PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2021-027

March 17, 2020

The Uniform Jury Instructions – Criminal Committee has recommended amendments to UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029, 14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 16, 2021, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

14-7010. Explanation of [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding; single aggravating circumstance.[1]

INTRODUCTION OF STAFF:

I am Judge _____ (name of Judge sentencing proceeding over sentencing hearing). My bailiff, who will escort you and assist in communicating with the court, is _____. My administrative assistant is _____. If you need anything during this sentencing proceeding the bailiff or the administrative assistant would be happy to help. The court [reporter][monitor] is making a record of the sentencing proceeding. You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the sentencing proceeding because ordinarily transcripts of the witnesses testimony will not be provided to you.

INTRODUCTION TO PRELIMINARY INSTRUCTIONS:

As the sentencing proceeding begins, I have some instructions for you. These instructions, along with those previously given, are preliminary only and may be changed during or at the end of the sentencing proceeding. All of you must pay attention to the evidence. After you have heard all of the evidence I will read the final instructions of law to you. You will also receive a written copy of the instructions. You must follow the final instructions in deciding the sentence.

SCHEDULING DURING HEARING:

This sentencing proceeding is expected to last [until _____] [_____ days]. The usual hours of sentencing proceeding will be from ___ (a.m.) to ___ (p.m.) with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by ___ (a.m.). Please do not come back into the courtroom until you are called by the bailiff.

NOTE TAKING PERMITTED

You are allowed, but not required, to take notes during this sentencing proceeding. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the sentencing proceeding. Listening and watching witnesses during their testimony will help you assess their appearance, behavior, memory and whatever else bears on their credibility. At each recess you must either leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your notes and return them to you when the sentencing proceeding resumes. When deliberations commence you will take your notes with you to the jury room. Ordinarily at the end of the case the notes will be collected and destroyed.[3]

ORDER OF SENTENCING HEARING

The sentencing proceeding generally begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during the course of the sentencing proceeding can be of considerable assistance to you in understanding the evidence as it is presented at the sentencing proceeding. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a sentence.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this sentencing proceeding, which you must do solely upon the evidence received in court.

It is the duty of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper, and you must not hold such objection against the objecting party. I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account, among other things, the witness's ability and opportunity to observe, memory, manner or any bias or prejudice that the witness may have and the reasonableness of the testimony considered in light of all of the evidence of the case.

No ruling, gesture or comment I make during the course of the sentencing proceeding should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

QUESTIONS BY JURORS

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have an unanswered question after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write the

question and your name it down on a piece of your note paper and give it to the bailiff before the witness leaves the stand. I will decide whether or when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may prevent the question from being asked. If the question is not asked, please do not give it any further consideration, do not discuss it with the other jurors and please do not hold it against either side that you did not get an answer.

CONDUCT OF JURORS

There are a number of important rules governing your conduct as jurors during the sentencing proceeding. You must decide the sentencing proceeding solely upon the evidence received in court. You must not consider anything you may have read or heard about the sentencing proceeding outside the courtroom. During the sentencing proceeding and your deliberations, you must avoid news accounts of the sentencing proceeding, whether they be on radio, television, the internet or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the sentencing proceeding.

You, as jurors, must decide this sentencing proceeding based solely on the evidence presented here within the four walls of this courtroom. This means that during the sentencing proceeding you must not conduct any independent research about this sentencing proceeding, the matters in this sentencing proceeding and the individuals or corporations involved in the sentencing proceeding. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this sentencing proceeding or to help you decide the sentence. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this sentence to be imposed with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the sentence to be imposed with your fellow jurors, but you cannot discuss the sentence to be imposed with anyone else, including your family and friends, until the sentencing proceeding is at an end.

I know that many of you use cell phones, the internet, and other tools of technology. You are not to discuss or provide any information to anyone about this sentencing proceeding through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this sentencing proceeding until I have accepted your verdict and this sentencing proceeding is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the sentencing proceeding until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this sentencing proceeding you exercise your judgment impartially and without regard to sympathy, bias or prejudice. Therefore, until you retire to deliberate, you must not discuss this sentencing proceeding or the evidence with anyone, even with each other, because you have not heard all the evidence, you have not been instructed on the law, and you have not heard the final arguments of the lawyers. If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

To minimize the risk of accidentally overhearing something that is not evidence, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Although it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

[~~LADIES AND GENTLEMEN~~]SENTENCING HEARING PROCEDURE:

I will outline the procedure for you to follow in deciding the defendant's sentence. The law provides that if you unanimously agree beyond a reasonable doubt that the aggravating circumstance charged by the state is present you shall decide whether the defendant will be sentenced to life imprisonment or [~~death~~] life imprisonment without possibility of release or parole.

The state has charged that the following aggravating circumstance was present:[2]

[at the time of the murder, _____ *(name of peace officer)* was a peace officer and was performing the duties of a peace officer];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] kidnapping];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual contact of a minor];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual penetration];

[the murder of _____ *(name of victim)* was committed while the defendant was attempting to escape from a penal institution];

[at the time of the murder, _____ *(name of victim)* was an inmate of a penal institution];

[at the time of the murder _____ *(name of victim)* was a person lawfully on the premises of a penal institution];

[at the time of the murder _____ *(name of victim)* was an employee of the corrections department];

[the murder of _____ *(name of victim)* was for hire];

[the murder was of a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was of a person likely to become a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will [~~first~~] decide whether this aggravating circumstance was present beyond a reasonable doubt. [~~If you unanimously agree beyond a reasonable doubt that this aggravating circumstance was present, you must then weigh this aggravating circumstance against any mitigating circumstances.~~

~~In determining whether or not this aggravating circumstance exists you must not consider anything you may have read or heard about the case outside the courtroom.~~

~~You may give testimony of any witness whatever weight you believe it deserves. It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful.~~

~~[You are not permitted to take notes during the trial. In your deliberations you must rely on your individual memories of the evidence in the case.]~~[3]

~~[You are permitted to take notes during trial, and the court will provide you with note taking material if you wish to take them. However, if you choose to take notes, be sure that your note taking does not interfere with your listening to and considering all the evidence. It is difficult to take notes and at the same time pay attention to what a witness is saying. In your deliberations you should rely on your own memory of the evidence rather than on the written notes of another juror. Do not take your notes with you at the end of the day or discuss them with anyone before you begin your deliberations.]~~[4]

~~If an exhibit is admitted in evidence, you should examine it yourself and not talk about the exhibit with other jurors until you retire to deliberate.~~

~~Ordinarily the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question unanswered after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to me. Your name as juror should appear below the question. I must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if I deem the question to be proper.~~

~~No statement, ruling, remark or comment which I make during the course of the sentencing proceeding is intended to indicate my opinion as to how you should decide the issue or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.~~

~~Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter has been completed and submitted to you. Your special responsibility as jurors demands that throughout this sentencing proceeding you exercise your judgment without regard to any biases or prejudices that you may have.~~]

The prosecuting attorney will now make an opening statement if [~~[he] [she] desires~~] they desire. The defendant's attorney may make an opening statement if [~~[he] [she] desires~~] they desire or may wait until later in the sentencing proceeding to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [~~[he] [she] expects~~] they expect the evidence to show.

USE NOTES

1. This instruction may only be used in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings where defendant has been convicted of a single murder and a single aggravating circumstance has been charged. (For cases where the death penalty remains an option, *see* UJI 14-7010 NMRA (2020), *available at* https://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink)). It is to be given before opening statements. This instruction does not go to the jury room. If the defendant has been convicted of more than one capital offense, use UJI 14-7011 NMRA. If more than one aggravating circumstance

is charged for the same murder, use UJI 14-7011 NMRA. This instruction may be modified as appropriate in a bifurcated sentencing proceeding.

2. Use only the applicable alternative.

3. [~~This instruction leaves it to the discretion of the judge as to whether or not jurors will be permitted to take notes during the sentencing proceeding.~~

~~4. If the court permits the taking of notes, the~~] The court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — This instruction may only be used in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings where the state has charged a single aggravating circumstance [~~is present~~]. It is to be used instead of [~~using~~] UJI 14-101 NMRA. Although "the death penalty ha[s] been abolished . . . the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 12, 414 P.3d 326 (internal quotation marks and citation omitted). In these cases, this instruction must be modified by the historical UJI to ensure proper consideration of aggravating and mitigating factors.

14-7011. Explanation of [~~death penalty~~]life imprisonment without possibility of release or parole sentencing proceeding; multiple aggravating circumstances.[1]

INTRODUCTION OF STAFF:

I am Judge _____(name of Judge proceeding over sentencing hearing). My bailiff, who will escort you and assist in communicating with the court, is_____. My administrative assistant is_____. If you need anything during this sentencing proceeding the bailiff or the administrative assistant would be happy to help. The court [reporter][monitor] is making a record of the sentencing proceeding. You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the sentencing proceeding because ordinarily transcripts of the witnesses testimony will not be provided to you.

