

**SELF-DEFENSE; DEFENSE OF ANOTHER;  
DEFENSE OF PROPERTY**

**I. SELF-DEFENSE**

**INTRODUCTION**

**A person is allowed to act in self-defense. If evidence of self-defense is present, the Commonwealth must prove beyond a reasonable doubt that the defendant did *not* act in self-defense. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.**

*Here instruct either on "A. Use of Non-Deadly Force" or "B. Use of Deadly Force." In the occasional situation in which the level of force cannot be determined as a matter of law, the jury must be instructed on both. See note 4, infra.*

**A. USE OF NON-DEADLY FORCE**

**To prove that the defendant did not act in self-defense, the Commonwealth must prove one of the following things beyond a reasonable doubt:**

***First*, that the defendant did not reasonably believe he (she) was being attacked or immediately about to be attacked, and that his (her) safety was in immediate danger; or**

***Second***, that the defendant did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; *or*

***Third***, that the defendant used more force to defend himself (herself) than was reasonably necessary in the circumstances.

**B. USE OF DEADLY FORCE**

If the defendant (used deadly force, which is force intended or likely to cause death or great bodily harm) (or) (used a dangerous weapon in a manner intended or likely to cause death or great bodily harm), the Commonwealth must prove one of the following three things beyond a reasonable doubt:

***First***, that the defendant did not reasonably and actually believe that he (she) was in immediate danger of great bodily harm or death; *or*

***Second***, that the defendant did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; *or*

***Third***, that the defendant used more force to defend himself (herself) than was reasonably necessary in the circumstances.

In conclusion, to obtain a conviction for the offense(s) of

\_\_\_\_\_, the Commonwealth must prove each element of the

**offense beyond a reasonable doubt. If there is evidence of self-defense, the Commonwealth also has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.**

**If each element of the crime has been proved beyond a reasonable doubt and it has also been proved beyond a reasonable doubt that the defendant did not act in self-defense, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, or the Commonwealth did not prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.**

SUPPLEMENTAL INSTRUCTIONS

***1. Reasonable apprehension.* A person cannot lawfully act in self-defense unless he (she) is attacked or is immediately about to be attacked. The Commonwealth may prove that the defendant did not act in self-defense by proving beyond a reasonable doubt that there was no overt act — either words, a gesture, or some other action — that gave rise to a reasonable belief of**

**attack or immediate danger**

*Where use of deadly force is at issue add:*

**of great bodily harm or death.**

**2. Duty to retreat.** A person cannot lawfully act in self-defense

**unless he or she has exhausted all other reasonable alternatives before resorting to force. A person may use physical force in self-defense only if he (she) could not get out of the situation in some other way that was available and reasonable at the time. The Commonwealth may prove the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.**

**You may consider any evidence about where the incident took place, whether or not the defendant might have been able to escape by walking away or otherwise getting to safety or by summoning help if that could be done in time, or by holding the attacker at bay if the means were available, or by some other**

method. You may consider whether the use of force reasonably seemed to be the only means of protection in the circumstances. You may take into account that a person who is attacked may have to decide what to do quickly and while under emotional strain.

**3. Excessive force.** A person cannot lawfully act in self-defense if one uses more force than necessary in the circumstances to defend oneself. How much force is necessary may vary with the situation. Exactness is not always possible. You may consider whether the defendant had to decide how to respond quickly under pressure. The Commonwealth may prove the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant used clearly excessive and unreasonable force. You may also consider any evidence about the relative size or strength of the persons involved, where the incident took place, (and what kind of weapons, if any, were used), among other things.

**4. Retaliation.** A person cannot lawfully act in self-defense when one uses force in retaliation. The right to self-defense arises from necessity and ends when the necessity ends. The Commonwealth may prove the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and was just pursuing his (her) attacker for revenge or to ward off any possibility of attack in the indefinite future.

**5. The "castle rule": retreat not required in dwelling.** A person lawfully occupying a house, apartment or other dwelling is not required to retreat from or use other means to avoid combat with an unlawful intruder, if two circumstances exist:

*First*, the occupant reasonably believes that the intruder is about to inflict great bodily injury or death on him (her) or on another person lawfully in the dwelling; *and*

*Second*, the occupant uses only reasonable means to defend himself (herself) or the other person lawfully in the dwelling.

