AIDING OR ABETTING

(Formerly JOINT VENTURE)

The Supreme Judicial Court recommends that judges incorporate instructions regarding aiding and abetting into the elements of the crime. "For instance, in cases charging murder in the first degree where two or more persons may have participated in the killing, the first element, 'that the defendant committed an unlawful killing,' should be changed to 'that the defendant knowingly participated in the commission of an unlawful killing.'" Commonwealth v. Zanetti, *454 Mass. 449 (2009). The following instruction may be given following the judge's explanation of the elements of the specific offense.*

Where there is evidence that more than one person may have participated in the commission of a crime, the Commonwealth must prove two things beyond a reasonable doubt:

First: **that the defendant knowingly and intentionally participated in some meaningful way in the commission of the alleged offense, alone or with (another) (others), and**

Second: **that the defendant did so with the intent required for that offense.**

The Commonwealth must prove that the defendant intentionally participated in the commission of a crime as something they wished to bring about, and sought by their actions to make succeed. Such participation may take the form of:

(personally committing the acts that constitute the crime) *or*

(aiding or assisting another person in those acts) *or*

(asking or encouraging another person to commit the crime) *or*

(helping to plan the commission of the crime) ***or***

(agreeing to stand by, or near, the scene of the crime to act as lookout) ***or***

(agreeing to provide aid or assistance in committing the crime)

or

(agreeing to help in escaping if such help becomes necessary).

An agreement to help if needed does not need to be made through a formal or explicit written or oral advance plan or agreement. It is enough to act consciously together before or during the crime with the intent of making the crime succeed.

The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime charged, *[identify the crime charged if needed to avoid confusion]* **, they had or shared the intent required for that crime. You are permitted, but not required, to infer the defendant's mental state or intent from their knowledge of the circumstances or any subsequent participation in the crime. The inferences that you draw must be reasonable, and you may rely on your experience and common sense**

in determining from the evidence the defendant's knowledge and intent.

See *Commonwealth v. Zanetti*, 454 Mass. 449, 470-471 (2009).

SUPPLEMENTAL INSTRUCTIONS

1. *Mere presence.* **Our law does not allow for guilt by association. Mere presence at the scene of the crime is not enough to find a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that they knew about it in advance. There must be proof that the defendant intentionally participated in committing the particular crime, not just that they were there or knew about it.**

2. *Presence not required.* **Presence at the scene of the crime is not required. If the Commonwealth has proved that the defendant knowingly and intentionally participated in the offense with the intent required for that offense, the Commonwealth is not required to prove that the defendant was physically present at the scene at the time of the crime.**

See *Commonwealth v. Carrillo*, 483 Mass. 269, 291 (2019), citing *Zanetti*, 454 Mass. at 462, 467.

3. *Mere knowledge.* **Mere knowledge that the crime was to be committed is not sufficient to convict the defendant. The Commonwealth must prove more than mere association with a perpetrator of the crime, either before or after its commission. (Even evidence that the defendant agreed with another person to commit the crime would be insufficient to support a conviction if the defendant did nothing more.) The Commonwealth must prove more than a failure to take appropriate steps to prevent the commission of the crime. Some active participation in, or furtherance of, the criminal enterprise is required in order**

to prove the defendant guilty.

4. *Withdrawal from joint venture.* **The defendant is not guilty of a crime if they withdrew from or abandoned it in a timely and effective manner. A withdrawal is effective only if it is communicated to the other persons involved, and only if it is communicated to them early enough so that they have a reasonable opportunity to abandon the crime as well. If the withdrawal comes so late that the crime cannot be stopped, it is too late and is ineffective.**

If the evidence raises a question whether the defendant withdrew from participation, then the Commonwealth has the burden of proving to you beyond a reasonable doubt that the defendant did not withdraw. If the Commonwealth does not do so, then you must find the defendant not guilty.

See *Commonwealth v. Tillis*, 486 Mass. 497, 504 (2020); *Commonwealth v. Miranda*, 458 Mass. 100, 118 (2010); *Commonwealth v. Pucillo*, 427 Mass. 108, 116 (1998); *Commonwealth v. Cook,* 419 Mass. 192, 201-202 (1994) (instruction required only where supported by evidence, viewed in light most favorable to defendant). See also *Commonwealth v. Hogan*, 426 Mass. 424, 434 (1998) ("In the case of multiple crimes committed by joint venturers and the issue of withdrawal, an instruction about withdrawal should point out, when the evidence warrants, that a defendant can be found guilty as a joint venturer of an initial crime but then can effectively withdraw so as to avoid culpability for a subsequent crime.")*; Commonwealth v. Fickett*, 403 Mass. 194, 201 (1988) (defendant may argue to jury, alternately, that he never entered a joint venture and that if he did he also timely withdrew).

