 (indicating courts "are divided as to whether knowledge of the collision alone is required to hold a driver accountable, or whether the prosecution must prove both the driver's knowledge of his involvement in a collision and that he knew death or injury resulted"); 7A Am. Jur. 2d *Automobiles* § 328 (Feb. 2022 Update) ("Criminal liability under a [hit-and-run] statute … may require proof that the motorist knew of the damage or injury, or, at least, proof that the motorist reasonably should have known, from the nature of the accident, of the resulting damage or injury, or that the circumstances were such that a reasonable person would have believed that an accident had occurred resulting in death, damage, or injury to another."). Accordingly, the Committee takes no position on whether a defendant's knowledge of injury or some lesser degree of knowledge is required and has not included such an element in the instruction at this time.

The statute does not define the term "accident" or the phrase "involved in an accident." However, the New Mexico Court of Appeals has explained that, "[b]ased on the plain meaning of the term, the history of Section 66-7-201, the purposes of the hit-and-run statute, and guidance from courts in other jurisdictions," the language "involved in an accident" has a broader meaning than "collision" and includes scenarios where someone jumps out of a moving vehicle, whether or not the vehicle collides with anything. *Hertzog*, 2020-NMCA-031, ¶¶ 7, 18.

The New Mexico Court of Appeals has also explained that "a driver may be convicted under Section 66-7-201(D) by failing to 'immediately stop the vehicle at the scene of the accident or as close thereto as possible' *or* failing to 'immediately return to' and 'remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203.'" *State v. Esparza*, 2020-NMCA-050, ¶ 17, 475 P.3d 815 (quoting § 66-7-201(A)). Because "[t]he failure to perform either of these duties is grounds for a violation," the Committee has crafted an instruction reflecting these alternative means of committing the crime. *Id*.

To further ensure consistency with *Esparza* and the language of Section 66-7-201, the Committee has included the defendant's failure to satisfy the requirements of Section 66-7-203 before leaving the scene as "an essential element when it is alleged that the driver unlawfully failed to remain at the scene of the accident." *Id*. ¶ 12. A defendant is not required to remain at the scene indefinitely under Section 66-7-201. Inclusion of this element thus ensures that criminal liability attaches only if the jury finds that the defendant has failed "to satisfy the requirements of Section 66-7-203 before leaving the scene." *Id*.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

14-4514. Knowingly leaving the scene of an accident involving great bodily harm or death; essential elements.[1]

For you to find the defendant guilty of leaving the scene of an accident involving death or 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 drove a vehicle involved in an accident;

2. The defendant knew that there was an accident;

3. The accident resulted in [great bodily harm] [or] [death][3] to _____;

4. [The defendant knew that the accident involved injury;][4]

5. The defendant [failed to immediately stop at the scene of an accident or stop as close to the scene as possible without obstructing traffic more than necessary]

[or]

[failed to remain at the scene of an accident until defendant had:

(a) given defendant's name, address, and registration number to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][5];

(b) displayed, upon request, defendant's license to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][5]; and

(c) rendered reasonable assistance to any person injured in the accident, including by taking or making arrangements to take the injured person to a physician or hospital for medical treatment if it was apparent that such treatment was necessary or such treatment was requested by the injured person][5];

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

USE NOTES

1. For use when the defendant is charged with the third-degree felony of knowingly leaving the scene of an accident involving great bodily harm or death under Section 66-7-201(C) NMSA 1978. If the defendant is charged with the misdemeanor or fourth-degree felony of leaving the scene of an accident involving personal injury or death under Subsections (B) and (D) of Section 66-7-201, use UJI 14-4513 NMRA. If the defendant is charged with leaving the scene of an accident involving only damage to another vehicle driven or attended by someone else under Section 66-7-202 NMSA

1978, use UJI 14-4515 NMRA. If the defendant is charged with failing to give information or render aid following an accident involving personal injury or death or damage to a vehicle driven or attended by another person under Section 66-7-203 NMSA 1978, use UJI 14-4516 NMRA.

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

3. Use only the applicable bracketed alternative established by the evidence. If great bodily harm is instructed, the definition of great bodily harm contained in UJI 14-131 NMRA should be given.

4. The status of this element is unclear under New Mexico law. *See* Committee commentary.

5. Use only the applicable bracketed alternative or alternatives established by the evidence.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — *See* NMSA 1978, § 66-7-201 (1989); *see also* NMSA 1978, § 66-7-202 (1978) (Accidents involving damage to vehicle); NMSA 1978, § 66-7-203 (1978) (Duty to give information and render aid); UJI 14-4513 NMRA (Leaving the scene of accident involving death or personal injury); UJI 14-4515 NMRA (Leaving the scene of an accident involving damage to vehicle); UJI 14-4516 NMRA (Failing to give information and render aid).

This instruction is to be used when the defendant is charged with the third-degree felony of knowingly leaving the scene of an accident involving great bodily harm or death under Subsection (C) of Section 66-7-201. If the defendant is charged with the misdemeanor or fourth degree felony of leaving the scene of an accident involving personal injury or death under Subsections (B) and (D) of the same statute, use UJI 14-4513.

New Mexico courts have not squarely determined whether defendants must have knowledge of the accident or any awareness of injury for the misdemeanor or fourth-degree felony versions of the offense of leaving the scene of an accident under Subsections (B) and (D) of Section 66-7-201. *See* UJI 14-4513 NMRA comm. cmt. Because the “vast majority of courts construing these statutes” have determined that knowledge of the accident is required even in the absence of any explicit statutory language, the Committee believes that knowledge of the accident is required as an element for all versions of leaving the scene of accident contained in Section 66-7-201. *Pardo v. State*, 160 A.3d 1136, 1146-47 (Del. 2017); *State v. Sidway*, 431 A.2d 1237, 1239 (Vt. 1981) (“A majority of the states … have hit and run statutes, and many of these statutes, like ours, contain no express requirement of knowledge on the part of the driver of the car that he was involved in an accident. Most courts, however, in

interpreting the legislative intent behind these statutes, have taken the view that actual knowledge of the collision is an essential element of the offense."); *see* UJI 14-4513 NMRA, comm. cmt. The Legislature's use of the term "knowingly" in Subsection (C) further necessitates that knowledge of the accident is required and therefore includes it as an element.

The Committee believes the Legislature's use of the term "knowingly" in Subsection (C) also requires the defendant to have some degree of knowledge that the accident involved injury. *See* Model Penal Code § 202(4) (2021) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears"); *see also State v. Granillo*, 2016-NMCA-094, ¶ 16, 384 P.3d 1121 (collecting authority relying upon the Model Penal Code and "look[ing] to the Model Penal Code to inform our definition of an intentional *mens rea*").

In *State v. Cumpton*, 2000-NMCA-033, 129 N.M. 47, 1 P.3d 429, the New Mexico Court of Appeals indicated that "the knowledge required of Defendant [under Subsection (C)] is not the degree of his crime, but the extent of the factual circumstances of the incident." *Id*. ¶¶ 14-15. This suggests some degree of knowledge of injury to another is required under Subsection (C), but it does not clarify if actual knowledge of the extent of the injury or some lesser awareness will suffice. *See, e.g.,* Barbara J. Van Arsdale et al., *Driver's knowledge or mental state after accident*, 7A Am. Jur. 2d Automobiles § 328 (August 2021 Update) ("Criminal liability under a [hit-and-run] statute . . . may require proof that the motorist knew of the damage or injury, or, at least, proof that the motorist reasonably should have known, from the nature of the accident, of the resulting damage or injury, or that the circumstances were such that a reasonable person would have believed that an accident had occurred resulting in death, damage, or injury to another."). Accordingly, the Committee includes knowledge of injury as an element for purposes of Subsection (C), but takes no position on whether actual knowledge of great bodily harm or death is required.

The statute does not define the term "accident" or the phrase "involved in an accident," but the New Mexico Court of Appeals has explained that the phrase "involved in an accident" has a broader meaning than "collision" and includes scenarios where someone jumps out of a moving vehicle, whether or not the vehicle collides with anything. *State v. Hertzog*, 2020-NMCA-031, ¶ 18, 464 P.3d 1090.

The New Mexico Court of Appeals has also explained that a driver may be convicted under Section 66-7-201 "by failing to 'immediately stop the vehicle at the scene of the accident or as close thereto as possible' *or* failing to 'immediately return to' and 'remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203.'" *State v. Esparza*, 2020-NMCA-050, ¶ 17, 475 P.3d 815 (quoting § 66-7-201). Because "[t]he failure to perform either of these duties is grounds for a violation," the Committee has crafted an instruction reflecting these alternative means of committing the crime. *Id*.

To further ensure consistency with *Esparza* and the language of Section 66-7-201, the Committee has included the defendant's failure to satisfy the requirements of Section 66-7-203 before leaving the scene as "an essential element when it is alleged that the driver unlawfully failed to remain at the scene of the accident." *Id*. ¶ 12. A defendant is not required to remain at the scene indefinitely under Section 66-7-201. Inclusion of this element thus ensures that criminal liability attaches only if the jury finds that the defendant has failed "to satisfy the requirements of Section 66-7-203 before leaving the scene." *Id*.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

14-4515. Leaving the scene of an accident involving damage to vehicle; essential elements.[1]

For you to find the defendant guilty of leaving the scene of an accident involving only damage to a 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 drove a vehicle involved in an accident;

2. The defendant knew that there was an accident;

3. The accident resulted in damage to a vehicle driven or attended by another person;

4. The defendant [failed to immediately stop at the scene or stop as close to the scene as possible without obstructing traffic more than necessary]

[or]

[failed to remain at the scene until defendant had:

(a) given defendant's name, address, and registration number to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][3]; and

(b) displayed, upon request, defendant's license to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with]];[3]

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

USE NOTES

1. For use when the defendant is charged with leaving the scene of an accident involving only damage to another vehicle driven or attended by someone else under Section 66-7-202 NMSA 1978. If the defendant is charged with the misdemeanor or fourth degree felony of leaving the scene of an accident involving personal injury or death under Subsections (B) or (D) of Section 66-7-201 NMSA 1978, use UJI 14-4513 NMRA. If the defendant is charged with the third degree felony of knowingly leaving the scene of an accident involving great bodily harm or death under Subsection (C) of Section 66-7-201, use UJI 14-4514 NMRA. If the defendant is charged with failing to give information or render aid following an accident involving personal injury or death or damage to a vehicle driven or attended by another person under Section 66-7-203 NMSA 1978, use UJI 14-4516 NMRA.

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

3. Use only the applicable bracketed alternative or alternatives established by the evidence.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — *See* NMSA 1978, § 66-7-202 (1978); *see also* NMSA 1978, § 66-7-201 (1989) (Accidents involving death or personal injury); NMSA 1978, § 66-7-203 (1978) (Duty to give information and render aid); UJI 14-4513 NMRA (Leaving the scene of an accident involving death or personal injury); UJI 14-4514 NMRA (Knowingly leaving the scene of an accident involving great bodily harm or death); UJI 14-4516 NMRA (Failing to give information and render aid).

New Mexico courts have not squarely decided whether, for purposes of Subsections (B) and (D) of Section 66-7-201, the defendant must have knowledge of an accident or of injury to another or whether some lesser awareness may suffice. *See State v. Hertzog*, 2020-NMCA-031, ¶ 9 n.2, 464 P.3d 1090 (questioning whether knowledge of the accident was a required element of the offense under Subsection (B) of 66-7-201 but deeming it unnecessary to decide based on the issues raised on appeal); *State v. Kuchan*, 1943-NMSC-025, ¶¶ 6-7, 47 N.M. 209, 139 P.2d 592 (declining to decide if, under a prior version of the statute, knowledge of the accident or knowledge that a person was struck or injured are elements of the crime).

However, the Committee believes that New Mexico would follow the “vast majority of courts construing these statutes” and require knowledge of the accident even in the absence of any explicit statutory language. *Pardo v. State*, 160 A.3d 1136, 1146-47 (Del. 2017); *State v. Sidway*, 431 A.2d 1237, 1239 (Vt. 1981) (“A majority of the states . . . have hit and run statutes, and many of these statutes, like ours, contain no express requirement of knowledge on the part of the driver of the car that he was involved in an accident. Most courts, however, in interpreting the legislative intent behind these statutes, have taken the view that actual knowledge of the collision is an essential element of the offense.”).

New Mexico law has long recognized that "[w]hen a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the [L]egislature intended to enact a no-fault or strict liability crime. Rather, we presume criminal intent as an essential element of the crime unless it is clear from the statute that the [L]egislature intended to omit the *mens rea* element." *State v. Ramos*, 2013-NMSC-031, ¶ 16, 305 P.3d 921 (internal quotation marks and citations omitted). Hence, New Mexico courts have repeatedly determined that knowledge of particular circumstances giving rise to or increasing criminal penalties is required even when the statutes are otherwise silent on the required mental state. *See id*. ¶ 26 (requiring a knowing violation of a protection order); *State v. Nozie*, 2009-NMSC-018, ¶ 30, 146 N.M. 142, 207 P.3d 1119 (deeming knowledge that the victim is a peace officer an element of battery on a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15, 17, 287 P.3d 372 (holding that knowledge that a victim is a health care worker is an essential element of the crime of battery on a health care worker).

In addition, the majority of other jurisdictions require knowledge of an accident or collision. *See* Marjorie A. Caner, Annotation, *Necessity and Sufficiency of Showing, in Criminal Prosecution under "Hit-And-Run" Statute, Accused's Knowledge of Accident, Injury, or Damage*, 26 A.L.R. 5th 1 (1995) ("Under most 'hit-and-run' statutes, knowledge of the occurrence of the collision, injury, or damage is a prerequisite to a conviction under the statute."); *accord* 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed.) (August 2020 Update); *but see People v. Manzo*, 144 P.3d 551, 556, 558-59 (Colo. 2006) (noting that imposing strict liability for leaving the scene of an accident with injury was constitutional despite the resulting felony conviction because the statute constitutes a public welfare offense and the penalties, including up to eight years imprisonment, "are small in comparison to many common law crimes"); *see also People v. Hernandez*, 250 P.3d 568, 573 (Colo. 2011) (*en banc*) (describing the Colorado hit-and-run statute as a "strict liability offense" (citing *Manzo*, 144 P.3d at 555, 558)).

States requiring knowledge of an accident or collision include jurisdictions with "hit-and-run statutes nearly identical to New Mexico's [statutes]." *Hertzog*, 2020-NMCA-031, ¶¶ 16-17 (deeming authority from Alaska, Arizona, and Texas persuasive because of similar statutory language); *see, e.g., Kimoktoak v. State*, 584 P.2d 25, 29-33 (Alaska 1978) (requiring knowledge of an accident and knowledge of injury or "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"); *State v. Porras*, 610 P.2d 1051, 1053-54 (Ariz. Ct. App. 1980) (requiring knowledge of an accident and knowledge of injury or "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"); *Mayer v. State*, 494 S.W.3d 844, 848-50 (Tex. Crim. App. 2016) (requiring knowledge of an accident). Given New Mexico's strong presumption against strict-liability offenses and the consensus on this element elsewhere, the Committee believes New Mexico's statute requires knowledge of an accident as an element of the offense.

There is less agreement as to whether knowledge of damage is also required. *See Pardo*, 160 A.3d at 1146-47 (indicating courts "are divided as to whether knowledge of the collision alone is required to hold a driver accountable, or whether the prosecution

must prove both the driver's knowledge of his involvement in a collision and that he knew death or injury resulted"); *State v. Johnson*, 630 A.2d 1059, 1064 (Conn. 1993) (concluding that knowledge of the accident was required but that knowledge of damage was not); 7A Am. Jur. 2d *Automobiles* § 328 (Feb. 2022 Update) ("Criminal liability under a [hit-and-run] statute … may require proof that the motorist knew of the damage or injury, or, at least, proof that the motorist reasonably should have known, from the nature of the accident, of the resulting damage or injury, or that the circumstances were such that a reasonable person would have believed that an accident had occurred resulting in death, damage, or injury to another."). Accordingly, the Committee takes no position on whether a defendant's knowledge of damage or some lesser degree of knowledge is required and has not included such an element in the instruction at this time.

The statute does not include a definition of the term "accident" or of the phrase "involved in an accident," but the New Mexico Court of Appeals has held that the phrase "involved in an accident" has a broader meaning than "collision." *Hertzog*, 2020-NMCA-031, ¶ 18 (interpreting identical language in Section 66-7-201). Nonetheless, the Committee does not believe that the phrase is so broad for purposes of Section 66-7-202 as to include situations where the only vehicle involved in the accident is the defendant's vehicle. Instead, the Committee believes that the statutory scheme requires involvement of another vehicle driven or attended by someone other than the defendant. *See e.g.*, § 66-7-202 (requiring a defendant to remain until the requirements of Section 66-7-203 are satisfied); § 66-7-203 (requiring a defendant to provide information to "the driver or occupant of or person attending any vehicle collided with"). The Committee has therefore specified in element 3 of this instruction that the vehicle damaged must be "driven or attended by another person."

