REASONABLE DOUBT

I. *WEBSTER* CHARGE (MODERN SYNTAX)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

I have told you that every person is presumed to be innocent until he is proved guilty, and that the burden of proof is on the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the

defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

II. *WEBSTER* CHARGE (VERBATIM)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

"Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on . . . evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

"The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there

is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

"For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt . . . ."

NOTES:

1. **Model instructions.** The first model instruction above is a close paraphrase of the language of *Commonwealth v. Webster*, 5 Cush. 295, 320 (1850). The complex syntax of the original has been simplified, but all key *Webster* phrases have been preserved intact. For judges who prefer the traditional language, the second model instruction above is the exact language of *Webster*. Only the phrase "moral evidence" has been truncated to "evidence," since the term "moral evidence," which refers to "all evidence that is subject to human error and mistake," is archaic. R. McBride, The Art of Instructing the Jury 106-107 (Supp. 1978). See *Victor v. Nebraska,* 511 U.S. 1, 13, 114 S.Ct. 1239, 1246 (1994) ("Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters").

2. **Function of charge.** The Due Process Clause requires that in a criminal case every element of the crime charged must be proved beyond a reasonable doubt. "The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence . . . ." *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072-1073 (1970). A standard of proof serves to instruct the fact finder concerning the degree of confidence that he or she should have in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance of the ultimate decision. In criminal cases our society has decided to exclude as nearly as possible the likelihood of an erroneous judgment and to impose almost the entire risk of error upon itself. *Addington v. Texas*, 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1808 (1979).

3. **Defining reasonable doubt is mandatory**. The Supreme Court long ago noted the problem that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles v. United States*, 103 U.S. 304, 312 (1881), and that the term "may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them," *Hopt v. Utah*, 120 U.S. 430, 440-441, 7 S.Ct. 614, 619 (1887). See also *United States v. Gibson*, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960

(1984) ("It can be said beyond any doubt that the words 'reasonable doubt' do not lend themselves to accurate definition").

Federal due process principles would permit a judge, in his or her discretion, to offer the jury no definition of the phrase "reasonable doubt." *United States v. Olmstead*, 832 F.2d 642, 644-646 (1st Cir. 1987), cert. denied, 486 U.S. 1009, 108 S.Ct. 1739 (1988); *United States v. Walton*, 207 F.3d 694, 696-697 (4th Cir. 2000); *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993); *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir. 1991); *United States v. Taylor*, 997 F.2d 1551, 1557 (D.C. Cir. 1993). For an excellent discussion of the arguments in favor of such a practice, see *Smith v. Butler*, 696 F. Supp. 748, 762-766 (D. Mass. 1988) (Woodlock, J.)

However, Massachusetts law requires more than the Federal Constitution does. It is error, and reversible error in a close case, for the judge to give the jury no definition of the phrase "beyond a reasonable doubt," even if the defendant fails to object to the omission. *Commonwealth v. Stellberger*, 25 Mass. App. Ct. 148, 515 N.E.2d 1207 (1987).

4. **Standard of review.** The standard of review for a reasonable doubt instruction is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor,* 511 U.S. at 6, 114 S.Ct. at 1243, referring to *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970). A constitutionally deficient reasonable doubt instruction is never subject to harmless error review, since it "vitiates all the jury's findings." *Sullivan v. California,* 508 U.S. 275, 280, 113 S.Ct. 2078, 2082 (1993).

5. **Permissible formulations.** Massachusetts appellate courts have indicated that personal variations in a reasonable doubt charge are rarely prudent, and have repeatedly called for reasonable doubt to be explained "in close reliance on the time-tested language" of *Commonwealth v. Webster*, *supra*. *Commonwealth v. Ortiz*, 435 Mass. 569, 579, 760 N.E.2d 282, 290 (2002) (declining to overturn *Webster* reasonable doubt standard); *Commonwealth v. Ferreira*, 373 Mass. 116, 130 n.12, 364 N.E.2d 1264, 1273 n.12 (1977). See, e.g. *Commonwealth v. Wood*, 380 Mass. 545, 551, 404 N.E.2d 1223, 1228 (1980); *Commonwealth v. Lanigan*, 12 Mass. App. Ct. 913, 914-915, 423 N.E.2d 800, 802-803 (1981), cert. denied sub nom. *Maloney v. Lanigan,* 488 U.S. 1007 (1989). Indeed, there is "an unbroken line of cases which all but command that the definition of reasonable doubt be taken from the *Webster* case." *Commonwealth v. Fitzpatrick*, 16 Mass. App. Ct. 99, 100, 449 N.E.2d 392, 393 (1983).

