

SUPREME JUDICIAL COURT

MODEL JURY INSTRUCTIONS ON HOMICIDE

I. Criminal Responsibility.....1

II. Joint Venture.....13

III. Self-Defense and Defense of Another.....18

 A. Self-Defense18

 B. Defense of Another31

IV. Murder in the First Degree.....36

 A. Murder with Deliberate Premeditation.....37

 B. Murder with Extreme Atrocity or Cruelty42

 C. Felony Murder in the First Degree.....49

V. Murder in the Second Degree.....57

 A. Felony-Murder in the Second Degree.....58

VI. Voluntary Manslaughter(Lesser Included Offense to Murder).64

 A. Voluntary Manslaughter (Absent a Murder Charge)71

VII. Involuntary Manslaughter73

 A. Involuntary Manslaughter Caused by Wanton and Reckless Conduct.....74

 B. Involuntary Manslaughter Unintentionally Caused by a Battery.....87

VIII. Supplemental Instructions91

 A. Definition of Death91

 B. Object of Killing Must Be a Human Being91

 C. Use of Dangerous Weapon92

 D. Questions from Jury93

 E. Jurors' Obligation on Guilt or Innocence93

IX. Appendix

 Chalk: Requirements of Proof for HomicideA1

MASSACHUSETTS SUPREME JUDICIAL COURT
MODEL JURY INSTRUCTIONS ON HOMICIDE¹

CRIMINAL RESPONSIBILITY

[Note to Judge: Where there is evidence of lack of criminal responsibility, this instruction, at the discretion of the judge, may be given as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction. In deciding when to give this instruction, a judge may wish to consider whether the defendant has conceded that he committed the crime and whether the only live issue for the jury to decide is the defendant's criminal responsibility.]

To prove the defendant guilty of any crime, the Commonwealth must prove beyond a reasonable doubt that the defendant was criminally responsible at the time the alleged crime was committed.² The burden is not on the defendant to prove a lack of criminal responsibility.³ Under the law, the Commonwealth bears the burden of proving beyond a reasonable

¹ Because these Model Jury Instructions on Homicide reflect existing statutory and case law, they will be continually reviewed and revised by the Supreme Judicial Court as the law develops or changes. Comments by judges and attorneys regarding these model instructions may be sent to modelhomicide@sjc.state.ma.us and will be considered in future revisions of these instructions.

² Commonwealth v. Berry, 457 Mass. 602, 612 (2010), quoting Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967).

³ Commonwealth v. Berry, 457 Mass. 602, 612 (2010), quoting Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967).

doubt that the defendant committed the crime with which he⁴ is charged and also that the defendant is criminally responsible for his conduct.⁵

Criminal responsibility is a legal term. A person is not criminally responsible for his conduct if he has a mental disease or defect, and, as a result of that mental disease or defect, lacks substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law.⁶

⁴ We use the masculine pronoun to avoid the repetitive "he or she," or the clumsy "he/she," recognizing that the majority of defendants are male. Of course, where a defendant does not identify as male, the judge should insert the feminine pronoun, and where there are multiple defendants of different gender, the judge should use both the masculine and feminine pronouns in referring to the defendants.

⁵ This sentence tracks the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 737 ¶ 4 (1996) (promulgating model instruction on criminal responsibility). See Commonwealth v. Berry, 457 Mass. 602, 612 (2010), quoting Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967) ("once a defendant raises the issue of criminal responsibility, the Commonwealth has the burden to prove, beyond a reasonable doubt, that the defendant did not lack the substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law, as a result of a mental disease or defect. In order to prove that a defendant can 'conform [her] conduct to the requirements of the law,' the prosecution must show that the defendant had a 'substantial ability to behave as the law requires; that is, to obey the law'").

⁶ This paragraph tracks the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 737 ¶ 5 (1996) (promulgating model instruction on criminal responsibility). See Commonwealth v. Berry, 457 Mass. 602, 612 (2010), quoting Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967) ("that the defendant did not lack the substantial capacity to appreciate the wrongfulness

The phrase "mental disease or defect" is a legal term, not a medical term; it need not fit into a formal medical diagnosis. The phrase "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.⁷ It is for you to determine in light of all the evidence whether the defendant had a mental disease or defect.⁸ If the Commonwealth has proved to you beyond a reasonable doubt that the defendant was not suffering from a mental disease or defect at the time of the killing, the Commonwealth has satisfied its burden of proving that the defendant was criminally responsible.

of her conduct or to conform her conduct to the requirements of the law, as a result of a mental disease or defect").

⁷ This sentence tracks the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 737 ¶ 7 (1996) (promulgating model instruction on criminal responsibility).

⁸ See Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 328 (2010) ("We have previously indicated that a judge is not required to define 'mental disease or defect' but has discretion to provide the instructions that are appropriate to the context"); Commonwealth v. Fuller, 421 Mass. 400, 411 (1995) ("This court has declined to impose any obligation on a trial judge to provide a further explanation of the terms in issue here. . . . Our unwillingness to impose a mandatory instruction arises not because the term 'mental disease or defect' is so clear on its face that such an explanation would be superfluous. The reason may well be the opposite; the subject is so complex and obscure that any general explanatory formula is likely to mislead and confuse"). Cf. Commonwealth v. Mulica, 401 Mass. 812, 816-820 (1988) (mental disease and defect instruction focusing jury on one particular type of mental disease or defect may have limited jury's consideration of other types of mental disease or defects and improperly reduced Commonwealth's burden).

If you have a reasonable doubt whether the defendant had a mental disease or defect at the time of the killing, then you must determine whether, as a result of a mental disease or defect, he lacked substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law. To establish that the defendant had substantial capacity to conform his conduct to the requirements of the law, the Commonwealth must prove beyond a reasonable doubt that any mental disease or defect that may have existed did not deprive the defendant of his ability to behave as the law requires, that is, to obey the law.⁹

The word "appreciate" means to understand rather than merely to know. "Criminality" means the legal significance of conduct; "wrongfulness" means the moral significance.¹⁰ The Commonwealth must prove that the defendant knew and understood that his conduct was illegal or that it was wrong. It is not enough for the Commonwealth to show that the defendant merely knew or was intellectually aware that his conduct was illegal or wrong; rather, the Commonwealth must prove beyond a reasonable doubt that a mental disease or defect did not deprive

⁹ This sentence tracks the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 738 ¶ 5 (1996) (promulgating model instruction on criminal responsibility).

¹⁰ This sentence tracks, with modifications, the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 736, 738 ¶ 3 (1996).

the defendant of a meaningful understanding of the legal or moral significance of his conduct. The defendant must have been able to realize, in some meaningful way, that his conduct was illegal or wrong.¹¹

In considering whether the Commonwealth has met its burden of proof, you may consider all the evidence that has been presented at this trial. You may consider the facts underlying the crime and evidence of the defendant's actions before and after the crime. You may consider the opinions of any experts who testified, and give those opinions whatever weight you think they deserve.¹²

[Where there is evidence that a defendant had a mental disease or defect and consumed drugs or alcohol]

A defendant's lack of criminal responsibility must be due to a mental disease or defect. Intoxication caused by the voluntary consumption of alcohol or drugs, by itself, is not a mental disease or defect. Where a defendant lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the law solely as a result of voluntary intoxication, then he is criminally responsible for

¹¹ This paragraph tracks, with modifications, the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 736, 738 ¶¶ 3-4 (1996).

¹² This paragraph tracks, with modifications, the language approved in Commonwealth v. Goudreau, 422 Mass. 731, 736, 739 ¶ 3 (1996).

his conduct.¹³ However, the consumption of alcohol or drugs may trigger or intensify (make worse) a defendant's preexisting mental disease or defect. If it did so here, and the mental disease or defect then caused the defendant to lose substantial capacity to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law, the defendant is not criminally responsible for his conduct.¹⁴

[Where there is evidence the defendant knew that consumption of drugs or alcohol would trigger or intensify a mental disease or defect]

There is one exception to the principle just stated. A defendant who lost the substantial capacity I have just described after he consumed drugs or alcohol, and who knew or had reason to know that his consumption would trigger or intensify in him a mental disease or defect that could cause him

¹³ This paragraph comes from Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction). See Commonwealth v. Berry, 457 Mass. 602, 617-618 (2010), citing Commonwealth v. Sheehan, 376 Mass. 765, 770 (1978).

¹⁴ This paragraph comes from Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction). See Commonwealth v. Berry, 457 Mass. 602, 612-613 (2010), quoting Commonwealth v. Brennan, 399 Mass. 358, 363 (1987) ("if the jury find that the 'defendant had a latent mental disease or defect which caused the defendant to lose the capacity . . . to conform his conduct to the requirements of the law, lack of criminal responsibility is established even if voluntary consumption of alcohol activated the illness,' as long as the defendant did not know or have reason to know that the activation would occur").

to lack that capacity, is criminally responsible for his resulting conduct.¹⁵ In deciding what the defendant had reason to know about the consequences of his consumption of drugs or alcohol, you should consider the question solely from the defendant's point of view, including his mental capacity and his past experience with drugs or alcohol. But you must keep in mind that where a defendant, at the time the crime is committed, had a mental disease or defect that by itself caused him to lack the required substantial capacity, he is not criminally responsible for his conduct regardless of whether he used or did not use alcohol or drugs. That is true even if he did use alcohol or drugs and the alcohol or drug use made the symptoms of his mental disease or defect worse, and even if he knew they would make his symptoms worse.¹⁶

¹⁵ This paragraph comes from Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction). See id. at 436 ("where a defendant's substance abuse interacts with a mental disease or defect, that defendant is criminally responsible only if two conditions are true: (1) his mental condition alone, prior to the consumption of the drugs, did not render him criminally irresponsible; and (2) he knew or reasonably should have known that this consumption would cause him to lose substantial capacity to appreciate wrongfulness of conduct or to conform his conduct to the law - that is, would cause him to become criminally irresponsible"); Commonwealth v. Berry, 457 Mass. 602, 612-613 (2010), quoting Commonwealth v. Brennan, 399 Mass. 358, 363 (1987) (foreknowledge or reason to know that consumption of drugs or alcohol will trigger latent mental defect nullifies defense of lack of capacity).

¹⁶ This paragraph comes from Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction). See id. at 437 (jury should be instructed that "(1) if the

[Where there is not evidence the defendant knew that consumption of drugs or alcohol would trigger or intensify a mental disease or defect]

You must also keep in mind that where a defendant, at the time the crime is committed, had a mental disease or defect that by itself caused him to lack the substantial capacity that I have just described, he is not criminally responsible for his conduct regardless of whether he used or did not use alcohol or drugs. That is true even if he did use alcohol or drugs and the alcohol or drug use made the symptoms of his mental disease or defect worse.¹⁷

defendant's mental illness did not reach the level of a lack of criminal responsibility until he consumed drugs, he was criminally responsible if he knew (or should have known) that the consumption would have the effect of intensifying or exacerbating his mental condition; and, in contrast, (2) if the defendant's mental illness did reach the level of lack of criminal responsibility even in the absence of his consumption of drugs, it was irrelevant whether he took drugs knowing that they would exacerbate that condition" [emphasis in original]); Commonwealth v. Berry, 457 Mass. 602, 616-618 (2010) ("defense of lack of criminal responsibility is not defeated where the defendant also consumed alcohol or drugs, as long as the mental disease or defect was the cause of the lack of criminal responsibility Where a defendant has an active mental disease or defect that caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law, the defendant's consumption of alcohol or another drug cannot preclude the defense of lack of criminal responsibility").

¹⁷ Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction). See id. at 437 (jury should be instructed that "(1) if the defendant's mental illness did not reach the level of a lack of criminal

[The following paragraphs finish the charge on criminal responsibility instruction and should be given whether or not the case involves the consumption of drugs or alcohol]

In a moment, I will instruct you on the elements of the offense[s] that the Commonwealth alleges the defendant has committed. Remember that the Commonwealth must prove to you beyond a reasonable doubt that the defendant was criminally responsible at the time the crime was committed, that is, that the defendant did not lack criminal responsibility at that time. Therefore, it is the Commonwealth's burden to prove at least one of the following beyond a reasonable doubt:¹⁸

responsibility until he consumed drugs, he was criminally responsible if he knew (or should have known) that the consumption would have the effect of intensifying or exacerbating his mental condition; and, in contrast, (2) if the defendant's mental illness did reach the level of lack of criminal responsibility even in the absence of his consumption of drugs, it was irrelevant whether he took drugs knowing that they would exacerbate that condition" [emphasis in original]); Commonwealth v. Berry, 457 Mass. 602, 616-618 (2010) ("defense of lack of criminal responsibility is not defeated where the defendant also consumed alcohol or drugs, as long as the mental disease or defect was the cause of the lack of criminal responsibility Where a defendant has an active mental disease or defect that caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law, the defendant's consumption of alcohol or another drug cannot preclude the defense of lack of criminal responsibility").