**A “dwelling” is a place where a person lives; a place where one is “temporarily or permanently residing and which is in [one’s] exclusive possession.” The term includes all buildings or parts of buildings used as dwellings, including (apartment houses) (tenement houses) (hotels) (boarding houses) (dormitories) (hospitals) (institutions) (sanitoriums) (or) (other buildings where people reside).**

**The term “dwelling” does not extend to common areas such as common hallways in an apartment building. In multi-unit housing, the “dwelling” only extends to areas over which the person has a right of exclusive control.**

**The Commonwealth may prove that the defendant did not act in self-defense in a dwelling by proving beyond a reasonable doubt:**

***First*, that (the premises were not a dwelling) (or) (the defendant was not a lawful occupant of the premises) (or) (the alleged victim was not an unlawful intruder) (or) (the defendant did not reasonably believe that the alleged victim was about to inflict great bodily injury or death on him (her) or on another**

person lawfully in the dwelling) (or) (the defendant used clearly excessive force to defend himself (herself) or the other person lawfully in the dwelling); *and*

**Second**, that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.

*If there is an issue as to whether the alleged victim was an unlawful intruder, the jury must be instructed on trespass (Instruction 8.220) or given other appropriate instructions.*

**6. Defendant as original aggressor.** Generally, the original aggressor

has no right of self-defense unless he (she) withdraws from the conflict in good faith and announces his (her) intention of abandoning the fight.

*Commonwealth v. Naylor*, 407 Mass. 333, 553 N.E.2d 542 (1990); *Commonwealth v. Evans*, 390 Mass. 144, 152-154, 454 N.E.2d 458 (1983); *Commonwealth v. Walden*, 380 Mass. 724, 405 N.E.2d 939 (1980); *Commonwealth v. Johnson*, 379 Mass. 177, 396 N.E.2d 974 (1979); *Commonwealth v. Maguire*, 375 Mass. 768, 772, 378 N.E.2d 445 (1978). See *Commonwealth v. Harrington*, 379 Mass. 446, 454, 399 N.E.2d 475 (1980) (defendant not required to prove that he was not the aggressor as prerequisite to self-defense claim).

**7. Victim's prior threats and violence against defendant.** In considering who

was being attacked by whom, you may take into account any threats of violence made by  [the alleged victim]  against the

**defendant and whether, as the defendant contends,**  
 [the alleged victim]  **was trying to carry out such threats during this incident. If the defendant was aware, at the time of the incident, that such threats had been made, you may also consider them in determining whether the defendant was reasonably afraid for his (her) own safety.**

*Commonwealth v. Edmonds*, 365 Mass. 496, 499-501, 313 N.E.2d 429 (1974); *Commonwealth v. Rubin*, 318 Mass. 587, 63 N.E.2d 344 (1945). See also G.L. c. 233, § 23F as to the use of evidence of past or present physical, sexual or psychological harm or abuse of the defendant.

**You may also consider any specific, recent acts of violence that were committed by**  [the alleged victim] **against the defendant and that were known to the defendant, on the issue of whether the defendant was reasonably afraid for his (her) own safety.**

*Commonwealth v. Rodriguez*, 418 Mass. 1, 633 N.E.2d 1039 (1994); *Commonwealth v. Pidge*, 400 Mass. 350, 509 N.E.2d 281 (1987); *Fontes*, 396 Mass. at 735-736, 488 N.E.2d 760. These three were all homicide cases, but it is likely that the rule is applicable to all self-defense claims.

**8. *Victim's prior acts of violence unknown to defendant.***

**In considering who was being attacked by whom, you may take into account any act (acts) of violence that may have been initiated by**  [the alleged victim] **on (a prior occasion) (prior occasions), even if the defendant did**

**not know of (that act) (those acts) of violence at the time of this incident. You may consider that evidence on the issue of whether  [the alleged victim]  initiated this incident.**

“Where the identity of the first aggressor is in dispute, the accused may offer evidence of specific incidents of violence allegedly initiated by the victim, or a third party acting in concert with or to assist the victim, whether known or unknown to the accused, and the prosecution may rebut the same in reputation form only.” Mass. G. Evid. § 404(a)(2)(B) (2008-2009). Accord, *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 863 N.E.2d 936 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim’s reputation for violence. *Adjutant, supra*. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18, 893 N.E.2d 19, 32 & n.8 (2008).

9. *Victim’s reputation for violence known to defendant.*

**You may consider**

**whether  [the alleged victim]  had a reputation for violence or quarreling that was known to the defendant on the issue of whether the defendant was reasonably (and actually) afraid for his (her) own safety.**

With respect to a claim of self-defense, the jury may consider whether the victim had a reputation for violence or being quarrelsome that was known to the defendant prior to the alleged incident. *Commonwealth v. Clemente*, 452 Mass. 295, 308, 893 N.E.2d 19, 33 (2008). *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005), did not alter the rule that (unlike specific acts of violence) such reputation evidence is admissible only if known to the defendant. *Id.*

“In a criminal proceeding, in support of a claim of self-defense, the accused may offer evidence known to the accused prior to the incident in question of the victim’s reputation for violence, of specific instances of the victim’s violent conduct, or of statements made to the victim that caused reasonable apprehension of violence on the part of the accused.” Mass. G. Evid. § 404(a)(2)(A) (2008-2009). *Commonwealth v. Dilone*, 385 Mass. 281, 431 N.E.2d 576 (1982); *Commonwealth v. Simmons*, 383 Mass 40, 43, 417 N.E.2d 430 (1981); *Commonwealth v. Edmonds*,

