

**PRESUMPTION OF INNOCENCE;
BURDEN OF PROOF; UNANIMITY**

The complaint against the defendant is only an accusation. It is not evidence. The defendant has denied that he (she) is guilty of the crime(s) charged in this complaint.

The law presumes the defendant to be innocent of (the charge) (all the charges) against him (her). This presumption of innocence is a rule of law that compels you to find the defendant not guilty unless and until the Commonwealth produces evidence, from whatever source, that proves that the defendant is guilty beyond a reasonable doubt. This burden of proof never shifts. The defendant is not required to call any witnesses or produce any evidence, since he (she) is presumed to be innocent.

The presumption of innocence stays with the defendant unless and until the evidence convinces you unanimously as a jury that the defendant is guilty beyond a reasonable doubt. It requires you to find the defendant not guilty unless his (her) guilt has been proved beyond a reasonable doubt.

Your verdict, whether it is guilty or not guilty, must be unanimous.

Commonwealth v. Boyd, 367 Mass. 169, 189, 326 N.E.2d 320, 332 (1975); *Commonwealth v. Devlin*, 335 Mass. 555, 569, 141 N.E.2d 269, 276-277 (1957); *Commonwealth v. DeFrancesco*, 248 Mass. 9, 142 N.E. 749 (1924).

NOTES:

1. **Function of charge.** The presumption of innocence is a doctrine that allocates the burden of proof and admonishes the jury to judge the defendant's guilt solely on the evidence and not on suspicions that may arise from the facts of arrest and charge. *Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861, 1870 (1979). It is not a true presumption, but a shorthand description of the right of the accused "to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion" (citations omitted). *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12, 98 S.Ct. 1930, 1934 n.12 (1978). It is "founded in humanity" and "upon the soundest principle of criminal law . . . that it is better that nine guilty persons should escape, than that one innocent man should suffer." *Commonwealth v. Anthes*, 5 Gray 185, 230 (1855).

2. **Required formulation.** The judge need not give any particular definition of the presumption of innocence if the charge makes clear that the complaint does not imply guilt and that the jury's decision must be based solely on the evidence and not on suspicion or conjecture. The latter point is covered by Instruction 2.03. But Massachusetts practice requires the judge, on request, to instruct the jury in terms that the defendant is "presumed to be innocent." *Commonwealth v. Blanchette*, 409 Mass. 99, 105, 564 N.E.2d 992, 996 (1991); *Commonwealth v. Drayton*, 386 Mass. 39, 46-47, 434 N.E.2d 997, 1003-1004 (1982).

3. **Impermissible formulations.** Embellishing the standard formulation is unnecessary and should be avoided. *Commonwealth v. Healy*, 15 Mass. App. Ct. 134, 138, 444 N.E.2d 957, 959 (1983). It is a "self-defeating qualification" and reversible error to explain that the presumption of innocence relates only to the government's burden and is unrelated to actual guilt. *Id.*, 15 Mass. App. Ct. at 135-138, 444 N.E.2d at 958-959. The judge should not describe the presumption of innocence as an initial "score of nothing to nothing." *Commonwealth v. Lutz*, 9 Mass. App. Ct. 357, 361-362, 401 N.E.2d 148, 151-152 (1980).

An instruction on the "disappearing presumption of innocence" derived from *Commonwealth v. Powers*, 294 Mass. 59, 63, 200 N.E. 562 (1936), is reversible error if it implies that the presumption disappears as soon as any evidence of guilt is introduced, but is not error if it indicates that the presumption disappears only after the Commonwealth has presented evidence that has convinced the jury beyond a reasonable doubt of the defendant's guilt. *Commonwealth v. O'Brien*, 56 Mass. App. Ct. 170, 174-175 & n.5, 775 N.E.2d 798, 801-802 & n.5 (2002); *Commonwealth v. Kane*, 19 Mass. App. Ct. 129, 139, 472 N.E.2d 1343, 1350 (1985). "[T]he disappearing presumption formulation is 'not preferred' It is conspicuously absent from the Model Jury Instructions for Use in the District Court (1995) and might best be avoided as an unnecessary and potentially confusing embellishment on the standard charge." *O'Brien, supra*.

4. **Comparing criminal burden with certainty of private decisions.** Analogizing the Commonwealth's burden of proof beyond a reasonable doubt to the degree of certainty used to make certain important private decisions is strongly disfavored, *Commonwealth v. McGrath*, 437 Mass. 46, 48, 768 N.E.2d 1075, 1076 (2002), and will constitute error unless the analogy clearly stands alone and does not modify or suggest it is the equivalent to language about moral certainty and reasonable doubt. See, e.g., *Commonwealth v. Watkins*, 425 Mass. 830, 838, 683 N.E.2d 653, 659 (1997); *Commonwealth v. Rembiszewski*, 391 Mass. 123, 129-130, 461 N.E.2d 201, 206 (1984); *Commonwealth v. Fielding*, 371 Mass. 97, 116, 353 N.E.2d 719, 731 (1976); *Commonwealth v. Libby*, 358 Mass. 617, 621, 266 N.E.2d 641, 644 (1971).

5. **General and specific unanimity.** The above model instruction includes a general unanimity instruction. "A general unanimity instruction informs the jury that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." *Commonwealth v. Kevan*, 400 Mass. 557, 566-567, 511 N.E.2d 534, 540 (1987). For a model instruction on specific unanimity, see Instruction 2.320 (Multiple Incidents or Theories in One Count).

6. **Timing of instruction.** A judge must, upon request, instruct the jury that the defendant is presumed to be innocent, but it is within the judge's discretion when to do so. Even if the defense requests that the judge do so at the start of trial, a judge may choose to give the instruction with the rest of the charge after closing arguments and prior to deliberations. *Commonwealth v. Nancy M. Cameron*, 70 Mass. App. Ct. 1114, 877 N.E.2d 641, 2007 WL 4303057 (No. 06-P-1148, Dec. 10, 2007) (unpublished opinion under Appeals Court Rule 1:28).