

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL  
PROPOSAL 2022-020**

**March 7, 2022**

The Uniform Jury Instructions - Criminal Committee has recommended new UJIs 14-2228A, 14-2228B, and 14-2228C, amendments to UJI 14-2221 NMRA, and the withdrawal of UJI 14-2228 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:

Sally A. Paez, Deputy Clerk of Court  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 6, 2022**, 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.

---

**14-2221. Escape from jail; essential elements.<sup>1</sup>**

For you to find the defendant guilty of escape from jail [as charged in Count \_\_\_\_\_]<sup>2</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed<sup>3</sup> to jail;
2. The defendant [escaped from]<sup>4</sup> [or] [attempted to escape from] jail;
3. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**USE NOTES**

1. See Section 30-22-8 NMSA 1978. If the escape is from a jail initiated prisoner-release program, established under Section 33-3-24 NMSA 1978, use UJI 14-2228A NMRA. If the escape is from a community custody release program, Section 30-22-8.1 NMSA 1978, use UJI 14-2228C NMRA.

2. Insert the count number if more than one count is charged.

3. ~~[The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge. (See "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest", following these instructions.)]~~ "Committed" means being physically placed in custody, with or without an order of confinement.

4. Use only the applicable bracketed element established by the evidence.  
[Adopted, effective October 1, 1976; UJI Criminal Rule 22.00 NMSA 1978; UJI 14-2221 SCRA; as amended, effective January 1, 1999; as amended by Supreme Court Order No. \_\_\_\_\_; effective for all cases pending or filed on or after \_\_\_\_\_.]

~~Committee commentary. — [See Section 30-22-8 NMSA 1978. In *State v. Weaver*, 83 N.M. 362, 492 P.2d 144 (Ct. App. 1971), the Court held that an escape from the kitchen of the jail was the same as escape from the jail. Escape from jail includes escape from a jail release program. See *State v. Najar*, 118 N.M. 230, 232, 880 P.2d 327, 329 (Ct.App. 1994) (*cert. denied* 118 N.M. 90, 879 P.2d 91):~~

~~Escape from jail or a jail inmate release program is a fourth degree felony. NMSA 1978, § 30-22-8 (Repl. Pamp. 1994); *State v. Coleman*, 101 N.M. 252, 253, 680 P.2d 633, 634 (Ct. App. 1984).~~

~~Section 30-22-8 NMSA 1978 requires that the defendant must have been lawfully committed for the crime of escape from jail to be committed. The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge.]~~

~~See NMSA 1978, § 30-22-8 (1963).~~

~~Before a defendant can be charged with escape, the person must first have undergone some moment of actual custody. See *State v. Pearson*, 2000-NMCA-102, ¶ 13, 129 N.M. 762, 13 P.3d 980 (construing escape from prison under NMSA 1978, Section 30-22-9 (1963)). A defendant is “committed” when placed in custody with or without an order of confinement. See *State v. Garcia*, 1968-NMCA-007, ¶¶ 7-8, 78 N.M. 777, 438 P.2d 521. Physical confinement at the time of escape is not required; escape from constructive custody while assigned to a work detail or failure to return from furlough constitutes an escape. See *State v. Gilman*, 1981-NMCA-123, ¶ 7, 97 N.M. 67, 636 P.2d 886; *State v. Hill*, 1994-NMCA-069, ¶ 5, 117 N.M. 807, 877 P.2d 1110.~~

~~Although both offenses are fourth degree felony violations of Section 30-22-8, the elements of escape from jail are not the same as the elements of escape from a jail initiated prisoner-release program; the latter is a more specific -- and limited -- sub-set of the former. Compare NMSA 1978, § 33-3-24 (1981) (establishing jail release program requirements and limiting applicability to NMSA 1978, §§ 33-2-43 (1969) and 33-2-44 (1971)), with NMSA 1978, § 30-22-8 (1963) (escape from jail is a fourth degree felony and has different elements), and *State v. Najar*, 1994-NMCA-098, ¶¶ 3, 6, 118 N.M. 230, 880 P.2d 327 (escape from a jail initiated prisoner-release program is a fourth degree felony). The Court of Appeals has held that it was fundamental error to use UJI 14-2221 NMRA (escape from jail) and (former) UJI 14-2228 NMRA (escape from an inmate release program) interchangeably. See *State v. Grubb*, 2020-NMCA-003, ¶¶ 10-17, 455 P.3d 877.~~

