

LACK OF CRIMINAL RESPONSIBILITY

You have heard testimony suggesting that the defendant may have been lacking criminally responsibility at the time of the offense with which he (she) is charged. Under the law, a person is not guilty if he (she) lacked criminal responsibility when he (she) committed a crime. This is sometimes referred to as not guilty by reason of insanity. Before the defendant may be found guilty, the Commonwealth must prove beyond a reasonable doubt that he (she) committed the offense charged and that he (she) was sane when he (she) did so.

A person is lacking in criminal responsibility if he (she) has a mental disease or defect, and as a result of that mental disease or defect

either he (she) is substantially unable to appreciate the criminality — the wrongfulness — of his (her) conduct,

or he (she) is substantially unable to conform his (her) conduct to the requirements of the law.

The defendant's mental condition must have been such that he (she) was unable to realize that his (her) behavior was wrong or was unable to make himself (herself) behave as the law requires.

In considering whether or not the defendant was sane, if you feel it appropriate you may take into account that the great majority of people are sane, and that there is a resulting likelihood that any particular person is sane. However, you should also carefully weigh any specific evidence of sanity or insanity that has been presented in this case. You may consider not only the opinions of any psychiatrists who testified, but also all of the other evidence. You are not bound by the statements or opinions of any witness; you may accept or reject any testimony, in whole or in part, as you see fit.

Remember that it is not up to the defendant to prove that he (she) lacked criminal responsibility at the time of the crime. Rather, the burden is on the Commonwealth to prove beyond a reasonable doubt *both* that the defendant committed the crime, *and* that the defendant was sane at the time that he (she) committed the crime.

Therefore, if you have a reasonable doubt whether the defendant committed every one of the required elements of this crime, you must find the defendant not guilty. If you have a reasonable doubt whether the defendant was sane at the time of the crime, then you must find him (her) not guilty by reason of lack of criminal responsibility.

Commonwealth v. McHoul, 352 Mass. 544, 546-547, 226 N.E.2d 556, 557-558 (1967) (adopting definition of insanity from Model Penal Code § 4.01[1] [Proposed Official Draft 1962]).

A defense of lack of criminal responsibility may be raised by “any evidence which, if believed, might create a reasonable doubt concerning the defendant’s criminal responsibility at the time of the [crime].” Expert testimony is not always required to raise such a doubt; the defendant may rely on the facts of the case, the Commonwealth’s witnesses, the testimony of lay witnesses, or any combination. *Commonwealth v. Mills*, 400 Mass. 626, 627-632, 511 N.E.2d 572, 573-576 (1987) (discussing when facts of case alone sufficient to raise insanity issue); *Commonwealth v. Monico*, 396 Mass. 793, 800-801, 488 N.E.2d 1168, 1172 (1986) (collecting cases on that issue); *Commonwealth v. Genius*, 387 Mass. 695, 697-698, 442 N.E.2d 1157, 1159 (1982) (same); *Commonwealth v. O’Brien*, 377 Mass. 772, 784, 388 N.E.2d 658, 664 (1979) (jury need not accept even uncontradicted expert testimony of insanity); *Commonwealth v. Mattson*, 377 Mass. 638, 643-644, 387 N.E.2d 546, 549-550 (1979); *Commonwealth v. Laliberty*, 373 Mass. 238, 245-247, 366 N.E.2d 736, 742 (1977); *Blaisdell v. Commonwealth*, 372 Mass. 753, 764-765, 364 N.E.2d 191, 199-200 (1977) (defendant’s psychiatric records; observations of lay witnesses). “This court’s view has consistently been that ‘[w]here the appropriateness of an insanity instruction is marginal, the better choice would seem to be to err on the side of giving it’” *Mills*, 400 Mass. at 630, 511 N.E.2d at 575.

