

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS  
FOR CRIMINAL CASES**

The Uniform Jury Instructions for Criminal Cases Committee has recommended proposed amendments to UJI 14-2810 NMRA and proposed new jury instructions regarding multiple conspiracy convictions for the Supreme Court's consideration.

If you would like to comment on the proposed amendments or new material 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://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

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Your comments must be received by the Clerk on or before April 6, 2016, 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.

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**14-2810. Conspiracy; single/multiple objectives; essential elements.**

For you to find the defendant guilty of conspiracy to commit \_\_\_\_\_<sup>1</sup> [[or \_\_\_\_\_], or [ \_\_\_\_\_ ]]<sup>2</sup> [as charged in Count \_\_\_\_\_]<sup>3</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant and another person by words or acts agreed together to commit \_\_\_\_\_<sup>1</sup>; [[or \_\_\_\_\_], or [ \_\_\_\_\_ ]]<sup>2</sup>;

[2. That other person was not a state or federal agent acting in the agent's official capacity at the time;]<sup>4</sup>

[2]3. The defendant and the other person intended to commit \_\_\_\_\_<sup>1</sup> [[or \_\_\_\_\_], or [ \_\_\_\_\_ ]]<sup>2</sup>;

[3]4. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

USE NOTE

1. ~~[Insert] For a conspiracy with a single objective, insert the name of the felony. [or felonies in the alternative and give the essential elements other than venue immediately after this instruction unless] Unless they are covered by essential element instructions relating to the substantive offenses, give the essential elements, other than venue, immediately after this instruction. Give a separate instruction for each count where the defendant is charged with not just a single conspiracy with multiple objectives, but more than one conspiracy.~~

2. For a conspiracy to commit multiple felonies, insert the names of the felonies in the alternative and give the essential elements other than venue immediately after this instruction unless they are covered by essential element instructions relating to the substantive offense. Where the state

charges multiple objectives, the unanimity and special verdict instructions, UJI 14-2810A and UJI 14-6019B NMRA, must be given.

[2]3. Insert the count number if more than one count is charged.

4. Insert bracketed language if the co-conspirator's status as a governmental agent is an issue.

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

**Committee commentary.** — See Section 30-28-2 NMSA 1978.

This instruction sets forth the essential elements of the crime of conspiracy. The offense is complete when the defendant combines with another for felonious purpose. ~~[No]~~ In New Mexico, as at common law, no overt act in furtherance of the conspiracy need be proved. 4 Wharton's Criminal Law § 681 (15th ed. 2014); Perkins, Criminal Law 616 (2d ed. 1969). See State v. Gallegos, 2011-NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655 (citing State v. Lopez, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 (no overt act required) and State v. Villalobos, 1995-NMCA-105, ¶ 11, 120 N.M. 694, 905 P.2d 732 (conspiracy is complete when the agreement is reached)).

Because Section 30-28-2 NMSA 1978 links the penalty for conspiracy to the penalty for the felony object(s) of the conspiracy, where the State charges multiple objectives which would result in differing penalties, the general verdict form (UJI 14-6014) is not sufficient. UJI 14-2810A and a special verdict, UJI 14-6019B, should be used to ensure jury unanimity beyond a reasonable doubt regarding which felonies, if any, the defendant agreed to commit. See Apprendi v. New Jersey, 530 U.S. 466, 496 (2000) (facts—other than prior convictions—which increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt); Gallegos, 2011-NMSC-027, ¶ 53 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed.)

New Mexico law appears to accept that a defendant cannot be found guilty of conspiracy where the agreement is solely with an agent of the State, such as an undercover officer, an informant, or a person who is a de facto agent, despite ostensible private status (e.g. parcel service deliverer who routinely is rewarded for opening suspicious packages for law enforcement purposes). See Villalobos, 1995-NMCA-105, ¶¶ 20-27 (assuming without deciding that New Mexico law follows United States v. Barboa, 777 F.2d 1420, 1422 (10th Cir. 1985) that a defendant cannot be convicted of conspiring with only government agents or informers and supported defendant's tendered instruction that he could not be convicted of conspiracy with government agents); see also State v. Dressel, 1973-NMCA-113, ¶ 3, 85 N.M. 450, 513 P.2d 187 (“It takes at least two persons to effect a conspiracy. The essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means.” (internal citations omitted)) quoted by Villalobos, 1995-NMCA-105, ¶ 26. Where there is some evidence to support a defendant's theory that the only other alleged co-conspirator was a de jure or de facto state agent, the additional phrase in Use Note 4 should be included. See Villalobos, 1995-NMCA-105, ¶¶ 20-27; see also State v. Privett, 1986-NMSC-025, ¶ 20, 104 N.M. 79, 717 P.2d 55 (defendant's requested instruction on intoxication requires some evidence; the court does not weigh that evidence but merely determines whether it exists).