¹⁸ This paragraph and the factors that follow are taken from Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction).

1. That at the time of the alleged crime the defendant did not suffer from a mental disease or defect; or

2. That if the defendant did suffer from a mental disease or defect, he nonetheless retained the substantial capacity to appreciate the wrongfulness or criminality of his conduct and to conform his conduct to the requirements of the law; or

3. **[Where there is evidence the defendant consumed drugs or alcohol]** That if the defendant lacked the substantial capacity to appreciate the wrongfulness or criminality of his conduct and to conform his conduct to the requirements of the law, his lack of such capacity was solely the result of voluntary intoxication by alcohol or other drugs; or

4. **[Where there is evidence the defendant knew that consumption of drugs or alcohol would trigger or intensify a mental disease or defect]** That, if the defendant lacked the substantial capacity I have just described due to a combination of a mental disease or defect and his voluntary consumption of alcohol or other drugs, he knew or should have known that his use of the substance[s] would interact with his mental disease or defect and cause him to lose such capacity.¹⁹

[At the defendant's request or on the judge's own initiative, absent a defense objection]

¹⁹ Commonwealth v. DiPadova, 460 Mass. 424, 439-440 (2011) (appendix providing model jury instruction).

Consequences of Verdict of Not Guilty by Reason of Lack of Criminal Responsibility.²⁰ As I have previously instructed, your decision should be based solely on the evidence and the law of this case, without regard to the possible consequences of the verdicts. You may not consider sentencing or punishment in reaching your verdicts. However, I am going to tell you what happens to a defendant if he is found not guilty by reason of lack of criminal responsibility. The Court may order the defendant to be hospitalized at a mental health facility for a period of forty days for observation and examination. During this observation period, or within sixty days after a verdict of not guilty by reason of lack of criminal responsibility, the district attorney or other appropriate authorities may petition the Court to commit the defendant to a mental health facility or to Bridgewater State Hospital. If the Court then concludes that the defendant is mentally ill and that his discharge would create a substantial likelihood of serious harm to himself or others, the Court may grant the petition and commit him to a proper mental facility or to Bridgewater State Hospital for six

²⁰ Commonwealth v. Biancardi, 421 Mass. 251, 251-252 (1995), quoting Commonwealth v. Mutina, 366 Mass. 810, 823 n.12 (1975) ("where the defense of insanity [lack of criminal responsibility] is fairly raised, the defendant, on his timely request, is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity"). See Commonwealth v. Callahan, 380 Mass. 821, 827 (1980) (judge may give instruction on his or her own initiative where the defendant does not object).

months. Periodically, the Court reviews the order of commitment. If the person is still suffering from a mental disease or defect and is still dangerous, he is kept in the mental facility. If the person is no longer mentally ill and can resume a normal life, he is discharged. The district attorney must be notified of any hearing concerning whether the person may be released, and the district attorney may be heard at any such hearing. However, the final decision on whether to recommit or release the person is always made by the Court. This is what happens if you find the defendant not guilty by reason of lack of criminal responsibility.

JOINT VENTURE

[Where there is evidence of joint venture]

The Commonwealth is not required to prove that the defendant himself performed the act that caused the victim's death.²¹ However, to establish that a defendant is guilty of murder [or voluntary manslaughter or involuntary manslaughter], the Commonwealth must prove two things beyond a reasonable doubt. First, the Commonwealth must prove that the defendant knowingly participated in the commission of the crime [identify the crime if needed to avoid confusion]. Second, the Commonwealth must prove that he did so with the intent required to commit the crime.²²

Such knowing participation by the defendant may take many forms. It may take the form of personally committing the acts that constitute the crime, or of aiding or assisting another in

²¹ Commonwealth v. Deane, 458 Mass. 43, 50-51 (2010) ("Commonwealth is not required to prove exactly how a joint venturer participated in the murders . . . or which of the two did the actual killing"). See Commonwealth v. Zanetti, 454 Mass. 449, 467, 470-471 (2009) (promulgating model jury instruction). Cf. Commonwealth v. Echavarria, 428 Mass. 593, 598 & n.3 (1998) (giving "exemplary" example, but one that uses obsolete joint venture language).

²² Commonwealth v. Deane, 458 Mass. 43, 50-51 (2010) ("Commonwealth is not required to prove exactly how a joint venturer participated in the murders . . . or which of the two did the actual killing"); Commonwealth v. Zanetti, 454 Mass. 449, 467-468, 470-471 (2009) (promulgating model jury instruction). See Commonwealth v. Marrero, 459 Mass. 235, 247 (2011); Commonwealth v. Housen, 458 Mass. 702, 706-707 (2010); G. L. c. 274, § 2.

those acts.²³ It may take the form of the defendant asking or encouraging another person to commit the crime, or of helping to plan the commission of the crime.²⁴ Alternatively, it may take the form of the defendant agreeing to stand by at, or near, the scene of the crime to act as a lookout, or to provide aid or assistance in committing the crime, or in escaping, if such help becomes necessary.²⁵ An agreement to help if needed does not need to be made through a formal or explicit written or oral advance plan or agreement; it is enough if the defendant and at least one other person consciously acted together before or during the crime with the intent of making the crime succeed.²⁶

The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime [identify the crime if needed to avoid confusion], he possessed or shared the intent required for that

²³ Commonwealth v. Zanetti, 454 Mass. 449 462-464 (2009). Commonwealth v. Santos, 440 Mass. 281, 290 (2003); Commonwealth v. Soares, 377 Mass. 461, 470, cert. denied, 444 U.S. 881 (1979).

²⁴ Commonwealth v. Zanetti, 454 Mass. 449 462-463 (2009); Commonwealth v. Soares, 377 Mass. 461, 470, cert. denied, 444 U.S. 881 (1979).

²⁵ Commonwealth v. Mavredakis, 430 Mass. 848, 863-864 (2000), quoting Commonwealth v. Colon-Cruz, 408 Mass. 533, 545 (1990) (escape); Commonwealth v. Miranda, 441 Mass. 783, 791-792 (2004), quoting Commonwealth v. James, 30 Mass. App. Ct. 490, 499 n.10 (1991) (lookout).

²⁶ Commonwealth v. Zanetti, 454 Mass. 449, 466-467 (2009); Commonwealth v. Deane, 458 Mass. 43, 50-51 (2010); Commonwealth v. Echavarria, 428 Mass. 593, 598 n.3 (1998).

crime.²⁷ ²⁸ You are permitted, but not required, to infer the defendant's mental state or intent from his knowledge of the circumstances or any subsequent participation in the crime.²⁹ The inferences you draw must be reasonable, and you may rely on your experience and common sense in determining the defendant's knowledge and intent.³⁰

Mere knowledge that a crime is to be committed is not sufficient to convict the defendant.³¹ The Commonwealth must also prove more than mere association with the perpetrator of the crime, either before or after its commission.³² It must also

²⁷ Commonwealth v. Zanetti, 454 Mass. 449, 467-468 (2009).

²⁸ A joint venturer need not be proved to have committed the murder with extreme atrocity or cruelty, as long as one joint venturer committed the killing with extreme atrocity or cruelty. See Commonwealth v. Chaleumphong, 434 Mass. 70, 79-80 (2001), quoting Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983) (finding no error in instruction that "[i]t is not necessary for the Commonwealth to prove that [the defendants] had a conscious awareness that the acts were being committed with extreme atrocity or cruelty or that either of them desired the acts to be carried out in that manner. . . . We have consistently held that 'proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty'").

²⁹ Commonwealth v. Carnes, 457 Mass. 812, 823 (2010), citing Commonwealth v. Soares, 377 Mass. 461, 470, cert. denied, 444 U.S. 881 (1979).

³⁰ See Commonwealth v. Carnes, 457 Mass. 812, 837 (2010) ("reasonable"). See Commonwealth v. Zanetti, 454 Mass. 449, 470 (2009).

³¹ Commonwealth v. Soares, 377 Mass. 461, 471, cert. denied, 444 U.S. 881 (1979); Commonwealth v. Perry, 357 Mass. 149, 151 (1970).

³² Commonwealth v. Echavarria, 428 Mass. 593, 598 n.3 (1998).

prove more than a failure to take appropriate steps to prevent the commission of the crime.³³

Mere presence at the scene of the crime is not enough to find a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and that he had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that he knew about it in advance.³⁴

Where an element of an offense is that a person who committed the crime possessed, carried, or used a weapon, the Commonwealth must prove beyond a reasonable doubt either that the defendant himself possessed a weapon, or that the defendant knew that a person with whom he participated in the commission of the crime was armed with a weapon.³⁵ However, mere knowledge

³³ Commonwealth v. Zanetti, 454 Mass. 449, 470-471 (2009) (appendix providing model jury instruction); Commonwealth v. Maynard, 436 Mass. 558, 564-565 (2002), quoting Commonwealth v. Ortiz, 424 Mass. 853, 859 (1997).

³⁴ Commonwealth v. Deane, 458 Mass. 43, 58 (2010), citing Commonwealth v. Ortiz, 424 Mass. 853, 859 (1997); Commonwealth v. Zanetti, 454 Mass. 449, 470-471 (2009) (appendix providing model jury instruction).

³⁵ Commonwealth v. Phillips, 452 Mass. 617, 631 (2008), citing Commonwealth v. Ellis, 432 Mass. 746, 762 (2000).

that a participant in the crime was armed is not sufficient to hold the defendant liable for the acts of that participant. The Commonwealth must also prove that the defendant knowingly participated in the commission of the crime, with the intent required to commit the crime.³⁶

³⁶ Commonwealth v. Zanetti, 454 Mass. 449, 467-468 (2009).

SELF-DEFENSE AND DEFENSE OF ANOTHER

A. SELF-DEFENSE

[Note to Judge: This instruction, at the discretion of the judge, may be given as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction.³⁷ The instruction is to be used where the evidence raises an issue of deadly force in self-defense, and the theory of murder is not felony-murder alone.³⁸ Because the Commonwealth need not prove the absence of self-defense to prove felony-murder, this instruction does not apply to felony-murder. If the Commonwealth is entitled to an instruction on murder and felony-murder, the judge should instruct the jury that this instruction does not apply to felony-murder because the Commonwealth is not required to prove the absence of self-defense to prove felony-murder.]

Since this case raises a question whether the defendant properly used force to defend himself from an attack, I will provide you with instructions concerning the law governing the use of deadly force in self-defense before discussing the elements of the crime of murder.

³⁷ *Commonwealth v. Santiago*, 425 Mass. 491, 506 (1997) ("Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime, a specific order in jury instructions is not required").

³⁸ A separate self-defense instruction may be required where self-defense is raised in connection with the underlying felony.

A person is not guilty of any crime if he acted in proper self-defense.³⁹ It is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in proper self-defense.⁴⁰ The defendant does not have the burden to prove that he acted in proper self-defense. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in proper self-defense, then you must find the defendant not guilty.⁴¹

The law does not permit retaliation or revenge.⁴² The proper exercise of self-defense arises from necessity of the moment and ends when the necessity ends.⁴³ An individual may only use sufficient force to prevent occurrence or reoccurrence

³⁹ Commonwealth v. Rogers, 459 Mass. 249, 269-270 (2011) ("if the defendant acted with reasonable force in self-defense, he was entitled . . . to a verdict of not guilty").

⁴⁰ Commonwealth v. King, 460 Mass. 80, 83 (2011) ("Commonwealth bears the burden of proving, beyond a reasonable doubt, that the defendant did not act in self-defense"); Commonwealth v. Glacken, 451 Mass. 163, 166-167 (2008), quoting Commonwealth v. Williams, 450 Mass. 879, 882 (2008) ("To obtain a conviction of murder '[w]here the evidence raises a question of self-defense, the burden is on the government to prove beyond a reasonable doubt that the defendant did not act in self-defense'").

⁴¹ See Commonwealth v. Glacken, 451 Mass. 163, 166-167 (2008).

⁴² See Commonwealth v. Pike, 428 Mass. 393, 398 (1998) (self-defense theory not submitted to jury where evidence showed defendant used force out of "anger or revenge").

⁴³ Commonwealth v. Santos, 454 Mass. 770, 782-783 (approving of prior jury instruction); Commonwealth v. Kendrick, 351 Mass. 203, 212 (1966) ("right of self-defence arises from necessity, and ends when the necessity ends").

of the attack.⁴⁴ The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions, and is not to be judged too strictly.⁴⁵

The Commonwealth satisfies its burden of proving that the defendant did not act in proper self-defense if it proves any one of the following four [or five] propositions beyond a reasonable doubt:⁴⁶

1. The defendant did not actually believe that he was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force.⁴⁷ Deadly force is force that is intended or likely to cause death or serious bodily harm.⁴⁸

⁴⁴ Commonwealth v. King, 460 Mass. 80, 83 (2011) ("force that was used was greater than necessary in all the circumstances of the case"); Commonwealth v. Kendrick, 351 Mass. 203, 211-212 (1966).

