

## MODEL CRIMINAL JURY PRECHARGE

< *after jury has been sworn* >

Jurors, you will be responsible for deciding this case. Please pay close attention to the evidence you will see and hear during this trial. When the evidence is complete, I will explain the legal rules that you must apply to decide this case. You will then meet together in private to consider the evidence, apply those rules, and work together to reach a verdict.

Before we start the trial itself, I will give you some initial instructions. I will explain the indictments that the clerk just read aloud and describe what will happen during the trial. I will then explain my role as the judge, the lawyers' role, and your role as jurors. I will discuss some of the legal rules that apply in this case. And I will explain some important things that you must do, and other things you must not do, during this trial.

### The Indictments

A moment ago our clerk read the language of the indictment[s] in this case. An indictment is a legal document that formally accuses someone of a crime. In less formal terms, the indictment[s] in this case charge DFT with committing < *brief list of charges* >.

These indictments are not evidence in this case. And the fact that DFT is facing these charges does not mean that he is guilty of committing any crime. As I told you when we were choosing our jurors, DFT has pleaded **not guilty** to all of these charges. At the end of the trial, you will decide whether the prosecution has proved these charges beyond a reasonable doubt.

## Outline of the Trial

When I finish with these initial instructions, the prosecutor and defense counsel will make opening statements.<sup>1</sup> An opening statement is a summary of what the lawyer expects the evidence will show.

After the opening statements, you will hear testimony from various witnesses. The evidence may also include documents and other things. The prosecution will call witnesses first. Then DFT will have a chance to call additional witnesses if he chooses to do so. Both sides may question each witness.

After you see and hear all the evidence, each side will make a closing argument to summarize the evidence and to suggest conclusions you may reach based on the evidence and the law.

The lawyers' opening statements and closing arguments may help you make sense of the evidence you hear and see during the trial, but the openings and closings are not evidence.

At the end of the trial, I will instruct you in detail on the legal rules you must apply in deciding this case. You will then discuss the case in private and work together, as a jury, to agree on a verdict.

[< *Optional Discussion of Alternate Jurors*><sup>2</sup> The law allows only twelve jurors to deliberate at the end of the trial and decide this case. We chose

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<sup>1</sup> The judge should ask in advance whether defense counsel plans to open. If counsel does not plan to open, plans to defer opening, or is uncertain, an alternative instruction would be: "When I finish with these initial instructions, the prosecutor will make an opening statement. Defense counsel may or may not do so; defense counsel has no obligation to make an opening statement because, as I will explain in a moment, the burden is on the prosecution to prove the charges in this case and the defendant has no burden to prove anything."

<sup>2</sup> Some judges believe that it is important to let the jurors know at the start of the trial that only twelve jurors will deliberate and the others will be alternates, so they are not surprised or confused at the end of trial by the selection of alternates. Other judges fear that telling the jurors some will be alternates might cause some jurors unconsciously not to pay as close attention to the evidence, or make others assume that they will be alternates based on their seat number. This paragraph tries to address that concern.

fourteen people to serve on this jury in case one or two of you gets sick or has some other unexpected emergency. If all fourteen of you are still with us at the end of the trial, we will choose two of you to be alternate jurors. We do this by random lottery. Each of you has an equal chance of being a deliberating juror, so you all need to pay careful attention to the evidence.]

## **Trial Roles**

### **(a) Role of the Judge**

My job, as the judge in this case, is to make sure the case is tried fairly, efficiently, and according to the law.

I must make sure that you hear and see only evidence that is allowed under our "rules of evidence." Those rules determine what evidence the lawyers may and may not present to you. The purpose of these rules is to make sure that what you see and hear at this trial is relevant to the case and appropriate for you to consider.

If one of the lawyers says "Objection," that means the lawyer thinks that a particular answer or exhibit violates the rules of evidence.

If I am not persuaded by the objection, I will say "Overruled." That means that the witness may answer the question or the other party may show you the exhibit, and you may consider the answer or exhibit as evidence.

If I instead say "Sustained," that means the witness may not answer the question or the party may not show you the exhibit, because under our rules you may not consider the answer or exhibit. If I sustain an objection, you may not talk about or try to guess what the evidence might have been.

There may be times when I instruct you to "Disregard" something or allow a motion to "Strike" something that you have already heard or seen. If that happens, that means that the testimony or exhibit I tell you to disregard or that I strike is not evidence, and you may not consider it.

As the judge in this case, I must also explain the law to you. At the end of the trial, I will give you detailed instructions about the law you must follow to decide this case. I will give you those instructions orally, out loud, and will also give you a written version to read while you work together to decide this case.

### **(b) Role of Counsel**

The lawyers have their own important role in this trial. Their job is to bring to your attention the evidence and arguments that best support their position. They may also object to evidence offered by the other side, as I just discussed.