5. *Joint participant hearsay exception.* **You may consider against an individual defendant any statements made by another (defendant) (alleged participant in a joint venture) only if three things about that statement have been proved to be more likely than not: *First,* that other evidence apart from that statement shows that the speaker and this defendant were participating with each other in the commission of the crime; *Second,* that the statement was made during the commission or in furtherance of the crime; and *Third,* that the statement was made in order to further or help along the goal of committing the crime. Only if those three things have been proved to be more likely than not are you allowed to consider the statement of another (defendant) (alleged participant) when you are considering the charges against (a defendant other than the speaker) (the defendant).**

The statement of one participant during and in furtherance of the crime is admissible against other participants. See *Commonwealth v. Winquist*, 474 Mass. 517, 520-521 (2016); *Commonwealth v. Carriere*, 470 Mass. 1, 8 (2014); *Commonwealth v. Burton*, 450 Mass. 55, 63 (2007); *Commonwealth v. Bonzargone*, 390 Mass. 326, 340 (1983). See also Mass. G. Evid. § 801 (d)(2)(E) and notes (2024). See note 3.

NOTES:

1. **No distinction between a principal and a joint venturer.** In *Commonwealth* v. *Zanetti,* 454 Mass. 449, 464 (2009), the Supreme Judicial Court renounced "the false distinction between a principal and an accomplice," holding, "We, therefore, now adopt the language of aiding and abetting rather than joint venture for use in trials that commence after the issuance of the rescript in this case. When there is evidence that more than one person may have participated in the commission of the crime, judges are to instruct the jury that the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense." *Id*. at 467.

2. **Accessory after the fact.** Unlike a participant, an accessory after the fact to a felony is not involved in the planning or execution of the crime and need not have advance knowledge of it. Accessory after the fact is a separate crime, under G.L. c. 274, § 4, over which the District Court does not have jurisdiction. See G.L. c. 218, § 26.

3. **Anticipatory compact not required.** Unlike a conspiracy charge, "there is no need to prove an anticipatory compact between the parties to establish joint venture … if, at the climactic moment[,] the parties consciously acted together in carrying out the criminal endeavor." *Commonwealth v. Silvia*, 97 Mass. App. Ct. 151, 157 (2020), citing *Commonwealth* v. *McCray*, 93 Mass. App. Ct. 835, 843 (2018), quoting *Commonwealth* v. *Sexton*, 425 Mass. 146, 152 (1997). For that reason, the acquittal of all codefendants on a conspiracy charge does not collaterally estop the Commonwealth from later trying them on a joint venture charge. See *Commonwealth v. Benson*, 389 Mass. 473, 478 (1983); *Commonwealth v. DeCillis*, 41 Mass. App. Ct. 312, 314 (1996). "The shared purpose of joint venturers in the commission of a substantial offense differs from the prior agreement to commit the offense that is the essence of a conspiracy...As a general rule,...the agreement that must be shown to prove a conspiracy is a meeting of the minds of the conspirators separate and distinct from and prior to the common intent that is implicit in the commission of the substantive crime." *DeCillis*, 41 Mass. App. Ct. at 314. Except in situations where concerted advance planning is necessarily implied in the substantive offense, a jury might acquit joint venturers of a conspiracy charge because there was insufficient proof on an antecedent, agreed-upon plan. *Id*. at 315.

4. **Joint venturer hearsay exception**. Statements of coventurers are considered to be reliable and equivalent to a statement by the defendant. See *Commonwealth v. Carriere*, 470 Mass. 1, 8 (2014) citing *Commonwealth v. Stewart*, 454 Mass. 527, 535 (2009). Before statements of co-conspirators may be admitted, the trial judge must determine whether the Commonwealth has established the existence of a joint venture and the defendant's involvement in it by a preponderance of the evidence, independent of the joint venturers' statements. See *Commonwealth v. Samia*, 492 Mass. 135, 142 (2023); *Winquist*, 474 Mass. at 521, citing *Carriere*, 470 Mass. at 8. "If the judge is satisfied that the Commonwealth has met this burden, the statement may be admitted, and the jury are instructed that they may consider the statements only if they find that a joint venture existed independent of the statements, and that the statements were made in furtherance of that venture." *Winquist, supra* (citation omitted). Before considering joint venture hearsay statements, "the jury must still 'make an independent determination of the existence of a common undertaking' by a preponderance of the evidence" and must be instructed about that burden of proof. *Commonwealth v. Steadman*, 489 Mass. 372, 380 n. 9 (2022), quoting *Commonwealth* v. *Bright*, 463 Mass. 421, 430, 434 (2012). The rule applies even in severed trials. *Commonwealth v. Florentino*, 381 Mass. 193, 194 (1980).