Judges are discouraged from attempting "freehand embellishments" of the standard *Webster* charge. *Commonwealth v. Beldotti,* 409 Mass. 553, 562, 567 N.E.2d 1219, 1225 (1991). On the other hand, they are not required to deliver the *Webster* charge verbatim. The Supreme Judicial Court has noted its approval over the years of many "unimpeachable instructions . . . based on the key phrases of *Webster*, as modified and unquestionably improved by some variations from the exact language of the *Webster* case." *Ferreira*, *supra*. See *Commonwealth v. Randolph*, 415 Mass. 364, 367, 613 N.E.2d 899, 901 (1993) (upholding description of reasonable doubt as a "conscious uncertainty" and "an uncertainty you are aware of as to the defendant's guilt based on the evidence" and instruction that jury is "not to search for doubt"). See Instruction 2.200 for such an alternative.

The "heart" of the *Webster* charge is the phrase "moral certainty." *Commonwealth v. Therrien*, 371 Mass. 203, 207, 355 N.E.2d 913, 916 (1976). While acknowledging "that the use of this language in isolation, without further explanation, might amount to an erroneous instruction on reasonable doubt," the Supreme Judicial Court favors continued use of the term "if used as a part of or in conjunction with the approved charge from *Commonwealth v. Webster*." *Commonwealth v. Pinckney,* 419 Mass. 341, 344-345, 644 N.E.2d 973,976-977 (1995). See *Beldotti, supra; Commonwealth v. Morse*, 402 Mass. 735, 738, 525 N.E.2d 364, 366 (1988); *Commonwealth v. Pires*, 389 Mass. 657, 664, 451 N.E.2d 1155, 1159-1160 (1983); *Commonwealth v. Conceicao*, 388 Mass. 255, 266-267, 446 N.E.2d 383, 390 (1983); *Commonwealth v. Williams*, 378 Mass. 217, 232-233, 391 N.E.2d 1202, 1212 (1979). Federal courts have been less sympathetic to the phrase. In the First Circuit it is error for Federal judges to use it, *United States v. DeWolf*, 696 F.2d 1, 4 (1st Cir. 1982); *United States v. Indorato*, 628 F.2d 711, 720-721 & n.8 (1st Cir.), cert. denied, 449 U.S. 1016 (1980), although the First Circuit concedes that it is "hard to imagine, without recourse to prolixity, a charge more reflective of the solemn and rigorous standard intended." *Lanigan v. Maloney*, 853 F.2d 40, 43 (1st Cir. 1988). The United States Supreme Court has suggested that the phrase "add[s] nothing to the words 'beyond a reasonable doubt'; one may require explanation as much as the other," *Hopt, supra*, 120 U.S. at 440, 7 S.Ct. at 619. While "not condon[ing] the use of the phrase," the Supreme Court tolerates its use by state courts when joined with the other *Webster* phrases which clarify its historical meaning as "the highest degree of certitude based on" empirical evidence. *Victor*, 511 U.S. at 11, 114 S.Ct. at 1245. The Appeals Court has affirmed, but discouraged, modification of the phrase by adding the italicized words "a moral, *but not necessarily absolute,* certainty." *Commonwealth v.*

Littleton, 38 Mass. App. Ct. 951, 952 n.2, 649 N.E.2d 162, 163 n.2 (1995).

The phrase "moral certainty" in an instruction must be accompanied by language that gives proper content to that phrase. To avoid reversible error, it should not be used without the other *Webster* wording that accompanies and elaborates on it. *Commonwealth v. Therrien*, 428 Mass. 607, 610, 703 N.E.2d 1175, 1178 (1998); *Commonwealth v. James*, 424 Mass. 770, 787-788, 678 N.E.2d 1170, 1182-1183 (1997); *Commonwealth v. Bonds*, 424 Mass. 698, 703, 677 N.E.2d 1131, 1134 (1997).