~~[Amended November 12, 1998; as amended by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]~~

## [NEW MATERIAL]

### 14-2228A. Escape; jail release program; essential elements.<sup>1</sup>

For you to find the defendant guilty of escape from a jail release program [as charged in Count \_\_\_\_\_]<sup>2</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed to \_\_\_\_\_ (*identify institution*);

2. The [sheriff] [jail administrator]<sup>3</sup> of \_\_\_\_\_ (*identify institution*), with the approval of the [board of county commissioners of \_\_\_\_\_ (*name of county*)] [governing body of \_\_\_\_\_ (*name of municipality*)] had established a release program to allow prisoners to [attend school] [or] [be employed];
3. The defendant was released from \_\_\_\_\_ (*identify institution*) to \_\_\_\_\_ (*describe purpose for release*);
4. The defendant failed to return to confinement within the time fixed for the defendant's return;
5. The defendant's failure to return was willful, without sufficient justification or excuse<sup>4</sup>;
6. The defendant intended not to return within the time fixed<sup>4</sup>;
7. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

#### USE NOTES

1. This instruction is to be used when a prisoner escapes from a prisoner-release program established in a county or municipal jail or detention center under Section 33-3-24 NMSA 1978. For escape from a community custody release program, under Section 30-22-8.1 NMSA 1978, use UJI 14-2228C NMRA. For escape from a penitentiary inmate-release program, under Sections 33-2-43 through 33-2-47 NMSA, use UJI 14-2228B NMRA.

2. Insert the count number if more than one count is charged.

3. Use only the applicable alternatives.

4. This element is necessary to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]

**Committee commentary.** — See NMSA 1978, § 30-22-8 (1963); NMSA 1978, § 33-3-24 (1981); see also NMSA 1978, §§ 33-2-43 (1969) and 33-2-44 (1971) (penitentiary inmate-release program provisions incorporated into Section 33-3-24); NMSA 1978, § 30-22-8.1 (1999) (escape from a community custody release program); UJI 14-2228B NMRA (escape from a penitentiary release program); UJI 14-2228C NMRA (escape from a community custody release program).

This instruction is to be used when a defendant is charged with escape from a prisoner-release program initiated in a jail or detention center; it is not to be used when the defendant is charged with other types of escape from jail (NMSA 1978, § 30-22-8), or escape from a penitentiary inmate-release program (NMSA 1978, § 33-2-46 (1980)), or escape from a community custody release program (NMSA 1978, § 30-22-8.1 (1999)). See *State v. Grubb*, 2020-NMCA-003, ¶¶ 12-16, 455 P.3d 877 (stating UJIs 14-2221 NMRA (escape from jail) and UJI 14-2228 NMRA (escape from an inmate-release program) -- withdrawn and replaced with UJIs 14-2228A, 14-2228B, and 14-2228C NMRA in response to *Grubb* -- cannot be used interchangeably); see also *Grubb*, 2020-NMCA-003, ¶ 16 (concluding that [the 1999 version of] “UJI 14-2228 was intended to be used when a prisoner escapes from a release program initiated in a jail rather than a penitentiary”). But see *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (finding 1997 version of UJI 14-2228 NMRA (escape; inmate-release program) applicable to a defendant who was committed to a state penitentiary, erroneously failed to require that the defendant's failure to return in violation of Section 33-2-46 be willful).

Unlike escape from a community custody release program under Section 30-22.8.1, escape from a jail initiated prisoner-release program requires that the board of county commissioners or the governing body of a municipality approved the program established by the sheriff or jail administrator. *See* § 33-3-24; *State v. Duhon*, 2005-NMCA-120, ¶¶ 9-13, 138 N.M. 466, 122 P.3d 50. *Compare* § 33-3-24, with § 30-22-8.1. Section 33-3-24 explicitly incorporates the provisions of Section 33-2-44, which provides that the release program only applies to work at paid employment in a private business or in public employment or to attend school. *See Grubb*, 2020-NMCA-003, ¶ 17 (explaining that release for “furlough purposes” was not one of the specific purposes authorized by Section 33-2-44 and there was no evidence to support instructing the jury on escape from jail using UJI 14-2228 in lieu of UJI 14-2221).