"'It is well established that the joint venture [exemption] to the hearsay rule does not apply to statements made after the joint venture has ended.'" *Commonwealth v. Chalue*, 486 Mass. 847, 875

(2021), quoting *Commonwealth* v. *Winquist*, 474 Mass. at 522. The exception does not apply "after the criminal enterprise has ended, as where a joint venturer has been apprehended and imprisoned. At that point, the joint venturers no longer share the commonality of interests which is some assurance that their statements are reliable." *Commonwealth v. Colon-Cruz*, 408 Mass. 533, 543 (1990). Statements made after the completion of a crime may be admissible if made by joint venturers in an effort to conceal the crime. See *Commonwealth v. Winquist*, 474 Mass. at 522-524; *Commonwealth v. Angiulo*, 415 Mass. 502, 519 (1993). "The inquiry focuses not on whether the crime has been completed, but on whether a joint venture was continuing." *Commonwealth v. Stewart*, 454 Mass. 527, 537 (2009). While statements must usually be made during and in furtherance of the joint venture in order to be admissible, there is a "narrow exception" for statements involving preparation to enter a joint venture or where statements of intent to join a joint venture are relevant and necessary to understand the history of the joint venture. See *Commonwealth v. Samia*, 492 Mass. 135, 143 n. 4 (2023), citing *Commonwealth v. Rakes*, 478 Mass. 22, 38-39 (2017).

5. **Co-venturers tried separately.** Joint venturers need not be tried together. *Commonwealth* v. *Cifizzari,* 397 Mass. 560, 575 (1986). Where warranted by the evidence, a joint venture charge may be appropriate even where a single defendant is on trial, to indicate that the defendant need not have acted alone. *Commonwealth v. Dyer*, 389 Mass. 677, 682-683 (1983). A joint venture charge is permissible even if the alleged co-venturer was previously acquitted at a separate trial. *Commonwealth* v. *Jones*, 403 Mass. 279, 289-290 (1988). "'It is not necessary for the Commonwealth to prove the identity of the other joint venturer or joint venturers, as long as the evidence supports the existence of some principal other than the defendant and that the defendant shared that other's intent and was available to help if needed.'" *Commonwealth v. Williams*, 450 Mass. 645, 652 (2008), quoting *Commonwealth* v. *Gonzalez*, 443 Mass. 799, 806 (2005).

6. **Knowledge of coventurer's weapon. "**In the case of a crime that does *not* include possession or use of a dangerous weapon as an element, there is no need to prove the defendant's knowledge of the presence of the weapon in order to convict on a joint venture theory." See *Commonwealth v. Rosa*, 468 Mass. 231, 245 (2014), citing *Commonwealth v. Britt,* 465 Mass. 87, 99-100 (2013). "The Commonwealth should bear the burden of proving only that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element." *Britt*, 465 Mass. at 100.

7. **Lookout liability.** "A person who acts as a lookout while others are engaged in a criminal enterprise can be convicted on a joint enterprise theory." *Commonwealth* v. *Miranda*, 441 Mass. 783, 791 (2004). Although merely "looking up and down the street" does not implicate a defendant as a "lookout," additional evidence may permit an inference that a defendant contributed more than mere presence to a crime. See *id.* See also *Commonwealth v. Lara*, 58 Mass. App. Ct. 915, 916 (2003) (listing "plus factors" of "incriminating evidence of something other than presence") (internal quotations omitted); *Commonwealth v. DeJesus*, 48 Mass. App. Ct. 911, 911-912 (1999) (finding additional factors where defendant hung out window of target apartment, looking up and down the street, and was later found there with four others, surrounded by drugs, cash, and packaging materials); *Commonwealth v. Velasquez*, 48 Mass. App. Ct. 147, 150 (1999) (finding additional factors where defendant disposed of illegal drugs and made threatening remarks to police).

8. **Mere presence.** If the defendant was present at the scene of the crime but denies participation, or knew that a crime was planned but denies aiding it, the jury should be instructed that "mere presence coupled with the failure to take affirmative steps to prevent the crime is insufficient, as is simple knowledge that a crime will be committed, even if evidence of such knowledge is supplemented by

evidence of subsequent concealment of the completed crime." *Commonwealth v. Bonner*, 489 Mass. 268, 277 (2022), quoting *Commonwealth v. Ortiz,* 424 Mass. 853, 859 (1997).

9. **Conviction as principal.** "The jury are not required to conclude unanimously that the defendant was either the principal or the joint venturer, so long as sufficient evidence exists to support either role." *Commonwealth v. Ellis*, 432 Mass. 746, 761 (2000). See also *Commonwealth v. Silva*, 471 Mass. 610, 621 (2015); *Commonwealth v. Gonzalez*, 68 Mass. App. Ct. 620, 628 (2007).

10. **Specific unanimity instruction not required; use of general verdict slip proper.** A specific unanimity instruction or bifurcated verdict slip should not be used, and a general verdict slip is properly used. *Commonwealth* v. *Santos*, 440 Mass. 281 (2003); *Commonwealth v. Ramos,* 31 Mass. App. Ct. 362, 367-368 (1991). The Supreme Judicial Court held that the trial judge may "furnish the jury with a general verdict even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice; and (3) on conviction, examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime." *Zanetti*, 454 Mass. at 466-467. "We continue to permit the trial judge to furnish the jury with a general verdict slip even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice. Now, however, on appeal after a conviction, we will examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime, rather than examine the sufficiency of the evidence separately as to principal and joint venture liability. *Zanetti*, 454 Mass. at 468.