The agreement need not be verbal but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme. The agreement may be established by circumstantial evidence. *State v. Deaton*, 1964-NMSC-062, ¶ 5, 74 N.M. 87, 390 P.2d 966 [(1964)]; *State v. Sellers*, 1994-NMCA-053, ¶ 17, 117 N.M. 644, 875 P.2d 400; [*State v. Dressel*, 1973-NMCA-113, ¶ 4 [85 N.M. 450, 513 P.2d 187 (Ct. App. 1973)].

A defendant may be charged with conspiracy to commit a single felony or multiple felonies. However, a [~~conspiracy~~] single agreement to commit two felonies has been held to constitute only a single conspiracy. *State v. Ross*, 1974-NMCA-028, ¶ 17, 86 N.M. 212, 521 P.2d 1161 [~~Ct. App. 1974~~] (quoting *Braverman v. United States*, 317 U.S. 49, 54 (1942) that “whether the object of a single agreement is to commit one or many crimes, it is in either case the agreement which constitutes the conspiracy which the statute punishes” (emphasis added)); *see also Gallegos*, 2011-NMSC-027, ¶ 38 (accepting *Braverman* that the number of prosecutable conspiracies is based on the number of agreements), ¶ 45 (cautioning against conflating the existence of multiple objectives in a single conspiracy with multiple conspiracies). If the single conspiracy is alleged to be for the purpose of committing more than one felony, the essential elements of each felony must be given.

Distinct from a single conspiracy count alleging multiple objectives, a defendant may be charged with more than one count of conspiracy, with each count alleging a separate agreement to commit one or more felonies. Where the defendant is charged with more than one conspiracy, UJI 14-2810B must be given.

In a multi-defendant trial, evidence may be admitted regarding only one or fewer than all of the defendants. Where certain evidence—such as co-conspirators’ statements—is admitted as to only a particular defendant, an appropriate limiting instruction should be given. See UJIs 14-5007 and 14-5008.

The statute includes a conspiracy to commit a felony outside of New Mexico. In such cases, the foreign law is controlling as to the essential elements of the felony. *See State v. Henneman*, 1936-NMSC-021, ¶¶ 18, 26, 40 N.M. 166, 56 P.2d 1130 [~~1936~~] (“The better rule” is that facts for the proof of foreign laws and their impact on the case at hand are to be decided by the court and not the jury).

Although the gist of the offense is the combination between two or more persons, conviction of all the conspirators is not required. *State v. Verdugo*, 1969-NMSC-008, ¶ 9, 79 N.M. 765, 449 P.2d 781 [~~1969~~].

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

**[NEW MATERIAL]**

**14-2810A. Conspiracy; multiple objectives; unanimity.<sup>1</sup>**

For you to find [the] [a] defendant guilty of conspiracy to commit more than one crime [as charged in Count \_\_\_\_\_]<sup>2</sup>, it is not necessary for the State to prove a conspiracy to commit [both] [all] of those crimes. It would be sufficient if the State proves beyond a reasonable doubt a conspiracy to commit any one of those crimes.

But if you do not agree that the State has proven conspiracy to commit [both] [all] of those crimes, in order to return a verdict of guilty, you must unanimously agree upon which of the [two][three, etc.] crimes, if any, was the subject of the conspiracy. If you are unable to unanimously identify at least one of the specified crimes as the subject of a conspiracy, you must find the defendant not guilty of conspiracy.

In this case, you must record your unanimous verdict[s] on the form[s]<sup>4</sup> provided.

**USE NOTE**

1. For use where the defendant is charged with a single conspiracy with multiple objectives.

2. Where the defendant is charged with more than one conspiracy and at least one conspiracy alleges multiple objectives, this instruction should be given for each conspiracy count alleging multiple objectives.