⁴⁵ Commonwealth v. Kendrick, 351 Mass. 203, 211, quoting Monize v. Begaso, 190 Mass. 87, 89 (1906).

⁴⁶ See Commonwealth v. Glacken, 451 Mass. 163, 167 (2008) (enumerating required factors for self-defense).

⁴⁷ Commonwealth v. Hart, 428 Mass. 614, 615 (1999), quoting Commonwealth v. Wallace, 460 Mass. 118, 124-125 (2011) ("If deadly force is used, a self-defense instruction must be given only if the evidence permits at least a reasonable doubt that the defendant reasonably and actually believed that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force"). See Commonwealth v. Santos, 454 Mass. 770, 773 (2009); Commonwealth v. Diaz, 453 Mass. 266, 280 (2009), quoting Commonwealth v. Harrington, 379 Mass. 446, 450 (1980).

⁴⁸ Commonwealth v. Noble, 429 Mass. 44, 46 (1999) ("force intended or likely to cause death or serious bodily harm"). Commonwealth v. Cataldo, 423 Mass. 318, 321 (1996), quoting Commonwealth v. Klein, 372 Mass. 823, 827 (1977).

2. A reasonable person in the same circumstances as the defendant would not reasonably have believed that he was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force.⁴⁹

3. The defendant did not use or attempt to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force.⁵⁰

4. The defendant used more force than was reasonably necessary under all the circumstances.⁵¹

5. [Where there is evidence the defendant was the initial aggressor] The defendant was the first to use or threaten deadly force, and did not withdraw in good faith from the conflict and announce to the person (or persons) he provoked his intention to withdraw and end the confrontation without any use of or additional use of force.

I will now discuss each of these four [or five] propositions in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the

⁴⁹ Commonwealth v. Wallace, 460 Mass. 118, 124-125 (2011); Commonwealth v. Santos, 454 Mass. 770, 773 (2009).

⁵⁰ Commonwealth v. Mercado, 456 Mass. 198, 209 (2010), citing Commonwealth v. Benoit, 452 Mass. 212, 226 (2008) ("privilege to use self-defense arises only in circumstances in which the defendant uses all proper means to avoid physical combat").

⁵¹ Commonwealth v. Glacken, 451 Mass. 163, 167 (2008) ("defendant used more force than was reasonably necessary in all the circumstances of the case").

defendant did not act in proper self-defense by proving any one of these propositions beyond a reasonable doubt:

The first proposition is that the defendant did not actually believe that he was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force.⁵²

The second proposition is that a reasonable person in the same circumstances as the defendant would not reasonably have believed that he was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force.⁵³

In considering whether or not the defendant actually believed that he was in immediate danger of death or serious bodily harm, and the reasonableness of that belief that he was in such danger, you may consider all the circumstances bearing on the defendant's state of mind at the time.^{54 55} Moreover, in

⁵² Commonwealth v. Hart, 428 Mass. 614, 615 (1999), quoting Commonwealth v. Wallace, 460 Mass. 118, 124-125 (2011) ("If deadly force is used, a self-defense instruction must be given only if the evidence permits at least a reasonable doubt that the defendant reasonably and actually believed that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force"). See Commonwealth v. Santos, 454 Mass. 770, 773 (2009); Commonwealth v. Diaz, 453 Mass. 266, 280 (2009), quoting Commonwealth v. Harrington, 379 Mass. 446, 450 (1980).

⁵³ Commonwealth v. Wallace, 460 Mass. 118, 124-125 (2011); Commonwealth v. Santos, 454 Mass. 770, 773 (2009).

⁵⁴ See Commonwealth v. Santos, 454 Mass. 770, 773 (2009) ("person using a dangerous weapon (or deadly force) in self-defense must

determining whether the defendant was reasonably in fear of death or serious bodily harm, you may consider any or all of the following:

- evidence of the deceased's reputation as a violent or quarrelsome person, but only if that reputation was known to the defendant;⁵⁶
- evidence of other instances of the deceased's violent conduct, but only if the defendant knew of such conduct;⁵⁷ and

also have actually believed that he was in imminent danger of serious harm or death"); Commonwealth v. Little, 431 Mass. 782, 787 (2000).

⁵⁵ In deciding whether the evidence in the case raises a question of self-defense, a judge may consider, among other evidence:

"(a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse;

"(b) evidence by 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."

G. L. c. 233, § 23F. See Commonwealth v. Anestal, 463 Mass. 655, 676 (2012) ("psychological consequences of a history of abuse are relevant to the consideration whether the defendant was in fear of serious injury or death").

⁵⁶ Commonwealth v. Clemente, 452 Mass. 295, 308 (2008), citing Commonwealth v. Fontes, 396 Mass. 733, 734-735 (1986) ("The judge instructed in regard to the reputation evidence that the jury could consider whether the victim had a reputation as a 'violent or quarrelsome person that was known to the defendant before the alleged incident.' That instruction was and is a correct statement of the law").

- evidence of threats of violence made by the deceased against the defendant, but again, only if the defendant was aware of such threats.⁵⁸

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the defendant actually believed that he was in immediate danger of

⁵⁷ Commonwealth v. Adjutant, 443 Mass. 649, 654 (2005), quoting Commonwealth v. Fontes, 396 Mass. 733, 735, 737 (1986) ("Massachusetts has long followed the evidentiary rule that permits the introduction of evidence of the victim's violent character, if known to the defendant, as it bears on the defendant's state of mind and the reasonableness of his actions in claiming to have acted in self-defense"); Commonwealth v. Rodriguez, 418 Mass. 1, 5 (1994), quoting Commonwealth v. Fontes, 396 Mass. 733, 735 (1986), and Commonwealth v. Pidge, 400 Mass. 350, 353 (1987) ("It is well established that a defendant asserting self-defense is allowed to introduce evidence showing 'that at the time of the killing [she] knew of specific violent acts recently committed by the victim'" because such evidence is relevant in determining "whether the defendant acted justifiably in reasonable apprehension of bodily harm").

⁵⁸ Commonwealth v. Pidge, 400 Mass. 350, 353 (1987); Commonwealth v. Edmonds, 365 Mass. 496, 502 (1974). Where a defendant has been the victim of abuse, evidence of abuse and expert testimony regarding the consequences of abuse are admissible and may be considered by the jury with respect to the reasonableness of a defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of a defendant's belief that he had used all available means to avoid physical combat, and the reasonableness of a defendant's perception of the amount of force needed to deal with the threat. See G. L. c. 233, § 23F.

serious bodily harm or death, but not in determining whether a reasonable person in those circumstances would have believed he was in immediate danger.⁵⁹

[Where the evidence raises an issue of mistaken belief] A person may use deadly force to defend himself even if he had a mistaken belief that he was in immediate danger of serious bodily harm or death, provided that the defendant's mistaken belief was reasonable based on all of the circumstances presented in the case.⁶⁰

The third proposition is that the defendant did not use or attempt to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force.⁶¹ Whether a defendant used all reasonable means to avoid physical combat before resorting to the use of deadly force depends on all of the circumstances, including the relative physical capabilities of the combatants, the weapons

⁵⁹ Cf. Commonwealth v. Barros, 425 Mass. 572, 576 (1997) ("determination as to whether a defendant's belief concerning his exposure to danger was reasonable may not take into account his intoxication").

⁶⁰ Commonwealth v. Pike, 428 Mass. 393, 396-397 (1998) ("If the defendant's apprehension of grievous bodily harm or death, though mistaken, was reasonable, his actions in self-defense may be justifiable").

⁶¹ Commonwealth v. Mercado, 456 Mass. 198, 209 (2010), citing Commonwealth v. Benoit, 452 Mass. 212, 226 (2008) ("privilege to use self-defense arises only in circumstances in which the defendant uses all proper means to avoid physical combat").

used, the availability of room to maneuver or escape from the area, and the location of the assault.⁶²

[For self-defense cases not under the "castle law," G. L. c. 278, § 8A] A person must retreat unless he cannot do so in safety, or unless retreat would increase the danger to his own life.⁶³

[For self-defense cases under the "castle law," G. L. c. 278, § 8A] A person who is lawfully residing in his house, apartment or some other dwelling is not required to retreat before using reasonable force against an unlawful intruder, if the resident reasonably believes that the intruder is about to kill or seriously injure him or another person lawfully in the

⁶² Commonwealth v. Pike, 428 Mass. 393, 399 (1998) ("Whether a defendant used all reasonable means of escape before acting in self-defense is a factual question dependent on a variety of circumstances, including the relative physical capabilities of the combatants, the weapons used, the availability of maneuver room in, or means of escape from, the area, and the location of the assault").

⁶³ Commonwealth v. Benoit, 452 Mass. 212, 226-227 (2008), quoting Commonwealth v. Pike, 428 Mass. 393, 398 (1998) ("A self-defense instruction is not required unless there is some evidence that the defendant availed himself of all means, proper and reasonable in the circumstances, of retreating from the conflict before resorting to the use of deadly force. 'This rule does not impose an absolute duty to retreat regardless of personal safety considerations; an individual need not place himself in danger nor use every means of escape short of death before resorting to self-defense. . . . He must, however, use every reasonable avenue of escape available to him'" [citations omitted]). Cf. Commonwealth v. Pelouquin, 437 Mass. 204, 212 (2002) (noting in dicta that set of jury "instructions, taken as a whole, explained that a defendant need not retreat unless he can do so in safety, and need not do so when he would increase the danger to his own life").

dwelling, and also reasonably believes that such force is necessary to protect himself or the other person lawfully in the dwelling.⁶⁴

The fourth proposition is that the defendant used more force than was reasonably necessary under all the circumstances.⁶⁵ In considering whether the force used by a person was reasonable under the circumstances, you may consider evidence of the relative physical capabilities of the combatants, the number of persons who were involved on each side, the characteristics of any weapons used, the availability of room to maneuver, the manner in which the deadly force was used, the scope of the threat presented, or any other factor you

⁶⁴ This instruction is required by G. L. c. 278, § 8A, which provides that, where "an occupant of a dwelling . . . was in his dwelling at the time of the offense and . . . acted in the reasonable belief that the person unlawfully in [the] dwelling was about to inflict great bodily injury or death upon [the] occupant or upon another person lawfully in [the] dwelling, and that [the] occupant used reasonable means to defend himself or such other person lawfully in [the] dwelling[, that] [t]here shall be no duty on [the] occupant to retreat from [the] person unlawfully in [the] dwelling." This instruction is not appropriate where the occupant of a dwelling uses force on another person lawfully in the dwelling. See Commonwealth v. Pelouquin, 437 Mass. 204, 208 (2002) ("Nothing in G. L. c. 278, § 8A, . . . eliminates the duty on the part of the occupant of the dwelling to retreat from a confrontation with a person who is lawfully on the premises"). See also Commonwealth v. Carlino, 449 Mass. 71, 76 (2007) (instruction not warranted where fatal encounter occurs outside of dwelling, in driveway); Commonwealth v. McKinnon, 446 Mass. 263, 267-268 (2006) (same; outside stairs and porch).

⁶⁵ Commonwealth v. Glacken, 451 Mass. 163, 167 (2008) ("defendant used more force than was reasonably necessary in all the circumstances of the case").

deem relevant to the reasonableness of the person's conduct under the circumstances.⁶⁶

5. [Where there is evidence the defendant was the initial aggressor] The fifth proposition is that the defendant was the first to use or threaten deadly force,⁶⁷ and did not withdraw in good faith from the conflict and announce to the person (or persons) he provoked his intention to withdraw and end the confrontation without any use of or additional use of force.

The right of self-defense cannot be claimed by a defendant who was the first to use or threaten deadly force, because a defendant must have used or attempted to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force. A defendant

⁶⁶ Commonwealth v. Walker, 443 Mass. 213, 218 (2005); Commonwealth v. King, 460 Mass. 80, 83 & n.2, 87 (2011), affirming the factors given in Commonwealth v. Kendrick, 351 Mass. 203, 212 (1966) ("jury should consider evidence of the relative physical capabilities of the combatants, the characteristics of the weapons used, and the availability of maneuver room in, or means of escape from, the . . . area").

