

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2020-021**

March 3, 2020

The Uniform Jury Instructions – Criminal Committee has recommended the adoption of new UJI 14-5062 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 2, 2020, 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.

[NEW MATERIAL]

14-5062. Lost, destroyed, or uncollected evidence; adverse inference permitted.¹

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

USE NOTE

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

2. Use applicable alternative or alternatives.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee Commentary. – This instruction may be given as a sanction against the State in two types of cases: first, when the trial court determines that the State collected but improperly

failed to preserve evidence under *State v. Chouinard*, 1981-NMSC-096, ¶ 16, 96 N.M. 658, 634 P.2d 680; or second, when the trial court determines that the State improperly failed to collect evidence under *State v. Ware*, 1994-NMSC-091, ¶¶ 25-26, 118 N.M. 319, 881 P.2d 679.

In the first category of cases, involving failure to preserve evidence, the three-part test in *Chouinard*, 1981-NMSC-096, ¶ 16, applies. In such cases, deprivation of evidence is reversible error when: “1) The State either breached some duty or intentionally deprived the defendant of evidence; 2) The improperly ‘suppressed’ evidence [was] . . . material; and 3) The suppression of this evidence prejudiced the defendant.” *Id.* (quoting *State v. Lovato*, 1980-NMCA-126, ¶ 6, 94 N.M. 780, 617 P.2d 169). If the trial court finds that those three factors are satisfied and the loss of evidence is known prior to trial, then “there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import.” *Chouinard*, 1981-NMSC-096, ¶ 23. If the trial court chooses the latter alternative, then this instruction may be given. *See, e.g., Scoggins v. State*, 1990-NMSC-103, ¶ 9, 111 N.M. 122, 802 P.2d 631 (emphasizing that *Chouinard* grants trial courts broad discretion to choose between suppression and full disclosure on a case-by-case basis); *cf. Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶¶ 53-54, 127 N.M. 729, 987 P.2d 386 (holding that an adverse inference instruction is an appropriate lesser remedy for evidence spoliation in civil cases), *overruled in part on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181.

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

[Adopted by Supreme Court Order No. _____, effective _____.]

March 23, 2020

MAR 23 2020

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848



RE: Proposal 2020-021, UJI 14-5062 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 suggest that the proposed new UJI is appropriate only for when the state has failed to gather or collect evidence. I do not think that case law supports its use in a case where the state has lost, destroyed, or inadequately preserved evidence.

Proposed UJI 14-5062 seems appropriate for when the state has failed to gather or collect evidence because it tracks language from *State v. Ware*, 1994-NMSC-091, that once the trial court has made the legal determinations required under *Ware*, “the court may instruct the jury that it can infer that the material evidence not gathered from the crime scene would be unfavorable to the State.” ¶26. However, I would like to suggest that the phrase “under its control” be deleted. If the state failed to gather the evidence, then the state does not have that evidence at all. Nonexistent evidence cannot logically be “under [the state’s] control.”

Proposed UJI 14-5062 is not appropriate for when the state has lost, destroyed or inadequately preserved evidence. Although *State v. Chouinard*, 1981-NMSC-096, relied upon in the commentary, provides the decisional law, it does not direct that the jury be given the negative-inference instruction proposed in 14-5062. Neither does *Scoggins v. State*, 1990-NMSC-103. The commentary’s description of *Scoggins*, ¶9, is not accurate and does not support instructing a jury under proposed 14-5062 in the case of lost or destroyed evidence. Rather, *Chouinard* directs that “full disclosure of the loss and its relevance and import” be “fully presented to the jury for their consideration.” Id. ¶¶ 17, 20, 23. That is all. *Chouinard* does not direct the jury to make the negative inference, but only to consider the loss. It may be that other criminal case law directs the giving of the negative-inference instruction proposed in 14-5062, but *Chouinard* and *Scoggins* are not those cases.

Thank you for your consideration of these comments.

Submitted by:

Marjorie Christensen, Esq.; 505-334-6151
aztdmcj@nmcourts.gov

April 17, 2020

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

RE: Proposal 2020-021, UJI 14-5062 NMRA

Dear Mr. Moya:

First and foremost, I want to thank the “Uniform Jury Instructions – Criminal Committee” for the time they have generously volunteered toward improving our criminal justice system.

In my capacity as the elected District Attorney of the Twelfth Judicial District, I would like to submit my comment regarding the proposed UJI 14-5062 for the Supreme Court’s consideration.

I believe the proposed instruction should not be adopted because as a practical matter it is wholly unnecessary. Current case law already provides a proper remedy for “lost, destroyed, or uncollected evidence.”

Moreover, the instruction inappropriately inserts the District Court into the role of advocacy on behalf of one of the parties and the instruction would constitute an improper comment by the Court on the evidence. I.e., the whole thrust of non-binding language about allowing (but not requiring) the jury to “infer that the evidence would be unfavorable to the State” is a proposition that would most appropriately be articulated not by the Court, but by defense counsel during closing argument.¹

As indicated in the Committee Commentary to 14-5062, there are two distinct categories within the single jury instruction. I view each category as uniquely problematic. Accordingly, I bifurcate the remainder of my comment to address each category independent of the other.

¹ In the event the Supreme Court does see fit to approve UJI 14-5062, I respectfully suggest that the following limiting language be added to its Use Notes: “No instruction on this subject shall be given.” This use note is identical to what is found in many of the UJIs located in Chapter 50: Evidence and Guides for its Consideration. This includes the Use Notes for existing UJI 14-5011 (Production of all witnesses or all available evidence not required) and UJI 14-5014 (Failure of the State to call a witness). As the Committee Commentary for UJI 14-5014 recognizes, instructions like the proposed UJI 14-5062 “may constitute a comment on the evidence” contrary to Rule 11-107, NMRA.

