

## Defendant in Custody

*Note: A defendant may be in custody during a trial, normally because of his or her failure to post a monetary bail and when that is so the defendant will nonetheless appear at the trial in civilian clothes. In a limited number of instances, the defendant's presence in jail at the time of the event and/or at the time of trial will be revealed either inadvertently or because the elements of a crime or its circumstances place the defendant in jail. And, in a rare instance, a defendant may refuse to wear civilian clothes. The following instruction is designed to cure any prejudice to the defendant that may have flowed from the jury's knowledge of the defendant's presence in jail or appearance in well-recognizable prison clothes.*

Select the appropriate paragraph(s):

[As you have heard,] the defendant was in jail at the time of the alleged event.

[As you have heard,] the defendant is presently in jail.<sup>1</sup>

[The defendant is entitled to, and has been offered, ordinary clothes to wear during his/her appearances here at the trial. He/she has, however, chosen, as he/she may, to wear the clothing that most, if not all of you recognized, as the clothing distributed to inmates of a jail.]

The defendant's presence in jail [and his/her appearance in the clothes distributed to inmates of the jail] is irrelevant, that is, it is of no significance, on the question of whether the defendant is guilty or not guilty.

You must not therefore draw any inference favorable or unfavorable to the defendant or the People from the defendant's presence in jail [and appearance] or otherwise consider the defendant's presence in jail [and appearance] for any purpose in deciding whether the defendant is guilty or not guilty.

If there is any member of the jury who cannot follow that instruction, please raise your hand.

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<sup>1</sup> In order to avoid undue prejudice, at the defendant's request, and after hearing from the People, the Court should consider whether at this point to grant the defendant's request to provide the jury with a "benign" (but truthful) reason for the defendant's incarceration. Thus, for example, when bail is imposed and the defendant is unable to post it, if the defendant requests it, the Court should consider adding an instruction that "The defendant is in jail because he/she has not posted the bail set to allow for his/her release."