⁶⁷ See Commonwealth v. Barbosa, 463 Mass. 116, 136 (2012), quoting Commonwealth v. Maguire, 375 Mass. 768, 772 (1978) ("right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault"). See also Commonwealth v. Harris, 464 Mass. 425, 435-436 & n. 11 (2013) (noting that instruction that "[a] person who provokes or initiates an assault ordinarily cannot claim the right of self-defense" is "potentially overbroad because it does not define what constitutes provocation of the type that results in the forfeiture of a self-defense claim" and advising judges to "make clear that conduct involving only the use of nonthreatening words will not be sufficient to qualify a defendant as a first aggressor").

who provokes or initiates such a confrontation must withdraw in good faith from the conflict and announce to the person (or persons) he provoked his intention to withdraw and end the confrontation without the use of force or additional force.⁶⁸ For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the deceased's [and a third party acting together with the deceased's] past violent conduct, whether or not the defendant knew of it.⁶⁹

[Note to Judge: Where the evidence, viewed in the light most favorable to the defendant, would permit the jury to find that the force used by the defendant in killing the victim was either deadly or nondeadly force, the defendant is entitled to instructions on the use of both deadly and nondeadly force in

⁶⁸ Commonwealth v. Pring-Wilson, 448 Mass. 718, 733 (2007), quoting Commonwealth v. Maguire, 375 Mass. 768, 772 (1978) ("right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire").

⁶⁹ Commonwealth v. Pring-Wilson, 448 Mass. 718, 736-738 (2007), quoting Commonwealth v. Adjutant, 443 Mass. 649, 664 (2005) (evidence of violent conduct, even when defendant did not know of such conduct, admissible to resolve contested identity of likely first attacker; "where the identity of the first aggressor is in dispute and the victim has a history of violence . . . trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated, to support the defendant's claim of self-defense").

self-defense and the jury shall decide on the type of force used.^{70]}

Deadly or Nondeadly Force: Deadly force is force that is intended to or likely to cause death or serious bodily harm. Nondeadly force, by contrast, is force that is not intended to or likely to cause death or serious bodily harm.⁷¹ You must determine whether the Commonwealth has proved beyond a reasonable doubt that the defendant used deadly force. If you have a reasonable doubt whether the defendant used deadly force but are convinced that he used some force, then you must consider whether the defendant used nondeadly force in self-defense. If the defendant had reasonable grounds to believe that he was in immediate danger of harm from which he could save himself only by using nondeadly force, and had availed himself of all reasonable means to avoid physical combat before resorting to nondeadly force, then the defendant had the right to use the nondeadly force reasonably necessary to avert the threatened harm, but he could use no more force than was reasonable and proper under the circumstances. You must consider the proportionality of the force used to the threat of

⁷⁰ Commonwealth v. King, 460 Mass. 80, 83 (2011).

⁷¹ Commonwealth v. Cataldo, 423 Mass. 318, 325 (1996) ("force neither intended nor likely to cause death or great bodily harm"). See Commonwealth v. Lopes, 440 Mass. 731, 739 (2004) (using one's fists is nondeadly force).

immediate harm in assessing the reasonableness of nondeadly force.⁷²

B. DEFENSE OF ANOTHER

[Note to Judge: As with self-defense, this instruction in the discretion of the judge may be given as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction.⁷³ The instruction is to be used where the evidence raises an issue of deadly force in defense of another,⁷⁴ and the theory of murder is not felony-murder alone.⁷⁵ Because the Commonwealth need not prove the absence of defense of another to prove felony-murder, this instruction does not apply to felony-murder. If the Commonwealth is entitled to an instruction on murder and felony-murder, the judge should

⁷² Commonwealth v. King, 460 Mass. 80, 83 (2011), quoting Commonwealth v. Franchino, 61 Mass. App. Ct. 367, 368-369 (2004) ("(1) the defendant had reasonable concern for his personal safety; (2) he used all reasonable means to avoid physical combat; and (3) 'the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness'"); Commonwealth v. Adams, 458 Mass. 766, 774 (2011); Commonwealth v. Lopes, 440 Mass. 731, 739 (2004), quoting Commonwealth v. Baseler, 419 Mass. 500, 502-503 (1995) ("use of nondeadly force is justified at a lower level of danger, in circumstances giving rise to a 'reasonable concern over his personal safety'"); Commonwealth v. Noble, 429 Mass. 44, 46 (1999).

⁷³ Commonwealth v. Santiago, 425 Mass. 491, 506 (1997) ("Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime, a specific order in jury instructions is not required").

⁷⁴ See Commonwealth v. Barbosa, 463 Mass. 116, 135-136 (2012).

⁷⁵ A separate self-defense instruction may be required where self-defense is raised in connection with the underlying felony.

instruct the jury that this instruction does not apply to felony-murder because the Commonwealth is not required to prove the absence of defense of another to prove felony-murder.

Because the issue of defense of another generally arises where there is also an issue of self-defense, the instruction below is premised on the jury having earlier been instructed as to the law of self-defense. Where an issue of defense of another arises without an issue of self-defense, the judge may still need to explain the law of self-defense to assist the jury in understanding the law of defense of another, because the jury are required to determine whether, based on the circumstances known to the defendant, a reasonable person would believe that the other person was justified in using deadly force to protect himself.]

A person is not guilty of any crime if he acted in proper defense of another. It is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in proper defense of another. The defendant does not have the burden to prove that he acted in proper defense of another. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in proper defense of another, then you must find the defendant not guilty.⁷⁶

⁷⁶ See Commonwealth v. Glacken, 451 Mass. 163, 166-167 (2008).

The Commonwealth may satisfy its burden of proving that the defendant did not act in proper defense of another by proving any one of the following three propositions beyond a reasonable doubt:⁷⁷

1. The defendant did not actually believe that the other person was in immediate danger of death or serious bodily harm from which the other person could save himself only by using deadly force. You need not determine whether the other person actually believed himself to be in immediate danger of death or serious bodily harm; you must focus instead on whether the defendant actually had that belief.⁷⁸

2. A reasonable person in the circumstances known to the defendant would not have believed that the other person was in immediate danger of death or serious bodily harm from which the other person could save himself only by using deadly force. You need not determine whether a reasonable person in the circumstances known to the other person would have believed himself to be in immediate danger of death or serious bodily

⁷⁷ See Commonwealth v. Young, 461 Mass. 198, 208 (2012) (enumerating required factors for defense of another); Commonwealth v. Martin, 369 Mass. 640, 649 (1976) (same).

⁷⁸ See Commonwealth v. Barbosa, 463 Mass. 116, 135-136 (2012); Commonwealth v. Young, 461 Mass. 198, 209 & n.19 (2012); Commonwealth v. Martin, 369 Mass. 640, 649 (1976).

harm; you must focus instead on what a reasonable person in the circumstances known to the defendant would have believed.⁷⁹

3. A reasonable person in the circumstances known to the defendant would not have believed that the other person was justified in using deadly force to protect himself.⁸⁰

[Note to Judge: Where the evidence, viewed in the light most favorable to the defendant, would permit the jury to find that the force used by the defendant in killing the victim was either deadly or nondeadly force, the defendant is entitled to instructions on the use of both deadly and nondeadly force in defense of another and the jury shall decide on the type of force used.⁸¹]

Deadly or Nondeadly Force: Deadly force is force that is intended to or likely to cause death or serious bodily harm. Nondeadly force, by contrast, is force that is not intended to or likely to cause death or serious bodily harm.⁸² If the

⁷⁹ See Commonwealth v. Young, 461 Mass. 198, 209 & n.19 (2012) (circumstances must be viewed from perspective of intervening defendant, not third party; "whether the third party was, in retrospect, actually entitled to use self-defense is not a consideration"). See also Commonwealth v. Barbosa, 463 Mass. 116, 135-136 (2012).

⁸⁰ See Commonwealth v. Young, 461 Mass. 198, 208 (2012), quoting Commonwealth v. Martin, 369 Mass. 640, 649 (1976). See also Commonwealth v. Barbosa, 463 Mass. 116, 135-136 (2012).

⁸¹ Commonwealth v. King, 460 Mass. 80, 83 (2011).

⁸² Commonwealth v. Cataldo, 423 Mass. 318, 325 (1996) ("force neither intended nor likely to cause death or great bodily harm"). See Commonwealth v. Lopes, 440 Mass. 731, 739 (2004) (using one's fists is nondeadly force).

defendant, based on the circumstances known to the defendant, had reasonable grounds to believe (1) that the other person was in immediate danger of harm from which the other person could save himself only by using nondeadly force, and (2) that the other person was justified in using nondeadly force to protect himself, then the defendant had the right to use whatever nondeadly means were reasonably necessary to avert the threatened harm, but he could use no more force than was reasonable and proper under the circumstances. You must consider the proportionality of the force used to the threat of immediate harm in assessing the reasonableness of nondeadly force.⁸³

⁸³ See Commonwealth v. King, 460 Mass. 80, 83 (2011) ("(1) the defendant had reasonable concern for his personal safety; (2) he used all reasonable means to avoid physical combat; and (3) 'the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness'"); Commonwealth v. Adams, 458 Mass. 766, 774 (2011); Commonwealth v. Lopes, 440 Mass. 731, 739 ("use of nondeadly force is justified at a lower level of danger, in circumstances giving rise to a 'reasonable concern over his personal safety'"); Commonwealth v. Noble, 429 Mass. 44, 46 (1999).

MURDER IN THE FIRST DEGREE

Murder is the unlawful killing of a human being. There are two different degrees of murder: murder in the first degree and murder in the second degree.

[Where the jury is to be instructed on voluntary and/or involuntary manslaughter] If you find the defendant not guilty of murder in the first degree or murder in the second degree, you shall consider whether the Commonwealth has proved the defendant guilty beyond a reasonable doubt of the lesser offenses of voluntary manslaughter or involuntary manslaughter.

The Commonwealth alleges that the defendant committed murder in the first degree on the following theories: [list theory or theories as follows: murder with deliberate premeditation, murder with extreme atrocity or cruelty, and/or murder in the commission or attempted commission of a felony punishable by a maximum sentence of life.] You are to consider each of these theories, and may find the defendant not guilty, or guilty on one [or two or three] of these theories. Your verdict must be unanimous, whether it be "not guilty" or "guilty" of one or more theories of murder. To find the defendant guilty on any of these theories of murder [or of any of the lesser offenses of manslaughter], you must be unanimous, that is, all the deliberating jurors must agree that the Commonwealth has met its burden of proving every required

element of that theory beyond a reasonable doubt. You should check the appropriate block or blocks on the verdict slip as to each theory on which you agree unanimously.

I will begin by instructing you on the elements [and additional requirements of proof] for each of these theories of murder in the first degree. I will next instruct you on murder in the second degree. [I will then instruct you on voluntary manslaughter and involuntary manslaughter.] I will then review the verdict slip with you.

A. MURDER WITH DELIBERATE PREMEDITATION

I will first define the elements of murder in the first degree with deliberate premeditation. To prove the defendant guilty of murder in the first degree with deliberate premeditation, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. The defendant caused the death of [victim's name].
2. The defendant intended to kill [victim's name], that is, the defendant consciously and purposefully intended to cause [victim's name] death.
3. The defendant committed the killing with deliberate premeditation, that is, he decided to kill after a period of reflection.

4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

5. **[Where there is evidence of mitigating circumstances]**
In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances.

I will now discuss each of these requirements in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of [the victim's] death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.⁸⁴

The second element is that the defendant intended to kill [the victim], that is, the defendant consciously and purposefully intended to cause [the victim's] death.⁸⁵

[Where there is evidence of accident] If you have a reasonable doubt as to whether the victim's death was accidental, because the death was an unintended consequence of a defendant's intentional act, or was caused by a negligent,

⁸⁴ See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

⁸⁵ See Commonwealth v. Zanetti, 454 Mass. 449, 455 (2009) ("mental state or intent for deliberately premeditated murder [is] an intent to kill"); Commonwealth v. Jenks, 426 Mass. 582, 585 (1998) ("Where only deliberate premeditation is offered to the jury as a basis for murder in the first degree, the inclusion of instructions on second and third prong malice, even if justified for other reasons, could be confusing . . .").

careless, or mistaken act of the defendant, or resulted from a cause separate from the defendant's conduct, you may not find that the Commonwealth has proved this element of intent to kill the victim.⁸⁶

[Where there is evidence of transferred intent] If the defendant intends to kill a person and in attempting to do so mistakenly kills another person, such as a bystander, the defendant is treated under the law as if he intended to kill the actual victim. This is referred to as transferred intent under the law. For example, if I aim and fire a gun at one person intending to kill him but instead mistakenly kill another person, the law treats me as if I intended to kill the actual victim. My intent to kill the intended victim is transferred to the actual victim.⁸⁷

The third element is that the defendant committed the killing with deliberate premeditation, that is, he decided to

⁸⁶ See Commonwealth v. Palmariello, 392 Mass. 126, 145 & n.4 (1984) (Commonwealth has burden of proof to show beyond a reasonable doubt that death was not accident).

