PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2019-017

March 4, 2019

The UJI-Criminal Committee has recommended amendments to UJI 14-5040 NMRA 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:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 3, 2019, 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.

14-5040. Use of voluntary confession or admission.

[~~Evidence has been admitted concerning a statement allegedly made by the defendant.~~] Before you consider [~~such~~] a statement made by the defendant for any purpose, you must determine that the statement was given voluntarily. In determining whether a statement was voluntarily given, you should consider if it was freely made and not induced by promise or threat. [In determining whether the statement was induced by a promise or threat, you may consider the defendant's diminished mental capacity.][2]

USE NOTES

1. This instruction must be used when the court has made a determination that a statement by the defendant is voluntary and then submits it to the jury for consideration.

2. Instruct with bracketed language only if at issue.

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

Committee commentary. — Under the federal constitution and New Mexico law, the court must determine the voluntariness of a confession or inculpatory admission out of the hearing of the jury. *Jackson v. Denno*, 378 U.S. 368[~~, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205~~] (1964); *State v. Martinez*, 1924-NMSC-075, ¶¶ 18-21, 30 N.M. 178, [~~192,~~] 230 P. 379[~~ (1924)~~][~~. See~~]; *see also* Rule 11-104(C) NMRA (requiring, as a "preliminary question," a hearing outside presence of jury to determine admissibility of a confession). If the court finds that the statement is voluntary (and

also was given after compliance with *Miranda v. Arizona*, 384 U.S. 436[~~, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974~~] (1966)), the statement is admitted and the jury is instructed to determine that the statement is voluntary before considering it as substantive evidence. *See, e.g.*, *State v. Burk*, 1971-NMCA-018, ¶¶ 16-21, 82 N.M. 466, [~~469-70,~~] 483 P.2d 940[~~, 943-44, (Ct. App.)~~], *cert. denied*, 404 U.S. 955[~~, 92 S. Ct. 309, 30 L. Ed. 2d 271~~] (1971).

Although required under New Mexico precedents, submission of the question of voluntariness to the jury is not required under federal constitutional law. *Lego v. Twomey*, 404 U.S. 477[~~, 92 S. Ct. 619, 30 L. Ed. 2d 618~~] (1972). Under New Mexico law, failure to submit the voluntariness question is harmless error if the defendant substantially admits the facts which are contained in the confession. *State v. Barnett*, 1973-NMSC-056, ¶¶ 16-17, 85 N.M. 301, 512 P.2d 61 [~~(1973)~~], *rev'g* 1972-NMCA-159, 84 N.M. 455, 504 P.2d 1088[~~(Ct. App. 1972)~~].

[~~Under Rule 11-801 NMRA, a nonverbal "assertion" may be admissible. The federal committee drafting the Rules of Evidence did not include any special provisions for an "admission by silence" made during custodial interrogation. The federal committee appears to doubt that the admission would be admissible under federal constitutional law. *See* 56 F.R.D. 183, 298 (1973). *Cf. United States v. Hale*, 442 U.S. 171[, 95 S. Ct. 2133, 45 L. Ed. 2d 99] (1975). Consequently, the language of this instruction is based on the assumption that the statement is an oral or written assertion and not an admission by silence.~~]

The ultimate question is whether the defendant's "will has been overborne" and the defendant's "capacity for self-determination critically impaired." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). While voluntariness is largely concerned with police coercion, this instruction was updated to include the jury's consideration of the defendant's mental capacity in its assessment of voluntariness. The bracketed language is applicable in cases in which otherwise common and non-coercive police interrogation tactics may have unduly coercive effects due to a particular defendant's vulnerabilities. *See State v. LaCouture*, 2009-NMCA-071, ¶ 11, 146 N.M. 649, 213 P.3d 799 (the totality of the circumstances for voluntariness includes "the physical and mental state of the Defendant as a context affecting what might be coercive and overreaching"); *State v. Martinez*, 1999-NMSC-018, ¶ 18, 127 N.M. 207, 979 P.2d 718 (adopting totality of circumstances factors from NMSA 1978, Section 32A-2-14(E) (2009), for analyzing adult confessions, which includes the mental and physical condition of the defendant). *Accord State v. Aguilar*, 1988-NMSC-004, ¶¶ 10-13, 106 N.M. 798, 751 P.2d 178 (finding a confession involuntary due to evidence of subnormal intelligence and mental illness, causing defendant's inability to understand the implications of interrogation techniques).

[Commentary amended by Supreme Court Order No. _____, effective _____.]

April 3, 2019

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Submitted as an attachment via email to nmsupremecourtclerk@nmcourts.gov

RE: Proposal 2019-017; UJI 14-5040 NMRA

Please accept for consideration the following comments which are strictly my own and do not represent any views of the district court for which I work.

I write to recommend that the proposed amendments to the text and commentary in UJI 14-5040 NOT be adopted.

There is a tremendous body of case law in New Mexico concerning the voluntariness of a confession in a criminal case -- case law that cannot be reduced to the single, bracketed add-on being proposed. The proposed add-on stems from the misstatement of the law in the proposed commentary that states that voluntariness of a confession is "largely concerned with police coercion." Actually, coercive police conduct is in fact "a necessary predicate" to the finding that a confession is not voluntary. *State v. Galindo*, 2018-NMSC-021, ¶31. Where there is no coercive police conduct that caused the defendant's will to be overborne and the defendant's capacity for self-determination to be critically impaired, the confession is voluntary UNLESS the defendant is injured or medicated or impaired to such a degree that it "transforms" non-coercive police activity into coercive police activity. (*State v. LaCouture*, 2009-NMCA-071, ¶¶ 11, 14.) I do not think that the proposed incomplete, cryptic, bracketed, add-on to UJI 14-5040 sufficiently instructs the jury as to this exception to the bedrock law that if there is no official overreaching, the confession is voluntary.

The proposed changes to the text and commentary will result in mini-trials demanding evidence concerning a defendant's medications, mental faculties, and possible impairment due to any number of causes including the use of illegal drugs – all of which is usually inadmissible at trial. I suggest that the changes proposed by the UJI-Criminal Committee are not only unnecessary, but contrary to current law. I think that the law about the voluntariness of a confession has developed since the Court of Appeals' opinion in *State v. Burk* in 1971 to the point that the Supreme Court should withdraw UJI 14-5040 in its entirety and leave the decision about the voluntariness of a confession in the hands of the trial judge as a matter of law prior to trial.

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