Chouinard Category

The first part of the instruction includes the three potential prongs of lost, destroyed, or inadequately preserved evidence. These arise from *State v. Chouinard*, 1981-NMSC-096, which under certain circumstances permits a defendant to seek two forms of relief in the event of lost or destroyed evidence: “Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import.” *Id.* at ¶ 23.

The *Chouinard* portion of proposed UJI 14-5062 should not be adopted for these reasons:

- It gives the defense a *third* bite at the proverbial apple, in effect allowing defense counsel to wring additional benefit out of *Chouinard* after already asking first for exclusion of all relevant evidence and (if exclusion is denied) full disclosure to the jury of the loss.
- The prong of “inadequate preservation” is always either going to be duplicative or unnecessary. To wit: if “inadequate preservation” results in the destruction of the evidence, then the “destroyed” prong would apply; and if “inadequate preservation” damages but doesn’t destroy the evidence, then *Chouinard* isn’t invoked because there would still be something to present for the jury to consider in its capacity as the trier of fact.

Ware Category

The second part of the instruction addresses the failure to gather or collect evidence; it is based on *State v. Ware*, 1994-NMSC-091, which has as its prerequisites that uncollected evidence be material to the case at hand and that law enforcement acts with gross negligence.

The *Ware* component of proposed UJI 14-5062 should not be adopted for these reasons:

- By trying to combine *Chouinard* and *Ware* into a single instruction, an obvious contradiction has arisen due to the conflict between the phrase “under its control” and the inherent nature of uncollected evidence which law enforcement never actually possessed. E.g., if a judge decides to give the instruction on *Ware* grounds, this is how it will confusingly read: “If the State fails to produce evidence *under its control* because the State *failed to gather or collect that evidence*, then you may, but are not required to, infer that the evidence would be unfavorable to the State.” (Emphasis added.)
- The specific requirements for invoking *Ware* (materiality of the evidence, gross negligence of law enforcement) are not reflected in the actual jury instruction. Resultantly, it is not hard to imagine a scenario in which a jury – not knowing the instruction is intended to only apply to *material evidence* that was not collected due to *gross negligence* – receives a 14-5062 instruction about evidence “the State failed to gather or collect” and unintentionally overextends the application of that instruction to evidence which was reasonably not collected (e.g., a 14-5062 instruction could catalyze a jury to unnecessarily scrutinize the

absence of crime-scene fingerprints in a case where the entire incident is captured on video showing the defendant's presence at the crime making the collection of fingerprint impressions unnecessary).

- If adopted, the *Ware* component of 14-5062 would likely spawn negative collateral consequences regarding how law enforcement approaches criminal investigations. In order to avoid invoking the evidentiary presumption of 14-5062 which weighs heavily against the State, police will have to divert valuable time and resources into collecting nearly everything from the scene even if the item appears to be immaterial to the investigation. This lost time will take away from other critical parts of the investigation (collecting witness statements, interrogation of suspects, etc.). Moreover, the increased volume of collected evidence will certainly strain existing infrastructures for storing and scientifically testing evidence.

Conclusion

Approving UJI 14-5062 would be ill-advised because its unwieldy wording creates confusion in a misguided attempt to cure perceived problems that don't exist. Accordingly, I am respectfully requesting this Court not adopt proposed UJI 14-5062.

Respectfully submitted,



John P. Sugg
District Attorney
Twelfth Judicial District
1000 New York Ave
Alamogordo, NM 88310
jsugg@da.state.nm.us
(575) 437-3640

comments on proposed rule changes

Charles Knoblauch <quidproquo@zianet.com>

Apr 17, 2020 2:31 PM

Posted in group: **nmsupremecourtclerk**

Proposal 2020-014

This amendment appears to be a good in granting a remedy for the non-feasance of the district attorney on abiding by the rules. There have been too many instances of prosecutors acting as though they are above the rules.

Proposal 2020-015

This amendment rectifies a long standing problem wherein an accused is arrested and jailed without knowing his charges. It is a not uncommon scenario for a defendant to contact a lawyer from jail and ask for advice. Without the defendant having the charging document in hand, counsel is left with merely guessing as to what the charges might be and their severity when attempting to advise the defendant. Further, paragraph E is greatly needed to ensure the arresting officer actually removes an arrest warrant from the system—too often someone is released from custody only to find that his warrant is still active and then suffers another arrest.

Proposal 2020-019

You need to go back to the drawing board on this UJI. The addition of “intent” to the knowingly might work.

Please review the statute.

Proposal 2020-021

I like this new UJI. It may put a bit of pressure on prosecuting authorities to be a bit more careful in handling evidence.

Charles E. Knoblauch

Attorney at Law

1412 Lomas Blvd. NW

Albuquerque, NM 87104

(505) 842-0392

Proposal 2020-021

Please accept this as my comment regarding Proposal 2020-021. Comments are my own, and do not reflect those of my employer.

I respectfully disagree to one part of the comment by Ms. Christenson. This instruction is not required to be given under any circumstance, including a finding of a violation of *Ware* or *Chouinard*. The commentary says “may be given.” In circumstances where the district court feels that the failure raises to the level of this instruction needing to be given, this is a good instruction to use. While I think that is more likely in a *Ware* case than a *Chouinard* case, that doesn’t mean it won’t ever be necessary in the latter. And, of course, the committee includes the cite to *Torres*, which specifically allows for an adverse instruction in civil cases, and there is no reason why that wouldn’t make sense in criminal cases.

In short, I think that the instruction is a useful tool for the courts to use in the appropriate circumstances.

Jonathan L. Ibarra
Assistant Public Defender

SUPREME COURT OF NEW MEXICO
FILED

APR 17 2020

