

LOST OR DESTROYED EXCULPATORY EVIDENCE

This instruction may be given as one possible judicial remedy in cases where the defendant has established a "reasonable possibility, based on concrete evidence" that lost or destroyed evidence would have been favorable to the defendant. See *Commonwealth v. Neal*, 392 Mass. 1, 12 (1984). The judge then must weigh "the Commonwealth's culpability, the materiality of the evidence, and the prejudice to the defendant" in determining what remedy is appropriate. *Commonwealth v. Williams*, 455 Mass. 706, 718 (2010).

You have heard testimony that [item of evidence] has been (lost) (destroyed) in this case.

You may infer that, if the evidence had been preserved, it would have been favorable to the defendant. You are not compelled to make this inference, but you may, after considering all of the facts and circumstances you have heard about the (loss) (destruction) of this evidence.

NOTES:

1. Preliminary determination on lost or destroyed evidence. The Commonwealth has a duty not to destroy exculpatory evidence and must preserve exculpatory evidence in its possession for potential inspection or testing by the defense. See *Commonwealth v. Sasville*, 35 Mass. App. Ct. 15, 19 (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 exculpatory. See *id* at 20-21. See also *Commonwealth v. Clemente*, 452 Mass. 295, 309 (2008) (same rule applicable where evidence unavailable because police have returned to owner). The defendant must show, a "reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the [evidence] would have produced evidence favorable to his cause". *Commonwealth v. Neal*, 392 Mass. 1, 12 (1984) (internal quotations omitted). 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. See *Commonwealth v. Williams*, 455 Mass. 706, 718 (2010). "[W]here the Commonwealth has acted in bad faith or recklessly, resulting in the loss or destruction of evidence, the defendant may be independently entitled to a remedy even without meeting the *Neal* test." *Williams*, 455 Mass. at 718, citing *Commonwealth v. Gliniewicz*, 398 Mass. 744, 747-749 (1986); *Commonwealth v. Olszewski*, 401 Mass. 749, 754 n.2 (1988).

Where relief is appropriate, the judge has discretion as to the appropriate remedy, subject to review only for abuse of discretion. See *Commonwealth v. Kater*, 432 Mass. 404, 418-419 (2000), quoting *Commonwealth v. Lydon*, 413 Mass. 309, 317 (1992). See also *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 551 (2002) (“consistent with the specific facts and circumstances of the underlying case, sanctions for spoliation are carefully tailored to remedy the precise unfairness occasioned by that spoliation.”). Judicial remedies for the loss of evidence may include “allowing the defendant to bring to the jury’s attention the Commonwealth’s negligent handling of the evidence,” *Commonwealth v. Harwood*, 432 Mass. 290, 302 (2000), citing *Commonwealth v. Olszewski*, 416 Mass. 707, 716-717 (1993), suppression of evidence, see *Gliniewicz*, 398 Mass. at 747-749, a jury instruction, see *Commonwealth v. Kee*, 449 Mass. 550, 557-558 (2007), or dismissal, see *Sasville*, 35 Mass. App. Ct. at 28. See also *Commonwealth v. Phoenix*, 409 Mass. 408, 415 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).

“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.” *Kee*, 449 Mass. at 557-558. See also *Commonwealth v. Heath*, 89 Mass. App. Ct. 328, 339-340 (2016) (conviction reversed where booking video depicting alleged assault on police officer by defendant not preserved despite court’s order to preserve; at retrial, lost or destroyed evidence instruction required).