

CONSCIOUSNESS OF GUILT

You have heard evidence suggesting that the defendant:

Here outline the nature of the evidence, e.g.:

A. *Flight.* may have fled after he (she) discovered that he (she) was about to be (arrested for) (charged with) the offense for which he (she) is now on trial.

B. *False statements.* may have intentionally made certain false statements (before) (after) his (her) arrest.

C. *False name.* may have used a false name to conceal his (her) identity.

D. *Evidence tampering.* may have intentionally tried to (conceal) (destroy) (falsify) evidence in this case.

E. *Witness intimidation or bribery.* may have intentionally attempted to (intimidate or coerce) (bribe) a witness whom he (she) believed would testify against him (her).

If the Commonwealth has proved that the defendant did _____ , you may consider whether such actions indicate feelings of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt on (this charge) (these charges). You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case.

If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people.

Finally, remember that, standing alone, such evidence is never enough by itself to convict a person of a crime. You may not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence.

Whenever the prosecution argues that certain evidence indicates consciousness of guilt, the judge is required at the defendant's request to instruct the jury: (1) that they may, but need not, consider such evidence as a factor tending to prove the defendant's guilt; (2) that they may not convict on the

basis of such evidence alone; (3) that flight or similar conduct does not necessarily reflect feelings of guilt, since there are numerous reasons why an innocent person might flee; and (4) that even if flight or similar conduct demonstrates feelings of guilt, it does not necessarily mean that the defendant is guilty in fact because guilt feelings are sometimes present in innocent people. If the defense does not request such an instruction, it "is left to the sound discretion of the judge" whether to give such an instruction sua sponte. *Commonwealth v. Simmons*, 419 Mass. 426, 435-436, 646 N.E.2d 97, 102-103 (1995) (discarding *Cruz* rule that required such a charge sua sponte); *Commonwealth v. Cruz*, 416 Mass. 27, 515 N.E.2d 804 (1993); *Commonwealth v. Matos*, 394 Mass. 563, 566, 476 N.E.2d 608, 610 (1985); *Commonwealth v. Toney*, 385 Mass. 575, 433 N.E.2d 425 (1982); *Commonwealth v. Henry*, 37 Mass. App. Ct. 429, 437-438, 640 N.E.2d 503, 508-509 (1994); *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 400, 509 N.E.2d 300, 306 (1987); *Commonwealth v. Rivera*, 23 Mass. App. Ct. 605, 608-610, 504 N.E.2d 371, 373-374 (1987); *Commonwealth v. Dwyer*, 22 Mass. App. Ct. 724, 728-729, 497 N.E.2d 1103, 1106 (1986). Where consciousness of guilt is central to the prosecution case, it is reversible error for the judge to charge only on the first two points and to refuse on request to charge as to the third and fourth points. *Commonwealth v. Estrada*, 25 Mass. App. Ct. 907, 514 N.E.2d 1099 (1987).

The model instruction has been affirmed as "balanced and in accord with the principles enunciated in" *Toney*. *Commonwealth v. Knap*, 412 Mass. 712, 715-716, 592 N.E.2d 747, 750 (1992).

SUPPLEMENTAL INSTRUCTION

Where such evidence is of another crime.

I caution you, in considering such evidence, that the defendant is not on trial for _____, and you are not to consider such evidence as a substitute for proof of guilt of the offense with which he (she) is charged. You may use such evidence only for the purpose I have outlined to you.

NOTES:

1. **When inference permissible.** The evidence need not be "conclusive" but merely "sufficient" to warrant a consciousness of guilt instruction. *Commonwealth v. Lamont L.*, 54 Mass. App. Ct. 748, 753, 767 N.E.2d 1105, 1109 (2002). However, probatively weak evidence should be excluded or the jury charged not to draw such an inference, *Commonwealth v. Kane*, 19 Mass. App. Ct. 129, 137 n.6, 472 N.E.2d 1343, 1348 n.6 (1985). The judge has discretion to ban the prosecution from arguing a particular inference of consciousness of guilt because its inflammatory nature outweighs its probative value. *Commonwealth v. Sawyer*, 389 Mass. 686, 700, 452 N.E.2d 1094,

1102 (1983) (pretrial jail break); *Connors*, 18 Mass. App. Ct. at 290, 464 N.E.2d at 1379 (same).