In *State v. Esparza*, 2020-NMCA-050, 475 P.3d 815, the New Mexico Court of Appeals explained that a driver may be convicted under Section 66-7-201 "by failing to 'immediately stop the vehicle at the scene of the accident or as close thereto as possible' *or* failing to 'immediately return to' and 'remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203.'" *Id*. ¶ 17 (quoting § 66-7-201). Because Section 66-7-202 includes identical language, the Committee has crafted an instruction reflecting that "[t]he failure to perform either of these duties is grounds for a violation" under Section 66-7-202. *Id*.

To further ensure consistency with *Esparza* and the language of Section 66-7-202, the Committee has included the defendant's failure to satisfy the requirements of Section 66-7-203 before leaving the scene as "an essential element when it is alleged that the driver unlawfully failed to remain at the scene of the accident." *Id*. ¶ 12. A defendant is not required to remain at the scene indefinitely. Inclusion of this element thus ensures that criminal liability attaches only if the jury finds that the defendant has failed "to satisfy the requirements of Section 66-7-203 before leaving the scene." *Id*. However, because Section 66-7-202 applies to accidents that involve only damage to another person's vehicle and not accidents involving physical injury, the Committee does not believe that a defendant's duty to render reasonable assistance to an injured party

under Section 66-7-203 is applicable. Consequently, the Committee has removed that particular requirement of Section 66-7-203 from this instruction.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

14-4516. Failing to give information and render aid; essential elements.[1]

For you to find the defendant guilty of failing to give information or render aid [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 drove a vehicle involved in an accident involving [injury] [great bodily harm] [death] [or] [damage to any vehicle driven or attended by another person][3];

2. The defendant knew that there was an accident;

3. The defendant failed to:

(a) give defendant's name, address, and registration number to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][4];

(b) display, upon request, defendant's license to [the person struck] [the driver or occupant of the vehicle collided with] [or] [the person attending any vehicle collided with][4]; and

(c) render reasonable assistance to any person injured in the accident, including by taking or making arrangements to take the injured person to a physician or hospital for medical treatment if it was apparent that such treatment was necessary or such treatment was requested by the injured person][4];

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

USE NOTES

1. For use when the defendant is charged with failing to give information or render aid following an accident involving injury or damage to a vehicle driven or attended by another person under Section 66-7-203 NMSA 1978. If the defendant is charged with the misdemeanor or fourth-degree felony of leaving the scene of an accident involving personal injury or death under Subsections (B) or (D) of Section 66-7-201 NMSA 1978, use UJI 14-4513 NMRA. If the defendant is charged with the third-degree felony of knowingly leaving the scene of an accident involving great bodily harm or death under Subsection (C) of Section 66-7-201, use UJI 14-4514 NMRA. If the defendant is charged with leaving the scene of an accident involving only damage to another vehicle

driven or attended by someone else under Section 66-7-202 NMSA 1978, use UJI 14-4515 NMRA.

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

3. Use only the applicable bracketed alternative or alternatives established by the evidence. If there is dispute as to whether there is personal injury, which may establish a misdemeanor, or great bodily harm or death, which may establish a third or fourth-degree felony, separate instructions should be given or a special verdict form should be used to clarify the jury's finding. If great bodily harm is instructed, the definition of great bodily harm contained in UJI 14-131 NMRA should be given.

4. Use only the applicable bracketed alternative or alternatives established by the evidence.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — *See* NMSA 1978, § 66-7-203; *see also* NMSA 1978, § 66-7-201 (1989) (Accidents involving death or personal injury); NMSA 1978, § 66-7-202 (1978) (Accidents involving damage to vehicle); UJI 14-4513 NMRA (Leaving the scene of an accident involving death or personal injury); UJI 14-4514 NMRA (Knowingly leaving the scene of an accident involving great bodily harm or death); UJI 14-4515 NMRA (Leaving the scene of an accident involving damage to vehicle).

New Mexico courts have not squarely decided whether, for purposes of Subsections (B) and (D) of Section 66-7-201, the defendant must have knowledge of an accident or of injury to another or whether some lesser awareness may suffice. *See State v. Hertzog*, 2020-NMCA-031, ¶ 9 n.2, 464 P.3d 1090 (questioning whether knowledge of the accident was a required element of the offense under Subsection (B) of 66-7-201 but deeming it unnecessary to decide based on the issues raised on appeal); *State v. Kuchan*, 1943-NMSC-025, ¶¶ 6-7, 47 N.M. 209, 139 P.2d 592 (declining to decide if, under a prior version of the statute, knowledge of the accident or knowledge that a person was struck or injured are elements of the crime).

However, the Committee believes that New Mexico would follow the "vast majority of courts construing these statutes" and require knowledge of the accident even in the absence of any explicit statutory language. *Pardo v. State*, 160 A.3d 1136, 1146-47 (Del. 2017); *State v. Sidway*, 431 A.2d 1237, 1239 (Vt. 1981) ("A majority of the states . . . have hit and run statutes, and many of these statutes, like ours, contain no express requirement of knowledge on the part of the driver of the car that he was involved in an accident. Most courts, however, in interpreting the legislative intent behind these statutes, have taken the view that actual knowledge of the collision is an essential element of the offense.").

New Mexico law has long recognized that "[w]hen a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the [L]egislature intended to enact a no-fault or strict liability crime. Rather, we presume criminal intent as an essential element of the crime unless it is clear from the statute that the [L]egislature intended to omit the *mens rea* element." *State v. Ramos*, 2013-NMSC-031, ¶ 16, 305 P.3d 921 (internal quotation marks and citations omitted). Hence, New Mexico courts have repeatedly determined that knowledge of particular circumstances giving rise to or increasing criminal penalties is required even when the statutes are otherwise silent on the required mental state. *See id*. ¶ 26 (requiring a knowing violation of a protection order); *State v. Nozie*, 2009-NMSC-018, ¶ 30, 146 N.M. 142, 207 P.3d 1119 (deeming knowledge that the victim is a peace officer an element of battery on a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15, 17, 287 P.3d 372 (holding that knowledge that a victim is a health care worker is an essential element of the crime of battery on a health care worker).

In addition, the majority of other jurisdictions require knowledge of an accident or collision. *See* Marjorie A. Caner, Annotation, *Necessity and Sufficiency of Showing, in Criminal Prosecution under "Hit-And-Run" Statute, Accused's Knowledge of Accident, Injury, or Damage*, 26 A.L.R. 5th 1 (1995) ("Under most 'hit-and-run' statutes, knowledge of the occurrence of the collision, injury, or damage is a prerequisite to a conviction under the statute."); *accord* 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed.) (August 2020 Update); *but see People v. Manzo*, 144 P.3d 551, 556, 558-59 (Colo. 2006) (noting that imposing strict liability for leaving the scene of an accident with injury was constitutional despite the resulting felony conviction because the statute constitutes a public welfare offense and the penalties, including up to eight years imprisonment, "are small in comparison to many common law crimes"); *see also People v. Hernandez*, 250 P.3d 568, 573 (Colo. 2011) (*en banc*) (describing the Colorado hit-and-run statute as a "strict liability offense" (citing *Manzo*, 144 P.3d at 555, 558)).

States requiring knowledge of an accident or collision include jurisdictions with "hit-and-run statutes nearly identical to New Mexico's [statutes]." *Hertzog*, 2020-NMCA-031, ¶¶ 16-17 (deeming authority from Alaska, Arizona, and Texas persuasive because of similar statutory language); *see, e.g., Kimoktoak v. State*, 584 P.2d 25, 29-33 (Alaska 1978) (requiring knowledge of an accident and knowledge of injury or "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"); *State v. Porras*, 610 P.2d 1051, 1053-54 (Ariz. Ct. App. 1980) (requiring knowledge of an accident and knowledge of injury or "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"); *Mayer v. State*, 494 S.W.3d 844, 848-50 (Tex. Crim. App. 2016) (requiring knowledge of an accident). Given New Mexico's strong presumption against strict-liability offenses and the consensus on this element elsewhere, the Committee believes New Mexico's statute requires knowledge of an accident as an element of the offense.

There is less agreement as to whether knowledge of injury is also required. *See Pardo*, 160 A.3d at 1146-47 (indicating courts "are divided as to whether knowledge of the collision alone is required to hold a driver accountable, or whether the prosecution must

prove both the driver's knowledge of his involvement in a collision and that he knew death or injury resulted"); 7A Am. Jur. 2d *Automobiles* § 328 (Feb. 2022 Update) ("Criminal liability under a [hit-and-run] statute … may require proof that the motorist knew of the damage or injury, or, at least, proof that the motorist reasonably should have known, from the nature of the accident, of the resulting damage or injury, or that the circumstances were such that a reasonable person would have believed that an accident had occurred resulting in death, damage, or injury to another."). Accordingly, the Committee takes no position on whether a defendant's knowledge of injury or some lesser degree of knowledge is required and has not included such an element in the instruction at this time.

The statute does not include a definition of the term "accident" or of the phrase "involved in an accident," but the New Mexico Court of Appeals has held that the phrase "involved in an accident" has a broader meaning than "collision." *Hertzog*, 2020-NMCA-031, ¶ 18 (interpreting identical language in Section 66-7-201). Nonetheless, the Committee does not believe that the phrase is so broad for purposes of Section 66-7-203 as to include situations where the only vehicle involved in the accident is the defendant's vehicle. Instead, the Committee believes that the statutory scheme requires involvement of another vehicle driven or attended by someone other than the defendant. *See e.g.*, § 66-7-203 (requiring a defendant to provide information to "the driver or occupant of or person attending any vehicle collided with"). The Committee has therefore specified in element 1 of this instruction that the vehicle damaged must be "driven or attended by another person."

[Adopted by Supreme Court Order No. S-1-RCR-2023-00029, effective for all cases pending or filed on or after December 31, 2023.]

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 NOTES

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).

14-5002. Withdrawn.

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 NOTES

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 [withdrawn].

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

14-5007. Evidence limited to one defendant.[1]

You are [again][2] instructed that you must not consider evidence about _____ (*describe evidence*) against _____ (*name of defendant*).

You may consider this evidence only against _____ (*name of defendant*).

Your verdict as to each defendant must be reached as if each defendant were being tried separately.

USE NOTES

1. Upon request, the court must instruct the jury of the limited scope of evidence admitted only as to one co-defendant but not the other co-defendant when the co-defendants are tried jointly.

2. Use only if jury was admonished at the time the evidence was admitted.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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."

In general, evidence that is properly "admissible for one purpose is not to be excluded because it is inadmissible for another purpose." *State v. Wyman*, 1981-NMCA-087, 96 N.M. 558, 632 P.2d 1196; *see also DeMatteo v. Simon*, 1991-NMCA-027, ¶ 3, 112 N.M. 112, 812 P.2d 361. "Evidence inadmissible for one purpose may be admissible for other purposes under a different rule of evidence." *State v. Litteral*, 1990-NMSC-059, ¶ 10, 110 N.M. 138, 793 P.2d 268. "Evidence can be admitted for a limited purpose and, once so limited, it cannot be relied on for another purpose." *Attorney Gen. of State of N.M. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 9, 101 N.M. 549, 685 P.2d 957.

Even when it is shown that evidence of other acts has a legitimate alternative use that does not depend upon an inference of propensity, the proponent must establish that under Rule 11-403 NMRA, the probative value of the evidence used for a legitimate, non-propensity purpose outweighs any unfair prejudice to the defendant. *See State v. Ruiz*, 1995-NMCA-007, ¶ 9, 119 N.M. 515, 892 P.2d 962; *see also State v. Kerby*, 2005-NMCA-106, ¶ 25, 138 N.M. 232, 118 P.3d 740, *aff'd*, 2007-NMSC-014, ¶ 25, 141 N.M. 413, 156 P.3d 704.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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.

14-5009. Evidence admitted for a limited purpose.[1]

You are [again][2] instructed that you must not consider evidence about _____ (*describe evidence*) for any purpose other than _____ (*proof*).

USE NOTES

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* UJIs 14-5010, 14-5022, 14-5028, 14-5034, and 14-5035 NMRA.

2. Use only if jury was admonished at the time the evidence was admitted.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This instruction is required by Rule 11-105 NMRA. *See also* the commentary to UJI 14-5007 NMRA.

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*, 1974-NMCA-150, ¶ 21, 87 N.M. 155, 530 P.2d 949 (testimony inadmissible to establish the truth of a blackmail defense did not render it inadmissible for the purpose of rebutting the implied charge of recent fabrication).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5010. Statements made by defendant during psychiatric examination or treatment.

Statements made by the defendant in the course of a mental examination or treatment may be considered only for the limited purpose of showing the information upon which an expert based the expert's opinion about the defendant's mental capacity.

USE NOTES

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.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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, *see, e.g., State v. Milton*, 1974-NMCA-094, 86 N.M. 639, 526 P.2d 436, the statement will be admitted under the restrictions of Rule 5-602. In construing a similar federal statute, 18 U.S.C. § 4244, the Tenth Circuit has noted that "such statements could be prejudicial. The 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).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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).

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 NOTES

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.

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 NOTES

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 NOTES

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.

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 NOTES

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.

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 NOTES

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).

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 NOTES

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.

14-5022. Impeachment of defendant; wrongs, acts or conviction of a crime.[1]

You may consider whether the defendant [was convicted of the crime[s] of _____[2]] [committed the act of _____[3]] for the purpose of determining whether the defendant told the truth when the defendant testified in this case and for that purpose only.

USE NOTES

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 NMRA may not be included in this instruction.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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 NOTES

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.

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 NOTES

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 NOTES

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."

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 NOTES

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).

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 NOTES

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.

14-5028. Evidence of other wrongs or offenses.[1]

You may consider whether the defendant committed[2] [_____[3]] [_____[4]] other than the crime charged in this case 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]] and for that purpose only.

USE NOTES

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.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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).

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 NOTES

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 [withdrawn] and Rule 11-107 NMRA. The adoption of this instruction consequently supersedes the holding in *State v. Vigil*, supra.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

14-5034. Admission or confession used for impeachment.[1]

You may consider statements the defendant made to the authorities during the investigation of the case for the purpose of determining whether the defendant told the truth when the defendant testified in this case and for that purpose only.

USE NOTES

1. Upon request, this instruction must be given when the state uses an otherwise inadmissible statement for impeachment.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

14-5035. Impeachment of defendant by inadmissible evidence.[1]

You may consider evidence that _____ (*describe circumstances*)] for the purpose of determining whether the defendant told the truth when the defendant testified in this case and for that purpose only.

USE NOTES

1. Upon request, this instruction must be given when the state uses illegally seized evidence to impeach the defendant.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 NOTES

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).

Part C
Substantive Use of Admissions and Confessions

14-5040. Use of voluntary confession or admission.

Before you consider a statement made by the defendant 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. [In determining whether the statement was induced by a promise or threat, you may consider the defendant's mental state.][2]

USE NOTES

1. 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.

2. Instruct with bracketed language only if at issue.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 (1964); *State v. Martinez*, 1924-NMSC-075, ¶¶ 18-21, 30 N.M. 178, 230 P. 379; *see also* Rule 11-104(C) NMRA (requiring, as a "preliminary question," a hearing outside presence of jury to determine admissibility of a confession). If the court finds that the statement is voluntary (and also was given after compliance with *Miranda v. Arizona*, 384 U.S. 436 (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*, 1971-NMCA-018, ¶¶ 16-21, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955 (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 (1972). Under New Mexico law, failure to submit the voluntariness question is harmless error if the defendant substantially admits the facts that are contained in the confession. *State v. Barnett*, 1973-NMSC-056, ¶¶ 16-17, 85 N.M. 301, 512 P.2d 61, *rev'g* 1972-NMCA-159, 84 N.M. 455, 504 P.2d 1088.

The ultimate question is whether the defendant's "will has been overborne" and the defendant's "capacity for self-determination critically impaired." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). While involuntariness requires police coercion, this instruction was updated to include the jury's consideration of the defendant's mental capacity in its assessment of voluntariness. The bracketed language is applicable in cases in which otherwise common and non-coercive police interrogation tactics may

have unduly coercive effects due to a particular defendant's vulnerabilities. *See State v. LaCouture*, 2009-NMCA-071, ¶ 11, 146 N.M. 649, 213 P.3d 799 (the totality of the circumstances for voluntariness includes "the physical and mental state of the Defendant as a context affecting what might be coercive and overreaching"); *State v. Martinez*, 1999-NMSC-018, ¶ 18, 127 N.M. 207, 979 P.2d 718 (adopting totality of circumstances factors from NMSA 1978, Section 32A-2-14(E) (2009), for analyzing adult confessions, which includes the mental and physical condition of the defendant). *Accord State v. Aguilar*, 1988-NMSC-004, ¶¶ 10-13, 106 N.M. 798, 751 P.2d 178 (finding a confession involuntary due to evidence of subnormal intelligence and mental illness, causing defendant's inability to understand the implications of interrogation techniques).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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).

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 NOTES

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.

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 NOTES

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).

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 NOTES

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.