⁸⁷ Commonwealth v. Taylor, 463 Mass. 857, 863 (2012) ("A transferred intent instruction provides that if a defendant intends to kill a person and in attempting to do so mistakenly kills another person, such as a bystander, the defendant is treated under the law as if he intended to kill the bystander"); Commonwealth v. Shea, 460 Mass. 163, 172-174 (2011) (discussing proper jury instructions on transferred intent); Commonwealth v. Castro, 438 Mass. 160, 165-166 (2002), quoting Commonwealth v. Fisher, 433 Mass. 340, 344-345 (2001) ("to find murder based on a theory of transferred intent, the jury need only find that the defendant 'intended to kill one person and, in the course of an attempt to do so, killed another'").

kill after a period of reflection. Deliberate premeditation does not require any particular length of time of reflection. A decision to kill may be formed over a period of days, hours, or even a few seconds.⁸⁸ The key is the sequence of the thought process: first the consideration whether to kill; second, the decision to kill; and third, the killing arising from the decision.⁸⁹ There is no deliberate premeditation where the action is taken so quickly that a defendant takes no time to reflect on the action and then decides to do it.⁹⁰

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant intended to kill the victim and whether he formed that intent with deliberate premeditation, you may consider any credible evidence that the defendant suffered from a mental impairment or was affected by his consumption of alcohol or

⁸⁸ See, e.g., Commonwealth v. Gambora, 457 Mass. 715, 733 (2010), quoting Commonwealth v. Coleman, 434 Mass. 165, 168 (2001) ("no particular period of reflection is required, and . . . a plan to murder may be formed in seconds"). See Commonwealth v. Tucker, 189 Mass. 457, 487 (1905) (including extracts from instructions to jury on this subject in numerous earlier trials).

⁸⁹ See Commonwealth v. McMahan, 443 Mass. 409, 418 (2005) (correct instruction explains that sequence of events began with "deliberation and premeditation, then the decision to kill, and lastly, the killing in furtherance of the decision").

⁹⁰ See Commonwealth v. Stewart, 460 Mass. 817, 826 (2012) (proper to instruct "that the defendant's resolution to kill resulted from reflection over some span of time; and that the act could not have been undertaken so quickly as to preclude such reflection"); Commonwealth v. McInerney, 373 Mass. 136, 153-154 (1977).

drugs. A defendant may form the required intent and act with deliberate premeditation even if he suffered from a mental impairment or consumed alcohol or drugs, but you may consider such evidence in determining whether the Commonwealth has proved these elements.⁹¹

[Where there is evidence of self-defense or defense of another] The next element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you as to the circumstances under which a person properly may act in self-defense or in the defense of another.

[Where there is evidence of mitigating circumstances] Finally, the Commonwealth is also required to prove beyond a reasonable doubt that there were no mitigating circumstances. The law recognizes that in certain circumstances, which we refer

⁹¹ Commonwealth v. Mercado, 456 Mass. 198, 207 (2010), quoting Commonwealth v. Sires, 413 Mass. 292, 300 (1992) ("All that we have ever required' be said to juries about the effect of mental impairment on a defendant's intent or knowledge is 'satisfied by a simple instruction that the jury may consider credible evidence' of the mental impairment 'in deciding whether the Commonwealth had met its burden of proving the defendant's state of mind beyond a reasonable doubt'"). See Commonwealth v. Herbert, 421 Mass. 307, 316 (1995) (instruction regarding intoxication warranted where "evidence raised a reasonable doubt whether the defendant was so intoxicated at the time of the incident that he was incapable of forming the intent that is a necessary element of the crimes charged"). Contrast Commonwealth v. Johnson, 435 Mass. 113, 121-122 (2001) (reversal due to erroneous instruction on premeditation where mental impairment was a live issue).

to as mitigating circumstances, the crime is a lesser offense than it would have been in the absence of a mitigating circumstance. A killing that would otherwise be murder in the first or second degree is reduced to the lesser offense of voluntary manslaughter if the defendant killed someone under mitigating circumstances.

Not every circumstance you may think to be mitigating is recognized as mitigating under the law. In this case, the mitigating circumstance[s] that you must consider is/are:

1. heat of passion on a reasonable provocation;
2. heat of passion induced by sudden combat;
3. excessive use of force in self-defense or in defense of another.

To prove the defendant guilty of murder in the first degree with deliberate premeditation, the Commonwealth must prove beyond a reasonable doubt that there were no mitigating circumstances.

[I will instruct you on this (each of these) mitigating circumstance(s) in more detail later, when I discuss voluntary manslaughter.]

B. MURDER WITH EXTREME ATROCITY OR CRUELTY

Next I will define the elements of murder in the first degree with extreme atrocity or cruelty

[Where the Commonwealth has also charged murder in the first degree with deliberate premeditation] You shall consider

this theory of murder in the first degree regardless whether or not you find that the Commonwealth has proved murder in the first degree with deliberate premeditation.⁹²

To prove the defendant guilty of murder with extreme atrocity or cruelty, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant caused the death of [victim's name];
2. The defendant either:
 - a. intended to kill [victim's name]; or
 - b. intended to cause grievous bodily harm to [victim's name]; or
 - c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.
3. The killing was committed with extreme atrocity or cruelty.
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

⁹² See Commonwealth v. Candelario, 446 Mass. 847, 859-860 (2006), citing Commonwealth v. Caputo, 439 Mass. 153, 168 (2003) (jury may find defendant guilty on any theory of murder in first degree advanced by Commonwealth).

5. [Where there is evidence of mitigating circumstances]

In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances.

I will now discuss each of these requirements in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of [the victim's] death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.⁹³

The second element is that the defendant:

- a. intended to kill [victim's name]; or
- b. intended to cause grievous bodily harm to [victim's name]; or
- c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

As you can see, this second element has three sub-elements, which I shall call prongs, and the Commonwealth satisfies its burden of proof if it proves any one of the three prongs beyond a reasonable doubt.⁹⁴

⁹³ See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

⁹⁴ See Commonwealth v. Townsend, 453 Mass. 413, 428-429 (2009) (under extreme atrocity or cruelty theory first element may be satisfied by any one of three prongs).

The first prong - the defendant intended to kill - is the same as the second element of murder in the first degree with deliberate premeditation. The second and third prongs are different from any element of murder in the first degree with deliberate premeditation.

The second prong is that the defendant intended to cause grievous bodily harm to [victim's name]. Grievous bodily harm means severe injury to the body.⁹⁵

The third prong is that the defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. Let me help you understand how to analyze this third prong. You must first determine whether the defendant intended to perform the act that caused the victim's death. If you find that he intended to perform the act, you must then determine what the defendant himself actually knew about the relevant circumstances at the time he acted. Then you must determine whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result.⁹⁶

⁹⁵ See Commonwealth v. Reed, 427 Mass. 100, 105 (1998).

⁹⁶ See Commonwealth v. Robidoux, 450 Mass. 144, 162 nn.8 & 9 (2007).

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant intended to kill, intended to cause grievous bodily harm, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result, you may consider any credible evidence that the defendant suffered from a mental impairment or was affected by his consumption of alcohol or drugs.⁹⁷

The third element is that the killing was committed with extreme atrocity or cruelty. Extreme atrocity means an act that is extremely wicked or brutal, appalling, horrifying, or utterly revolting.⁹⁸ Extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life.⁹⁹ You must determine whether the method or mode of a killing is so shocking as to amount to

⁹⁷ See generally Commonwealth v. Mercado, 456 Mass. 198, 207-208 (2010); Commonwealth v. Herbert, 421 Mass. 307, 316 (1995); Commonwealth v. Sires, 413 Mass. 292, 300 (1992).

⁹⁸ See, e.g., Commonwealth v. Linton, 456 Mass. 534, 546-547 (2010); Commonwealth v. Perry, 432 Mass. 214, 219-220, 224-227 (2000).

⁹⁹ See Commonwealth v. Sok, 439 Mass. 428, 437 (2003) ("judge correctly impressed on the jury that '[e]xtreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of human life'" [emphasis in original]).

murder with extreme atrocity or cruelty.¹⁰⁰ The inquiry focuses on the defendant's action in terms of the manner and means of inflicting death, and on the resulting effect on the victim.¹⁰¹

In deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant caused the death of the deceased with extreme atrocity or cruelty, you must consider the following factors:¹⁰²

1. whether the defendant was indifferent to or took pleasure in the suffering of the deceased;¹⁰³

2. the consciousness and degree of suffering of the deceased;¹⁰⁴

3. the extent of the injuries to the deceased;¹⁰⁵

¹⁰⁰ See, e.g., Commonwealth v. Hunter, 416 Mass. 831, 837 (1994), quoting Commonwealth v. Connolly, 356 Mass. 617, 628, cert. denied, 400 U.S. 843 (1970) ("mode").

¹⁰¹ See, e.g., Commonwealth v. Barros, 425 Mass. 572, 581 (1997), quoting Commonwealth v. Gould, 380 Mass. 672, 684 (1980) ("inquiry focuses both on the defendant's actions, in terms of the manner and means of inflicting death, and on the resulting effect on the victim").

¹⁰² Commonwealth v. Linton, 456 Mass. 534, 536 n.10 (2010) (approving these factors as defined in Commonwealth v. Cunneen, 389 Mass. 216, 227 [1983]). See Commonwealth v. Stroyny, 435 Mass. 635, 651 (2002) ("reasonable juror would have understood that the Commonwealth bore the burden of proving at least one of the Cunneen factors beyond a reasonable doubt").

¹⁰³ See, e.g., Commonwealth v. Anderson, 445 Mass. 195, 202 (2005) (defendant bragged about brutal murder after crime); Commonwealth v. Sok, 439 Mass. 428, 431 (2003).

¹⁰⁴ See, e.g., Commonwealth v. Linton, 456 Mass. 534, 546-547 (2010) (victim suffered conscious suffering as she was strangled to death); Choy v. Commonwealth, 456 Mass. 146, 151 (2010).

4. the number of blows delivered;¹⁰⁶
5. the manner, degree and severity of the force used;¹⁰⁷
6. the nature of the weapon, instrument, or method used;¹⁰⁸

and

7. the disproportion between the means needed to cause death and those employed.¹⁰⁹ This seventh factor refers to whether the means used were excessive and out of proportion to what would be needed to kill a person.

You cannot make a finding of extreme atrocity or cruelty unless it is based on one or more of the factors I have just listed.¹¹⁰

¹⁰⁵ See, e.g., Commonwealth v. Barbosa, 457 Mass. 773, 802-803 (2010) (photograph depicting depressed skull fracture highly probative on extent of injury victim sustained).

¹⁰⁶ See, e.g., Commonwealth v. Miller, 457 Mass. 69, 71 (2010) (evidence consistent with twenty-five blows from hammer to victim's head).

¹⁰⁷ See, e.g., Commonwealth v. Carlson, 448 Mass. 501, 502-503 (2007) (defendant "stomped on [victim's] abdomen, kicked her in the groin, and slammed her head on the floor ten times"; autopsy revealed "'massive contusions' in the abdomen and genitalia that required a degree of force that might occur in an automobile accident").

¹⁰⁸ See, e.g., Commonwealth v. Garuti, 454 Mass. 48, 55 (2009) (defendant used his special utility vehicle to strike his former wife and then drive back over her).

¹⁰⁹ See, e.g., Commonwealth v. Moses, 436 Mass. 598, 601 (2002) (after victim raised arms in act of surrender defendant shot at victim seven times, hitting him four times; two wounds were potentially fatal).

¹¹⁰ Commonwealth v. Smith, 460 Mass. 318, 323 (2011), citing Commonwealth v. Hunter, 416 Mass. 831, 836-837 (1994) (error to instruct that extreme atrocity or cruelty is not limited to factors defined in Commonwealth v. Cunneen, 389 Mass. 216, 227 [1983]).

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant committed the killing with extreme atrocity or cruelty.¹¹¹

[Where there is evidence of self-defense or defense of another] The defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you about when a person properly may act in self-defense or in the defense of another.

[Where there is evidence of mitigating circumstances] In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances. I have already mentioned that I will instruct you on mitigating circumstances later, when I discuss voluntary manslaughter.