365 Mass. 496, 313 N.E.2d 429 (1974); *Commonwealth v. Rubin*, 318 Mass. 587, 63 N.E.2d 344 (1945); *Commonwealth v. Kamishlian*, 21 Mass. App. Ct. 931, 486 N.E.2d 743 (1985) (defendant's nickname suggesting he was violent or quarrelsome); *Commonwealth v. MacMurtry*, 20 Mass. App. Ct. 629, 633, 482 N.E.2d 332 (1985); *Commonwealth v. Marler*, 11 Mass. App. Ct. 1014, 419 N.E.2d 854 (1981). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 790 N.E.2d 739 (2003). Accord, *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Commonwealth v. Adjutant, supra*.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness, *Adjutant, supra*; *Lapointe*, 402 Mass. at 324-5, 522 N.E.2d 937.

**10. Mutual combat.**

**When two people engage in a fist fight by agreement, generally neither of them is acting in self-defense because they have not used all reasonable means to avoid combat. But a person regains the right of self-defense if during the fight he (she) reasonably concludes that the other person, contrary to their mutual understanding, has escalated the fight by introducing deadly force.**

*Commonwealth v. Bertrand*, 385 Mass. 356, 432 N.E.2d 78 (1982); *Commonwealth v. Collberg*, 119 Mass. 350 (1876); *Commonwealth v. Barber*, 18 Mass. App. Ct. 460, 466 N.E.2d 531 (1984), *aff'd*, 394 Mass. 1013, 477 N.E.2d 587 (1985).

**11. Injury-prone victim.**

**If a person has exhausted all proper means to avoid physical combat, he (she) may use appropriate non-deadly force in self-defense if he (she) reasonably believes**

**that his (her) personal safety is in danger, even against someone, like a drunk, who is known to be susceptible to injury.**

*Commonwealth v. Bastarache*, 382 Mass. 86, 414 N.E.2d 984 (1980).

**12. Police privilege; Resisting arrest.**

**Because of the nature of the job, a police officer is permitted to use force in carrying out his (her) official duties if such force is necessary and reasonable. A person who is arrested by someone who he (she) knows is a police officer is not allowed to resist that arrest with force, whether the arrest is lawful or not. Even if the arrest is illegal, the person must resort to the legal system to restore his (her) liberty.**

**However, if a police officer uses excessive or unnecessary force to make an arrest — whether the arrest is legal or illegal — the person who is being arrested may defend himself (herself) with as much force as reasonably appears to be necessary. The person arrested is required to stop resisting once he (she) knows or should know that if he (she) stops resisting, the officer will also stop using excessive or unnecessary force. The**

**Commonwealth must prove beyond a reasonable doubt that the police officer did not use excessive or unnecessary force in making the arrest.**

*Commonwealth v. Moreira*, 388 Mass. 596, 447 N.E.2d 1224 (1983) (resisting unlawful arrest); *Commonwealth v. Martin*, 369 Mass. 640, 341 N.E.2d 885 (1976) (police privilege); *Commonwealth v. Urkiel*, 63 Mass. App. Ct. 445, 826 N.E.2d 769 (2005) (unconstitutional entry into dwelling does not itself constitute excessive force giving rise to right to resist); *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 511 N.E.2d 38 (1987) (knowledge of officer's identity); *Commonwealth v. McMurtry*, 20 Mass. App. Ct. 629, 632, 482 N.E.2d 332 (1985). G.L. c. 111B, § 8, sixth par. (police privilege in protective custody situations). See also G. L. c. 268, § 32B (resisting arrest).

The Commonwealth has the burden of proof on the issue of whether the police used excessive force. *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 818 N.E.2d 1069 (2004).

**13. Deadly force during citizen's arrest.**

**A person may use deadly**

**force to make a citizen's arrest only if:**

***First*, he (she) believes that such force is necessary to make a lawful arrest;**

***Second*, the arrest is for a felony;**

***Third*, either he (she) announces the purpose of the arrest or believes it is already known to the person being arrested or believes it cannot reasonably be made known to the person being arrested;**

***Fourth*, either he (she) is assisting a person whom he (she)**

**believes is a peace officer; or he (she) is a peace officer;**

***Fifth*, he (she) believes there is no substantial risk of injury to innocent persons;**

***Sixth*, he (she) believes that the person being arrested used or threatened to use force in committing the felony;**

***Seventh*, he (she) believes that there is a substantial risk that the person being arrested will cause death or serious bodily harm to someone if he (she) is not immediately arrested.**

*( If made pursuant to a warrant:*

**and *Eighth*, that the warrant was valid or was believed by the citizen to be valid.)**

**Crimes that may be punished with a state prison sentence are called “felonies,” while other crimes are called “misdemeanors.”**

**I instruct you as a matter of law that     *[the relevant crime]*    is a (felony) (misdemeanor).**

**Deadly force is force that is (intended or likely to cause**

death or great bodily harm) (or) (applied using a dangerous weapon likely to cause death or serious injury). It is the level of force used, not to the degree of injury caused, if any, that determines whether it is deadly force.