2. **What constitutes evidence of consciousness of guilt.** The most common forms of consciousness of guilt evidence include **flight or hiding** to avoid apprehension, *Commonwealth v. Roberts*, 407 Mass. 731, 735, 555 N.E.2d 588, 591 (1990) (attempted escape while being transported to court); *Commonwealth v. Stewart*, 398 Mass. 535, 547-549, 499 N.E.2d 822, 830-831 (1986) (flight from Commonwealth); *Matos*, 394 Mass. at 564, 476 N.E.2d at 609 (flight from scene); *Commonwealth v. Jackson*, 388 Mass. 98, 103-104, 445 N.E.2d 1033, 1036-1037 (1983) (police chase and shootout); *Commonwealth v. Smith*, 350 Mass. 600, 605-607, 215 N.E.2d 897, 902-903 (1966) (hiding); *Commonwealth v. Garuti*, 23 Mass. App. Ct. 561, 566-568, 504 N.E.2d 357, 360-361 (1987) (delay in surrendering to police); *Commonwealth v. Connors*, 18 Mass. App. Ct. 285, 290-292, 464 N.E.2d 1375, 1379-1380 (1984) (pretrial jail break), giving intentionally **false statements** to police after the crime, *Commonwealth v. Lavalley*, 410 Mass. 641, 649-650, 574 N.E.2d 1000, 1006 (1991); *Commonwealth v. Sullivan*, 410 Mass. 521, 526, 574 N.E.2d 966, 970 (1991) (requesting relative to give false story); *Commonwealth v. Merola*, 405 Mass. 529, 546-547, 542 N.E.2d 249, 259-260 (1989); *Commonwealth v. Nadworny*, 396 Mass. 342, 370-372, 486 N.E.2d 675, 692 (1985), cert. denied, 477 U.S. 904 (1986); *Commonwealth v. Basch*, 386 Mass. 620, 624-625, 437 N.E.2d 200, 204-205 (1982); *Commonwealth v. Porter*, 384 Mass. 647, 653, 429 N.E.2d 14, 18 (1981); *Commonwealth v. Smith*, 368 Mass. 126, 129, 330 N.E.2d 197, 198 (1975); *Commonwealth v. Connors*, 345 Mass. 102, 105, 185 N.E.2d 629, 631 (1962), using a **false name or address** in connection with the crime, *Commonwealth v. Carrion*, 407 Mass. 263, 276, 552 N.E.2d 558, 566 (1990); *Commonwealth v. Pringle*, 22 Mass. App. Ct. 746, 751-752, 498 N.E.2d 131, 134-135 (1986); *Commonwealth v. Fetzer*, 19 Mass. App. Ct. 1024, 1024-1025, 476 N.E.2d 981, 982-983 (1985); *Commonwealth v. Walters*, 12 Mass. App. Ct. 389, 396, 425 N.E.2d 382, 387 (1981); *Commonwealth v. DiStasio*, 297 Mass. 347, 362, 8 N.E.2d 923, 931-932 (1937), **threats or bribery of witnesses**, *Commonwealth v. Sowell*, 22 Mass. App. Ct. 959, 961, 494 N.E.2d 1359, 1362 (1986); *Commonwealth v. Toney*, 385 Mass. 575, 584 n.4, 433 N.E.2d 425, 431 n.4 (1982); *Porter, supra*; but see *United States v. Pina*, 844 F.2d 1, 9 (1st Cir. 1988) (threat against witness made after witness has already testified should not be allowed as consciousness of guilt; where too late to effect trial, its probative value is outweighed by its inflammatory potential), concealing or destroying evidence, *Id.*; *Commonwealth v. Stanton*, 17 Mass. App. Ct. 1, 7, 455 N.E.2d 464, 467 (1983), **inordinate interest in the details** of a crime, *Commonwealth v. Montecalvo*, 367 Mass. 46, 52, 323 N.E.2d 888, 892 (1975), **refusing to provide saliva, hair and blood examples pursuant to court order**, *Commonwealth v. Brown*, 24 Mass. App. Ct. 979, 980-981, 573 N.E.2d 693, 695-696 (1987), or **altering his appearance** after the crime to conceal his physical characteristics, *Carrion*, 407 Mass. at 277, 552 N.E.2d at 567 (unspecified alteration of appearance); *Commonwealth v. Laaman*, 25 Mass. App. Ct. 354, 360 n.9, 518 N.E.2d 861, 865 n.9 (1988) (newly-grown beard that hid facial moles relevant to identification of the perpetrator).

