

LESSER INCLUDED OFFENSES

The offense of _____ includes the lesser offense of _____. As a matter of law, the complaint that is before you which charges the defendant with _____ also charges him (her) with that lesser included offense.

The Commonwealth may prove the lesser included charge of _____ even if it fails to prove the greater charge of _____. You may find the defendant guilty of _____ *[lesser included offense]* only if you are *not* convinced beyond a reasonable doubt that the defendant is guilty of _____ *[greater offense]*, and you *are* convinced beyond a reasonable doubt that the defendant *is* guilty of _____ *[lesser included offense]*.

Here instruct on elements of lesser included offense.

The model charge is adapted in part from *Recommended Arizona Jury Instructions (Criminal)* § 1.03 (1980), and from *Manual of Model Jury Instructions for the Ninth Circuit* § 3.03 (1985 ed.).

NOTES:

1. **Subsumed in greater charge.** The jury may render a verdict convicting the defendant of a lesser included offense and acquitting the defendant of the greater offense charged. G.L. c. 278, § 12 (felonies). *Commonwealth v. Gosselin*, 365 Mass. 116, 118-120, 309 N.E.2d 884, 886-887 (1974) (misdemeanors). One crime is a lesser included offense of another if each of its elements is also an element of the other crime. *Commonwealth v. Perry*, 391 Mass. 808, 813, 464 N.E.2d 389, 393 (1984); *Commonwealth v. Parenti*, 14 Mass. App. Ct. 696, 704, 442 N.E.2d 409, 413 (1982). Conversely, if each crime requires proof of an additional fact that the other does not, neither is a lesser included offense of the other. *Commonwealth v. Jones*, 382 Mass. 387, 393, 416 N.E.2d 502, 506 (1981). See *Morey v. Commonwealth*, 108 Mass. 433, 434 (1981).

2. **When charge required or permitted.** The judge must, on request, charge the jury concerning a lesser included offense if the evidence provides a rational basis for acquitting the defendant of the greater crime

charged and convicting on the lesser included offense. *Commonwealth v. Hawkins*, 388 Mass. 1014, 447 N.E.2d 665 (1983); *Commonwealth v. Costa*, 360 Mass. 177, 184, 274 N.E.2d 802, 807 (1971); *Commonwealth v. Thomas*, 21 Mass. App. Ct. 183, 187, 486 N.E.2d 66, 69 (1985); *Commonwealth v. Dreyer*, 18 Mass. App. Ct. 562, 566, 468 N.E.2d 863, 867 (1984). The judge need not consider all possible factual scenarios subsumed in the evidence, no matter how unreasonable, but only whether the proof on the element that distinguishes the greater from the lesser crime was sufficiently in dispute at the trial so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser offense. *Commonwealth v. Egerton*, 396 Mass. 499, 502-505, 487 N.E.2d 481, 485-486 (1986); *Commonwealth v. Lashway*, 36 Mass. App. Ct. 677, 683, 634 N.E.2d 930, 934 (1994); *Commonwealth v. Thayer*, 35 Mass. App. Ct. 599, 602, 624 N.E.2d 572, 575 (1993), *aff'd*, 418 Mass. 130, 634 N.E.2d 576 (1994).

Even if supported by the evidence, such an instruction is not required if neither party requests it. *Commonwealth v. Roberts*, 407 Mass. 731, 737, 555 N.E.2d 588, 592 (1990). If the judge is inclined to give such an instruction *sua sponte*, neither the Commonwealth nor the defense have any right to object to the instruction in order to pursue an "all or nothing" strategy, *Thayer*, 35 Mass. App. Ct. at 603 n.9, 624 N.E.2d at 575 n.9; *Commonwealth v. Vasquez*, 27 Mass. App. Ct. 655, 660, 542 N.E.2d 296, 299 (1989); *Commonwealth v. Pizzotti*, 27 Mass. App. Ct. 376, 384-385, 538 N.E.2d 69, 74 (1989), but neither does the judge have any duty to undercut an "all or nothing" strategy by giving the instruction, *Commonwealth v. Matos*, 36 Mass. App. Ct. 958, 962, 634 N.E.2d 138, 142 (1994). The parties are entitled to know at the charge conference whether the judge will give such an instruction. See Mass. R. Crim. P. 24(b); *Thayer*, 418 Mass. at 134, 634 N.E.2d at 579.

It is error to charge over defense objection on a lesser included offense not supported by the evidence. *Commonwealth v. Lee*, 383 Mass. 507, 513-514, 419 N.E.2d 1378, 1383 (1981); *Commonwealth v. Caine*, 366 Mass. 366, 374-375, 318 N.E.2d 901, 908 (1974). The judge should not charge on a lesser included offense not supported by the evidence even when the defense requests such a charge, since doing so improperly invites the jury to pick between offenses so as to determine the degree of punishment, a matter reserved to the judge. *Thayer*, 35 Mass. App. Ct. at 603, 624 N.E.2d at 575-576; *Commonwealth v. Santo*, 375 Mass. 299, 305-306, 376 N.E.2d 866, 871 (1978); *Commonwealth v. McKay*, 363 Mass. 220, 228, 294 N.E.2d 213, 219 (1973).

The judge cannot rely on a defense assertion that one offense is a lesser included offense of another, since "the parties may not by consent, conduct, or waiver confer jurisdiction on the court" over an offense that is not in law a lesser included offense of a crime charged. *Commonwealth v. Rowe*, 18 Mass. App. Ct. 926, 927, 465 N.E.2d 1220, 1221 (1984).

3. **Jury nullification.** When the judge charges as to a lesser included offense, the judge should also charge the jury that they have a duty, if they conclude that the defendant is guilty, to return a verdict of guilty of the highest crime which has been proved beyond a reasonable doubt. *Commonwealth v. Fernette*, 398 Mass. 658, 667-668, 500 N.E.2d 1290, 1296 (1986); *Commonwealth v. Dickerson*, 372 Mass. 783, 397, 364 N.E.2d 1052, 1061 (1977).

4. **When charged in separate count.** If greater and lesser included offenses are charged in separate counts, generally the Commonwealth is not required to elect among them before trial. If guilty verdicts are returned on more than one, the judge should then dismiss the lesser included count(s). *Commonwealth v. Crocker*, 384 Mass. 353, 358 n.6, 424 N.E.2d 524, 528 n.6 (1981); *Jones*, 382 Mass. at 395 n.10, 416 N.E.2d at 507 n.10.

See generally *Jury Trial Manual for Criminal Offenses Tried in the District Court* §§ 2.01, 2.75 and 2.86.