

## DESTROYED OR LOST EVIDENCE <sup>1</sup>

Under our law, when the government is in possession of evidence which is reasonably likely to be of material importance, and the defense, using reasonable diligence, requests that evidence, the government is required to preserve that evidence.

In this case, on or about (*date*) [*specify government agent or agency*] was in possession of (*specify*), which constituted evidence reasonably likely to be of material importance.

On or about (*date*), the defense requested that evidence. Thereafter, the agents of the government [destroyed / lost] it. As a result, you may, but are not required to, infer that the destroyed evidence would have been favorable to the defense.

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<sup>1</sup> In *People v Handy*, 20 NY3d 663, 669 (2013), the Court of Appeals held that, “a permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State. . . . We hold only that the jury should be told it *may* draw an inference in defendant’s favor” (emphasis in original).

In *People v. Viruet*, 29 N.Y.3d 527, 532–33 (2017), the Court applied *Handy* to lost or missing evidence:

Under these circumstances—where defendant acted with due diligence by requesting the evidence in discovery and the lost evidence was video footage of the murder defendant was charged with committing—it cannot be said that the evidence was not “reasonably likely to be of material importance” (*Handy*, 20 NY3d at 665). According to the trial testimony, the camera captured the moment when the victim was shot and the location of the two eyewitnesses at the time of the shooting. There was also testimony that the video contained footage of people going in and out of the club throughout the course of the night, making it at least possible that the video captured the earlier incident involving defendant and the bouncer—a key issue in the sequence of events. . . . Accordingly, the trial court erred in failing to give an adverse inference instruction.