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]

**[NEW MATERIAL]**

**14-2228B. Escape; penitentiary release program; essential elements.<sup>1</sup>**

For you to find the defendant guilty of escape from a penitentiary release program [as charged in Count \_\_\_\_\_]<sup>2</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed to \_\_\_\_\_ (*identify institution*);
2. The defendant was released from \_\_\_\_\_ (*identify institution*) to \_\_\_\_\_ (*describe purpose for release*);
3. The defendant failed to return to confinement within the time fixed for the defendant’s return;
4. The defendant’s failure to return was willful, without sufficient justification or excuse<sup>3</sup>;
5. The defendant intended not to return within the time fixed<sup>3</sup>;
6. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

USE NOTES

1. This instruction is to be used for escape from a penitentiary inmate-release program established under Sections 33-2-43 through 33-2-46 NMSA 1978. For escape from a county or municipal jail initiated prisoner-release program, established under Section 33-3-24 NMSA 1978, use UJI 14-2228A NMRA. For escape from a community custody release program, under Section 30-22-8.1 NMSA 1978, use UJI 14-2228C NMRA.

2. Insert the count number if more than one count is charged.

3. This element is necessary to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]

**Committee commentary.** — *See* NMSA 1978, § 33-2-46 (1980). The penitentiary inmate-release program is described in NMSA 1978, Sections 33-2-43 (1969) through 33-2-47 (1969).

Escape from a penitentiary is a second degree felony. NMSA 1978, § 30-22-9 (1963). Escape from a penitentiary inmate-release program is a third degree felony. NMSA 1978, § 33-2-46 (1980). Their essential elements are different; unless the prisoner was released for one of the

specific limited purposes set out in Section 33-2-44 (1971) (paid work or attending school) or Section 33-2-45 (1971) (up to 30-day release to contact prospective employers or job or school interviews), UJI 14-2222 NMRA must be used instead of this instruction. *See State v. Grubb*, 2020-NMCA-003, ¶ 17, 455 P.3d 877 (stating only the statutory specific purposes for release reduce the more serious offense of escape from a penitentiary to escape from an inmate-release program).

The penitentiary inmate-release enabling statute states that the program applies to prisoners “under sentence of confinement” in the penitentiary. NMSA 1978, § 33-2-43. Since its inception, Element 1 of the instruction has used the term “committed.” The Committee believes that decades-used term adequately informs the jury, without the possibility of distracting the jury to consider or speculate about the defendant’s prior sentence and without injecting sympathy or prejudice into the current case. *See, e.g., State v. Brown*, 1997-NMSC-029, ¶¶ 12-13, 123 N.M. 413, 941 P.2d 494 (information about the consequences of a current verdict invites the jury to “ponder matters that are not within their province” and may improperly inject sympathy and prejudice into the jury’s decision making).

In 1999, the Committee added Element 4 to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (holding instruction at trial of penitentiary work release inmate convicted under Section 33-2-46 was defective by not requiring a finding that the defendant’s failure to return on time was willful as well as intentional). Element 5 is also required by *State v. Rosaire*, 1997-NMSC-034, ¶¶ 11-12 (holding that Section 33-2-46 requires both a willful failure to return and an intent not to return within the time prescribed).

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]

**[NEW MATERIAL]**

**14-2228C. Escape; community custody release program; essential elements.<sup>1</sup>**

For you to find the defendant guilty of escape from a community custody release program [as charged in Count \_\_\_\_\_]<sup>2</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was charged with a [misdemeanor] [felony]<sup>3</sup> offense<sup>4</sup>;
2. The defendant was not on probation or parole;<sup>4</sup>
3. The defendant was committed to a judicially approved community custody release program;
4. Under the procedures and conditions of the program, the defendant was required to \_\_\_\_\_ (*describe the program requirement(s) allegedly violated*);
5. The defendant [failed to comply] [attempted to avoid complying]<sup>3</sup> with the requirement to \_\_\_\_\_ (*describe the program requirement*) [by \_\_\_\_\_ (*describe the substantial step toward attempting to escape*)]<sup>5</sup>;
6. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**USE NOTES**

1. This instruction is to be used for escape from a community custody release program under Section 30-22-8.1 NMSA 1978. For escape from a county or municipal jail-initiated

prisoner-release program, established under Section 33-3-24 NMSA 1978, use UJI 14-2228A NMRA. For escape from a penitentiary inmate-release program established under Sections 33-2-43 through 33-2-47 NMSA 1978, use UJI 14-2228B NMRA.