INTRODUCTION TO PRELIMINARY INSTRUCTIONS:

As the sentencing proceeding begins, I have some instructions for you. These instructions, along with those previously given, are preliminary only and may be changed during or at the end of the sentencing proceeding. All of you must pay attention to the evidence. After you have heard all of the evidence I will read the final instructions of law to you. You will also receive a written copy of the instructions. You must follow the final instructions in deciding the sentence.

SCHEDULING DURING HEARING:

This sentencing proceeding is expected to last [until _____] [_____ days]. The usual hours of sentencing proceeding will be from ___ (a.m.) to ___ (p.m.) with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by ___ (a.m.). Please do not come back into the courtroom until you are called by the bailiff.

NOTE TAKING PERMITTED

You are allowed, but not required, to take notes during this sentencing proceeding. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the sentencing proceeding. Listening and watching witnesses during their testimony

will help you assess their appearance, behavior, memory and whatever else bears on their credibility. At each recess you must either leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your notes and return them to you when the sentencing proceeding resumes. When deliberations commence you will take your notes with you to the jury room. Ordinarily at the end of the case the notes will be collected and destroyed.[3]

ORDER OF SENTENCING HEARING

The sentencing proceeding generally begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during the course of the sentencing proceeding can be of considerable assistance to you in understanding the evidence as it is presented at the sentencing proceeding. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a sentence.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this sentencing proceeding, which you must do solely upon the evidence received in court.

It is the duty of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper, and you must not hold such objection against the objecting party. I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account, among other things, the witness's ability and opportunity to observe, memory, manner or any bias or prejudice that the witness may have and the reasonableness of the testimony considered in light of all of the evidence of the case.

No ruling, gesture or comment I make during the course of the sentencing proceeding should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

QUESTIONS BY JURORS

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have an unanswered question after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write the question and your name it down on a piece of your note paper and give it to the bailiff before the witness leaves the stand. I will decide whether or when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may prevent the question from being asked. If the question is not asked, please do not give it any further consideration, do not discuss it with the other jurors and please do not hold it against either side that you did not get an answer.

CONDUCT OF JURORS

There are a number of important rules governing your conduct as jurors during the sentencing proceeding. You must decide the sentencing proceeding solely upon the evidence received in court.

You must not consider anything you may have read or heard about the sentencing proceeding outside the courtroom. During the sentencing proceeding and your deliberations, you must avoid news accounts of the sentencing proceeding, whether they be on radio, television, the internet or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the sentencing proceeding.

You, as jurors, must decide this sentencing proceeding based solely on the evidence presented here within the four walls of this courtroom. This means that during the sentencing proceeding you must not conduct any independent research about this sentencing proceeding, the matters in this sentencing proceeding and the individuals or corporations involved in the sentencing proceeding. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this sentencing proceeding or to help you decide the sentence. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this sentence to be imposed with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the sentence to be imposed with your fellow jurors, but you cannot discuss the sentence to be imposed with anyone else, including your family and friends, until the sentencing proceeding is at an end.

I know that many of you use cell phones, the internet, and other tools of technology. You are not to discuss or provide any information to anyone about this sentencing proceeding through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this sentencing proceeding until I have accepted your verdict and this sentencing proceeding is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the sentencing proceeding until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this sentencing proceeding you exercise your judgment impartially and without regard to sympathy, bias or prejudice. Therefore, until you retire to deliberate, you must not discuss this sentencing proceeding or the evidence with anyone, even with each other, because you have not heard all the evidence, you have not been instructed on the law, and you have not heard the final arguments of the lawyers. If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

To minimize the risk of accidentally overhearing something that is not evidence, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Although it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

[~~LADIES AND GENTLEMEN~~]SENTENCING HEARING PROCEDURE:

I will outline the procedure for you to follow in deciding the defendant's sentence. The law provides that if you unanimously agree beyond a reasonable doubt that one or more of the aggravating circumstances charged by the state are present you shall decide whether the defendant will be sentenced to life imprisonment or [~~death~~]life imprisonment without possibility of release or parole.

The state has charged that the following aggravating circumstances were present:

[at the time of the murder _____ *(name of peace officer)* was a peace officer and was performing the duties of a peace officer][2];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] kidnapping];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual contact of a minor];

[the murder of _____ *(name of victim)* was committed during [the commission of] [an attempt to commit][2] criminal sexual penetration];

[the murder of _____ *(name of victim)* was committed while attempting to escape from a penal institution];

[at the time of the murder, _____ *(name of victim)* was an inmate of a penal institution];

[at the time of the murder, _____ *(name of victim)* was lawfully on the premises of a penal institution];

[at the time of the murder [~~of~~], _____ *(name of victim)* was an employee of the corrections department];

[the murder of _____ *(name of victim)* was for hire];

[the murder was of a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was of a person likely to become a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will first consider each of the aggravating circumstances separately. You will then decide whether or not each one of the aggravating circumstances is present beyond a reasonable doubt. [~~If you unanimously agree beyond a reasonable doubt that one or more of these aggravating circumstances were present, you must then weigh such aggravating circumstances against any mitigating circumstances.~~

~~In determining whether or not an aggravating circumstance exists, you must not consider anything you may have read or heard about the case outside the courtroom.~~

~~You may give the testimony of any witness whatever weight you believe it deserves. It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful.~~

~~[You are not permitted to take notes during the sentencing proceeding. In your deliberations you must rely on your individual memories of the evidence in the case.]~~[3]

~~[You are permitted to take notes during the sentencing proceeding, and the court will provide you with note taking material if you wish to take them. However, if you choose to take notes, be sure that your note taking does not interfere with your listening to and considering all the~~

~~evidence. It is difficult to take notes and at the same time pay attention to what a witness is saying. In your deliberations you should rely on your own memory of the evidence rather than on the written notes of another juror. Do not take your notes with you at the end of the day or discuss them with anyone before you begin your deliberations.]~~[4]

~~If an exhibit is admitted in evidence, you should examine it yourself and not talk about the exhibit with other jurors until you retire to deliberate.~~

~~Ordinarily the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to me. Your name as juror should appear below the question. I must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if I deem the question to be proper.~~

~~No statement, ruling, remark or comment which I make during the course of the proceeding is intended to indicate my opinion as to how you should decide the issue or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.~~

~~Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment without regard to any biases or prejudices that you may have.~~]

The prosecuting attorney will now make an opening statement if [~~[he] [she] desires~~] they desire. The defendant's attorney may make an opening statement if [~~[he] [she] desires~~] they desire or may wait until later in the sentencing proceeding to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [~~[he] [she] expects~~] they expect the evidence to show.

USE NOTES

1. This instruction may only be used in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings when the defendant has been convicted of multiple murders or when the state has charged that multiple aggravating circumstances were present during a single murder. (For cases where the death penalty remains an option, *see* UJI 14-7011 NMRA (2020), *available at* https://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink)). It is to be given before opening statements. This instruction does not go to the jury room. There must be an independent factual basis for each aggravating circumstance. *See State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728. Aggravating circumstances to be given to the jury should be consecutively numbered. [~~If the judge decides to bifurcate the process by having the jury find the presence of an aggravating circumstance before considering any mitigating circumstances, this instruction may be modified as appropriate.~~]

2. Use only the applicable alternative.

3. [~~This instruction leaves it to the discretion of the judge as to whether or not jurors will be permitted to take notes during the proceeding.~~

~~4. If the court permits the taking of notes, the~~] The court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — This instruction is to be used only in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings where the state has charged multiple aggravating circumstances [~~are present~~]. It is to be used instead of [~~using~~] UJI 14-101 NMRA. Although "the death penalty ha[s] been abolished . . . the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 12, 414 P.3d 326 (internal quotation marks and citation omitted). In these cases, this instruction must be modified by the historical UJI to ensure proper consideration of aggravating and mitigating factors.

[~~Although this procedure is not recognized in any court rule, the committee recognizes that some judges are bifurcating the penalty phase.~~] Rule 5-705 NMRA allows for the bifurcation of guilt and penalty phase. If the court bifurcates the sentencing proceeding, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist.

14-7012. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; consideration of evidence.[1]

LADIES AND GENTLEMEN:

You have heard all of the evidence that is to be presented for this sentencing proceeding. In deciding the sentence you shall consider all of the evidence admitted during the trial[2] [and all of the evidence admitted during this sentencing proceeding][3].

