

1 **14-3106. Possession of a dangerous drug.**

2 For you to find the defendant guilty of possession of a dangerous drug [as charged in Count  
3 \_\_\_\_\_]<sup>1</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the  
4 following elements of the crime:

5 1. The defendant possessed<sup>2</sup> a drug called \_\_\_\_\_<sup>3</sup>;

6 2. \_\_\_\_\_<sup>3</sup> [has been determined to be a dangerous drug by the New Mexico  
7 Board of Pharmacy;]<sup>4</sup>

8 [OR]

9 [only may be used under the supervision of a practitioner licensed by law to administer or  
10 prescribe the drug under federal law;]

11 [OR]

12 [Is dispensed bearing the legend [“Caution: federal law prohibits dispensing without a  
13 prescription”]<sup>4</sup> [or] [“Caution: federal law restricts this drug to use by or on the order of a licensed  
14 veterinarian”] [or] [“RX only”];]

15 3. The defendant knew it was \_\_\_\_\_<sup>3</sup> [or believed it to be  
16 \_\_\_\_\_<sup>3</sup>];

17 [4. The defendant knew that \_\_\_\_\_<sup>3</sup> [has been determined to be a dangerous  
18 drug by the New Mexico Board of Pharmacy;]<sup>4</sup> [OR] [only may be used under the supervision of  
19 a practitioner licensed by law to administer or prescribe the drug under federal law;] [OR] [Is  
20 dispensed bearing the legend [“Caution: federal law prohibits dispensing without a prescription”]<sup>4</sup>  
21 [or] [“Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian”]  
22 [or] [“RX only”];];]<sup>5</sup>

1 [5. The defendant [did not have a valid prescription for \_\_\_\_\_<sup>3</sup>;]<sup>4</sup> [or]  
2 [was not licensed] [or] [was not legally authorized to possess a dangerous drug because  
3 \_\_\_\_\_<sup>6</sup>;]]

4 6. This happened in New Mexico, on or about \_\_\_\_\_<sup>7</sup>.

5 USE NOTES

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

7 2. UJI 14-130 NMRA, the definition of possession in controlled substance cases,  
8 should be given if possession is in issue.

9 3. Use chemical name for drug.

10 4. Use applicable alternative or alternatives.

11 5. Element 4 distinguishes the penalties as defined in NMSA 1978, Section 26-1-  
12 26(A) and (B). Thus, this instruction may be used to instruct on the lesser-included offense defined  
13 in Section 26-1-26(B) by removing element 4. *See* Committee commentary.

14 6. If evidence is presented that possession of the drug was legal under NMSA 1978,  
15 Section 26-1-18, describe the factual basis for the claim. *See* Committee commentary.

16 7. Insert date on which offense occurred.

17 [Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or  
18 after December 31, 2016.]

19 **Committee commentary.** — NMSA 1978, Section [~~26-1-2(F)~~] 26-1-2(G) (1976) defines a  
20 “dangerous drug” to mean “a drug, other than a controlled substance enumerated in Schedule I of  
21 the Controlled Substances Act, that because of a potentiality for harmful effect or the method of  
22 its use or the collateral measures necessary to its use is not safe except under the supervision of a  
23 practitioner licensed by law to direct the use of such drug and hence for which adequate directions

1 for use cannot be prepared.” Therefore, a charge of unlawfully possessing a dangerous drug  
2 presupposes the substance is not enumerated in Schedule I. *See State v. Reams*, 1982-NMSC-075,  
3 98 N.M. 215, 647 P.2d 417.

4 The Legislature created three levels of penalties for illegal possession of a dangerous drug, stating  
5 that a person who “knowingly” violates NMSA 1978, Section 26-1-16 (1967), the prohibition  
6 against possession of a dangerous drug, “is guilty of a fourth degree felony and shall be punished  
7 by a fine of not less than one thousand dollars (\$1,000) or more than five thousand dollars (\$5,000)  
8 or by imprisonment for not less than one year or both.” NMSA 1978, § 26-1-26(A) (1967).  
9 Meanwhile, all other violations of the Drug, Device, and Cosmetic Act, including Section 26-1-  
10 16, are punishable as a misdemeanor for the first offense and for second and subsequent offenses  
11 as a basic fourth degree felony. [~~NMSA 1978, §~~ Section 26-1-26(B)].

12 UJI 14-3106, element 4, includes the requisite knowledge for Section 26-1-26(A) and instruction  
13 without element 4 therefore only supports the penalty defined in Section 26-1-26(B). New Mexico  
14 has long recognized a two-tiered knowledge requirement for drug possession crimes, as captured  
15 by UJIs 14-3102 and 14-3130 (requiring [~~knowledge that “it is on his person or in his presence”~~  
16 “knowingly having a substance on one’s person or in one’s presence, and exercising control over  
17 it,” and knowledge or belief that it was the particular substance charged). The Committee seeks to  
18 give meaning to the Legislature’s separate inclusion of “knowledge” for the heightened felony  
19 penalty in Section 26-1-26(A), while avoiding strict liability for the misdemeanor and basic felony  
20 penalties contained in Section 26-1-26(B), by requiring the violation itself to be knowing to incur  
21 the heightened penalty. *See State v. Nozie*, 2009-NMSC-018, ¶¶ 25-26, 146 N.M. 142, 207 P.3d  
22 1119 (New Mexico seeks to avoid strict liability crimes by imputing a knowledge requirement).