14-5062. Lost, destroyed, or uncollected evidence; adverse inference permitted.[1]

If the State fails to produce evidence [under its control][2] because the State [lost][3] [or] [destroyed] [or] [inadequately preserved] [or] [failed to gather or collect] that evidence, then you may, but are not required to, infer that the evidence would be unfavorable to the State.

USE NOTES

1. For use upon a court's finding that the State breached a duty to preserve material evidence and the deprivation of evidence was prejudicial to the defendant, or upon a court's finding that the State acted with gross negligence in failing to collect material evidence.

2. Use when the State failed to preserve evidence.

3. Use applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — This instruction may be given as a sanction against the State in two types of cases: first, when the trial court determines that the State collected but improperly failed to preserve evidence under *State v. Chouinard*, 1981-NMSC-096, ¶ 16, 96 N.M. 658, 634 P.2d 680; or second, when the trial court determines that the State improperly failed to collect evidence under *State v. Ware*, 1994-NMSC-091, ¶¶ 25-26, 118 N.M. 319, 881 P.2d 679.

In the first category of cases, involving failure to preserve evidence, the three-part test in *Chouinard*, 1981-NMSC-096, ¶ 16, applies. In such cases, deprivation of evidence is

reversible error when: "1) The State either breached some duty or intentionally deprived the defendant of evidence; 2) The improperly 'suppressed' evidence [was] . . . material; and 3) The suppression of this evidence prejudiced the defendant." *Id.* (quoting *State v. Lovato*, 1980-NMCA-126, ¶ 6, 94 N.M. 780, 617 P.2d 169). If the trial court finds that those three factors are satisfied and the loss of evidence is known prior to trial, then "there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import." *Chouinard*, 1981-NMSC-096, ¶ 23. If the trial court chooses the latter alternative, then this instruction may be given.

If the trial court chooses an adverse inference instruction, this instruction may be given—alone, modified to ensure "full disclosure of the loss and its relevance and import," or as a non-exclusive portion of a broader remedy to assure "justice is done, both to the defendant and to the public." *Id.* ¶ 23; *see Scoggins v. State*, 1990-NMSC-103, ¶ 9, 111 N.M. 122, 802 P.2d 631 (emphasizing that *Chouinard* grants the trial court broad discretion to choose remedy on a case-by-case basis); *State v. Hill*, 2008-NMCA-117, ¶ 15, 192 P.3d 770 (noting that *Chouinard* may be applied "in a flexible manner"); *State v. Sanchez*, 1999-NMCA-004, ¶ 14, 126 N.M. 559, 972 P.2d 1150 (concluding that the trial court "always has the discretion to limit the ability of the state to take unfair advantage of evidence destroyed"); *cf. Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶¶ 53-54, 127 N.M. 729, 987 P.2d 386 (holding that an adverse inference instruction is an appropriate lesser remedy for evidence spoliation in civil cases), *overruled in part on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *Restaurant Management Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 11, 18, 127 N.M. 708, 986 P.2d 504 (recognizing that the court has inherent power to give an adverse inference instruction as one possible sanction for evidence spoliation).

In the second category of cases, involving failure to collect evidence, the two-part test in *Ware*, 1994-NMSC-091, ¶¶ 25-26, applies. In such cases, the first question is whether the evidence is material to the defense. "Evidence is material only if there is a reasonable probability that, had the evidence been available to the defense, the result of the proceeding would have been different." *Id.* ¶ 25 (internal quotation marks, citation, and alteration omitted). If the trial court finds that the evidence is material, then it considers the conduct of the investigating officers. *Id.* ¶ 26. If the investigating officers acted in bad faith, then the trial court may order the evidence suppressed. *Id.* However, absent a finding of bad faith, suppression of the evidence is not appropriate. *Id.* Instead, if the investigating officers "were grossly negligent in failing to gather the evidence—for example, by acting directly contrary to standard police investigatory procedure—then the trial court may instruct the jury that it can infer that the material evidence not gathered from the crime scene would be unfavorable to the State." *Id.* Mere negligence may be addressed through cross-examination and argument, but does not warrant an adverse inference instruction. *Id.* Thus, in the context of failure to collect evidence, this instruction may only be given when the trial court determines that investigating officers acted with gross negligence.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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";

"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 disorder normally 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, and the term does not mean developmental disability.

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 NOTES

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; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Initially, there is a presumption that the defendant is sane. *See State v. Dorsey*, 1979-NMSC-097, ¶ 3, 93 N.M. 607, 603 P.2d 717 (relied on in *State v. Martinez*, 2021-NMSC-012, ¶ 37, 483 P.3d 590). Once the defendant introduces some competent evidence to support the defense of insanity, "the burden [of proof] then shifts to the [s]tate to prove beyond a reasonable doubt that [the] defendant was sane at the time the act was committed." *Martinez*, 2021-NMSC-012, ¶ 37 (quoting *State v. Lopez*, 1978-NMSC-060, ¶ 4, 91 N.M. 779, 581 P.2d 872); *State v. Wilson*, 1973-NMSC-093, ¶¶ 17-19, 85 N.M. 552, 514 P.2d 603. However, the state is not required to present any evidence on the issue, and it may instead simply rely on the presumption. *Martinez*, 2021-NSMC-012, ¶ 37; *Wilson*, 1973-NMSC-093, ¶ 19; *see generally*, W.E. Shipley, Annotation, *Modern Status of Rules As To Burden and*

Sufficiency of Proof of Mental Irresponsibility In Criminal Case, 17 A.L.R.3d 146 § 9 (1968).

The trial court must determine, as a matter of law, whether a reasonable doubt exists as to the accused's sanity. *State v. Chavez*, 1975-NMCA-119, ¶ 18, 88 N.M. 451, 541 P.2d 631. If the trial court determines the evidence is sufficient to raise an issue as to the defendant's sanity, it must instruct the jury on the issue of sanity. *See id.*

"[T]he jury should be instructed to consider first whether the defendant is guilty of the crime charged," and if the defendant is found guilty, then the jury should "determine whether the defendant is not guilty by reason of insanity." *State v. James*, 1971-NMCA-156, ¶ 18, 83 N.M. 263, 490 P.2d 1236. However, it may not be reversible error if a jury considers the defendant's insanity before considering the elements of the offense. *State v. Victorian*, 1973-NMSC-008, ¶ 12, 84 N.M. 491, 505 P.2d 436. If the jury is not persuaded that the defendant committed the crime beyond a reasonable doubt, the defendant is entitled to a verdict of not guilty. UJI 14-5060 NMRA.

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. *See James*, 1971-NMCA-156, ¶¶ 10-11.

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 the jury to decide whether to afford greater weight to expert testimony. "The purpose of psychiatry is to diagnose and cure mental illnesses, but not to assess blame for acts resulting from these illnesses. The law seeks to find facts and assess accountability." *Dorsey*, 1979-NMSC-097, ¶ 9. Psychiatric testimony, however, is relevant evidence in determining accountability. *Id.*

Rule 5-602(A)(2) NMRA 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 because the consequences are not relevant to the jury's consideration. *State v. Neely*, 1991-NMSC-087, ¶ 29, 112 N.M. 702, 819 P.2d 249; *see also* UJI 14-6007 NMRA.

[As amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

14-5102. Withdrawn.

14-5103. Withdrawn.

14-5104. Determination of present competency.[1]

An issue in this case is the defendant's competency to stand trial. The defendant has the burden of proving by the greater weight of the evidence that the defendant is mentally incompetent to be tried.

[Before considering whether the defendant committed the crime charged, you must make a determination of the defendant's competency to stand trial.][2] A person is competent to stand trial if that person has:

1. a sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding;

2. a rational as well as factual understanding of the proceedings against the person;

3. the capacity to assist in the person's own defense; and

4. the capacity to comprehend the reasons for punishment.

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 foreperson 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 NOTES

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.

[As amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 31-9-1 (1993).

"A person is competent to stand trial when he or she has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding, a rational as well as factual understanding of the proceedings against him [or her], and the capacity to assist in his own defense and to comprehend the reasons for punishment." *State v. Linares*, 2017-NMSC-014, ¶ 34, 393 P.3d 691 (quoting *State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131 (brackets, internal

quotation marks, and footnote omitted). This jury instruction was updated in 2022 to reflect the controlling standard for competency set forth in Linares.

"The law has long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *Rotherham*, 1996-NMSC-048, ¶ 13; *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). All participants in a criminal proceeding—including the court acting sua sponte—have a shared duty to inquire into the defendant's competency whenever circumstances suggest that the defendant, "though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Drope*, 420 U.S. at 171 (internal quotation marks and citation omitted); § 31-9-1.

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 NMRA is not limited to incompetency by reason of mental illness. *See Jackson v. Indiana*, 406 U.S. 715 (1972) (recognizing where a developmentally disabled, deaf, non-verbal person who can neither read nor write and who is unable to communicate with the person's attorney may be incompetent to stand trial even though not suffering from any mental disease).

The issue of a defendant's competency to stand trial may be raised at any time during a criminal proceeding. *See* § 31-9-1 ("Whenever it appears that there is a question as to the defendant's competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined."). If a motion for competency evaluation is filed after the start of a trial by jury in district court, the court shall instruct the jury under UJI 14-5104 to determine the defendant's competency to stand trial. Rule 5-602.1(I)(2) NMRA ("If the motion for a competency evaluation was filed after the start of a trial by jury, the court shall submit the question to the jury at the close of evidence."). Rules 5-602.1, 6-507.1, 7-507.1, and 8-507.1 NMRA govern the procedure for resolving a question of competency.

The defendant has the burden of proving by a preponderance or greater weight of the evidence that the defendant is not competent to stand trial. *State v. Santillanes*, 1978-NMCA-051, ¶ 6, 91 N.M. 721, 580 P.2d 489; Rule 5-601.2(I)(2) NMRA ("The jury shall decide by a preponderance of the evidence if the defendant is not competent to stand trial before considering the defendant's guilt or innocence beyond a reasonable doubt.").

[As amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Part B
Intoxication

14-5105. Withdrawn.

14-5106. Involuntary intoxication; defined.[1]

An issue you must consider in this case is whether the defendant was intoxicated and if so, whether 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 NOTES

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 the defendant was involuntarily intoxicated, then the defendant nonetheless [knew what (he) (she) was doing or understood the consequences of (his) (her) act][3]

[or]

[knew that (his) (her) act was wrong]

[or]

[could have prevented (himself) (herself) from committing the act].

2. Use only the applicable source of the intoxication.

3. Use only the applicable alternative or alternatives.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Involuntary intoxication may result from the mistaken use of a liquor or narcotic substance. *See generally* Perkins, *Criminal Law* 894 (2d ed. 1969). "[I]nvoluntary intoxication is a defense only when it negates the intent element of a crime." *State v. Gurule*, 2011-NMCA-042, ¶ 17, 149 N.M. 599, 252 P.3d 823. Involuntary intoxication is not available as a defense to strict liability crimes, which, by definition, do not require criminal intent. *Id*. ¶ 18. Involuntary intoxication may serve as a

defense "only . . . to the extent that it impairs the ability to form intent." *Id*. (internal quotation marks and citation omitted). In *State v. Brown*, 1996-NMSC-073, ¶ 27, 122 N.M. 724, 931 P.2d 69, the Supreme Court extended the partial defense of voluntary intoxication to depraved mind murder. Our appellate courts have not yet considered whether involuntary intoxication would also be a partial defense to depraved mind murder. *See* UJIs 14-5110, 14-5111 NMRA.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Part C
Inability to Form Intent

14-5110. Inability to form a deliberate intention to take away the life of another or to know conduct was greatly dangerous to life.[1]

An issue you must consider in this case is whether the defendant was [intoxicated from use of (alcohol) (drugs)][2] [or] [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 intent to take away the life of another][2] [or] [subjective knowledge that the defendant's conduct was greatly dangerous to the lives of others].

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][2] [or] [knowing that the defendant's conduct was greatly dangerous to the lives of others]. If you have a reasonable doubt as to whether the defendant was capable of [forming a deliberate intent to take away the life of another][2] [or] [knowing the dangerousness of the defendant's conduct], you must find the defendant not guilty of a first-degree murder by [deliberate killing][2] [or] [an act greatly dangerous to life].

USE NOTES

1. This instruction may be given only for a willful and deliberate murder or a depraved mind murder and should immediately follow UJI 14-201 NMRA 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 NMRA. 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] [or] [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] [or] [knowing the dangerousness of the defendant's conduct]."

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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Willful and deliberate first-degree murder requires "a *deliberate* intent, which by definition involves careful thought and the weighing of the consideration for and against a proposed course of action, and does not describe every intentional killing." *State v. Balderama*, 2004-NMSC-008, ¶ 29, 135 N.M. 329, 88 P.3d 845. Voluntary alcoholic and drug intoxication, *see State v. Nelson*, 1971-NMCA-152, 83 N.M. 269, 490 P.2d 1242, and mental disorders, *see State v. Padilla*, 1959-NMSC-100, 66 N.M. 289, 347 P.2d 312, may negate this intent. The defense of inability to form a "specific intent" is analogous to the defense of insanity. *State v. Holden*, 1973-NMCA-092, ¶ 8, 85 N.M. 397, 512 P.2d 970.

In *State v. Brown*, the Supreme Court recognized that depraved mind murder's "specific *mens rea* element of 'subjective knowledge'" may be negated by voluntary intoxication. 1996-NMSC-073, ¶ 27, 122 N.M. 724, 931 P.2d 69. Ultimately, the Supreme Court held that "evidence of intoxication [is] relevant to the formation of the heightened mens rea element of depraved mind murder." *Id*. More recent case law has affirmed that the defense of voluntary intoxication applies to specific-intent crimes such as first-degree murder. *State v. Arrendondo*, 2012-NMSC-013, ¶ 42, 278 P.3d 517.

The defense of voluntary intoxication is not available for felony murder, second-degree murder, or general intent crimes. *See State v. Campos*, 1996-NMSC-043, ¶¶ 39, 46, 122 N.M. 148, 921 P.2d 1266. For clarity, UJI 14-5105 NMRA (voluntary intoxication) [withdrawn], which previously limited the applicability of the voluntary intoxication defense, was withdrawn in 2019. UJI 14-5110 NMRA 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 or for depraved mind murder where intoxication can negate the subjective knowledge that the defendant's conduct was greatly dangerous to the lives of others. For non-homicide crimes, UJI 14-5111 is used where intoxication can negate the element of intent to do a further act or achieve a further consequence.

[As amended by Supreme Court Order No.19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5111. Inability to form intent to do a further act or achieve a further consequence.[1]

An issue you must consider in this case is whether 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 NOTES

1. This instruction is used for the intoxication or mental disease defense for a crime that 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 NMRA. 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 14-5101 NMRA. 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; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This instruction embodies the defense of intoxication (involuntary or voluntary) or mental disease short of "complete insanity," which will

negate a specific intent in a nonhomicide crime. *See, e.g., State v. Ortega*, 1968-NMCA-092, ¶ 9, 79 N.M. 707, 448 P.2d 813 ("[S]pecific intent to commit a felony or theft is an essential element of the state's case to be proved beyond a reasonable doubt."). This instruction may be used only for nonhomicide crimes containing an element of intent to do a further act or achieve a further consequence.

For clarity, UJI 14-5105 NMRA (voluntary intoxication) [withdrawn] has been withdrawn. *See* committee commentary to UJI 14-5110 NMRA. "Voluntary intoxication provides a defense to specific-intent crimes 'where the intoxication is to such a degree as would negate the possibility of the necessary intent.'" *State v. Hernandez*, 2003-NMCA-131, ¶ 20, 134 N.M. 510, 79 P.3d 1118 (internal quotation marks and citation omitted) (holding that the defendant was not entitled to a voluntary intoxication instruction for robbery where no evidence was presented that the defendant was intoxicated, much less to the point that he would be unable to form the mental state necessary to commit a specific-intent crime).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Part D
Mistake

14-5120. Ignorance or mistake of fact.[1]

An issue in this case is whether the defendant believed that _____[2]. The burden is on the state to prove beyond a reasonable doubt that the defendant did not have an honest and reasonable belief in the existence of those facts at the time of the alleged conduct. If you have a reasonable doubt as to whether the defendant's alleged conduct resulted from a reasonable belief in those facts, you must find the defendant not guilty.

USE NOTES

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 what the defendant claims he or she believed.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. —

When to give

A jury should be instructed on mistake of fact as a defense "when it negates the existence of the mental state essential to the crime charged." *State v. Contreras*, 2007-NMCA-119, ¶ 15, 142 N.M. 518, 167 P.3d 966. The jury instructions should be considered in their entirety to determine whether they adequately instruct on the requisite mental state. *Id*.

"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*, 1981-NMSC-047, ¶ 9, 96 N.M. 61, 628 P.2d 306 (upholding the district court's refusal to give the defendant's requested mistake of fact jury instruction because it was duplicative). *See also State v. Nozie*, 2009-NMSC-018, ¶ 36, 146 N.M. 142, 207 P.3d 1119, distinguishing *Venegas*, 1981-NMSC-047, ¶ 9 (explaining that it was unnecessary to decide whether a mistake of fact instruction, when given along with a proper instruction on the essential elements of the offense of aggravated battery upon a peace officer, would have been cumulative or superfluous because the jury had not been instructed that knowledge of the victim's status as a peace officer was an essential element of the offense). *See also* UJI 14-2211 NMRA.

