

DEFENDANT DOES NOT TESTIFY

The defendant is entitled to such an instruction on request. It is no longer reversible error to give such an instruction over the defendant's objection. See notes 1 and 2, infra.

You may have noticed that the defendant did not testify at this trial.

The defendant has an absolute right not to testify, since the entire burden of proof in this case is on the Commonwealth to prove that the defendant is guilty. It is not up to the defendant to prove that he (she) is innocent.

Under our system of law, a defendant has a perfect right to say to the Commonwealth, “You have the burden of proving your case against me beyond a reasonable doubt. I do not have to say a word.”

The fact that the defendant did not testify has nothing to do with the question of whether he (she) is guilty or not guilty. You are not to draw any adverse inference against the defendant because he (she) did not testify. You are not to consider it in any way, or even discuss it in your deliberations. You must determine whether the Commonwealth has proved its case against the defendant based solely on the testimony of the witnesses and the exhibits.

The model instruction above is an adaptation of the alternate instruction below but phrased exclusively in terms of the burden of proof, as presently recommended by Massachusetts appellate courts. See note 3, *infra*.

ALTERNATE INSTRUCTION

The defendant did not testify at this trial. We have a statute which says that a defendant in a criminal trial “shall at his own request, but not otherwise, be allowed to testify; but [if he does not testify, it] shall not create any presumption against him.”

A defendant in a criminal trial cannot be compelled to testify at his trial. He may testify if he chooses to, but if he does not choose to, he need not testify; and if he exercises that right, you may not draw any inference unfavorable to the defendant because he did not testify. Instead, you are to concern yourselves solely with the evidence that you have heard.

You are not to regard the fact that the defendant decided not to take the stand as having anything to do with the question of his (her) guilt or innocence. He (she) has a right under our law to say to the Commonwealth, as indeed he (she) is saying, “You must prove your case against me beyond a reasonable

doubt. I do not have to say a word.”

So in this case I will ask that, in the jury room, you *not* ask the question, “Why didn’t he (she) take the stand?” You will concern yourselves solely with the testimony you have heard from the lips of the witnesses and any exhibits that have been introduced into evidence.

G.L. c. 233, § 20, Third; *Commonwealth v. Gerald*, 356 Mass. 386, 391, 252 N.E.2d 344, 347 (1969); *Commonwealth v. Morrissey*, 351 Mass. 505, 515 n.5, 222 N.E.2d 755, 762 n.5 (1967). The alternate instruction is modeled closely upon the charge affirmed in *Morrissey*, except for: (1) the deletion of the phrase “right not to incriminate himself,” which has since been disapproved, see note 3, *infra*, and (2) the bracketed paraphrase for the statutory language that a defendant’s “neglect or refusal to testify” shall not prejudice him, since “the better course [is] for the judge not to repeat words such as ‘neglect’ or ‘refusal,’ even though they appear in the statute,” *Commonwealth v. Chandler*, 29 Mass. App. Ct. 571, 583, 563 N.E.2d 235, 243 (1990).

NOTES:

1. **When instruction required.** The Fifth and Fourteenth Amendments require that, upon the defendant’s proper request, the judge limit jury speculation by instructing that no adverse inferences are to be drawn from the fact that the defendant has not testified. *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S.Ct. 1112, 1121-1122 (1981); *Commonwealth v. Sneed*, 376 Mass. 867, 871-872, 383 N.E.2d 843, 845-846 (1978); *Commonwealth v. Goulet*, 374 Mass. 404, 410-414, 372 N.E.2d 1286, 1293-1295 (1978).

