

1 **14-6002B. Necessarily included offense; verdict(s).**<sup>1</sup>

2 To aid you in your deliberations and in returning your verdict, you will be provided both  
3 guilty and not guilty verdict forms for each of the crimes charged [in Count \_\_\_\_].<sup>2</sup> Unless you  
4 unanimously agree on a verdict, you should not sign a verdict form for that crime. Although you  
5 may deliberate on the crimes charged [in Count \_\_]<sup>2</sup> in any manner and order which you choose,  
6 you must return your verdicts for each offense [in Count \_\_\_\_]<sup>2</sup> in the order they are instructed.<sup>3</sup>

7 Under this procedure, if you unanimously find the defendant guilty of \_\_\_\_\_ (*greatest*  
8 *offense*),<sup>3</sup> you should sign the guilty verdict for that offense and should not proceed to reach a  
9 verdict on the remaining offense[s].<sup>4</sup> If, after reasonable deliberation, you do not reach a  
10 unanimous verdict on \_\_\_\_\_ (*greatest offense*), you should not sign a verdict form for that  
11 offense and should not proceed to reach a verdict on the remaining offense[s].<sup>4</sup>

12 You should only return a verdict on \_\_\_\_\_ (*next lower offense*) if you unanimously  
13 find the defendant not guilty of \_\_\_\_\_ (*greatest offense*). If you unanimously find the  
14 defendant not guilty of \_\_\_\_\_ (*greatest offense*), you must sign the not guilty verdict form  
15 for \_\_\_\_\_ (*greatest offense*) before returning a verdict on any other crime charged [in Count  
16 \_\_\_\_].<sup>2</sup>

17 If you unanimously find the defendant guilty of \_\_\_\_\_ (*next lower offense*), you  
18 should sign the guilty verdict for that offense [and should not proceed to reach verdicts on the  
19 remaining offenses].<sup>4</sup> If you do not reach a unanimous verdict on \_\_\_\_\_ (*next lower*  
20 *offense*), you should not sign a verdict form for that offense [and should not proceed to reach a  
21 verdict on the remaining offense[s]].<sup>4</sup>

1 [If you unanimously find the defendant not guilty of \_\_\_\_\_ (*next lower offense*), you  
2 must sign the not guilty verdict form for \_\_\_\_\_ (*next lower offense*) before returning a  
3 verdict on \_\_\_\_\_ (*lowest offense*).]<sup>4</sup>

4 [If you unanimously find the defendant not guilty of \_\_\_\_\_ (*greatest offense*) and  
5 \_\_\_\_\_ (*next lower offense*), you may then return a verdict on \_\_\_\_\_ (*lowest*  
6 *offense*). If you do reach a unanimous verdict on \_\_\_\_\_ (*lowest offense*), you should sign  
7 the corresponding verdict form for that offense. If you are not unanimous on a verdict, do not sign  
8 a verdict form for that offense.]<sup>4</sup>

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#### USE NOTES

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1. This instruction should be given immediately after UJI 14-6002A NMRA.

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2. If there is more than one count, identify the count charged.

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3. Both guilty and not guilty forms should be submitted for each level of offense. This instruction is drafted to accommodate three levels of the offense: “greatest,” “next lower,” and “lowest,” but can be modified to account for any number of lesser-included offenses following the same procedure. The elements instructions for the offenses should be instructed in descending order and identified in this instruction by the names used in the elements instruction for that offense.

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4. Use plural only if there are three or more crimes charged in the count.

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[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

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**Committee commentary.** — Under New Mexico decisions, there is no automatic right for a party to have the jury instructed on a lesser-included offense. The determination depends on both

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1 the statutory elements and the facts of the case. A party is entitled to a lesser-included offense  
2 instruction “when the statutory elements of the lesser crime are a subset of the statutory elements  
3 of the charged crime.” *State v. Meadors*, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731. A  
4 party is also entitled to a lesser-included offense instruction

5 if (1) the defendant could not have committed the greater offense in the manner  
6 described in the charging document without also committing the lesser offense . . . ;  
7 (2) the evidence adduced at trial is sufficient to sustain a conviction of the lesser  
8 offense; and (3) the elements distinguishing the lesser and greater offenses are  
9 sufficiently in dispute such that a jury rationally could acquit on the greater offense  
10 and convict on the lesser.

11  
12 *Id.* (applying test to a prosecution request); *see also State v. Darkis*, 2000-NMCA-085, ¶¶ 14-18,  
13 129 N.M. 547, 10 P.3d 871 (applying same test to a defense request and concluding that *Meadors*  
14 provides defendants with an “effectively greater” right to lesser-included offense instructions than  
15 the prosecution).

