

INTENTIONALLY NOT RECORDED EXCULPATORY EVIDENCE

This instruction may be given as one possible judicial remedy in cases where there is evidence that the police *intentionally* failed to record an encounter with the defendant(s) in violation of departmental policy. To be entitled to this instruction, the defendant must establish a "reasonable possibility, based on concrete evidence" that recording would have been favorable to the defendant. See *Commonwealth v. Neal*, 392 Mass. 1, 12 (1984). The Court 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) (seen) evidence that a [_____ video] [_____ audio recording] was intentionally not recorded in violation of the officer's departmental policy.

If the failure to record was intentional and was in violation of department policy, you may infer that, if there was a recording, 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 failure to record.

NOTES:

1. Preliminary determination for intentionally not recorded 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 (1992). When it is alleged that the police have intentionally failed to record an encounter in violation of departmental policy, similar to cases where 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. 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. *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 destruction of evidence may include cross-examination and argument by counsel, see *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.

The remedy of an 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).