

## **VOIR DIRE INSTRUCTIONS**

### **Introductory Note to Judge**

*The following is designed to set forth a template for the composition of instructions to a prospective jury. The responsibility of implementing the applicable law falls squarely on the trial judge. Thus, the instructions that follow are, in effect, “model,” or “sample,” charges.*

*The Criminal Procedure Law sets forth the following requirements with respect to a trial court's voir dire of a jury panel.*

*The court shall initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of [the] case to all the prospective jurors [CPL 270.15 (1)(b)].*

*These instructions are therefore designed to set the scene for the trial by introducing the participants, setting forth the procedures for jury selection, and providing an overview of the functions and responsibilities of the judge, counsel, and jury. See CPL 270.15(1)(c); People v. Boulware, 29 N.Y.2d 135 (1971). Thus, at the appropriate time, the judge should address the panel and consider inclusion of the following in whatever order the judge finds appropriate.*

*The trial judge may, and should, tailor and arrange these instructions to fit his/her personal style and manner of speech in order that he/she may communicate clearly and succinctly with the prospective jurors. Of course, except for charges required by law, the Court may elect to give or not give one or more of the charges.*

## Table of Contents

Welcome.....	2
Title of Action .....	3
Introduction of Parties .....	4
Nature of the Case.....	5
Status of [Indictment/information].....	6
Jury Composition .....	6
Jury Selection Procedure.....	6
Role of the Jury .....	7
Definition of a Fair Juror .....	8
Role of the Judge.....	11
Evidence .....	12
[Multiple Defendants] .....	13
Definition of: "Elements" of a Crime.....	14
Presumption of Innocence.....	15
[Defendant who does not testify] .....	15
Burden of Proof .....	16
Reasonable Doubt .....	17
Credibility of Witnesses.....	19
Police Testimony.....	19
[Identification].....	20
[Accessorial Liability] .....	21
Nature of Jury Deliberations.....	22

## Welcome

Members of the jury panel, welcome to (name of court). I am (judge's name) and I will be presiding at this trial. Some of you are about to be selected as jurors in a criminal case, and I

am about to explain to you what the trial involves and the role of the judge and the jury. We will also determine in this process, which of you will actually sit as jurors.

Before I continue, I want to thank you for being here. I realize that it may be an inconvenience for you. But, as I am sure you appreciate, a trial by jury is, and has been, the cornerstone of our system of justice for more than 200 years. Under that system, members of the community, and not a government official, decide whether a person accused of a crime by the government is guilty or not guilty.

### **Title of Action**

The name of this case is the “People of the State of New York against (*defendant’s name[s]*).” The words, People of the State of New York, in that title mean the government of the State of New York. The fact that this action is brought in the name of the People or that the evidence is presented by a public official does not in any way indicate that the public wants a specific verdict. The People are served by whatever verdict is justified by the evidence.

## Introduction of Parties<sup>1</sup>

The People are represented by the District Attorney of (specify) County, (name). Assistant District Attorney (name) will be appearing for the People in this case.

The defendant in this case is \_\_\_\_\_.<sup>11</sup>

The defendant is represented by Mr./Ms.\_\_\_\_\_.

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<sup>1</sup> Depending upon courtroom circumstances and security concerns, the Court may invite the prosecutor, defendant, and defense lawyer to stand and face the jury panel as each is introduced.

<sup>11</sup> *If the defendant is proceeding pro se:* The defendant has decided to represent himself/herself. The defendant has a right to do this. That a defendant has chosen to represent himself/herself is not a factor from which any inference favorable or unfavorable to the defendant or the People may be taken. Although the defendant is representing himself, Mr./Ms. (name) is a lawyer and will be available to advise him/her.

## Nature of the Case

The defendant(s) (is/are) charged with the crime(s)  
of: \_\_\_\_\_.