Now the lawyers will address you. What the lawyers say is not evidence. It is an opportunity for the lawyers to discuss the evidence and the law as I have instructed you. The state has the right to speak first; the defense may then speak; the state may then reply[4].

USE NOTES

1. This instruction must be given in every [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding after all the evidence has been completed. This instruction may be modified as appropriate if the judge decides to bifurcate the sentencing process by having the jury find the presence of an aggravating circumstance before proceeding further.

2. Upon request of a party, the court may modify this instruction when evidence has been admitted for a limited purpose during the trial. A separate additional instruction may be necessary to explain how this evidence is to be considered during the sentencing proceeding.

3. Use bracketed phrase if additional evidence was admitted during the sentencing proceeding.

4. If the sentencing proceeding has been bifurcated, this instruction must be given at each phase and may need to be modified.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

~~[**Committee commentary.** — The second phase of a bifurcated proceeding involves a weighing process. Specifically, the jury is charged with balancing the aggravating and mitigating circumstances. The state does not necessarily, therefor, have the right to speak first. As a result some trial courts in New Mexico have varied the order of argument in this second phase of a bifurcated sentencing proceeding.~~]

14-7014. [~~Death penalty~~] Life imprisonment without possibility of parole sentencing proceeding; aggravating circumstances; murder of a peace officer; essential elements.

The state has charged the aggravating circumstance of murder of a peace officer. Before you may find the aggravating circumstance of murder of a peace officer, you must find that the state has proved to your satisfaction beyond a reasonable doubt that at the time _____ *(name of victim)* was murdered, _____ *(name of victim)*:

1. was a peace officer;
2. was performing the duties of a peace officer;
3. the defendant knew or should have known that _____ *(name of victim)* was a peace officer; [A peace officer is a public employee whose employment duties include maintaining the public order;][2] and
4. the defendant intended to kill or acted with a reckless disregard for human life and knew that [[~~his~~] [~~her~~]] their acts carried a grave risk of death.

USE NOTES

1. This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.
2. If there is an issue as to whether or not the victim was a "peace officer" the bracketed definition is given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — "Peace officer" is defined in [~~Section 30-1-12~~] NMSA 1978, § 30-1-12 (1963). The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. *See State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 164 [~~(1980)~~]. The question of whether the peace officer was lawfully discharging the duties of a peace officer is also normally a question of law to be decided by the court. *See* committee commentary to UJI 14-2201 NMRA.

The committee anticipates the defense of a peace officer not being in the lawful discharge of duty being raised. As there are a number of ways and situations in which this defense may be raised, it was not feasible to draft an essential elements instruction on this issue. *See State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464 [~~(1978)~~] for a discussion of "lawful discharge of duties".

The requirement that the defendant intended to kill or acted with reckless disregard has been added to this instruction to be consistent with *Tison v. Arizona*, 481 U.S. [~~131, 107 S. Ct. 1676, 95 L. Ed. 2d 127~~] 137 (1987).

[*~~See also~~* ~~committee commentary to UJI 14-7013.~~]

[As amended by Supreme Court Order No. _____, effective _____.]

14-7015. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder in the commission of kidnapping; essential elements.[1]

The state has charged the aggravating circumstance of murder in [the commission of][~~2~~] [an attempt to commit][2] a kidnapping. Before you may find the aggravating circumstance of murder in [the commission of][~~2~~] [an attempt to commit][2] kidnapping, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of][~~2~~] [an attempt to commit][2] kidnapping was committed;
2. _____ *(name of victim)* was murdered while _____ *(name of defendant)* was [committing][~~2~~] [or] [attempting to commit][2] kidnapping; and
3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.
2. Use applicable alternative.
3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, Underlying felony offense; sample instruction. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The penalty of [~~death~~] life imprisonment without possibility of release or parole may be imposed if the defendant committed murder while committing or attempting to commit one of three felonies: kidnapping, criminal sexual contact of a minor or criminal sexual penetration. Even if the jury has found the defendant guilty of a felony murder in the commission of a kidnapping, it must also find that the murder was committed with an intent to kill in order to find this aggravating circumstance.

If the sentencing jury has not previously been instructed pursuant to [~~UJI 14-404, Kidnapping~~] UJI 14-403 NMRA, Kidnapping, and UJI 14-2801 NMRA, Attempt to Commit a Felony; UJIs 14-921 to 14-936 NMRA, Criminal Sexual Contact of a Minor; or UJI 14-941 to [~~14-961~~] 14-963 NMRA, Criminal Sexual Penetration, the appropriate instruction must be given.

If UJI 14-7016 NMRA or UJI 14-7017 NMRA [~~are~~] is to be given with this instruction, there must be evidence of an independent factual basis for each of the offenses. [~~Unless there is an independent separate factual basis that each offense has been committed, UJI 14-7015A NMRA must be given.~~] For example, the evidence may create a jury issue regarding the existence of a factually separate aggravating factor of murder during the course of a kidnapping.

See also committee commentary to UJI [~~14-7013 [withdrawn] and~~] 14-7014 NMRA.

[As amended by Supreme Court Order No. _____, effective _____.]

14-7016. [~~Death penalty~~]Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder in the commission of criminal sexual contact of a minor; essential elements.

The state has charged the aggravating circumstance of murder in the in [the commission of][~~2~~] [an attempt to commit]2 criminal sexual contact of a minor. Before you may find the aggravating circumstance of murder in in [the commission of][~~2~~] [an attempt to commit]2 criminal sexual contact of a minor, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of][~~2~~] [an attempt to commit]2 criminal sexual contact of a minor was committed;

2. _____ *(name of victim)* was murdered while _____ *(name of defendant)* was [committing] [~~2~~] [or] [attempting to commit]2 criminal sexual contact of a minor; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, [~~"Underlying felony offense; sample instruction"~~]Elements of uncharged crimes. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

14-7017. [~~Death penalty~~]Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder in the commission of criminal sexual penetration; essential elements.

The state has charged the aggravating circumstance of murder in the in [the commission of][~~2~~] [an attempt to commit]2 criminal sexual penetration. [¶]Before you find the aggravating circumstance of murder in in [the commission of][~~2~~] [an attempt to commit]2 criminal sexual penetration, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of][~~2~~] [an attempt to commit]2 criminal sexual penetration was committed;

2. _____ *(name of victim)* was murdered while defendant was [committing] [~~2~~] [or] [attempting to commit]2 criminal sexual penetration; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, "Underlying felony offense; sample instruction". Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

14-7018. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder during attempt to escape from penal institution; essential elements.[1]

The state has charged the aggravating circumstance of murder with the intent to attempt to escape from a penal institution. Before you may find the aggravating circumstance of murder while attempting to escape from a penal institution, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. While attempting to escape from _____ *(name of penal institution)*, the defendant committed the murder of _____ *(name of victim)*;[2] and

2. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.

2. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, Underlying felony offense; sample instructions. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~Subsection C of Section 31-20A-5~~] NMSA 1978, Section 31-20A-5(C) (1981), provides that it is an aggravating circumstance if the defendant committed the murder while attempting to escape from a penal institution. [~~A penal institution includes penitentiary or jail. 31-18-9 NMSA 1978 (repealed by Laws 1977, Chapter 216, Section 17).~~]The jury may have been instructed previously pursuant to UJI 14-2222 NMRA, Escape From the Penitentiary, UJI 14-2221 NMRA, Escape From Jail, or UJI 14-202 NMRA, Felony Murder. If not, the applicable escape instruction must be given along with any other instructions required by the essential elements instruction, including definitions. *See* committee commentary to UJI 14-2221 NMRA and 14-2222 NMRA.

Escape from the penitentiary includes escape from other facilities under the department of corrections. *See* committee commentary to UJI 14-2222 NMRA. This aggravating circumstance requires that the defendant must have intended to kill the victim.

See also committee commentary to UJI [~~14-7013 [withdrawn] and~~] 14-7016 NMRA.

[As amended by Supreme Court Order No. _____, effective _____.]

14-7019. [~~Death penalty~~]Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder by an inmate of another inmate, a person lawfully on the premises of a penal institution or an employee of the corrections department; essential elements.[1]

The state has charged the aggravating circumstance of murder of a person who was at the time [incarcerated in a penal institution][~~2~~] [or] [lawfully on the premises of a penal institution] [or] [an employee of the state corrections department]2.

Before you may find the aggravating circumstance of murder of [an inmate of a penal institution][~~2~~] [or] [a person lawfully on the premises of a penal institution] [or] [murder of an employee of the state corrections department]2, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. At the time defendant committed the murder of _____ *(name of victim)* the _____ *(name of defendant)* was incarcerated in _____[3] *(name of penal institution)*;

2. At the time _____ *(name of victim)* was murdered _____ *(name of victim)*, was

[incarcerated in _____ *(name of penal institution)*;] [~~2~~] [or]

[lawfully on the premises of _____ *(name of penal institution)*;] [or]

[an employee of the state corrections department]; 2

and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is only to be used in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings when the victim was an inmate, a person who was lawfully on the premises of the penal institution or an employee of the state corrections department.

