MULTIPLE INCIDENTS OR THEORIES IN ONE COUNT (SPECIFIC UNANIMITY)

I. MULTIPLE INCIDENTS IN ONE COUNT

The Commonwealth has charged that the defendant committed this offense on several different occasions. You may find the defendant guilty only if you unanimously agree that the Commonwealth has proved beyond a reasonable doubt that the defendant committed the offense on at least one, specific occasion.

It is not necessary for the Commonwealth to prove, or for you all to be agreed, that the offense was also committed on other occasions. But you must unanimously agree that the Commonwealth has proved that the defendant committed the offense on at least one of the specific occasions (charged in the complaint) (specified in the bill of particulars).

Where there are several, alternative *methods* for committing an offense (*e.g.,* type of weapon or mental state), jurors need not agree unanimously on the method. But where specific alternative *incidents* (e.g., "divers" dates or times) are charged in a single count, the judge is required on defense request to give a "specific unanimity instruction," charging the jurors that they must agree unanimously as to at least one of those acts or episodes; jurors may not mix non-unanimous findings about several incidents to come up with a general verdict of guilty. *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491 (1991); *Commonwealth v. Conefrey,* 420 Mass. 508, 650 N.E.2d 1268 (1995) (reversible error to refuse instruction where defendant charged with offense "at divers times and dates during 1986" and evidence of several such incidents); *Commonwealth v. Comtois,* 399 Mass. 668, 675-677 & n.11, 506 N.E.2d 503, 508-509 & n.11 (1987); *Commonwealth v. Ramos*, 47 Mass. App. Ct. 792, 798, 716 N.E.2d 676, 680 (1999) (construing *Conefrey*, *supra*); *Commonwealth v. Lemar,* 22 Mass. App. Ct. 170, 172, 492 N.E.2d 105, 106 (1986). Such an instruction is required "only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict him of the crime charged"; it is not required "where the spatial

and temporal separations between acts are short, that is, where the facts show a continuing course of conduct, rather than a succession of clearly detached incidents." *Commonwealth v. Thatch,* 39 Mass. App. Ct. 904, 653 N.E.2d 1121 (1995) (instruction required where jurors might convict while disagreeing about specific act committed out of separate events or episodes; not required where spatial and temporal separation between acts is short and a continuing course of conduct is charged in a single count rather than a succession of detached incidents). See also *Commonwealth v. Sanchez,* 423 Mass. 591, 598-600, 670 N.E.2d 377, 382-383 (1996) (instruction not required where child complainant testified to continuous pattern of abuse but was unable to isolate discrete instances); *Commonwealth v. Medina*, 64 Mass. App. Ct. 708, 835 N.E.2d 300 (2005) (instruction not required in trial of multiple counts of rape of a child where a repetitive pattern of abuse over time and not discrete incidents); *Commonwealth v. Erazo*, 63 Mass. App. Ct. 624, 631, 827 N.E.2d 1288, 1293 (2005) (instruction not required when complainant of indecent assault and battery cannot separate the alleged criminal episodes by giving specific dates and that they are so closely connected as to amount to a single criminal episode); *Commonwealth v. Pimental*, 54 Mass. App. Ct. 325, 329, 764 N.E.2d 940, 946 (2002) (instruction not required in larceny case where there was ample evidence that defendant stole four guns as part of a common scheme or plan).

"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. Keevan,* 400 Mass. 557, 566-567, 511 N.E.2d 534, 540 (1987). For a general unanimity instruction, see Instruction 2.160 (Presumption of Innocence; Burden of Proof; Unanimity).

II. MULTIPLE THEORIES OF CULPABILITY IN ONE COUNT

This instruction is not applicable to the offense of assault. Commonwealth v. Porro, 458 Mass. 526, 393 N.E.2d 1157 (2010); *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010).

The offense of *[offense]* **may be committed in two different ways.** *[Describe different theories of culpability.]* **You may find the defendant guilty only if you all unanimously agree that the Commonwealth has proved beyond a reasonable doubt that the defendant committed the offense in one of those two ways. So you may not find the defendant guilty unless you all agree that the Commonwealth has proved beyond a reasonable doubt that the defendant** *[indicate first theory of culpability]* **, or you all agree that the**

Commonwealth has proved beyond a reasonable doubt that the defendant *[indicate second theory of culpability]* **.**

In the jury room you will have a verdict slip on which to record your verdict. Your foreperson will mark the verdict slip to indicate either that you have unanimously found the defendant not guilty, or that you have unanimously found the defendant guilty because *[indicate first theory of culpability]*, **or that you have unanimously found the defendant guilty because** *[indicate second theory of culpability]* **.**

"[I]n cases involving more than one theory on which the defendant may be found guilty of a crime, separate verdicts on each theory should be obtained" on the verdict slip, and the judge must, on request, instruct the jury that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta,* 422 Mass. 642, 646-647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett,* 422 Mass. 634, 640, 664 N.E.2d 833, 837 (1996). See also *Commonwealth v. Barry,* 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995) (adopting rule for murder cases).

For samples of such verdict slips, see those appended to Instruction 5.300 (OUI-Liquor or with .08% Blood Alcohol Level), Instruction 5.500 (OUI Causing Serious Injury), Instruction 6.140 (Assault and Battery), and Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

The model instruction and the sample verdict slips referenced above are drafted for the common situation in which the alternate legal theories are logically exclusive of one another (e.g., liability as a principal or as an accessory). In a situation where the jury could properly find the defendant guilty under *both* theories (e.g. both receiving and concealing a stolen motor vehicle under G.L. c. 266, § 28), the instruction should be appropriately adapted.

NOTES:

1. **Appellate standard where specific unanimity instruction omitted**. If several offenses occur on divers dates or are otherwise clearly separate incidents, and a specific unanimity instruction has been requested and its omission objected to, the conviction will be reversed, possibly without application of the harmless error analysis. *Commonwealth v. Black*, 50 Mass. App. Ct. 477, 478, 738 N.E.2d 751, 752 (2000). When no objection is made, no risk of a miscarriage of justice will be found if the several offenses transpire in the context of a single criminal episode. The same result is often reached even when the evidence shows multiple acts of the same nature on divers dates. *Id.,* citing, inter alia, *Commonwealth v. Comtois*, 399 Mass. 668, 675-677, 506 N.E.2d 503, 507-509 (1987).

2. **Joint venturer or principal.** When a judge instructs the jury on the defendant's potential liability either as a principal or as a joint venturer, but does not require the jury to specify the theory of liability on which they

rest their verdict, a new trial is required if the evidence supports a finding of either principal or joint venture liability, but not both. However, if the evidence fails to establish who was the principal and who was the joint venturer, the verdict may stand, since the jury would be warranted in convicting the defendant either as the principal or the joint venturer. *Commonwealth v. Williams*, 450 Mass. 894, 898, 882 N.E.2d 850, 854-855 (2008).