*[NOTE: Here, the Court should, after consultation with the parties, add a definition, or list the elements, of the key crime(s) charged, and/or a short description of the allegations sufficient to permit a member of the panel to determine whether he or she could be fair in judging the case at hand. If a defense will also be the subject of voir dire, the Court may briefly explain it. See People v. Harper, 32 A.D.3d 16 (2<sup>nd</sup> Dept. 2006), aff'd 7 N.Y.3d 882 (2006) for further guidance.]*

At the end of the trial, I will give you detailed instructions on the crime(s) charged [and the defense of (*specify*)] and it is upon those instructions that you must base your decision. I have given you this brief [definition/description] of the charge(s) only for the purpose of allowing you to consider whether there is anything about the nature of the charge(s) that would affect your ability to be a fair and impartial juror. You are not to use this [definition/description] for any other purpose; in particular, you are not now, or during the presentation of the evidence, to use this [definition/description] to come to a decision about whether or not the defendant is guilty.

## **Status of [Indictment/information]**

The case comes to us by way of an [indictment/information]. An [indictment/information] is a document that contains an accusation. Neither the [indictment/information] itself nor the fact that an [indictment/information] has been filed constitutes evidence. The [indictment/information] has been filed against the defendant, and the defendant has answered that he/she is not guilty of the accusation. The trial therefore is to be conducted for you to decide whether the defendant is guilty or not guilty.<sup>1</sup>

## **Jury Composition**

A jury is composed of [6/12] people.<sup>2</sup> In addition to the [6/12] jurors, we will also select alternate jurors. The first person called who is sworn as a juror will serve as the jury's foreperson.<sup>3</sup>

## **Jury Selection Procedure**

*[Note: The judge should here set forth the procedure for the selection of the jury, including the expected length of the trial, the days and hours of the trial, and any other important scheduling information that may impact the jurors' ability to serve.]*

## Role of the Jury <sup>III</sup>

The jury's responsibility is to evaluate fairly the testimony and other evidence presented at the trial, to apply the law to the facts, and to decide whether the People have proven the defendant guilty beyond a reasonable doubt.

In your deliberations, you may not consider or speculate about matters relating to sentence or punishment. If there is a verdict of guilty, it will be my responsibility to impose an appropriate sentence.<sup>4</sup>

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<sup>III</sup> Pursuant to CPL § 300.10(3):

"Where a defendant has raised the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, as defined in section 40.15 of the penal law, the court must, without elaboration, instruct the jury as follows:

'A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings.'

## **Definition of a Fair Juror <sup>5</sup>**

In reaching a verdict, guilty or not guilty, the jury must be fair. It is important therefore for you to know what makes a person a fair juror, so you can decide whether or not you can be a fair juror. Later in the proceedings, I will ask you whether or not you can be a fair juror. What makes a person a fair juror?

A fair juror is a person who will accept and apply the law of New York, as I explain it.

A fair juror is a person who has no bias or prejudice in favor of or against, a party, or any witness, be the witness a police officer or civilian.

A fair juror is a person who will keep the promise to be fair and impartial and will not base the decision in this case upon a bias or prejudice in favor of or against a person who may appear in this trial on account of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation.

A fair juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have and must not allow those stereotypes or attitudes to affect their decision. As you learned from the video presentation you saw during your orientation, we all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or about groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a juror, you are asked to make a very important decision about another member of the community. I know you would not want to make that decision based on such stereotypes or attitudes, that is, on

implicit biases, and it would be wrong for you to do so. A fair juror must guard against the impact of such stereotypes or attitudes. So you must ask yourself whether you have concerns about your capacity to put aside any biases you may have that might affect your views and conclusions about the defendant, witnesses, or others that you may hear about or see in court on account of their race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or disability.

And if you do have those concerns, you must tell us in your answer to Select appropriate alternative:

the questions I will be asking you shortly.  
the following questions <sup>4</sup>

A fair juror is a person who will therefore base his or her decision solely on the testimony and other evidence presented at this trial, and will not make a final decision on the verdict until the end of the case, after the juror:  
has heard all the testimony and other evidence,  
has heard the lawyers' summations,  
has heard the court's final instructions on the law, and  
has had an opportunity after all of that to discuss the evidence

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<sup>4</sup> **Questions:**

1. Is there any reason you cannot promise, or you doubt your capacity to keep a promise to be fair and impartial and not base your decision in this case upon a bias or prejudice in favor of or against a person who may appear in this trial on account of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation?
2. Can you promise to guard against allowing stereotypes or attitudes about individuals or about groups of people, referred to as an implicit bias [in the video you saw], influence your decision in this case?
3. Is there any reason, whether it be a bias or something else, that would interfere with your ability to be fair in reaching a verdict?

with the other jurors and consider their views.