2. Use applicable alternatives.

3. Insert the name of the penal institution. "Penal institution" includes facilities under the jurisdiction of the state corrections department and county and municipal jails.

[Approved, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~The law requires that a capital jury's sentencing discretion be meaningfully narrowed and channeled in a way that reserves the death penalty for the most heinous of murders. "The eighth amendment mandates that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *State v. Henderson*, 109 N.M. 655, 663, 789 P.2d 603, 611 (1990) (*quoting Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976)).~~]

One implication of the principle that the jury's sentencing discretion must be narrowed and channeled is the prohibition against "double counting", *e.g.*, in the submission of jury instructions suggesting to the jury the same set of facts constitutes more than one aggravating factor. "[D]ouble counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996); *see also State v. Henderson*, 1990-NMSC-030, ¶ 45, 109 N.M. 655, 789 P.2d 603 [~~,109 N.M. at 655, 789 P.2d at 613~~](Ransom, J., concurring in part, dissenting in part[~~, reasons~~]) (reasoning that aggravating factor of murder in the course of a kidnapping and murder in the course of a sexual assault

amounted to double counting under facts of case), [~~cited with approval in~~] , *overruled on other grounds by Clark v. Tansy*, 1994-NMSC-098, ¶¶ 20-21, 118 N.M. 486, 882 P.2d 527, *cited with approval in State v. Allen*, 2000-NMSC-002, [~~P~~]¶ 74, 128 N.M. 482, [~~509,~~] 994 P.2d 728[~~, 755~~]. "[S]imply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven." *Henderson*, [~~109 N.M. at 661, 789 P.2d at 609~~] 1990-NMSC-030, ¶ 22.

The problem of double counting thus may arise when two distinct statutory aggravators overlap under the facts of a particular case. *Cf.* [~~*Henderson.*~~]*id.* In some instances, the capital felony sentencing statute appears to create situations in which one set of facts, if found by the jury, would automatically fit within multiple statutory aggravators.

For example Section [~~31-20A-5(D) NMSA 1978~~] NMSA 1978, § 31-20A-5(D) (1981) allows the jury to consider that [¶]"while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico." [¶] Facts that would prove the existence of this aggravator also would seem to describe Section 31-20A-5(E) [~~NMSA~~], which allows the jury to consider whether, [¶] "while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department]."

In most cases, murder by an inmate of an employee of the corrections department automatically will constitute the murder of a person "lawfully on the premises of a penal institution in New Mexico". The committee has addressed this problem by creating a single instruction for these aggravators. The use notes provide that in an individual case the court should select the applicable alternative.

In appropriate cases, a jury question also may exist whether two alleged aggravating factors, if supported by the evidence, are factually distinct from one another under the facts found by the jury. For example, the evidence may create a jury issue regarding the existence of a factually separate aggravating factor of murder during the course of a kidnapping. In such instances, the court may need to draft jury instructions to insure a separate factual basis exists for any finding of multiple aggravators by the jury. *Cf. Allen*, 2000-NMSC-002, [~~P~~]¶ 76 (failure to provide definitional instruction did not amount to fundamental error).

[As amended by Supreme Court Order No. _____, effective _____.]

14-7022. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder for hire; essential elements.

The state has charged the aggravating circumstance of murder for hire.

Before you may find the aggravating circumstance of murder for hire, you must find that the state has proved to your satisfaction beyond a reasonable doubt that:

1. The murder of _____ *(name of victim)* was committed for hire; and
2. The defendant had the intent to kill.

USE NOTES

This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The phrase "murder for hire" are words of common knowledge and normally requires no separate instruction.

See committee commentary to UJI 14-7014 NMRA.

14-7023. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; aggravating circumstances; murder of a witness; essential elements.[1]

The state has charged the aggravating circumstance of [[murder of a witness to a crime] [or] [murder of any person likely to become a witness to a crime]][2] [[for the purpose of [preventing the reporting of a crime][2] [or] [~~for the purpose of~~ preventing testimony in a criminal proceeding]] [or] [murder in retaliation for having testified in a criminal proceeding].

Before you find the aggravating circumstance of [murder of a witness to a crime][~~2~~] [or] [murder of any person likely to become a witness to a crime] [or] [murder in retaliation for having testified in a criminal proceeding][2], you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. _____ *(name of victim)* [~~was a witness to the [crime][crimes]][or][was likely to become a witness to the [crime][crimes]] of~~] [[was a witness] [or] [was likely to become a witness] to the [crime] [crimes] of _____ *(name of separate crime or crimes)*] [has testified in a criminal proceeding][~~3~~][2]; and

2. _____ *(name of defendant)* committed the murder of _____ *(name of victim)*

[with the motive to prevent _____ *(name of victim)* from reporting _____ *(name of crime)*, and _____ *(name of crime)* was a separate crime from the murder of _____ *(name of victim)*;][2]

[OR]

[with the motive to prevent _____ *(name of victim)* from testifying in a criminal proceeding regarding the crime of _____ *(name of crime)* and _____ *(name of crime)* was a separate crime from the murder of _____ *(name of victim)*;]

[OR]

[with the motive of retaliation for _____ *(name of victim)* having testified in a criminal proceeding.

USE NOTES

1. This instruction is to be used only in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding. This instruction may be used only if the motive for the murder was to prevent the victim from testifying or for having testified in any criminal proceeding. *See Clark v. Tansy*, 1994-NMSC-098, ¶ 25, 118 N.M. 486, [~~494,~~] 882 P.2d 527[~~, 535 [(1995)~~].

2. Use only applicable alternative or alternatives.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~Subsection G of Section 31-20A-5 NMSA 1978~~] NMSA 1978, § 31-20A-5 (G) (1981) [~~has been broken into~~] provides three alternatives: murder of a witness to prevent the report of a crime, murder of a witness to prevent testimony in a criminal proceeding and murder of a witness in retaliation for the witness having testified in a criminal proceeding. For a discussion of "a person likely to become a witness to a crime", *see State v. Bell*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50 [~~(1967)~~].

In those cases where the defendant intended only to intimidate the witness and not to kill him, it will be necessary to instruct on intimidation of a witness. As there is no essential elements instruction on intimidation of a witness, it will be necessary to draft an appropriate instruction. *See* NMSA 1978, § 30-24-3 [~~NMSA 1978~~] (1997) for the essential elements. If the jury was instructed on this subject previously, it is not necessary to give such an instruction during this sentencing proceeding.

See State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728; *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851; *State v. Clark*, 1989-NMSC-010, 108 N.M. 288, 772 P.2d 322 [~~(1989)~~] (Clark I); *Clark v. Tansy*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527 [~~(1994)~~] (Clark II); *Clark v. Tansy*, 13 F.3d 1407 (10th Cir., 1993); *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793 (Clark III); *State v. Henderson*, 1990-NMSC-030,109 N.M. 655, 789 P.2d 603 [~~(1990)~~].

See also committee commentary to UJI [~~14-7013 [withdrawn] and~~] 14-7014 NMRA.

[As amended by Supreme Court Order No. _____, effective _____.]

14-7026. [~~Death penalty~~]Life imprisonment without possibility of release or parole sentencing proceeding; reasonable doubt; burden of proof.[1]

The burden is always on the state to prove beyond a reasonable doubt that [the aggravating circumstance was present][~~2~~] [one or more of the aggravating circumstances were present][2].

It is not required that the state prove the existence of an aggravating circumstance beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

USE NOTES

1. This instruction must be given in all [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings.

2. Use applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — This instruction must be given in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings instead of UJI 14-5060 NMRA.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. [~~*See* Section 31-20A-3 NMSA 1978; *State v. Allen*, 2000-NMSC-002, P61, 128 N.M. 482, 994 P.2d 728; *Gregg v. Georgia*, 428 U.S. 153 , 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).~~] NMSA 1978, § 31-20A-2 (2009); *see State v. Fry*, 2006-NMSC-001, ¶ 28, 138 N.M. 700, 126 P.3d 516 ("For the use of . . . felonies as an aggravating circumstance, [in a death penalty case] the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill.").

[As amended by Supreme Court Order No. _____, effective _____.]

14-7027. [~~Death penalty~~]Life imprisonment without possibility of release or parole sentencing proceeding; jury procedure for consideration of each aggravating circumstance.[1]

In this case, as to the aggravating circumstance of _____ *(insert the aggravating circumstance)*, there are three possible verdicts:

(1) finding beyond a reasonable doubt that the aggravating circumstance exists;

(2) finding that the aggravating circumstance does not exist; or

(3) being unable to reach an agreement.

