

Presumption of Innocence
Burden of Proof (in cases with an affirmative defense)
Proof Beyond A Reasonable Doubt

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 or at the preliminary instructions stage, as the case may be, the jury will not be informed of the affirmative defense, the standard instruction on reasonable doubt should be given.

NOTE: The difference between the instruction “with” an affirmative defense and the instruction “without” an affirmative defense is in the fourth paragraph that begins: “The defendant is not required to prove or disprove any element of a charged crime.”

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.¹

Throughout these proceedings, the defendant is presumed to be innocent.² 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.³

[*NOTE: Add if the defendant introduced evidence:*

In determining whether the People have satisfied their burden of proving the defendant's guilt beyond a reasonable doubt, you may consider all the evidence presented, whether by the People or by the defendant.⁴ In doing so, however, remember that, even though the defendant introduced evidence, the burden of proof remains on the People.⁵]

The defendant is not required to prove or disprove any element of a charged crime.⁶ To the contrary, the People have

the burden of proving every element of a charged crime beyond a reasonable doubt.⁷ 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.⁸ The burden of proof never shifts from the People to the defendant.⁹ If the People fail to satisfy their burden of proof, you must find the defendant not guilty.¹⁰ If the People satisfy their burden of proof of all of the elements of a crime, you¹¹ will then consider an affirmative defense, which I will explain shortly.

First, what does our law mean when it requires proof of guilt "beyond a reasonable doubt"?¹²

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.¹³ 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.¹⁴ On the other hand, it is not sufficient to prove that the defendant is probably guilty.¹⁵ In a criminal case, the proof of guilt must be stronger than that.¹⁶ It must be beyond a reasonable doubt.¹⁷

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.¹⁸ It is an actual doubt, not an imaginary doubt.¹⁹ 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.²⁰

Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced²¹ 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.²²

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.²³ 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.²⁴

If you are not convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant not guilty of that crime. If you are convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant guilty of that crime.²⁵

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1. CPL 300.10(2).
 2. *Taylor v. Kentucky*, 436 U.S. 478 (1978).
 3. *In re Winship*, 397 U.S. 358 (1970); *Taylor v. Kentucky*, *supra*; *People v Antommarchi*, 80 N.Y.2d 247, 252-253 (1992).
 4. *People v. Kirkpatrick*, 32 N.Y.2d 17, 21, *appeal dismissed for want of substantial federal question*, 414 U.S. 948 (1973); *People v. Jackson*, 65 N.Y.2d 265 (1985); *People v. Goldstein*, 120 A.D.2d 471, 472-473 (1st Dept. 1986).
 5. See *People v. Antommarchi*, *supra*.
 6. *Id.*
 7. *In re Winship*, *supra* ; *People v Antommarchi*, *supra*.
 8. 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).
 9. 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...").
 10. See *Taylor v. Kentucky*, *supra*; *In re Winship*, *supra*; *People v Antommarchi*, *supra*.
 11. See *People v Goetz*, 73 N.Y.2d 751, 752 (1988).
 12. 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) § 21 (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."

13. See *Victor v. Nebraska*, *supra*; *In re Winship*, *supra*.
14. See *Victor v. Nebraska*, *supra*, 511 U.S. at 13 and 17-20 (Approving a 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 *** 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 § 21, at 17-18 ("...in criminal cases the law does not require proof that overcomes every possible doubt.")
15. See Federal Judicial Center, Pattern Criminal Jury Instructions, *supra*, at § 12.10, at 17-18.
16. See Solan, *supra*, at 111-112 ("...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*, 511 U.S. 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).
17. *In re Winship*, *supra*.
18. 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).
19. 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.).

20. 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 (1st 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 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).

21. 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.

22. See Solan, *supra*, at 145 ("Other possible instructions, such as 'proof so convincing that it leaves no reasonable doubt of the defendant's guilt,' may also accomplish the same goals [of focusing a jury on what they should consider]."); L. Sand, *supra*, at 4-12 (reporting that the pattern instructions of the Fifth and Eleventh Circuit include the language: "It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.")

23. See *Victor v. Nebraska*, *supra*, 511 U.S. at 19-20; *People v. Barker*, *supra*, 153 N.Y. at 114-115 (approving a charge which said: "A reasonable doubt, gentlemen, is not a mere whim, guess or surmise; nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing; but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence in the case.").

24. *Id.*

25. *People v Goetz*, *supra*, 73 N.Y.2d at 752.