

## NOTICE TO THE BAR

### **SUPPORTING JUROR IMPARTIALITY BY ADDRESSING IMPLICIT BIAS – PROPOSAL FOR (1) NEW MODEL *VOIR DIRE* QUESTIONS AND (2) UPDATES TO MODEL CIVIL AND CRIMINAL JURY CHARGES - PUBLICATION FOR COMMENT**

The Supreme Court invites written comments on two components of ongoing efforts to support juror impartiality through awareness and discussion of implicit bias: (1) new model *voir dire* questions; and (2) updates to the model civil and criminal jury charges.

#### **Background**

Our State and Federal Constitutions guarantee the right to trial by an impartial jury. U.S. Const. amends. VI, VII, XIV; N.J. Const. art. I, ¶ 9, ¶ 10. Jurors, therefore, must be “as nearly impartial as the lot of humanity will admit.” State v. Williams, 93 N.J. 39, 60 (1983) (Williams I) The trial court's duty is to take all appropriate measures to ensure the fair and proper administration of a trial, including by searching out juror biases and seating an impartial jury.

The Court through its standing committees, including the Committee on Jury Selection in Civil and Criminal Trials, the Committees on Model Jury Charges, and the Committee on Diversity, Inclusion, and Community Engagement, long has been committed to supporting juror impartiality, including through comprehensive juror orientation, statewide model *voir dire* questions, and detailed jury charges, as well as through implementation of protocols designed to facilitate fair and unbiased processes.

#### **Recent Efforts to Advance Juror Impartiality**

To complement the ongoing work of its committees, the Court in 2019 established an internal Working Group on Juror Impartiality (“Working Group”) to focus on practical steps that can be implemented to improve fairness in the jury selection and deliberation process. Criminal Presiding Judge Edward J. McBride, Jr., Chair of the Criminal Practice Committee, and Criminal Division Judge David Ironson, Chair of the Committee on Jury Selection, serve as co-chairs of the Working Group, which includes judicial representatives of those committees and the Supreme Court Civil Practice Committee.

As requested by the Court, the Working Group developed preliminary proposals on a number of interlocking initiatives, including items 1(a) through 1(c) in the Court's July 16, 2020 Action Plan for Ensuring Equal Justice:

**Supporting Juror Impartiality.** The Judiciary will work to implement policies and protocols to support juror impartiality, including: (a) expanded juror orientation content regarding implicit and explicit bias; (b) model jury charges on impartiality and implicit bias; (c) new and revised mandatory model jury selection questions on recognizing and counteracting bias in the jury process...

### Enhancing Juror Orientation

The Working Group recommends that the Judiciary supplement the existing juror orientation process with a concise video about bias, including both explicit and implicit bias, which emphasizes the importance for jurors to recognize the effects of implicit biases so that they can discharge their duty of impartiality. That video at present is in development, and further information will be provided as available.

For purposes of considering the following proposals, it is important to note that the orientation video will precede *voir dire* and jury charges. Accordingly, key terms including implicit bias and impartiality will have been introduced, defined, and illustrated before jurors are asked questions or provided specific instructions about those topics. The terms and descriptions included in the following proposals align with those in the video.

### Proposed New *Voir Dire* Questions

The proposal, as developed by the Working Group and refined through preliminary review by the Committee on Jury Selection, is to add the following new model *voir dire* questions in both civil and criminal trials:

- Question 1: In the juror orientation video and my introductory remarks, the concept of implicit bias was defined and discussed. Do you think you will be able to decide the case fairly and impartially and not be affected by any biases you may have - explicit or implicit? Please explain.
- Question 2: Some of the witnesses, parties, lawyers, jurors, or other people involved with this case may have personal characteristics (such as

their race, ethnicity, or religion) or backgrounds different from yours, or they may be similar to yours. Would those differences or similarities make it difficult for you to decide this case impartially based solely on the evidence and the law? Please explain.

The proposed new questions would be asked during the open-ended portion of *voir dire* and would be in addition to the other open-ended questions.

### Proposed Amendments to the Model Jury Charges

The Working Group recommends adding content to three model jury charges – (1) preliminary instructions; (2) instructions after being sworn; and (3) final instructions– to reinforce the importance of impartiality, including through ongoing awareness of implicit biases and how they can affect consideration of jurors’ thought processes and decision-making.

The recommendation is to add the same supplemental language to the existing model civil jury charges and the model criminal jury charges. The full text of the criminal model jury charges is attached with the proposed amendments shown in bold. Identical amendments are proposed for the civil jury charges. These proposed changes incorporate initial input from the Committee on Model Civil Jury Charges and the Committee on Model Criminal Jury Charges.

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Please send any comments on the proposed new *voir dire* questions and the supplements to the model jury charges in writing by March 12, 2021 to:

Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Comments on Proposed Juror Impartiality Initiatives  
Hughes Justice Complex; P.O. Box 037  
Trenton, New Jersey 08625-0037

Comments may also be submitted via e-mail to: [Comments.Mailbox@njcourts.gov](mailto:Comments.Mailbox@njcourts.gov).

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address

(and those submitting comments by e-mail should include their name and email address). Comments are subject to public disclosure upon receipt.

A handwritten signature in black ink, reading "Glenn A. Grant". The signature is written in a cursive style with a horizontal line underneath.