You must first consider whether the aggravating circumstance charged was present in this case. In order to find the aggravating circumstance, you must agree unanimously. [~~You may consider the penalty to be imposed only if you have found that [the aggravating circumstance has]~~[2] ~~[one or more aggravating circumstances have] been proven beyond a reasonable doubt.~~]

A special form has been prepared for [the][~~2~~] [each][2] aggravating circumstance charged. If you unanimously find the state has proved beyond a reasonable doubt that the aggravating circumstance was present, you shall complete the form indicating your finding, and have the foreperson sign this part. [You will then consider any other aggravating circumstances.][3]

If you unanimously find that the aggravating circumstance was not present, your finding shall be that the state has not proved beyond a reasonable doubt the aggravating circumstance. If you are unable to reach a unanimous agreement either way, the foreperson shall sign this part of the finding form.

[You will then consider any other aggravating circumstances until you have separately considered each aggravating circumstance. You must complete a form for each aggravating circumstance before returning to the court.][3]

If you do not find an aggravating circumstance beyond a reasonable doubt, then return to the courtroom.

[[~~If you unanimously find beyond a reasonable doubt that an aggravating circumstance was present, you shall then consider the penalty to be imposed.~~][4]]

USE NOTES

1. This instruction must be given in every [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding for each aggravating circumstance to be given to the jury. It is to be given immediately prior to UJI 14-7032 NMRA [~~and 14-7033~~], sample [~~forms~~] form of findings.

2. Use only applicable alternative.

3. This alternative is to be given if more than one aggravating circumstance is to be given.

[~~4. This sentence is given unless the court has bifurcated the sentencing proceeding.~~]

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — At least one aggravating circumstance must be proved beyond a reasonable doubt to impose [~~the death penalty. *State v. Allen*, 2000-NMSC-002, P61, 128 N.M. 482, 994 P.2d 728; *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Section 31-20A-3 NMSA 1978.~~] life imprisonment without possibility of release or parole. NMSA 1978, § 31-20A-2 (2009); *see State v. Fry*, 2006-NMSC-001, ¶ 28, 138 N.M. 700, 126 P.3d 516

("For the use of . . . felonies as an aggravating circumstance, [in a death penalty case] the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill.").

This instruction provides the procedure for finding an aggravating circumstance and for completing the form in UJI 14-7032 NMRA as to the presence of one or more aggravating circumstances.

[As amended by Supreme Court Order No. _____, effective _____.]

[WITHDRAWN]

~~**[14-7029. Death penalty sentencing proceeding; mitigating circumstances.**[1]~~

~~[If you unanimously find an aggravating circumstance, each of you must consider all mitigating circumstances.][2] [You have found an aggravating circumstance. You must now consider any and all mitigating circumstances.][3] A mitigating circumstance is any conduct, circumstance or thing which would lead you individually or as a jury to decide not to impose the death penalty. You are not required to reach unanimous agreement on the existence of any of the mitigating circumstances. Instead, if any one of you, individually, believes that a mitigating circumstance exists, you may consider it in the weighing process.~~

~~[Each of you must consider any and all of the following mitigating circumstances][4]:[5]~~

~~[the defendant did not have any significant history of prior criminal activity;]~~
~~[the defendant acted under duress or under the domination of another person;]~~
~~[the defendant's capacity to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was impaired;]~~
~~[the defendant was under the influence of mental or emotional disturbance;]~~
~~[the victim was a willing participant in the defendant's conduct;]~~
~~[the defendant acted under circumstances which tended to justify, excuse or reduce the crime;]~~
~~[the defendant is likely to be rehabilitated;]~~
~~[cooperation by the defendant with authorities;]~~
~~[the defendant's age;]~~
~~the circumstances of the offense which are mitigating; and anything else which may lead you to believe that the death penalty should not be imposed.~~
~~[You must also consider the (character), (emotional history) (and) (family history) of the defendant which are mitigating.][6]~~
~~[You must also consider _____.][7]~~

~~You need not unanimously agree on the existence of a mitigating circumstance.~~

~~USE NOTES~~

~~1. This instruction must be given in every death penalty sentencing proceeding.~~

~~2. Use this bracketed sentence unless the court has bifurcated the sentencing proceeding.~~

~~3. Use the bracketed sentence only if the court has bifurcated the sentencing proceeding.~~

~~4. Use this phrase only if there is one or more statutory mitigating circumstance.~~

5. Use the following bracketed mitigating circumstances for which there is evidence, but do not add other specific circumstances. *See* Section 31-20A-6 NMSA 1978 for statutory mitigating circumstances.

6. Use bracketed phrase and applicable words or phrases set forth in parentheses if requested by defendant.

7. Include any non-statutory mitigating circumstances about which evidence has been presented.

[As amended, effective August 1, 2001.]

Committee commentary. Section 31-20A-2 NMSA 1978 requires the trier of fact to determine if mitigating circumstances exist and to weigh them against the aggravating circumstances. The weight to be given to the mitigating and aggravating circumstances and the burden of proof for each are not provided in the statute. Aggravating circumstances must be proven beyond a reasonable doubt.

It is not necessary for the jury to unanimously agree on any mitigating circumstance. *See Clark v. Tansy*, 118 N.M. 486, 494, 882 P.2d 527, 535. *See also State v. Henderson*, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990); *State v. Clark*, 1999-NMSC-035, P66, 128 N.M. 119, 990 P.2d 793.

Section 31-20A-2 NMSA 1978 requires the trier of fact to consider the defendant and the crime. The mitigating circumstances includes, but is not limited to the specific mitigating circumstances identified in 31-20A-6 NMSA 1978.]

[WITHDRAWN]

[14-7030. Death penalty sentencing proceeding; weighing the aggravating circumstances against the mitigating circumstances.[1]

If you unanimously find [any of the aggravating circumstances that were charged][2] [an aggravating circumstance that was charged], you must weigh [that aggravating circumstance][2] [those aggravating circumstances] against any mitigating circumstances, you as an individual member of the jury, may have found in this case. After considering the aggravating [circumstance][2] [circumstances] and the mitigating circumstances weighing them against each other and considering both the defendant and the crime, you shall each determine whether the defendant should be sentenced to death or life imprisonment. Only if the aggravating [circumstance][2] [circumstances] outweigh the mitigating circumstances may the death penalty be imposed.

However, even if the aggravating [circumstance outweighs][2] [circumstances outweigh] the mitigating circumstances, you may still decide not to impose the death penalty.

If you decide not to impose the death penalty or if you do not reach a unanimous decision, a sentence of life imprisonment is imposed.

USE NOTES

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use applicable alternative.

3. The bracketed language may be given in appropriate cases upon request of the defendant.

[As amended, effective August 1, 2001.]]

14-7030A. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; explanation of sentence of life imprisonment.[1]

In New Mexico, a sentence of life imprisonment means that the defendant will not be released from prison before serving thirty (30) years in the penitentiary. After thirty (30) years in prison, the defendant may have the opportunity to have the defendant's case reviewed by the parole board. Therefore, if sentenced to life imprisonment, the defendant will have to serve at least thirty (30) years in the penitentiary with no reduction of sentence for good behavior.

[In addition, _____ *(name of defendant)* has been sentenced to additional imprisonment on other felony charges that will be served consecutively to a life sentence.][2] [_____ *(name of defendant)* will not be eligible for parole until after completion of the sentence on the other charges in addition to the life sentence. _____ *(name of defendant)* will be at least _____ years old before becoming eligible for parole.][3]

USE NOTES

1. Upon request of the defendant, this instruction must be given in a [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.

2. Upon request of the defendant, the bracketed sentence is used if the defendant has any other sentences to serve.

3. Upon request of the defendant, the bracketed sentence shall be given.

[Approved, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

14-7031. [~~Death penalty~~]Life imprisonment without possibility or release or parole sentencing proceeding; jury deliberation procedure.

You shall now retire to the jury room [and select one of you to act as foreperson][2]. [You may select the foreperson from the trial portion to continue as foreperson or you may select a new foreperson for the [~~death penalty~~] life imprisonment without possibility or release or parole sentencing proceeding.] That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreperson on the forms that will be provided, and then you shall return with them to this courtroom.

USE NOTES

1. This instruction must be given in every [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceeding.

2. Use first bracketed phrase only when a new jury is hearing the sentencing proceeding. Use second bracketed phrase if the original jury is hearing the sentencing proceeding.

This instruction is given last.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The committee amended this instruction to make it clear that the foreperson from the trial may continue or that the jury may select a new foreperson for the sentencing proceeding.

