ASSAULT AND BATTERY ON A POLICE OFFICER OR PUBLIC EMPLOYEE

I. INTENTIONAL ASSAULT AND BATTERY

The defendant is charged with having committed an intentional assault and battery upon a police officer (public employee) in violation of section 13D of chapter 265 of our General Laws.

In order to prove that the defendant is guilty of having committed an intentional assault and battery on a police officer (public employee), the Commonwealth must prove six things beyond a reasonable doubt:

First: **That the defendant touched the person of** *[the alleged victim]* **, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch** *[the alleged victim]* **;**

Third: **That the touching was *either* likely to cause bodily harm to** *[the alleged victim]* **, *or* was done without his (her) consent;**

***Fourth*: That** *[the alleged victim]* **was a police officer (public employee);**

***Fifth*: That the defendant knew** *[the alleged victim]* **was a police officer (public employee); and**

***Sixth*: That** *[the alleged victim]* **was engaged in the performance of his**

(her) duty at the time of the alleged incident.

If additional language on intent is appropriate. **As I mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch** *[the alleged victim]* **, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** *[the alleged victim]* **.**

The model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482, 457 N.E.2d 622, 624 (1983). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.

Commonwealth v. Ford, 424 Mass. 709, 677 N.E.2d 1149 (1997) (assault and battery is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Burke*, 390 Mass. at 482-483, 487, 457 N.E.2d at 624, 627 (any touching likely to cause bodily harm is a battery regardless of consent, but an offensive but nonharmful battery requires lack of consent or inability to consent); *Commonwealth v. McCan*, 277 Mass. 199, 203, 178 N.E. 633, 634 (1931) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another"); *Commonwealth v. Bianco*, 390 Mass. 254, 263, 454 N.E.2d 901, 907 (1983) (same); *Commonwealth*

v. Campbell, 352 Mass. 387, 397, 226 N.E.2d 211, 218 (1967) (same); *Commonwealth v. Musgrave,* 38 Mass. App. Ct. 519, 521, 649 N.E.2d 784, 786 (1995), aff'd, 421 Mass. 610, 659 N.E.2d 284 (1996) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"); *Commonwealth v. Moore,* 36 Mass. App. Ct. 455, 457-460, 632 N.E.2d 1234, 1236-1238 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson,* 30 Mass. App. Ct. 580, 584, 571 N.E.2d 411, 414 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"). See *Commonwealth v. Bianco*, 388 Mass. 358, 366-367, 446 N.E.2d 1041, 1047 (1983) (assault and battery by joint venture); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to cross-complaints of assault and battery; "such license is void, because it is against the law"); *Commonwealth v. Rubeck*, 64 Mass. App. Ct. 396, 401, 833 N.E.2d 650, 654 (2005) (no substantial risk of miscarriage of justice from omitting separate instruction that parent may use reasonable but not excessive force to discipline child because it is merely an elaboration of "right or excuse" language).

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery was already charged on.* **There is a second way in which a person may be guilty of an assault and battery on a police officer (public employee). Instead of intentional conduct, it involves reckless conduct that results in bodily injury.**

B. *If intentional assault and battery was not already charged on.* **The defendant is charged with having committed an assault and battery upon a police officer (public employee) by reckless conduct. Section 13A of chapter 265 of our General Laws provides that "Whoever commits . . . an assault and battery upon a police officer (public employee) shall be punished . . . ."**

In order to prove that the defendant is guilty of having committed an assault and battery upon a police officer (public employee) by reckless conduct, the Commonwealth must prove five things beyond a reasonable doubt:

First: **That the defendant intentionally engaged in actions which caused bodily injury to** *[the alleged victim]* **;**

Second: **That the defendant's actions amounted to reckless conduct;**

***Third*: That** *[the alleged victim]* **was a police officer (public employee);**

***Fourth*: That the defendant knew** *[the alleged victim]* **was a police officer (public employee); and**

***Fifth*: That** *[the alleged victim]* **was engaged in the performance of his (her) duty at the time of the alleged incident.**

To prove the first element, the Commonwealth must prove that the defendant intended the act(s) which resulted in the injury in the sense that those acts did not happen accidentally. The Commonwealth must also prove that the injury was sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

To prove the second element, the Commonwealth must prove that the defendant's actions amounted to reckless conduct. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be

shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway. The Commonwealth must prove that the defendant intended his (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally.