Hon. Glenn A. Grant, J.A.D.

Acting Administrative Director of the Courts

Dated: February 2, 2021

## Attachment 1

### Proposed Revisions to the “Preliminary Instructions to the Jury” Model Criminal Jury Charge – Revisions Shown in Bold/Underscored Font

My name is \_\_\_\_\_ and I'm a Judge in the Superior Court of the State of New Jersey.

Ladies and Gentlemen, you have been brought here today so that we may select a jury for this case, which is entitled the State of New Jersey v. \_\_\_\_\_. We are about to begin a process called the voir dire and the purpose of the voir dire is very simple. It is to obtain a jury which is able to hear this case without any bias, prejudice or pre-conceived ideas. In short the idea is to select a fair jury.

Members of the panel we are here to try the matter in dispute between the State of New Jersey and \_\_\_\_\_. This is a criminal case and the charge(s) is (are) \_\_\_\_\_.

I realize that jury service may be new to some of you, so a few preliminary remarks may prove to be helpful.

The first step in a jury trial is the selection of the jury. This process is important because both the State and the defendant are entitled to jurors who are impartial and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice or sympathy and must not be influenced by preconceived ideas.

**Everyone of us makes implicit or unconscious associations and assumptions, and has biases of which we are not consciously aware. Implicit or unconscious thinking, including implicit bias, affects what we see and hear, how we remember what we see and hear, and how we make decisions. Jurors have an obligation to judge the facts and apply**

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**the law as instructed without bias, prejudice or partiality. To do so, jurors need to acknowledge their own implicit or unconscious biases so as to not be affected by them during the trial and jury deliberations.**

Those of you selected as jurors on this case shall serve as judges of the facts. In other words, you will listen to the testimony of witnesses, examine any physical evidence introduced and thereafter determine the facts.

I am the judge of the law. At the conclusion of this matter, after the evidence has been presented and counsel have made their closing arguments, I will tell you what the law is and you must apply that law to the facts in order to reach a fair and impartial verdict.

Although you may be qualified to serve as a juror in most cases, there may be something that could disqualify you in this case or make it embarrassing for you to serve. In order to learn such information and to ensure that you are impartial and unbiased with respect to this particular trial, I will ask each of you a number of standard questions about your background and your views on certain issues, as well as several questions that ask\_about your television and Internet viewing habits, favorite news sources, and the like. This process ensures fairness in each case. I will go over each of the questions so that you understand them [and you've been given a printed version as well]. Please understand that the questions I will ask are for a legitimate purpose and not intended to pry into your personal affairs. It is a way for me, as well as the attorneys and the defendant, to learn life experiences that may affect your service on this trial. Do not hesitate to speak your mind honestly and plainly. It is very important that you answer each question fully and truthfully. Keep in mind that there are

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no right or wrong answers. Truthful and honest answers are necessary so that a fair and impartial jury can be selected.

As we mature we all to some extent develop certain biases, prejudices, fixed opinions and views. We develop these from our families, others around us, the media and from our everyday experiences. You are entitled to be who you are and to feel and think about things as you do. It is important to recognize any biases, prejudices, fixed opinions and views that you may have and to disclose them to me during jury selection. **This includes recognizing and not being affected by implicit or unconscious biases.** If for any reason my questions do not cover why you would not be able to listen with an open mind to the evidence in this case or be unable to reach a fair and impartial verdict, it is necessary that you volunteer this information to me when you are questioned.

If at any time during the jury selection process you wish to discuss anything with me concerning your ability to serve as a juror that you believe touches on a sensitive matter, raise your hand and I will speak with you outside the presence of the other jurors but in the presence of the attorneys [choose appropriate: [and the defendant] [and the defendant who is listening at counsel table through a headset]].<sup>1</sup> I do this because you may feel more comfortable responding with some degree of privacy and because I need you to be completely open and honest in your responses. I also want to avoid the risk that your comment could influence your fellow jurors if they heard it. These discussions will also be recorded as part of the court record.

After I have questioned each of you, you may be excused as a juror by me if in my opinion there is a valid reason why you should not serve. Each

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<sup>1</sup> See State v. W.A. 184 N.J. 45 (2005), advising that the defendant has the right to be present during voir dire sidebar conferences but must request to be present.

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attorney may also excuse a limited number of jurors without giving any reason for doing so. In the event you are excused, please do not consider this an insult or take it personally. It is merely part of the process employed in selecting a jury as permitted by our Court Rules. If you are excused and return to the juror assembly area, it is important that you do not discuss anything about this case or about your experience in this courtroom with your fellow jurors -- because any such information may affect the ability of those individuals to serve on this trial or another trial.

Briefly this case involves: EXPLAIN NATURE OF THE CASE AT BAR

Our best estimate is that this case will take \_\_\_\_\_ or \_\_\_\_\_ days to complete. At the outside the attorneys and I feel that it could possibly take as much as \_\_\_\_\_ days, but it is highly unlikely that it would take any more time than that.

(Discuss Daily Schedule of Trial)

This is a criminal case there are certain principles of law that must be accepted and followed by jurors.<sup>2</sup>

The indictment is not evidence of the defendant's guilt on the charge(s). An indictment is a step in the procedure to bring the matter before the court and jury for the jury's ultimate determination as to whether the defendant is guilty or not guilty on the charge(s) stated in it.