Actions by others. Generally, only a defendant's own statements or actions can institute consciousness of guilt, and the judge should not charge that the jury may infer a defendant's consciousness of guilt if they disbelieve the defendant's alibi witnesses. *Commonwealth v. Ciampa*, 406 Mass. 257, 267, 272, 547 N.E.2d 314, 321, 323-324 (1989). There is a limited exception for "[a]cts of a joint venturer amounting to consciousness of guilt [which] may be attributed to another joint venturer if the acts occurred during the course of a joint venture and in furtherance of it." See *Commonwealth v. Mahoney*, 405 Mass. 326, 330-331, 540 N.E.2d 179, 182 (1989).

Flight after subsequent offense. When the defendant fled after a subsequent offense, there is no automatic rule that evidence of such flight cannot be admitted in the trial of an earlier offense. "While such a consideration affects the relevance of evidence and may prompt a judge to exclude it," other evidence may indicate that the flight evinced consciousness of guilt as to the earlier as well as the later offense. *Commonwealth v. Burke*, 414 Mass. 252, 260-261, 607 N.E.2d 991, 997 (1993).

Knowledge that complaint has issued not sufficient. A consciousness of guilt instruction is not warranted based solely on police having told the defendant that a criminal complaint had issued against him, without more. "The statement to a lay person that a complaint had 'issued' is not meaningful and does not convey that any particular action is required." *Commonwealth v. Stuckich*, 450 Mass. 449, 453, 879 N.E.2d 105, 111 (2008).

Knowledge that police looking for defendant not required. Proof that the defendant knew that the police were looking for him is not a precondition to a consciousness of guilt instruction based on alleged flight from the scene of a crime or from his usual environs. *Commonwealth v. Figueroa*, 451 Mass. 566, 887 N.E.2d 1040 (2008); *Commonwealth v. Toney*, 385 Mass. 575, 583, 433 N.E.2d 425, 431 (1982).

Perjury. The defendant's perjury at trial can be considered as evidence of consciousness of guilt, but an instruction to that effect is disfavored, since it places undue emphasis on only one aspect of the evidence. If a charge is given, it must carefully avoid implying that perjury is itself sufficient grounds for a guilty verdict. *Commonwealth v.*

Edgerly, 390 Mass. 103, 109-110, 453 N.E.2d 1211, 1215-1216 (1983); *Commonwealth v. Jackson*, 388 Mass. 98, 103-104, 445 N.E.2d 1033, 1036-1037 (1983).

3. **Defendant's default at trial requires showing of voluntariness.** Evidence of the defendant's failure to appear for trial should not be admitted as evidence of consciousness of guilt unless the Commonwealth, at minimum, shows that the defendant knew of the scheduled court date and nevertheless failed to appear. *Commonwealth v. Hightower*, 400 Mass. 267, 269, 508 N.E.2d 850, 852 (1987) (reserving decision on whether failure to appear on a known assigned date, standing alone, is evidence of consciousness of guilt). See *Commonwealth v. Goldoff*, 24 Mass. App. Ct. 458, 465-466, 510 N.E.2d 277, 281-282 (1987) (evidence that defendant may have given police a false address, to which notices were sent, justified submitting issue of consciousness of guilt to jury). The judge should require the Commonwealth to make a showing before the jury, under the usual rules of evidence, that the defendant's absence is voluntary. Otherwise, the judge should warn against drawing any unfavorable inference from the defendant's absence. *Commonwealth v. Kane*, 19 Mass. App. Ct. 129, 134-137, 472 N.E.2d 1343, 1347-1349 (1985). For an instruction about the defendant's absence that may be used when the judge does not permit the jury to consider it as evidence of consciousness of guilt, see Instruction 1.320.