Massachusetts courts continue to affirm other key *Webster* phrases: e.g. that proof need not be beyond all possible doubt, *Commonwealth v. Seay*, 376 Mass. 735, 745 n.7, 383 N.E.2d 828, 834 n.7 (1978); that it is not enough to prove that the defendant's guilt is more probable than not, *Commonwealth v. Beverly*, 389 Mass. 866, 870-873, 452 N.E.2d 1112, 1115-1116 (1983); *Commonwealth v. Bannister*, 15 Mass. App. Ct. 71, 81, 443 N.E.2d 1325, 1332 (1983); that there must be certainty that satisfies the minds, judgment and consciences of reasonable jurors and leaves in their minds a settled conviction of guilt, *Commonwealth v. Rembiszewski*, 391 Mass. 123, 130, 461 N.E.2d 201, 206 (1984); *Beverly*, *supra*; *Seay*, *supra*; *Commonwealth v. Andrews*, 10 Mass. App. Ct. 866, 867-868, 408 N.E.2d 662, 664 (1980). In addition, "[t]he words 'beyond a reasonable doubt' are themselves evocative . . . ." *Commonwealth v. Ferguson*, 365 Mass. 1, 12, 309 N.E.2d 182, 189 (1974).

6. **Impermissible formulations.** Appellate courts have indicated that judges should not use the following phrases in charging on reasonable doubt:

"Abiding" or "obvious" doubt. The judge should not explain reasonable doubt as a doubt which a juror "finds abiding in his mind at the end of a full consideration of the facts of the case," since such language could be interpreted as calling upon the defendant to establish doubt in the jurors' minds. *Pinckney,* 419 Mass. at 347, 644 N.E.2d at 977. On the other hand, the judge should not suggest that a reasonable doubt is one that is "obvious" or "spontaneous" or "natural," since a reasonable doubt may arise only after careful consideration of the evidence. *Commonwealth v. Pettie*, 363 Mass. 836, 842, 298 N.E.2d 836, 840 (1973).

Abbreviated definition at start of case. "Whenever jurors are instructed on the crucial concept of reasonable doubt, they should receive a full and accurate instruction." *Commonwealth v. Walker*, 68 Mass. App. Ct. 194, 200-206, 861 N.E.2d 457, 463-467 (2007) (judge "courted confusion" by giving jury an abbreviated written definition of reasonable doubt at outset of case, followed by full *Webster* charge at its conclusion).

Analogies with personal decisions. The judge should not compare the degree of certainty required to convict with that involved in jurors' important personal decisions — e.g., whether to marry or whether to undergo surgery. *Commonwealth v. Kelleher*, 395 Mass. 821, 482 N.E.2d 804 (1985); *Rembiszewski*, *supra*; *Commonwealth v. Smith*, 381 Mass. 141, 407 N.E.2d 1291 (1980), habeas corpus denied sub nom. *Smith v. Butler*, 696 F. Supp. 748 (D. Mass. 1988); *Commonwealth v. Garcia*, 379 Mass. 422, 438-442, 399 N.E.2d 460, 471-473 (1980); *Commonwealth v. Canon*, 373 Mass. 494, 501-502, 368 N.E.2d 1181, 1185-1186 (1977); *Ferreira*, 373 Mass. at 128-129, 364 N.E.2d at 1272-1273 (1977); *Ferguson*, *supra*; *Commonwealth v. Bumpus*, 362 Mass. 672, 682, 290 N.E.2d 167, 175 (1972), vacated on other grounds, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66, 309 N.E.2d 491 (1974), denial of habeas corpus aff'd sub nom. *Bumpus v. Gunter*, 635 F.2d 907 (1st Cir. 1980), cert. denied, 450 U.S. 1003 (1981); *Dunn v. Perrin*, 570 F.2d 21, 24 (1st Cir.), cert. denied, 437 U.S. 910 (1978); *Grace v. Butterworth*, 635 F.2d 1, 6 (1st Cir. 1980), cert. denied, 452 U.S. 917 (1981). Although it is not reversible error to analogize reasonable doubt to personal decisions of great significance as long as they remain unspecified, *Williams*, *supra*, it is better to avoid even such references since the degree of certainty required to convict is unique to the criminal law, and it may not even be possible to make private decisions according to this standard, *Ferreira*, 373 Mass. at 130, 364 N.E.2d at 1273. But see *Commonwealth v. Ambers*, 397 Mass. 705, 709 n.3, 493 N.E.2d 837, 840 n.3 (1986).