Essential Element – Examples

Where the defendant was charged with aggravated battery upon a peace officer, an offense requiring knowledge of the victim's identity as a peace officer, the defendant was entitled to a mistake of fact instruction where a reasonable jury could have found that the defendant was in an intoxicated and disoriented state, and in such a state, he believed that the individual he attacked was the private security guard who had followed him from the supermarket parking lot. *Nozie*, 2009-NMSC-018, ¶¶ 34-35. (Note: UJI 14-2213 and UJI 14-2214 were amended in 2010 to be consistent with *Nozie* and add knowledge as an essential element to the offense of aggravated battery upon a peace officer.)

In a conviction for breaking and entering, where lack of permission is an essential element, the defendant was entitled to a mistake of fact instruction because sufficient evidence was presented that the defendant believed he had permission to enter the room: the defendant was very intoxicated, he paid for a room, and it could be reasonably inferred that he used the room as one that he paid for. *Contreras*, 2007-NMCA-119, ¶¶ 9, 11-12, 18.

Fundamental Error

In *State v. Bunce*, the Supreme Court held that if the defendant had offered a correct mistake of fact instruction as a defense to embezzlement, the district court's refusal to instruct the jury would have been in error. 1993-NMSC-057, ¶ 13, 116 N.M. 284, 861 P.2d 965. The Supreme Court further concluded that the defendant's offered mistake of fact instruction was inadequate because the jury could have convicted the defendant based on solely innocent conduct and reversed the defendant's conviction on the basis of fundamental error. *Id*. ¶¶ 14-15 (explaining the defendant's offered instruction would

have required the jury to find the defendant not guilty if the defendant believed only that he was owed money, but that the pertinent question was not whether the defendant believed that he was owed money, "but [instead] whether the payments [received by the defendant] were intended to apply to the balance due or whether those payments were intended for some other purpose, such as the purchase and installation of materials").

[As amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

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 NOTES

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.

Part E
Duress

14-5130. Duress; nonhomicide crimes.[1]

An issue in this case is whether the defendant was forced to _____[2] [under threats] [or] [out of necessity][3]. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under reasonable fear. A defendant acted under a reasonable fear when:

1. The defendant feared immediate great bodily harm to himself or another person if he did not commit the crime;

[2. The defendant did not find himself in a position that compelled him to violate the law due to his own recklessness;

3. The defendant's illegal conduct was directly caused by the threat of harm][4]; and

4. A reasonable person would have acted in the same way under the circumstances.

USE NOTES

1. For use when duress is a defense to any crime except homicide or a crime requiring an intent to kill. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act under duress."

2. Describe acts of defendant constituting the offense.

3. Choose applicable alternative or alternatives. *See* committee commentary.

4. Bracketed elements apply only when duress is raised as a defense to a strict liability crime.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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*, 1971-NMSC-082, 83 N.M. 18, 487 P.2d 1088 was covered by the requirement that the duress must be present, imminent and impending "and of such nature as to induce a well-grounded apprehension of death or serious bodily injury." *See Esquibel v. State*, 1978-NMSC-024, ¶ 2, 91 N.M. 498, 576 P.2d 1129 *overruled on other grounds by State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

"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*, 1991-NMSC-096, ¶ 4, 112 N.M. 766, 819 P.2d 1324 (citing *Esquibel*, 1978-NMSC-024, ¶ 9).

UJI 14-5130 applies to all crimes, other than homicide or a crime requiring an intent to kill. *Esquibel*, 1978-NMSC-024, ¶ 8. *Esquibel* further clarified that duress is a defense to escape from a penitentiary, so that if the circumstances of the case present a prima facie case of duress, the jury should be instructed accordingly. *Id.* ¶¶ 2, 12. *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).

In addition to affirmative threats by a third party, New Mexico recognizes a duress defense in circumstances of "necessity" even absent threatening conduct by another. *See State v. Rios*, 1999-NMCA-069, ¶¶ 14-15, 127 N.M. 334, 980 P.2d 1068 (collecting, with approval, authorities noting the modern rejection of common law distinctions between necessity and duress). "Duress and necessity are two forms of compulsion that may be raised as valid defenses in criminal law." *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, 124 N.M. 129, 148, 947 P.2d 86, 105, cert. granted, *judgment rev'd sub nom. New Mexico, ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998). The New Mexico Supreme Court recognizes that "the distinction between duress and necessity has been blurred by modern case law and is no longer deemed decisive." *Id.* (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980)). In *Bailey*, the United States Supreme Court stated that both "defenses were designed to spare a person from punishment if he acted 'under threats or conditions that a person of ordinary firmness would have been unable to resist,' or if he reasonably believed that criminal action 'was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense.'" *Bailey*, 444 U.S. at 410 (quoting and *reversing on other grounds, United States v. Bailey*, 585 F.2d 1087, 1097-98 (D.C. Cir. 1978)). The Committee Commentary uses the term "duress" to refer to this overarching concept.

A duress defense is available for strict liability crimes, but in such cases requires additional instruction on the bracketed elements outlined in UJI 14-5130 as indicated in Use Note 4. *See Castrillo*, 1991-NMSC-096, ¶¶ 11-19; *see* ¶ 13 ("Application of the concept of duress to a charge of felon in possession does not require us to develop special rules or alter the law of duress. We merely evaluate the different elements in the context of the strict liability crime. … A reasonable felon, knowing that possession of a firearm is a felony, is expected to pursue other possible avenues of relief before arming himself."). *See also Rios*, 1999-NMCA-069, ¶ 25 (recognizing duress as a defense to driving while intoxicated); *State v. Baca*, 1992-NMSC-055, ¶ 13, 114 N.M. 668, 845 P.2d 762 (recognizing duress as a defense to possession of a deadly weapon by a prisoner). Therefore, to balance the duress defense with the protective purposes of strict liability crimes, "New Mexico law establishes four elements to duress in the strict liability context: (1) the defendant acted under unlawful and imminent threat of death or serious bodily injury, (2) he did not find himself in a position that compelled him to violate the law due to his own recklessness, (3) he had no reasonable legal alternative, and (4) his illegal conduct was directly caused by the threat of harm." *Id.* (citing *Baca*, 1992-NMSC-055, ¶ 19).

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

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 NOTES

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.]

14-5132. Escape from jail or penitentiary; duress defined.[1]

An issue you must consider is whether the defendant escaped from [jail][2] [the penitentiary] 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*)][2] [(he) (she) would be sexually assaulted] if [he] [she] did not escape;

2. [The defendant did not have time to complain to the authorities;][2]

[OR]

[Under the circumstances it would have been futile for the defendant to complain to the authorities;]

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][2] [reported] 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 NOTES

1. For use when necessity is defense to crimes of escape or attempted escape from jail (UJI 14-2221 NMRA) or escape or attempted escape from the penitentiary (UJI 14-2222 NMRA). 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 alternative or alternatives.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.

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 NOTES

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.

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 NOTES

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.

Part H
Entrapment

14-5160. Entrapment; unfair inducement; not predisposed.[1]

An issue in the case is whether _____ (*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 NOTES

1. When entrapment is in issue this instruction or 14-5161 NMRA, or both instructions, may be appropriate. When evidence exists that the 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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 State v. Vallejos*, 1997-NMSC-040, ¶ 5, 123 N.M. 739, 945 P.2d 957; *Baca v. State*, 1987-NMSC-092, ¶ 7, 106 N.M. 338, 742 P.2d 1043. 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, ¶ 5 (quoting

Sorrells v. United States, 287 U.S. 435, 442 (1932)). Where the defendant is predisposed to commit the crime, the subjective entrapment defense necessarily fails.

Unlike in subjective entrapment, under the "objective entrapment" standard, the actual intent of the defendant is not directly at issue. *See* UJI 14-5161 NMRA. Further, 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, ¶ 34.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5161. Entrapment; law enforcement unconscionable methods and illegitimate purposes.[1]

An issue in this case is whether 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 NOTES

1. When entrapment is in issue this instruction or UJI 14-5160 NMRA, 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 NMRA 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, ¶¶ 18-19, 123 N.M. 739, 945 P.2d 957, the Supreme Court gave extensive specific—but non-dispositive or exclusive— examples of unconscionable methods or illegitimate purposes and delineated the roles of the court and the jury in resolving such claims.

4. Insert the name of the felony or the felonies in the disjunctive.

[Adopted, effective September 1, 1994; as amended, effective July 1, 1998; January 1, 2000; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — In addition to subjective entrapment—where unfair inducement overbears a person not predisposed to commit the crime (UJI 14-5160 NMRA)—the Supreme Court recognizes three overlapping, but not identical, defenses of "objective entrapment," "outrageous government conduct," and "due process" violations. *State v. Vallejos*, 1997-NMSC-040, ¶ 17, n.8, 123 N.M. 739, 945 P.2d 957. However the non-subjective defense is denominated, this instruction is to be used if 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 solely raises the defense of subjective entrapment, "the focal issue is 'the intent or predisposition of the defendant to commit the crime.'" *Id*. ¶ 5 (quoting *State v. Fiechter*, 1976-NMSC-006, ¶ 9, 89 N.M. 74, 547 P.2d 557. The defense of subjective entrapment is the focus of UJI 14-5160. However, a defendant may raise both the defense of subjective entrapment and objective entrapment, in which case both UJI 14-5160 NMRA and this instruction may be appropriate. *Vallejos*, 1997-NMSC-040, ¶ 34.

Whether the conduct of government agents exceeded the standards of proper investigation focuses 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." *Id*. ¶ 2 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*, 1987-NMSC-092, 106 N.M. 338, 742 P.2d 1043, 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, ¶ 6.

In addition, the 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. *Id*. 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, or are so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id*. ¶ 16 (internal quotation marks and citations omitted).

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-040, ¶¶ 17-19 (giving “possible indicia”).

Ordinarily, the judge decides the issue of whether the alleged government conduct, if it occurred, was acceptable as a matter of law, leaving for the jury the issue of whether this misconduct did occur. 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-040, ¶ 20.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Part I
Justifiable Homicide

14-5170. Justifiable homicide; defense of habitation.[1]

An issue you must consider in this case is whether 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 NOTES

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 violent felony being committed or attempted. The essential elements of the violent felony being committed or attempted must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.

3. Identify the place where the killing occurred.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) (1963) 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 interpreted the statute broadly. *See also* commentary to UJI 14-5171 NMRA. 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. Couch*, 1946-NMSC-047, ¶ 30, 52 N.M. 127, 193 P.2d 405 ("The . . . rule limiting the amount of force which may be lawfully used in defense of other property does not apply in defense of habitation."); *State v. Martinez*, 1929-NMSC-040, ¶ 9, 34 N.M. 112, 278 P. 210 (explaining that "[e]ven if deceased was a trespasser [on the defendant's land], taking his life for that reason was not justifiable"); *State v. McCracken*, 1917-NMSC-029, ¶ 8, 22 N.M. 588, 166 P. 1174 (addressing trespass on open lands and holding that the defendant did not have the right to use deadly force "to enable him to enter upon the land and construct his fence," even if he did legally possess the land). *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*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122; *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152. 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 violent felony is required. *Couch*, 1946-NMSC-014; *see also State v. Boyett*, 2008-NMSC-030, ¶ 21, 144 N.M. 184, 185 P.3d 355 (requiring felony, in defense of habitation context, to be a violent felony); *State v. Cardenas*, 2016-NMCA-042, ¶ 6, 380 P.3d 866 (same); *State v. Baxendale*, 2016-NMCA-048, ¶ 15, 370 P.3d 813 (same); 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.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5171. Justifiable homicide; self defense.[1]

An issue you must consider in this case is whether 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];[4] 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 NOTES

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 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 the context of the evidence.

4. UJI 14-5190 NMRA (assailed person need not retreat), must be given if at issue. If at issue, UJI 14-5191 NMRA (self defense; limitations; aggressor) and UJI 14-5191A NMRA (first aggressor; exceptions to the limitation on self defense) should also be given.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — New Mexico cases recognize deadly force may be justified to defend against an actual or apparent and imminent threat of harm in three basic circumstances: self defense, defense of another, and defense of habitation. *See generally State v. Rudolfo*, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170 (self defense); *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537 (defense of another); *State v. Cardenas*, 2016-NMCA-042, 380 P.3d 866 (defense of habitation); UJI 14-5170 NMRA (defense of habitation), UJI 14-5171 NMRA (self defense); UJI 14-5172 NMRA (defense of another); *see also* NMSA 1978, § 30-2-7 (1963) (recognizing defenses).

The threat of harm required for self-defense or defense of another is that of death or great bodily harm. *See, e.g., Rudolfo*, 2008-NMSC-036, ¶ 17. For defense of habitation, the justification for use of deadly force arises from a threat of a violent felony by an intruder into the home. *Cardenas*, 2016-NMCA-042, ¶ 18. These defenses provide "a complete justification to homicide" based on "the reasonable belief in the necessity of using deadly force." *State v. Coffin*, 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477; *see also* NMSA 1978, § 30-2-8 (1963) (requiring that the defendant be acquitted when the killing is justified or excused). "It is only just that one who is unlawfully

attacked by another, and who has no opportunity to resort to the law for . . . defense, should be able to take reasonable steps to defend [against] harm." Wayne R. LaFave, *Substantive Criminal Law*, § 10.4(a) (3rd ed.; Oct. 2017 Update). Deadly force may not be used solely to defend one's personal property. *See State v. Baxendale*, 2016-NMCA-048, ¶ 12, 370 P.3d 813 (quoting *Brown v. Martinez*, 1961-NMSC-040, ¶ 22, 68 N.M. 271, 361 P.2d 152).

Under New Mexico law, the danger involved may be either real or apparent based on the circumstances known to or perceived by the accused. *Rudolfo*, 2008-NMSC-036, ¶ 17; *State v. Chesher*, 1916-NMSC-083, 22 N.M. 319, 161 P. 1108. The apparent danger must be imminent. *Jernigan*, 2006-NMSC-003, ¶ 5; *Territory v. Baker*, 1887-NMSC-021, ¶ 11, 4 N.M. 236, 13 P. 30. The defendant must also believe in the existence of the apparent danger. *State v. Parks*, 1919-NMSC-041, ¶ 6, 25 N.M. 395, 183 P. 433. New Mexico uses a hybrid test, judging the appearance of actual danger and actual apprehension subjectively while judging whether the use of deadly force was reasonable objectively. *Coffin*, 1999-NMSC-038, ¶ 15.

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*, 1935-NMSC-082, 39 N.M. 518, 50 P.2d 968. *See generally*, LaFave, *supra*, § 10.4(g); Annot., 55 A.L.R.3d 620 (1974).

The third 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. Benally*, 2001-NMSC-033, ¶ 43, 131 N.M. 258, 34 P.3d 1134 (Baca, J., dissenting).

Self-defense is not available to an aggressor unless the aggressor first tries to stop the fight or unless it is necessary to defend against an unreasonable force. *See State v. Chavez*, 1983-NMSC-037, ¶ 6, 99 N.M. 609, 661 P.2d 887; UJI 14-5191 NMRA; UJI 5191A NMRA.

Homicide requires as an element that the killing was unlawful. *Benally*¸ 2001-NMSC-033, ¶ 10. Because self defense, defense of another, or defense of habitation justifies the defendant's actions, when established they negate the element of unlawfulness. *State v. Armijo*, 1999-NMCA-087, ¶ 14, 127 N.M. 594, 985 P.2d 764. Once sufficient evidence has been presented to create a jury issue on the elements of one of these defenses, unlawfulness becomes an element the state must prove, and therefore it bears the burden to disprove these defenses beyond a reasonable doubt. *State v. Parish*, 1994-NMSC-073, ¶¶ 11, 13, 118 N.M. 39, 878 P.2d 988.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5172. Justifiable homicide; defense of another.[1]

An issue you must consider in this case is whether 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[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 killed _____ (*name of victim*) 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 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 NOTES

1. For use when the defense theory is based on 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. The definition of great bodily harm, UJI 14-131 NMRA, 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.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This instruction is a combination of the defense of spouse or family against any unlawful action, NMSA 1978, Section 30-2-7(A) (1963), and the

defense of another against a felony or act that would result in some great personal injury to the other person, Section 30-2-7(B). *See e.g., State v. Beal*, 1951-NMSC-055, 55 N.M. 382, 234 P.2d 331. For a discussion of the general rules that apply to defense of another, *see* the commentary to UJI 14-5171.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5173. Justifiable homicide; public officer or employee.[1]

An issue you must consider in this case is whether 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, the defendant was a public officer or employee;

2. The killing was committed while the defendant was performing the defendant's 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]; or

[overcoming the actual resistance of _____ (*name of victim*) to the discharge of _____][4]; or

[retaking [_____ (*name of victim*)] [a person], who had committed _____[5] (*name of felony*) and who had [been rescued][6] [escaped]]; or

[arresting [_____ (*name of victim*)] [a person], who had committed _____[5] (*name of felony*) and was fleeing from justice]; or

[attempting to prevent the escape from _____[7] by [_____ (*name of victim*)] [a person] who had committed _____[5] (*name of felony*)];

4. The defendant believed that _____ (*name of victim*) posed a threat of death or great bodily harm to the defendant or another person; and

5. Under the totality of the circumstances, a reasonable officer would have acted as the defendant did. The following factors may be considered in evaluating the totality of the circumstances:

[the officer's training]

[the officer's experience]

[the officer's expertise]

[the feasibility of giving a warning prior to using deadly force]

[the feasibility of taking lesser measures than using deadly force]

[(other factor(s))][8]

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 NOTES

1. For use when the defense is based on NMSA 1978, Section 30-2-6 (1989). 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. Unless the parties stipulate or the court deems naming the felony unfairly prejudicial, insert the name of the felony. If named, the essential elements of the felony must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.

