

1 **14-202. Felony murder; essential elements.**

2 For you to find the defendant \_\_\_\_\_ (*name of*  
3 *defendant*) guilty of felony murder, which is [~~first-degree~~ first-degree murder, [as charged in Count  
4 \_\_\_\_\_],<sup>1</sup> the state must prove to your satisfaction beyond a reasonable doubt each of the following  
5 elements of the crime:

6 1. The defendant \_\_\_\_\_ (*name of*  
7 *defendant*) [committed]<sup>2</sup> [attempted to commit] the crime of \_\_\_\_\_<sup>3</sup> (*name*  
8 *of felony*) [under circumstances or in a manner dangerous to human life];<sup>4</sup>

9 2. \_\_\_\_\_ (*name of defendant*) caused<sup>5</sup> the  
10 death of \_\_\_\_\_ (*name of deceased*) during [the  
11 commission of]<sup>2</sup> [the attempt to commit] \_\_\_\_\_ (*name of felony*);

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

14 [4. The defendant did not act as a result of sufficient provocation];<sup>6</sup>

15 5. This happened in New Mexico on or about the \_\_\_\_\_ day of  
16 \_\_\_\_\_, \_\_\_\_\_.

17 USE NOTES

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

19 2. Use applicable alternative or alternatives.

20 3. Unless the court has instructed on the essential elements of the felony or attempted  
21 felony, these elements must be given in a separate instruction. To instruct on the elements of an  
22 uncharged offense, UJI 14-140 NMRA must be used.

23 4. Use bracketed phrase unless the felony is a [~~first-degree~~ first-degree felony.

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

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

5 [As amended, effective March 15, 1995; as amended by Supreme Court Order No. 14-8300-005,  
6 effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme  
7 Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31,  
8 2021; as amended by Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases  
9 pending or file on or after December 31, 2025.]

10 **Committee commentary.** — Felony murder consists of a second-degree murder committed in the  
11 course of a dangerous felony. NMSA 1978, § 30-2-1(A)(2) (1994); *see State v. Montoya*, 2013-  
12 NMSC-020, ¶ 15, 306 P.3d 426; *see also State v. Nieto*, 2000-NMSC-031, ¶¶ 13-14, 129 N.M.  
13 688, 12 P.3d 442 (citing *State v. Campos*, 1996-NMSC-043, ¶ 17, 122 N.M. 148, 921 P.2d 1266).  
14 *See* Section 30-2-1A(2). Proof of malice aforethought or deliberate intention is not required as an  
15 element of felony murder. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211. The  
16 defense of “inability to form specific intent” does not apply to the murder element of felony murder  
17 because felony murder does not include the element of deliberate intention to take the life of  
18 another. *See* UJI 14-5110 NMRA. However, the felony which forms the basis for the felony murder  
19 may include a specific intent and the defense could apply to that element. *See* UJI 14-5111 NMRA.  
20 Before a defendant can be convicted of felony murder, ~~he~~the defendant must be given notice of  
21 the precise felony involved in the charge. The notice may be in the indictment or information, or  
22 otherwise furnished to the defendant in sufficient time to enable the defendant to prepare a defense.  
23 *State v. Stephens*, 1979-NMSC-076, ¶ 10, 93 N.M. 458, 601 P.2d 428; *State v. Hicks*, 1976-NMSC-

1 069, ¶ 8, 89 N.M. 568, 555 P.2d 689. Rule 5-303 NMRA of the Rules of Criminal Procedure for  
2 the District Courts would seem to indicate that the proper procedure may be to amend the  
3 indictment or information. The state must prove each element of the underlying felony [or  
4 attempt], otherwise it is improper to submit felony murder. *State v. DeSantos*, 1976-NMSC-034,  
5 ¶ 8, 89 N.M. 458, 553 P.2d 1265. Felony murder may be charged as part of an open count of  
6 murder by also charging the underlying felony. *Stephens*, 1979-NMSC-076, ¶ 11. However, when  
7 a jury convicts a defendant of both felony murder and the same felony upon which the felony  
8 murder conviction is predicated, the predicate felony is vacated because it is subsumed within the  
9 felony murder conviction. *State v. Torrez*, 2013-NMSC-034, ¶ 15, 305 P.3d 944.

10 “In New Mexico, the underlying felony must be a first-degree felony, an inherently dangerous  
11 lesser degree felony, or a lesser degree felony committed under inherently dangerous  
12 circumstances.” *State v. Smith*, 2001-NMSC-004, ¶ 12, 130 N.M. 117, 19 P.3d 254 (citing *State v.*  
13 *Harrison*, 1977-NMSC-038, ¶ 14, 90 N.M. 439, 564 P.2d 1321). There is a presumption of inherent  
14 dangerousness “in a felony murder case where the predicate felony is a first-degree felony, but not  
15 where the felony is of a lesser degree.” *State v. Mora*, 1997-NMSC-060, ¶ 21, 124 N.M. 346, 950  
16 P.2d 789, *overruled on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120,  
17 164 P.3d 1. For lesser felonies, “both the nature of the felony and the circumstances surrounding  
18 its commission may be considered to determine whether it was inherently dangerous to human  
19 life.” *Smith*, 2001-NMSC-004, ¶ 12. This is a factual matter “for the jury to decide in each case,  
20 subject to review by the appellate courts.” *Id.*

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

1 “[T]o charge felony murder for a killing in the commission of or attempt to commit a felony, the  
2 felony must be either a first-degree felony (in which case the ‘res gestae’ test must be used) or the  
3 lesser degree felony must be inherently dangerous or committed under circumstances that are  
4 inherently dangerous.” *State v. Ortega*, 1991-NMSC-084, ¶ 17, 112 N.M. 554, 817 P.2d 1196,  
5 *abrogated on other grounds by Frazier*, 2007-NMSC-032, ¶ 1. “[F]or the homicide to come within  
6 the res gestae, the felony and the homicide must be part of one continuous transaction and closely  
7 connected in point of time, place and causal connection. . . . [C]ausation must be the acts of  
8 defendant leading to the homicide without an independent force intervening.” *State v. Martinez*,  
9 1982-NMCA-053, ¶ 17, 98 N.M. 27, 644 P.2d 541 (citing *Harrison*, 1977-NMSC-038, ¶ 11). If  
10 there is sufficient evidence to raise the issue of causation, the question must be left to the jury  
11 under this instruction and the causation instruction, UJI 14-251 NMRA.

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

17 [As amended by Supreme Court Order No. 14-8300-005~~[-effective for all cases filed or pending~~  
18 ~~on or after December 31, 2014]~~; as amended by Supreme Court Order No. 21-8300-25~~[-effective~~  
19 ~~for all cases pending or filed on or after December 31, 2021]~~; as amended by Supreme Court Order  
20 No. S-1-RCR-2025-00126.]