( If a warrantless arrest was made by a police officer outside his/her jurisdiction:

A police officer who makes a warrantless arrest outside of his [her] jurisdiction acts as a private citizen. The officer must have probable cause to believe that a felony was committed and that this person committed it.)

14. Non-deadly force during citizen's arrest. A person may use

reasonable force to make a citizen's arrest only if:

*First*, he (she) believes that such force is immediately necessary to make a lawful arrest;

*Second*, he (she) announces the purpose of the arrest or believes that it is already known to the person being arrested or believes that it cannot reasonably be made known to the person being arrested, *and*

Choose appropriate instruction below:

**A. If arrest was made pursuant to a warrant:** **Third, the arrest was**

**pursuant to a valid warrant or the citizen making the arrest believed it was valid.**

**B. If arrest was made without a warrant:** **Third, the arrest without a**

**warrant was for a felony. Crimes that may be punished with a state prison sentence are called “felonies” while other crimes are called “misdemeanors.”**

**C. If warrantless arrest was made by a police officer outside his/her jurisdiction:**

**Third, the police officer made a warrantless arrest outside of his (her) jurisdiction and had probable cause to believe a felony was committed and that it was committed by this person.**

**I instruct you as a matter of law that \_\_\_\_\_ [relevant crime] \_\_\_\_\_ is a (felony) (misdemeanor).**

*Commonwealth v. Grise*, 398 Mass. 247, 496 N.E.2d 162 (1986) (warrantless citizen arrests limited to felonies only); *Commonwealth v. Klein*, 372 Mass. 823, 828-832, 363 N.E.2d 1313 (1977) (burden of proof on Commonwealth); *Commonwealth v. Lussier*, 333 Mass. 83, 128 N.E.2d 569 (1955). Extra-territorial arrests by police are limited to felonies. *Commonwealth v. Twombly*, 435 Mass. 440, 758 N.E.2d 1051 (2001); *Commonwealth v. Savage*, 430 Mass. 341, 719 N.E.2d 473 (1999); *Commonwealth v. Clairborne*, 423 Mass. 275, 667 N.E.2d 873 (1996); *Commonwealth v. Morrissey*, 422 Mass. 1, 660 N.E.2d 376 (1996). On arrest by a bail surety, see *Commonwealth v. Cabral*, 443 Mass. 171, 819 N.E.2d 951 (2005).

## II. DEFENSE OF ANOTHER

Society wishes to encourage all of us to come to the aid of each other when that is necessary. Therefore, a person may use reasonable force when that is necessary to help another person, if it reasonably appears that the person being aided is in a situation where the law would allow him to act in self-defense himself.

If there is any evidence in this case that the defendant may have been coming to the aid of another person, you must find the defendant not guilty unless the Commonwealth proves beyond a reasonable doubt at least *one* of the following two things:

***First:*** That a reasonable person in the defendant's position would *not* have believed that his (her) use of force was necessary in order to protect     [third party]     ; ***or***

***Second:*** That to a reasonable person in the defendant's position would *not* have believed that     [third party]     was justified in using such force in his (her) own self-defense.

**So when does a person have a right to act in self-defense?**

*Here instruct on self-defense.*

Defense of another is a complete defense. *Commonwealth v. Johnson*, 412 Mass. 368, 589 N.E.2d

311 (1992). The legal principles regarding defense of another “are not unlike those which control the use of self-defense.” As with self-defense, in determining whether there is sufficient evidence to raise the issue of defense of another, all reasonable inferences should be resolved in favor of the defendant. *Commonwealth v. Green*, 55 Mass. App. Ct. 376, 379, 770 N.E.2d 995 (2002). Where defense of another has been properly raised, the Commonwealth has the burden of disproving the defense beyond a reasonable doubt. *Id.*; *Commonwealth v. Monico*, 373 Mass. 298, 302-304, 366 N.E.2d 1241, 1244 (1977) (defense not limited to persons related to defendant); *Commonwealth v. Martin*, 369 Mass. at 649, 341 N.E.2d at 891; *Commonwealth v. Montes*, 49 Mass. App. Ct. 789, 794-796, 733 N.E.2d 1068 (2000) (absent excessive force by police, defendant cannot assist another in resisting even an unlawful arrest; doubtful that common-law right to resist an unlawful arrest, now abolished in Massachusetts, ever permitted third parties to assist another in resisting an unlawful arrest); *Commonwealth v. McClendon*, 39 Mass. App. Ct. 122, 125-126, 653 N.E.2d 1138 (1995) (use of force justified only in response to immediate danger to third person). Where defense of others is relied on by the defendant and the evidence is sufficient to raise the issue, an instruction is required, even absent a request by the defendant. *Commonwealth v. Kivlehan*, 57 Mass. App. Ct. 793, 795-796, 786 N.E.2d 431 (2003).

