

OMISSIONS IN POLICE INVESTIGATIONS

You have heard some evidence suggesting that the Commonwealth did not conduct certain scientific tests or otherwise follow standard procedure during the police investigation. This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

First: Whether the omitted tests or other actions were standard procedure or steps that would otherwise normally be taken under the circumstances;

Second: Whether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and

Third: Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions.

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the Commonwealth.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

NOTES:

1. **Instruction is optional but preferable.** This instruction is based on *Commonwealth v. Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482, 491 (1980), and the discussion of *Bowden* and related decisions set forth in *Commonwealth v. Flanagan*, 20 Mass. App. Ct. 472, 475-476, 481 N.E.2d 205, 207-208 (1985).

A jury instruction on this subject is not required but is permissible in the judge's discretion. *Commonwealth v. Williams*, 439 Mass. 678, 687, 790 N.E.2d 662, 670 (2003); *Commonwealth v. Lapage*, 435 Mass. 480, 488, 759 N.E.2d 300, 307 (2001); *Commonwealth v. Richardson*, 425 Mass. 765, 769, 682 N.E.2d 1354, 1357 (1997); *Commonwealth v. Cowels*, 425 Mass. 279, 291, 680 N.E.2d 924, 932 (1997); *Commonwealth v. Rivera*, 424 Mass. 266, 274, 675 N.E.2d 791, 797-798 (1997); *Commonwealth v. Smith*, 412 Mass. 823, 838, 593 N.E.2d 1288, 1296 (1992); *Commonwealth v. Fitzgerald*, 412 Mass. 516, 525, 590 N.E.2d 1151, 1156 (1992); *Commonwealth v. Cordle*, 412 Mass. 172, 176-178, 587 N.E.2d 1372, 1375-1376 (1992); *Commonwealth v. Daye*, 411 Mass. 719, 740-741, 587 N.E.2d 194, 206-207 (1992); *Commonwealth v. Andrews*, 403 Mass. 441, 463, 530 N.E.2d 1222, 1234-1235 (1988); *Commonwealth v. Reid*, 29 Mass. App. Ct. 537, 540-541, 562 N.E.2d 1362, 1364-1365 (1990); *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 520-521, 529 N.E.2d 1348, 1350-1351 (1988); *Commonwealth v. Ly*, 19 Mass. App. Ct. 901, 901-902, 471 N.E.2d 383, 384-385 (1984). The Appeals Court, while recognizing such discretion, has suggested that "it might be[] preferable for the judge to inform the jurors that the evidence of police omissions could create a reasonable doubt." *Commonwealth v. Reid*, 29 Mass. App. Ct. 537, 540-541, 562 N.E.2d 1362, 1365 (1990).

The obligation of law enforcement authorities to investigate a crime, and to disclose exculpatory evidence in their possession, does not entitle the defense to an instruction that the authorities have any duty to gather exculpatory evidence. *Commonwealth v. Martinez*, 437 Mass. 84, 92, 769 N.E.2d 273, 281 (2002); *Lapage*, 435 Mass. at 488, 759 N.E.2d at 307.

2. **Defense must be permitted to argue.** Defense counsel has a right to argue to the jury that they should draw an adverse inference against the Commonwealth from the failure of the police to preserve and introduce material evidence or to perform probative tests. See *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988) (while police have no constitutional duty to perform any particular test, the defense may argue to the jury that a particular test may have been exculpatory). While a judge is not required to instruct the jury that they may draw such an inference, the defendant is entitled to make such an argument, and in such a case it is error to caution the jury against drawing any inferences from the absence of evidence. *Commonwealth v. Person*, 400 Mass. 136, 140, 508 N.E.2d 88, 91 (1987); *Commonwealth v. Gilmore*, 399 Mass. 741, 745, 506 N.E.2d 883, 886 (1987); *Bowden*, *supra*; *Commonwealth v. Rodriguez*, 378 Mass. 296, 308, 391 N.E.2d 889, 896 (1979); *Commonwealth v. Jackson*, 23 Mass. App. Ct. 975, 975-976, 503 N.E.2d 980, 981-982 (1987); *Flanagan*, 20 Mass. App. Ct. at 475-477 & n.2, 481 N.E.2d at 207-209 & n.2.

3. **Instruction on lost or destroyed evidence.** The Commonwealth has a duty not to destroy exculpatory evidence, and must preserve such evidence for potential inspection or testing by the defense. *Commonwealth v. Sasville*, 35 Mass. App. Ct. 15, 19, 616 N.E.2d 476, 479 (1992). When it is alleged that the Commonwealth has lost or destroyed potentially exculpatory evidence, the defense has the initial burden of showing a reasonable possibility that the lost evidence was in fact exculpatory. A claim that the evidence "could have" exonerated the defendant is speculative and insufficient. If the defense meets this burden, the judge must then balance the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant. Where relief is appropriate, the judge has discretion as to the appropriate remedy, subject to review only for abuse of discretion. "In certain cases where evidence has been lost or destroyed, it may be appropriate to instruct

the jury that they may, but need not, draw an inference against the Commonwealth [S]uch instruction should generally permit, rather than require, a negative inference against the Commonwealth. It may be possible to draw more than one inference from the circumstances warranting the missing evidence instruction, and choosing between competing inferences is the province of the jury.” *Commonwealth v. Kee*, 449 Mass. 550, 554-558, 870 N.E.2d 57, 62-66 (2007). Accord, *Commonwealth v. Clemente*, 452 Mass. 295, 309, 893 N.E.2d 19, 34 (2008) (same rule applicable where evidence unavailable because police have returned to owner); *Commonwealth v. Phoenix*, 409 Mass. 408, 415 n. 3, 567 N.E.2d 193, 197 n.3 (1991) (if requested, defense may have been entitled to instruction that jury may draw adverse inference from Commonwealth’s negligent destruction of evidence which prevented forensic testing). Cf. *Sasville*, *supra* (grossly negligent destruction of evidence central to case could not be remedied by cross-examination or suppression and required dismissal).