16 This instruction was amended in 2019 to clarify the process for the jury to deliberate and  
17 return verdicts on lesser-included offenses. *State v. Lewis*, 2019-NMSC-001, ¶¶ 22-25, 433 P.3d  
18 276. UJIs 14-6002A and 14-6002B NMRA now serve as a single adaptable instruction set to  
19 replace UJIs 14-6002, 14-250, and 14-625 NMRA.

20 In *Lewis* the Supreme Court adopted a rule of deliberation permitting the jury to deliberate  
21 on levels of an offense in any order, but requiring a full acquittal (and not just inability to agree)  
22 of the greater offense before a verdict can actually be returned on the lesser. 2019-NMSC-001, ¶  
23 37.

24 To ensure a clear record after this deliberative process, *Lewis* held that polling the jury on  
25 *each* level of a count upon return of the verdict is the best way to determine unambiguously upon  
26 which offenses the jury acquitted, hung, or convicted. *Id.* ¶ 17. The Court recommended providing

1 the jury with “partial verdict forms, allowing the jury to indicate that it unanimously finds the  
2 defendant not guilty on a greater offense even if deadlocked on a lesser offense.” *Id.* ¶ 38. This  
3 includes submitting not-guilty verdict forms for each level of the offense to indicate when a  
4 unanimous acquittal has occurred. *See* Use Note 3. Clarity regarding the jury’s intent with respect  
5 to which level of charge the jury has hung is paramount to avoid a double jeopardy bar on retrial.  
6 *See State v. Phillips*, 2017-NMSC-019, ¶¶ 1, 17, 396 P.3d 153 (when a judge fails to properly  
7 clarify a verdict that even ambiguously reflects an acquittal, then double jeopardy principles  
8 require courts treat the ambiguous verdict as an acquittal barring future prosecution); *Lewis*, 2019-  
9 NMSC-001, ¶¶ 10-11.

10 The adoption of UJIs 14-6002A and 14-6002B NMRA coincides with the withdrawal of  
11 UJIs 14-250 NMRA (homicide cases) and 14-625 NMRA (child abuse cases resulting in death).

12 In homicide cases, the district court must instruct the jury on every degree of homicide for  
13 which there is evidence in the case tending to sustain such degree. *State v. Ulibarri*, 1960-NMSC-  
14 102, ¶¶ 8-9, 67 N.M. 336, 355 P.2d 275. This could involve instructing the jury on various types  
15 of first-degree murder, second-degree murder, voluntary manslaughter and involuntary  
16 manslaughter. *See, e.g., State v. Omar-Muhammad*, 1987-NMSC-043, ¶ 23, 105 N.M. 788, 737  
17 P.2d 1165 (stating that the New Mexico Supreme Court has “analyzed felonious homicide, the  
18 unlawful taking of human life, as a ‘generic offense’ encompassing several degrees or forms”);  
19 *State v. La Boon*, 1960-NMSC-118, ¶ 10, 67 N.M. 466, 357 P.2d 54 (“Manslaughter is included  
20 in the charge of murder.”); *cf. State v. McFall*, 1960-NMSC-084, ¶ 12, 67 N.M. 260, 354 P.2d 547  
21 (stating that “manslaughter is one of the four kinds of homicide, and . . . it is included within a  
22 charge of murder”). Because the distinctions between the various degrees are not clear-cut, the  
23 jury will typically be given the option of multiple degrees of homicide. *See State v. Reed*, 2005-

1 NMSC-031, ¶ 22, 138 N.M. 365, 120 P.3d 447 (acknowledging a “lack of clear-cut distinctions  
2 between varying degrees of homicide”).

3 In cases involving various degrees of child abuse resulting in death of a child under twelve  
4 years of age, the jury may be instructed on the crimes of intentional child abuse resulting in the  
5 death of a child under twelve years of age, and child abuse with reckless disregard resulting in the  
6 death of a child under twelve years of age. *See State v. Montoya*, 2015-NMSC-010, ¶¶ 41-42, 345  
7 P.3d 1056 (holding that reckless child abuse resulting in the death of a child under twelve is a  
8 lesser-included offense of intentional child abuse resulting in the death of a child under twelve and  
9 that the use of a step-down instruction therefore is appropriate). UJIs 14-6002A and 14-6002B  
10 NMRA should be adaptable for this scenario.

11 [Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or  
12 after December 31, 2020.]