

# PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL

## PROPOSAL 2024-017

March 13, 2024

The Uniform Jury Instructions - Criminal Committee has recommended amendments to Uniform Jury Instructions 14-6013 and 14-6014 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's website at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
rules.supremecourt@nmcourts.gov  
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 12, 2024**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

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### 14-6013. Special verdict; ~~[+]use of a firearm[+]¹; [noncapital felony against a person sixty years of age or older]¹].~~

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~~¹[against a person sixty years of age or older, and that person was intentionally injured]~~ [while brandishing a firearm] [while discharging a firearm] and report your determination. ~~[You must complete the special form to indicate your finding. [With respect to any crime,]² For you to make a finding of "yes," the state must prove to your satisfaction beyond a reasonable doubt that that crime was committed [with the use of a firearm]¹ [against a person sixty years of age or older, and that person was intentionally injured].]~~

[“Use” 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,]<sup>3</sup> for you to make a finding of “yes,” the state must prove to your satisfaction beyond a reasonable doubt that the crime was committed [with the use of a firearm] [while brandishing a firearm] [while discharging a firearm]<sup>2</sup>.

#### USE NOTES

1. Use the applicable bracketed alternative.
2. Use the applicable bracketed alternative. ~~[phrase if more than one crime committed.]~~
  - 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, 2023, if the firearm was used in the commission of a drug transaction, an aggravated burglary under Section 30-16-4, NMSA 1978 (1963), or a serious violent offense under Section 33-2-34(L)(4)(a) through (n), NMSA 1978 (2015).
  - 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.

**Committee commentary.** — NMSA 1978, § 31-18-16 (2022). This instruction, together with the special interrogatory, UJI 14-6014, is required by NMSA 1978, Section 31-18-16 (2020, 2022) ~~[NMSA 1978]~~. Special sentencing provisions apply if the jury finds that a firearm was used in the commission of any felony, other than a capital felony. *State v. Wilkins*, 1975-NMCA-069, 88 N.M. 116, 537 P.2d 1012, [(Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975)]. *See also, State v. Ellis*, 88 N.M. 90, 537 P.2d 207 (Ct. App. 1975)] *State v. Espinosa*, 1988-NMSC-050, ¶¶ 14-13, 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”). ~~[and *State v. Gabaldon*, 92 N.M. 230, 585 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 230, 585 P.2d 1352 (1978).]~~ The use of this instruction and the interrogatory is based on the assumption ~~[that]~~ the defendant was put on notice ~~[that]~~ he must defend against a crime committed with a firearm. *State v. Barreras*, 1985-NMCA-082, 88 N.M. 52, 536 P.2d 1108; [(Ct. App. 1975)] ; *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).

~~[The use of a firearm is not limited to situations where the defendant was the user of the firearm; it also applies where the defendant was only an accessory. Section 31-18-16 NMSA 1978 (former Section 31-18-4 NMSA 1978) requires only that the firearm be used in the commission of the crime. *State v. Roque*, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4 (1977).]~~

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, except that 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 pursuant to 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. “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 removed).

~~[This instruction must also be given when, under Section 31-18-16.1, the evidence shows that a person sixty years of age or older was intentionally injured during the commission of a noncapital felony.]~~

[As amended by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_].

#### 14-6014. Sample forms of verdict.<sup>1</sup>

(style of case)  
We find the defendant [\_\_\_\_\_] (name)<sup>2</sup> GUILTY of \_\_\_\_\_<sup>3</sup> [as charged in Count \_\_\_\_\_<sup>4</sup>].

\_\_\_\_\_  
FOREPERSON

(style of case)  
We find the defendant [\_\_\_\_\_] (name)<sup>2</sup> NOT GUILTY of \_\_\_\_\_<sup>3</sup> [as charged in Count \_\_\_\_\_<sup>4</sup>].

\_\_\_\_\_  
FOREPERSON

(style of case)

We find the defendant [\_\_\_\_\_] (name)]<sup>2</sup> NOT GUILTY.<sup>5</sup>

\_\_\_\_\_  
FOREPERSON

(style of case)

We find the defendant [\_\_\_\_\_] (name)]<sup>2</sup> NOT GUILTY BY REASON OF  
INSANITY.

