

ALIBI

You have heard testimony suggesting that the defendant was not present at the place and time when the offense charged in the complaint is alleged to have occurred.

Such testimony is commonly referred to as alibi evidence. Now I caution you not to give the word “alibi” any sinister connotation. It is only a shorthand phrase for a very important issue in this case: did the defendant commit the crime as charged, or was he (she) elsewhere at the time and therefore necessarily innocent?

In considering this matter, please remember that the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant committed the offense charged, and of course that includes proving that the defendant was present at the scene and not somewhere else at the time. The defendant has no duty to call witnesses or produce evidence on this or any other element of the crime.

If there was evidence of a complete alibi.

In this case you have heard evidence suggesting that the defendant was [where] at the

time when this offense was committed. You will have to decide whether or not you believe that evidence. Obviously, if you believe it, then the Commonwealth has failed to prove the defendant's guilt beyond a reasonable doubt and you must find him (her) not guilty. But even if you disbelieve some or all of that evidence, that doesn't mean that the defendant is automatically guilty. You still have to find, on all the evidence, that the Commonwealth has proved the defendant's guilt beyond a reasonable doubt.

Please give this issue your careful consideration, since in some cases an alibi may be the only refuge of an innocent person. After you consider all the evidence, if the Commonwealth has proved beyond a reasonable doubt that the defendant was present and committed the crime as charged, you should find the defendant guilty. On the other hand, if you have a reasonable doubt about whether the defendant was present at the time and place of the offense, or about any other element of the crime, then you must find him (her) not guilty.

The model instruction is based on the recommended instruction in *Commonwealth v. McLeod*, 367 Mass. 500, 502 n.1, 326 N.E.2d 906, 906 n.1 (1975), quoting from E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 11.31 (2d ed. 1970), on the recommended instruction in *Commonwealth v. Bowden*, 379 Mass. 472, 480 n.3, 399 N.E.2d 482, 488 n.3 (1980), and on Federal Judicial Center, *Pattern Criminal Jury Instructions* § 53 (1983 ed.).

It is preferable to charge on alibi upon request, but it is not error to refuse to do so if the jury is clearly instructed that the burden is on the Commonwealth to prove every element of the offense. *Commonwealth v. Medina*, 380 Mass. 565, 579-580, 404 N.E.2d 1228, 1236-1237 (1980); *Commonwealth v. Keaton*, 36 Mass. App. Ct. 81, 88-89, 628 N.E.2d 1286, 1290 (1994). On request, a judge should give such an instruction. *Commonwealth v. Dreyer*, 18 Mass. App. Ct. 562, 567, 468 N.E.2d 863, 867 (1984).

It is reversible error to put the burden of proof as to alibi on the defendant. It is “not ordinarily helpful” to single out alibi evidence for “rigid scrutiny” and the like in a charge, but if this is done it must be balanced with an instruction that an alibi may be the only refuge of the innocent. *McLeod*, 367 Mass. at 502, 326 N.E.2d at 905. See also *Bowden*, 379 Mass. at 480-482, 399 N.E.2d at 488-489; *Commonwealth v. Palmarin*, 378 Mass. 474, 478-479, 392 N.E.2d 534, 537 (1979); *Commonwealth v. Garrett*, 8 Mass. App. Ct. 894, 393 N.E.2d 954 (1979); *Commonwealth v. Cobb*, 5 Mass. App. Ct. 421, 423-424, 363 N.E.2d 1123, 1124-1125 (1977), S.C. 6 Mass. App. Ct. 921, 380 N.E.2d 142 (1978). A charge should not suggest that the defendant has some burden to “substantiate” his or her alibi or to “create” a reasonable doubt. *Id.*

NOTES:

1. **Alibi witness’s pretrial silence.** The Commonwealth may impeach a defense witness other than the defendant with his or her pretrial silence only upon establishing the following foundation: (1) the witness knew of the pending charges in sufficient detail to realize that he or she possessed exculpatory information; (2) the witness had reason to make such information available; (3) the witness was familiar with the way to report it to the proper authorities; and (4) neither the defendant nor defense counsel asked the witness to refrain from doing so. *Commonwealth v. Gregory*, 401 Mass. 437, 445, 517 N.E.2d 454, 459 (1988); *Commonwealth v. Edgerton*, 396 Mass. 499, 506-507, 487 N.E.2d 481, 486-487 (1986); *Commonwealth v. Berth*, 385 Mass. 784, 790, 434 N.E.2d 192, 196 (1982); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1007, 530 N.E.2d 805, 807 (1988); *Commonwealth v. Bassett*, 21 Mass. App. Ct. 713, 716-717, 490 N.E.2d 459, 461-462 (1986); *Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 296-297, 416 N.E.2d 218, 224 (1981). See also *Commonwealth v. Nickerson*, 386 Mass. 54, 58 n.4, 434 N.E.2d 992, 995 n.4 (1982) (inference impermissible if witness had other reasons for not wanting to deal with police); *Commonwealth v. Baros*, 24 Mass. App. Ct. 964, 964, 511 N.E.2d 362, 363-364 (1987) (inferable from witness’s explanation that fourth foundation requirement satisfied). The Commonwealth is entitled to pose such foundation questions in the presence of the jury, *Enos, supra*, but it is error to permit such impeachment unless the proper foundation has been laid, *Commonwealth v. Rivers*, 21 Mass. App. Ct. 645, 648, 489 N.E.2d 206, 208 (1986).

2. **Disbelief of alibi witnesses.** Since generally only a defendant’s own statements or actions can indicate consciousness of guilt, the jury may not be instructed that their disbelief of defense alibi witnesses may support an inference of the defendant’s consciousness of guilt. *Commonwealth v. Ciampa*, 406 Mass. 257, 267, 547 N.E.2d 314, 321 (1989).

3. **Notice of alibi.** Motions for advance notice of alibi are governed by Mass. R. Crim. P. 14(b)(1). The seminal case is *Commonwealth v. Edgerly*, 372 Mass. 337, 361 N.E.2d 1289 (1977). See also *Commonwealth v. Hanger*, 377 Mass. 503, 508-510, 386 N.E.2d 1262, 1265-1266 (1979); *Commonwealth v. Blodgett*, 377 Mass. 494, 498-502, 386 N.E.2d 1042, 1045-1046 (1979); *Commonwealth v. LaFrennie*, 13 Mass. App. Ct. 977, 978-979, 432 N.E.2d 535, 537-538 (1982); *Commonwealth v. Delaney*, 11 Mass. App. Ct. 398, 416 N.E.2d 972 (1981) (discovery of Commonwealth’s rebuttal witnesses).

Where a notice of alibi has been ordered, both the Sixth Amendment and art. 12 of the Massachusetts Declaration of Rights will, under some circumstances, permit a judge to exclude a late-disclosed alibi witness. Faced with a previously undisclosed alibi witness, the judge either may declare a continuance to give the Commonwealth time to investigate, or may conduct a voir dire to determine whether an asserted surprise discovery of the witness is genuine or contrived. The judge must balance the fair and efficient administration of justice against getting all material evidence before the jury. If the defense explanation suggests desultory preparation or an intentional ambush of the prosecution, exclusion is warranted. If the explanation is cogent, the judge may consider the materiality of the testimony in determining how to rule. *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 518-520, 529 N.E.2d 1348, 1349-1350 (1988). See *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988); *Commonwealth v. Chappee*, 397 Mass. 508, 492 N.E.2d 719 (1986), grant of habeas corpus rev'd sub nom. *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988).