FUNCTION OF THE JURY
WHAT IS EVIDENCE
CREDIBILITY OF WITNESSES

Your function as the jury is to determine the facts of this case. You alone determine what evidence you believe, how important any evidence is that you *do* believe, and what conclusions to draw from that evidence. In making these determinations, you are to use your common sense, life experience, and good judgment.

You are to decide what the facts are solely from the evidence admitted in this case. In evaluating the evidence and determining the facts, keep in mind that we all tend to perceive information and form opinions based on our own personal experience and background. This tendency may cause us to hold biases of which we may or may not be conscious. As I previously instructed you, you must not allow bias – whether held consciously or subconsciously – to interfere with your ability to fairly evaluate the evidence, apply the law as I instruct you, or render a fair and impartial verdict based on the evidence before you.

The evidence consists of the testimony of witnesses, as you recall it, (any documents or other things that were received into

evidence as exhibits) (and any fact on which the lawyers have agreed or which I have told you that you may accept as proved).

[See Instruction 2.240 (Direct and Circumstantial Evidence) for additional instructions on direct and circumstantial evidence].

If Bowden defense advanced and judge opts not to give Bowden instruction (Instruction 3.740, "Omissions in Police Investigations"), omit this section, as the references to guesswork, conjecture, and "unanswered questions" can undercut a defendant's Bowden argument. See Commonwealth v. Grier, 490 Mass. 455, 475 (2022); *Commonwealth v. Alvarez*, 480 Mass. 299, 318 (2018)
Otherwise, proceed with instruction as written.

Picture in your minds that all of the evidence – [(testimony) (exhibits) (stipulations)] **– went into a box. That box is now closed**. **Your verdict(s) must be based on what is in the box, together with any reasonable inferences you choose to draw from it.**

Your determination of the facts must not be based on speculation or conjecture. During your deliberations one of you might say, "what about this?" or "what about that?" Well, if the "this" or the "that" is not in the box – if it is mere guesswork – don't consider it.

In short, base your verdict on the evidence and any reasonable inferences you choose to draw from it, but do

not guess or speculate about things about which there is no evidence.

Of course, the quality or strength of the proof is not determined by the sheer volume of evidence or the number of witnesses. It is the *weight* of the evidence that is important.

Some things that occur during a trial are *not* evidence and you may *not* consider them as evidence in deciding the facts of this case. The complaint itself is not evidence. A question put to a witness is never evidence; only the answers are evidence. [(Also, you may not consider any answer that I struck from the record and told you to disregard. Do not consider such answers.) (You may not consider any item that was marked for identification but was never received in evidence as an exhibit.)] Anything that you may have seen or heard when the court was not in session is not evidence.

The opening statements and the closing arguments of the lawyers are not evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. If your memory of the testimony differs from the attorneys', you are to

follow your own recollection. You should not consider anything I have said or done during the trial as any indication of my opinion as to what your verdict(s) should be.

In evaluating a witness's testimony, you have to decide what testimony to believe, and how much weight to give that testimony. You should give the testimony of a witness whatever degree of belief and importance that you judge it is fairly entitled to receive.

You are the sole judges of the credibility of a witness. You may believe everything a witness says, part of it, or none of it. If there are any conflicts, discrepancies, or inconsistencies in the testimony, you should examine them carefully. You may consider whether a witness was candid or guarded, responsive or evasive, and whether the testimony is reasonable or unreasonable, probable or improbable. You may take into account how good an opportunity a witness had to observe the facts about which the witness testifies, and whether the testimony seems accurate. You may also consider evidence, if any, about a witness's motive for testifying, whether a witness displays any bias in testifying, and whether or not a witness has any interest in the outcome of the case.

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence, drawing on your own common sense, life experience, and good judgment.

Consider the evidence as a whole. Do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case, and you and your fellow jurors have discussed the evidence. Keep an open mind until then. Once you have determined the facts, apply the law as I explain it to you to the facts in order to decide the verdict(s).

