

3.19 Lost or Destroyed Evidence

If you find that the government intentionally [destroyed] [failed to preserve] [*insert description of evidence*] that the government knew or should have known would be evidence in this case, you may infer, but are not required to infer, that this evidence was unfavorable to the government.

Comment

An instruction concerning evidence lost or destroyed by the government is appropriate when the balance “between the quality of the Government’s conduct and the degree of prejudice to the accused” weighs in favor of the defendant. *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), overruled on other grounds by *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008); see *United States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir. 2013). The government bears the burden of justifying its conduct, and the defendant bears the burden of demonstrating prejudice. *Id.* In evaluating the government’s conduct, a court should consider whether the evidence was lost or destroyed while in the government’s custody, whether it acted in disregard of the defendant’s interests, whether it was negligent, whether the prosecuting attorneys were involved, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. *Id.* (citing *Loud Hawk*, 628 F.2d at 1152). Factors relevant to prejudice to the defendant include the centrality and importance of the evidence to the case, the probative value and reliability of secondary or substitute evidence, the nature and probable weight of the factual inferences and kinds of proof lost to the accused, and the probable effect on the jury from the absence of the evidence. *Id.* While a showing of bad faith on the part of the government is required to warrant the dismissal of a case based on lost or destroyed evidence, it is not required for a remedial jury instruction. *Id.* at 1170.

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