

1 **14-5062. Lost, destroyed, or uncollected evidence; adverse inference permitted.<sup>1</sup>**

2 If the State fails to produce evidence [under its control]<sup>2</sup> because the State [lost]<sup>3</sup>  
3 [or] [destroyed] [or] [inadequately preserved] [or] [failed to gather or collect] that evidence,  
4 then you may, but are not required to, infer that the evidence would be unfavorable to the  
5 State.

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USE NOTE

8 1. For use upon a court’s finding that the State breached a duty to preserve  
9 material evidence and the deprivation of evidence was prejudicial to the defendant, or upon  
10 a court’s finding that the State acted with gross negligence in failing to collect material  
11 evidence.

12 2. Use when the State failed to preserve evidence.

13 3. Use applicable alternative or alternatives.

14 [Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or  
15 filed on or after December 31, 2020.]

16 **Committee Commentary.** – This instruction may be given as a sanction against  
17 the State in two types of cases: first, when the trial court determines that the State collected  
18 but improperly failed to preserve evidence under *State v. Chouinard*, 1981-NMSC-096, ¶  
19 16, 96 N.M. 658, 634 P.2d 680; or second, when the trial court determines that the State  
20 improperly failed to collect evidence under *State v. Ware*, 1994-NMSC-091, ¶¶ 25-26, 118  
21 N.M. 319, 881 P.2d 679.

1           In the first category of cases, involving failure to preserve evidence, the three-part  
2 test in *Chouinard*, 1981-NMSC-096, ¶ 16, applies. In such cases, deprivation of evidence  
3 is reversible error when: “1) The State either breached some duty or intentionally deprived  
4 the defendant of evidence; 2) The improperly ‘suppressed’ evidence [was] . . . material;  
5 and 3) The suppression of this evidence prejudiced the defendant.” *Id.* (quoting *State v.*  
6 *Lovato*, 1980-NMCA-126, ¶ 6, 94 N.M. 780, 617 P.2d 169). If the trial court finds that  
7 those three factors are satisfied and the loss of evidence is known prior to trial, then “there  
8 are two alternatives: Exclusion of all evidence which the lost evidence might have  
9 impeached, or admission with full disclosure of the loss and its relevance and import.”  
10 *Chouinard*, 1981-NMSC-096, ¶ 23. If the trial court chooses the latter alternative, then this  
11 instruction may be given.

12           If the trial court chooses an adverse inference instruction, this instruction may be  
13 given—alone, modified to ensure “full disclosure of the loss and its relevance and import,”  
14 or as a non-exclusive portion of a broader remedy to assure “justice is done, both to the  
15 defendant and to the public.” *Id.* ¶ 23; *see Scoggins v. State*, 1990-NMSC-103, ¶ 9, 111  
16 N.M. 122, 802 P.2d 631 (emphasizing that *Chouinard* grants the trial court broad discretion  
17 to choose remedy on a case-by-case basis); *State v. Hill*, 2008-NMCA-117, ¶ 15, 192 P.3d  
18 770 (noting that *Chouinard* may be applied “in a flexible manner”); *State v. Sanchez*, 1999-  
19 NMCA-004, ¶ 14, 126 N.M. 559, 972 P.2d 1150 (concluding that the trial court “always  
20 has the discretion to limit the ability of the state to take unfair advantage of evidence  
21 destroyed”); *cf. Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶¶ 53-54, 127 N.M. 729,

1 987 P.2d 386 (holding that an adverse inference instruction is an appropriate lesser remedy  
2 for evidence spoliation in civil cases), *overruled in part on other grounds by Herrera v.*  
3 *Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *Restaurant Management*  
4 *Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 11, 18, 127 N.M. 708, 986 P.2d 504  
5 (recognizing that the court has inherent power to give an adverse inference instruction as  
6 one possible sanction for evidence spoliation).

7 In the second category of cases, involving failure to collect evidence, the two-part  
8 test in *Ware*, 1994-NMSC-091, ¶¶ 25-26, applies. In such cases, the first question is  
9 whether the evidence is material to the defense. “Evidence is material only if there is a  
10 reasonable probability that, had the evidence been available to the defense, the result of the  
11 proceeding would have been different.” *Id.* ¶ 25 (internal quotation marks, citation, and  
12 alteration omitted). If the trial court finds that the evidence is material, then it considers the  
13 conduct of the investigating officers. *Id.* ¶ 26. If the investigating officers acted in bad faith,  
14 then the trial court may order the evidence suppressed. *Id.* However, absent a finding of  
15 bad faith, suppression of the evidence is not appropriate. *Id.* Instead, if the investigating  
16 officers “were grossly negligent in failing to gather the evidence—for example, by acting  
17 directly contrary to standard police investigatory procedure—then the trial court may  
18 instruct the jury that it can infer that the material evidence not gathered from the crime  
19 scene would be unfavorable to the State.” *Id.* Mere negligence may be addressed through  
20 cross-examination and argument, but does not warrant an adverse inference instruction. *Id.*  
21 Thus, in the context of failure to collect evidence, this instruction may only be given when

- 1 the trial court determines that investigating officers acted with gross negligence.
- 2 [Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or
- 3 filed on or after December 31, 2020.]