14-7032. [~~Death penalty~~] Life imprisonment without possibility of release or parole sentencing proceeding; sample form of findings; aggravating circumstance findings.[1]

(style of case)

[~~You cannot consider the penalty to be imposed unless you have found that [the][2] [an][3] aggravating circumstance has been proven beyond a reasonable doubt.~~]

Sign only one of the following findings as to the aggravating circumstance of _____ *(insert the aggravating circumstance)*. You must complete a form for each aggravating circumstance. [~~If you signed Finding Number 1, as to any aggravating circumstance, then consider the penalty. If not, return to the courtroom.~~]

Finding Number 1. We unanimously find beyond a reasonable doubt the aggravating circumstance of _____ *(set forth the aggravating circumstance)*.

_____
FOREPERSON

Finding Number 2. We unanimously find the aggravating circumstance of _____ *(set forth the aggravating circumstance)* has not been proven beyond a reasonable doubt.

_____
FOREPERSON

Finding Number 3. We are unable to reach an agreement as to the aggravating circumstance of _____ *(set forth the aggravating circumstance)*.

_____
FOREPERSON

USE NOTES

1. This instruction is to be given immediately after UJI 14-7027 NMRA. This instruction is for use only in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings. The court is to set forth only one aggravating circumstance on this form prior to submission to the jury. A separate form is to be submitted for each aggravating circumstance to be submitted to the jury. [~~The jury is to be given both this instruction and UJI 14-7033 when they retire to deliberate.~~

~~2. Use this alternative if only one aggravating circumstance is given.~~

~~3. Use this alternative if more than one aggravating circumstance is given.~~]

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~Section 31-20A-2 NMSA 1978~~] NMSA 1978, § 31-20A-2 (2009) establishes the procedure to be followed by the jury in determining the sentence to be imposed and requires a finding beyond a reasonable doubt of an aggravating circumstance before a sentence of life imprisonment without possibility of release or parole may be imposed. This instruction is the form to be used by the jury to indicate whether an aggravating circumstance charged was found [~~, and if so, whether the defendant should be sentenced to death or life imprisonment.~~

~~If an aggravating circumstance is not found, it is not necessary for the foreperson to complete the verdict portion of the form since there would be no decision to be made as to whether or not to impose the death penalty~~].

The warning on the form is to prevent any jury from imposing [~~the death penalty~~] life imprisonment without possibility of release or parole without finding an aggravating circumstance. [As amended by Supreme Court Order No. _____, effective _____.]

[WITHDRAWN]

[~~14-7033. Death penalty sentencing proceeding; sample forms of findings; death penalty findings.~~

~~*(style of case)*~~

~~DO NOT CONSIDER THIS VERDICT FORM UNLESS THE JURY HAS UNANIMOUSLY FOUND AN AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. IF THE JURY HAS NOT FOUND AN AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT, RETURN TO THE COURTROOM.~~

~~Sign only one of the following forms:~~

~~We unanimously agree that the defendant, _____ *(name of defendant)*, be sentenced to death.~~

_____

~~FOREPERSON~~

~~OR~~

~~We DO NOT unanimously agree that the defendant, _____ *(name of defendant)*, be sentenced to death.~~

_____

~~FOREPERSON~~

~~OR~~

~~We unanimously agree that the defendant not be sentenced to death and therefore a life sentence should be imposed.~~

_____

~~FOREPERSON~~

~~USE NOTES~~

~~UJI 14-7030.1 is given immediately prior to this instruction. This instruction is for use only in death penalty sentencing proceedings. The jury is to be given both this instruction and UJI 14-7032 when they retire to deliberate.~~

~~[As amended, effective August 1, 1989; August 1, 2001.]~~

~~**Committee commentary.** The warning on the form is to prevent any jury from imposing the death penalty without finding an aggravating circumstance.~~]

14-7034. Sentencing proceeding; duty to consult.

Your findings must represent the considered judgment of each juror.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after a thorough review of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a finding.

USE NOTES

This instruction must be given in every [~~death penalty~~] life imprisonment without possibility of release or parole proceeding. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given.

[As amended, effective August 1, 2001.]

Committee commentary. — This instruction is almost identical to UJI 14-6008 [~~and UJI 14-7043 [withdrawn]~~] NMRA. It has been modified for use in [~~death penalty~~] life imprisonment without possibility of release or parole sentencing proceedings.

Proposal 2021-027

Please accept this as my comment regarding Proposal 2021-027. Comments are my own, and do not reflect those of my employer.

I generally agree with the changes being made, and they match with what I believe the Rules of Criminal Procedure committee (on which I sit) intended in the LWOP rules.

That said, 14-7023 has an error. The commentary says that there is no instruction for Intimidation of a Witness. However, there are instructions at 14-2402 and 14-2403 for different types of Intimidation. This jury instruction should capture that.

Further, I think that the mere citations to the cases involving killing of a witness seems unhelpful compared to most committee commentary. I know that it's not an easy issue, and it's certainly one that I see, having read some of the cases, that I misunderstood. But I think there needs to be more information in there so that practitioners have a better understanding of what killing a witness means. So I would seriously increase the commentary in that section. Most of the other aggravating factors are pretty self-explanatory. That's not true for this factor.

Thank you for your hard work on these instructions.

Jonathan L. Ibarra
Assistant Public Defender

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

To: The Criminal UJI Committee
RE: Comments to Proposal 2021-027 (instructions on life without the possibility of parole)
Date: April 15, 2021
From: Victoria Wilson, Assistant Attorney General and M. Anne Kelly, Deputy Attorney General

Dear Committee Members,

Please consider the following comments to Proposal 2021-027.

Point One: The proposed instructions inaccurately state that the jury will be deciding the defendant's sentence, and will be choosing between a sentence of life with the possibility of parole and life without the possibility of parole. This is not an accurate statement of the law, violates the principle that the jury may not consider the consequences of its verdict, and creates the potential for injection of sympathy and prejudice into the jury's decision-making.

In *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 25, 414 P.3d 326, the New Mexico Supreme Court recognized that "[t]he plain language" of NMSA 1978, § 31-20A-2 (2009) "is unequivocal with respect to sentencing" for first-degree murder when the State is seeking a sentence of life without the possibility of parole (LWOP). "Under the statute's plain language, the determinative factors are the jury's findings of guilt and of one or more aggravating circumstances. When both findings are present, an LWOP sentence is **mandatory** and cannot be mitigated." *Chadwick-*

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McNally, 2018-NMSC-018, ¶ 25 (emphasis added). As a result, "[n]either the district court nor the jury has discretion to deviate from the statute's command." *Id.*

Because LWOP is the mandatory sentence for a person found guilty of committing first-degree murder under one or more aggravating circumstance, there is no sentencing decision for the jury to make. The jury's role ends with its findings on aggravating circumstances following a guilty verdict. In contrast, in a death penalty case, after finding a defendant guilty of committing first-degree murder and finding one or more aggravating circumstance, the jury must choose between two possible sentences. This is what makes the two sentencing procedures so different, and this is why uniform jury instructions for an LWOP case should not simply be a modified version of the instructions for a death penalty case, as the proposed instructions appear to be.

The proposed revised instructions appear to recognize the jury's limited role because they do not include instructions or verdict forms for the jury to decide the sentence. Nevertheless, the proposed revised instructions suggest to the jury that it will be making such a decision. For example, proposed revised UJI 14-7010 and UJI 14-7011 refer to the proceeding in which the jury will hear evidence on and determine the existence of aggravating circumstances as a "sentencing hearing." They each include this language to describe the proceeding no fewer than twenty-seven times. Although these instructions are not provided to the jury, but are the

explanatory instructions read to the jury by the trial judge, the repeated referral to the proceeding as a sentencing hearing will, at the very least, confuse the jury as to its role in the proceeding.

Indeed, these instructions also tell the jury that, after hearing evidence and argument, it will retire to "decide the sentence," and use that phrase at least four times. At least once, the instructions use that language to suggest that the jury will decide the sentence. Most important, the instructions, under the heading "Sentencing Hearing Procedure," tell the jury that the judge is outlining "the procedure for [the jury] to follow **in deciding the defendant's sentence."** *See* Proposed Revised UJI 14-7010 (emphasis added). That is an inaccurate statement of the jury's role, and, combined with the numerous references to the sentencing proceeding, will certainly mislead the jurors into believing that they will be deciding the defendant's sentence.