3. Set out the separate felony crimes alleged to be the object of the single conspiracy, *e.g.* robbery or kidnapping; trafficking marijuana or manufacturing methamphetamine.

4. Use the special verdict form, UJI 14-6019B, to determine whether there is unanimity on each criminal objective.

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

**Committee commentary.** — *See* Eighth Circuit Manual of Model Criminal Jury Instructions 5.06F (rev. ed. 2013) (general requirement for jury unanimity regarding the criminal object of the conspiracy). *See Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) (facts - other than prior convictions - which increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt).

The instruction serves two distinct purposes: (1) ensuring unanimity that there was an agreement to commit at least one of the specific objects of the conspiracy charged, regardless of the penalties for committing the offenses; and (2) fulfilling the *Apprendi* mandate where there are different penalties for different offenses which were alleged to be the objects of the conspiracy.

UJI 14-2810A and the special verdict form (UJI 14-6019B) should be used to ensure jury unanimity regarding defendant's agreement to commit which felonies, if any, have been proven beyond a reasonable doubt. *See also State v. Gallegos*, 2011-NMSC-027, ¶ 53, 149 N.M. 704, 254 P.3d 655 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed).

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

## [NEW MATERIAL]

### 14-2810B. Multiple conspiracies; distinct agreements.<sup>1</sup>

The Defendant[s] [\_\_\_\_\_, and \_\_\_\_\_] [is] [are] charged in Counts \_\_\_\_\_ and \_\_\_\_\_ with \_\_\_\_\_ separate conspiracies. Each of these Counts requires a separate verdict and must be considered separately.

For you to find [the] [a] Defendant[s] guilty of one or more conspiracies, as charged in Counts \_\_\_\_\_ and \_\_\_\_\_, the State must prove to your satisfaction beyond a reasonable doubt that the defendant entered into an agreement to commit [one or more of] the crime[s] alleged in that specific count.

It is not enough to return a verdict of guilty on a particular count for you to find [the] [a] Defendant is guilty of some other conspiracy count or entered into some other agreement to commit a crime not charged in that specific count of the indictment. Each conspiracy count must be considered separately and each verdict of guilty must be supported by evidence - beyond a reasonable doubt - of a distinct agreement to commit the crime[s] alleged in that specific count: Otherwise you must find the defendant not guilty of that count, regardless of your verdict on other counts of the indictment.

If you conclude that [the] [a] Defendant conspired and agreed to commit more than one crime, to assist you in determining whether the defendant entered into two or more separate agreements with different criminal objects - or whether [the] [a] Defendant entered into only a single conspiracy agreement to commit multiple crimes, you may consider all the evidence [which I have admitted with regard to Count \_\_\_ and Defendant[s][\_\_\_\_\_, and \_\_\_\_\_]<sup>2</sup> and the totality of the circumstances [- including, but not limited to, the following:

1. The location or locations where events of the alleged conspiracy agreements took place;
2. Whether there was an overlap of the time between the alleged conspiracy agreements;
3. The degree to which the people - both charged and not charged - in the alleged conspiracies were the same;
4. Whether acts alleged in one conspiracy were similar to acts alleged in another conspiracy; and
5. Whether the role of the defendant in one alleged conspiracy was similar to the role alleged in another conspiracy.]<sup>3</sup>

#### USE NOTE

1. Use when the evidence indicates the defendant participated in more than one conspiracy agreement. The factors provided should be employed by the court to determine whether there is sufficient evidence of separate agreements to support the giving of this instruction. If not supported, UJI 14-2810 NMRA should be given instead.

2. Use when the Court has limited evidence regarding a particular count and/or defendant. *See* UJI 14-5007 and 14-5008.

3. The bracketed factors may be relevant to determining the existence of two or more agreements, but have not been formally adopted as a five-factor test. If the court determines that they would aid the jury and if applicable to the evidence in a particular case, the court shall instruct the jury on one or more factors. *See* committee commentary.