Once the issue of insanity has been raised, the Commonwealth must prove beyond a reasonable doubt that the defendant was sane at the time of the crime. *Commonwealth v. Kappler*, 416 Mass. 574, 578, 625 N.E.2d 513, 516 (1993); *Commonwealth v. Kostka*, 370 Mass. 516, 531-532, 350 N.E.2d 444, 451 (1976); *Commonwealth v. Smith*, 357 Mass. 168, 177-180, 258 N.E.2d 13, 19-21 (1970). The Commonwealth must prove both the defendant’s substantial capacity to appreciate the wrongfulness of his conduct *and* his substantial capacity to conform his conduct to the requirements of the law. *Commonwealth v. Goudreau*, 422 Mass. 731, 735, 666 N.E.2d 112, 115 (1996). The Commonwealth may rest, in whole or part, on the “presumption of sanity” (although that phrase should not be used with the jury) to overcome even uncontradicted expert evidence of insanity. *Kappler*, 416 Mass. at 579, 585-587, 625 N.E.2d at 516, 520; *Commonwealth v. Matthews*, 406 Mass. 380, 392, 548 N.E.2d 843, 850 (1990); *Commonwealth v. Brown*, 387 Mass. 220, 221-222, 439 N.E.2d 296, 297 (1982); *Kostka*, 370 Mass. at 531-537, 350 N.E.2d at 451; *Commonwealth v. Robinson*, 14 Mass. App. Ct. 591, 594, 441 N.E.2d 553, 556 (1982) (“The ‘presumption of sanity’ is really a short-hand expression for the fact that the majority of people are sane, and the related probability that any particular person is sane”).

The judge may not limit an instruction on lack of criminal responsibility to the specific medical diagnosis raised by defense psychiatric experts, since the burden of proving sanity remains on the Commonwealth and the jury is not bound by any particular definition of “mental disease or defect.” *Commonwealth v. Mulica*, 401 Mass. 812, 520 N.E.2d 134 (1988).

The model instruction draws some phrasing from Federal Judicial Center, *Pattern Criminal Jury Instructions* § 55 (1983 ed.), and *Manual of Model Jury Instructions for the Ninth Circuit* § 6.03 (1985 ed.).

SUPPLEMENTAL INSTRUCTIONS

1. *Consequences of NGI verdict.* I want to explain to you what

could happen to the defendant if he (she) is found not guilty by reason of lack of criminal responsibility.

A judge may order such a person to be hospitalized for an initial 40-day observation period, either at a facility for the mentally ill or, in certain cases, under strict security at Bridgewater State Hospital. During that period, the district attorney or certain mental health personnel may petition the court to commit the person for 6 months.

If it is shown beyond a reasonable doubt that the person continues to be mentally ill and that his (her) discharge would create a likelihood of serious harm to himself or to others, a judge may grant the petition and order the person committed for 6 months. After that, a judge will review the person's mental condition at least once a year, and there may be additional periods of commitment if he (she) continues to be mentally ill and dangerous. If the person is no longer mentally ill and dangerous, he (she) will be discharged.

The district attorney must be notified prior to any hearing about the person's release, and may be heard at any such hearing, but the final decision, either to recommit or to release the person, is always made by a judge.

I have given you this information so that you are not concerned about the possible consequences of the difficult function which you are about to perform. However, now please put the possible consequences of your decision out of your minds when you consider your verdict. You must decide this case solely on the evidence before you, in light of the law as I have explained it to you.

"Where the defense of insanity is fairly raised, the defendant on his timely request, is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity. Such instruction shall also be given on the request of the jury, if the defendant does not object thereto." *Commonwealth v. Mutina*, 366 Mass. 810, 821 & 823 n.12, 323 N.E.2d 294, 301 & 302 n.12 (1975). *Commonwealth v. Robbins*, 422 Mass. 305, 312, 662 N.E.2d 213, 218 (1996) (affirming instruction that included accurate explanation of burden of proof for committing defendant to treatment center); *Commonwealth v. Biancardi*, 421 Mass. 251, 254, 656 N.E.2d 1234, 1235 (1995) (reversible error for judge to refuse defendant's request to instruct jury on consequences of NGI verdict). See also **G.L. c. 123, § 16; *Genius, supra*; *Commonwealth v. Loring*, 14 Mass. App. Ct. 655, 658, 441 N.E.2d 791, 793 (1982)**. Such an instruction is not required sua sponte, *Commonwealth v. Bannister*, 15 Mass. App. Ct. 71, 81, 443 N.E.2d 1325, 1332 (1983), but may be given sua sponte if the defendant does not object, *Commonwealth v. Callahan*, 380 Mass. 821, 826-828, 406 N.E.2d 385, 388-389 (1980).