### III. DEFENSE OF PROPERTY

**A person may use reasonable force, but not deadly force, to defend his lawful property against someone who has no right to it.**

**A person may also use reasonable force, but not deadly force, to regain lawful possession of his property where his (her) possession has been momentarily interrupted by someone with no right to the property.**

**Finally, a person may also use reasonable force, but not deadly force, to remove a trespasser from his property after the trespasser has been requested to leave and has refused to do so.**

*See Instruction 8.220 (Trespass).*

**If there is evidence in this case that the defendant used force in (that**

situation) (any of those situations), you must find the defendant not guilty unless the Commonwealth has proved one of two things beyond a reasonable doubt:

**either** that a reasonable person in the defendant's position would *not* have believed that force was necessary in order to (defend) (regain possession of) (remove a trespasser from) his ( her) property;

**or** that the defendant used force that was deadly or unreasonable.

Deadly force is force that is intended to, or likely to, kill or seriously injure someone. It refers to the level of force the defendant used, not to the degree of injury, if any, to \_\_\_\_\_ *[alleged victim]* \_\_\_\_\_.

How much force is reasonable may vary with the situation. Exactness is not always possible and you may take into account whether the defendant had to decide how to respond quickly under pressure. A person who uses what is clearly excessive and unreasonable force becomes an aggressor and loses the right to act in defense of his (her) property.

*Commonwealth v. Donohue*, 148 Mass. 529, 531-532, 20 N.E. 171, 172 (1889); *Low v. Elwell*, 121 Mass.309 (1876); *Commonwealth v. Clark*, 2 Metc. 23, 25 (1840); *Commonwealth v. Kennard*, 8 Pick, 133 (1829). But see G.L. c. 186, § 14 and G L. c. 266, § 120 (residential landlord may not evict tenant except through court proceedings). See also *Klein, supra*, (citing Model Penal Code on defense of property); *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 248 n.2 & 249, 770 N.E.2d 440 (1999) (person may use reasonable non-deadly force to defend personal property from theft or destruction and real property from unwelcome invasion).

## NOTES:

1. **Self-defense is a complete exoneration.** *Commonwealth v. Corlino*, 429 Mass. 692, 710 N.E.2d 967 (1999); *Commonwealth v. Evans*, 390 Mass. 144, 454 N.E.2d 458 (1983). Self-defense is available in assault cases as well as homicide cases. *Commonwealth v. Burbank*, 388 Mass. 789, 448 N.E.2d 735 (1983) (assault and battery with dangerous weapon); *Commonwealth v. Mann*, 116 Mass. 58 (1874) (assault and battery).

Self-defense is available only where there is an immediate need to resort to force and not where other remedies are available. *Commonwealth v. Lindsey*, 396 Mass. 840, 489 N.E.2d 666 (1986) (unlawfully carrying a firearm in putative self-defense); *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982) (unlawful attempt to shut down nuclear power plant).

2. **When self-defense instruction must be given.** A defendant is entitled to an instruction on self-defense if the evidence, viewed in the light most favorable to the defendant, warrants at least a reasonable doubt about whether the elements of self-defense may be present. *Commonwealth v. Harrington*, 379 Mass. 446, 399 N.E.2d 475 (1980). The evidence of self-defense may come from the Commonwealth's case, the defendant's case or both. *Commonwealth v. Galvin*, 56 Mass. App. Ct. 698, 779 N.E.2d 998 (2002). All reasonable inferences should be resolved in favor of the defendant, and a judge should err on the side of caution in determining whether self-defense has been raised sufficiently to warrant an instruction. *Commonwealth v. Pike*, 428 Mass. 393, 701 N.E.2d 951 (1998); *Commonwealth v. Galvin*, 56 Mass. App. Ct. at 701, 779 N.E.2d at 1001; *Commonwealth v. Toon*, 55 Mass. App. Ct. 642, 644, 773 N.E.2d 993, 998 (2002). A self-defense instruction may be appropriate as to some counts but not as to others. *Commonwealth v. Clark*, 20 Mass. App. Ct. 392, 480 N.E.2d 1034 (1985).

If there is an evidentiary basis, a judge should instruct on self-defense sua sponte, even absent a defense request. *Commonwealth v. Galvin*, *supra*.

"Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime," a judge may choose to instruct on self-defense first and then on the elements of the crimes charged. *Commonwealth v. Santiago*, 425 Mass. 491, 506, 681 N.E.2d 1205, 1216 (1997).

A self-defense instruction is not required where the defendant entirely denies striking the victim. *Commonwealth v. Vezina*, 13 Mass. App. Ct. 1002, 433 N.E.2d 99 (1982). A judge may properly withdraw a self-defense instruction earlier given to the jury if the judge later concludes that there is no evidence to support it. *Commonwealth v. Carrion*, 407 Mass. 263, 552 N.E.2d 558 (1990). See *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 675-676, 885 N.E.2d 848, 851-852 (2008) (where defendant was charged with indecent assault and battery, and the Commonwealth requested an instruction on lesser included offense of assault and battery,) court erred in withdrawing self-defense instruction because evidence permitted view that contact occurred only when defendant tried to push complainant away during scuffle.

3. **Burden of proof and phrasing of instruction.** Self-defense is "probably the most sensitive part of jury instructions in a criminal trial." *Commonwealth v. Deagle*, 10 Mass. App. Ct. 748, 751, 412 N.E.2d 911, 914 (1980). When the issue of self-defense is properly raised, the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense and this burden of proof should be expressly incorporated into the charge. *Commonwealth v. A Juvenile*, 396 Mass. 108, 483 N.E.2d 822 (1985). Self-defense instructions "must be carefully prepared and delivered so as to eliminate any language that might convey to the jury the impression that a defendant must prove that he acted in self-defense." *Commonwealth v. Vidito*, 21 Mass. App. Ct. 332, 487 N.E.2d 206 (1985). Where deadly force was used, special care must be taken to instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt the absence of circumstances justifying deadly force in self-defense. *Commonwealth v. Fontes*, 396 Mass. 733, 488 N.E.2d 760 (1986).

If the judge properly instructs the jury on the Commonwealth's burden of proof with respect to self-defense, the judge is not required also to expressly instruct the jury to consider any evidence of self-defense presented by the defendant. As long as the judge does not distinguish between evidence of self-defense presented by the defendant and that presented by the Commonwealth, the jury should not be instructed on the burden of production because it lies outside the function of the jury. *Commonwealth v. Glacken*, 451 Mass. 163, 883 N.E.2d 1228 (2008).

A judge should not (1) suggest that self-defense is a "defense" or that it must be established "to your satisfaction", *Commonwealth v. Simmons*, 383 Mass. 40, 417 N.E.2d 430 (1981), nor (2) use "if you find" or "the defendant claims" language, *Commonwealth v. Mejia*, 407 Mass. 493, 554 N.E.2d 1186 (1990), nor (3) refer to self-defense as a "legal justification for conduct which would otherwise constitute a crime," *Commonwealth v. Vidito*, *supra*.

However, a judge may tell the jury that they must first “determine” or “find” whether self-defense exists, *Id.*, 21 Mass. App. Ct. at 338, 487 N.E.2d at 210. A judge should avoid any explicit analogy with the “prudent person” standard of negligence law. *Commonwealth v. Doucette*, 391 Mass. 443, 462 N.E.2d 1084 (1984). A judge is not required to charge that any particular weapon may give rise to self-defense rights, *Commonwealth v. Monico*, 396 Mass. 793, 806-807, 488 N.E.2d 1168, 1177 (1986) (shod foot).

4. **Deadly force and non-deadly force involve two different standards.** The right to use non-deadly force arises at a “somewhat lower level of danger” than the right to use deadly force. *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955. For that reason, the standards for self-defense using deadly force and non-deadly force “are mutually exclusive.” *Commonwealth v. Walker*, 443 Mass. 213, 820 N.E.2d 195 (2005).

It is reversible error for a judge to give self-defense instructions related to deadly force when he or she should charge on self-defense related to non-deadly force, since doing so lowers the Commonwealth’s burden in proving that the defendant did not act in self-defense. *Commonwealth v. Baseler*, 419 Mass. 500, 503-504, 645 N.E.2d 1179, 1181 (1995).

Where the level of force cannot be determined as a matter of law, it is a jury issue and the defendant is entitled to instructions on both use of deadly force and non-deadly force in self-defense. Where a weapon which may be dangerous was not used in its intended deadly manner, the jury must determine if it was deadly force. *Commonwealth v. Walker, supra*; *Commonwealth v. Cataldo*, 423 Mass. 318, 668 N.E.2d 762 (1996) (conflicting evidence about whether defendant who threatened aggressor with gun but did not shoot, intended to do so); *Commonwealth v. Baseler, supra* (conflicting evidence about whether defended himself by drawing gun or only by struggling). When the only force used was deadly force, the defendant is not entitled to a non-deadly force instruction. *Commonwealth v. Lopes*, 440 Mass. 731, 802 N.E.2d 97 (2004).