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

**Committee commentary.** — *See State v. Gallegos*, 2011-NMSC-027, ¶¶ 48-49, 149 N.M. 704, 254 P. 3d 655 (jury must be instructed that separate/multiple conspiracy convictions must be supported by evidence beyond a reasonable doubt of separate/multiple agreements); *see also* Tenth Circuit Criminal Pattern Jury Instruction 2.20 (2011) (proof of separate conspiracies is not proof of a single, overall, conspiracy; proof of involvement in some other conspiracy not enough to convict on the charged conspiracy); Eighth Circuit Manual of Modern Criminal Jury Instructions, 5.06D (rev. ed. 2013) (same).

A defendant may be charged with more than one count of conspiracy, with each count alleging agreement to commit one or more felonies. Conviction of multiple conspiracies – as opposed to a single conspiracy with multiple objectives – requires the Court to conduct a double jeopardy analysis, *de novo*, as a matter of law. *Gallegos*, 2011-NMSC-027, ¶¶ 50-51.

To avoid the risk of conflating the existence of multiple conspiracies with the existence of multiple objects in a single conspiracy, the jury must be instructed that conviction for multiple conspiracies requires finding beyond a reasonable doubt that the defendant distinctly agreed to (one or more of) the objective(s) of each separate conspiracy charged. *See id.*, ¶¶ 48-49, 149 N.M. 704, 254 P.3d 655; *see also State v. Sanders*, 1994-NMCA-043, ¶ 16, 117 N.M. 452, 872 P.2d 870 (cited in *Gallegos*, 2011-NMSC-027, ¶ 34, and in turn citing *State v. Hernandez*, 1986-NMCA-040, ¶ 40, 104 N.M. 268, 720 P.2d 303 that “determination of number of conspiracies is a fact question for the jury”). Where the indictment charges more than one conspiracy, regardless of the number of objectives, use this instruction.

In *Gallegos*, the New Mexico Supreme Court communicated the need for explicitly instructing the jury that “multiple conspiracy convictions require multiple agreements.” 2011-NMSC-027, ¶ 49. In determining whether there are two (or more) agreements or only one, the Court spoke approvingly of the majority of the federal circuits’ practice of using a five-factor totality of the circumstances test that considers (1) location; (2) temporal overlap; (3) overlap of participants;

(4) similarity of overt acts charged; and (5) similarity of roles played by the defendant. *See Gallegos*, 2011-NMSC-027, ¶ 42; *see also, e.g.*, Eighth Circuit Manual of Model Criminal Jury Instructions, 5.06B, p. 158 (2014).

However, the Court stopped short of adopting particular factors for the jury’s consideration and noted that the Tenth Circuit does not use such a test. *Gallegos*, 2011-NMSC-027, ¶ 42 (citing *United States v. Sasser*, 974 F.2d 1544, 1549 n.4 & 1550 (10th Cir. 1992)). Nor does the Ninth Circuit. *See Ninth Circuit Manual of Model Criminal Jury Instructions*, 8.22, p. 158 (2010; updated electronically through June 2015) available at [http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal Jury Instructions 2015 06.pdf](http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal%20Jury%20Instructions%202015%2006.pdf).

For these reasons, the Committee recommends that trial courts conduct a preliminary double jeopardy analysis consistent with *Gallegos* and only permit the jury to consider multiple conspiracies upon finding sufficient evidence thereof. *See Gallegos*, 2011-NMSC-027, ¶ 50. If the trial court submits the case to the jury, it should tailor its instruction to the facts of the case by giving the general “totality of the circumstances” instruction contained in UJI 14-2810B, and, if applicable to the evidence presented at trial, by adding specific bracketed factors for the jury’s consideration, or additional factors as required by the facts of the case. *See* UJI-Criminal General Use Note. [Adopted by Supreme Court Order No. \_\_\_\_\_, effective\_\_\_\_\_.]

**[NEW MATERIAL]**

**UJI 14-6019B. Conspiracy; multiple objectives; special verdict.<sup>1</sup>**

(style of case)

**QUESTION 1**

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of \_\_\_\_\_?<sup>2</sup>

\_\_\_\_\_ (Yes or No)

**QUESTION [\_\_\_\_\_ (insert question number)]<sup>3</sup>**

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of \_\_\_\_\_?<sup>2</sup>

\_\_\_\_\_ (Yes or No)

\_\_\_\_\_  
FOREPERSON

**USE NOTE**

1. This verdict form is to be used in conjunction with UJI 14-2810B when the defendant is charged with a single conspiracy to commit multiple crimes.

