

## REASONABLE DOUBT (ALTERNATE CHARGE)

I have told you that the standard of proof that the Commonwealth must meet is proof beyond a reasonable doubt. What is a “reasonable doubt”? I am going to give you a definition based on the decisions of our Supreme Judicial Court. Since this concept is so important, I am going to ask you to pay special attention for the next few minutes.

Proof beyond a reasonable doubt does not mean proof beyond *all* doubt. It does not mean proof beyond a whimsical or an imaginary doubt, or proof beyond all possibility of innocence. A reasonable doubt does not mean the kind of doubt that could be conjured up by someone who is seeking for doubts or for an excuse to acquit a defendant.

Instead, a reasonable doubt means such doubt as remains in the mind of a reasonable person who is earnestly seeking the truth. The Commonwealth is not required to prove the defendant's guilt to an absolute or mathematical certainty — the kind of certainty that you have when you add two and two and get four. But the Commonwealth *is* required to prove the defendant's guilt to a moral certainty — the kind of certainty that satisfies your judgment and your consciences as reasonable men and

women, and leaves in your minds a clear and settled conviction that the defendant is guilty.

So, to repeat once more, proof beyond a reasonable doubt is not proof beyond all possible or imaginary doubt. Instead, it is proof that excludes every reasonable hypothesis except that the defendant is guilty. It is proof to a moral certainty — as distinguished from an absolute certainty — that the defendant committed the crime(s) charged. It is proof that satisfies your judgment and consciences as reasonable people, applying your reason to the evidence. It is proof that leaves you with no other reasonable conclusion possible except that the defendant is guilty.

It is not enough for the Commonwealth to show that it is more likely than not that the defendant is guilty. That is not proof beyond a reasonable doubt. To be proof beyond a reasonable doubt, the evidence must establish the defendant's guilt to a reasonable and moral certainty, a certainty that convinces and directs your judgment and satisfies your understanding and reason as jurors earnestly seeking for the truth.

When all is said and done, if you have any reasonable doubt about the existence of any fact which is essential to proving the guilt of the defendant (on this) (on any particular) charge, the defendant must have the benefit of

## **that doubt and must be acquitted.**

This alternate instruction is included for judges who wish to utilize a charge that is *Webster*-based and has repeatedly been affirmed on appellate review, but that also incorporates several post-*Webster* formulations of reasonable doubt that have passed appellate muster in other cases: instructions that a reasonable doubt is not a whimsical, fanciful doubt, *Commonwealth v. Seay*, 376 Mass. 735, 745 n.7, 383 N.E.2d 828, 834 n.7 (1978); that it is not the doubt of a person seeking a doubt or an excuse to acquit, *Id.*, that it is such doubt as remains in the minds of reasonable jurors earnestly seeking the truth, *Id.*, and that proof beyond a reasonable doubt is proof to the exclusion of every reasonable theory consistent with innocence, *Commonwealth v. Bannister*, 15 Mass. App. Ct. 71, 81, 443 N.E.2d 1325, 1332 (1983).

The first five paragraphs of this instruction are a paraphrase of the jury charge affirmed in *Commonwealth v. Little*, 384 Mass. 262, 266 n.4, 424 N.E.2d 504, 507 n.4 (1981), as corrected by *Commonwealth v. A Juvenile*, 396 Mass. 215, 217-220, 485 N.E.2d 170, 172-174 (1985). See *Commonwealth v. Bowie*, 25 Mass. App. Ct. 70, 80-81, 514 N.E.2d 1345, 1352-1353 (1987); *Commonwealth v. Giacalone*, 24 Mass. App. Ct. 166, 171, 507 N.E.2d 769, 773 (1987). *Commonwealth v. Santos*, 402 Mass. 775, 588, 525 N.E.2d 388, 396 (1988), appeared to have disapproved the use of this instruction. However, a subsequent case has clarified that *Santos* only meant to indicate that it must be corrected for the error noted in *A Juvenile, supra*. *Commonwealth v. Gagliardi*, 418 Mass. 562, 568 n.3, 638 N.E.2d 20, 24 n.3 (1994) (“While the *Webster* charge is preferable, the corrected *Little* instruction is faithful to the language of *Webster* and currently remains a permissible charge”).

The phrase “moral certainty” in the model instruction must be accompanied by language that gives proper content to that phrase. To avoid reversible error, it should not be used without the other *Webster* wording that accompanies and elaborates on it. *Commonwealth v. Therrien*, 428 Mass. 607, 610, 703 N.E.2d 1175, 1178 (1998); *Commonwealth v. James*, 424 Mass. 770, 787-788, 678 N.E.2d 1170, 1182-1183 (1997); *Commonwealth v. Bonds*, 424 Mass. 698, 703, 677 N.E.2d 1131, 1134 (1997).

The last paragraph of the model instruction is paraphrased from the charge affirmed in *Commonwealth v. Robinson*, 7 Mass. App. Ct. 600, 607, 389 N.E.2d 758, 762 (1979). It was added because it is preferable that a charge specifically mention the option of acquittal. *Commonwealth v. Sheline*, 391 Mass. 279, 297, 461 N.E.2d 1197, 1209 (1984).