6. Use only the applicable parenthetical alternative.

7. Describe circumstances and place of lawful custody or confinement.

8. Element 5 is not an exhaustive list. Use any applicable bracketed phrase or insert description of factor(s).

[As amended, effective October 1, 1985; January 1, 1997; April 25, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-036, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-2-6 (1989).

Since before statehood, New Mexico case law has interpreted this justifiable homicide defense to apply to only law enforcement officers with arrest authority. *See Territory v. Gutierrez*, 1905-NMSC-018, 13 N.M. 138, 79 P. 716; *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62; *State v. Gabaldon*, 1939-NMSC-060, 43 N.M. 525, 96 P.2d 293; *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033; *Cordova v. City of Albuquerque*, 1974-NMCA-101, 86 N.M. 697, 526 P.2d 1290; and *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272. However, the committee did not find it necessary to limit the application to law enforcement officers with arrest authority.

In considering the reasonableness of the officer's actions, the jury should consider whether it was feasible for the officer to give a warning prior to using deadly force and whether the officer should have done so. NMSA 1978, § 30-2-6(B).

This instruction has been modified to meet the requirements of NMSA 1978, Section 30-2-6(B) as amended in 1989 and recommended in *Mantelli*, 2002-NMCA-033, ¶ 48. The parenthetical options to name either the victim or another person reflect the possibility that the person justifiably killed in retaking, arresting, or preventing the escape of a felon may not be the felon.

Additionally, *Mantelli* goes beyond simply referring to the statutory requirement for "probable cause" by the defendant and incorporates an objectively reasonable standard which takes into account "the expertise and experience of the officer." *Id. Mantelli* calls for a jury to consider the totality of the circumstances to decide if a defendant's use of deadly force was reasonable and constituted a justifiable homicide. *Id.* ¶ 31. In considering the totality of the circumstances, *Mantelli* suggests consideration of the officer's training and experience, but this is not a complete list of circumstances that may be considered in assessing objective reasonableness. *See id*. ¶¶ 31, 36-37, 48.

The totality of the circumstances has been defined by other jurisdictions as "the whole picture." *See State v. Williams*, 99-1006, p. 10 (La. App. 5 Cir. 3/30/99); 735 So. 2d 62; *State v. Hebert*, 95-1645, p. 7 (La. App. 3 Cir. 6/5/96); 676 So. 2d 692; *State v. Duhe*, 2012-2677, p. 8 (La. 12/10/13); 130 So. 3d 880; *State v. Perez-Jungo*, 329 P.3d 391, 397 (Idaho 2014). Furthermore, the totality of the circumstances includes "both the quantity and quality of the information known by the police" at the time of the event. *Reed v. Pompeo*, 810 S.E.2d 66, 73 (W. Va. 2018) (internal quotation marks and citation omitted).

Element 5 provides a nonexclusive, open-ended list of specific factors frequently relevant to determining reasonableness under a totality of the circumstances. Based on the evidence adduced by either party, the trial court can approve including a wide variety of other relevant factors as long as they are not unfairly prejudicial to either party. The committee believes the trial court is in the best position to decide whether to avoid the jury's giving undue weight to additional factors by leaving them to the argument of counsel.

This instruction also omits the statutory grounds of justifiable homicide when acting in obedience to a judgment of the court. The committee believed that the provision applied exclusively to death penalty judgments and would never be prosecuted. A special bracketed sentence would have to be drafted to follow Use Note 3 if the defense of acting in obedience to a judgment is raised.

[As amended by Supreme Court Order No. 22-8300-036, effective for all cases pending or filed on or after December 31, 2022.]

14-5174. Justifiable homicide; aiding public official.[1]

An issue you must consider in this case is whether 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 _____[6] 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 NOTES

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 person aiding 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. The essential elements of the felony must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words “the defendant” in UJI 14-140 NMRA.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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.

Part J
Nonhomicidal Defense of Self, Others or Property

14-5180. Defense of property.[1]

An issue in this case is whether 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*) 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 NOTES

1. For use when defense is based on defense of property against either felony act or nonfelony act. UJI 14-5170 NMRA is used for justifiable homicide; defense of habitation. UJI 14-5171 NMRA (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 NMRA, must also be given if not already given.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — In *State v. Couch*, 1946-NMSC-047, ¶ 31, 52 N.M. 127, 193 P.2d 405, 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." (Internal quotation marks and citation omitted.) *See also Brown v. Martinez*, 1961-NMSC-040, ¶¶ 21-28, 68 N.M. 271, 361 P.2d 152. A person may use reasonable force to protect the person's property from unlawful interference by another, however, no force is reasonable if a request to cease the unlawful interference would have been sufficient. *See* Wayne LaFave, 2 Subst. Crim. L. § 10.6(a), *Defense of property: Generally*, (2d ed., Oct. 2017 update).

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, *supra*.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5181. Self defense; nondeadly force by defendant.[1]

An issue in this case is whether 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 NOTES

1. For use in cases 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 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) and (B) (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. "A defendant is not entitled to a self-defense instruction unless it is justified by sufficient evidence on every element of self-defense." *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170. Sufficient evidence means "enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense." *Id*. ¶ 27. "If any reasonable minds could differ, the instruction should be given." *Id*. 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; 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (3d ed. Oct. 2017 update).

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*, 1935-NMSC-082, 39 N.M. 518, 50 P.2d 968. *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*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d 1285. The words "without excuse or justification" have been held to be "clearly equivalent to the word unlawful." *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250. *Cf. State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988 (once the defense raised a self-defense theory, unlawfulness became a necessary element of voluntary manslaughter). 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); *State v. Woods*, 1971-NMCA-026, ¶ 4, 82 N.M. 449, 483 P.2d 504 (noting that unlawfulness includes "without legal excuse or justification").

Unlawfulness is generally present in an assault or a battery if the other elements are proved. *Cf. Parish*, 1994-NMSC-073, ¶ 5 ("It seems tautological to stress that unlawfulness is an essential aspect of any crime. Indeed, it is not an element which must be proven unless a defense which justifies the homicide is raised."). 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*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193. 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*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, where the defendant is charged with a nondeadly assault. Previously, the instruction failed to adequately address the use of nondeadly force against the threat of nondeadly force.

In 2018, the committee removed the use note language limiting nondeadly force instructions to “nonhomicide” cases, recognizing that the instruction is intended to be used in some cases where death does result. *See State v. Romero*, 2005-NMCA-060, ¶ 13, 137 N.M. 456, 112 P.3d 1113 (recognizing the non-deadly force instruction is appropriate in some homicide cases where "[t]he force used by defendant ordinarily would not create a substantial risk of death or great bodily harm," but where death nevertheless results); *State v. Gallegos*, 2001-NMCA-021, ¶ 12, 130 N.M. 221, 22 P.3d 689 ("It is entirely plausible that a person could act intentionally in self-defense and at the same time achieve an unintended result.").

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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5182. Defense of another; nondeadly force by defendant.[1]

An issue in this case is whether 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 NOTES

1. For use in cases when the defense theory is based on (1) a reasonable ground to believe a design exists to commit an unlawful act or do bodily harm against another; or (2) a defense of spouse or other family member 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 NMRA, must be given if not already given.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) (1963) provides that a person may necessarily defend a member of the person's family against any unlawful action. Section 30-2-7(B) 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 the person reasonably believes the other person to be in danger of death or great bodily harm. *See* committee commentary to UJI 14-5172 NMRA.

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 NMRA were made to clarify this instruction and to make this instruction consistent with other instructions on self-defense.

See also committee commentary to UJI 14-5181 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5183. Self defense; deadly force by defendant.[1]

An issue in this case is whether 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 harm[2] 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 NOTES

1. For use in nonhomicide cases 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 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. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5184. Defense of another; deadly force by defendant.[1]

An issue in this case is whether 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 NOTES

1. For use in nonhomicide cases when the defense theory is based on 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 NMRA, 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5185. Self defense against excessive force by a peace officer; nondeadly force by defendant.[1]

An issue in this case is whether 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 NOTES

1. For use in nonhomicide cases when the self defense theory is based on 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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]

An issue in this case is whether 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 harm[3] 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 NOTES

1. For use in nonhomicide cases when the self defense theory is based on 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; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

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.[1]

A person who is [defending against an attack][2] [defending another from an attack] [or] [defending property] need not retreat. In the exercise of the right of [self defense][2] [defense of another] [or] [defense of property], a person may stand the person's ground and defend [herself][2] [himself] [another] [the person's habitation] [or] [property].

USE NOTES

1. This instruction must be given when a duty to retreat is at issue in a self defense, defense of another, or defense of property case.

2. Choose applicable alternative or alternatives.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — When acting in self-defense, defense of another, or defense of property, a person may use no more force than is reasonably necessary to avoid the threatened harm. *See* UJIs 14-5171, 14-5181 NMRA. A person need not, however, retreat even though the person could do so safely. *See State v. Horton*, 1953-NMSC-044, 57 N.M. 257, 258 P.2d 371 (holding 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).

In *State v. Anderson*, the Court of Appeals declined to conclude that UJI 14-5190 NMRA was a mere definitional instruction. 2016-NMCA-007, ¶ 13, 364 P.3d 30. The Court explained that "[w]here the evidentiary basis for the instruction has been laid, UJI 14-5190 informs jurors of what is reasonable under the third prong of UJI 14-5190, and it is therefore critical to understanding the third element of a general self-defense instruction." *Id*. ¶ 14; *see also* UJI 14-5171. The Court therefore held that omission of UJI 14-5190, after the district court determined that giving the instruction was appropriate, amounted to fundamental error because it was "akin to a missing elements instruction." *Id*. ¶¶ 15, 19.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-5191. Self defense; limitations; aggressor.[1]

Before you consider whether the defendant acted in self defense, you must first decide whether the defendant was the first aggressor. The defendant was the first aggressor if the defendant

[started the fight with _____ (*name of victim*)][2]

[or]

[agreed to fight with _____ (*name of victim*)]

[or]

[intentionally provoked a fight in order to harm _____ (*name of victim*)]

[or]

[committed the act of _____ (*describe defendant's conduct that constituted the alleged crime*), in response to _____'s (*name of victim*) act of _____ (*describe conduct of victim giving rise to an appearance of*

immediate danger of harm to defendant), where _____'s (*name of victim*) act was the [lawful and][3] foreseeable result of _____ (*describe defendant's alleged unlawful act that resulted in victim's conduct*)][4].

The burden is on the state to prove beyond a reasonable doubt that the defendant was the first aggressor. [If the defendant was the first aggressor, the defendant cannot claim self defense. If the defendant was not the first aggressor, you should proceed to decide whether the defendant acted in self defense.][5] [If you find that the defendant was the first aggressor, you must then decide whether _____ (*name of victim*) became the aggressor. If _____ (*name of victim*) became the aggressor, the defendant may claim self defense even though the defendant was the first aggressor.][6]

USE NOTES

1. This instruction must be given in all self defense cases in which first aggressor is an issue.

2. Use only applicable bracketed element or elements established by the evidence.

3. If the lawfulness of the victim's conduct is at issue, e.g., may have been privileged or justified, give appropriate definition.

4. This alternative should be used when the defendant provoked the victim through an unlawful act and the victim responded in a lawful manner. *See State v. Denzel B.*, 2008-NMCA-118, 144 N.M. 746, 192 P.3d 260; *see also* committee commentary, *infra*.

5. Use this bracketed alternative in cases where UJI 14-5191A NMRA will not be given.

6. Use this bracketed alternative in cases where UJI 14-5191A will be given. If UJI 14-5191A will be given, it should immediately follow this instruction.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — A defendant's "claim of self defense may fail if the defendant was the aggressor or instigator of the conflict." *State v. Lucero*, 1998-NMSC-044, ¶ 7, 126 N.M. 552, 972 P.2d 1143 (internal quotation marks and citation omitted). In *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887, the defendant was a first aggressor when he entered a convenience store with a knife intending to rob the store and subsequently stabbed and killed a patron who tried to stop the robbery. *Id*. ¶ 6. The Supreme Court held that it is "well established in this jurisdiction that 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." *Id*. *Lucero* then clarified that if the defendant was an aggressor or instigator of the conflict, self-defense is still available if the

"defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and [the] . . . victim responded with force which would ordinarily create a substantial risk of death or great bodily harm[.]" 1998-NMSC-044, ¶ 7 (internal quotation marks and citation omitted). Thus, the right of self-defense can be reinstated if the victim responds by escalating the conflict or pursues the conflict after the defendant attempts to disengage. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(e) (3d ed. Oct. 2017 update); *see also Territory v. Clarke*, 1909-NMSC-005, ¶ 8, 15 N.M. 35, 99 P. 697 (upholding conviction where jury was instructed that defendant could claim self defense if "defendant in reality and in good faith endeavored to decline any further struggle before the fatal shot was fired").

The state bears the burden of proving that the defendant was the first aggressor beyond a reasonable doubt. *See State v. Pruett*, 1918-NMSC-062, ¶ 9, 24 N.M. 68, 172 P. 1044.

The bracketed "lawful" term in this instruction should be used and defined if there is an issue about whether the victim's use of force may have been a lawful response to the defendant's conduct. *See* Use Note 3. For example, *State v. Southworth* held that the self-defense instruction was improper because it did not require the jury to determine whether the victim acted reasonably in defense of her home when she used potentially deadly force against the trespassing defendant. *See* 2002-NMCA-091, ¶¶ 18-19, 132 N.M. 615, 52 P.3d 987 ("The trial court should instruct the jury that [the defendant] had the right to stand his ground and did not need to retreat unless he was threatened with lawful force. In order to determine whether the force used by [the victim] was lawful, the jury must conclude that [she] acted reasonably in defending her home against the perceived threat of the commission of a felony (similar to the elements of defense of habitation set for in UJI 14-5170).").

Similarly, *State v. Denzel B*. held that the self-defense instruction was improper because it failed to instruct the jury that the victim's conduct, grabbing the defendant by the shirt after the defendant pushed him, may have been protected by the parental privilege. *See* 2008-NMCA-118, ¶¶ 3-4, 17, 144 N.M. 746, 192 P.3d 260 ("We therefore hold that when a child asserts self-defense as justification for battery against his parent, the jury must first determine whether the parent's use of physical discipline was reasonable under the circumstances."). In both *Southworth* and *Denzel B*., the court held that the jury must be instructed that the state must prove that the defendant did not act in self-defense, taking into account whether the victim's response to the defendant's conduct was lawful under the particular circumstances of the case. *Accord State v. Lara*, 1989-NMCA-098, ¶¶ 7-9, 109 N.M. 294, 784 P.2d 1037 (explaining defendant had no right to defend against store employees who had a lawful right to seize defendant for shoplifting).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5191A. First aggressor; exceptions to the limitation on self defense.[1]

If you find beyond a reasonable doubt that the defendant was the first aggressor, you must then decide whether [the following exception applies][2] [any of the following exceptions apply]. If [the exception applies][2] [one of these exceptions apply], _____ (*name of victim*) became the aggressor, and the defendant is no longer the first aggressor.

[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][2];

[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*) continued to fight the defendant.]

If the state proves beyond a reasonable doubt that _____ (*name of victim*) did not become the aggressor, the defendant is still the aggressor and cannot claim self defense. If after deliberation you find that _____ (*name of victim*) became the aggressor, you should proceed to decide whether the defendant acted in self defense.

USE NOTES

1. This instruction must be given in conjunction with UJI 14-5191 NMRA in all self-defense cases in which there is an issue regarding whether a first aggressor regained the right to claim self defense because the victim became the aggressor.

2. Use applicable bracketed alternative or alternatives.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* committee commentary to UJI 14-5191 NMRA.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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.

14-6002. Withdrawn.

14-6002A. Necessarily included offense; deliberations.[1]

You have been instructed on the crimes of _____ (*greater/greatest offense*), [_____ (*next lower offense(s)*],[2] and _____ (*lowest offense*), as charged [in Count _____].[3] It is up to you, the jury, to choose the manner and order in which you deliberate on the crimes charged [in that count].[3] However, to return a verdict, you must follow the procedure described in the next instruction.[4]

USE NOTES

1. This instruction should be given immediately after the instructions containing the elements of the offenses charged in the count.