2. Insert the count number if more than one count is charged.
3. Use the applicable alternative.
4. Essential element, but rarely at issue; *see* Committee commentary.
5. For attempts to escape, specify the act(s) allegedly constituting a substantial step toward escape and give UJI 14-2801 NMRA following this instruction. For completed offenses, UJI 14-141 NMRA must be given following this instruction.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — *See* NMSA 1978, § 30-22-8.1 (1999); *see also* NMSA 1978, § 30-22-8 (1963) (escape from jail); NMSA 1978, § 33-2-46 (1980) (escape from a penitentiary inmate release program); NMSA 1978, § 33-3-24 (1981) (jail operated prisoner release program).

The charge pending against the defendant placed in the community custody release program controls the statutory punishment for escape from the program. *See* NMSA 1978, §§ 30-22-8.1B (misdemeanor) and 30-22-8.1C (felony). Because Section 30-22-8.1 does not specify the degree or punishment for misdemeanor or felony escape, misdemeanor violations are punished as petty misdemeanors and felony violations are punished as fourth degree felonies. *See* NMSA 1978, § 31-18-13 (1993). The fact the defendant faced a felony charge is an essential element of the offense. *State v. Sanchez*, 2019-NMCA-006, ¶ 10, 458 P.3d 428 (“For a defendant to be found guilty of felony escape from CCP the state must show that a felony charge led to the defendant’s commitment to the program.”). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *see also State v. Radosevich*, 2018-NMSC-028, ¶¶ 15-27, 419 P.3d 176 (applying *Apprendi* and holding that New Mexico’s tampering with evidence statute cannot be constitutionally applied to impose greater punishment for committing tampering where the underlying crime is indeterminate than where the underlying crime is a misdemeanor).

The jury should not be told the nature of the predicate charge leading to the defendant’s placement in the program. *See State v. Tave*, 1996-NMCA-056, ¶¶ 8-18, 122 N.M. 29, 919 P.2d 1094 (finding error in admission as proof of felon in possession charge of the name and details of the prior felony), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *see also State v. Rackley*, 2000-NMCA-027, ¶ 19, 128 N.M. 761, 998 P.2d 1212 (“In an apparent effort to reduce the potential impact . . . of his prior felonies [in a felon in possession trial], Defendant stipulated to the fact of a prior, unidentified felony conviction.”).

The Committee believes the requirement that the defendant not be on probation or parole when placed in a community correction release program is jurisdictional; the enabling statute specifically “exclud[es] a person on probation or parole.” Section 30-22-8.1A.

Section 30-22-8.1’s requirement that the defendant was “lawfully committed” appears in other escape statutes: NMSA 1978, § 30-22-8 (1963) (escape from jail); NMSA 1978, § 30-22-9 (1963) (escape from penitentiary). Since adoption of corresponding UJI 14-2221 NMRA (escape from jail) and UJI 14-2222 NMRA (escape from the penitentiary) in 1976, UJI 14-2228 NMRA (Escape; inmate-release program – withdrawn and reconfigured in response to *State v. Grubb*, 2020-NMCA-003, 455 P.3d 877 -- has used “committed.” The Committee believes that challenges

to prima facie proof of lawful commitment are likely to be rare and that continued use of “committed” is the appropriate term. *See State v. Grubb*, 2020-NMCA-003, ¶ 19 (finding sufficient evidence for retrial where the state had presented a certified copy of an order revoking probation committing the defendant to the penitentiary and granting the defendant furlough – from which the jury “could reasonably conclude that he was ‘committed to the [detention center] for transport to the Department of Corrections”); *see also State v. Starr*, 1917-NMSC-092, ¶¶ 15-16, 24 N.M. 180, 173 P. 674 (finding no error in admitting jail records and commitments showing the prisoners charged with escape had been lawfully committed to the county jail).