Callahan, supra, suggests that a judge should not charge (either sua sponte or in response to a jury question) about the consequences of an NGI verdict if the defendant objects to such a charge, but does not indicate whether doing so would be reversible error.

The judge need not give a parallel instruction on the consequences of a simple “not guilty” verdict. *Commonwealth v. Blanchette*, 409 Mass. 99, 108-109, 564 N.E.2d 992, 997-998 (1991).

2. *Mental illness or defect.*

You are not required to adopt any particular definition of “mental illness or defect.” Because it may be of some help to you, I am going to read you the definition of “mental illness” that is used by the Commonwealth’s Department of Mental Health. The Department defines mental illness as “a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life”

104 Code Mass. Regs. § 3.01(a) (defining “mental illness” for purposes of involuntary commitment and determination of criminal responsibility under G.L. c. 123). See *Mills*, 400 Mass. at 635 & n.3, 511 N.E.2d at 577 & n.3 (O’Connor, Nolan and Lynch, JJ., dissenting) (“This court has never defined the words ‘mental disease or defect’ for purposes of the *McHoul* rule”); *Commonwealth v. Shelley*, 381 Mass. 340, 348 n.4, 409 N.E.2d 732, 737 n.4 (1981) (jury not required to adopt any particular definition of “mental disease or defect”); *Laliberty*, *supra* (same).

For a description of Battered Women’s Syndrome, see *Commonwealth v. Conaghan*, 48 Mass. App. Ct. 304, 312, 720 N.E.2d 48, 55 (1999), *rev’d on other grounds*, 433 Mass. 105, 740 N.E.2d 956 (2000).

3. *Alcohol or drug intoxication.*

Intoxication with (alcohol) (drugs) is not by itself a “mental disease or defect” that will support a

finding of lack of criminal responsibility. However, under some circumstances a person's consumption of (alcohol) (drugs) may activate a latent mental disease or defect, apart from the intoxication itself. Such a latent mental disease or defect, once activated, may be the basis for a finding of lack of criminal responsibility, unless the defendant knew or had reason to know that the (alcohol) (drugs) would activate that illness.

Commonwealth v. Herd, 413 Mass. 834, 839-840, 604 N.E.2d 1294, 1298-1299 (1992) (irrelevant if drug-induced mental disease or defect was the "natural and inevitable result of illegal drug use" or was impermanent, but it may not be limited to periods of the defendant's intoxication and it must last "for a substantial time after the intoxicating effects of the drug had worn off"); *Commonwealth v. Blake*, 409 Mass. 146, 157, 564 N.E.2d 1006, 1013 (1991); *Commonwealth v. Brennan*, 399 Mass. 358, 361-363, 504 N.E.2d 612, 614-616 (1987) (alcohol); *Commonwealth v. Doucette*, 391 Mass. 443, 459, 462 N.E.2d 1084, 1096 (1984) (drugs); *Commonwealth v. Shelley*, 381 Mass. 340, 350, 409 N.E.2d 732, 738-739 (1980) (alcohol); *Commonwealth v. Sheehan*, 376 Mass. 765, 767-772, 383 N.E.2d 1115, 1119 (1978) (drugs); *Commonwealth v. McGrath*, 358 Mass. 314, 319-320, 264 N.E.2d 667, 670-671 (1970) (drugs and alcohol).

