

### *Suppressed Evidence Instruction*

The law requires the prosecutor to disclose evidence favorable to the defense – that is, evidence that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses – in a timely fashion. *U.S. v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005); *Sykes v. U.S.*, --- A.2d ----, 2006 WL 564050 \*8 (D.C. Mar 09, 2006); *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995); *Ebron v. United States*, 838 A.2d 1140, 1156 n. 13 (D.C. 2003). A conscientious prosecutor will not allow for delayed disclosure of exculpatory or impeachment evidence because it threatens a defendant’s right to a fair trial. *Sykes v. U.S.*, --- A.2d ----, 2006 WL 564050 \*8 (D.C. Mar 09, 2006); *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995); *Ebron v. United States*, 838 A.2d 1140, 1156 n. 13 (D.C. 2003).

Here, the prosecutor suppressed information that \_\_\_\_ had failed to identify Mr. \_\_ as the culprit until \_\_ days before trial, even though the prosecutor had had this information in her possession since \_\_. Under the law, the prosecutor should have disclosed this exculpatory information to the defense shortly after acquiring it, which means that she should have disclosed it no later than \_\_\_\_\_. *Sykes v. U.S.*, --- A.2d ----, 2006 WL 564050 \*8 (D.C. Mar 09, 2006). You may, if you deem appropriate, consider the prosecutor’s suppression of exculpatory evidence as a circumstance tending to show consciousness by the prosecutor that her case against Mr. \_\_ is a weak one. *Conley v. United States*, 415 F.3d 183, 190 (1<sup>st</sup> Cir. 2005) (suppression of exculpatory evidence by prosecutor gives rise to permissible “inference that the prosecutors resorted to improper tactics because they were justifiably fearful without such tactics the defendants might be acquitted.”); *United States v. Boyd*, 55 F.3d 239, 241 (7<sup>th</sup> Cir. 1995) (same); *Mills v. United States*, 599 A.2d 775, 783-84 (D.C. 1991), quoting, II J. Wigmore, Evidence § 278, at 133 (Chadbourn ed. 1979) (“It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party’s *falsehood or other fraud* in the preparation or presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit. *The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.*”) (emphasis in original); cf. *Van Ness v. United States*, 568 A.2d 1079, 1083 (D.C. 1990)

(evidence that defendant tried to conceal himself – by fleeing – can permit jury to infer consciousness of guilt).