

1 on or after December 31, 2019.]

2 **Committee Commentary.** — *See* NMSA 1978, § 30-6A-3(C) (2016).

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

12 Distribution may be committed by possessing files in a shared location, but the
13 distribution does not occur—and the crime is not complete—until a third party downloads
14 a file. *See United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012) (“When an
15 individual consciously makes files available for others to take and those files are in fact
16 taken, distribution has occurred.” (citing *United States v. Shaffer*, 472 F.3d 1219 (10th Cir.
17 2007))). In *Shaffer*, the Tenth Circuit was able to point to extensive evidence of intent in the
18 factual record. 472 F.3d at 1222-24. First, the defendant himself explained that the particular
19 file sharing program he used provided incentive rewards “corresponding to how many
20 images other users downloaded from his computer,” and admitted that he stored his

1 possessed images in the shared folder specifically to receive the incentive rewards. *Id.* at
2 1222. Moreover, the defendant admitted that he subjectively knew that “other people had
3 downloaded child pornography from his shared folder.” *Id.* at 1224. Thus, the Tenth Circuit
4 concluded he had “openly invited [others] to take, or download, those items.” *Id.* at 1223.

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

15 The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as
16 Subsection C. *See* 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016). The Legislature also
17 amended the basic sentence from a “third-degree felony” to a “third-degree felony for sexual
18 exploitation of children,” and added new subsections for felonies “for sexual exploitation
19 of children” to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.
20 [Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed

**UJI-CRIMINAL
14-632
[NEW MATERIAL]**

**Supreme Court Approved
November 1, 2019**

1 on or after December 31, 2019.]