Even if the reasoning is that the jury does decide the sentence because the jury's finding on aggravating circumstances is determinative of which statutory scheme is imposed, that reasoning should be rejected. The Supreme Court has rejected that reasoning as justification for instructing the jury on the consequences of its verdict. *See State ex rel. Schiff v. Madrid*, 1984-NMSC-047, ¶ 9, 101 N.M. 153. In that case, the defendant argued that the trial court properly instructed the jury that it should consider the consequence of its verdict with respect to whether the defendant used a firearm to commit aggravated battery. In so doing, the defendant

relied on the mandatory nature of the firearm sentence enhancement. *Id.* According to the defendant, mandatory sentencing means that the jury's verdict decides the sentence and, therefore, endows the jury "with a different version of discretion," including the discretion to consider the consequences of its verdict in deciding whether to find the defendant guilty. *Id.* The Court rejected that argument because "the jury has no authority to exercise such discretion. The jury only finds facts." *Id.* In so doing, the Court relied on the well-settled principle that the jury may not consider the potential punishment, or the consequences of its verdict. *Id.* ¶ 7.

"In New Mexico, it has long been settled that the jury's function is to determine guilt or innocence, not to participate in the imposition of punishment. The effect of the verdict upon the defendant is not the concern of jurors." *State v. Brown*, 1997-NMSC-029, ¶ 14, 123 N.M. 413 (quotation marks, alterations, and citations omitted). This principle "'is a reflection of the basic division of labor in our legal system between judge and jury.'" *Id.* ¶ 12 (quoting *Shannon v. United States*, 512 U.S. 573, 579 (1994)). Information regarding the consequences of a verdict is not only irrelevant to the jury's task of finding the facts and determining guilt or innocence, this information invites the jury "to ponder matters that are not within their province," such as the effect the verdict will have on the defendant. *Id.* ¶¶ 12-13. Indeed, information regarding the consequences of a verdict improperly injects sympathy and prejudice into the jury's decision-making. *Id.* ¶ 13-14.

The one exception to the principle that the jury may not consider the consequences of its verdict is a death penalty case. However, even in a death penalty case, the exception is limited to the penalty phase in which the jury must choose between a life sentence and a death sentence. That is because, unlike LWOP, the death penalty is not mandatory upon a finding of guilt and aggravating circumstances. Rather, the jury is tasked with choosing between a life sentence and a death sentence once it has found the defendant guilty of committing first-degree murder under an aggravating circumstance. The jury can hardly choose the sentence without considering the consequences of its choice. Where the sentence is mandatory, however, the jury does not choose the sentence. Therefore, the jury should not consider the consequences of its verdict in deciding whether the murder was committed under one or more aggravating circumstance. *See State ex rel. Schiff v. Madrid*, 1984-NMSC-047, ¶ 9.

Proposed revised uniform jury instructions 14-7010, 14-7011, 14-7012, 14-7030A, and 14-7031 violate the principle that the jury may not consider the consequences of its verdict. These proposed revised instructions will result, at best, in confusion, and at worst, in the improper injection of sympathy and prejudice into a jury's decision regarding the existence of aggravating circumstances. It is not necessary to the jury's fact-finding role to know that its decision will determine

whether the defendant receives a sentence of life with the possibility of parole, and what that means, or a sentence of life without the possibility of parole.

Point Two: The proposed instructions presume a bifurcated process in which the question of aggravating circumstances will be decided in a separate proceeding from the trial in which guilt is determined. Bifurcation is not required, but should be decided on a case-by-case basis.

In *Chadwick-McNally*, the defendant argued that death penalty procedures provided in repealed provisions of the Capital Felony Sentencing Act should be provided in a case in which the State seeks LWOP. 2018-NMSC-018, ¶ 4. One of the procedures the defendant insisted should apply is the provision for bifurcated proceedings: one proceeding for determining guilt/innocence, and a separate proceeding, following a finding of guilt, to determine aggravating circumstances and select a sentence. *Id.* The trial court rejected the request for death penalty procedures, including bifurcation. *Id.* ¶ 5. In addressing the question of bifurcation, the Supreme Court declined to adopt a rule requiring bifurcation, in the absence of a clear directive from the constitution. *Id.* ¶ 21. Instead, the Court concluded that "[w]hether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued" under the rules of criminal procedure. *Id.* ¶ 22.

The Court's conclusion is consistent with the Legislature's limited authorization of bifurcated proceedings for sentencing increases. For example, the Legislature authorizes bifurcated sentencing proceedings where the fact necessary

for sentencing involves inadmissible evidence, such as prior offenses; *see* NMSA 1978, § 31-18-24(A) (1994); NMSA 1978, § 31-18-26(A) (1996) (requiring bifurcation to determine whether a conviction for a violent sexual offense against a child is a second or subsequent conviction for such offense). On the other hand, where the fact necessary for sentencing is presented to the jury as part of the *res gestae* of the underlying crime, bifurcation is not required. Instead, such facts are presented to the jury in special interrogatories. S*ee* NMSA 1978, § 31-18-16 (1993) (for purposes of the firearm sentence enhancement, whether the defendant used a firearm in the commission of the underlying felony is determined through special interrogatories).

The Court in *Chadwick-McNally* recognized that bifurcation would be necessary in some cases to protect the defendant against prejudice from inadmissible evidence, but would not be necessary in all cases. The proposed revised uniform jury instructions for LWOP cases presume a bifurcated proceeding and fail to follow the Supreme Court's directive that the decision to bifurcate the proceedings and hold a separate proceeding for aggravating circumstances should be decided on a case-by-case basis.

New Mexico Courts

Terri Saxon <suptls@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments to 2021 Proposed Rule Amendments

1 message

Chief Judge Jennifer DeLaney <demdjed@nmcourts.gov> Fri, Apr 16, 2021 at 10:04 AM
Reply-To: demdjed@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov
Cc: "Hofacket, Jarod" <demdjkh@nmcourts.gov>, Tom Stewart <sildtfs@nmcourts.gov>, Jim Foy <sildjbf@nmcourts.gov>

Mr. Moya,

Attached are the comments from the District Judges of the Sixth Judicial District concerning the 2021 proposed rule amendments. Please let me know if I need to submit each one separately or if the attached document is sufficient to distribute to each of the rule committees. Thank you,

Chief Judge DeLaney

--
Jennifer E. DeLaney
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2021 Proposed Rule Amendment Comments.docx
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Code of Professional Conduct Committee

Proposal 2021-006 – Lawyer communications and solicitation of clients
[Rules 16-701, 16-702, and 16-703 NMRA; and Withdrawn Rules 16-704 and 16-705 NMRA]

The Code of Professional Conduct Committee proposes to amend Rules 16-701, 16-702, and 16-703 NMRA to incorporate certain of the 2018 amendments to the ABA Model Rules of Professional Conduct. Because the proposed amendments to Rules 16-701, 16-702, and 16-703 also incorporate some provisions and commentary from Rules 16-704 and 16-705 NMRA, the Committee proposes to withdraw Rules 16-704 and 16-705.

No issues regarding this proposed change.

Rules of Civil Procedure for State Courts Committee

Proposal 2021-007 – Production of documents and things
[Rule 1-034 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-034 NMRA to: (1) clarify that in answering a request for production, the responding party shall permit inspection in its entirety unless the responding party files a proper objection; (2) require the responding party to state the specific reasons for an objection to a request for production; (3) require the responding party to state whether the response includes all responsive materials; and (4) if the responding party withholds any responsive materials based on an objection, the objection must clearly describe with reasonable particularity the materials withheld for each objection. The Committee also added committee commentary to further explain the amendments.

No issues regarding this proposed change.

Proposal 2021-008 – Electronic filing and service fees as recoverable costs
[Rules 1-054, 2-701, and 3-701 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 1-054, 2-701, and 3-701 NMRA to clarify that electronic filing and service fees are recoverable costs.

This rule change helps to clarify what is included in fees and that is helpful to the Court.

Proposal 2021-009 – Court trust account requirements
[Rule 1-102 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-102 NMRA to clarify that district courts must deposit litigant funds within two (2) business days of receipt in a bank that is a member of the Federal Deposit Insurance Corporation and in an account that is distinct from the court's accounts for general funds. The Committee additionally proposes to amend Rule 1-102 NMRA to specify that funds deposited in a court trust fund checking account

must be invested and maintained in a financial institution located within the court's judicial district and in accordance with governing statutes and any regulation prescribed by the Director of the Administrative Office of the Courts. The Committee also replaced the references to "social security number" and "employer identification number" with the more-inclusive term "taxpayer identification number," and also cited Form W-9 (Request for Taxpayer Identification Number and Certification) by name.

No comment.

Proposal 2021-010 – *Tribal court personal representative*
[Rule 1B-102 NMRA; and Forms 4B-801 and 4B-802 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1B-102 NMRA, and Forms 4B-801 and 4B-802 NMRA, to clarify that a domiciliary foreign personal presentative includes a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs. The Committee further proposes to amend Forms 4B-801 and 4B-802 NMRA to recognize tribal court appointments. Finally, the Committee proposes to amend Form 4B-801 NMRA to allow "equivalent indicia of authority from a tribal court or the Bureau of Indian Affairs" to serve as a substitute for Letters of Administration or Letters Testamentary, recognizing that tribal courts may title documents differently than probate courts.