\_\_\_\_\_  
FOREPERSON

(style of case)

Do you unanimously find beyond a reasonable doubt that a firearm was [used]<sup>6</sup> [brandished]  
[discharged] in the commission of \_\_\_\_\_<sup>3</sup> [as charged in Count \_\_\_\_\_<sup>4</sup>]?  
\_\_\_\_\_ (Yes or No)

\_\_\_\_\_  
FOREPERSON

~~[(style of case)]~~

~~Do you unanimously find beyond a reasonable doubt that \_\_\_\_\_<sup>3</sup> was committed  
against a person sixty years of age or older, and that person was intentionally injured [as charged  
in Count \_\_\_\_\_]?~~

~~\_\_\_\_\_ (Yes or No)~~

\_\_\_\_\_  
~~FOREPERSON]~~

(style of case)

Do you find that the defendant [\_\_\_\_\_] (name)]<sup>2</sup> 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.
  - 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, 2023, if the firearm was used in the commission of a drug transaction, an aggravated burglary under Section 30-16-4 NMSA 1978 (1963), or a serious violent offense under in Section 33-2-34(L)(4)(a) through (n) NMSA 1978 (2015).

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. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]



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## [rules.supremecourt-grp] Comments by NMJC Legislation and Rules Subcommittee

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**Judge Emilio Chavez** <taodejc@nmcourts.gov>

Thu, Apr 11, 2024 at 9:49 AM

Reply-To: taodejc@nmcourts.gov

To: rules.supremecourt@nmcourts.gov, Angie Schneider <aladaks@nmcourts.gov>, Thomas Pestak <tpestak@sierraco.org>, Jennifer Attrep <coajla@nmcourts.gov>

Attached is NMJC L&R Subcommittee's comments regarding the current proposed rule changes.  
Please kindly confirm receipt.

Thank you,

Emilio J. Chavez  
Chief Judge  
Eighth Judicial District  
[105 Albright Street, Suite N](#)  
[Taos, NM 87571](#)



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**NEW MEXICO JUDICIAL COUNCIL LEGISLATION AND RULES SUBCOMMITTEE COMMENTS (1).docx**  
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## NEW MEXICO JUDICIAL COUNCIL LEGISLATION AND RULES SUBCOMMITTEE COMMENTS

1. Proposal 2024-002 – Permanency Review Hearings [comments begin on p. 4]
  - The proposed changes to Rules 10-345 NMRA and 10-346 are mostly stylistic and appropriate.
2. Proposal 2024-003 – Child’s First Appearance on a Delinquency Petition
  - The proposed changes to Form 10-711 NMRA: The form is for use with Rule 10-224 NMRA and should indicate at the top of the form similar to other delinquency forms. It makes sense to change arraignment to first appearance.
  - However, in the comparable criminal forms the language indicates “I understand that I am charged with the following criminal offense or offenses.” *See e.g.* 9-405 NMRA. Although the suggested change “I understand the allegations in the petition” is correct, it insert “allegations” rather than “offense,” which is the language indicated in Rule 10-224(A) NMRA. A suggestion might be to amend the language to “I understand that I am charged with the following ~~criminal~~ offense or offenses” to track the language of the rule and to be consistent with the criminal form.
  - Rule 10-224(G) NMRA reads, “the right to remain silent, and that any statement made by the respondent child may be used against the respondent child.” The proposed change to Form 10-711 regarding right to remain silent is appropriate but the change should omit “in court”. The proposed changed language might be modified as follows “the RIGHT to remain silent with the understanding that any statement I make may be used against me ~~in court~~, except any “**confidential**” statements I make to my attorney.”  
*See e.g.* Rules 11-503 NMRA; 6-501 NMRA.
3. Proposal 2024-004 – Water Settlement Agreements
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4. Proposal 2024-005 – Garnishment [comments begin on p. 50]
  - Rule 1-065.1(E): The word “filed” is missing in the following sentence: “Notwithstanding the foregoing, for cases **filed** on or after July 1, 2023, it shall not be necessary for a judgment debtor to assert an exemption to the first two thousand four hundred dollars (\$2,400.00) held in a [depository or investment] account.”
  - Rule 2-802(B): The phrase “certificate of service shall be filed by the judgment creditor indicating” is missing in the following sentence: “A separate **certificate of**

service shall be filed by the judgment creditor indicating transmission of the writ on the judgment debtor.”

5. Proposal 2024-006 – Political Activity and Elections

- The proposed changes are stylistic and appropriate. The inclusion in 21-401(C)(7) of the language “express and implied” is superfluous.

6. Proposal 2024-007 – Lawyer Succession Rule [comments begin on p. 4]

- The proposed changes are necessary and appropriate.

7. Proposal 2024-008 – Surreptitious Recordings of Clients, Third Parties

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8. Proposal 2024-009 – Providing Financial Assistance to Clients

- The proposed change to Rule 16-108 NMRA is a much needed exception, but perhaps modest gift should be defined.