2. The instruction is drafted to accommodate three levels of the offense: "greatest," "next lower," and "lowest," but can be modified to account for any number of lesser-included offenses following the same procedure. The offenses should be identified by the names used in the elements instruction for that offense.

3. If there is more than one count, identify the count charged.

4. UJI 14-6002B NMRA should be given immediately after this instruction.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* Commentary for UJI 14-6002B NMRA.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

14-6002B. Necessarily included offense; verdict(s).[1]

To aid you in your deliberations and in returning your verdict, you will be provided both guilty and not guilty verdict forms for each of the crimes charged [in Count _____].[2] Unless you unanimously agree on a verdict, you should not sign a verdict form for that crime. Although you may deliberate on the crimes charged [in Count _____][2] in any manner and order which you choose, you must return your verdicts for each offense [in Count _____][2] in the order they are instructed.[3]

Under this procedure, if you unanimously find the defendant guilty of _____ (*greatest offense*),[3] you should sign the guilty verdict for that offense and should not proceed to reach a verdict on the remaining offense[s].[4] If, after reasonable deliberation, you do not reach a unanimous verdict on _____ (*greatest offense*), you should not sign a verdict form for that offense and should not proceed to reach a verdict on the remaining offense[s].[4]

You should only return a verdict on _____ (*next lower offense*) if you unanimously find the defendant not guilty of _____ (*greatest offense*). If you unanimously find the defendant not guilty of _____ (*greatest offense*), you must sign the not guilty verdict form for _____ (*greatest offense*) before returning a verdict on any other crime charged [in Count _____].[2]

If you unanimously find the defendant guilty of _____ (*next lower offense*), you should sign the guilty verdict for that offense [and should not proceed to reach verdicts on the remaining offenses].[4] If you do not reach a unanimous verdict on _____ (*next lower offense*), you should not sign a verdict form for that offense [and should not proceed to reach a verdict on the remaining offense[s]].[4]

[If you unanimously find the defendant not guilty of _____ (*next lower offense*), you must sign the not guilty verdict form for _____ (*next lower offense*) before returning a verdict on _____ (*lowest offense*)].[4]

[If you unanimously find the defendant not guilty of _____ (*greatest offense*) and _____ (*next lower offense*), you may then return a verdict on _____ (*lowest offense*). If you do reach a unanimous verdict on _____ (*lowest offense*), you should sign the corresponding verdict form for that offense. If you are not unanimous on a verdict, do not sign a verdict form for that offense].[4]

USE NOTES

1. This instruction should be given immediately after UJI 14-6002A NMRA.

2. If there is more than one count, identify the count charged.

3. Both guilty and not guilty forms should be submitted for each level of offense. This instruction is drafted to accommodate three levels of the offense: "greatest," "next lower," and "lowest," but can be modified to account for any number of lesser-included offenses following the same procedure. The elements instructions for the offenses should be instructed in descending order and identified in this instruction by the names used in the elements instruction for that offense.

4. Use plural only if there are three or more crimes charged in the count.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Under New Mexico decisions, there is no automatic right for a party to have the jury instructed on a lesser-included offense. The determination depends on both the statutory elements and the facts of the case. A party is entitled to a lesser-included offense instruction "when the statutory elements of the lesser crime are a subset of the statutory elements of the charged crime." *State v. Meadors*, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731. A party is also entitled to a lesser-included offense instruction

> if (1) the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense . . .; (2) the evidence adduced at trial is sufficient to sustain a conviction of the lesser offense; and (3) the elements distinguishing the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.

Id. (applying test to a prosecution request); *see also State v. Darkis*, 2000-NMCA-085, ¶¶ 14-18, 129 N.M. 547, 10 P.3d 871 (applying same test to a defense request and

concluding that *Meadors* provides defendants with an "effectively greater" right to lesser-included offense instructions than the prosecution).

This instruction was amended in 2019 to clarify the process for the jury to deliberate and return verdicts on lesser-included offenses. *State v. Lewis*, 2019-NMSC-001, ¶¶ 22-25, 433 P.3d 276. UJIs 14-6002A and 14-6002B NMRA now serve as a single adaptable instruction set to replace UJIs 14-6002, 14-250, and 14-625 NMRA.

In *Lewis* the Supreme Court adopted a rule of deliberation permitting the jury to deliberate on levels of an offense in any order, but requiring a full acquittal (and not just inability to agree) of the greater offense before a verdict can actually be returned on the lesser. 2019-NMSC-001, ¶ 37.

To ensure a clear record after this deliberative process, *Lewis* held that polling the jury on each level of a count upon return of the verdict is the best way to determine unambiguously upon which offenses the jury acquitted, hung, or convicted. *Id.* ¶ 17. The Court recommended providing the jury with "partial verdict forms, allowing the jury to indicate that it unanimously finds the defendant not guilty on a greater offense even if deadlocked on a lesser offense." *Id.* ¶ 38. This includes submitting not-guilty verdict forms for each level of the offense to indicate when a unanimous acquittal has occurred. *See* Use Note 3. Clarity regarding the jury's intent with respect to which level of charge the jury has hung is paramount to avoid a double jeopardy bar on retrial. *See State v. Phillips*, 2017-NMSC-019, ¶¶ 1, 17, 396 P.3d 153 (when a judge fails to properly clarify a verdict that even ambiguously reflects an acquittal, then double jeopardy principles require courts treat the ambiguous verdict as an acquittal barring future prosecution); *Lewis*, 2019-NMSC-001, ¶¶ 10-11.

The adoption of UJIs 14-6002A and 14-6002B NMRA coincides with the withdrawal of UJIs 14-250 NMRA (homicide cases) and 14-625 NMRA (child abuse cases resulting in death).

In homicide cases, 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*, 1960-NMSC-102, ¶¶ 8-9, 67 N.M. 336, 355 P.2d 275. This could involve instructing the jury on various types of first-degree murder, second-degree murder, voluntary manslaughter and involuntary manslaughter. *See, e.g., State v. Omar-Muhammad*, 1987-NMSC-043, ¶ 23, 105 N.M. 788, 737 P.2d 1165 (stating that the New Mexico Supreme Court has "analyzed felonious homicide, the unlawful taking of human life, as a 'generic offense' encompassing several degrees or forms"); *State v. La Boon*, 1960-NMSC-118, ¶ 10, 67 N.M. 466, 357 P.2d 54 ("Manslaughter is included in the charge of murder."); *cf. State v. McFall*, 1960-NMSC-084, ¶ 12, 67 N.M. 260, 354 P.2d 547 (stating that "manslaughter is one of the four kinds of homicide, and . . . it is included within a charge of murder"). Because the distinctions between the various degrees are not clear-cut, the jury will typically be given the option of multiple degrees of homicide. *See State v. Reed*, 2005-NMSC-031, ¶ 22, 138 N.M. 365, 120 P.3d 447 (acknowledging a "lack of clear-cut distinctions between varying degrees of homicide").

In cases involving various degrees of child abuse resulting in death of a child under twelve years of age, the jury may be instructed on the crimes of intentional child abuse resulting in the death of a child under twelve years of age, and child abuse with reckless disregard resulting in the death of a child under twelve years of age. *See State v. Montoya*, 2015-NMSC-010, ¶¶ 41-42, 345 P.3d 1056 (holding that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve and that the use of a step-down instruction therefore is appropriate). UJIs 14-6002A and 14-6002B NMRA should be adaptable for this scenario.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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 NOTES

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.

14-6004. Multiple counts; single defendant.

Each crime charged in the [indictment] [information] should be considered separately.

USE NOTES

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.

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 NOTES

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.

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 NOTES

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.

14-6007. Jury must not consider penalty.

You must not concern yourself with the consequences of your verdict.

USE NOTES

This is a proper instruction to be given in every case. In light of the legislative repeal of the verdict of guilty but mentally ill, where evidence is presented of mental illness, or in cases presenting defenses related to the inability to form specific intent, this instruction may be of particular importance to the jury's deliberations. *See* 2010 N.M. Laws, ch. 97, § 1 (repealing NMSA 1978, § 31-9-3 relating to the plea, verdict, and sentence of "guilty but mentally ill"); *see also* UJI 14-5110; -5111 NMRA.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

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*, 1972-NMSC-069, 84 N.M. 309, 502 P.2d 999. *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*, 1926-NMSC-032, 31 N.M. 436, 246 P. 897. 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.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

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 NOTES

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).

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).

14-6011. Use of multiple verdict forms; insanity.[1]

In this case, there are three (3) possible verdicts as to the defendant _____ (*name of defendant*) [for each crime charged][2]:

(1) not guilty;

(2) not guilty by reason of insanity; and

(3) 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 NOTES

1. For use with UJI 14-5101 NMRA.

2. Use this bracketed phrase if there is more than one offense charged.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* committee commentary under UJI 14-6010 NMRA.

[As amended for stylistic compliance by Supreme Court Order No. 22-8300-031, effective December 31, 2022.]

14-6012. Multiple verdict forms; lesser included offenses.[1]

In this case, as to the charge of _____[2] [contained in Count _____], there are four possible verdicts [as to each defendant] [as to the defendant[s] _____ (*name*)]

(1) guilty of _____;[2]

(2) not guilty of _____;[2]

(3) guilty of _____;[3]

(4) not guilty of _____;[3]

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 have the discretion to choose the manner and order in which you deliberate on this Count, but you must return a unanimous verdict of not guilty on _____[2] before entering a verdict on _____.[3]

You will first decide whether [the] [a] defendant is guilty of the crime of _____.[2] If you unanimously find the defendant guilty of _____,[2] then that is the only form of verdict which is to be signed as to this Count. If you unanimously find the defendant not guilty of_____,[2] then you should sign only the not guilty form as to _____.[2]

If, after reasonable deliberation, you do not reach a unanimous verdict on _____,[2] you should not sign a verdict form for that crime and you should not proceed to reach a verdict on the remaining crime[s].[1]

If you unanimously find the defendant not guilty of_____,[2] you will then go on to a consideration of the crime of _____.[3] If you unanimously find the defendant guilty of _____,[3] then that is the only form of verdict which should be signed. But if you unanimously find the defendant not guilty of the crime of _____,[3] then you should sign only the not guilty form. If, after reasonable deliberation, you do not reach a unanimous verdict on _____,[3] you should not sign a verdict form for that crime.

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 the defendant is not guilty of that crime. If you find the defendant not guilty of all of these crimes, [in Count _____] you must return a verdict of not guilty [as to this Count].

USE NOTES

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.

2. Insert name of greater offense.

3. Insert name of lesser included offense.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* committee commentary under UJI 14-6010 NMRA.

In addition to this instruction, to avoid a double jeopardy bar on retrying charges after a deadlock, the jury should be provided both guilty and not guilty verdict forms for each degree of offense charged in a single count, "allowing the jury to indicate that it unanimously finds the defendant not guilty on a greater offense even if deadlocked on a lesser offense," and to "create a clear record as to which offenses the jury has agreed and which it has deadlocked." *State v. Lewis*, 2019-NMSC-001, ¶ 38, 433 P.3d 276.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

14-6013. Special verdict; use of a firearm.

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][2] [while brandishing a firearm] [while discharging a firearm] and report your determination.

["Use" of a firearm means: A firearm was present at some point during the encounter. _____ (*name of victim*) knew, or based on the defendant's words or actions, had reason to know that the defendant had a firearm. The defendant intentionally used the presence of the firearm to facilitate the commission of the crime.][1]

["Brandished" means: Displaying or making a firearm known to _____ (*name of victim*) while the firearm is present on the person of the defendant with intent to intimidate or injure another person.]

["Discharged" means: A firearm was present and expelled a projectile by the action of an explosion.]

You must complete the special form to indicate your finding. [With respect to any crime,][3] for you to make a finding of "yes," the state must prove to your satisfaction beyond a reasonable doubt that that the crime was committed [with the use of a firearm] [while brandishing a firearm] [while discharging a firearm][2].

USE NOTES

1. Use the applicable bracketed alternative.

2. Use the applicable bracketed alternative.

a. Use the first alterative, "with the use of a firearm," for all noncapital felony crimes committed on or before June 30, 2020, and for crimes committed on or after May 18, 2022, if the firearm was used in the commission of a drug transaction, an aggravated burglary under Section 30-16-4 NMSA 1978, or a serious violent offense under Section 33-2-34(L)(4)(a) through (n) NMSA 1978.

b. The second alternative, "while brandishing a firearm," may be used for all noncapital felony crimes committed on or after July 1, 2020.

c. The third alternative, "while discharging a firearm," may be used for all noncapital felony crimes committed on or after May 18, 2022.

3. Use the bracketed phrase if more than one crime was committed.

4. Use a separate special verdict form from UJI 14-6014 NMRA for each crime being enhanced and for each applicable alternative.

[As amended by Supreme Court Order No. S-1-RCR-2024-00105, effective for all cases pending or filed on or after December 31, 2024.]

Committee commentary. — NMSA 1978, § 31-18-16 (2022). This instruction, together with the special interrogatory, UJI 14-6014 NMRA, is required by NMSA 1978, Section 31-18-16 (2020, 2022). 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*, 1975-NMCA-069, 88 N.M. 116, 537 P.2d 1012; *State v. Espinosa*, 1988-NMSC-050, ¶¶ 12-13, 107 N.M. 293, 756 P.2d 573 (clarifying that the firearm enhancement statute applies to each applicable crime that is committed and not just to a "unified course of events"). The use of this instruction and the interrogatory is based on the assumption the defendant was put on notice the defendant must defend against a crime committed with a firearm. *State v. Barreras*, 1975-NMCA-063, 88 N.M. 52, 536 P.2d 1108; *see also State v. Roque*, 1977-NMCA-094, ¶ 10, 91 N.M. 7, 569 P.2d 417 (recognizing that, in the context of a conviction for the offense of robbery with a firearm,

it is irrelevant whether the defendant or a co-defendant is the one who is actually armed because the statute does not limit imposition of an enhanced sentence to only those situations where the defendant personally uses the firearm).

Section 31-18-16 has been amended twice since June 30, 2020, to vary the penalty depending on the manner in which a firearm was used in the commission of the crime. The law at the time of the commission of the offense controls the applicable sentence. *See State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102, 163 P.3d 489. The Committee modified Use Note 2 to assist parties in selecting the appropriate alternative based on the date the crime was committed and the type of offense at issue. For crimes committed on or before June 30, 2020, the first alternative involving the "use" of a firearm should be used for all noncapital felony offenses. For crimes committed between July 1, 2020, and May 17, 2022, the second alternative involving the "brandishing" of a firearm should be used for all noncapital felony offenses. For crimes committed on or after May 18, 2022, any of the three applicable alternatives—"use," "brandishing," or "discharging"—may be used, but the "use" of a firearm alternative only applies if the firearm was used "in relation to a drug transaction," during the commission of an aggravated burglary contrary to NMSA 1978, Section 30-16-4 (1963), or during the commission of a serious violent offense as enumerated in NMSA 1978, Section 33-2-34(L)(4)(a) through (n) (2015). "In relation to a drug transaction" is defined in the most recent version of the statute as "participating or attempting to participate in the trafficking of a controlled substance pursuant to [NMSA 1978, Section 30-31-20 (2006)], distribution of a controlled substance to a minor pursuant to [NMSA 1978, Section 30-31-21 (2021),] or distribution of a controlled or counterfeit substance" as a seller, purported seller, or accomplice under NMSA 1978, Section 30-31-22 (2021).

The definition of "use of a firearm" in this instruction has been modified to comport with the holding in *State v. Zachariah G*., 2022-NMSC-003, 501 P.3d 451. In *Zachariah G*., the Supreme Court expanded the definition of "use of a firearm" to commit assault when a defendant makes "facilitative use" of the weapon. *Id*. "Facilitative use of a deadly weapon may be found if (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used by the defendant to facilitate the commission of the assault." *Id*. ¶ 3 (emphasis omitted).

[As amended by Supreme Court Order No. S-1-RCR-2024-00105, effective for all cases pending or filed on or after December 31, 2024].

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)

Do you unanimously find beyond a reasonable doubt that a firearm was [used][6] [brandished] [discharged] in the commission of _____[3] [as charged in Count _____[4]]?

_____ (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 NOTES

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 the 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* UJI 14-6012 NMRA.

6. Insert the appropriate bracketed phrase. If multiple alternatives are at issue, a separate verdict form or verdict finding should be used for each alternative.

a. Use the first alternative, "with the use of a firearm," for all noncapital felony crimes committed on or before June 30, 2020, and for crimes committed on or after May 18, 2022, if the firearm was used in the commission of a drug transaction, an aggravated burglary under Section 30-16-4 NMSA 1978, or a serious violent offense under Section 33-2-34(L)(4)(a) through (n) NMSA 1978.

b. The second alternative, "while brandishing a firearm," may be used for all noncapital felony crimes committed on or after July 1, 2020.

c. The third alternative, "while discharging a firearm," may be used for all noncapital felony crimes committed on or after May 18, 2022.