**Non-deadly force.** Non-deadly force is justified in self-defense if (1) the defendant had a reasonable concern for his or her safety, (2) the defendant pursued all possible alternatives to combat, and (3) the force used was no greater than required in the circumstances. *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999). “A defendant is entitled to an instruction on the use of non-deadly force if any view of the evidence, regardless of its credibility, and resolving all reasonable inferences in favor of the defendant, would support a finding that non-deadly force was, in fact, used in self-defense.” *Lopes, supra*. There is no right to use non-deadly force if there was no overt act against the defendant. *Commonwealth v. Alebord*, 49 Mass. App. 915, 733 N.E.2d 169 (2000).

**Deadly force.** When deadly force is used, the first two prongs of self-defense are the same, but (3) is instead that the defendant had a reasonable fear that he or she was in imminent danger of death or serious bodily harm, and that no other means would suffice to prevent such harm. *Id.* Where deadly force was used, to show that “the defendant did not act in proper self-defense, the Commonwealth must prove at least one of the following propositions beyond a reasonable doubt: (1) the defendant did not have a reasonable ground to believe, and did not believe, that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force; or (2) the defendant had not availed himself of all proper means to avoid physical combat before resorting to the use of deadly force; or (3) the defendant used more force than was reasonably necessary in all the circumstances of the case.” *Commonwealth v. Glacken*, 451 Mass. 163, 883 N.E.2d 1228 (2008).

Deadly force is “force intended or likely to cause death or great bodily harm. This tracks our long-standing definition of a ‘dangerous weapon’.” *Commonwealth v. Klein*, 372 Mass. 823, 827, 363 N.E.2d 1313 (1977). “Deadly force” refers to the level of force used, not the seriousness of the resulting injury. *Commonwealth v. Noble*, 429 Mass. 44, 707 N.E.2d 819 (1999) (use of fist is non-deadly force even if death results); *Commonwealth v. Pike*, 428 Mass. at 396 n.3, 701 N.E.2d at 955 n.3 (judge should instruct on standard for non-deadly force if force generally considered non-deadly results in death in particular case); *Commonwealth v. Wolmart*, 57 Mass. App. Ct. 780, 786 N.E.2d 427 (2002) (use of knife was deadly force despite relatively minor injury). For when deadly force may be used in self-defense, see *Commonwealth v. Berry*, 431 Mass. 326, 727 N.E.2d 517 (2000); *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955 (assault with overt threat to cause serious bodily injury sufficient to warrant instruction on deadly force in self-defense); *Commonwealth v. Barber*, 394 Mass. 1013, 477 N.E.2d 587 (1985); *Commonwealth v. Harrington*, 379 Mass. 446, 399 N.E.2d 475 (1980); *Commonwealth v. Hartford*, 346 Mass. 482, 194 N.E.2d 401 (1963); *Commonwealth v. Houston*, 332 Mass. 687, 127 N.E.2d 294 (1955).

5. **Retaliation.** A person loses the right to self-defense if he or she pursues the original aggressor for retribution or to prevent future attacks, *Commonwealth v. Barber*, 394 Mass. 1013, 477 N.E.2d 587 (1985), or where if he or she has already disarmed the victim and retaliates in anger, *Clark, supra*.

6. **Reasonable apprehension.** A person may use non-deadly force in self-defense when he “has a reasonable concern over his personal safety,” *Commonwealth v. Baseler, supra; Commonwealth v. Bastarache*, 382 Mass. 86, 414 N.E.2d 984 (1980), based on some overt act by the other, *Commonwealth v. Alebord*, 49 Mass. App. 915, 733 N.E.2d 169 (2000). Location, physical attributes, threats and weapons may be considered as to the reasonableness of the defendant’s state of mind. *Vidito*, 21 Mass. App. Ct. at 338, 487 N.E.2d at 210.

To use deadly force in self-defense, a person must have reasonable cause to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force. *Commonwealth v. Berry*, 431 Mass. 326, 727 N.E.2d 517 (2000). A first strike can be justified on a reasonable belief that the victim is reaching for a deadly weapon, *Commonwealth v. Bray*, 19 Mass. App. Ct. 751, 477 N.E.2d 596 (1985), but not on mere fear of a non-imminent assault, *Commonwealth v. Hartford*, 346 Mass. 482, 194 N.E.2d 401 (1963).

7. **Mistaken but reasonable apprehension.** A defendant is entitled to a self-defense instruction if he had a mistaken but reasonable belief that death or serious bodily injury was imminent, or that he had used all available means to avoid physical combat, or as to the amount of force necessary to deal with the perceived threat, provided that there is some evidence of the other elements of self-defense. *Commonwealth v. Glass*, 401 Mass. 799, 809; 519 N.E.2d 1311, 1318 (1988). See also *Commonwealth v. Walker, supra; Commonwealth v. Toon, supra*. For such a belief to be reasonable, the victim must have committed some overt act, including threats, against the defendant. *Commonwealth v. Walker, supra*.

