

LACK OF CRIMINAL RESPONSIBILITY

If the Commonwealth has proved the elements of the offense beyond a reasonable doubt, the Commonwealth must also prove beyond a reasonable doubt that the defendant was criminally responsible at the time of the alleged offense. Under the law, a person is not guilty if they lacked criminal responsibility when they committed the offense. This is sometimes referred to as not guilty by reason of insanity. There is no burden on the defendant to prove that they lacked criminal responsibility.

The Commonwealth may meet its burden of proving a defendant was criminally responsible for their conduct in either of two ways.

The first way is for the Commonwealth to prove beyond a reasonable doubt that the defendant did not suffer from a mental disease or defect at the time of the alleged offense.

A mental disease or defect need not fit into a formal medical diagnosis. It is a legal term, not a medical term. It does not, however, include an abnormality that presents itself only by repeated criminal or otherwise antisocial behavior. It is for you to determine from the evidence whether the defendant had a mental disease or defect at the time of the alleged offense.

See *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300, 328 (2010) ("We have previously indicated that a judge is not required to define "mental disease or defect" but has discretion to provide the instructions that are appropriate to the context"); *Commonwealth v. Fuller*, 421 Mass. 400, 411 (1995) ("This court has declined to impose any obligation on a trial judge to provide a further explanation of the terms in issue here Our unwillingness to impose a mandatory instruction arises not because the term 'mental disease or defect' is so clear on its face that such an explanation would be superfluous. The reason may well be the opposite; the subject is so complex and obscure that any general explanatory formula is likely to mislead and confuse"). Cf. *Commonwealth v. Mulica*, 401 Mass. 812, 816-820 (1988) (mental disease and defect instruction focusing jury on one particular type of mental disease or defect may have limited jury's consideration of other types of mental disease or defects and improperly reduced Commonwealth's burden).

The second way for the Commonwealth to prove a defendant was criminally responsible for their conduct is for the Commonwealth to prove beyond a reasonable doubt that, even if the defendant suffered from a mental disease or defect at the time of the alleged offense, the defendant nonetheless retained the substantial capacity to appreciate the wrongfulness or criminality of their conduct and to conform their conduct to the requirements of the law.

To establish that the defendant had the substantial capacity to appreciate the wrongfulness or criminality of their conduct, the Commonwealth must prove beyond a reasonable doubt that the defendant appreciated – that is, that the defendant knew or understood in some meaningful way – that their conduct was either illegal or wrong.

To establish that the defendant had the substantial capacity to conform their conduct to the law's requirements, the Commonwealth

must prove beyond a reasonable doubt that any mental disease or defect that may have existed at the time of the alleged offense did not deprive the defendant of their ability to behave as the law requires – that is, to obey the law.

[If there is evidence that the defendant had a mental disease or defect and consumed drugs or alcohol, continue with Supplemental 1. If not, continue here]

To summarize, if the Commonwealth proved beyond a reasonable doubt that the defendant did not have a mental disease or defect at the time of the alleged offense, the Commonwealth has satisfied its burden of proving that the defendant was criminally responsible.

Alternatively, if the Commonwealth proved beyond a reasonable doubt that, even if the defendant did suffer from a mental disease or defect at the time of the alleged offense, the defendant nonetheless retained the substantial capacity to appreciate the wrongfulness or criminality of their conduct and to conform their conduct to the requirements of the law, the Commonwealth has satisfied its burden of proving the defendant was criminally responsible.

Remember that there is no burden on the defendant to prove that they lacked criminal responsibility at the time of the offense.

Rather, the burden is on the Commonwealth to prove beyond a reasonable doubt *both* that the defendant committed the offense, *and* that the defendant was criminally responsible at the time that they committed the offense.

If you have a reasonable doubt whether the defendant committed any one of the required elements of the alleged offense, you must find the defendant not guilty. If you have a reasonable doubt whether the defendant was criminally responsible at the time of the offense, you must find the defendant not guilty by reason of a lack of criminal responsibility.

Commonwealth v. McHoul, 352 Mass. 544, 546-55 (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].” *Commonwealth v. Mills*, 400 Mass. 626, 627 (1987) (quoting *Commonwealth v. Laliberty*, 373 Mass. 238, 246-47 (1977)). 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. *Id.* at 628. *Commonwealth v. Genius*, 387 Mass. 695, 697-98 (1982) (collecting cases on that issue); *Blaisdell v. Commonwealth*, 372 Mass. 753, 764-65 (1977) (defendant’s psychiatric records; observations of lay witnesses; nature of crime). “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 (quoting *Commonwealth v. Mattson*, 377 Mass. 638, 644 (1979)).