9. Proposal 2024-010 – Incorporation of Plea Deadlines [comments begin on p. 6]

- The proposed change to Rule 5-304(E) NMRA is important to define a set timeframe for plea deadlines. Instead of creating (F), the new proposed (E) might read no plea agreement shall be entered into later than five (5) days before the scheduled date for jury selection or commencement of a bench trial **unless a written finding of good cause is made by the judge that excuses the untimely submission of the agreement.**
- (F) might also include language “In addition, to finding good cause excusing the untimely plea agreement, the court may consider sanctions against the state and defense counsel.”
- In (F), the phrase “the scheduled date for jury selection or commencement of a bench” might be added in the following sentence for consistency: “A request for the court to approve an untimely plea agreement less than five (5) days before **the scheduled date for jury selection or commencement of a bench** trial shall not be granted except on a written finding by the judge of good cause that excuses the untimely submission of the agreement.”
- In the “Notwithstanding” sentence the committee may want to consider including “a defendant may plead guilty to all **legally permissible** charges . . .” There are often times where a criminal information implicates double jeopardy or there is not a factual basis supporting the allegation.

10. Proposal 2024-011 – Filing of Criminal Complaint Upon Arrest



- The proposed change to Rule 5-210 NMRA providing a definitive timeframe is a much needed change.

#### 11. Proposal 2024-012 – Consolidated Cases [comments begin on p. 5]

- The proposal seeks to create Rule 5-305 NMRA. The proposed new rule is generally accomplished under Rule 5-203(A) or filing a superseding indictment. Rather than creating a new rule, the same purpose might be done by amending in 5-203(A) NMRA to include similar language to 5-203(B) NMRA.
- For example after separate count “**or a separate complaint, indictment or information may be consolidated on motion of a party.**” The language “whether felonies or misdemeanors or both:” is likely unnecessary and could be removed.

#### 12. Proposal 2024-013 – Plea Deadlines, Suppression Hearings, and Extensions for Trial [comments begin on p. 14]

- The proposed change to the committee commentary to Rule 5-212 NMRA should be included in the substantive part of the rule under (D) rather than commentary. The committee may want to consider 7-10 day requirement to allow the court time to rule and the parties to timely enter a plea after the ruling under the new proposed deadline for Rule 5-304 NMRA.

#### 13. Proposal 2024-014 – Kinship Guardianship Forms

- The proposed changes to the forms appear to be appropriate and add consistency.

#### 14. Proposal 2024-015 – Parentage Forms

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#### 15. Proposal 2024-016 – Human Rights Act Intentional Discrimination

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#### 16. Proposal 2024-017 – Firearm Enhancement

- The proposed change to UJI Special Verdict Form 14-6013 NMRA is needed to track the language of NMSA 1978 §31-18-16. The definitions are likewise clear and important for the determination. Likewise, the use note is necessary to provide clarification regarding the changes to the statute. The committee may want to consider an additional sentence to the firearm instruction that the defendant can use a gun without brandishing it

- On the sample verdict form, the committee may want to consider that there may be cases where the jury needs to determine if the firearm was either used, brandished, or discharged.
- Depending on the facts of the case the form might have Used \_\_\_\_\_ (Yes or No; Brandished \_\_\_\_\_ (Yes or No); or Discharged \_\_\_\_\_ (Yes or No)

The sentencing judge would use the highest of the three alternatives to sentence.

#### 17. Proposal 2024-018 – Multiple Defendants

- Prior to changing UJI 14-6003 NMRA the committee should consider if the instruction is necessary? UJI 14-6005 NMRA is short and simple and illustrates the point that the counts should be considered separately as to each defendant. Also, the committee may want to look at UJI's 14-6010 and 14-6012 that include some of the proposed language.
- If a change is necessary, the proposed change to UJI 14-6003 NMRA might be clearer if the instruction read, "In this case, involving multiple defendants, you must consider separately whether each defendant is guilty or not guilty. The state must prove to your satisfaction beyond a reasonable doubt each of the elements of a crime against a defendant to render a verdict of guilty. You should analyze what the evidence in the case shows with respect to each individual defendant. [[Both] [All] defendants are charged with the same crimes.] [The defendants are charged with different offenses. Please review the verdict forms to clarify the offense(s) that [is][are] applicable to each defendant.
- The last two proposed sentences for 14-6003 are redundant as to instructions UJI 14-6010 "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] and UJI 14-6012.

Respectfully submitted,

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New Mexico Judicial Council Legislation and  
Rules Subcommittee

Hon. Jennifer Attrep  
Hon. Emilio Chavez  
Hon. Thomas Pestak  
Hon. Angie Schneider