

1 **14-632. Sexual exploitation of children; distribution.**

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

- 5 1. The defendant intentionally distributed a visual or print medium<sup>2</sup>;
- 6 2. The medium depicted a prohibited sexual act<sup>2</sup> [or simulation of such an act]<sup>3</sup>;
- 7 3. The defendant knew or had reason to know that medium depicts prohibited sexual act  
8 [or simulation of such act]<sup>3</sup>;
- 9 4. The defendant knew or had reason to know that one or more of the participants in that  
10 act is a child under eighteen years of age;
- 11 [5. The depictions are obscene<sup>4</sup>;]<sup>3</sup> and
- 12 6. This happened in New Mexico on or about \_\_\_\_\_, 20\_\_.

13 USE NOTES

- 14 1. Insert the count number if more than one count is charged.
  - 15 2. If in issue, definitions of “visual or print medium” and/or “prohibited sex act” shall be  
16 given. *See* NMSA 1978, § 30-6A-2.
  - 17 3. Instruct with bracketed language only if in issue.
  - 18 4. If this element is instructed, a definition of “obscene” shall be given. *See* NMSA 1978,  
19 § 30-6A-2.
- 20 [Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or  
21 after December 31, 2019.]
- 22 **Committee commentary.** — *See* NMSA 1978, § 30-6A-3(E) (2016).

1 Section 30-6A-3(C) defines the crime of child pornography distribution. UJIs were not created for  
2 statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including “visual  
3 or print medium,” “prohibited sex act,” and “obscene.” While the act of distribution itself must be  
4 done “intentionally,” the Court of Appeals held that the additional scienter requirement “that a  
5 person ‘knows or has reason to know’ that one or more of the participants depicted in the child  
6 pornography is under eighteen, is constitutionally sufficient.” *State v. Adamo*, 2018-NMCA-013,  
7 ¶¶ 28-34, 409 P.3d 1002. Because that element is identical for possession and distribution offenses,  
8 the holding in *Adamo* is applicable to that particular element of distribution as well.

9 Distribution may be committed by possessing files in a shared location, but the distribution does  
10 not occur—and the crime is not complete—until a third party downloads a file. *See United States*  
11 *v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012) (“When an individual consciously makes files  
12 available for others to take and those files are in fact taken, distribution has occurred.” (citing  
13 *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007))). In *Shaffer*, the Tenth Circuit was able  
14 to point to extensive evidence of intent in the factual record. 472 F.3d at 1222-24. First, the  
15 defendant [~~himself~~] explained that the particular file sharing program [~~he~~ defendant] used provided  
16 incentive rewards “corresponding to how many images other users downloaded from [~~his~~] [the  
17 defendant’s] computer,” and admitted that [~~he stored his~~] defendant stored the possessed images  
18 in the shared folder specifically to receive the incentive rewards. *Id.* at 1222. Moreover, the  
19 defendant admitted [~~that he subjectively knew~~] subjectively knowing that “other people had  
20 downloaded child pornography from [~~his~~] [the defendant’s] shared folder.” *Id.* at 1224. Thus, the  
21 Tenth Circuit concluded [~~he~~] the defendant had “openly invited [others] to take, or download, those  
22 items.” *Id.* at 1223.

1 In 2016, the New Mexico Court of Appeals held the unit of prosecution for distribution offenses  
2 under Section 30-6A-3 may be ambiguous if committed by shared possession in a peer-to-peer  
3 program, noting the lack of a statutory definition for “distribute.” *State v. Sena*, 2016-NMCA-062,  
4 ¶¶ 9-19, 376 P.3d 887 (“Notably, Section 30-6A-3(D) defines manufacture somewhat differently  
5 than possession and distribution, and Section 30-6A-2(D) provides a more specific and detailed  
6 definition for the word ‘manufacture.’”). Thus, the Court held that if a defendant’s distribution  
7 conduct is not itself distinct, only one count may be punished for multiple images acquired from  
8 the defendant by third parties. [~~*Id.* ¶¶ 15-16~~] *Id.* ¶¶ 15-16, 19 (citing *State v. Olsson*,  
9 2014-NMSC-012, [~~¶¶ 20-29, 32~~] ¶¶ 20-29, 32, 45, 324 P.3d 1230[~~and~~] ; *State v. Leeson*,  
10 2011-NMCA-068, ¶ 17, 149 N.M. 823, 255 P.3d 401).

11 The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as Subsection C. *See*  
12 2016 N.M. Laws [~~Ch. 2~~] ch. 2, § 1 (eff. Feb. 25, 2016). The Legislature also amended the basic  
13 sentence from a “third-degree felony” to a “third-degree felony for sexual exploitation of  
14 children,” and added new subsections for felonies “for sexual exploitation of children” to NMSA  
15 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws [~~Ch. 2~~] ch. 2, [~~§§ 1, 2~~] § 2 (eff. Feb. 25,  
16 2016).

17 [Adopted by Supreme Court Order No. 19-8300-016[~~, effective for all cases pending or filed on~~  
18 ~~or after December 31, 2019~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]