[As amended, effective August 1, 1997; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00105, effective for all cases pending or filed on or after December 31, 2024.]

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 NOTES

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.

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 NOTES

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.

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 NOTES

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.

14-6018. Withdrawn.

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 underlying crime(s)*)] [*or*] [_____ (*identify underlying crime(s) for which defendant was on probation or parole*)][2]?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. Give these instructions after UJI 14-2241 NMRA. Forms of verdict must be separately submitted to the jury for each category (penalty level) of crime for which tampering with evidence is alleged to have been committed for the sentencing court to determine the permissible range of punishment under NMSA 1978, Section 30-22-5(B).

2. Do not leave blank for the jury to complete. Insert the name of the offense (or multiple offenses within a penalty category under Section 30-22-5(B)). If a violation for probation or parole is at issue, the instruction must identify the underlying offense(s) for which the defendant was serving probation or parole. *See State v. Radosevich*, 2018-

NMSC-028, ¶ 31, 419 P. 3d 176. *Accord* UJI 14-2241 NMRA, Use Note 4. This may include submitting a form of verdict to the jury that states "a crime or violation which cannot be determined." *See Radosevich*, 2018-NMSC-028, ¶ 29 ("[I]ndeterminate tampering" must be limited to the penalties "prescribed in the statute for the lowest level of tampering, which are currently the petty misdemeanor penalties of Section 30-22-5(B)(3).").

[Adopted by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, § 30-22-5(B) (2003). Because the permissible punishment range under Section 30-22-5 depends on the highest crime for which tampering with evidence is committed, the jury must clearly identify the 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). In *State v. Radosevich*, 2018-NMSC-028, ¶ 29, 419 P.3d 176, the Court limited the provisions of Section 30-22-5(B)(4), which permit a defendant to be convicted of a crime where the underlying crime is indeterminate, and held that the only constitutionally permissible punishment where the jury does not find the level of the underlying offense is limited to the petty misdemeanor penalties of Section 30-22-5(B)(3).

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-6019A. Special verdict; sexual offense against a child.[1]

If you find the defendant guilty of _____ (*insert name of offense*) [as charged in Count _____][2], then you must determine whether, at the time of the offense, _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old. You must complete the special form to indicate your findings.

For you to make a finding of "yes," to the question, the state must prove to your satisfaction beyond a reasonable doubt that _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old. Do you unanimously find beyond a reasonable doubt that _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old?

_____ (yes or no)

_____
FOREPERSON

USE NOTES

1. For use in criminal sexual penetration cases when the age of the victim is not already an essential element of the offense.

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

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — NMSA 1978, Section 30-9-11(E) specifies six circumstances of criminal sexual penetration in the second degree. Only Section 30-9-11(E)(1) makes the victim's age an essential element of the offense. However, unless Section 30-9-11(E) (1) has been charged, under Sections 30-9-11(E)(2)-(6), whenever the victim is 13-18, the criminal sexual penetration in the second degree both triggers a statutory increase to a second-degree felony and also triggers a mandatory minimum three-year sentence not otherwise imposed for second-degree felonies. Where the State is seeking the second-degree felony statutory punishments and/or the mandatory minimum sentence prescribed by Section 30-9-11—notwithstanding the normal sentence for a second-degree felony under NMSA 1978, Section 31-18-15—because the victim is 13-18, the victim's age becomes an essential fact that must be submitted to the jury and determined beyond a reasonable doubt. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901.

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

14-6019B. Conspiracy; multiple objectives; special verdict.[1]

If you find the defendant guilty of conspiracy [as charged in Count _____][2], then you must determine which crime[s] the defendant conspired to commit. You must complete the special [form] [forms] to indicate your findings. [With respect to each question,][3] For you to make a finding of "yes," the state must prove to your satisfaction beyond a reasonable doubt that the defendant conspired to commit the crime of _____ (*name of crime*).

(style of case)

QUESTION 1

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of _____(*name of crime*)?

_____ (Yes or No)

QUESTION [_____ (*insert question number*)][4]

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of _____(*name of crime*)?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. This verdict form is to be used in conjunction with UJI 14-2810B NMRA when the defendant is charged with conspiracy to commit multiple crimes. If the jury has been instructed on more than one count of conspiracy involving multiple objectives, use a separate special verdict form UJI 14-6019B for each count of conspiracy.

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

3. Use the bracketed phrase if more than one question is given to the jury.

4. For each crime the commission of which is alleged to be part of the conspiracy, provide a separate question.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* the committee commentary to UJI 14-2810A NMRA, the unanimity instruction.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-6019C. Sexual exploitation of children; under 13; special verdict.[1]

(*Style of Case*)

If you find the defendant guilty of sexual exploitation of children (possession) [as charged in Count ____][2], then you must determine if a child depicted in the visual or print medium was under the age of thirteen (13). You must complete this special form to indicate your finding. For you to make a finding of Ayes,@ the State must have proven it to your satisfaction beyond a reasonable doubt. Do you unanimously find beyond a reasonable doubt that a child depicted in the visual or print medium was under the age of thirteen (13)?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. This verdict form is to be used in conjunction with UJI 14-631 NMRA when the State seeks to enhance a defendant=s sentence under Section 30-6A-3(A) NMSA 1978.

2. Insert Count number if more than one (1) count is charged.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(A) (2016).

The Legislature amended Section 30-6A-3(A) in 2016, adding the one-year sentence enhancement for depictions of children under the age of 13. 2016 N.M. Laws, ch. 2, ' 1 (eff. Feb. 25, 2016). This enhancement is applicable to possession offenses only. *Id*.

Because the enhancement requires an additional fact not required for conviction, the age of a depicted child becomes an essential fact that must be submitted to the jury and proved beyond a reasonable doubt. *See generally 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 a reasonable doubt).

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 NOTES

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.

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 NOTES

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 No. 07-8300-031, 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.

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 NOTES

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 No. 07-8300-031, 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 NOTES

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.

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 NOTES

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.

Part B
Life Imprisonment

14-7010. Explanation of life imprisonment without possibility of release or parole proceeding; single aggravating circumstance.[1]

INTRODUCTION OF STAFF:

I am Judge _____ (name of Judge presiding over hearing). My bailiff, who will escort you and assist in communicating with the court, is_____. My administrative assistant is _____. If you need anything during this proceeding the bailiff or the administrative assistant would be happy to help. The court [reporter][monitor] is making a record of the proceeding. You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the proceeding because ordinarily transcripts of the witnesses testimony will not be provided to you.

INTRODUCTION TO PRELIMINARY INSTRUCTIONS:

As the proceeding 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 proceeding. 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 the instructions. You must follow the final instructions in reaching your verdict.

SCHEDULING DURING HEARING:

This proceeding is expected to last [until _____] [_____ days]. The usual hours of the proceeding 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.

NOTE TAKING PERMITTED

You are allowed, but not required, to take notes during this proceeding. 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 proceeding. 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 proceeding 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 HEARING

The proceeding 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 proceeding can be of considerable assistance to you in understanding the evidence as it is presented at the proceeding. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or 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 your verdict.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this proceeding, 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 opportunity 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 proceeding 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 the question and your name 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 proceeding. You must reach your verdict based solely upon the evidence received in court. You must not consider anything you may have read or heard about the proceeding outside the courtroom. During the proceeding and your deliberations, you must avoid news accounts of the proceeding, 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 proceeding.

You, as jurors, must decide this proceeding based solely on the evidence presented here within the four walls of this courtroom. This means that during the proceeding you must not conduct any independent research about this proceeding, the matters in this proceeding and the individuals or corporations involved in the proceeding. 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

proceeding or to help you reach your verdict. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this proceeding with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the verdict to be reached with your fellow jurors, but you cannot discuss the verdict with anyone else, including your family and friends, until the proceeding is at an end.

I know that many of you use cell phones, the internet, and other tools of technology. You are not to discuss or provide any information to anyone about this proceeding through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this proceeding until I have accepted your verdict and this proceeding is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing, or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the proceeding until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment impartially and without regard to sympathy, bias, or prejudice. Therefore, until you retire to deliberate, you must not discuss this proceeding 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.

To minimize the risk of accidentally overhearing something that is not evidence, 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.

HEARING PROCEDURE:

I will outline the procedure for you to follow in reaching your verdict.

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] [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 for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was of a person likely to become a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will decide whether this aggravating circumstance was present beyond a reasonable doubt.

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 NOTES

1. This instruction is to be used if the defendant is charged with a crime carrying a sentence of life imprisonment without possibility of release or parole and the court adopts a bifurcated proceeding to determine whether an aggravating circumstance exists. It is to be used when the defendant has been convicted of a single murder and a single aggravating circumstance has been charged. (For cases where the death penalty remains an option, *see* UJI 14-7010 NMRA (2020), *available at* https://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink)). It is to be given at the start of the proceeding on the aggravating factor and 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 NMRA. If more than one aggravating circumstance is charged for the same murder, use UJI 14-7011 NMRA.

If the court does not adopt a bifurcated proceeding, do not use this instruction or the other instructions in Chapter 70; instead give special verdict and special interrogatory instructions patterned on UJIs 14-6013 and 14-6014 NMRA for each alleged murder and aggravating circumstance.

2. Use only the applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — This instruction may only be used in a proceeding involving a potential sentence of life imprisonment without possibility of release or parole when the court adopts a bifurcated proceeding and the state has charged a single aggravating circumstance. Rule 5-705 NMRA allows for the bifurcation of the issues of guilt of the defendant and whether one or more aggravating circumstances exist. "Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued [before the district court]." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 22, 414 P.3d 326. If the court bifurcates the proceedings, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist. *See* Rule 5-705(C) NMRA.

Although "the death penalty ha[s] been abolished . . . the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *Chadwick-McNally*, 2018-NMSC-018, ¶ 12 (internal quotation marks and citation omitted). In these cases, this instruction must be modified by the historical UJI to ensure proper consideration of aggravating and mitigating factors.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

14-7011. Explanation of life imprisonment without possibility of release or parole proceeding; multiple aggravating circumstances.[1]

INTRODUCTION OF STAFF:

I am Judge _____ (name of Judge presiding over hearing). My bailiff, who will escort you and assist in communicating with the court, is _____. My administrative assistant is _____. If you need anything during this proceeding the bailiff or the administrative assistant would be happy to help. The court [reporter][monitor] is making a record of the proceeding. You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the proceeding because ordinarily transcripts of the witnesses testimony will not be provided to you.

INTRODUCTION TO PRELIMINARY INSTRUCTIONS:

As the proceeding 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 proceeding. 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 the instructions. You must follow the final instructions in reaching your verdict.

SCHEDULING DURING HEARING:

This proceeding is expected to last [until _____] [_____ days]. The usual hours of proceeding 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.

NOTE TAKING PERMITTED

You are allowed, but not required, to take notes during this proceeding. 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 proceeding. 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 proceeding 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 HEARING

The proceeding 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 proceeding can be of considerable assistance to you in understanding the evidence as it is presented at the proceeding. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or 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 proceeding, 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 opportunity 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 proceeding 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 the question and your name 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 proceeding. You must reach your verdict based solely upon the evidence received in court. You must not consider anything you may have read or heard about the proceeding outside the courtroom. During the proceeding and your deliberations, you must avoid news accounts of the proceeding, 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 proceeding.

You, as jurors, must decide this proceeding based solely on the evidence presented here within the four walls of this courtroom. This means that during the proceeding you must not conduct any independent research about this proceeding, the matters in this proceeding and the individuals or corporations involved in the proceeding. 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 proceeding or to help you reach your verdict. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this proceeding with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the verdict to be reached with your fellow jurors, but you cannot discuss the verdict with anyone else, including your family and friends, until the proceeding is at an end.

I know that many of you use cell phones, the internet, and other tools of technology. You are not to discuss or provide any information to anyone about this proceeding through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this proceeding until I have accepted your verdict and this proceeding is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing, or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the proceeding until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment impartially and without regard to sympathy, bias, or prejudice. Therefore, until you retire to deliberate, you must not discuss this proceeding 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.

To minimize the risk of accidentally overhearing something that is not evidence, 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.

HEARING PROCEDURE:

I will outline the procedure for you to follow in reaching your verdict.

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, _____ (*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 for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was of a person likely to become a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[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.

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 NOTES

1. This instruction is to be used if the defendant is charged with a crime carrying a sentence of life imprisonment without possibility of release or parole and the court adopts a bifurcated proceeding to determine whether aggravating circumstances exist. It is to be used 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. (For cases where the death penalty remains an option, *see* UJI 14-7011 NMRA (2020), *available at* https://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink)). It is to be given at the start of the proceeding on the aggravating factors and 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 court does not adopt a bifurcated proceeding, do not use this instruction or the other instructions in Chapter 70; instead give special verdict and special interrogatory instructions patterned on UJIs 14-6013 and 14-6014 NMRA for each alleged murder and aggravating circumstance.

2. Use only the applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — This instruction is to be used only in a proceeding involving a potential sentence of life imprisonment without possibility of release or parole when the court adopts a bifurcated proceeding and the state has charged

multiple aggravating circumstances. Rule 5-705 NMRA allows for the bifurcation of the issues of guilt of the defendant and whether one or more aggravating circumstances exist. "Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued [before the district court]." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 22, 414 P.3d 326. If the court bifurcates the proceedings, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist. *See* Rule 5-705(C) NMRA.

Although "the death penalty ha[s] been abolished . . . the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *Chadwick-McNally*, 2018-NMSC-018, ¶ 12 (internal quotation marks and citation omitted). In these cases, this instruction must be modified by the historical UJI to ensure proper consideration of aggravating and mitigating factors.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

14-7012. Life imprisonment without possibility of release or parole proceeding; consideration of evidence.[1]

LADIES AND GENTLEMEN:

You have heard all of the evidence that is to be presented for this proceeding. In reaching your verdict you shall consider all of the evidence admitted during the trial[2] [and all of the evidence admitted during this 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.

USE NOTES

1. This instruction must be given in every life imprisonment without possibility of release or parole proceeding after all the evidence has been completed.

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 proceeding.

3. Use bracketed phrase if additional evidence was admitted during the proceeding.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction may only be used in a proceeding involving a potential sentence of life imprisonment without possibility of release or parole when the court adopts a bifurcated proceeding and the state has charged one or more aggravating circumstances. Rule 5-705 NMRA allows for the bifurcation of the issues of guilt of the defendant and whether one or more aggravating circumstances exist. "Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued [before the district court]." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 22, 414 P.3d 326. If the court bifurcates the proceedings, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist. *See* Rule 5-705(C) NMRA.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7013. Withdrawn.

14-7014. Life imprisonment without possibility of parole 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 NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole 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; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — "Peace officer" is defined in NMSA 1978, § 30-1-12 (1963). 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*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 164.

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*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464 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. 137 (1987).

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7015. Life imprisonment without possibility of release or parole 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] [an attempt to commit][2] a kidnapping. Before you may find the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] 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] [an attempt to commit][2] kidnapping was committed;

2. _____ (*name of victim*) was murdered while _____ (*name of defendant*) was [committing] [or] [attempting to commit][2] kidnapping; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, 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; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — The penalty of life imprisonment without possibility of release or parole 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 jury has not previously been instructed pursuant to UJI 14-403 NMRA, Kidnapping, and UJI 14-2801 NMRA, Attempt to Commit a Felony; UJIs 14-921 to 14-936 NMRA, Criminal Sexual Contact of a Minor; or UJI 14-941 to 14-963 NMRA, Criminal Sexual Penetration, the appropriate instruction must be given.

If UJI 14-7016 NMRA or UJI 14-7017 NMRA is to be given with this instruction, there must be evidence of an independent factual basis for each of the offenses. 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.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7016. Life imprisonment without possibility of release or parole 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] [an attempt to commit][2] criminal sexual contact of a minor. Before you may find the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] 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] [an attempt to commit][2] criminal sexual contact of a minor was committed;

2. _____ (*name of victim*) was murdered while _____ (*name of defendant*) was [committing] [or] [attempting to commit][2] criminal sexual contact of a minor; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, Elements of uncharged crimes. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7017. Life imprisonment without possibility of release or parole 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] [an attempt to commit][2] criminal sexual penetration. Before you find the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] 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] [an attempt to commit][2] criminal sexual penetration was committed;

2. _____ (*name of victim*) was murdered while defendant was [committing] [or] [attempting to commit][2] criminal sexual penetration; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, “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; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7018. Life imprisonment without possibility of release or parole 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 NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, 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; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — NMSA 1978, Section 31-20A-5(C) (1981), provides that it is an aggravating circumstance if the defendant committed the murder while attempting to escape from a penal institution. The jury may have been instructed previously pursuant to UJI 14-2222 NMRA, Escape From the Penitentiary, UJI 14-2221 NMRA, Escape From Jail, or UJI 14-202 NMRA, 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 NMRA and 14-2222 NMRA.