Comparison with civil standard. The judge should not contrast reasonable doubt with the civil burden of proof in terms of a percentage scale, since reasonable doubt is inherently qualitative and not subject to quantification. *Commonwealth v. Crawford,* 417 Mass. 358, 367, 629 N.E.2d 1332, 1337 (1994); *Commonwealth v. Sullivan*, 20 Mass. App. Ct. 802, 804-807, 482 N.E.2d 1198, 1199-1201 (1985). The Appeals Court has apparently discouraged even a correct distinction between the civil and criminal standards of proof, preferring *Webster* terminology. *Commonwealth v. Lanigan*, *supra*.

"Doubt based on a reason". The judge should not equate a reasonable doubt with a "doubt based on a reason," *Commonwealth v. Robinson*, 382 Mass. 189, 197-198, 415 N.E.2d 805, 811 (1981); *Commonwealth v. Coleman*, 366 Mass. 705, 712, 322 N.E.2d 407, 412 (1975); *Commonwealth v. Bjorkman*, 364 Mass. 297, 308, 303 N.E.2d 715, 722-723 (1973); *Commonwealth v. Cresta*, 16 Mass. App. Ct. 939, 940, 451 N.E.2d 440, 441 (1983), or with a "doubt for which a good reason can be given," *Commonwealth v. Lanoue*, 392 Mass. 583, 590-591, 467 N.E.2d 159, 164-165 (1984); *Commonwealth v. Thurber*, 383 Mass. 328, 333, 418 N.E.2d 1253, 1258 (1981); *Commonwealth v. Hughes*, 380 Mass. 596, 598-602, 404 N.E.2d 1246, 1248 (1980); *United States v. MacDonald*, 455 F.2d 1259, 1263 (1st Cir.), cert. denied, 406 U.S. 962 (1972); *Dunn*, 570 F.2d at 23-24, or with doubt that one can argue to fellow jurors "with principle and integrity," *Bumpus*, 635 F.2d at 910. Compare *Commonwealth v. Anderson*, 425 Mass. 685, 690, 682 N.E.2d 859, 863 (1997) (while "doubt based on a reason" or "founded upon a reason" would impermissibly shift the burden of proof to the defendant, the phrases "doubt based on reason" and "doubt founded upon reason" are permissible).

Negative examples. "The Supreme Judicial Court concluded in *Commonwealth v. Pires,* 389 Mass. 657, 664 (1983), that the concept of reasonable doubt 'is sufficiently metaphysical that it may be helpful to a jury to know what does not measure up to the standard.' As the use of negative examples, however, may have a tendency to minimize the high burden imposed on the government in criminal trials, trial judges must take particular care not to import illustrative examples which tend to confuse, rather than clarify, the definition of reasonable doubt." *Commonwealth v. Caramanica,* 49 Mass. App. Ct. 376, 378-379, 729 N.E.2d 656, 660 (2000) ("the confusing, circular locutions used by the judge here did more harm than good").

"Real reservoir of doubt". A charge on reasonable doubt should not include the "problematic" phrase that the jury must acquit if they are left with "a real reservoir of doubt." *Commonwealth v. Burke,* 44 Mass. App. Ct. 76, 80-81, 687 N.E.2d 1279, 1283 (1997).

"Shorthand" phrases. The judge should avoid extemporaneous or "short-form" phrases which the jury might take as a total substitute for the more precise and formal instructions, perhaps lessening the burden of proof. *Pettie*, 363 Mass. at 842-843, 298 N.E.2d at 840 (jury "won't be able to escape" a reasonable doubt). See *Therrien*, 371 Mass. at 207, 355 N.E.2d at 916 (jury should acquit if it has "serious unanswered questions"); *Fitzpatrick*, *supra* (reasonable doubt means jury must be "pretty darn sure"); *Commonwealth v. Hardy,* 31 Mass. App. Ct. 909, 910, 575 N.E.2d 355, 356 (1991) ("unnecessary and questionable departure" for judge to describe how he decides bench trials based on whether "satisfied in his own conscience as to a defendant's guilt").

"Should" have a firm belief in guilt. It is error to instruct that the jury "should" rather than "must" have "a firm and settled belief" in the defendant's guilt to convict. "[T]he misstep goes to the heart of the message embodied in *Webster:* where reasonable doubt remains, acquittal is mandatory." *Commonwealth v. Caramanica,* 49 Mass. App. Ct. 376, 378, 729 N.E.2d 656, 659-660 (2000).