The credibility of witnesses is always a jury question, *Commonwealth v. Sabean,* 275 Mass. 546, 550 (1931); *Commonwealth v. Bishop,* 9 Mass. App. Ct. 468, 471 (1980), and no witness is incredible as a matter of law, *Commonwealth v. Hill,* 387 Mass. 619, 623-24 (1982); *Commonwealth v. Haywood,* 377 Mass. 755, 765 (1979). Inconsistencies in a witness's testimony are a matter for the jury, *Commonwealth v. Clary,* 388 Mass. 583, 589 (1983); *Commonwealth v. Dabrieo,* 370 Mass. 728, 734 (1976), which is free to accept testimony in whole or in part, *Commonwealth v. Fitzgerald,* 376 Mass. 402, 411 (1978). Disbelief of a witness is not affirmative evidence of the opposite proposition. *Commonwealth v. Swartz,* 343 Mass. 709, 713 (1962).

In charging on credibility, the judge should avoid any suggestion that only *credible* testimony constitutes evidence. See *Commonwealth v. Gaeten,* 15 Mass. App. Ct. 524, 531 (1983).

SUPPLEMENTAL INSTRUCTIONS

1. *Stipulations of fact or stipulation to an element of the offense.* **The Commonwealth and the defendant have agreed, or stipulated, that**

_____. This means that they both agree that this is a fact. You are therefor to treat this fact as undisputed and proved.

"[W]hen the defendant and the Commonwealth have agreed to stipulate to the existence of an element in a case, the stipulation should be placed before the jury before the close of the evidence. Such a rule is consistent with the acknowledged burdens of production and proof that rest with the Commonwealth in a criminal case." *Commonwealth v. Ortiz*, 466 Mass. 475, 484 (2013). It is incumbent on the prosecution to ensure that the stipulation to the element is provided to the jury by some means, and failure to do so may result in a substantial risk of a miscarriage of justice. See *Commonwealth v. Kurko*, 95 Mass. App. Ct. 719, 721-722 (2019).

Under Mass. R. Crim. P. Rule 23, a stipulation to an element of the offense must be memorialized in writing and must be signed by the Commonwealth, defense counsel, and the defendant. It shall be read to the jury prior to the close of the Commonwealth's case in chief and may be introduced as an exhibit.

Where the evidence includes a stipulation to all of the facts, the defendant "in effect relinquishes the same rights as one who pleads guilty," and the judge must offer the defendant "the same safeguards that surround the acceptance of a guilty plea". *Commonwealth v. Hill*, 20 Mass. App. Ct. 130, 132 (1985). See also *Commonwealth v. Castillo,* 66 Mass. App. Ct. 34, 34-35 2006); *Commonwealth v. Brown,* 55 Mass. App. Ct. 440, 448-449 (2002). This must include an oral colloquy on the record, in which the trial judge shall "question the defendant whether he recognizes that 1) he is entitled to confront witnesses against him; 2) the Commonwealth has the burden of proving the offense beyond a reasonable doubt; 3) he may be giving up the right not to incriminate himself; 4) he is giving up the right to cross-examine; and 5) … he is acknowledging evidence likely to lead to a finding of guilty." *Commonwealth v. Monteiro*, 75 Mass. App. Ct. 280, 289 (2009). "[T]he practice of judges allowing criminal trials to be conducted on stipulated evidence has long been disfavored… ." *Commonwealth v. Castillo*, 66 Mass. App. Ct. 34, 34 (2006). See also *Commonwealth v. Gomez*, 480 Mass. 240, 248 (2018) (stipulated evidence trials are disfavored).

2. *Stipulated testimony*. **The Commonwealth and the defendant have agreed, or stipulated, that if** *[name of witness]* **were called as a witness, they would testify that _____. Both parties have agreed that** *[name of witness]* **would give that testimony if called as a witness. You should consider that testimony in the same way as if it**

had been given here in court. As with all witnesses, it is for you to determine how believable and how significant that testimony is.