The defendant has pleaded not guilty to the charge(s) and is presumed to be innocent. Unless each and every element of the offense(s) charged is (are) proved beyond a reasonable doubt, the defendant must be found not guilty of that charge.

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<sup>2</sup> At the least, the jury must be asked whether they understand the basic principles of presumption of innocence and those governing the indictment and whether they can abide by these principles. State v. Lumumba, 253 N.J. Super. 375, 394 (App. Div. 1992).

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The burden of proving each element of the charge(s) beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. It is not the obligation or the duty of the defendant in a criminal case to prove his/her innocence or offer any proof relating to his/her innocence.

The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.

The State 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 necessary to prove only that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. 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/her guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give the defendant the benefit of the doubt and find him/her not guilty.

You will have to apply the law as I give it to you regardless of your own personal feelings about it.

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As this is a criminal case, your verdict must be unanimous; that is, all 12 deliberating jurors must agree upon the verdict.<sup>3</sup>

I would like to first introduce to you the attorneys. The State of New Jersey will be represented throughout these proceedings by \_\_\_\_\_. I would like (him/her) to rise and introduce (himself/herself) to you. The defendant will be represented by \_\_\_\_\_.<sup>4</sup> I would like (him/her) to rise and introduce (himself/herself) to you, and (his/her) client.

(Conduct the Voir Dire)

As you may have noticed, defendant is dressed in [jail] [prison] garb. You must not speculate about the reason the defendant is wearing such clothing. The fact that (NAME OF DEFENDANT) is dressed in [jail] [prison] clothing is irrelevant to the issue of whether the State has proven defendant's guilt of the charge(s) beyond a reasonable doubt and cannot form the basis of any discussion during your deliberations. Will any of you have any difficulty in carrying out my instruction on this matter?

[CHARGE NOW IF NOT PREVIOUSLY CHARGED BEFORE FIRST  
BREAK]

**INSTRUCTIONS REGARDING JUROR RESEARCH**  
**FIRST RECESS**

In a few minutes you will be excused for a short break. I instruct that you must not discuss this case among yourselves or with anyone else during this or any other recess.

No one is permitted to talk to you about this case outside the courtroom. If you should see any of the attorneys or parties and they do not

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<sup>3</sup> See State v. Milton, 178 N.J. 421 (2004), setting forth the process to be used to determine the unanimity of the verdict.

<sup>4</sup> Do not mention that the defense attorney is a public defender.

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greet you, do not be offended or think that they are being rude. They are not permitted to talk to you. If anyone approaches you and tries to talk about this case report that to me or my staff immediately without discussing it with your fellow jurors. Do NOT discuss anything about this case with your fellow jurors until I instruct you to do so at the end of the case after you have heard all of the evidence produced in this courtroom, heard the summations of the lawyers, heard my instructions to you about the law. Once I instruct you to begin your deliberations in the privacy of the jury room that will be the first time you can discuss this case. You may NOT have any discussions with anyone before then about this case.

During this or any other recess, or when you go home at the end of the day, I instruct you NOT to discuss this case with anyone such as your fellow jurors, friends, co-workers or family members. Do NOT text them, phone them, e-mail them, tweet them about this case by any means either in person or by any electronic means. Every conversation about a jury trial begins with just a single sentence no matter how innocent. If you start talking about this trial with someone else, that person will say something that might affect your thinking about the facts of this case. That would obviously be unfair to both parties in this case because what some other person says outside this courtroom is NOT evidence in this case.

I instruct you not to read or have anyone read to you any newspaper accounts or search the internet for any media accounts about this trial or read or have anyone read to you or search the Internet for blogs, tweets or Facebook pages about any persons, topics or places related to this case. I also instruct you not to visit the scene(s) of the incident(s) or try to view (it/them) on the Internet through Mapquest or Google Earth type sites. Do

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not do any legal or factual research about anyone or any topic connected to this case. You are NOT here as investigators.

If you are sworn as jurors in this case, you will become the sole judges of the facts, so you must remain impartial throughout the trial. You must decide the facts of this case solely from the evidence produced in this courtroom and NOTHING ELSE. It would be unfair and a violation of your oath as jurors to base your decision about the facts of this case upon something that was said to you or discovered by you outside this courtroom.

## **Attachment 2**

### **Proposed Revisions to the “Instructions After Jury Is Sworn” Model Criminal Jury Charge – Revisions Shown in Bold/Underscored Font**

Ladies and Gentlemen of the jury, you have been selected as the jury in this case. As you know this is a criminal case, and to assist you in better understanding your functions and duties, I will tell you how the case will proceed.

You are the sole judges of the facts. Your determination of the facts is to be based solely upon the evidence submitted during the course of the trial. When I use the term "evidence" I mean the testimony of witnesses who will testify, and any exhibits which may be marked into evidence and which will be taken into the jury room for your review at the end of the case.

The first order of business will be the prosecutor's opening statement. In the opening statement the prosecutor will present the State's contentions and will outline what he/she expects to prove. Following that, the defense counsel, if he/she chooses, will make an opening statement. [OR, WHERE APPLICABLE: Defense counsel has chosen not to make an opening statement which is his/her right and no adverse inference should be drawn.]

What is said in an opening statement is not evidence. The evidence will come from the witnesses who will testify and from whatever documents or tangible items that are received in evidence.