Please do not hold it against the lawyers if they make an objection. The lawyers have to let me know when there is a potential issue about whether you may see, hear, or consider something.

### **(c) Role of the Jury**

Jurors, you have the most important role in this trial. After you have heard and seen all the evidence, you will decide who and what to believe, and whether the prosecution has proved that DFT is guilty of the crimes charged, based on the legal principles I will explain to you.

You must decide this case based only on the evidence you see and hear during this trial and on my instructions on the law. You may not decide this case based on suspicion, guesswork, or speculation.

The evidence consists of the testimony of witnesses, as you recall it, and any documents or other things that become exhibits. Other things you will see and hear during the trial are not evidence. For example, the attorneys' opening statements and closing arguments are not evidence. And the questions the attorneys ask are not evidence either. A witness's answers are evidence, but a lawyer's questions are not.

A very important part of your job as jurors is to decide who and what to believe. Whether testimony is contradicted or not, it is up to you to decide

whether you believe it. You may believe everything a witness says, part of it, or none of it. The same is true of each exhibit; you must decide whether you believe what it shows or not.

In deciding who or what to believe, you should ask and consider some important questions.

First, was the witness honestly trying to tell the truth, or deliberately lying? Though witnesses take an oath to tell the truth, sometimes a witness says things that the witness knows are false. If you conclude that a witness lied to you about something, then of course you should not believe that part of the testimony.

Second, was the witness accurate, or did the witness get something wrong without meaning to do so? Sometimes a witness may recall seeing or hearing something, but still be mistaken. If you conclude that a witness tried to be truthful but that some part of the person's testimony was not accurate, then you should not consider the inaccurate testimony.

I have no opinion about who or what you should believe or about how you should decide this case. So please do not take anything I say or do during the trial to suggest to you what to believe or how to decide this case.

### **Be Fair<sup>3</sup>**

Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. All people deserve fair and equal treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level, or any other personal characteristic. You have agreed to be fair. I am sure that you want to be fair, but that is not always easy.

One difficulty comes from our own built-in expectations and assumptions. They exist even if we are not aware of them and even if we believe we do

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<sup>3</sup> See Supreme Judicial Court Model Jury Instructions on Implicit Bias.

not have them. Some of you may have heard this called “implicit” bias and that is what I’m talking about. We judges have the same problem as everyone else, so let me share a few strategies that we have found useful.

First, slow down; do not rush to a decision. Hasty decisions are more likely to reflect stereotypes or hidden biases.

Second, keep an open mind. Avoid drawing conclusions until the end of the case, when you and your fellow jurors deliberate. Remember that when you deliberate, you will have all the evidence and all the time you need to make a careful decision. So, there truly is no need to start making your mind up before then.

Third, you should listen closely to all the witnesses. That is the best way to ensure that you decide this case based on the evidence and the law, instead of upon unsupported assumptions.

Fourth, as you listen to testimony about the people involved in this case, consider them as individuals, rather than as members of a particular group.

Finally, I might ask myself: Would I view the evidence differently if the people were from different groups, such as different racial, ethnic, or gender identity groups?

At the end of the case, I will remind you of these strategies and ask you to focus on the evidence instead of any unsupported assumptions you may have. All we ask is that you, individually and as a group, do your best to resolve this case based upon the evidence and law, without sympathy, bias, or prejudice, to the best of your ability as human beings.

## **Legal Principles**

There are certain legal rules that you must follow in this case. I will discuss them in more detail at the end of the trial, but here are some key things you should know from the beginning.

### (a) Presumption of Innocence

As I told you during the jury-selection process, every person who is accused of a crime is presumed to be innocent of that crime. DFT is presumed innocent of the charge[s] in this case. That means you must consider DFT to be innocent now, and must still consider him to be innocent at the end of the trial **unless** the prosecution has proved **beyond a reasonable doubt**—through evidence presented during the trial—that DFT committed the crime[s] charged. I will explain what I mean by “reasonable doubt” in just a moment.

DFT does not have to do anything to convince you he is innocent. He does not have to explain anything. DFT does not have to testify, call or question witnesses, or provide any evidence at all—because you must presume he is innocent. Instead, it is up to the Commonwealth to prove the charge[s] against DFT beyond a reasonable doubt. This burden of proof never shifts to the defendant.

At the end of the trial, after you have heard and seen all of the evidence, you will deliberate with each other, meaning you will discuss the evidence and decide on your verdict. If you have a reasonable doubt about DFT’s guilt on a particular charge then your verdict must be **not guilty** on that charge. You may find DFT **guilty** of a charge only if all twelve deliberating jurors agree that the Commonwealth has proved the charge beyond a reasonable doubt.

