

1 **14-5031. Defendant not testifying; no inference of guilt.**

2 You must not draw any inference of guilt from the fact that the defendant did not testify in
3 this case, nor should this fact be discussed by you or enter into your deliberations in any way.

4 USE NOTES

5 This instruction must be given on request of a defendant who does not testify and must not
6 be given if the defendant objects.

7 **Committee commentary.** — In *Griffin v. California*^[7], 380 U.S. 609 (1965), it was held that an
8 instruction that a [~~defendant's~~] defendant's failure to testify supports an unfavorable inference
9 against [~~him~~] the defendant violated the United States constitutional guarantee against compelling
10 a person in a criminal case to be a witness against themselves [~~himself~~]. However, it is only adverse
11 comments that are prohibited under *Griffin*^[-]. In *Lakeside v. Oregon*^[-], 435 U.S. 333^{[-98 S. Ct.}
12 ^{4091, 55 L. Ed. 2d 319]} (1978), the United States Supreme Court held that an instruction given
13 over the [~~defendant's~~] defendant's objection that the jury must draw no adverse inferences of any
14 kind from the [~~defendant's~~] defendant's exercise of [~~his~~] the privilege not to testify does not violate
15 the privilege against self-incrimination.

16 The New Mexico courts have consistently held that this instruction may be given by the court over
17 the [~~defendant's~~] defendant's objection. *See, e.g., State v. Garcia*, 1972-NMCA-142, 84 N.M. 519,
18 505 P.2d 862 [~~(Ct. App.), cert. denied~~], cert. denied, 84 N.M. 512, 505 P.2d 855 (1972); *Patterson*
19 *v. State*, 1970-NMCA-007, 81 N.M. 210, 465 P.2d 93 [~~(Ct. App. 1970)~~]. The rationale of the cases
20 is that the instruction is for the benefit of the defendant and, therefore, it is proper to give it sua
21 sponte. However, the better view is that the instruction should be given upon request of the
22 defendant and not given over the objection of the defendant. Under an adversary system, the use
23 of this instruction should be the choice of the defendant.

1 Under prior law, if the defendant requested the instruction, it was error for the court to refuse to
2 give this instruction. *State v. Spearman*[~~;~~], 1972-NMCA-150, 84 N.M. 366, 503 P.2d 649 [~~Ct.~~
3 ~~App. 1972~~]. The [~~court~~] Court in *Spearman* relied upon former NMSA 1953, Section 41-12-19
4 [~~NMSA 1953 Comp.~~] as authority for its holding. However, with the adoption of the Rules of
5 Criminal Procedure in 1972, the [~~supreme court~~] Supreme Court abrogated the trial court rule
6 codified as former Section 41-12-19. The adoption of this instruction reinstates the requirement
7 that the jury, on the [~~defendant's~~] defendant's request, be instructed not to indulge any
8 presumptions against [~~him~~] the defendant.
9 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]