During the trial the attorneys may make objections as evidence is offered or they may address motions to me. They have a right and, indeed, a duty to make objections and motions when it seems to them to be proper to do so. I have a duty to rule upon any objections and motions based upon the law.

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If you hear me say that an objection is overruled that means I am ruling against the attorney making the objection. If I say the objection is sustained I am ruling in favor of the attorney making the objection. Anything excluded by me is not evidence and must not be considered by you in your deliberations. Sometimes these evidence questions or legal questions will be heard in your presence in open court, other times at a sidebar, or you may be excused and go into the jury room so that we can discuss the issue in open court. I realize that being confined in the jury room for any length of time is not very pleasant, but I ask your indulgence and patience. I am sure that you realize that these legal arguments must be heard outside of your presence.

You should not conclude that because I rule one way or another that I have any feelings about the outcome of the case. I do not; but even if I did, you would have to disregard them since you will be the sole judges of the facts.

During the trial from time to time there shall be recesses. During any of those recesses I direct you not to discuss the case among yourselves, and when we recess overnight, you must not discuss the case or the testimony with any members of your family or any other persons or provide an account of your juror service to others, including through any electronic means, such as shared Internet websites.<sup>1</sup> Thus, for example, do not talk face to face or use any electronic device, such as the telephone, cell or smart phone, Blackberry, iPhone, PDA, computer, the Internet, e-mail, any text or instant message service, any Internet chat room, blog or website such as Facebook, MYSpace, YouTube, or Twitter, to communicate to anyone any information about this case. The reason of course is that you should not begin any deliberations until the entire case has been concluded, i.e., until you have heard all

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<sup>1</sup> [See Assignment Judges memorandum, dated March 17, 2010, “Jurors’ Use Of Electronic Devices During Juror Service - Revised Policy.”] **See “Policy Regulating Jurors’ Use of Electronic Devices During Juror Service,” promulgated July 24, 2018.**

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of the witnesses, the final arguments of counsel, and my instructions as to the law. It would be improper for any outside influence to intrude upon your thinking. If anyone should attempt to discuss the case with you, you should report the fact to me or my staff immediately.

If you have a cell phone, pager, or any device that is capable of providing Internet access and any device that may be used to record or transmit sound or images, whether video images or still images, you must turn that device off while in the courtroom. Similarly, you must turn off these communication devices and cannot use them for any purpose while in the jury deliberation room. You will be given a telephone number at which you can be contacted during the trial. Unless I otherwise instruct, you may only use these communication devices when you are outside the jury deliberation room during recesses. Please be mindful of these instructions at all times.

During jury selection, you were asked and responded to a series of questions from the court and counsel. If, during the course of trial, you realize that you may have made a misstatement or omission during your responses, or if circumstances arise that could change or alter the answers you gave, do not discuss the matter with your fellow jurors. Rather, you should tell the court officer, who will notify me at once.<sup>2</sup>

During the trial, you are not to speak to or associate with any of the attorneys, the witnesses or the defendant, \_\_\_\_\_, nor are they permitted to speak or associate with you. This separation should not be regarded as rudeness but rather as a proper precaution to ensure fairness to both sides. If anyone connected with this case, or any other person approaches you or attempts to influence you in

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<sup>2</sup> State v. Bianco, 391 N.J. Super. 509, 523 (App. Div. 2007).

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any way, do not discuss it with the other jurors. Simply tell the sheriff's officer and I will be notified immediately.

Your deliberations must be based solely on the testimony and exhibits admitted into evidence, without any outside influence or opinions of relatives or friends. Additionally, do not read any news stories or articles, in print, on the Internet, or in any blog about this case. I do not know if there will be any newspaper or other media coverage of this trial, but you are instructed to completely avoid reading, viewing or listening to any newspaper or media accounts or listening to anyone else discuss them.

Additionally, I must instruct you not to read any newspaper articles, or search for, or research information relating to the case, including any participants in the trial, such as the parties, the witnesses, the lawyers, the judge or court personnel through any means, including electronic means. This strict prohibition against outside research or communication applies not only to printed reference materials, such as dictionaries or encyclopedias, but also to the Internet and any other electronic medium. You are not to seek any additional information on the subject matter of this case, the laws in any way related to this case, or any other factual or legal matter that has any connection to this case. Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or view any place discussed in the testimony. I am sure that you can understand why this instruction is so important. Information from other sources outside the courtroom is not evidence, is often based upon second or third hand information, is purely hearsay, is not always accurate and is not subject to examination by the attorneys. A juror's improper use of outside technology threatens the very fairness of our system of justice and could result in the court

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having to start the trial all over, wasting the court's, the parties' and your valuable time and resources. In the event that such outside information comes to your attention, it is important that you tell me or a member of my staff so I can determine what further action is necessary to insure the fairness of the trial.

The court and the parties rely upon your good faith and the fact that you have been sworn to comply with the instructions of the court so that both sides may receive a fair trial. Because this instruction is so important, it is my duty to remind you of it at the end of each day's proceedings.

Since you are the sole judges of the facts, you must pay close attention to the testimony. It is important that you carry with you to the jury room not only a clear recollection of what the testimony was, but also a recollection of the manner in which it was given. It will be your duty to pay careful attention to all the testimony. If you are unable to hear any witness, I ask that you indicate this to me by raising your hand so that I may instruct the witness to speak louder and/or more clearly. As jurors you will be required to pass upon all the questions of fact including the credibility or believability of the witnesses.