A stipulation of fact leaves that fact no longer at issue and must be accepted by the jury. By contrast, a stipulation as to testimony does not compel the jury to accept as true all the facts within the stipulated testimony, but permits the jury to accept the stipulated evidence in whole, in part, or not at all. *Commonwealth v. Triplett,* 398 Mass. 561, 570 (1986).

It is not necessary that a stipulation of fact be formally entered as an exhibit. *Sierra Marketing, Inc. v. New England Wholesale Co.,* 14 Mass. App. Ct. 976, 978 (1982). The defendant's willingness to stipulate to a fact does not preclude the Commonwealth from introducing evidence on that issue. *Commonwealth v. Andrews*, 403 Mass. 441, 451 (1988)

3. *Judicial Notice.* **The law permits me to take notice of certain facts that are not subject to reasonable dispute. I have decided to accept as proved the fact that _____. Therefore, you may accept this fact as true, even though no evidence has been introduced about it. You are not required to do so, but you may.**

All factual issues should be submitted to the jury, including matters of which the judge may take judicial notice. *Commonwealth v. Kingsbury,* 378 Mass. 751, 754-755 (1979) (time of sunset); *Commonwealth v. Finegan*, 45 Mass. App. Ct. 921, 923 (1998). See Mass. G. Evid. § 201(e) (2024) ("In a criminal case, the court must instruct the jury that it may or may not accept the noticed facts as conclusive").

The general rule in Massachusetts is that courts do not take judicial notice of regulations; they must be put in evidence. *Shafnacker v. Raymond James & Assocs., Inc.*, 425 Mass. 724, 730 (1997). This rule has been overridden in part by G.L. c. 30A, § 6, which requires judicial notice of regulations published in the Code of Massachusetts Regulations. *Shafnacker, supra,* 425 Mass. at 730 n.7.

4. *Discrepancies in testimony.* **In evaluating testimony, you may find inconsistencies or discrepancies. They may or may not cause you to discredit such testimony. Consider whether they involve**

important facts or only minor details, and whether any inconsistencies or discrepancies result from innocent lapses of memory or intentional falsehoods.

5. *Prejudice.* **It would be improper for you to allow any feelings you might have about the nature of the crime to interfere with your decision. Any person charged with any crime is entitled to the same presumption of innocence, and the Commonwealth has the same burden of proving the defendant's guilt beyond a reasonable doubt.**

The fact that the prosecution is brought in the name of the Commonwealth entitles the prosecutor to no greater consideration and no less consideration than any other litigant, since all parties are entitled to equal treatment before the law.

The word "verdict" comes from two Latin words meaning "to say the truth," and that is what the law looks to your verdict(s) to do based solely on the evidence in the case. Justice is done when a verdict is returned based on the evidence and the law regardless of whether that verdict is guilty or not guilty.

Commonwealth v. Smith, 387 Mass. 900, 909-10 (1982) (verdict must be based on evidence and not sympathy); *Commonwealth v. Fitzgerald,* 376 Mass. 402, 424 (1978) (verdict may not be based on sympathy for victim or general considerations); *Commonwealth v. Clark,* 292 Mass. 409, 411 (1935) (jury should be both impartial and courageous); *Commonwealth v. Anthes,* 5 Gray 185, 197-98 (1855) (jury's judgment is

conclusive of facts in case); *Commonwealth v. Carney,* 31 Mass. App. Ct. 250, 254 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies); *Commonwealth v. Ward,* 28 Mass. App. Ct. 292, 296 (1990).

6. *Sympathy.* **In many criminal cases there is an element of sympathy which surrounds the trial. You may not permit sympathy to affect your verdict(s).**

The model instruction is drawn from *Commonwealth v. Harris,* 28 Mass. App. Ct. 724, 733 n.5 (1990). It may be appropriate where the trial is for a particularly emotional offense, such as vehicular homicide.