"Substantial" or "grave" doubt. The judge should not define a reasonable doubt as an "actual substantial doubt" or a "grave uncertainty," since "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage v. Louisiana,* 498 U.S. 39, 41, 111 S.Ct. 328, 329-330 (1990) (per curiam). See *Sullivan, supra.*

"Unreasonable" doubt. The judge should not charge that to acquit on an unreasonable doubt or the mere possibility of innocence would "make the lawless supreme." That phrase from the jury charge in the preface to *Commonwealth v. Madeiros*, 255 Mass. 304, 307 (1926), has emotional overtones, is one-sided, and improperly focuses on general public safety concerns rather than on the evidence. *Pinckney,* 419 Mass. at 347-348, 644 N.E.2d at 977-978; *Commonwealth v. Bembury,* 406 Mass. 552, 563, 548 N.E.2d 1255, 1261 (1990); *Commonwealth v. Sheline*, 391 Mass. 279, 291-297, 461 N.E.2d 1197, 1206-1209 (1984); *Commonwealth v. Tavares*, 385 Mass. 140, 147-149, 430 N.E.2d 1198, 1203-1204, cert. denied, 457 U.S. 1137 (1982); *Hughes*, *supra*; *Commonwealth v. Spann*, 383 Mass. 142, 150-151, 418 N.E.2d 328, 333-334 (1981); *Commonwealth v. Powers*, 9 Mass. App. Ct. 771, 771-773, 404 N.E.2d 1260, 1261-1262 (1980). It appears that the judge should also avoid the *Madeiros* language that the jury should deal "firmly" with crime. See *Williams*, 378 Mass. at 233-235, 391 N.E.2d at 1212-1213. Any instruction that absolute certainty is not required should be balanced by a statement to the effect that "belief in guilt at least

approaching absolute certainty *was* required." *Lanigan*, 853 F.2d at 47.

"Which side right"; even balance in the evidence. The judge should not suggest that the jury's task is to figure out which side is "right" rather than to determine whether the Commonwealth has proved the defendant's guilt beyond a reasonable doubt. *Lanigan*, 853 F.2d at 48. It is preferable not to charge that the jury should acquit upon an even balance in the evidence, since the jury may improperly infer that they may convict if the even balance tilted just slightly against the defendant. *Beverly*, 389 Mass. at 872-873, 452 N.E.2d at 1116-1117.

Slips of the tongue. In a reasonable doubt charge, the judge must be particularly careful to avoid slips of the tongue that invert the opposing concepts of "reasonable doubt" and "proof beyond a reasonable doubt." See, e.g., *Commonwealth v. Drumgold*, 423 Mass. 230, 254-259, 668 N.E.2d 300, 316-320 (1996) (charge that "ultimate fact of innocence or guilt . . . must be found beyond a reasonable doubt" erroneously implies that a not guilty verdict requires proof beyond a reasonable doubt)*; Commonwealth v. A Juvenile*, 396 Mass. 215, 217-220, 485 N.E.2d 170, 172-174 (1985) (proof beyond a reasonable doubt erroneously defined as "not proof beyond all reasonable doubt"); *Wood*, 380 Mass. at 547-548, 404 N.E.2d at 1225-1226 (reasonable doubt erroneously defined as "doubt which amounts to a moral certainty"); *Commonwealth v. Grant,* 418 Mass. 76, 84-85, 634 N.E.2d 565, 570-571 (1994) (presumption of innocence erroneously explained as requiring jury to convict "unless his guilt has been proved beyond a reasonable doubt"); *Commonwealth v. Souza,* 34 Mass. App. Ct. 436, 443-444, 612 N.E.2d 680, 685 (1993) (reasonable doubt erroneously defined as "that state of the case [in] which . . . you feel an abiding conviction to a moral certainty of the truth of the charge"); *Commonwealth v. May*, 26 Mass. App. Ct. 801, 806, 533 N.E.2d 216, 220 (1989) (reasonable doubt erroneously defined as not "proof beyond the probability of innocence"); *Lanigan*, 853 F.2d at 46 (proof beyond a reasonable doubt erroneously defined as "a degree of moral certainty"); *Dunn*, 570 F.2d at 24 (reasonable doubt erroneously defined as "a strong and abiding conviction as still remains after careful consideration of all the facts and arguments"). The judge should be cautious in characterizing the antique language of *Webster*. *Commonwealth v. Dupree*, 22 Mass. App. Ct. 945, 494 N.E.2d 54 (1986) (reversible error to characterize *Webster* language as "a little silly").