You are not permitted to visit the scene of the alleged incident, do your own research or otherwise conduct your own investigation. Your verdict must be based solely on the evidence introduced in this courtroom.

Jurors are not permitted to take notes.<sup>3</sup> Experience has shown that note taking is distracting. It is better to depend upon the combined recollections of all the jurors than upon notes taken by one or more of them.

At the conclusion of the testimony the attorneys will speak to you once again in summation. At that time they will present to you their final arguments based upon

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<sup>3</sup> See R. 1:8-8(b), which authorizes trial judges, at their discretion, to permit jurors to take notes.

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their respective recollections of the evidence. Again, this is not evidence but their recollection as to the evidence. It is your recollection as to the evidence presented that is controlling.

Following summations you will receive your final instructions on the law from me, and you will then retire to consider your verdict. You are not to form or express an opinion on this case but are to keep an open mind until you have heard all the testimony, have heard summations, have had the benefit of my instructions as to the applicable law, and have been instructed to begin your deliberations.

**The responsibility of all jurors is to reach a fair verdict based on the law as the judge explains it and on the evidence in the case. The court's goal in every jury trial is to seat jurors who will decide the case before them without prejudice or bias because under our Constitution everyone deserves a fair trial.**

**Jurors fulfill this responsibility by remaining impartial, or neutral, until the jury reaches a verdict. Remaining impartial throughout the trial means ensuring that jurors are not affected or influenced by biases or any preconceived ideas about the case.**

It is your duty to weigh the evidence calmly, **impartially**, and without **explicit or implicit** bias, passion, prejudice or sympathy, and to decide the issues [upon] **on** the merits.

You, as jurors, should find your facts from the evidence adduced during the trial. Evidence may be either direct or circumstantial. Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

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An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved by direct evidence or circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Indeed, in many cases, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence.

In any event, both circumstantial and direct evidence should be scrutinized and evaluated carefully. A conviction may be based on direct evidence alone, circumstantial evidence alone or a combination of direct evidence and circumstantial evidence, provided, of course, that it convinces you of a defendant's guilt beyond a reasonable doubt.

Conversely, if direct or circumstantial evidence gives rise to a reasonable doubt in your minds as to the defendant's guilt then the defendant must be found not guilty.

A simple illustration may be helpful. The following is one set of possible illustrations:

Optional Illustrations:

The problem is proving that it snowed during the night:

- (a) Direct Evidence: Testimony indicating that the witness observed snow falling during the night.
- (b) Circumstantial Evidence: Testimony indicating that there was no snow on

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the ground before the witness went to sleep, and that when he or she arose in the morning, it was not snowing, but the ground was snow-covered.<sup>4</sup>

The former directly goes to prove that fact that snow fell during the night; while the latter establishes facts from which the inference that it snowed during the night can be drawn.

As the judges of the facts you are to determine the credibility of the witnesses, and, in determining whether a witness is worthy of belief and therefore credible, you may take into consideration: the appearance and demeanor of the witness; the manner in which he or she may testify; the witness' interest in the outcome of the trial, if any; his or her means of obtaining knowledge of the facts; the witness' power of discernment meaning their judgment, their understanding; his or her ability to reason, observe, recollect and relate; the possible bias (if any) in favor of the side for whom the witness testifies; the extent to which, if at all, each witness is either corroborated or contradicted, supported or discredited by other evidence; whether the witness testified with an intent to deceive you; the reasonableness or unreasonableness of the testimony the witness has given; whether the witness made any inconsistent or contradictory statements; and any and all other matters in the evidence which serve to support or discredit his or her testimony to you.

During your deliberations, you may ask: what is more reasonable; the more probable or the more logical version?

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<sup>4</sup> For cases dealing with circumstantial evidence, see: State v. Corby, 28 N.J. 106 (1958); State v. Fiorello, 36 N.J. 80, 87-88 (1961), cert. denied, 368 U.S. 967 (1962); State v. Ray, 43 N.J. 19, 30-31 (1964); State v. Mills, 51 N.J. 277, 287 (1968), cert. denied, 393 U.S. 186 (1969); State v. Franklin, 52 N.J. 386, 406 (1968); State v. Mayberry, 52 N.J. 413, 436-37 (1968), cert. denied, 393 U.S. 1043, (1969); State v. Graziani, 60 N.J. Super. 1, 13-14 (App. Div. 1959), aff'd o.b., 31 N.J. 538 (1960), cert. denied, 363 U.S. 830 (1960); State v. Hubbs, 70 N.J. Super. 322, 328-29 (App. Div. 1961); State v. Papitsas, 80 N.J. Super. 420, 424 (App. Div. 1963).

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Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience in weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and, whether the discrepancy results from innocent error or willful falsehood.

A witness or witnesses may testify in this case with the assistance of a certified court interpreter. Even if you understand the language spoken by the witness, you must accept the interpretation of the testimony and you must not provide any translation of your own to the jurors. Every juror is bound by the translation provided by the interpreter, whether or not the juror agrees or disagrees with the interpretation, because every juror must consider the same evidence during deliberations.