If relevant to the evidence. **If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.**

But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were

known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 625-627, 487 N.E.2d 1366, 1368-1370 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling . . . . For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most"); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-277, 450 N.E.2d 1100, 1102-1104 (1983) ("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act). See also *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4, 505 N.E.2d 171, 174 n.4 (1987) ("'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts"); *Commonwealth v. Godin*, 374 Mass. 120, 129, 371 N.E.2d 438, 444, cert. denied, 436 U.S. 917 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards"); *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused** *[alleged victim]* **reasonably to fear an immediate attack from the defendant, which then led him (her) to try to (escape) (*or*) (defend) himself**

(herself) from the defendant, and in doing so injured himself (herself).

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

NOTES:

1. **Verdict slip where there are alternate theories of guilt.** If the evidence would warrant a guilty verdict for the offense of assault and battery on more than one theory of culpability, the judge must provide the jury with a verdict slip to indicate the theory or theories on which the jury bases its verdict and, on request, instruct the jurors that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta,* 422 Mass. 642, 646-647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett,* 422 Mass. 634, 640, 422 N.E.2d 833, 837 (1996); *Commonwealth v. Barry,* 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995). See the appendix for a sample verdict slip that may be used when an assault and battery charge is submitted to the jury under both the intentional and reckless branches of assault and battery, and without any lesser included offenses. Where the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010).

2. **Intent.** An intent to strike the police officer or public employee is not required under the recklessness analysis. *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 457-458, 737 N.E.2d 1264, 1266 (2000). However, the court added, "There is no explicit scienter requirement for the[] elements [of reckless assault and battery] in the statute. Assuming, without deciding the existence of such a requirement, compare *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 577-578 & n.2, 511 N.E.2d 38, 40 & n.2 (1987); *Commonwealth v. Lawson*, 46 Mass. App. Ct. 627, 629-630, 708 N.E.2d 148, 149-150 (1999), there is ample evidence here supporting the inference of the requisite knowledge on the part of the defendant." *Id.*, 50 Mass. App. Ct. at 459 n.6, 737 N.E.2d at 1267 n.6. See also *Commonwealth v. McCrohan,* 34 Mass. App. Ct. 277, 282, 610 N.E.2d 326, 330 (1993) (jury could properly find that police officer was "engaged in the performance of his duty" while responding in a neighboring town pursuant to a mutual aid agreement under G.L. c. 40, § 8G); *Commonwealth v. Deschaine*, 77 Mass. App. Ct. 506, 932 N.E.2d 854 (2010), *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 577, 581, 511 N.E.2d 38, 40, 41-42 (1987) (similar statute, G.L. c. 127, § 38B, requires specific intent to strike a person known to be a correctional officer); *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920, 430 N.E.2d 866, 866 (1982) (defendant who inadvertently struck police officer while intending to strike someone else may only be convicted of lesser included offense of assault and battery). See *Commonwealth v. Sawyer*, 142 Mass. 530, 533, 8 N.E. 422, 424 (1886); *Commonwealth v. Kirby*, 2 Cush. 577, 579 (1849).

3. **Related offenses.** General Laws c. 127, § 38B sets forth the separate offense (which is not within the final jurisdiction of the District Court) of assault or assault and battery on a correctional officer.

Effective November 2, 2010: General Laws c. 265, § 13F also sets forth the separate offense of assault and battery on a person with an intellectual disability; a first offense is within the final jurisdiction of the District Court, though a subsequent offense is not. "Whoever commits an assault and battery on a person with an intellectual disability knowing such person to have an intellectual disability shall for the first offense be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than five years . . . . This section shall not apply to the commission of an indecent assault and battery by a person with

an intellectual disability upon another person with an intellectual disability."

General Laws c. 265, § 13*I* sets forth the separate offense of assault or assault and battery on an emergency medical technician or an ambulance operator or ambulance attendant, while treating or transporting a person in the line of duty.

There are separate aggravated forms of assault and battery if the victim is 60 years or older or is disabled, and the assault results in bodily injury (G.L. c. 265, § 13K[b]) or serious bodily injury (G.L. c. 265, § 13K[c]); both offenses are within the final jurisdiction of the District Court.

4. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798, 803 (1994).

5. **Transferred intent**. An instruction on transferred intent indicates that the Commonwealth need only prove intent as to one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11, 763 N.E.2d 1092, 1099 n.11 (2002). "It is a familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553, 32 N.E. 862, 863 (1893). Accord, *Commonwealth v. Drumgold,* 423 Mass. 230, 259, 668 N.E.2d 300, 319 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669, 532 N.E.2d 34, 36 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, 474 N.E.2d 1078, 1083-1084 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13, 544 N.E.2d 1276, 1281 n.13 (1983).

6. **Statement of reasons required if imprisonment not imposed**. A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.