1 Thus, a knowing *possession*, even without subjective knowledge that such possession violates  
2 Section 26-1-16, constitutes a lesser-included offense under Section 26-1-26(B).

3 Section [~~26-1-2(F)~~] 26-1-2(G) further provides a “drug shall be dispensed only upon the  
4 prescription or drug order of a practitioner licensed by law to administer or prescribe the drug if  
5 it:

6 (1) is a habit-forming drug and contains any quantity of a narcotic or hypnotic substance or a  
7 chemical derivative of such substance that has been found under the federal act and the board to  
8 be habit forming;

9 (2) because of its toxicity or other potential for harmful effect or the method of its use or the  
10 collateral measures necessary to its use is not safe for use except under the supervision of a  
11 practitioner licensed by law to administer or prescribe the drug;

12 (3) is limited by an approved application by Section 505 of the federal act to the use under the  
13 professional supervision of a practitioner licensed by law to administer or prescribe the drug;

14 (4) bears the legend: “Caution: federal law prohibits dispensing without prescription.”;

15 (5) bears the legend: “Caution: federal law restricts this drug to use by or on the order of a  
16 licensed veterinarian.”; or

17 (6) bears the legend “RX only.”

18 Subsections (3) through (6) of this definition refer to the type of factual elements that traditionally  
19 have been within the province of a jury. However, in the Committee’s judgment subsections (1)  
20 and (2) set forth criteria to be used by the Board of Pharmacy in determining whether a particular  
21 drug should be expressly regulated as a dangerous drug pursuant to NMSA 1978, Section 26-1-  
22 18(B) (1972) (providing that the Board “shall, by regulation, declare a substance a ‘dangerous

1 drug’ when necessary, and notification shall be sent to all registered pharmacies in the state within  
2 sixty days of the adoption of the regulation”).

3 Indeed, Subsection (1) of Section 26-1-2(G) directly requires administrative action by the Board.  
4 Subsection (2) requires a determination that use of the drug “is not safe [---] . . . except under the  
5 supervision of a practitioner.” In the Committee’s view, this is a policy determination that lies  
6 within the delegated authority and expertise of the Board. Conversely, were this provision  
7 interpreted instead to create a self-effecting element of a criminal offense of unlawful possession  
8 it might be subject to constitutional challenge for vagueness. A person of common intelligence  
9 would have little means of ascertaining before the fact whether a lay jury would find a particular  
10 drug sufficiently dangerous to require the supervision of a practitioner. *See generally State v.*  
11 *Laguna*, 1999-NMCA-152, ¶¶ 25-26, 128 N.M. 345, 992 P.2d 896 (two arms of vagueness test are  
12 whether the statute provides a person of ordinary intelligence a fair opportunity to determine  
13 whether their conduct is prohibited and whether it the statute has no standards or guidelines and  
14 therefore allows, if not encourages, subjective and ad hoc application); *see also Schlieter v. Carlos*,  
15 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709 (“It is an enduring principle of constitutional  
16 jurisprudence that courts will avoid deciding constitutional questions unless required to do so.”).

17 For this reason, element 2 of UJI 14-3106 contains, as an alternative element of the crime of  
18 unlawful possession of a dangerous drug, the language that the substance “has been determined to  
19 be a dangerous drug by the New Mexico Board of Pharmacy.” *See* § ~~[26-1-2(F)(1)]~~ 26-1-2(G)(1),  
20 (2). The remaining alternatives track the statutory language of subsections (3) through (6)  
21 inclusive.

22 Element 3 and Use Note 5 contain a list of possible exceptions to the prohibition against possessing  
23 a dangerous drug and the jury should be instructed on these exceptions when the evidence creates

1 a jury issue. ~~[NMSA 1978,~~ Section 26-1-16 provides, generally, that possession of a dangerous  
2 drug requires a prescription or that the drug be dispensed by a licensed practitioner who has a valid  
3 practitioner-patient relationship with the person possessing the drug. Section 26-1-16(E). This  
4 Section also, however, contains exemptions for entities and individuals licensed by the Board to  
5 possess or dispense dangerous drugs. These include manufacturers, wholesalers or distributors,  
6 hospitals, nursing homes, clinics or pharmacies, the University of New Mexico College of  
7 Pharmacy or a public health laboratory, and licensed practitioners. Section 26-1-16(A), (B).  
8 Subsection (H) creates an exception livestock owners, employees, and consignees of livestock.  
9 [Adopted by Supreme Court Order No. 16-8300-008~~], effective for all cases pending or filed on~~  
10 ~~or after December 31, 2016~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.