C. FELONY-MURDER IN THE FIRST DEGREE

Next, I will define the elements of felony-murder in the first degree. A defendant is guilty of felony-murder in the

¹¹¹ See Commonwealth v. Rutkowski, 459 Mass. 794, 798 (2011); Commonwealth v. Rosenthal, 432 Mass. 124, 130 (2000); Commonwealth v. Gould, 380 Mass. 672, 686 (1980).

first degree if the Commonwealth has proved beyond a reasonable doubt that the victim was killed during the defendant's commission or attempted commission¹¹² of a felony with a maximum sentence of life imprisonment.¹¹³

[Where other theories of murder in the first degree are charged] You shall consider this theory of murder in the first degree regardless whether or not you find that the Commonwealth has proved murder in the first degree with deliberate premeditation, or with extreme atrocity or cruelty, or both. Under the theory of felony-murder, the only intent the Commonwealth must prove is the intent to commit the underlying felony; the Commonwealth need not prove that the defendant intended to kill the victim or intended the act that resulted in the victim's death.¹¹⁴

To prove the defendant guilty of felony-murder in the first degree, the Commonwealth must prove the following elements beyond a reasonable doubt:¹¹⁵

¹¹² See Commonwealth v. Scott, 408 Mass. 811, 821 n.10 (1990) (attempted commission of crime punishable with imprisonment for life can also be basis for felony-murder in the first degree).

¹¹³ See, e.g., Commonwealth v. Petetabella, 459 Mass. 177, 191 (2011).

¹¹⁴ See, e.g., Commonwealth v. Petetabella, 459 Mass. 177, 191 (2011), citing Commonwealth v. Gricus, 317 Mass. 403, 411-412 (1944).

¹¹⁵ Previously, it was described as an element of felony-murder, both in the first and second degrees, that the killing must have been a "natural and probable consequence" of the felony. See, e.g., Commonwealth v. Matchett, 386 Mass. 492, 505 (1982).

1. The defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life.¹¹⁶

2. The death occurred during the commission or attempted commission of the underlying felony.¹¹⁷

3. The underlying felony was inherently dangerous [or the defendant committed the underlying felony with a conscious disregard for the risk to human life.¹¹⁸]

I will explain each element in more detail. The first element is that the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life. The Commonwealth alleges that the defendant committed [or attempted to commit] [name of crime[s]]. I instruct you that this crime is a felony with a maximum sentence of life imprisonment.

In order for you to decide whether [name of the crime[s]] actually occurred in this case, I must instruct you on all elements of this underlying offense[s].

Since 1999, however, the Supreme Judicial Court has recommended that the language not be used "as it is superfluous to the other elements of felony-murder." Commonwealth v. Rolon, 438 Mass. 808, 818 n.11 (2003). See Model Jury Instructions on Homicide at 67-68 n.8 (1999).

¹¹⁶ See, e.g., Commonwealth v. Cannon, 449 Mass. 462, 471 (2007); Commonwealth v. Roderick, 429 Mass. 271, 275-276 (1999).

¹¹⁷ See, e.g., Commonwealth v. Roderick, 429 Mass. 271, 277 (1999) (felony-murder applies where killing occurred during commission of or attempt to commit felony).

¹¹⁸ See Commonwealth v. Tevlin, 433 Mass. 305, 313-314 (2001) (prosecution does not need to prove defendant acted with conscious disregard for human life where felony is "inherently dangerous" because risk is implicit in intent required for any "inherently dangerous" felony).

[Note to Judge: Define all the elements of the substantive felonies alleged. In appropriate cases, a definition of "attempt" must be included. If more than one felony is alleged, the jury must be instructed that they must be unanimous with regard to the underlying felony in order to return a verdict of guilty of felony-murder in the first degree.]

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the defendant had the intent required in the underlying offense.^{119 120}

[Merger instruction where the predicate felony contains an element of assault and there is evidence that the defendant attacked multiple victims in the specific incident of violence

¹¹⁹ See, e.g., Commonwealth v. Rasmusen, 444 Mass. 657, 665-666 (2005).

¹²⁰ Commonwealth v. Herbert, 421 Mass. 307, 316 (1995) (instruction regarding intoxication warranted where "evidence raised a reasonable doubt whether the defendant was so intoxicated at the time of the incident that he was incapable of forming the intent that is a necessary element of the crimes charged").

that resulted in the victim's death or that the defendant committed a separate and distinct attack upon the deceased]¹²¹

¹²¹ Under the merger doctrine, if the only felony committed was the assault upon the victim which resulted in the victim's death, the assault merges with the killing and cannot be relied on by the Commonwealth to support felony-murder. Where the underlying felony contains an element of assault, the judge must ensure that the felony found by the jury is independent of the act that resulted in the death of the victim. Where the murder indictment does not specify an independent felonious assault and there is a risk that the jury may find the underlying felony to include the assault that resulted in the victim's death, the Commonwealth, in advance of trial, should identify the independent felonious assault or assaults that it intends to rely on at trial to prove felony-murder. For instance, if the underlying felony is armed assault in a dwelling, and two other persons apart from the homicide victim were in the dwelling at the time of the armed assault, the judge must explain that, to prove this first element of felony-murder, the Commonwealth must prove beyond a reasonable doubt the felony of armed assault in a dwelling of a person other than the homicide victim. To diminish the risk of confusion, the verdict form may require the jury to specify the person or persons other than the homicide victim that they concluded was assaulted. See Commonwealth v. Gunter, 427 Mass. 259, 274 (1998) ("Absent specification of an independent felonious assault in the murder indictment or absent a separate indictment on an independent assault, however, it is advisable in the future that the prosecution seek jury questions specifying the independent felonious assault pursuant to G. L. c. 265, § 18A, that it contends supports a felony-murder conviction"). If the underlying felony is armed assault in a dwelling or armed home invasion and the homicide victim was alone in the dwelling, but the Commonwealth contends that there was an earlier assault of the homicide victim in the dwelling that did not cause his death prior to the assault that did cause his death, the judge in instructing the jury must explain that, to satisfy the first element of felony-murder, the Commonwealth must prove beyond a reasonable doubt the felony of armed assault in a dwelling or armed home invasion, with the assault being the first alleged assault of the victim, not the assault that allegedly resulted in the victim's death. See Commonwealth v. Kilburn, 438 Mass. 356, 359-360 (2003).

The act of violence that is an element of the underlying felony may not be the same act that caused the victim's death.¹²² Where an act of violence is an element of the underlying felony, you may find felony-murder only if you find an act that is separate and distinct from the violent act that resulted in the victim's death.¹²³ In this case, the Commonwealth alleges the following separate and distinct acts: [list qualifying underlying acts]. You may find felony-murder only if you find that the Commonwealth has proved beyond a reasonable doubt one of these separate and distinct acts. [If there was more than one separate and distinct act that may satisfy an element of the underlying felony, you may find the underlying felony only if you unanimously find the Commonwealth has proved the same act beyond a reasonable doubt.¹²⁴]

If you find the defendant guilty of felony-murder, I require you to answer the following question[s]. [Recite special question or questions specific to the case.]

The second element is that the killing occurred during the commission or attempted commission of the underlying felony. The Commonwealth must prove beyond a reasonable doubt that the

¹²² See, e.g., Commonwealth v. Kilburn, 438 Mass. 356, 359-360 (2003); Commonwealth v. Gunter, 427 Mass. 259, 272-274 (1998).

¹²³ See, e.g., Commonwealth v. Bell, 460 Mass. 294, 300-302 (2011).

¹²⁴ Commonwealth v. Bell, 460 Mass. 294, 302 n. 13 (2011), citing Commonwealth v. Gunter, 427 Mass. 259, 274 (1998).

killing occurred in connection with the felony and at substantially the same time and place.¹²⁵ [A killing may be deemed to be connected with the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony.]¹²⁶

[Note to Judge: If accident is an issue in the case, the jury must be instructed that accident is not a defense to felony-murder.¹²⁷ If there is evidence of self-defense or defense of another, the jury must be instructed that the Commonwealth is not required to prove that the defendant did not act in proper self-defense or proper defense of another to prove felony-murder.¹²⁸ However, it may be necessary to instruct on self-defense in connection with the underlying felony.]

The third element is that the underlying felony was inherently dangerous (or) the defendant acted with a conscious disregard for the risk to human life.

Give one of the following two instructions:

¹²⁵ See Commonwealth v. Gunter, 459 Mass. 480, 488 (2011), quoting Commonwealth v. Ortiz, 408 Mass. 463, 466 (1990).

¹²⁶ See Commonwealth v. Gordon, 422 Mass. 816, 850 (1996).

¹²⁷ See Commonwealth v. Griffith, 404 Mass. 256, 264 (1989).

¹²⁸ See Commonwealth v. Smith, 459 Mass. 538, 548 (2011) (self-defense inapplicable to charge of felony-murder); Commonwealth v. Griffith, 404 Mass. 256, 264-265 (1989).

a. **[Where the underlying felony is inherently dangerous to human life]** I instruct you that, as a matter of law, [name of crime] is inherently dangerous to human life.¹²⁹

b. **[Where the underlying felony is not inherently dangerous to human life]** You must determine in the circumstances of this case whether the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life.¹³⁰ You may find that the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life if you find that the defendant intended the felony to occur or the felony did occur in a way known by the defendant to be dangerous to life or likely to cause death.

¹²⁹ See, e.g., Commonwealth v. Tevlin, 433 Mass. 305, 314 (2001) (armed robbery).

¹³⁰ See Commonwealth v. Scott, 428 Mass. 362, 364-365 (1998) ("It is not the province of the jury to determine whether a felony is inherently dangerous. Rather, it is incumbent on the judge to instruct that, should the jury choose to base a felony-murder conviction on a felony not designated as 'inherently dangerous,' the jury must determine that the felony was committed with a conscious disregard for human life in order to support a verdict of murder in the first or second degree").

MURDER IN THE SECOND DEGREE

In order to prove murder in the second degree, the Commonwealth must prove the following elements:

1. The defendant caused the death of [victim's name].
2. The defendant:
 - a. intended to kill [victim's name]; or
 - b. intended to cause grievous bodily harm to [victim's name]; or
 - c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.¹³¹
3. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

¹³¹ See Commonwealth v. Earle, 458 Mass. 341, 346-347 & n.9, 350 (2010) (finding evidence legally insufficient to support conviction for murder in the second degree under theory that parent's intentional failure to act, in circumstances known to that parent, created "plain and strong likelihood" of child's death); Commonwealth v. Grey, 399 Mass. 469, 470 n.1, 472 n.4 (1987) (in instructing jury regarding whether, in circumstances known to defendant, reasonably prudent person would have known of plain and strong likelihood of death, judge erred in instructing jury that malice was determined by objective standard, as objective reasonable person test is applied to circumstances defendant knew). See also Commonwealth v. Lyons, 444 Mass. 289, 293-294 (2005) (discussing distinction between murder in second degree based on "plain and strong likelihood of death" and involuntary manslaughter based on "high degree of likelihood of substantial harm"; concluding judge erred in reducing conviction to involuntary manslaughter).

4. [Where there is evidence of mitigating circumstances]

In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances. If the Commonwealth proves all the required elements, but fails to prove beyond a reasonable doubt that there were no mitigating circumstances, you must find the defendant not guilty of murder, but you shall return a verdict of voluntary manslaughter.

[Where murder in the first degree with extreme atrocity or cruelty is charged] The requirements of proof for murder in the second degree are the same as for murder in the first degree with extreme atrocity or cruelty, but without the element that the killing was committed with extreme atrocity or cruelty.

[Note to Judge: Where murder in the first degree with extreme atrocity or cruelty is not charged, the judge must give the detailed instructions for each element of murder in the second degree that are set forth in the instructions for murder in the first degree with extreme atrocity or cruelty.]

A. FELONY-MURDER IN THE SECOND DEGREE

[Note to Judge: Where the Commonwealth charges felony-murder in the first degree and the evidence supports a finding of guilt for an underlying felony with a maximum penalty of less than life imprisonment, the parties are entitled to an

instruction on felony-murder in the second degree, regardless whether the underlying felony is charged or uncharged.^{132]}

Next, I will define the elements of felony-murder in the second degree. A defendant is guilty of felony-murder in the second degree if the Commonwealth has proved beyond a reasonable doubt that the victim was killed during the defendant's commission or attempted commission of a felony with a maximum sentence of less than life imprisonment. To prove the defendant guilty of felony-murder in the second degree, the Commonwealth must prove the following elements beyond a reasonable doubt:¹³³

¹³² See Commonwealth v. Paulding, 438 Mass. 1, 10 n.4 (2002) ("if the evidence supports a verdict of felony-murder in the second degree within the charge of felony-murder in the first degree, that form of murder in the second degree would have to be explained to the jury"). But the "instruction on felony-murder in the second degree is required only when there is a rational basis in the evidence to warrant the instruction," Commonwealth v. Christian, 430 Mass. 552, 558 (2000), and a judge does not err in not giving the lesser included instruction where the underlying felony is not separately indicted and no party requests it. See Commonwealth v. Stokes, 460 Mass. 311, 315 (2011) ("where the felony later advanced by a defendant as the predicate for an instruction on second degree felony-murder is not itself the subject of a separate indictment, no error occurs if the trial charge does not charge the jury on it even though there may be sufficient evidence supporting such a charge - at least where, as here, no party requested such an instruction or even brought the issue to the judge's attention at trial").

