

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

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

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

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

15 2. _____ (*name of defendant*) committed the murder of
16 _____ (*name of victim*)
17 [with the motive to prevent _____ (*name of victim*) from reporting
18 _____ (*name of crime*), and _____ (*name*
19 *of crime*) was a separate crime from the murder of _____ (*name of*
20 *victim*);²

21 [OR]

22 [with the motive to prevent _____ (*name of victim*) from testifying
23 in a criminal proceeding regarding the crime of _____ (*name of*

1 *crime*) and _____ (*name of crime*) was a separate crime from the
2 murder of _____ (*name of victim*);]

3 [OR]

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

6

7

USE NOTES

8 1. This instruction is to be used only in a [~~death penalty sentencing~~] life imprisonment
9 without possibility of release or parole proceeding. This instruction may be used only if the motive
10 for the murder was to prevent the victim from reporting or testifying or for having testified in any
11 criminal proceeding. *See Clark v. Tansy*, 1994-NMSC-098, ¶ 25, 118 N.M. 486, [494,] 882 P.2d
12 527[; 535 [(1995)].

13 2. Use only applicable alternative or alternatives.
14 [As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008,
15 effective for all cases pending or filed on or after December 1, 2021.]

16 **Committee commentary.** — [~~Subsection G of Section 31-20A-5 NMSA 1978 has been broken~~
17 ~~into~~] NMSA 1978, § 31-20A-5 (G) (1981) provides three alternatives: murder of a witness to
18 prevent the report of a crime, murder of a witness to prevent testimony in a criminal proceeding
19 and murder of a witness in retaliation for the witness having testified in a criminal proceeding. For
20 a discussion of “a person likely to become a witness to a crime”, see *State v. Bell*, 1967-NMSC-
21 184, 78 N.M. 317, 431 P.2d 50 [(1967)].

22 In those cases where the defendant intended only to intimidate the witness and not to kill
23 him, it will be necessary to instruct on intimidation of a witness. See UJI 14-2403 NMRA. [As

1 ~~there is no essential elements instruction on intimidation of a witness, it will be necessary to draft~~
2 ~~an appropriate instruction. See 30-24-3 NMSA-1978 for the essential elements.]~~If the jury was
3 instructed on this subject previously, it is not necessary to give such an instruction during this
4 ~~[sentencing]~~ proceeding.

5 The touchstone of murder of a witness is evidence of the defendant’s specific intent to
6 prevent the witness from reporting another crime (or testifying or in retaliation). See *State v.*
7 *Martinez*, 2006-NMSC-007, ¶¶ 12-15, 139 N.M. 152, 130 P.3d 731; *State v. Allen*, 2000-NMSC-
8 002, 128 N.M. 482, 994 P.2d 728; *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851;
9 *State v. Clark*, 1989-NMSC-010, 108 N.M. 288, 772 P.2d 322 [(1989)] (Clark I); *Clark v. Tansy*,
10 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527 [(1994)] (Clark II); *Clark v. Tansy*, 13 F.3d 1407
11 (10th Cir., 1993); *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793 (Clark III); *State*
12 *v. Henderson*, 1990-NMSC-030, 109 N.M. 655, 789 P.2d 603 [(1990)], overruled in part by
13 *Martinez*, 2006-NMSC-007, ¶ 30 (holding that, to the extent that *Henderson* can be read as
14 upholding the murder-of-a-witness motive based on only the defendant’s lack of other plausible
15 motives and attempts to destroy evidence or conceal involvement in the crimes, *Henderson*
16 intolerably relaxes the constitutional and statutory standard).

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

18 For an analysis of multiple of cases concerning the evidence to support the murder-of-a-
19 witness aggravator across “a broad spectrum” see *Martinez*, 2006-NMSC-007, ¶¶ 17-31.

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