The Appeals Court has given detailed instructions on the protocol to be followed before a judge permits a defendant's midtrial default to be considered by the jury as evidence of consciousness of guilt:

"When a defendant fails to appear midtrial, the judge is to determine whether the trial should proceed in the defendant's absence or whether a mistrial should be declared. In determining this question, the judge must determine whether the defendant's absence is without cause and voluntary. This judicial determination, in turn, requires that there be time allotted for some measure of inquiry and investigation into the reasons for the defendant's absence and the results of the efforts to locate the defendant. To this end, the judge should grant a recess of such duration as the judge deems appropriate to allow for investigation.⁹ There must be evidence introduced on the record. The preferable practice . . . is that a voir dire hearing should be held directed to the evidence garnered concerning the circumstances of the defendant's failure to appear and the efforts to find the defendant.

"Following this hearing, the judge should state a finding concerning whether the defendant's absence is without cause and voluntary. If the judge determines not to declare a mistrial, but rather to continue the trial in absentia, then the judge should give a neutral instruction to the jury to the effect that the defendant may not be present for the remainder of the trial, that the trial will continue, and that the defendant will continue to be represented by his attorney. If there will be no evidence adduced before the jury concerning consciousness of guilt, the judge may add that the jury should not speculate as to the reasons for the defendant's absence and should not draw adverse inferences, as there are many reasons why a defendant may not be present for the full trial.

"Conversely, if the prosecution seeks to bring before the jury evidence of the defendant's flight to lay a foundation for a consciousness of guilt instruction, the judge should determine (based on the evidence adduced on voir dire) whether introducing such evidence is warranted. If so, the prosecution briefly may develop the facts and circumstances of the defendant's failure to appear, subject to such discretionary limitations as the judge believes necessary. If the judge determines that a consciousness of guilt instruction is appropriate based on the evidence, and that this instruction will be incorporated in the final charge, that instruction should be stated in accord with *Commonwealth v. Toney*, 385 Mass. at 585, and cases cited therein — all as tailored to the defendant's failure to appear at trial. See generally Model Jury Instructions for Use in the District Court § 4.12 (1997).

⁹ This investigation, in most cases, is not of the kind that would require a substantial amount of time or undue delay in the trial. A reasonably diligent investigation to determine if there is good cause for the defendant's absence from trial might entail some of the following steps: independent police inquiry; contact with the defendant's family and significant other persons in the defendant's life; calls to the places where the defendant lives and works; and inquiry of emergency health facilities in the immediate area where there is a reasonable probability the defendant may have been treated. Of course, defense counsel also should check to see if the defendant has communicated with counsel's law office."

Commonwealth v. Muckle, 59 Mass. App. Ct. 593, 639-640, 797 N.E.2d 456, 463-464 (2003) (citations omitted). This requirement applies only to absence at trial, and not to flight in anticipation of being charged with a crime. In the latter case, the Commonwealth is not required to prove that the defendant's absence was voluntary but only that it is probative of feelings of guilt. *Commonwealth v. Villafuerte*, 72 Mass. App. Ct. 908, 893 N.E.2d 73 (2008).

4. **Reference to specific evidence unnecessary.** In charging the jury, the judge is not required to identify specifically which items of evidence may bear on consciousness of guilt, *Porter*, 384 Mass. at 656 n.12, 429 N.E.2d at 20 n.12, or mention that the defendant has offered an innocent explanation, *Toney*, 385 Mass. at 583, 433 N.E.2d at 432.