Escape from the penitentiary includes escape from other facilities under the department of corrections. *See* committee commentary to UJI 14-2222 NMRA. This aggravating circumstance requires that the defendant must have intended to kill the victim.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7019. Life imprisonment without possibility of release or parole 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] [or] [lawfully on the premises of a penal institution] [or] [an employee of the state corrections department].[2]

Before you may find the aggravating circumstance of murder of [an inmate of a penal institution] [or] [a person lawfully on the premises of a penal institution] [or] [murder of an employee of the state corrections department],[2] 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*);] [or]

[lawfully on the premises of _____ (*name of penal institution*);]

[or]

[an employee of the state corrections department];[2]

and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is only to be used in life imprisonment without possibility of release or parole 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; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — 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 State v. Henderson*, 1990-NMSC-030, ¶ 45, 109 N.M. 655, 789 P.2d 603 (Ransom, J., concurring in part, dissenting in part) (reasoning 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), *overruled on other grounds by Clark v. Tansy*, 1994-NMSC-098, ¶¶ 20-21, 118 N.M. 486, 882 P.2d 527, *cited with approval in State v. Allen*, 2000-NMSC-002, ¶ 74, 128 N.M. 482, 994 P.2d 728. “[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*, 1990-NMSC-030, ¶ 22.

The problem of double counting thus may arise when two distinct statutory aggravators overlap under the facts of a particular case. *Cf. id.* 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 NMSA 1978, § 31-20A-5(D) (1981) allows the jury to consider that “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), 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, ¶ 76 (failure to provide definitional instruction did not amount to fundamental error).

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7020. Withdrawn.

14-7021. Withdrawn.

14-7022. Life imprisonment without possibility of release or parole 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 NOTES

This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — The phrase "murder for hire" are words of common knowledge and normally requires no separate instruction.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7023. Life imprisonment without possibility of release or parole 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] [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] [or] [murder of any person likely to become a witness to a crime] [or] [murder in retaliation for having testified in a criminal proceeding][2], 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] [or] [was likely to become a witness] to the [crime] [crimes] of _____ (*name of separate crime or crimes*)] [has testified in a criminal proceeding][2]; 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 NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding. This instruction may be used only if the motive for the murder was to prevent the victim from reporting or testifying or for having testified in any criminal proceeding. *See Clark v. Tansy*, 1994-NMSC-098, ¶ 25, 118 N.M. 486, 882 P.2d 527.

2. Use only applicable alternative or alternatives.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — NMSA 1978, § 31-20A-5(G) (1981) provides 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*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50.

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. *See* UJI 14-2403 NMRA. If the jury was instructed on this subject previously, it is not necessary to give such an instruction during this proceeding.

The touchstone of murder of a witness is evidence of the defendant's specific intent to prevent the witness from reporting another crime (or testifying or in retaliation). *See State v. Martinez*, 2006-NMSC-007, ¶¶ 12-15, 139 N.M. 152, 130 P.3d 731; *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*, 1989-NMSC-010, 108 N.M. 288, 772 P.2d 322 (Clark I); *Clark v. Tansy*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527 (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*, 1990-NMSC-030,109 N.M. 655, 789 P.2d 603, *overruled in part by Martinez*, 2006-NMSC-007, ¶ 30 (holding that, to the extent that *Henderson* can be read as upholding the murder-of-a-witness motive based on only the defendant's lack of other plausible motives and attempts to destroy evidence or conceal involvement in the crimes, *Henderson* intolerably relaxes the constitutional and statutory standard).

For an analysis of multiple of cases concerning the evidence to support the murder-of-a-witness aggravator across "a broad spectrum" *see Martinez*, 2006-NMSC-007, ¶¶ 17-31.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7024. Withdrawn.

14-7025. Withdrawn.

14-7026. Life imprisonment without possibility of release or parole 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] [one or more of the aggravating circumstances were present].[2]

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 NOTES

1. This instruction must be given in all life imprisonment without possibility of release or parole proceedings.

2. Use applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction must be given in life imprisonment without possibility of release or parole proceedings instead of UJI 14-5060 NMRA.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. NMSA 1978, § 31-20A-2 (2009); *see State v. Fry*, 2006-NMSC-001, ¶ 28, 138 N.M. 700, 126 P.3d 516 (“For the use of . . . felonies as an aggravating circumstance, [in a death penalty case] the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill.”).

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7027. Life imprisonment without possibility of release or parole 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.

A special form has been prepared for [the] [each][2] 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.

USE NOTES

1. This instruction must be given in every life imprisonment without possibility of release or parole proceeding for each aggravating circumstance to be given to the jury. It is to be given immediately prior to UJI 14-7032 NMRA, sample form of findings.

2. Use only applicable alternative.

3. This alternative is to be given if more than one aggravating circumstance is to be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — At least one aggravating circumstance must be proved beyond a reasonable doubt to impose life imprisonment without possibility of release or parole. NMSA 1978, § 31-20A-2 (2009); *see State v. Fry*, 2006-NMSC-001, ¶ 28, 138 N.M. 700, 126 P.3d 516 (“For the use of . . . felonies as an aggravating circumstance, [in a death penalty case] the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill.”).

This instruction provides the procedure for finding an aggravating circumstance and for completing the form in UJI 14-7032 NMRA as to the presence of one or more aggravating circumstances.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7028. Withdrawn.

14-7029. Withdrawn.

14-7030. Withdrawn.

14-7030A. Withdrawn.

14-7031. Life imprisonment without possibility of release or parole 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.] 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 NOTES

1. This instruction must be given in every life imprisonment without possibility of release or parole proceeding.

2. Use first bracketed phrase only when a new jury is hearing the proceeding. Use second bracketed phrase if the original jury is hearing the proceeding.

This instruction is given last.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

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 proceeding.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7032. Life imprisonment without possibility of release or parole proceeding; sample form of findings; aggravating circumstance findings.[1]

(style of case)

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.

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 NOTES

1. This instruction is to be given immediately after UJI 14-7027 NMRA. This instruction is for use only in life imprisonment without possibility of release or parole 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.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — NMSA 1978, § 31-20A-2 (2009) establishes the procedure to be followed by the jury in determining the sentence to be imposed and requires a finding beyond a reasonable doubt of an aggravating circumstance before a

sentence of life imprisonment without possibility of release or parole may be imposed. This instruction is the form to be used by the jury to indicate whether an aggravating circumstance charged was found.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

14-7033. Withdrawn.

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 NOTES

This instruction must be given in every life imprisonment without possibility of release or parole proceeding. After the jury has retired for deliberation neither this instruction nor any “shotgun” instruction shall be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction is almost identical to UJI 14-6008 NMRA. It has been modified for use in life imprisonment without possibility of release or parole sentencing proceedings.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

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 NOTES

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.

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 NOTES

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 NOTES

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.

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 NOTES

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 No. 08-8300-008, effective March 21, 2008.]

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.

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 NOTES

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 No. 08-8300-008, 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.

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 NOTES

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.

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 NOTES

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.

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 NOTES

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 No. 08-8300-008, 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.

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 NOTES

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 No. 08-8300-008, 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 NOTES

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 No. 08-8300-008, effective March 21, 2008.]

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).

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 No. 08-8300-008, effective March 21, 2008.]

USE NOTES

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.

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 NOTES

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.]

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 NOTES

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.]

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 NOTES

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.]

14-9005. Children's court; special verdict; amenability specific factors.[1]

If you find that _____ (*name of child*) committed the offense of _____ (*name of offense*) [as charged in Count_____][2], then you must determine whether the offense was committed in an aggressive, violent, premeditated or willful manner; and whether a firearm was used to commit the offense; and whether the offense was against a person or against property; and whether the _____ (*name of child*) inflicted physical injury to a person. You must complete the special forms to indicate your findings.

For you to make a finding of "yes" to the first question, the state must prove to your satisfaction beyond a reasonable doubt that the offense was committed in an aggressive, violent, premeditated or willful manner.

For you to make a finding of "yes" to the second question, the state must prove to your satisfaction beyond a reasonable doubt that a firearm was used to commit the offense.

For you to make a finding of "yes" to the third question, the state must prove to your satisfaction beyond a reasonable doubt that the offense was against a person.

For you to make a finding of "yes" to the fourth question, the state must prove to your satisfaction beyond a reasonable doubt that the offense was against property.

For you to make a finding of "yes," to the fifth question, the state must prove to your satisfaction beyond a reasonable doubt that _____ (*name of child*) inflicted physical injury to a person.

QUESTION [1]

Do you unanimously find beyond a reasonable doubt that the offense [as charged in Count _____], was committed in an aggressive, violent, premeditated or willful manner?[3]

_____ (Yes)
_____ (No)

QUESTION [2]

Do you unanimously find beyond a reasonable doubt that a firearm was used to commit the offense [as charged in Count ____]?

_____ (Yes)
_____ (No)

QUESTION [3]

Do you unanimously find beyond a reasonable doubt that the offense was against a person?

_____ (Yes)
_____ (No)

QUESTION [4]

Do you unanimously find beyond a reasonable doubt that the offense was against property?

_____ (Yes)
_____ (No)

QUESTION [5]

Do you unanimously find beyond a reasonable doubt that _____ (*name of child*) inflicted physical injury to a person[s]?

_____ (Yes)
_____ (No)

_____
FOREPERSON

USE NOTES

1. This instruction is to be submitted in all youthful offender cases on the question of whether the child can be rehabilitated or treated sufficiently to protect society's interests by the time the child reaches the age of twenty-one (21) and is therefore amenable to treatment or subject to adult penalties. This instruction only applies to the offenses enumerated in NMSA 1978, Section 32A-2-3(J)(1) (2009), and only when the child was fourteen to eighteen years of age at the time of the alleged offense.

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

3. All questions must be submitted to the jury unless the court makes a finding that a factor is not applicable to amenability under the facts of the particular case or there is a stipulation by parties as to a factor.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed on or after December 31, 2014.]

Committee commentary. — *State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22, 243 P.3d 726, held that while the inquiry of offense-specific factors is not a task traditionally performed by juries, it is prudent to submit the factors in NMSA 1978, Sections 32A-2-20(C)(2)(3) and (4) to the jury during the trial by way of special interrogatories so that only a minimal burden is placed on the process. Discussion regarding the omission of factors led to a consensus that the court could make a finding that a specific factor (such as use of a firearm) is not applicable to the amenability finding under the facts of the particular case and remove the question; or the parties could stipulate to the removal but that otherwise the factors should be presented as listed.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed on or after December 31, 2014.]

Juror Handbook.

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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
1.00	14-101
1.01	None
1.02	14-102
1.03	14-103
1.04	14-104
1.05	14-105
1.06	14-106
1.07	14-107
1.08	14-108
1.09	14-120
1.10	14-121

Former Instruction	UJI
3.12	14-313
3.13	14-314
3.14	14-315
3.50	14-320
3.51	14-321
3.52	14-322
3.53	14-323
4.00	14-401
4.01	14-402
4.02	14-403
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	9.33	14-934

3.08	14-309
3.09	14-310
3.10	14-311
3.11	14-312

Former Instruction	UJI
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
14.02	14-1403
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
22.09	14-2210

14.03	14-1410
14.10	14-1420
16.00	14-1601
16.01	14-1602
16.02	14-1603
16.05	14-1610
16.06	14-1611
16.10	14-1620
16.11	14-1621
16.20	14-1630
16.21	14-1631
16.22	14-1632
16.23	14-1633
16.30	14-1640
16.31	14-1641
16.32	14-1642
16.33	14-1643
16.34	14-1644
16.40	14-1660
16.41	14-1651
16.42	14-1652
16.50	14–1650
16.60	14-1670
16.61	14-1671
16.62	14-1672
16.63	14-1673
16.64	14-1674
16.65	14-1675
16.70	14-1630
16.71	14-1681
16.72	14-1682
16.73	14-1683

22.10	14-2211
22.11	14-2212
22.12	14-2213
22.13	14-2214
22.14	14-2215
22.20	14-2220
22.21	14-2221
22.22	14-2222
22.23	14-2223
22.24	14-2224
22.25	14-2225
22.26	14-2226
22.27	14-2227
22.28	14-2228
22.29	14-2229
22.40	14-2240
22.41	14-2241
22.50	14-2250
22.51	14-2251
22.52	14-2252
22.53	14-2253
22.54	14-2254
22.55	14-2255
25.01	14-2501
28.10	14-2801
28.11 to 28.19	None
28.20	14-2610
28.21	14-2811
28.22	None
28.23	14-2812
28.24	14-2813
28.25	14-2814

Former Instruction	UJI
28.26	14-2815
28.27	14-2816
28.28	14-2817
28.30	14-2822

Former Instruction	UJI
40.01	14-5002
40.02	14-5003
40.03	14-5004
40.04	14-5005

28.31	14-2820	40.05	14-5006
28.32	14-2821	40.06	14-5007
28.39	14-2823	40.07	14-5008
35.01	14-4501	40.08	14-5009
35.02	14-4502	40.09	14-5010
35.03	14-4503	40.10	14-5011
35.04	14-4504	40.11	14-5012
35.05	14-4505	40.12	14-5013
36.00	14-3101	40.13	14-5014
36.01	14-3102	40.14	14-5015
36.02	14-3103	40.20	14-5020
36.03	14-3104	40.21	14-5021
36.10	14-3110	40.22	14-5022
36.11	14-3111	40.23	14-5023
36.12	14-3112	40.24	14-5024
36.13	14-3113	40.25	14-5025
36.20	14-3105	40.26	14-5026
36.30	14-3120	40.27	14-5027
36.31	14-3121	40.28	14-5028
36.32	14-3122	40.29	14-5029
36.40	14-3130	40.30	14-5030
36.41	14-3131	40.31	14-5031
36.43	14-3140	40.32	14-5032
39.00	14-7001	40.33	14-5033
39.01	14-7002	40.34	14-5034
39.02	14-7003	40.35	14-5035
39.03	14-7004	40.36	14-5036
39.04	14-7005	40.40	14-5040
39.05	14-7006	40.41	14-5041
39.06	14-7007	40.45	14-5042
39.10	14-7010	40.50	14-5050
39.11	14-7011	40.51	14-5051
39.12	14-7012	40.60	14-5060
39.13	14-7013	40.61	14-5061
39.14	14-7014	41.00	14-5101
39.15	14-7015	41.01	14-5102
39.16	14-7016	41.02	14-5103
39.17	14-7017	41.03	14-5104

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

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
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
50.12	14-6012

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
61.00	14-9001

50.13	14-6013
50.14	14-6014
50.15	14-6015

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
14-251	2.50

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
14-934	9.33

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

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
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14-950	9.49
14-951	9.50
14-952	9.51
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14-955	9.54
14-956	9.55
14-957	9.56
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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
14-1402	14.01
14-1403	14.02
14-1410	14.03
14-1420	14.10
14-1601	16.00

UJI	Former Form
14-2209	22.08
14-2210	22.09
14-2211	22.10
14-2212	22.11
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	14-3104	36.03

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

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
14-5006	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
14-5024	40.24

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
14-6020	50.20

14-5025	40.25	14-6030	50.30
14-5026	40.26	14-7001	39.00
14-5027	40.27	14-7002	39.01
14-5028	40.28	14-7003	39.02
14-5029	40.29	14-7004	39.03
14-5030	40.30	14-7005	39.04
14-5031	40.31	14-7006	39.05
14-5032	40.32	14-7007	39.06
14-5033	40.33	14-7010	39.10
14-5034	40.34	14-7011	39.11
14-5035	40.35	14-7012	39.12
14-5036	40.36	14-7013	39.13
14-5040	40.40	14-7014	39.14
14-5041	40.41	14-7015	39.15
14-5042	40.45	14-7016	39.16
14-5050	40.50	14-7017	39.17
14-5051	40.51	14-7018	39.18
14-5060	40.60	14-7019	39.19
14-5061	40.61	14-7020	39.20
14-5101	41.00	14-7021	39.21
14-5102	41.01	14-7022	39.22
14-5103	41.02	14-7023	39.23
14-5104	41.03	14-7024	39.24
14-5105	41.05	14-7025	39.25
14-5106	41.06	14-7026	39.30
14-5110	41.10	14-7027	39.31
14-5111	41.11	14-7028	39.32
14-5120	41.15	14-7029	39.33
14-5121	41.16	14-7030	39.34
14-5130	41.20	14-7031	39.35
14-5131	41.21	14-7032	39.36
14-5132	41.22	14-7033	39.37
14-5140	41.26	14-7040	39.40
14-5150	41.30	14-7041	39.41
14-5160	41.35	14-7042	39.42
14-5170	41.40	14-7043	39.43
14-5171	41.41	14-8001	60.00
14-5172	41.42	14-8002	60.01

14-5173	41.43	14-8003	60.02
14-5174	41.44	14-8004	60.03
14-5180	41.50	14-8005	60.10
14-5181	41.51	14-8020	60.20
14-5182	41.52	14-8021	60.21
14-5183	41.53	14–9001	61.00
14-5184	41.54	14–9002	61.01
14-5195	41.60	14–9003	61.02
14-5196	41.61	14–9004	61.03
14-6001	50.00		
14-6002	50.01		