¹³³ Commonwealth v. Stokes, 460 Mass. 311, 314-315 (2011). Previously, it was described as an element of felony-murder, both in the first and second degrees, that the killing must have been a "natural and probable consequence" of the felony. See, e.g., Commonwealth v. Matchett, 386 Mass. 492, 505 (1982). Since 1999, however, the Supreme Judicial Court has recommended that the language not be used "as it is superfluous to the other elements of felony-murder." Commonwealth v. Rolon, 438 Mass.

1. The defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life.

2. The death occurred during the commission or attempted commission of the underlying felony.

3. The underlying felony was inherently dangerous (or) the defendant acted with a conscious disregard for the risk to human life.¹³⁴

All but the first element are the same as in felony-murder in the first degree. The first element in felony-murder in the second degree differs from felony-murder in the first degree in that, with felony-murder in the second degree, the Commonwealth must prove that the defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life.¹³⁵ The Commonwealth alleges that the defendant committed

808, 818 n.11 (2003). See Model Jury Instructions on Homicide at 67-68 n.8 (1999).

¹³⁴ See Commonwealth v. Ortiz, 408 Mass. 463, 466-467 (1990) ("while it may be fairly arguable that carrying a firearm in a vehicle is not inherently dangerous (especially if the firearm is not loaded), the jury in any event reasonably could have found that the defendant in this case committed that crime with conscious disregard for the risk to human life because of the obvious risk presented by the defendant and his brother's driving around with a loaded .357 Magnum revolver between them looking for an individual with whom their family had a longstanding feud").

¹³⁵ Commonwealth v. Burton, 450 Mass. 55, 57-60 (2007) (reducing conviction to murder in second degree where predicate offense, armed home invasion, was not punishable by life imprisonment at time crime was committed).

[name of crime]. I instruct you that this crime is a felony with a maximum sentence of less than life imprisonment.

In order for you to decide whether a [name of crime[s]] actually occurred in this case, I must instruct you on all elements of this [these] offense[s]. [Define all the elements of the substantive felony[ies] alleged.]

[Note to Judge: In appropriate cases, a definition of "attempt" must be included. If more than one felony is alleged, the jury must be instructed that they must be unanimous with regard to the underlying felony in order to return a verdict of guilty of felony-murder in the second degree. Where felony-murder in the first degree is not charged, the judge must give the detailed instructions for the second and third elements of felony-murder in the second degree that are set forth in the instructions for felony-murder in the first degree.]

[Merger instruction where the predicate felony contains an element of assault and there is evidence that the defendant attacked multiple victims in the specific incident of violence that resulted in the victim's death or the defendant committed a separate and distinct attack upon the deceased]¹³⁶

¹³⁶ Under the merger doctrine, if the only felony committed was the assault upon the victim which resulted in the victim's death, the assault merges with the killing and cannot be relied on by the Commonwealth to support felony-murder. Where the underlying felony contains an element of assault, the judge must ensure that the felony found by the jury is independent of the

The act of violence that is an element of the underlying felony may not be the same act that caused the victim's death.¹³⁷ Where an act of violence is an element of the underlying felony, you may find felony-murder only if you find an act that is separate and distinct from the violent act that resulted in the

act that resulted in the death of the victim. Where the murder indictment does not specify an independent felonious assault and there is a risk that the jury may find the underlying felony to include the assault that resulted in the victim's death, the Commonwealth, in advance of trial, should identify the independent felonious assault or assaults that it intends to rely on at trial in proving felony-murder. For instance, if the underlying felony is armed assault in a dwelling, and two other persons apart from the homicide victim were in the dwelling at the time of the armed assault, the judge must explain that, to prove this first element of felony-murder, the Commonwealth must prove beyond a reasonable doubt the felony of armed assault in a dwelling of a person other than the homicide victim. To diminish the risk of confusion, the verdict form may require the jury to specify the person or persons other than the homicide victim that they concluded was assaulted. See Commonwealth v. Gunter, 427 Mass. 259, 274 (1998) ("Absent specification of an independent felonious assault in the murder indictment or absent a separate indictment on an independent assault, however, it is advisable in the future that the prosecution seek jury questions specifying the independent felonious assault pursuant to G. L. c. 265, § 18A, that it contends supports a felony-murder conviction"). If the underlying felony is armed assault in a dwelling or armed home invasion and the homicide victim was alone in the dwelling, but the Commonwealth contends that there was an earlier assault of the homicide victim in the dwelling that did not cause his death prior to the assault that did cause his death, the judge in instructing the jury must explain that, to satisfy the first element of felony-murder, the Commonwealth must prove beyond a reasonable doubt the felony of armed assault in a dwelling or armed home invasion, with the assault being the first alleged assault of the victim, not the assault that allegedly resulted in the victim's death. See Commonwealth v. Kilburn, 438 Mass. 356, 359-360 (2003).

¹³⁷ See, e.g., Commonwealth v. Kilburn, 438 Mass. 359-360 (2003); Commonwealth v. Gunter, 427 Mass. 259, 272-274 (1998).

victim's death.¹³⁸ In this case, the Commonwealth alleges the following separate and distinct acts: [list qualifying underlying acts]. You may find felony-murder only if you find that the Commonwealth has proved beyond a reasonable doubt one of these separate and distinct acts. [If there was more than one separate and distinct act that may satisfy an element of the underlying felony, you may find the underlying felony only if you unanimously find the Commonwealth has proved the same act beyond a reasonable doubt.¹³⁹]

If you find the defendant guilty of felony-murder, I require you to answer the following question[s]. [Recite special question or questions specific to the case.]

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the defendant had the intent required in the underlying offense.¹⁴⁰

¹³⁸ See, e.g., Commonwealth v. Bell, 460 Mass. 294, 300-302 (2011).

¹³⁹ Commonwealth v. Bell, 460 Mass. 294, 302 n. 13(2011), citing Commonwealth v. Gunter, 427 Mass. 259, 274 (1998).

¹⁴⁰ See Commonwealth v. Fickett, 403 Mass. 194, 201-202 (1988).

VOLUNTARY MANSLAUGHTER (LESSER INCLUDED OFFENSE TO MURDER)

To prove the defendant guilty of murder in the first or second degree, the Commonwealth is required to prove beyond a reasonable doubt that there were no mitigating circumstances that reduce the defendant's culpability. A mitigating circumstance is a circumstance that reduces the seriousness of the offense in the eyes of the law. A killing that would otherwise be murder in the first or second degree is reduced to the lesser offense of voluntary manslaughter where the Commonwealth has failed to prove that there were no mitigating circumstances. Therefore, if the Commonwealth proves all the required elements of murder, but fails to prove beyond a reasonable doubt that there were no mitigating circumstances, you must find the defendant not guilty of murder, but you shall find the defendant guilty of voluntary manslaughter.

I will now instruct you on this (each of these) mitigating circumstance(s).

1. Heat of passion on reasonable provocation. Heat of passion includes the states of mind of passion, anger, fear, fright, and nervous excitement.¹⁴¹

¹⁴¹ Commonwealth v. Walden, 380 Mass. 724, 728 (1980) ("in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and . . . actually . . . produce such a state of mind in the defendant").

Reasonable provocation is provocation by the person killed¹⁴² that would be likely to produce such a state of passion, anger, fear, fright, or nervous excitement in a reasonable person as would overwhelm his capacity for reflection or restraint and did actually produce such a state of mind in the defendant.¹⁴³ The provocation must be such that a reasonable person would have become incapable of reflection or restraint and would not have cooled off by the time of the killing, and that the defendant himself was so provoked and did not cool off at the time of the killing.¹⁴⁴ In addition, there must be a causal connection between the provocation, the heat of passion,

¹⁴² Commonwealth v. Hinds, 457 Mass. 83, 90-91 (2010), quoting Commonwealth v. Ruiz, 442 Mass. 826, 838-839 (2004) ("provocation must come from the victim").

¹⁴³ Commonwealth v. Burgess, 450 Mass. 422, 439 (2008), quoting Commonwealth v. Walden, 380 Mass. 724, 728 (1980) ("in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and . . . actually . . . produce such a state of mind in the defendant"); Commonwealth v. Colon, 449 Mass. 207, 220 (2007) (provocation must be sufficient to cause accused to "lose his self-control in the heat of passion"); Commonwealth v. Lacava, 438 Mass. 708, 721 n.15 (2003), quoting Commonwealth v. Walden, 380 Mass. 724, 728 (1980) (provocation must "eclipse . . . capacity for reflection or restraint").

¹⁴⁴ Commonwealth v. Glover, 459 Mass. 836, 841 (2011), quoting Commonwealth v. Acevedo, 446 Mass. 435, 443 (2006) ("defendant's actions must be both objectively and subjectively reasonable. That is, the jury must be able to infer that a reasonable person would have become sufficiently provoked and would not have 'cooled off' by the time of the homicide, and that in fact a defendant was provoked and did not cool off" [internal quotation omitted]); Commonwealth v. Garabedian, 399 Mass. 304, 313 (1987) ("reasonable person would have become sufficiently provoked and that, in fact, the defendant was provoked").

and the killing.¹⁴⁵ The killing must occur after the provocation and before there is sufficient time for the emotion to cool, and must be the result of the state of mind induced by the provocation rather than by a preexisting intent to kill or grievously injure, or an intent to kill formed after the capacity for reflection or restraint has returned.¹⁴⁶

Mere words, no matter how insulting or abusive, do not by themselves constitute reasonable provocation.¹⁴⁷ [However, the existence of sufficient provocation is not foreclosed where a defendant learns of a fact from a statement rather than from personal observation.¹⁴⁸ If the information conveyed is of the

¹⁴⁵ Commonwealth v. Burgess, 450 Mass. 422, 437-438 (2008), quoting Commonwealth v. Garabedian, 399 Mass. 304, 313 (1987) ("voluntary manslaughter requires the trier of fact to conclude that there is a causal connection between the provocation, the heat of passion, and the killing").

¹⁴⁶ Commonwealth v. Anderson, 408 Mass. 803, 805 n.1 (1990) (judge's instructions to this effect upheld).

¹⁴⁷ Commonwealth v. Tu Trinh, 458 Mass. 776, 783 (2011), quoting Commonwealth v. Vick, 454 Mass. 418, 429 (2009); Commonwealth v. Mercado, 452 Mass. 662, 672 (2008) (proper instruction explained "the distinction between mere words, which 'no matter how insulting or abusive, standing alone do not constitute reasonable provocation,' and statements that convey information 'of the nature to cause a reasonable person to lose his or her self-control and did actually cause the defendant to do so").

¹⁴⁸ Commonwealth v. Schnopps, 383 Mass. 178, 180-181 (1981) (wife's sudden admission of ongoing adultery sufficient provocation to warrant instruction on voluntary manslaughter); Commonwealth v. Bermudez, 370 Mass. 438, 441-442 (1976) ("A reasonable man can be expected to control the feelings aroused by an insult or an argument, but certain incidents may be as provocative when disclosed by words as when witnessed personally"). Generally, for words or statements to incite heat

nature to cause a reasonable person to lose his self-control and did actually cause the defendant to do so, then a statement is sufficient.]

Physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection. The heat of passion must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions.¹⁴⁹

If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion on reasonable provocation, the Commonwealth has not proved that the defendant committed the crime of murder.

2. Heat of passion induced by sudden combat. Sudden combat involves a sudden assault by the deceased and the defendant upon each other. In sudden combat, physical contact,

of passion, they must contain new information as distinct from mere insults, taunts, or previously known, if inflammatory, information. See Commonwealth v. Ruiz, 442 Mass. 826, 839-840 (2004).

¹⁴⁹ Commonwealth v. Acevedo, 446 Mass. 435, 444-445 (2006). Cf. id. at 444 n.14, citing Commonwealth v. Ruiz, 442 Mass. 826, 839 (2004) (where victim's slaps and physical contact never posed threat of serious harm to defendant, this did not "warrant a manslaughter instruction, even when the victim initiated the contact").

even a single blow, may amount to reasonable provocation.¹⁵⁰ Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection.¹⁵¹ The heat of passion induced by sudden combat must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion without cooling off at the time of the killing.¹⁵² If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion induced by sudden combat, the Commonwealth has not proved that the defendant committed the crime of murder.

In summary, a killing that would otherwise be murder is reduced to the lesser offense of voluntary manslaughter if the defendant killed someone because of heat of passion on

¹⁵⁰ Commonwealth v. Espada, 450 Mass. 687, 696-697 (2008) (sudden combat as basis for voluntary manslaughter requires that "victim . . . attack the defendant or at least strike a blow against the defendant").

¹⁵¹ Commonwealth v. Espada, 450 Mass. 687, 697 (2008) (assault must pose real threat of serious harm).