2. Insert the name of each crime.

3. For each crime the commission of which is alleged to be part of the conspiracy, provide a separate question.

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

**Committee commentary.** — *See* committee commentary to UJI 14-2810A, the unanimity instruction.

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

Proposed Rule Changes Comment Form.

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SUPREME COURT OF NEW MEXICO  
FILED

MAR 31 2016

Rule No: Proposal 59



Comments:

Greetings,

I am writing concerning Proposal 69, dealing with Conspiracy instructions.

The first question I have is whether the government actor issue is sufficiently large to put it in the instruction. I have never seen conspiracy charged in such a case in all the time I have practiced, but perhaps it is a bigger issue outside of the 2nd. Certainly it appears that the instruction is correct, and the wording is fine, but I hate to clutter up the instruction unnecessarily, especially when it could likely be just mentioned in the commentary. But if it really is a big deal elsewhere, then I guess the instruction makes sense.

A smaller thing - in 2810A (and B), brackets are used without the appropriate use note of "Use applicable alternative." It is probably obvious, so I don't know if it is a big deal, but to be consistent with other instructions, it should probably be there.

Also in A, Use Note 3 doesn't have a note to attach to, nor does it seem like it has a place where it would apply. Am I missing something?

Thanks for your consideration,

JLI

TO: Mr. Joey Moya, Clerk of the New Mexico Supreme Court  
FROM: Marjorie C. Jones  
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Rule Number 14-2810 (proposal 2016-59)  
DATE: April 6, 2016

SUPREME COURT OF NEW MEXICO  
FILED

APR 06 2016



Please accept for consideration the following comments.

The conspiracy jury instruction has been problematic and I appreciate the rules committee tackling the amendment of this instruction with apparent great thought. For the committee's consideration, I suggest that a use note be attached to the title of UJI 14-2810. I offer some comments to clarify the use notes to 14-2810. Because I also suggest that UJI 14-2810B not be adopted, I propose an additional bracketed element to 14-2810, with use note, and suggest a change to the committee commentary. These and other suggestions follow.

**RE: 14-2810**

14-2810. Conspiracy; single/multiple objectives; essential elements. USE NOTE 1

1 ...

2 ...

3 ...

[4. The words or acts of agreement for this conspiracy are different from the words or acts of agreement for conspiracy as charged in Count(s) \_\_\_\_\_.] USE NOTE 6

5 ...

USE NOTES (to 14-2810)

1. The law presumes a single count of conspiracy, whether that conspiracy has one or more felonious objectives. Additional counts of conspiracy are based on separate conspiratorial agreements, not because there may be multiple felonious objectives. See committee commentary. If separate conspiratorial agreements constituting additional counts of conspiracy are alleged, give a separate UJI 14-2810 conspiracy instruction for each count of conspiracy.

~~1.2.~~ For a conspiracy with a single felonious objective, insert the name of the felony. ~~Unless they~~ the jury is otherwise being instructed on the elements of the named felony are covered by essential element instructions relating to the substantive offenses, give the essential elements of the named felony, other than venue, immediately after this conspiracy instruction. ~~Give a separate instruction for each count where the defendant is charged with not just a single conspiracy with multiple objectives, but more than one conspiracy.~~

2. ~~3.~~ For a conspiracy ~~to commit~~ with multiple felonies felonious objectives, insert the names of the felonies in the alternative. Unless the jury is otherwise being instructed on the elements of the named felonies, ~~and~~ give the essential elements of the named felonies, other than venue, immediately after this conspiracy instruction. ~~unless they are covered by essential element instructions relating to the substantive offense.~~ Where the state charges multiple objectives, The jury must unanimously agree about which of the named felonies, if any, was the object of the conspiratorial agreement and the unanimity and special verdict instructions, UJI 14-2810A and UJI 14-6019B NMRA must be given.

~~3.~~ 4. ...

~~4.~~ 5. ...

6. Insert bracketed element if the jury is being instructed on more than one count of conspiracy. Fill in the blank with the other count number(s) of conspiracy. The felonious objective(s) in each count of conspiracy will typically be different from those named in any other count of conspiracy. If the felonious objectives from one count to another count are the same because it is alleged that a separate agreement was reached with respect to a different victim, include the names of the different alleged victims in each of the conspiracy counts when naming the felony(ies).