[In appropriate cases charge "Testimony of Expert"]

( \_\_\_\_\_ ) stands before you on an indictment found by the Grand Jury charging (him/her) with committing the crime(s) of \_\_\_\_\_.

The indictment is not evidence of the defendant's guilt on the charge(s). An indictment is a step in the procedure to bring the matter before the court and jury for the jury's ultimate determination as to whether the defendant is guilty or not guilty on the charge(s) stated in it.

The defendant has pleaded not guilty to the charge(s).

### INSTRUCTIONS AFTER JURY IS SWORN

The defendant on trial is presumed to be innocent and unless each and every essential element of the offense(s) charged is (are) proved beyond a reasonable doubt, the defendant must be found not guilty of that charge.

The burden of proving each element of the charge(s) beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. It is not the obligation or the duty of the defendant in a criminal case to prove his/her innocence or offer any proof relating to his/her innocence.

The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.

The State 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 necessary to prove only that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. 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/her

**INSTRUCTIONS AFTER JURY IS SWORN**

guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him/her not guilty.

You will note that a jury of 14 has been drawn in this case. At the conclusion of all of the evidence and the charge of the court, there will be a random selection in which 2 jurors will be selected to act as alternates. The 12 remaining jurors will then deliberate and return a verdict. At this point we don't know who the alternates will be, and whether or not their services will be utilized. Thus, I direct that all jurors should pay equal attention to the evidence as it is presented, and to the court's rulings which are applicable to the case.

(OPENINGS)

### **Attachment 3**

## **Proposed Revisions to the “Final Instructions to the Jury” Model Criminal Jury Charge – Revisions Shown in Bold/Underscored Font**

### **GENERAL INFORMATION**

Ladies and Gentlemen of the Jury, the evidence in this case has been presented and the attorneys have completed their summations. We now arrive at that time when you, as jurors, are to perform your final function in this case.

At the outset, let me express my thanks and appreciation to you for your attention to this case. I would like to commend counsel for the professional manner in which they have presented their respective cases and for their courtesy to the court and jury during the course of this trial.

Before you retire to deliberate and reach your verdict, it is my obligation to instruct you as to the principles of law applicable to this case. You shall consider my instructions in their entirety and not pick out any particular instruction and overemphasize it.

Generally speaking, these instructions consist of four parts. The first part deals with the general principles of law that apply to a criminal case. The second part describes the evidence that you may consider in your deliberations. The third part is about the portions of the Criminal Code of New Jersey that you must apply to the facts you find in this case to determine whether the State has proven beyond a reasonable doubt that the defendant violated a specific criminal statute. Finally, the fourth part of the instructions tells you how to go about conducting your deliberations.

You must accept and apply this law for this case as I give it to you in this charge. Any ideas you have of what the law is or what the law should be or any statements by the attorneys as to what the law may be, must be disregarded by you, if they are in conflict with my charge.

## CRIMINAL FINAL CHARGE

### NATURE OF INDICTMENT

Now, beginning with the general principles of law that apply to a criminal case, the defendant(s) stand(s) before you on an indictment returned by the grand jury charging him/her with [Insert Counts of Indictment for the jury to consider]:

The indictment is not evidence of the defendant's guilt on the charge(s). An indictment is a step in the procedure to bring the matter before the court and jury for the jury's ultimate determination as to whether the defendant is guilty or not guilty on the charge(s) stated in it.

The defendant has pleaded not guilty to the charge(s).

### PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The defendant on trial is presumed to be innocent and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty of that charge.

The burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. The defendant in a criminal case has no obligation or duty to prove his/her innocence or offer any proof relating to his/her innocence.

The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.

The State 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 necessary to prove only that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond

## CRIMINAL FINAL CHARGE

a reasonable doubt.

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. 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/her guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him/her not guilty.

## FUNCTION OF THE COURT

The function of the judge is separate and distinct from the function of the jury. It is my responsibility to determine all questions of law arising during trial and to instruct the jury as to the law which applies in this case. You must accept the law as given to you by me and apply it to the facts as you find them to be.

During the course of the trial, I was required to make certain rulings on the admissibility of the evidence either in or outside of your presence. These rulings involved questions of law. The comments of the attorneys on these matters were not evidence. In ruling, I have decided questions of law and, whatever the ruling may have been in any particular instance, you should understand that it was not an expression or opinion by me on the merits of the case. Neither should my other rulings on any other aspect of the trial be taken as favoring one side or the other. Each matter was decided on its own merits.

## CRIMINAL FINAL CHARGE

I may have sustained an objection(s) to some questions asked by counsel which may have contained statements of certain facts. The mere fact that an attorney asks a question and inserts facts or comments or opinions in that question in no way proves the existence of those facts. You will only consider such facts which in your judgment have been proven by the testimony of witnesses or from exhibits admitted into evidence by the court.

## JUDGE'S QUESTIONING

The fact that I may have asked questions of a witness in the case must not influence you in any way in your deliberations. The fact that I asked such questions does not indicate that I hold any opinion one way or the other as to the testimony given by the witness. Any remarks made by me to counsel or by counsel to me or between counsel, are not evidence and should not affect or play any part in your deliberations.