And finally, a fair juror is a person who, without fear, favor, bias, prejudice, or sympathy for either the People or the defendant or any witness, be the witness a police officer or civilian, renders a verdict, guilty or not guilty, the juror is convinced is consistent with that juror's honest evaluation of the testimony and other evidence and that juror's honest application of the law.

## **Role of the Judge**

My role at the trial, the role of any judge, is to help assure a fair and orderly trial in accordance with our law. I do that by presiding over the trial, deciding questions of law that arise between/among the parties, and explaining to you, the jury, as I am now, what the law is that the jury must accept and follow.

Thus, we are both judges in this case. But it's important to recognize that we judge different things. You, the jury, judge the facts of the case in order to reach a verdict of guilty or not guilty, and I judge the law, meaning I decide questions of law and instruct the jury on the law.

It is not my responsibility to judge the facts here. It is yours. You and you alone are the judges of the facts, and you and you alone are responsible for deciding whether the defendant is guilty or not guilty.

So, nothing I say, or how I say it, and no ruling I make on the law, is intended to be, nor should it be, considered by you, as an expression of an opinion on the facts of the case or of whether the defendant is guilty or not guilty.

## **Evidence**

When you judge the facts, you are to consider only the evidence. The evidence in the case includes:

testimony of the witnesses,  
exhibits which are received in evidence, [and]

[any stipulation by the parties. (A stipulation is information the parties agree to present to the jury as evidence, without calling a witness to testify.)]

**[Multiple Defendants <sup>6</sup>**

*(Add if two or more defendants are on trial.)*

There are (specify the number) defendants before you and we are thus conducting (specify the number) trials in one.

It is your obligation to evaluate the evidence as it applies, or fails to apply, to each defendant separately.

Each instruction on the law must be considered by you as referring to each defendant separately.

You must return a separate verdict for each defendant. And those verdicts may be, but need not be, the same.

It is your sworn duty to give separate consideration to the case of each individual defendant.]

## **Definition of: "Elements" of a Crime**

During the trial, you will hear me and perhaps the lawyers use the term "elements" of a crime. Let me explain the meaning of that term. What constitutes a crime is defined by the written law of New York. Each written definition normally contains several parts, including generally, the specification of the conduct prohibited, the state of mind with which the conduct must be performed, and in some instances the result of the conduct. Those parts of the written definition of a charged crime, plus the identification of a person as the one who committed the crime charged, are what we mean by the term "elements" of the crime charged.

## **Presumption of Innocence**

We now turn to the fundamental principles of our law that apply in all criminal trials—the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt.<sup>7</sup>

Throughout these proceedings, the defendant is presumed to be innocent.<sup>8</sup> As a result, you must find the defendant not guilty, unless, on the evidence presented at this trial, you conclude that the People have proven the defendant guilty beyond a reasonable doubt.<sup>9</sup>

### **[Defendant who does not testify<sup>10</sup>**

*(Add, only if the defendant requests it.)*

That a defendant does not testify as a witness is not a factor from which any inference unfavorable to the defendant may be drawn.]

## **Burden of Proof**

The defendant is not required to prove that he/she is not guilty.<sup>11</sup> In fact, the defendant is not required to prove or disprove anything.<sup>12</sup> To the contrary, the People have the burden of proving the defendant guilty beyond a reasonable doubt.<sup>13</sup> That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.<sup>14</sup> The burden of proof never shifts from the People to the defendant.<sup>15</sup> If the People fail to satisfy their burden of proof, you must find the defendant not guilty.<sup>16</sup> If the People satisfy their burden of proof, you must find the defendant guilty.<sup>17</sup>

## **Burden of Proof**

*(in cases with an affirmative defense)*

*NOTE: If the defendant has not “committed” to interposing an affirmative defense or the defendant expects to interpose an affirmative defense but at the voir dire stage, the jury will not be informed of the affirmative defense, the above standard instruction on reasonable doubt should be given.*