### (b) Proof Beyond a Reasonable Doubt<sup>4</sup>

So, the burden is on the Commonwealth to prove **beyond a reasonable doubt** that DFT is guilty of the charge[s] made against him. 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

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<sup>4</sup> See *Commonwealth v. Russell*, 470 Mass. 464, 477-478 (2015).

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. When we refer to moral certainty, we mean the highest degree of certainty possible in matters relating to human affairs—based solely on the evidence that has been put before you in this case.

I have told you that every person is presumed to be innocent until he or she 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.

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

### **(c) Elements of the Charges**

*< Include where appropriate, especially if the case turns on a complicated or potentially unfamiliar concept such as the possibility of honest but mistaken identification, criminal responsibility, or the prosecution's burden of proving that the defendant did not act in proper self-defense.>*

## During the Trial

### (a) Note Taking by Jurors

At the end of the trial, when you meet in private to deliberate, you will have all of the exhibits with you. We cannot provide you with transcripts of any witness's testimony, however. So you will have to rely on your memory of what each witness tells you.

You may take notes during the trial, if you wish. Our court officers will give you a notebook or notepad and a pen or pencil. Some jurors find it helpful to take notes while listening to the evidence; it may help them focus on the testimony and remember what the witnesses said. Some of you may not want to take any notes, which is fine. Whether you take notes is entirely up to you.

Whether you take notes or not, you need to pay close attention to each witness and what they say. In deciding who and what to believe, you should watch and listen to each witness carefully. Think about whether the witness seems believable, whether the witness's memory seems reliable, and anything else about how the witness testifies and what the witness says that helps you decide whether and how much to believe the witness.

When you deliberate at the end of the trial, remember that it is your memory that counts. Your notes may help jog your memory about what a witness said, but they are not a substitute for what you or other jurors remember about the testimony. Do not assume that because you or another juror wrote something down that it is more accurate than your or another juror's memory of what the witness actually said.

Your notes are confidential. No one, including me, will read them. The court officers will collect your notebooks and pens at the end of each trial day and keep them safe until they are returned to you the next morning. When the trial is over, the court officers will destroy the notes.

### **(b) Juror Comfort**

If you have any trouble hearing or seeing during the trial, please raise your hand or let a court officer know, and we will make any necessary adjustments. We generally take a morning recess at about 11:00 A.M., but if you need a break at any other time, raise your hand or let a court officer know and we will take a break.

### **(c) Communicating with the Judge**

If you need to communicate with me during the trial, please let a court officer know or give the court officer a note to bring to me.

### **(d) Cautions to Jurors**

Finally, there are a few things that you need to do, and other things that you must not do, during this trial.

- Keep an open mind throughout the trial. You must not decide the case until after you have heard and seen all of the evidence and listened to my final instructions at the end of the trial.
- Do not discuss the evidence or this case with other jurors until you start your formal deliberations at the end of the trial. This is because it can be hard to keep an open mind if two or more of you start discussing the case in the middle of the trial.
- Do not talk to or communicate with anyone else about this case until after you reach and deliver your verdict, and I tell you that you have completed your jury service. This is because you have to decide this case based solely on the evidence presented in this court room, and must not consider other information or opinions.
- When I say that you may not communicate with anyone about the case before you have reached a verdict, that means you may not do so in any way, including through a cell phone or other device. So until you reach a verdict, you may not text, chat, email, tweet, blog, or post anything about the case, using social media, other electronic media, or anything else. You have to wait until

the trial is over and you have reached a verdict before you say anything about this case to others.

- You may not talk to the lawyers, parties, or witnesses during the trial. If the attorneys or other trial participants see you and turn away, they are not being rude; they are simply following the rule that they may not speak with you during the trial.
- During this trial, please do not read, watch, or listen to anything about this case that may appear in any news media, social media, or other source. If there is any press or other coverage about this case, you must ignore it.
- Do not do any research or investigation about the case, online or in any other way, or have anyone else do so for you. Do not visit any place mentioned during the trial. Do not Google or search for the names of anyone participating in this case or for anything else about it. Once again, this is because you must decide this case based only on the evidence and the law presented to you in the courtroom.

The rules that I just explained are very important. I will keep reminding you of them and ask if you have been able to comply with them. If anything happens that seems to be inconsistent with these rules, please do not discuss it with other jurors; instead, let a court officer know and I will speak with you privately.

## **Conclusion**

I know that you will try this case according to the oath that you have taken as jurors. When you took that oath, you promised that you would “well and truly try the issues between the Commonwealth and the defendant according to the evidence and the law.” If you follow that oath, approach this case with an open mind, and make your decisions fairly and without prejudice or bias or sympathy for anyone, then you will arrive at a fair and just verdict.

It is now time for the opening statements.