

1 5. If the consensual possession defense defined in NMSA 1978, Section
2 30-6A-3(B) is in issue, UJI 14-634 NMRA must be given.

3 6. To invoke the sentencing enhancement defined in Section 30-6A-3(A),
4 special interrogatory UJI 14-635 NMRA must be given.

5 [Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed
6 on or after December 31, 2019.]

7 **Committee Commentary.** — *See* NMSA 1978, § 30-6A-3(A) (2016).

8 “The [First Amendment] test for child pornography is separate from the obscenity
9 standard enunciated in *Miller [v. California]*, 413 U.S. 15 (1973).” *State v. Myers*,
10 2009-NMSC-016, ¶ 26, 146 N.M. 128, 207 P.3d 1105 (quoting *New York v. Ferber*, 458
11 U.S. 747, 764 (1982)). Nevertheless, where New Mexico provides a statutory definition of
12 the term obscene, that definition governs the State’s burden of proof for conviction in New
13 Mexico. *Id.* ¶¶ 34-40 (“[A]lthough we agree with the Court of Appeals that the challenged
14 material must do more than “‘merely depict a naked child’” to run afoul of the contemporary
15 community standard, we disagree that it ‘must be identifiable as hard-core child
16 pornography.’” (quoting *State v. Myers*, 2008-NMCA-047, ¶ 12, 143 N.M. 710, 181 P.3d
17 702 (quoting *State v. Rendleman*, 2003-NMCA-150, ¶ 44, 134 N.M. 744, 82 P.3d 554))).

18 Section 30-6A-3(A) defines the crime of child pornography possession. To commit
19 the crime intentionally, the possession concepts applicable to any contraband material are
20 applicable, and thus UJI 14-130 NMRA should be instructed when intentional possession

1 is in issue. UJIs were not created for statutory definitions that are contained in NMSA 1978,
2 Section 30-6A-2 (2001), including “visual or print medium,” “prohibited sex act,” and
3 “obscene.”

4 While the act of possession itself must be done “intentionally,” the Court of Appeals
5 held that “the scienter requirement in Section 30-6A-3(A) that a person ‘knows or has reason
6 to know’ that one or more of the participants depicted in the child pornography is under
7 eighteen, is constitutionally sufficient.” *State v. Adamo*, 2018-NMCA-013, ¶ 34, 409 P.3d
8 1002. The Court found sufficient evidence of intentional possession when images were
9 downloaded but later deleted. *Id.* ¶¶ 14-18.

10 In 2014, the New Mexico Supreme Court held the unit of prosecution for possession
11 offenses under Section 30-6A-3(A) was ambiguous and thus, under the rule of lenity, further
12 held that only one count may be punished for multiple images possessed unitarily. *State v.*
13 *Olsson*, 2014-NMSC-012, ¶¶ 23, 31, 43-47, 324 P.3d 1230. However, the Court of Appeals
14 held that convictions for possession and manufacture-by-recording do not violate double
15 jeopardy if distinct evidence can support a continuing knowing possession after the
16 manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, 41 P.3d 1157.

17 The Legislature amended Section 30-6A-3(A) in 2016, adding the one-year sentence
18 enhancement for depictions of children under the age of 13, and adding Subsection B, an
19 affirmative defense for consensual possession among teenagers. The unit of prosecution was
20 not altered. 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016).

1 In 2016, the Legislature also amended the basic sentence from a “fourth-degree
2 felony” to a “fourth-degree felony for sexual exploitation of children” and added new
3 subsections for felonies “for sexual exploitation of children” to NMSA 1978, Section
4 31-18-15 (2016) (defining basic sentences). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.
5 [Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed
6 on or after December 31, 2019.]