The defendant is not required to prove or disprove any element of a charged crime.<sup>18</sup> To the contrary, the People have the burden of proving every element of a charged crime beyond a reasonable doubt.<sup>19</sup> That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.<sup>20</sup> The burden of proof never shifts from the People to the defendant.<sup>21</sup> If the People fail to satisfy their burden of proof, you must find the defendant not guilty.<sup>22</sup> If the People satisfy their burden of proof of all of the elements of a crime, you<sup>23</sup> will then consider an affirmative defense, which I will explain shortly. First,

## Reasonable Doubt

What does our law mean when it requires proof of guilt "beyond a reasonable doubt"?<sup>24</sup>

The law uses the term, "proof beyond a reasonable doubt," to tell you how convincing the evidence of guilt must be to permit a verdict of guilty.<sup>25</sup> The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore, the law does not require the People to prove a defendant guilty beyond all possible doubt.<sup>26</sup> On the other hand, it is not sufficient to prove that the defendant is probably guilty.<sup>27</sup> In a criminal case, the proof of guilt must be stronger than that.<sup>28</sup> It must be beyond a reasonable doubt.<sup>29</sup>

A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence.<sup>30</sup> It is an actual doubt, not an imaginary doubt.<sup>31</sup> It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.<sup>32</sup>

Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced <sup>33</sup> of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime.

In determining whether or not the People have proven the defendant's guilt beyond a reasonable doubt, you should be guided solely by a full and fair evaluation of the evidence. After carefully evaluating the evidence, each of you must decide whether or not that evidence convinces you beyond a reasonable

doubt of the defendant's guilt.

Whatever your verdict may be, it must not rest upon baseless speculations. Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty.

## **Credibility of Witnesses**

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness. You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. It is the quality of the testimony that is controlling, not the number of witnesses who testify.<sup>34</sup>

I will instruct you further on this subject at the end of the trial.

## **Police Testimony**

In this case you will hear the testimony of (a) police officer(s). The testimony of a witness should not be believed solely and simply because the witness is a police officer. At the same time, a witness's testimony should not be disbelieved solely and simply because the witness is a police officer. You must evaluate a police officer's testimony in the same way you would evaluate the testimony of any other witness.<sup>35</sup>

**[Identification]**

*(Add if expected to be in issue in lawyers' voir dire)*

The People have the burden of proving beyond a reasonable doubt, not only that a charged crime was committed, but that the defendant is the person who committed that crime.

Thus, even if you are convinced beyond a reasonable doubt that a charged crime was committed by someone, you cannot convict the defendant of that crime unless you are also convinced beyond a reasonable doubt that he/she is the person who committed that crime.<sup>36</sup>

*Add if one witness identification case:*

Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the defendant as the person who committed the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince you beyond a reasonable doubt that all the elements of the charged crime have been proven and that the identification of the defendant is both truthful and accurate.<sup>37</sup>

I will instruct you further on this subject at the end of the trial.

### **[Accessorial Liability]**

*(Add if expected to be in issue in lawyers' voir dire.)*

Our law recognizes that two or more individuals can act jointly to commit a crime, and that in certain circumstances, each can be held criminally liable for the acts of the other(s). In that situation, those persons can be said to be "acting in concert" with each other.<sup>38</sup>

Our law defines the circumstances under which one person may be criminally liable for the conduct of another. That definition is as follows:

When one person engages in conduct which constitutes an offense, another is criminally liable for such conduct when, acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.<sup>39</sup>

I will instruct you further on this subject at the end of the trial.