2. **Instruction over defendant’s objection no longer error.** If the defendant requests that no charge be given, it is not reversible error for the trial judge to instruct the jury on the defendant’s right not to testify. *Commonwealth v. Rivera*, 441 Mass. 358, 368-371, 805 N.E.2d 942, 951-953 (2004) (overruling *Commonwealth v. Buiel*, 391 Mass. 744, 746-747, 463 N.E.2d 1172, 1173-1174 (1984)). However, the S.J.C. “remain[s] of the view that judges should not give the instruction when asked not to do so.” *Id.*, 441 Mass. at 371 n.9, 463 N.E.2d at 953 n.9. A request by the defendant must be clearly brought to the judge’s attention, *Commonwealth v. Thompson*, 23 Mass. App. Ct. 114, 502 N.E.2d 541 (1986), although it is better practice for the judge to raise the issue with defense counsel sua sponte, *Id.*, 23 Mass. App. Ct. at 116 n.1, 402 N.E.2d at 543 n.1; *Sneed*, 376 Mass. at 871 n.1, 393 N.E.2d at 846 n.1. If there are multiple defendants, the judge must give such an instruction as to any defendant who requests it, and should consult with counsel for any other defendant who objects to such a charge to see whether that defendant really wants reference to him or her to be omitted. *Buiel*, 391 Mass. at 747 n.3, 463 N.E.2d at 1174 n.3.

3. **Phrasing of instruction.** “No aspect of the charge to the jury requires more care and precise expression Even an unintended suggestion that might induce the jury to draw an unfavorable inference is error”

(citations omitted). *Sneed*, 376 Mass. at 871, 393 N.E.2d at 846. Absent a request by the defendant or other special circumstances, it is preferable not to refer to the constitutional privilege at all, and instead to phrase the defendant's right not to testify in terms of the defendant's "right to remain passive, and to insist that the Commonwealth prove its case beyond a reasonable doubt without explanation or denial" by the defendant. *Commonwealth v. Thomas*, 400 Mass. 676, 678-680, 511 N.E.2d 1095, 1097-1098 (1987) (reasonable, and within spirit of cases, for defendant to request judge not to refer to his "refusal" or "neglect" to testify); *Buiel*, 391 Mass. at 746, 463 N.E.2d at 1173; *Sneed*, 376 Mass. at 871 n.1, 393 N.E.2d at 846 n.1; *Commonwealth v. Small*, 10 Mass. App. Ct. 606, 611, 411 N.E.2d 179, 183 (1980); *Commonwealth v. Powers*, 9 Mass. App. Ct. 771, 774, 404 N.E.2d 1260, 1262-1263 (1980). See *United States v. Flaherty*, 558 F.2d 566, 599-600 (1st Cir. 1981). On the other hand, the defendant is entitled on request to an explicit instruction that the jury may not draw any adverse inference from the defendant's exercise of his constitutional right not to testify. *Commonwealth v. Torres*, 17 Mass. App. Ct. 676, 677, 461 N.E.2d 1230, 1231 (1984). If reference is made to the constitutional privilege, the phrase "right against self-incrimination" should be carefully avoided and the phrase "right to remain silent" substituted. *Commonwealth v. Charles*, 397 Mass. 1, 9-10, 489 N.E.2d 679, 684-685 (1986); *Commonwealth v. Delaney*, 8 Mass. App. Ct. 406, 409-410, 394 N.E.2d 1006, 1008 (1979). On defense request, it is preferable for the judge's charge to use the exact words "no adverse inference," as do both of the above model instructions. *Commonwealth v. Feroli*, 407 Mass. 405, 411, 553 N.E.2d 934, 938 (1990).

4. **Unfavorable comment.** The Fifth and Fourteenth Amendments to the United States Constitution and article 12 of the Massachusetts Declaration of Rights prohibit any comment by the judge which can be fairly understood by the jury as permitting an adverse inference because of the defendant's failure to testify. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965); *Commonwealth v. Goulet*, 374 Mass. 404, 412, 372 N.E.2d 1288, 1294 (1978); *Commonwealth v. Burden*, 15 Mass. App. Ct. 666, 681, 448 N.E.2d 387, 397 (1983). The prosecutor is also prohibited from inviting any unfavorable inference, directly or indirectly. See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.74.

5. **Colloquy unnecessary.** The judge is not required to conduct a colloquy with a defendant who does not testify to ascertain whether this is done knowingly and voluntarily. However, "[i]t may be the better practice for a judge to inform a defendant before trial of the right to testify and the right not to testify; that the decision, although made in consultation with counsel, is ultimately the defendant's own; and that the court will protect the defendant's decision." *Commonwealth v. Waters*, 399 Mass. 708, 716-717 & n.3, 506 N.E.2d 859, 864-865 & n.3 (1987); *Commonwealth v. Hennessey*, 23 Mass. App. Ct. 384, 386-390, 502 N.E.2d 943, 945-948 (1987).