

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

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

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

6 2. The defendant was released from \_\_\_\_\_ (*identify institution*) to  
7 \_\_\_\_\_ (*describe purpose for release*);

8 3. The defendant failed to return to confinement within the time fixed for the  
9 defendant's return;

10 4. The defendant's failure to return was willful, without sufficient justification or  
11 excuse<sup>3</sup>;

12 5. The defendant intended not to return within the time fixed<sup>3</sup>;

13 6. This happened in New Mexico on or about the \_\_\_\_\_ day of  
14 \_\_\_\_\_, \_\_\_\_\_.

15 **USE NOTES**

16 1. This instruction is to be used for escape from a penitentiary inmate-release program  
17 established under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980). For  
18 escape from a county or municipal jail initiated prisoner-release program established under NMSA  
19 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. For escape from a community custody  
20 release program under NMSA 1978, Section 30-22-8.1 (1999), use UJI 14-2228C NMRA.

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

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

[Adopted by Supreme Court Order No. 22-8300-033, effective for all cases pending or filed on or after December 31, 2022.]

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

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. Section 33-2-46. The essential elements of these statutes are different. Unless the prisoner was released for one of the specific limited purposes set out in Section 33-2-44, such as paid work or attending school, or Section 33-2-45, such as time to contact prospective employers or attend 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 that only the specific statutory 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.” Section 33-2-43. Since its inception, Element 1 of UJI 14-2228 NMRA (now withdrawn) 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 (reiterating that information about the consequences of a current verdict invites jurors to “ponder matters that are not within their province” and may improperly inject sympathy and prejudice into the jurors’ decision making (internal quotation marks and citation omitted)).

1           In 1999, the Committee added Element 4 of UJI 14-2228 (now withdrawn) to comply with  
2   *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (holding instruction at trial of  
3   penitentiary work release inmate convicted under NMSA 1978, Section 33-2-46 was defective by  
4   not requiring a finding that the defendant's failure to return on time was willful as well as  
5   intentional). That element is retained in this instruction. Element 5 is also required by the  
6   conclusion in *Rosaire*, 1997-NMSC-034, ¶¶ 11-12, that Section 33-2-46 requires both a willful  
7   failure to return and an intent not to return within the time prescribed.

8   [Adopted by Supreme Court Order No. 22-8300-033, effective for all cases pending or filed on or  
9   after December 31, 2022.]