## Nature of Jury Deliberations

Your verdict, whether guilty or not guilty, must be unanimous; that is, each and every juror must agree to it. You must render a verdict separately and specifically upon each [count/charge] submitted to you.<sup>40</sup>

Since [6/12] people seldom agree immediately on anything, to reach a unanimous verdict you must deliberate with the other jurors. That means you should discuss the evidence and consult with each other, listen to each other, give each other's views careful consideration, and reason together when considering the evidence.<sup>41</sup> And when you deliberate, you should do so with a view towards reaching an agreement if that can be done without surrendering individual judgment.<sup>42</sup>

Each of you must decide the case for yourself, but only after a fair and impartial consideration of the evidence with the other jurors. You should not surrender an honest view of the evidence simply because you want the trial to end or you are outvoted. At the same time, you should not hesitate to reexamine your views and change your mind if you become convinced that your position was not correct.

*NOTE: The court may wish to insert here the CJI2d charge on "admonitions" applicable to a juror's conduct during trial, or the court may wish to integrate them with its questions of the jury panel and thereby determine whether a juror would have any problem in adhering to the required conduct.*

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1. See *People v. Greaves*, 94 N.Y.2d 775 (1999).
  2. CPL § 270.05(1).
  3. CPL § 270.15(3).
  4. CPL § 300.10(2).
  5. Implicit Bias instruction added June 2019 and revised October, 2021.
  6. CPL § 300.10(4).
  7. CPL § 300.10(2).
  8. *Taylor v. Kentucky*, 436 U.S. 478 (1978).
  9. *In re Winship*, 397 U.S. 358 (1970); *Taylor v. Kentucky*, *supra*; *People v. Antommarchi*, 80 N.Y.2d 247, 252-253 (1992).
  10. CPL 300.10(2). The statute specifies that the charge must be given "[u]pon request of a defendant who did not testify in his own behalf, but not otherwise." Appellate courts have cautioned that this statutory charge should be given only upon the defendant's request, and when given, the charge should be limited to the statutory language. *People v. Koberstein*, 66 N.Y.2d 989 (1985); *People v. Vereen*, 45 N.Y.2d 856 (1978); *People v. Cooper*, 300 A.D.2d 4 (1<sup>st</sup> Dept. 2002); *People v. Clearwater*, 269 A.D.2d 462 (2<sup>nd</sup> Dept. 2000); *People v. Stinson*, 186 A.D.2d 23 (1<sup>st</sup> Dept. 1992); *People v. Morton*, 174 A.D.2d 1019 (4<sup>th</sup> Dept. 1991). See also *People v. Rogers*, 48 N.Y.2d 167, 174 n 3 (1979) ("it is unnecessary and improper to qualify the charge with words indicating that it is given at defendant's request").
  11. See *People v. Antommarchi*, *supra*.
  12. *Id.*
  13. *In re Winship*, *supra*; *People v. Antommarchi*, *supra*.
  14. See *People v. Whalen*, 59 N.Y.2d 273, 279 (1983); *People v. Beslanovics*, 57 N.Y.2d 726 (1982); *People v. Newman*, 46 N.Y.2d 126 (1978).
  15. Cf. *People v. Patterson*, 39 N.Y.2d 288, 296 (1976), *aff'd*. 432 U.S. 197 (1977) ("If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial...").
  16. See *Taylor v. Kentucky*, *supra*; *In re Winship*, *supra*; *People v. Antommarchi*, *supra*.

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17. See *People v. Goetz*, 73 N.Y.2d 751, 752 (1988).
18. *Id.*
19. *In re Winship, supra* ; *People v Antommarchi, supra.*
20. See *People v. Whalen*, 59 N.Y.2d 273, 279 (1983); *People v Beslanovics*, 57 N.Y.2d 726 (1982); *People v Newman*, 46 N.Y.2d 126 (1978).
21. Cf. *People v. Patterson*, 39 N.Y.2d 288, 296 (1976), *aff'd.* 432 U.S. 197 (1977) ("If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial...").
22. See *Taylor v. Kentucky, supra*; *In re Winship, supra*; *People v Antommarchi, supra.*
23. See *People v Goetz*, 73 N.Y.2d 751, 752 (1988).
24. See generally, *Victor v. Nebraska*, 511 U.S. 1 (1994); *People v. Antommarchi, supra.* Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt, 78 Tex. L. Rev. 105 (1999). L. Sand, et. al., Modern Federal Jury Instructions, Instruction 4-2, 4-8 to 4-21 (1999). Federal Judicial Center, Pattern Criminal Jury Instructions (1988)(which recommends the following charge: "As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."). Justice Ginsberg, in her concurrence, in *Victor v. Nebraska, supra*, at 26, stated that: "The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate."
25. See *Victor v. Nebraska, supra*; *In re Winship, supra.*
26. See *Victor v. Nebraska, supra* at 13 and 17-20 (Approving a jury charge that conveyed the concept that "absolute certainty is unattainable in matters relating to human affairs" when the charge said " 'everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt'..." ; and approving that portion of the charge that stated that "a reasonable doubt is 'not a mere possible doubt.'"); *People v. Malloy*, 55 N.Y.2d 296, 300, 303 (1982) (approving a charge that included language stating that a reasonable doubt is not "proof beyond \*\*\*

