

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

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

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

12 1. At the time defendant committed the murder of _____
13 (*name of victim*) the _____ (*name of defendant*) was incarcerated
14 in _____³ (*name of penal institution*);

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

17 [incarcerated in _____ (*name of penal institution*);]^[2] [or]
18 [lawfully on the premises of _____ (*name of penal institution*);]
19 [or]
20 [an employee of the state corrections department];²

21 and

22 3. The defendant had the intent to kill.

23

USE NOTES

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

6 2. Use applicable alternatives.

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

9 [Approved, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008,
10 effective for all cases pending or filed on or after December 31, 2021.]

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

18 One implication of the principle that the jury’s sentencing discretion must be narrowed and
19 channeled is the prohibition against “double counting”, *e.g.*, in the submission of jury instructions
20 suggesting to the jury the same set of facts constitutes more than one aggravating factor. “[D]ouble
21 counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the
22 weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus,
23 unconstitutionally.” *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996); *see also State*

1 v. Henderson, 1990-NMSC-030, ¶ 45, 109 N.M. 655, 789 P.2d 603 [~~109 N.M. at 655, 789 P.2d~~
2 ~~at 613~~](Ransom, J., concurring in part, dissenting in part[~~, reasons~~]) (reasoning that aggravating
3 factor of murder in the course of a kidnapping and murder in the course of a sexual assault
4 amounted to double counting under facts of case), [~~cited with approval in~~] overruled on other
5 grounds by Clark v. Tansy, 1994-NMSC-098, ¶¶ 20-21, 118 N.M. 486, 882 P.2d 527, cited with
6 approval in State v. Allen, 2000-NMSC-002, [P]¶ 74, 128 N.M. 482, [509,] 994 P.2d 728[~~, 755~~].
7 “[S]imply because there are sufficient elements present to prove more than one crime in the same
8 transaction does not mean that more than one aggravating circumstance has been proven.”
9 Henderson, [109 N.M. at 661, 789 P.2d at 609] 1990-NMSC-030, ¶ 22.

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

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

22 In most cases, murder by an inmate of an employee of the corrections department
23 automatically will constitute the murder of a person “lawfully on the premises of a penal institution

1 in New Mexico”. The committee has addressed this problem by creating a single instruction for
2 these aggravators. The use notes provide that in an individual case the court should select the
3 applicable alternative.

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

11 [As amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed
12 on or after December 31, 2021.]