5. **Parties' strategic decision not to seek instruction.** "Generally, if the prosecutor or defense counsel [seek a] jury instruction on the subject they would be entitled to the benefits of such instruction A prosecutor might choose not to request a consciousness of guilt instruction because the evidence raising the issue was of peripheral value and the instruction could divert the jury from considering other probative evidence on which the prosecutor based the case for conviction. A defense attorney also, as matter of trial tactics, might not want to request a consciousness of guilt charge if none is requested by the Commonwealth or given, sua sponte, by the judge. Defense counsel might feel that it would not assist the defendant's case to have the judge focus the jury's attention on such matters as flight or concealment, even with cautionary language on how the evidence is to be weighed. Counsel at the trial might wish only to discuss evidence suggesting consciousness of guilt in closing arguments or simply to leave it for the jury's reflection unadorned by comment either by them or the judge." *Simmons*, *supra*.

6. **Right to rebut.** The defendant has "an unqualified right to negate the inference of consciousness of guilt by explaining [the facts] to the jury." *Commonwealth v. Chase*, 26 Mass. App. Ct. 578, 580-581, 530 N.E.2d 185, 1887 (1988) (defendant entitled to explain why he lied to police); *Commonwealth v. Kerrigan*, 345 Mass. 508, 513, 188 N.E.2d 484, 487 (1963) (same); *Garuti*, *supra* (defendant entitled to explain delay in reporting to police). Such an explanation is offered as to state of mind, and therefore is not hearsay. *Kerrigan*, *supra*; *Garuti*, *supra*.

7. **Innocent alternatives.** A consciousness of guilt inference is permissible even where the defendant's actions might have an innocent explanation or indicate consciousness of guilt regarding unrelated offenses. *Commonwealth v. Rivera*, 397 Mass. 244, 249-251, 490 N.E.2d 1160, 1163-1164 (1986); *Commonwealth v. Sawyer*, 389 Mass. 686, 700, 452 N.E.2d 1094, 1102 (1983); *Commonwealth v. Geagan*, 339 Mass. 487, 512, 159 N.E.2d 870, 887-888, cert. denied, 361 U.S. 895 (1959); *Commonwealth v. Derby*, 263 Mass. 39, 46-47, 160 N.E. 315, 317 (1928).

The judge has no obligation to suggest to the jury specific examples of reasons other than consciousness of guilt why the defendant might have acted as he or she did. See *Commonwealth v. Lamont L.*, 54 Mass. App. Ct. 748, 754, 767 N.E.2d 1105, 1109 (2002); *Commonwealth v. Knap*, 412 Mass. 712, 715-717, 592 N.E. 2d 747 (1992).

8. **"Consciousness of innocence."** It is often appropriate to admit evidence alleged to be indicative of the defendant's "consciousness of innocence," although this may not be of right in all situations. Whether to draw such an inference should be left to argument, and should not be instructed on. *Commonwealth v. Lam*, 420 Mass. 615, 619, 650 N.E.2d 796, 799 (1995) (falling asleep shortly after being accused of crime); *Commonwealth v. Kozec*, 21 Mass. App. Ct. 355, 366, 487 N.E.2d 216, 223 (1985) (driving victim to hospital); *Commonwealth v. Coull*, 20 Mass. App. Ct. 955, 957-958, 480 N.E.2d 323, 326 (1985) (reporting related crime to police); *Commonwealth v. Martin*, 19 Mass. App. Ct. 117, 121-124, 472 N.E.2d 276, 278-280 (1984) (absence of flight). See *Commonwealth v. Preziosi*, 399 Mass. 748, 752-753, 506 N.E.2d 887, 890 (1987) (cooperation with police).

9. **Incriminating knowledge.** Evidence of consciousness of guilt should be distinguished from evidence of incriminating knowledge, i.e., knowledge of details of the crime that only the perpetrator would have, which may be admissible to prove identity. *Porter*, *supra*.