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all doubt or proof to a mathematical certainty, or scientific certainty."); L. Sand, *supra*, at 4-11 to 4-13 (reporting that approved charges in some federal circuits include that proof beyond a reasonable doubt does not mean proof "beyond all possible doubt."); Federal Judicial Center, Pattern Criminal Jury Instructions, *supra* at 17-18 ("...in criminal cases the law does not require proof that overcomes every possible doubt.")

27. See Federal Judicial Center, Pattern Criminal Jury Instructions, *supra* at 17-18.

28. See Solan, *supra* ("...we use the expression 'proof beyond a reasonable doubt' because we believe that the government should be required to prove its case so strongly that the evidence leaves the jury with the highest degree of certitude based on such evidence."). *Victor v. Nebraska*, *supra* at 22 (approving a jury instruction that informed the jury that the probabilities must be "strong" enough to prove the defendant's guilt beyond a reasonable doubt).

29. *In re Winship*, *supra*.

30. See *People v. Antommarchi*, *supra*, 80 N.Y.2d at 252; *People v. Barker*, 153 N.Y. 111, 115 (1897); *People v. Guidici*, 100 N.Y. 503, 509 (1885); *State v. Medina*, 147 N.J. 43, 60 (1996).

31. See *Victor v. Nebraska*, *supra*, 511 U.S. at 17-20 (1994) (Accepting a charge that stated that a reasonable doubt is an "actual and substantial doubt...as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture" (emphasis in original) and separately holding that "A fanciful doubt is not a reasonable doubt."); *People v. Guidici*, *supra*; and *People v. Jones*, 27 N.Y.2d 222 (1970) (Approving a charge that distinguished a reasonable doubt from a "vague and imaginary" doubt.).

32. See *People v. Cubino* 88 N.Y.2d 998, 1000 (1996); *People v. Radcliffe*, 232 N.Y. 249 (1921). *Cubino* approved language which read: "The doubt, to be a reasonable doubt, should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case." *Cubino*, 88 N.Y.2d at 1000. The failure, however, to include in that charge that a reasonable doubt may be founded on a "lack of evidence" is not error. *Radcliffe*, 232 N.Y. at 254. *Accord*, *People v. Reinoso*, 257 A.D.2d 484 (1<sup>st</sup> Dept. 1999); *Foran v Metz*, 463 F Supp 1088, 1091 (S.D.N.Y.), *affd* 603 F2d 212 (2d Cir), *cert denied* 444 U.S. 830 (1979). See *People v. Nazario*, 147 Misc.2d 934 (Supreme Court, Bronx Co., 1990). Compare *People v. Ostin*, 62 A.D.2d 1004 (2nd Dept. 1978). In its decision, explaining why the failure to include the "lack of evidence" language was not error *Radcliffe* explained: "The jurors were instructed that it was their duty to judge the facts and to weigh the evidence and that if they had the slightest doubt of the guilt of the defendants, so long as it was a reasonable doubt, founded on the evidence, it was their duty to acquit. We may assume

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that they possessed sufficient intelligence to understand that the court intended to tell them that they were to consider not only the evidence that was given in the case but also whether there was an absence of material and *convincing* evidence. *Radcliffe*, 232 N.Y. at 254 (emphasis added). This portion of the charge has combined *Cubino's* formulation with a modification from *Radcliffe's* "convincing evidence" language. (Footnote was revised December 1, 2002).