NOTES:

1. **Advance notice of defense of lack of criminal responsibility.** Where the defendant has failed to give advance notice of a defense of lack of criminal responsibility, Mass. R. Crim. P. 14(b)(2) permits the judge to exclude expert testimony of insanity, but only where the defendant has refused to submit to a court-ordered examination. But the judge may not exclude nonexpert testimony by the defendant or other lay witnesses. *Commonwealth v. Dotson*, 402 Mass. 185, 187-189, 521 N.E.2d 395, 396-397 (1988); *Commonwealth v. Guadalupe*, 401 Mass. 372, 516 N.E.2d 1159 (1987).

2. **Antipsychotic medication.** Where relevant to the issue of the defendant's sanity, a defendant who is under the influence of antipsychotic medication at the time of trial has a right on request: (1) to have the jury observe him or her in an unmedicated state, *Commonwealth v. Louraine*, 390 Mass. 28, 453 N.E.2d 437 (1983), or (2) if he or she continues to take such medication during trial, to present evidence of such to the jury, *Commonwealth v. Gurney*, 413 Mass. 97, 100-104, 595 N.E.2d 320, 322-324 (1992).

3. **Individual voir dire of potential jurors.** "In all future cases in which the defendant indicates that his or her lack of criminal responsibility may be placed in issue and so requests, the judge shall inquire individually of each potential juror, in some manner, whether the juror has any opinion that would prevent him or her from returning a

verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible. It will be in the judge's discretion whether to ask more detailed questions concerning a juror's views of the defense of insanity It may be desirable for the judge to give the entire venire a brief description of the charges and related facts . . . (in a form agreed to by the parties). Such a practice might help identify persons who tend to view as insane anyone who did what the defendant is charged with doing, as well as those who oppose the use of the defense of insanity." *Commonwealth v. Seguin*, 421 Mass. 243, 248-249 & n.6, 656 N.E.2d 1229, 1233 & n.6 (1995), cert. denied, 516 U.S. 1180 (1996).

In such questioning, a judge is not required to ask open-ended questions. A judge sufficiently complied with *Seguin* by asking each juror individually, "One of the issues in this case may be the defendant's mental state at the time the crimes were allegedly committed. In that regard, there may be testimony from psychiatrists and psychologists and other mental health professionals. Do you have any feelings or opinions that would prevent you from considering such testimony in a fair and impartial manner? . . . Do you have any feelings or opinions that would prevent you from returning a verdict of not guilty by reason of insanity if you felt such a verdict was warranted by the evidence? . . . Is there any other reason you know of why you could not serve as a fair, objective and impartial juror in this case?" *Commonwealth v. Lo*, 428 Mass. 45, 48-50 & n.7, 696 N.E.2d 935, 938-940 & n.7 (1998).

4. **"Insanity defense" and "criminal responsibility" terminology.** The term "insanity defense" is a shorthand colloquialism for a claim that the defendant lacked criminal responsibility. *Commonwealth v. Lo*, 428 Mass. 45, 46 n.2, 696 N.E.2d 935, 937 n.2 (1998). Since the phrase "insanity defense" is a legal and not a medical term, it is recommended that it generally be avoided, since repeated references to the "defense" of insanity may mislead the jury as to the burden of proof. "Criminal responsibility" is an appropriate shorthand reference to the *McHoul* standard that may be used by expert witnesses and counsel without running afoul of the prohibition against witnesses testifying in terms of the ultimate issue. *Commonwealth v. Collieran*, 452 Mass. 417, 426-427, 895 N.E.2d 425, 433-434 (2008).

5. **Verdict form.** Where an issue of lack of criminal responsibility is raised, the jury should be given a verdict form with "guilty," "not guilty," and "not guilty by reason of lack of criminal responsibility" options for their verdict. *Commonwealth v. Chandler*, 29 Mass. App. Ct. 571, 581-582, 563 N.E.2d 235, 242 (1990).