Unlike a jail prisoner release program under Section 33-3-24, a community custody release program under Section 30-22-8.1 does not require formal adoption by the board of county commissioners; it may simply be a set of defined procedures and conditions, “judicially approved” on a case-by-case basis by the judge setting terms of release. *See State v. Duhon*, 2005-NMCA-120, ¶ 11, 138 N.M. 466, 122 P.3d 50.

Escape from a community custody release program includes but is not limited to a day detention or reporting program, an electronic monitoring program, or a community tracking program. *See* Section 30-22-8.1A. The particular release program requirements imposed on the defendant and the defendant’s alleged acts or omissions should be described in ordinary terms, with sufficient specificity to preclude double jeopardy.

Section 30-22-8.1A does not contain an intent requirement: “Escape from a community custody release program consists of a person . . . escaping or attempting to escape from the community custody release program.” Absent explicit language negating a mental state, the legislature is presumed not to have intended strict liability; criminal intent is presumed an essential element, especially where the punishment is a third or fourth degree felony. *See State v. Nozie*, 2009-NMSC-018, ¶¶ 25-26, 30 (holding third degree aggravated assault upon a peace officer and fourth degree battery upon a peace officer requires knowledge that the victim was a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15-16, 287 P.3d 372 (applying the *Nozie* requirement to battery upon a health care worker where a misdemeanor battery charge is elevated to a fourth degree felony). The Committee believes that *Nozie*’s presumption against strict liability requires the jury to be instructed on general criminal intent using UJI 14-141 NMRA for completed escapes and attempt to commit a felony using UJI 14-2801 NMRA for attempts to escape.

Escape from a penitentiary inmate-release program requires that the prisoner “willfully” failed to return to confinement and also had “the intent not to return.” Section 33-2-46 (1980). Neither of these requirements appear in escape from the community custody release program. Section 30-22-8.1A (1999). Unlike escape from a penitentiary release program, the courts have not addressed whether the community custody release statute requires proving the defendant’s actions were without excuse or justification. *Cf. State v. Rosaire*, 1997-NMSC-034, ¶ 7, 123 N.M. 701, 945 P.2d 66 (finding that Section 33-2-46’s explicit requirement of willfully “denotes the doing of an act without just cause or lawful excuse”).

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[WITHDRAWN]**

**[14-2228. Escape; inmate release program; essential elements.**

~~For you to find the defendant guilty of escape from an inmate release program [as charged in Count \_\_\_\_\_]<sup>2</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:~~

1. The defendant was committed<sup>3</sup> to \_\_\_\_\_ (*identify institution*);
2. The defendant was released from \_\_\_\_\_ (*identify institution*) to \_\_\_\_\_ (*describe purpose for release*);
3. The defendant failed to return to confinement within the time fixed for the defendant's return;
4. The defendant's failure to return was willful, without sufficient justification or excuse<sup>4</sup>;
5. The defendant intended not to return within the time fixed;
6. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

#### USE NOTES

1. This instruction is also to be used for escape from jail.
2. Insert the count number if more than one count is charged.
3. The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge. (*See* "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest", following these instructions.)
4. This element is necessary to comply with *State v. Rosaire*, 1997 NMSC-034, 123 N.M. 701, 945 P.2d 66.  
[Adopted, effective October 1, 1976; UJI Criminal Rule 22.28 NMSA 1978; UJI 14-2228 SCRA; as amended, effective January 1, 1999.]

**Committee commentary.**— *See* Section 33-2-46 NMSA 1978. The inmate release program was established by Chapter 166, Laws 1969. In 1975, Section 33-2-46 NMSA 1978 was amended to make escape from the inmate release program the equivalent of a third degree felony.

The inmate release program is described in Sections 33-2-43 to 33-2-47 NMSA 1978. Since this is a specific offense carrying a lesser penalty than escape from the penitentiary, the essential elements include the specific reasons for the prisoner's release. Unless the prisoner is released for one of the specific purposes set forth in Section 33-2-44 [or] 33-2-45 NMSA 1978, an escape from custody by the prisoner is governed by Section 30-22-9 NMSA 1978, escape from the penitentiary.