33. Federal Judicial Center, Pattern Criminal Jury Instructions, *supra*, at § 12.10, at 17-18; L. Sand, Modern Federal Jury Instructions, *supra*, at 4-12 to 4-13 to 4-15 (the terminology "firmly convinced" is used in the Ninth Circuit Pattern Instruction, and the Fifth Circuit and District of Columbia Circuit have approved the Federal Judicial Center charge, that contains such terminology.). States adopting such terminology include New Jersey, Arizona, and Indiana. *State v. Medina*, *supra*, 147 N.J. at 61 (1996); *State v. Portillo*, 182 Ariz. 592, 596 (1995); *Winegeart v. State*, 665 N.E.2d 893, 902 (Ind. 1996). See *State v. Van Gundy*, 64 Ohio St. 3d 230, 232 (1992) (State statutory definition includes: "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge."). Solan, *supra*, at 149 ("While 'firmly convinced' is not really a definition of 'beyond a reasonable doubt,' it best reflects the idea that defendants should not be convicted unless the government has proven guilt to near certitude."). See also *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) ("...by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard [of proof beyond a reasonable doubt] symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."). *Victor v. Nebraska*, *supra*, 511 U.S. at 12.

34. See generally *People v Ward*, 282 A.D.2d 819 (3d Dept. 2001); *People v Love*, 244 A.D.2d 431 (2d Dept. 1997); *People v Turton*, 221 A.D.2d 671, 671-672 (2d Dept. 1995); *People v Jansen*, 130 A.D.2d 764 (2d Dept. 1987).

35. See *People v Freier*, 228 A.D.2d 520 (2d Dept. 1996); *People v Graham*, 196 A.D.2d 552, 552-53 (2d Dept. 1993); *People v Allan*, 192 A.D.2d 433, 435 (1<sup>st</sup> Dept. 1993); *People v McCain*, 177 A.D.2d 513, 514 (2d Dept. 1991). Cf. *People v Rawlins*, 166 A.D.2d 64, 67 [1<sup>st</sup> Dept. 1991].

36. See *People v. Knight*, 87 N.Y.2d 873, 874 (1995) ("The court's charge...sufficiently apprised the jury that the reasonable doubt standard applied to identification.")

37. See *People v. Ruffino*, 110 A.D.2d 198, 202 (2d Dept. 1985) ("In order to reduce the risk of convicting a defendant as a result of an erroneous identification, trial courts are encouraged, in appropriate cases, to provide juries with expanded identification charges that direct the jurors to consider both the truthfulness and the accuracy of the eyewitness' testimony."); *People v. Daniels*, 88 A.D.2d 392, 400 (2d Dept. 1982)(the

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Court stated that this case illustrated "...the situation found in many, if not most, pure identification cases. The eyewitnesses are usually firmly convinced that they *are* telling the truth and neither cross-examination nor endless polygraph tests will ever shake that belief. Bitter experience tells us, however, that the real issue is whether or not the witness is mistaken -- however honest or truthful that mistake might be....[The trial court] should have charged that in weighing the evidence on the issue of identification, the jury should focus on accuracy as well as veracity..."

38. The term "acting in concert" is included in this charge in order to create a term that can easily be used in the appropriate element of a charged crime to incorporate by reference the definition of accessorial liability. It is the term used in some counties to charge accessorial liability and its use has been accepted by the courts. *E.g., People v. Rivera*, 84 N.Y.2d 766 (1995).

For those who prefer an alternative term that can serve the same objective, we suggest, "accessory," and recommend substituting the following sentence: "In that situation, each person can be said to be an accessory in the commission of the crime."

39. PL §20.00. The charge substitutes the term "state of mind" for the statutory term "mental culpability." The former term is a traditional usage and should be more easily understood. If applicable, the jury should, at this point, also be charged on the provision of PL § 20.15. *See People v. Castro*, 55 N.Y.2d 972 (1982).

40. CPL § 300.10(4).

41. *See People v. Antommarchi*, 80 N.Y.2d 247, 251-253 (1992).

42. *People v. Faber*, 199 N.Y.256 (1910).