## FUNCTION OF THE JURY

As I instructed you when we started the case, I explained to you that you are the judges of the facts and, as judges of the facts, you are to determine the credibility of the various witnesses as well as the weight to be attached to their testimony. You and you alone are the sole and exclusive judges of the evidence, of the credibility of the witnesses and the weight to be attached to the testimony of each witness.

Regardless of what counsel said or I may have said recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence. Although the attorneys may point out what they think important in this case, you must rely solely upon your

## CRIMINAL FINAL CHARGE

understanding and recollection of the evidence that was admitted during the trial. Whether or not the defendant has been proven guilty beyond a reasonable doubt is for you to determine based on all the evidence presented during the trial. Any comments by counsel are not controlling.

It is your sworn duty to arrive at a just conclusion after considering all the evidence which was presented during the course of the trial.

Now I will move on to the second part of the instructions and discuss the evidence that you may consider in judging the facts of the case. When I use the term “evidence” I mean the testimony you have heard and seen from this witness box, any stipulations and the exhibits that have been admitted into evidence. Any exhibit that has not been admitted into evidence cannot be given to you in the jury room even though it may have been marked for identification. Only those items admitted into evidence can be given to you.

Any testimony that I may have had occasion to strike is not evidence and shall not enter in your final deliberations. It must be disregarded by you. This means that even though you may remember the testimony you are not to use it in your discussions or deliberations. Further, if I gave a limiting instruction as to how to use certain evidence, that evidence must be considered by you for that purpose only. You cannot use it for any other purpose.

As jurors, it is your duty to weigh the evidence calmly and without passion, prejudice or sympathy. Any influence caused by these emotions has the potential to deprive both the State and the defendant(s) of what you promised them - a fair and impartial trial by fair and impartial jurors. Also, speculation, conjecture and other forms of guessing play no role in the performance of your duty. **As jurors, your oath requires that you not be affected or influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including implicit, or unconscious, bias. During your deliberations if you think unconscious bias is**

## CRIMINAL FINAL CHARGE

**affecting your evaluation, think about the evidence again with the video and this instruction in mind.**

### DIRECT AND CIRCUMSTANTIAL EVIDENCE

As I instructed you at the beginning of the case, evidence may be either direct or circumstantial. Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.<sup>1</sup>

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. Whether or not inferences should be drawn is for you to decide using your own common sense, knowledge and every day experience. Ask yourselves is it probable, logical and reasonable.

It is not necessary that all the facts be proven by direct evidence. They may be proven by direct evidence, circumstantial evidence or by a combination of direct and circumstantial evidence. All are acceptable as a means of proof. In many cases, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence.

However, direct and circumstantial evidence should be scrutinized and evaluated carefully. A verdict of guilty may be based on direct evidence alone, circumstantial evidence alone or a combination of direct evidence and circumstantial evidence provided, of course, that it convinces you of a defendant's guilt beyond a reasonable doubt. The reverse is also true, a defendant may be found not guilty by reason of direct evidence, circumstantial evidence, a combination of the two or a

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<sup>1</sup> The court may make reference to the example given to the jury previously in the “Instructions After Jury is Sworn” model charge.

## CRIMINAL FINAL CHARGE

lack of evidence if it raises in your mind a reasonable doubt as to the defendant's guilt.

### CREDIBILITY OF WITNESSES

As the judges of the facts, you are to determine the credibility of the witnesses and, in determining whether a witness is worthy of belief and therefore credible, you may take into consideration:

- the appearance and demeanor of the witness;
- the manner in which he or she may have testified;
- the witness' interest in the outcome of the trial if any;
- his or her means of obtaining knowledge of the facts;
- the witness' power of discernment meaning his or her judgment - understanding;
- his or her ability to reason, observe, recollect and relate;
- the possible bias, if any, in favor of the side for whom the witness testified;
- the extent to which, if at all, each witness is either corroborated or contradicted, supported or discredited by other evidence;
- whether the witness testified with an intent to deceive you;
- the reasonableness or unreasonableness of the testimony the witness has given;
- whether the witness made any inconsistent or contradictory statement;
- and any and all other matters in the evidence which serve to support or discredit his or her testimony.

Through this analysis, as the judges of the facts, you weigh the testimony of each witness and then determine the weight to give to it. Through that process you may accept all of it, a portion of it or none of it.

## CRIMINAL FINAL CHARGE

(CHARGE, IF APPLICABLE MODEL CHARGE(S) (ATTACHED) ON: ALIBI, DEFENDANT'S ELECTION NOT TO TESTIFY, CREDIBILITY-PRIOR CONVICTION OF A DEFENDANT, CREDIBILITY- PRIOR CONVICTION OF A WITNESS, CREDIBILITY OF WITNESS-PRIOR ADJUDICATION OF DELINQUENCY, EXPERT TESTIMONY, FALSE IN ONE-FALSE IN ALL, TESTIMONY OF CHARACTER WITNESS, FINGERPRINTS, FLIGHT, IDENTIFICATION, IDENTITY-POLICE PHOTOS, PRIOR CONTRADICTORY STATEMENTS OF WITNESSES, STATEMENT BY DEFENDANT (WHERE ADMISSIBLE FOR CREDIBILITY PURPOSES ONLY), STATEMENTS OF DEFENDANT, WITNESS IMMUNITY, WITNESS - TESTIFYING WHILE WEARING RESTRAINTS, WITNESS-TESTIFYING IN JAIL GARB OR PRISON GARB, and DEFENDANT-TESTIFYING IN JAIL GARB OR PRISON GARB).<sup>2</sup>

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<sup>2</sup> This section should be deleted from the final draft of the charge to be given to the jury.

