

UNRECORDED POLICE ENCOUNTER

This instruction is tailored so that it may be given in cases where a police officer unintentionally or negligently failed to comply with their police department's policy to record an interaction between the officer and the defendant or a civilian. If the officer's failure to record was intentional, the trial judge may consider whether Instruction 3.900, Intentionally Not Recorded Exculpatory Evidence, should be given.

You have heard testimony about an encounter between a police officer and [the defendant] [a civilian]. There is evidence that the [_____ Police Department] has a policy of recording encounters with a [defendant] [civilian], but that this encounter was not recorded. This is a factor you may consider in evaluating all of the evidence in this case.

With respect to this factor, you should consider:

- i. whether a recording of the encounter between the police and the [defendant] [civilian] would reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and**
- ii. whether the evidence provides a reasonable or adequate explanation for the lack of video evidence of the encounter.**

Optional In determining what is an accurate depiction of a past event, you may consider the value of having a recording of the event as compared to or in addition to

a witness's recollection of the event. Human memory may be affected by factors including the stress or demands of an event, bias (implicit or explicit), or by memory loss or impairment. In comparison to the human memory, a recording might provide an objective and more accurate view of a prior interaction between law enforcement and a [defendant] [civilian]. Keep in mind, however, that a recording might only show a portion of the overall event and capture only one perspective or angle of the interaction.

See *Commonwealth v. Gomes*, 470 Mass. 352, 369 (2015), citing Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices, at 15 (2013) ("memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. ... Memory is, rather[,] a constructive, dynamic and selective process.")

If you determine that the lack of recording was significant and not adequately explained, you may consider whether the omission tends to affect the quality, reliability or credibility of the evidence about the encounter. These considerations involve factual determinations that are entirely up to you, and you are free to give these considerations whatever weight, if any, you deem appropriate based on all the evidence.

NOTES

1. **Instruction is optional.** This instruction is based on *Commonwealth v. Bowden*, 379 Mass. 472, 485-486 (1980). See also *Commonwealth v. Flanagan*, 20 Mass. App. Ct. 472, 475-476 (1985). A jury instruction on the failure of the police to record an encounter is not required, but is permissible in the judge's discretion. See *Commonwealth v. Durand*, 475 Mass. 657, 673-674 (2016); *Commonwealth v. Williams*, 439 Mass. 678, 687 (2003); *Commonwealth v. Rivera*, 424 Mass. 266, 274 (1997); *Commonwealth v. Cordle*, 412 Mass. 172, 176-178 (1992); *Commonwealth v. Daye*, 411 Mass. 719, 740-741 (1992); *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 520-521 (1988). 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 (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 (2002); *Commonwealth v. Lapage*, 435 Mass. 480, 488 (2001).

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, 59 (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). See also *Commonwealth v. Wilkerson*, 486 Mass. 159, 178 (2020) ("As we have explained repeatedly, a judge is not required to instruct on the claimed inadequacy of a police investigation. *Bowden* simply holds that a judge may not remove the issue from the jury's consideration." (Internal citations omitted.)) 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. See *Commonwealth v. Gilmore*, 399 Mass. 741, 745 (1987); *Bowden*, 379 Mass. at 485-486; *Commonwealth v. Rodriguez*, 378 Mass. 296, 308 (1979); *Commonwealth v. Jackson*, 23 Mass. App. Ct. 975, 975-976 (1987); *Flanagan*, 20 Mass. App. Ct. at 475-477 & n.2.