Committee commentary (to 14-2810)

I suggest revising paragraph 6, which begins: “Distinct from a single conspiracy . . . .”

There is a “rebuttable presumption” that despite the commission of multiple crimes, there is only one, overarching, conspiratorial agreement and thus only one count of conspiracy. *State v. Gallegos*, 2011-NMSC-027, ¶ 55, 149 N.M. 704, 254 P.3d 655. Nevertheless, Distinct from a single conspiracy count alleging multiple objectives, a defendant may be charged with more than one count of conspiracy, with each count alleging a *separate agreement* to commit one or more felonies. The addition of bracketed element #4 ensures that for each count of conspiracy, the jury has found

beyond a reasonable doubt evidence of an agreement for that count of conspiracy which is distinct and separate from evidence that would support any other conspiratorial agreement. Where the evidence of an agreement is distinct and separate, the jury may conclude that the conspiratorial agreement itself is a distinct and separate agreement and may on that basis convict on more than one count of conspiracy. The district court may, on the defendant's motion or the court's own motion, review the jury's verdicts for violation of the double jeopardy clause and vacate one or more convictions accordingly. Where the defendant is charged with more than one conspiracy, UJI 14-2810B must be given.

**RE: 14-2810B.** Multiple conspiracies; distinct agreements.

I suggest this instruction should not be adopted. I understand that the committee here attempts to rectify the instructional inadequacies identified in *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, and that the *Gallegos* case actually refers to a possible "multiple conspiracy instruction." However, I think adding element #4 to the elements instruction (UJI 14-2810) accomplishes what *Gallegos* requires *the jury* to do: determine whether each conspiracy is supported by evidence of a distinct agreement. And it does so in a way that is less confusing to the jury than by way of proposed new UJI 14-2810B.

By adding an element to 14-2810, the district court will have the directed-verdict opportunity to evaluate whether the State has met its burden to present some evidence that the words or acts of agreement for each conspiracy are different as between all counts of conspiracy. The district court will not have that opportunity if all counts of conspiracy go to the jury with just the proposed 14-2810B to sort it out. I believe adding an element to the elements instruction more appropriately accomplishes the direction in *Gallegos* that "our courts . . . take greater precautions and exercise more judicial oversight when presiding over multiple conspiracy prosecutions." *Gallegos* at ¶44.

I also think UJI 14-2810B should not be adopted because the factors mentioned in *Gallegos* at ¶42, which new UJI 14-2810B could send to the jury, are meant for the court only, and not the jury. Paragraphs 41 and 42 are clear that this multi-factor test is "for the court" to resolve the constitutional matter of double jeopardy. Although the jury is tasked with deciding whether factually there are distinct agreements supporting each conspiracy count, I do not think *Gallegos* can be read to mean that the jury needs to consider this multi-factor test in order to do so. Additionally, whether double jeopardy has been violated is determined after the jury

reaches its verdicts.<sup>1</sup> Not only could UJI 14-2810B improperly task the jury with deciding the constitutional matter of double jeopardy, it would do so prematurely.

**RE: 14-6019B.** Conspiracy; multiple objectives; special verdict. (use note 1)

I would suggest that an additional bracketed choice be included with each numbered question thus:

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of \_\_\_\_\_ (use note 2) [as charged in count \_\_\_\_\_]?(USE NOTE 3)

#### USE NOTE

1. This verdict form is to be used in conjunction with UJI 14-2810B when the defendant is charged with ~~a single~~ conspiracy to commit multiple crimes. If the jury has been instructed on more than one count of conspiracy in which multiple crimes are alleged, use a separate special verdict form 14-6019B for each count of conspiracy
  2. Insert the name of each crime which should be exactly as it appears in the elements instruction UJI 14-2810.
  3. Insert bracketed language if the jury has been instructed on more than one count of conspiracy. Fill in the blank with the number of the conspiracy count to which the special verdict form applies.
- 3- 4 . . .

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<sup>1</sup> “Double jeopardy is applied at the conclusion of a case to prevent multiple punishments.” *St. v. Swick*, 2012-NMSC-018 ¶18. “In the event the jury finds a defendant guilty of two crimes” that violate double jeopardy, “the trial judge must explicitly vacate one of the convictions.” *St. v. Garcia*, 2011-NMSC-003 ¶39.