7. *Juror equality*. **No juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict than any other juror (or solely because of that juror's occupation, education, experience, or any other characteristic).**

G.L. c. 234A, § 70 provides that this instruction must be given upon motion of either party or whenever the court deems it appropriate. *Commonwealth v. Oram,* 17 Mass. App. Ct. 941, 942-43 (1983).

8. *Judge's questions.* **I want to reemphasize my instruction that you draw no conclusions from the fact that on occasion I asked questions of some witnesses. I intended those questions only to clarify or expedite matters. They were not intended to suggest any opinions on my part about your verdict or about the credibility of any**

witness. You should understand that I have no opinion as to the verdict you should render in this case.

9. *Interested witnesses.* **The fact that a witness may have some interest in the outcome of this case doesn't mean that the witness isn't trying to tell you the truth as that witness recalls it or believes it to be. But the witness's interest is a factor that you may consider along with all the other factors.**

10. *Sentencing consequences.* **Your function as the jury is to find the facts and to decide whether, on those facts, the defendant is guilty or not guilty of the crime charged. By contrast, my function as the judge is to impose sentence if the defendant is found guilty. You are not to consider the sentencing consequences of your verdict at all, so please put any issues about sentencing out of your mind.**

Shannon v. United States, 512 U.S. 573, 579 (1994); *Rogers v. United States,* 422 U.S. 35, 40 (1975).

11. *Prosecution witnesses with plea agreement.* **In this case, you heard the testimony of** *[prosecution witness]* **, and you heard that they are testifying under an agreement. You should examine that witness's testimony with particular care. In evaluating their credibility, along**

with all of the other factors I have already mentioned, you may consider that agreement and any hopes that they may have about receiving future benefits.

[*Do not read the next two paragraphs unless evidence that the witness has agreed to provide "truthful" testimony has been admitted.*]

You are the sole judges of the credibility of a witness. The prosecutor is not in a position to have any specialized knowledge about whether the witness's testimony is truthful or not. You must disregard any suggestion that the government or prosecutor believes or doesn't believe any part of their testimony.

It is up to you to determine whether the witness's testimony has been affected by their interest in the outcome of the case or by any benefits that they have received or hope to receive.

When a prosecution witness testifies under a plea agreement that is disclosed to the jury and which makes the prosecution's promises contingent on the witness's testifying truthfully, the judge must "specifically and forcefully" charge the jury to use particular care in evaluating such testimony, in order to dissipate the vouching inherent in such an agreement. "We do not prescribe particular words that a judge should use. We do expect, however, that a judge will focus the jury's attention on the particular care they must give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth." *Commonwealth v. Ciampa,* 406 Mass. 257, 266 (1989). "'When a prosecution witness testifies pursuant to a plea agreement containing a promise to tell the truth, and the jury are aware of the promise, the judge should warn the jury that the government does not know whether the witness is telling the truth.'" See also

Commonwealth v. Shepherd, 493 Mass. 512, 530 (2024), quoting *Commonwealth v. Meuse*, 423 Mass. 831, 832 (1996).

The *Ciampa* rule is not triggered where the prosecution's promises were already fully performed prior to the testimony, and there is nothing before the jury suggesting that the plea agreement was contingent on the witness's veracity or the Commonwealth's satisfaction. *Commonwealth v. James,* 424 Mass. 770, 785-87 (1997).

