

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL  
PROPOSAL 2019-016**

**March 4, 2019**

The UJI-Criminal Committee has recommended amendments to UJI 14-2241 and 14-6019 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](mailto: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.

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**14-2241. Tampering with evidence; essential elements.**

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

1. The defendant [destroyed]<sup>2</sup> [changed] [hid] [fabricated] [placed]<sup>2</sup> \_\_\_\_\_ (*identify physical evidence*);
2. By doing so, the defendant intended to [prevent the apprehension, prosecution, or conviction of \_\_\_\_\_ (*name*) for the crime of \_\_\_\_\_ (*identify crime*)<sup>3,4</sup>]<sup>2</sup> [create the false impression that \_\_\_\_\_ (*name*) had committed the crime of \_\_\_\_\_ (*identify crime*)<sup>4</sup>]<sup>2</sup>;
3. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

You must complete the special verdict [form]<sup>2</sup> [forms]<sup>2</sup> to indicate your findings and report your determination.<sup>3</sup>

**USE [NOTE] NOTES**

1. If the defendant is charged with more than one count of tampering with evidence, this instruction must be repeated for each count. Likewise, if the defendant is charged with one count of tampering with evidence but the tampering with evidence is alleged to involve more than one crime,

this instruction must be repeated for each category of crime for which tampering with evidence is alleged to have been committed. *See* Use Note 3.

2. Use only the applicable bracketed elements established by the evidence.

3. If the defendant is charged with tampering with evidence involving multiple crimes, list all crimes. If the defendant is charged with tampering with evidence of crimes that fit into more than one category as defined in NMSA 1978, Section 30-22-5(B), the special verdict in UJI 14-6019 NMRA must be repeated for each category of offense~~[-as defined in Section 30-22-5(B) NMSA 1978].~~ For example, if the defendant is charged with tampering with evidence involving three crimes, two of which fit in category one and the third that fits in category two, the jury should receive a special verdict instruction for the category one crimes and a separate instruction for the category two crime.

4. If a violation for probation or parole is at issue, the instruction must identify the underlying offense for which the defendant was serving probation or parole. [*See State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754 (upholding tampering with evidence conviction for tampering with urine specimen required under terms of defendant's probation).]

[As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — *See* NMSA 1978, § Section 30-22-5~~[NMSA 1978]~~. A verdict in a criminal case must be unanimous. N.M. Const.~~[-Art.]~~ art. II, § 12. Because the permissible punishment range under Section 30-22-5 ~~[NMSA 1978]~~ depends on the highest crime for which tampering with evidence is committed, the jury must be given the special verdict in UJI 14-6019 NMRA for each crime for which tampering with evidence is alleged to have been committed. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond reasonable doubt).

To comport with *Apprendi*, New Mexico cases previously provided that, where no special verdict clarified the associated crime, the “indeterminate crime” provision from Section 30-22-5(B)(4) applied, rendering the tampering penalty a fourth-degree felony. *See State v. Alvarado*, 2012-NMCA-089, \_\_\_\_\_ P.3d \_\_\_\_\_, *overruled by State v. Radosevich*, 2018-NMSC-028, ¶ 34, 419 P.3d 176. However, in *Radosevich*, this approach was repudiated because the associated crime in that case could well have been a misdemeanor offense and no special verdict form was submitted to the jury. *See* 2018-NMSC-028, ¶¶ 2-6, 20 (discussing the tension between constitutional principles and prior precedent).

Under Section 30-22-5(B)(3), tampering with evidence of a misdemeanor is punishable only as a petty misdemeanor. As a result, the Supreme Court found that application of the “indeterminate crime” provision to impose felony liability would violate *Apprendi* and due process. *Radosevich*, 2018-NMSC-028, ¶ 24. Thus, in cases where the associated crime is indeed “indeterminate,” *Radosevich* limited tampering punishment to a petty misdemeanor. *Id.* ¶ 30 (overruling *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754).

Thus, under *Radosevich*, felony liability for tampering may only be accomplished through proper use of UJI 14-6019 to ensure express jury findings supporting the felony tampering provisions. *See* UJI 14-2241, Use Note 3. For tampering with evidence of a probation violation,

Radosevich held that the penalty tracks the highest “offense of conviction for which the defendant is on probation.” Id. ¶ 31. Accord UJI 14-2241, Use Note 4.

[As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**14-6019. Special verdict; tampering with evidence.<sup>1</sup>**

Do you unanimously find beyond a reasonable doubt that \_\_\_\_\_ (name of defendant) committed tampering with evidence related to [\_\_\_\_\_ (identify [crime] underlying crime(s))] [or] [\_\_\_\_\_ (identify underlying crime(s) for which defendant was on probation or parole)]<sup>2</sup>?

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

\_\_\_\_\_  
FOREPERSON

USE [NOTE] NOTES

1. ~~[Insert the name of the offense or offenses that fit within one category of crimes as defined in Section 30-22-5(B) NMSA 1978. A form]~~ Give these instructions after UJI 14-2241 NMRA. Forms of verdict must be separately submitted to the jury for each category (penalty level) of crime for which tampering with evidence is alleged to have been committed [~~in order~~] for the sentencing court to determine the permissible range of punishment under NMSA 1978, Section 30-22-5(B)[~~NMSA 1978~~].

2. Do not leave blank for the jury to complete. Insert the name of the offense (or multiple offenses within a penalty category under Section 30-22-5(B)). [~~Do not leave blank for the jury to complete.~~] If a violation for probation or parole is at issue, the instruction must identify the underlying offense(s) for which the defendant was serving probation or parole. See State v. Radosevich, 2018-NMSC-028, ¶ 31, 419 P. 3d 176. Accord UJI 14-2241 NMRA, Use Note 4. This may include submitting a form of verdict to the jury that states “a crime or violation which cannot be determined.” See Radosevich, 2018-NMSC-028, ¶ 29 (“[I]ndeterminate tampering” must be limited to the penalties “prescribed in the statute for the lowest level of tampering, which are currently the petty misdemeanor penalties of Section 30-22-5(B)(3).”). [~~If a violation for probation or parole is at issue, the instruction must identify the underlying offense for which the defendant was serving probation or parole. See State v. Jackson, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754 (upholding tampering with evidence conviction for tampering with urine specimen required under terms of defendant’s probation):]~~

[Adopted by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee Commentary.** — See NMSA 1978, § 30-22-5(B). Because the permissible punishment range under Section 30-22-5 depends on the highest crime for which tampering with evidence is committed, the jury must clearly identify the crime for which tampering with evidence is alleged to have been committed. See Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that

any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond reasonable doubt). In *State v. Radosevich*, 2018-NMSC-028, ¶ 29, 419 P.3d 176, the Court limited the provisions of Section 30-22-5(B)(4), which permit a defendant to be convicted of a crime where the underlying crime is indeterminate, and held that the only constitutionally permissible punishment where the jury does not find the level of the underlying offense is limited to the petty misdemeanor penalties of Section 30-22-5(B)(3).  
[Commentary adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]