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. Lawson*, 475 Mass. 806, 811 (2016). 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 (1996).

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, 819-20 (1988).

SUPPLEMENTAL INSTRUCTIONS

1. Intoxication and Defense of Lack of Criminal Responsibility

A defendant's lack of criminal responsibility must be due to a mental disease or defect. Intoxication caused by the voluntary consumption of (alcohol) (drugs) is not by itself a “mental disease or defect.” Where a defendant lacks substantial capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the law solely as a result of voluntary intoxication, then the defendant is criminally responsible for their conduct.

However, the consumption of alcohol or drugs may trigger or intensify (make worse) a defendant’s preexisting mental disease or defect. If it does so, and the mental disease or defect then causes the defendant to lose the substantial capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law, the defendant is not criminally responsible for their conduct.

[Continue as follows where there is evidence of defendant's knowledge that consumption of drugs or alcohol would trigger or intensify a mental disease or defect:]

There is one exception to the principle just stated. A defendant who loses the substantial capacity I have just described after consuming drugs or alcohol, who knows or had reason to know that consumption would trigger or intensify a mental disease or defect or condition that could cause them to lack that capacity, is criminally responsible for their resulting conduct. In deciding what the defendant had reason to know about the consequences of their consumption of drugs or alcohol, you should consider the question solely from the defendant's point of view, including their mental capacity and past experience with drugs or alcohol.

But you must keep in mind that where a defendant, at the time the alleged offense was committed, had a mental disease or defect that by itself caused the defendant to lack the required substantial capacity, the defendant is not criminally responsible for their conduct regardless of whether they used or did not use alcohol or drugs. That is

true even if the defendant did use alcohol or drugs and the alcohol or drug use made the symptoms of the defendant's mental disease or defect worse, and even if the defendant knew they would make the symptoms worse.

[Pick up here if there is no evidence of defendant's knowledge that consumption of drugs or alcohol would trigger or intensify a mental disease or defect:]

To summarize, in order for the Commonwealth to meet its burden of proving that the defendant was criminally responsible at the time the alleged offense was committed, that is, that the defendant did not lack criminal responsibility at that time, the Commonwealth must prove at least one of the following three (four) facts beyond a reasonable doubt:

One, that the defendant did not suffer from a mental disease or defect at the time of the alleged offense; or

Two, that even if the defendant did suffer from a mental disease or defect at the time of the alleged offense, the defendant nonetheless retained the substantial capacity to both appreciate the wrongfulness of their

conduct and to conform their conduct to the requirements of the law; or

Three, that if the defendant lacked the substantial capacity to appreciate the wrongfulness of their conduct or to conform their conduct to legal requirements, the defendant's lack of such capacity was solely the result of voluntary intoxication by alcohol or other drugs.(;)

[where there is evidence of defendant's knowledge that consumption of drugs or alcohol would trigger or intensify a mental disease or defect:]

(or Four) that if the defendant lacked the substantial capacity I have just described due to a combination of a mental disease or defect and voluntary consumption of alcohol or other drugs which the defendant knew or should have known use of would interact with the defendant's mental disease or defect and cause the defendant to lose such capacity.

If the Commonwealth has failed to prove at least one of these three (four) facts beyond a reasonable doubt, then

you must find the defendant not guilty by reason of lack of criminal responsibility.

See *Commonwealth v. DiPadova*, 460 Mass. 424, 439-40 (2011) (appendix providing model jury instruction). See also *Commonwealth v. Berry*, 457 Mass. 602, 616-18 (2010).

2. Consequences of NGI verdict.

Your decision must be based solely on the evidence and the law of this case, without regard to the possible consequences of your verdict. You may not consider sentencing or punishment in reaching your verdict.

You are, however, entitled to know what happens to a defendant if found not guilty by reason of a lack of criminal responsibility.