NOTES:

1. **Implicit bias instructions.** On September 29, 2021, the Supreme Judicial Court promulgated two model jury instructions on implicit bias to "be given at all criminal and civil trials, during the preliminary charge following empanelment and during the final charge prior to deliberations." The SJC "recommended that trial judges use the language of the Instructions unless the judge determines that different language would more accurately or clearly provide comparable guidance to the jury or better promote the fairness of the trial." The District Court Committees on Racial and Ethnic Fairness and Criminal proceedings collaborated to issue three instructions with language about implicit bias in March of 2019, prior to the release of the SJC's instructions. Those instructions are to be given to the jury both at empanelment, in preliminary instructions after empanelment, and in final instructions on evaluating the evidence. The language within this instruction is modeled on District Court Model Instructions 1.100, 1.120 and 2.120. The trial judge should evaluate, with input from the parties, whether to use the SJC's proposed model Instructions, these District Court instructions or a combination of the two. The SJC's instructions are available on mass.gov: Supreme Judicial Court Model Jury Instructions on Implicit Bias | Mass.gov .

2. **Defendant as witness.** Although federal cases have held that it is permissible to charge the jury that they may consider the defendant's inherent bias in evaluating his or her credibility as a witness, the better practice is not to single out the defendant for special comment. *United States v. Rollins*, 784 F.2d 35 (1st Cir. 1986); *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969). See *Reagan v. United States*, 157 U.S. 301 (1895).

3. **Specific classes of witnesses.** Generally, it is in the judge's discretion whether to include additional instructions about specific classes of witnesses, such as police officers, *Commonwealth v. Anderson,* 396 Mass. 306, 316 (1985); *Commonwealth v. A Juvenile,* 21 Mass. App. Ct. 121, 125 (1985), or children, *Commonwealth v. Figueroa,* 413 Mass. 193, 197-198 (1992). While an exceptional case "may be conceived of where the judge would be bound to particularize on the issue of credibility," no such case has been reported in Massachusetts. *A Juvenile, supra*. If additional, specific instructions are given in the judge's discretion, they must not create imbalance or indicate the judge's belief or disbelief of a particular witness. *Id*.

See Instruction 3.540, Credibility of Witnesses: Children and Individuals with Cognitive and/or Intellectual Differences, for an optional charge.

4. **Interested witnesses.** The defense is not entitled to require the judge to refrain from instructing the jury that, in assessing the credibility of a witness, they may consider the witness's interest in the outcome of the case. It is appropriate for a judge to mention that interest in the case is one of the criteria for assessing the credibility of witnesses, as long as the judge does so evenhandedly. *Commonwealth v. Ramos,* 31 Mass. App. Ct. 362, 368-69 (1991).

5. **Witness's violation of sequestration order.** It is within the judge's discretion whether to admit or exclude the testimony of a witness who violates a sequestration order. *Commonwealth* v.

Jackson, 384 Mass. 572, 582 (1981). See *Commonwealth v. Sullivan,* 410 Mass. 521, 528 n.3 (1991), for a charge on a witness's violation of a sequestration order.

6. **Witnesses and cooperation agreement**. A prosecutor may not inquire about the requirement that a cooperating witness be truthful unless the witness's credibility is first attacked based on the agreement. *Commonwealth* v. *Webb*, 468 Mass. 26, 33 (2014). The signatures of the witness's attorney and the prosecutor should be redacted from any plea agreement entered as an exhibit. *Webb*, *supra*, at 34. It is preferable to have the cautionary instruction given prior to the testimony as well as in the final instructions. *Webb*, *supra*, at 35.

7. Limiting instruction on character evidence not required sua sponte. Although prompt cautionary instructions to the jury are critical to protecting a defendant against prejudice where character evidence is admitted, there is no requirement that the judge give limiting instructions sua sponte. *Commonwealth v. Sullivan*, 436 Mass. 799, 809 (2002). Nor does the lack of a limiting instruction necessarily create a substantial likelihood of a miscarriage of justice. *Id.*

8. Negative answer to leading question. When a witness on cross-examination answers a leading question in the negative, the facts suggested by the question do not constitute evidence for the jury's consideration. *Commonwealth v. Judge*, 420 Mass. 433, 452 n.12 (1995). See also *Commonwealth v. Bailey*, 12 Mass. App. Ct. 104, 106 n.2 (1981).