## CRIMINAL FINAL CHARGE

Now, I will instruct you on the third part of the instructions on the portions of the Criminal Code that you must apply to the facts you find to determine whether the State has proven beyond a reasonable doubt that the defendant violated a specific criminal statute. The statute read together with the indictment identifies the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant on each of the counts in the indictment.

[CHARGE IF APPLICABLE]

In addition, you will have the opportunity to consider certain other offenses besides those charged specifically in the indictment. These are what we call lesser offenses, crimes or offenses of a lesser degree that are considered to be included within the charges brought in the indictment. I will give you instructions about how to consider these lesser offenses shortly.

[CHARGE IF APPLICABLE]

### MULTIPLE CHARGES

There are \_\_\_\_\_ offenses charged in the indictment. They are separate offenses by separate counts in the indictment. In your determination of whether the State has proven the defendant guilty of the crimes charged in the indictment beyond a reasonable doubt, the defendant is entitled to have each count considered separately by the evidence which is relevant and material to that particular charge based on the law as I will give it to you.

[CHARGE IF APPLICABLE]

### WHERE MORE THAN ONE DEFENDANT:<sup>3</sup>

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<sup>3</sup> When accomplice liability is involved charge according to State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993).

## **CRIMINAL FINAL CHARGE**

You must also return separate verdicts for each defendant as to each of the charges being tried. In other words, you will have to decide each case individually. Whether the verdicts as to each defendant are the same depends on the evidence and your determination as judges of the facts.

[CHARGE SPECIFIC OFFENSES AND LESSER OFFENSES]<sup>4</sup>

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<sup>4</sup>

This bracketed text should be deleted from the final draft of the charge to be given to the jury.

**DELIBERATIONS**

I will now give you some information on the final part of these instructions on conducting your deliberations.

There is nothing different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any questions depending upon evidence presented to them. You are expected to use your own good common sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your knowledge of how people behave. It is the quality of the evidence, not simply the number of witnesses that control.

As I said before, any exhibit that has not been marked into evidence cannot be given to you in the jury room even though it may have been marked for identification. Only those items marked in evidence can be given to you.

Very shortly you will go into the jury room to start your deliberations. I remind you that, during deliberations, and, in fact, any time that you are in the jury deliberation room, you must keep any cell phone, pager or other communication device you may possess turned off.

You are to apply the law as I have instructed you to the facts as you find them to be, for the purpose of arriving at a fair and correct verdict. The verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means all of you must agree if the defendant is guilty or not guilty on each charge.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your

## CRIMINAL FINAL CHARGE

opinion if convinced it is erroneous but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges--judges of the facts.

## UNANIMOUS VERDICT

You may return on each crime charged a verdict of either not guilty or guilty. Your verdict, whatever it may be as to each crime charged, must be unanimous. Each of the twelve members of the deliberating jury must agree as to the verdict.<sup>5</sup>

## INSTRUCTIONS AS TO VERDICT FORM

To assist you in reporting a verdict I have prepared a verdict sheet for you. You will have this with you in the jury room. This verdict form is not evidence. This form is only to be used to report your verdict.

[Go Over Form With Jury]

## JURY QUESTIONS

If, during your deliberations, you have a question or feel that you need further assistance or instructions from me, or wish to have certain testimony read or played back (or video or audio exhibit played back), write your question or request on a sheet of paper and give it to the sheriff's officer who will be standing at the jury room door who, in turn, will give it to me. That court officer will be sworn to perform certain duties, such as keeping the jury together in a private place for purposes of deliberations, and ensuring that no one speaks with you except by order of the court.

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<sup>5</sup> See State v. Milton, 178 N.J. 421 (2004), setting forth the process to be used in determining the unanimity of the verdict. In some cases, a specific unanimity instruction is appropriate. See State v. Parker, 124 N.J. 628 (1991) and State v. Frisby, 174 N.J. 583 (2002). In those cases, a judge should instruct a jury that it must be unanimous as to a particular theory of a case or as to a particular set of facts. The Judge must also provide the jury a special verdict form in such cases.

## **CRIMINAL FINAL CHARGE**

You are not to discuss with or ask the officer about trial matters or procedures. Please be aware that the officer is also instructed not to initiate communications with you, or to enter the deliberation room without your consent, except to communicate on my behalf regarding administrative matters, such as information about breaks or meals, or otherwise to ensure your comfort. If the officer must enter the deliberation room, the officer will knock first and complete the officer's responsibilities without delay. When the officer enters the room, please stop your deliberations and do not resume until the officer has left and closed the door.

Once I receive your question or request, I will go over it with the lawyers and will try to answer it as quickly as possible. Please be patient. If you do send out a question do not disclose where you stand on your deliberations. Do not tell us, as an example, that you are 10 to 2 or 8 to 4 on a given charge. If you have reached a unanimous verdict on each charge, knock on the door and let the officer know that and we will bring you into court as soon as possible to receive your verdict.

I have come to the end of my charge.

[Do sidebar to give counsel opportunity to note objections on the record or excuse jury for that purpose]

[Recharge if Necessary]