A judge may order the defendant to be hospitalized at a mental health facility for a period of observation and examination. During that period or within sixty days of the verdict, the district attorney or other appropriate authorities may petition the Court to commit the defendant to a mental health facility or to Bridgewater State Hospital, initially for a period of six months. At the end of the six months and every year thereafter, the court reviews the

order of commitment. If the defendant is still suffering from a mental disease or defect and is still dangerous, then the court will order the defendant to continue to be committed to the mental facility or to Bridgewater State Hospital.

There is no limit to the number of such renewed orders of commitments as long as the defendant continues to be mentally ill and dangerous; if these conditions do continue, the defendant may remain committed for the duration of his [or her] life.

If at some point the Court determines that the defendant is no longer mentally ill and dangerous, the defendant will be discharged. The district attorney must be notified of any hearing and the district attorney may be heard at any such hearing. However, the final decision on whether to recommit or release the defendant is always made by the Court.

Commonwealth v. Chappell, 473 Mass. 191 (2015) (Appendix).
See also G.L. c. 123, § 16.

“[W]here 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 (1975). *Commonwealth v. Biancardi*, 421 Mass. 251, 254 (1995) (reversible error for judge to refuse defendant’s request to instruct jury on consequences of NGI verdict); *Commonwealth v. Loring*, 14 Mass. App. Ct.

655, 658-61 (1982) (conviction reversed where instruction given did not adequately explain court's role over defendant's continued commitment).

Such an instruction is not required *sua sponte*, *Commonwealth v. Bannister*, 15 Mass. App. Ct. 71, 81 (1983), but may be given *sua sponte* if the defendant does not object, *Commonwealth v. Callahan*, 380 Mass. 821, 826-28 (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. But see *Commonwealth v. Robbins*, 422 Mass. 305, 312 (1996) (unwilling to find error where instruction provided an accurate explanation of the law).

NOTES:

1. **Advance notice of defense of lack of criminal responsibility.** "The defendant's failure to notify the Commonwealth under [Mass. R. Crim. P. 14(b)(2) of his intention to present an insanity defense bars only the introduction of expert opinion and then only in circumstances where the defendant has refused to submit to a court-ordered psychiatric examination." *Commonwealth v. Guadalupe*, 401 Mass. 372, 375-76 (1987); *Commonwealth v. Dotson*, 402 Mass. 185, 187-89 (1988). The scope of sanctions available for a violation of rule 14(b)(2) does not extend to precluding a defendant from presenting a defense of lack of criminal responsibility through non-expert sources such as his or her own testimony or that of lay witnesses. *Guadalupe*, 401 Mass. at 375-76.

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, 34 (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, 102-03 (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, 248-49 & 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 (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. *Lo*, 428 Mass. at 46 (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. Colleran*, 452 Mass. 417, 426-427 (2008).

5. **Presumption of sanity and required finding of not guilty.** In *Commonwealth v. Lawson*, 475 Mass. 806, 815 (2016), the Supreme Judicial Court, holding that the inference of sanity always raises an issue of fact for the jury, overruled prior case law that held that a motion for a required finding of not guilty does not apply to a claim of lack of criminal responsibility.. *Commonwealth v. Lawson*, 475 Mass. 806, 815 (2016). “The fact that a great majority of people are sane says little, if anything about whether a particular defendant was sane when he or she engaged in a type of conduct in which the great majority of people do not engage.” *Id.* at 814. As such, a motion for a required finding of not guilty by reason of lack of criminal responsibility may be brought, but “only at the close of all the evidence” so that “the Commonwealth has a full opportunity to offer evidence in rebuttal.” *Id.* at 816-17. In deciding the motion, “a judge must view the evidence in the light most favorable to the Commonwealth and must disregard contrary evidence presented by the defendant, including the testimony of a defense expert, unless the contrary evidence demonstrates that the Commonwealth’s evidence, or any inference drawn from such evidence, is conclusively incorrect.” *Id.* at 817 (internal quotation marks omitted). The Commonwealth is not required to offer expert evidence to meet its burden; rather, “[t]he Commonwealth may prove criminal responsibility through the inferences arising from the circumstances of the offense, including evidence that the defendant planned the offense, acted on a rational motive, made rational decisions in committing the offense and in avoiding capture, and attempted to conceal the offense or his or her role in the offense. The Commonwealth also may prove criminal responsibility through admissible evidence of the defendant’s words and conduct before, during, and after the offense, including evidence of malingering.” *Id.* at 815-16.

6. **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, 581-82 (1990).