8. **“Battered person’s syndrome.”** General Laws c. 233, § 23E provides that in self-defense cases, the defendant may introduce (1) evidence that he or she has been “the victim of acts of physical, sexual or psychological harm or abuse” and (2) expert testimony “regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse” on the issues of the reasonableness of: (1) the defendant’s apprehension of danger, (2) the defendant’s belief that he or she had used all available means to avoid physical combat, and (3) the defendant’s perception of the amount of force necessary. In essence, the same rule is also now the common law of this Commonwealth. *Commonwealth v. Rodriguez*, 418 Mass. 1, 7, 633 N.E.2d 1039, 1042 (1994).

The Commonwealth may also offer such testimony “to help explain the conduct of a victim or a complainant over the course of an abusive relationship.” The expert’s testimony must be confined to the general pattern of behavioral and emotional characteristics shared by typical battering victims, and may not discuss the symptoms exhibited by the particular victim, nor opine on whether the particular victim suffers from that syndrome, nor describe or profile the typical attributes of batterers. *Commonwealth v. Goetzendanner*, 42 Mass. App. Ct. 637, 640-646, 679 N.E.2d 240, 243-246 (1997).

9. **Duty to retreat.** A person must generally use all proper means of escape before resorting to physical combat. *Commonwealth v. Niemic*, 427 Mass. 718, 696 N.E.2d 117 (1998); *Commonwealth v. Gagne*, 367 Mass. 519, 326 N.E.2d 907 (1975). The location of an assault is “an element of major importance” in determining whether all proper means have been taken to avoid deadly force. *Commonwealth v. Shaffer*, 367 Mass. 508 at 512, 326 N.E.2d 880 (1975). See also *Commonwealth v. Williams*, 53 Mass. App. Ct. 719, 761 N.E.2d 1005 (2000) (little effort to avoid combat).

10. **Retreat not required in dwelling.** The retreat requirement has been modified by the “castle law,” G.L. c. 278, § 8A, which provides that an occupant of a dwelling need not retreat before using reasonable means to defend himself or other occupants against an unlawful intruder whom the occupant reasonably believes is about to inflict great bodily injury or death on him or another lawful occupant. Nor is the occupant required to exhaust any other means of avoiding combat in such circumstances; the statutory term “retreat” encompasses all such means. *Commonwealth v. Peloquin*, 437 Mass. 204, 208, 770 N.E.2d 440 (2002); *Commonwealth v. Gregory*, 17 Mass. App. Ct. 651, 461 N.E.2d 831 (1984).

The word “dwelling” is given its usual common law meaning and therefore excludes common areas of a multiple dwelling, *Commonwealth v. Albert*, 391 Mass. 853, 862; 466 N.E.2d 78, 85 (1984), an open porch and outside stairs, *Commonwealth v. McKinnon*, 446 Mass. 263; 843 N.E.2d 1020 (2006), and driveways, *Commonwealth v.*

*Bennett*, 41 Mass. App. 920, 671 N.E.2d 966 (1996). This statute does not eliminate the duty to retreat from a confrontation with a person lawfully on the premises, *Commonwealth v. Lapointe*, 402 Mass. 321, 522 N.E.2d 937 (1988), even when that guest launches a life-threatening assault on the defendant. *Commonwealth v. Peloquin, supra*; *Commonwealth v. Painten*, 429 Mass. 536, 709 N.E.2d 423 (1999). There is no right under the “castle law” to resist unlawful entry by police into one’s residence, *Commonwealth v. Gomes*, 59 Mass. App. Ct. 332, 795 N.E.2d 1217 (2003), or to resist unlawful arrest unless excessive force is used and the occupant is unable to retreat, *Commonwealth v. Peterson*, 53 Mass. App. Ct. 388, 759 N.E.2d 719 (2001).

The jury should be instructed on how to determine if the victim was an unlawful intruder. *Commonwealth v. Noble*, 429 Mass. 44, 707 N.E.2d 819 (1999). A person who enters lawfully but refuses to leave is a trespasser. *Commonwealth v. Peloquin*, 437 Mass. 204, 209, 770 N.E.2d 440 (2002). A person may use no more force than reasonably necessary to remove a trespasser, *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999).

11. **Excessive force.** The defendant may be found guilty if his use of deadly force was unreasonable and clearly excessive in the circumstances. *Commonwealth v. Stokes*, 374 Mass. 583, 374 N.E.2d 87 (1978). *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999) (objectively unreasonable belief that deadly force was required).