No comment.

Proposal 2021-011 – *Summons and order for free process*
[Rules 2-202 and 3-202 NMRA; and Forms 4-204 and 4-223 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 2-202 and 3-202 NMRA by replacing "incapacitated" with "incompetent" for consistency with Rules 1-004(I) and 1-017(D) NMRA applicable to the district courts.

The Committee also proposes to amend Rules 2-202 and 3-202 NMRA, as well as Form 4-204 NMRA, to permit *pro se* parties to serve a summons by mail.

Finally, the Committee proposes to amend Form 4-223 NMRA to specify the methods of service a person seeking free service of process must first attempt in the district, magistrate, and metropolitan courts.

The revisions are helpful in making the rule more clear.

Proposal 2021-012 – *Title page of transcript of civil proceedings*
[Form 4-708 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Form 4-708 NMRA for consistency with the comparable criminal form, Form 9-608 NMRA, to reflect that the court clerk, rather than the judge, issues the title page of a transcript of civil proceedings.

No objections to the new forms as proposed.

Rules of Criminal Procedure for State Courts Committee

Proposal 2021-013 – Order of trial
[Rule 5-607 NMRA; and New Rules 6-603.1 and 7-603.1 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 5-607 NMRA to clarify and make housekeeping changes to its text and committee commentary, and to adopt new Rules 6-603.1 and 7-603.1 NMRA that import Rule 5-607's sequence of trial events into jury trial practice in the magistrate and metropolitan courts.

No objections to the new rules as proposed.

Proposal 2021-014 – Time limits for filing citations
[Rules 6-201, 7-201, and 8-201 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-201, 7-201, and 8-201 NMRA to incorporate an express time limitation for the filing of a citation and an explicit remedy—the potential dismissal of the citation with prejudice—for a late-filed citation.

This is a necessary amendment to each of the above listed rules.

Proposal 2021-015 – Interview subpoenas
[Rule 6-606 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 6-606 NMRA to provide that a judge-issued subpoena in magistrate court will lie "only after good faith efforts to secure an interview . . . have been unsuccessful[,]" the same criterion that governs the issuance of interview subpoenas in metropolitan court under Rule 7-606 NMRA

The changes help to clarify and will reduce the procedure where litigants come straight to the court to obtain an interview subpoena.

Proposal 2021-016 – Time limits for probation violation hearings
[Rules 6-802, 7-802, and 8-802 NMRA]

6-802 (C)(2), 7-802 (C)(2), and 8-802(C)(2) With our current use of technology, there is no reason that a hearing should take two days longer to set if the person is in custody in an out of district detention center. It should be 3 days regardless if the defendant is in detention.

8-802 (D). Municipal ordinances are generally very low-level offenses and allowing someone to remain in custody for 18 days (3 before initial hearing and 15 from that date) seems extremely severe. There should be limited reasons why this kind of case could not be adjudicated with seven days from the initial appearance. The time should be reduced.

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-802, 7-802, and 8-802 NMRA to provide explicit time limits for the holding of a probation violation hearing in the limited jurisdiction criminal courts.

Proposal 2021-017 – *Waiver of counsel and other public defender forms*
[Forms 9-401, 9-403, 9-403A, and 9-403B NMRA; and Withdrawn Form 9-401A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Forms 9-401, 9-403, 9-403A, and 9-403B NMRA, and to withdraw Form 9-401A NMRA, to adopt a single, detailed "Waiver of Counsel Advisement" for use in all courts of criminal jurisdiction, align the form provisions governing the appointment of defense counsel with the current policies of the Law Offices of the Public Defender, and clarify the form provisions governing appeals of indigency determinations.

In the Waiver of Counsel form, the language is definitely much clearer than the previous form; however, there is still a lot of legalese especially in paragraphs six and seven. Additionally, there should be added language that the prosecutor has not duty to assist a self-represented criminal defendant and has no duty of loyalty to him/her.

Proposal 2021-018 – *Dismissal of criminal charges on completion of deferred sentence*
[Form 9-603A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Form 9-603A NMRA to make clear the mandatory nature of the dismissal remedy available to a defendant upon the defendant's completion of the terms of a deferred sentence without revocation.

No comment.

UJI-Civil Committee

Proposal 2021-019 – *Insurance has no bearing*
[UJI 13-208 NMRA]

The UJI-Civil Committee proposes to amend UJI 13-208 NMRA to align the instruction with jurors' current understanding of the role played by insurance and to provide for possible use of the instruction prior to the commencement of a trial.

The amendments appear to clarify the UJI, which is helpful.

Proposal 2021-020 – *Request for admission*
[New UJI 13-215 NMRA]

The UJI-Civil Committee proposes to adopt new UJI 13-215 NMRA to address the introduction of admitted facts at trial. The proposed instruction provides jurors with the definition of a request for admission and informs them of the effect of an admitted fact at trial.

These amendments help to streamline the UJI and increase clarity.

Proposal 2021-021 – *Unfair Practices Act claims*
[New UJI 13-25 Introduction NMRA; New UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and New UJI 13-25 Appendix NMRA]

The UJI-Civil Committee proposes to adopt a new Chapter 25 to the Civil Uniform Jury Instructions to use with Unfair Practices Act (UPA) claims. Proposed Chapter 25 includes new UJI 13-25 Introduction NMRA; new UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and new UJI 13-25 Appendix NMRA. The proposed Introduction orients practitioners and judges to Chapter 25 and explains how the instructions in the chapter may be used with other UJI chapters. Proposed UJI 13-2501 sets out the elements that a plaintiff alleging a UPA violation must prove and is intended for use in all cases alleging a UPA violation. Proposed UJI 13-2502 instructs the jury on the proof required to establish that a defendant engaged in an unconscionable trade practice under the UPA. Proposed UJI 13-2503, -2504, and -2505 are definitional instructions to be used as appropriate in a given case. Proposed UJI 13-2506 provides a damages framework for UPA claims. The proposed Appendix provides a sample set of jury instructions for a hypothetical case containing UPA violations.

The new UJI will help to give the parties a better framework for proceeding in these cases and assisting jurors in their role as fact finders.

UJI-Criminal Committee

Proposal 2021-022 – *Explanation of trial procedure*
[UJI 14-101 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-101 NMRA to simplify instructions on outside communications and internet use and to clarify that jurors ordinarily will not receive transcripts of witness testimony.

This seems like an excellent rule change. This has always been a challenging part of the jury script.

Proposal 2021-023 – *Procedure for instructing on uncharged offenses*
[UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378, 14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA]

The UJI-Criminal Committee proposes to amend the Use Notes to UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378,

14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA to reference the procedure for instruction on uncharged offenses outlined in UJI 14-140 NMRA.

This seems like a helpful correction to make the use of 14-140 mandatory instead of referencing it. I think the old rule was adequate. This is more clear.

Proposal 2021-024 – *Stalking and aggravated stalking*
[UJI 14-331 and 14-333 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-331 and 14-333 NMRA to conform more closely to the language of NMSA 1978, Section 30-3A-3 (2009), defining the crime of stalking, and NMSA 1978, Section 30-3A-3.1 (1997), defining the crime of aggravated stalking.

I think this change is a reach. The statute changed in 2009. No case has interpreted the statute the way the committee is attempting to, namely that proving that the Defendant was acting without lawful authority is an element for the State to prove. I do not believe the rules committee should be making this fundamental change to the law so long after the statute they are referencing changed.

Proposal 2021-025 - *Reliance in fraud*
[UJI 14-1640 NMRA]

The UJI-Criminal Committee proposes to amend the committee commentary to UJI 14-1640 NMRA to reference the definition of reliance provided in *State v. Garcia*, 2016-NMSC-034, 384 P.3d 1076, and to remove outdated citations.

No problem with this change. Nice update.

Proposal 2021-026 – *Securities offenses*
[UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA to update statutory references and style conventions.

No problem with this change. Nice update.

Proposal 2021-027 – *Life without possibility of release or parole*
[UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029, 14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA]

Good clarity to provide the Court and practitioners guidance on these cases. No issues.

The UJI-Criminal Committee proposes to amend UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029,

14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA to provide instructions for sentencing proceedings for life imprisonment without possibility of release or parole in response to the repeal of the death penalty and in conformity with *State v. Chadwick-McNally*, 2018-NMSC-018, 414 P.3d 326, Rule 5-705 NMRA, and proposed changes to Rule 14-101 NMRA.