¹⁵² See, e.g., Commonwealth v. Vick, 454 Mass. 418, 429 (2009); Commonwealth v. Amaral, 389 Mass. 184, 188 (1983), quoting Commonwealth v. Webster, 59 Mass. 295, 307 (1850) ("whenever . . . the blood has had reasonable time or opportunity to cool . . . it will be murder [rather than manslaughter]"); Commonwealth v. Acevedo, 446 Mass. 435, 443 (2006) ("jury must be able to infer that a reasonable person would have become sufficiently provoked and would not have 'cooled off' by the time of the homicide, and that in fact a defendant was provoked and did not cool off").

reasonable provocation or heat of passion induced by sudden combat. The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of heat of passion on reasonable provocation or heat of passion induced by sudden combat. If the Commonwealth fails to meet this burden, the defendant is not guilty of murder, but you shall find the defendant guilty of voluntary manslaughter if the Commonwealth has proved the other required elements.

3. Excessive use of force in self-defense or defense of another. As I have explained to you earlier, a person is not guilty of any crime if he acted in proper self-defense [or defense of another]. The Commonwealth must prove beyond a reasonable doubt that the defendant did not act in the proper exercise of self-defense [or defense of another]. If the Commonwealth fails to do so, then you must find the defendant not guilty because [with the exception of felony-murder] an element of the crime that the Commonwealth must prove beyond a reasonable doubt is that the defendant did not act in the proper exercise of self-defense [or defense of another].¹⁵³

¹⁵³ Commonwealth v. Santos, 454 Mass. 770, 772-777 (2009) (extensive discussion of murder instructions regarding self-defense); Commonwealth v. Silva, 455 Mass. 503, 525-526 (2009) ("One of the elements of self-defense is the reasonableness of the force used to defend oneself, and if the Commonwealth fails to disprove all the elements of self-defense except the element of reasonableness of the force used, i.e., that the defendant used excessive force in self-defense, then self-defense does not

In this case, you must consider whether the defendant used excessive force in defending himself [or another]. The term excessive force in self-defense means that, considering all the circumstances, the defendant used more force than was reasonably necessary to defend himself [or another]. In considering the reasonableness of any force used by the defendant, you may consider any factors you deem relevant to the reasonableness of the defendant's conduct under the circumstances, including evidence of the relative physical capabilities of the combatants, the number of persons who were involved on each side, the characteristics of any weapons used, the availability of room to maneuver, the manner in which the deadly force was used, the scope of the threat presented, or any other factor you

lie, but excessive force in self-defense will mitigate murder to voluntary manslaughter"); Commonwealth v. Glacken, 451 Mass. 163, 167 (2008) ("To establish 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. If the Commonwealth fails to prove either (1) or (2), but does prove (3) -- that is, does prove beyond a reasonable doubt that in his exercise of self-defense the defendant used excessive force -- then the jury must return a verdict of not guilty of murder and would be warranted in returning a verdict of guilty of voluntary manslaughter").

deem relevant to the reasonableness of the defendant's conduct under the circumstances.¹⁵⁴

I have already told you that to prove the defendant guilty of murder, the Commonwealth is required to prove beyond a reasonable doubt that the defendant did not act in the proper exercise of self-defense [or the defense of another]. If the Commonwealth proves that the defendant did not act in proper self-defense [or in the proper defense of another] solely because the defendant used more force than was reasonably necessary, then the Commonwealth has not proved that the defendant committed the crime of murder but, if the Commonwealth has proved the other required elements, you shall find the defendant guilty of voluntary manslaughter.¹⁵⁵

A. VOLUNTARY MANSLAUGHTER (ABSENT A MURDER CHARGE)

In this case, the defendant is charged with voluntary manslaughter. To prove the defendant guilty of voluntary

¹⁵⁴ Commonwealth v. Kendrick, 351 Mass. 203, 212 (1966).

¹⁵⁵ Commonwealth v. Santos, 454 Mass. 770, 776 (2009) ("permissive language should not be used where mandatory language is required If the defendant killed the victim by the use of excessive force in self-defense, the defendant must be found guilty of manslaughter; the jury cannot be given the option of considering that a murder has been committed"); Commonwealth v. Torres, 420 Mass. 479, 491-492 (1995) (in comparable charge, "judge should have used the mandatory word 'shall' rather than the permissive 'may'").

manslaughter, the Commonwealth must prove beyond a reasonable doubt the following elements:¹⁵⁶

1. The defendant intentionally inflicted an injury or injuries on the victim likely to cause death.

2. The defendant caused the death of the victim.

3. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

¹⁵⁶ See Commonwealth v. Ware, 438 Mass. 1014, 1015 (2003).

INVOLUNTARY MANSLAUGHTER¹⁵⁷

**[Where the Commonwealth has proceeded on the theory of
involuntary manslaughter caused by wanton and reckless conduct]**

Involuntary manslaughter is an unlawful killing unintentionally caused by wanton and reckless conduct.¹⁵⁸

**[Where the Commonwealth has proceeded on the theory of
involuntary manslaughter as an unlawful killing unintentionally
caused by a battery]**

Involuntary manslaughter is [also] an unlawful killing unintentionally caused by a battery that the defendant knew or should have known created a high degree of likelihood that substantial harm will result to another.¹⁵⁹

¹⁵⁷ "[A]n instruction on involuntary manslaughter is required where any reasonable view of the evidence will permit the jury to find involuntary manslaughter rather than murder." Commonwealth v. Linton, 456 Mass. 534, 552 (2010). "A judge is not required to instruct on involuntary manslaughter when it is obvious that 'the risk of physical harm to the victim creates a plain and strong likelihood that death would follow'" (internal quotations omitted). Commonwealth v. Braley, 449 Mass. 316, 331 (2007).

¹⁵⁸ Commonwealth v. Earle, 458 Mass. 341, 347 (2010); Commonwealth v. Walker, 442 Mass. 185, 191-192 (2004).

¹⁵⁹ Commonwealth v. Sneed, 413 Mass. 387, 393-394 (1992) ("each type of involuntary manslaughter requires a showing that the defendant knew, or should have known, that his conduct created a high degree of likelihood that substantial harm would result to another"); Commonwealth v. Braley, 449 Mass. 316, 331 (2007).

A. INVOLUNTARY MANSLAUGHTER CAUSED BY WANTON AND RECKLESS

CONDUCT.¹⁶⁰

Wanton and reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person.¹⁶¹ Wanton and reckless conduct usually involves an affirmative act.¹⁶² An omission or failure to act may constitute wanton and reckless conduct where the defendant has a duty to act.¹⁶³

[Where the Commonwealth alleges that the defendant committed an affirmative act that was wanton and reckless]

¹⁶⁰ "The standard of wanton or reckless behavior . . . is one standard, not two, and describes intentional conduct where 'there is a high degree of likelihood that substantial harm will result to another.'" Commonwealth v. Chase, 433 Mass. 293, 301 (2001), quoting Commonwealth v. Cruz, 430 Mass. 182, 186 (1999). In recent cases, the Supreme Judicial Court has described the standard as "wanton and reckless" and that language is used in these instructions. See, e.g., Commonwealth v. Walker, 442 Mass. 185, 191-192 (2004); Commonwealth v. Williams, 428 Mass. 383, 390 (1998).

¹⁶¹ Commonwealth v. Earle, 458 Mass. 341, 347 (2010); Commonwealth v. Walker, 442 Mass. 185, 191-192 (2004).

¹⁶² Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("Wanton or reckless conduct generally involves a wilful act that is undertaken in disregard of the probable harm to others that may result"); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("Usually wanton or reckless conduct consists of an affirmative act . . .").

¹⁶³ Commonwealth v. Levesque, 436 Mass. 443, 451 (2002) ("defendant's omission when there is a duty to act can constitute manslaughter if the omission is wanton or reckless"); Commonwealth v. Twitchell, 416 Mass. 114, 117-118 (1993); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care . . .").

To prove that the defendant is guilty of involuntary manslaughter because of wanton and reckless conduct, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant caused the victim's death;¹⁶⁴
2. The defendant intended the conduct that caused the victim's death;¹⁶⁵
3. The defendant's conduct was wanton and reckless;¹⁶⁶
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

I will now discuss each element in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of [the victim's] death

¹⁶⁴ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("Involuntary manslaughter is 'an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct'" [citations omitted]).

¹⁶⁵ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("when we refer to the intent required to support a conviction of involuntary manslaughter, we refer to the intent to perform the act that causes death and not the intent that a death occur").

¹⁶⁶ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("[Commonwealth] based its case on involuntary manslaughter through wanton or reckless conduct. . . . Usually wanton or reckless conduct consists of an affirmative act").

where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.¹⁶⁷

The second element is that the defendant intended the conduct that caused the death.¹⁶⁸ The Commonwealth is not required to prove that the defendant intended to cause the death.¹⁶⁹

The third element is that the defendant's conduct was wanton and reckless.¹⁷⁰ Wanton and reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another.¹⁷¹ It is conduct involving a grave risk of harm to another that a person undertakes with indifference to

¹⁶⁷ See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

¹⁶⁸ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("when we refer to the intent required to support a conviction of involuntary manslaughter, we refer to the intent to perform the act that causes death and not the intent that a death occur"). See Commonwealth v. Earle, 458 Mass. 341, 347 (2010); Commonwealth v. Walker, 442 Mass. 185, 191-192 (2004); Commonwealth v. Catalina, 407 Mass. 779, 789 (1990); Commonwealth v. Welansky, 316 Mass. 383, 398 (1944).

¹⁶⁹ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("reckless conduct does not require that the actor intend the specific result of his or her conduct, but only that he or she intended to do the reckless act"); Commonwealth v. Walker, 442 Mass. 185, 192-193 (2004).

¹⁷⁰ Commonwealth v. Welansky, 316 Mass. 383, 396-397 (1944).

¹⁷¹ Commonwealth v. Earle, 458 Mass. 341, 347 (2010), quoting Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) ("conduct [that] involves a high degree of likelihood that substantial harm will result to another"); Commonwealth v. Tolan, 453 Mass. 634, 648-649 (2009) ("wanton or reckless conduct that creates a high degree of likelihood that substantial harm will result to another"); Commonwealth v. Walker, 442 Mass. 185, 192 (2004).

or disregard of the consequences of such conduct.¹⁷² Whether conduct is wanton and reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew.¹⁷³ If the defendant realized

¹⁷² Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("act causing death must be undertaken in disregard of probable harm to others in circumstances where there is a high likelihood that such harm will result"); Commonwealth v. Godin, 374 Mass. 120, 129 (1977), quoting Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences."); Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("judge charged the jury correctly when he said, 'To constitute wanton or reckless conduct . . . grave danger to others must have been apparent, and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm'").

¹⁷³ Commonwealth v. Earle, 458 Mass. 341, 347 n.9 (2010), citing Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) (Welansky) ("relevant inquiry is whether a defendant knew of facts that would cause a reasonable person to know of the relevant danger, or whether the defendant in fact knew of the danger"; "judge charged the jury correctly when he said 'If the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not. But even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'"); Commonwealth v. Catalina, 407 Mass. 779, 789 (1990), citing Welansky, *supra* at 398-399 ("defendant's subjective awareness of the reckless nature of his conduct is sufficient, but not necessary, to convict him of involuntary manslaughter. Conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice as well"); Commonwealth v. Godin, 374 Mass. 120, 129 (1977) ("standard necessary for a conviction 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

the grave risk created by his conduct, his subsequent act amounts to wanton and reckless conduct whether or not a reasonable person would have realized the risk of grave danger.¹⁷⁴ Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton and reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another.¹⁷⁵

It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted.¹⁷⁶ The

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").

¹⁷⁴ Commonwealth v. Chapman, 433 Mass. 481, 490 (2001), citing Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("judge charged the jury correctly when he said, . . . 'If the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not").

¹⁷⁵ Commonwealth v. Walker, 442 Mass. 185, 192 (2004), citing Commonwealth v. Catalina, 407 Mass. 779, 789 (1990) ("Conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice . . ."), and citing Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("judge charged the jury correctly when he said . . . 'But even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'").

¹⁷⁶ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010), citing Commonwealth v. Welansky, 316 Mass. 383, 397-401 (1944) ("Conviction of involuntary manslaughter requires

Commonwealth must prove that the defendant's actions went beyond negligence and amounted to wanton and reckless conduct as I have defined that term.

[Where there is evidence of self-defense or defense of another] The fourth element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you as to when a person properly may act in self-defense or in the defense of another.

[Where the Commonwealth alleges that the defendant's failure to act was wanton and reckless]

An intentional omission or failure to act that creates a high degree of likelihood that substantial harm will result to another may constitute involuntary manslaughter where the defendant has a duty to act.¹⁷⁷ Such a duty may arise out of a

more than negligence or gross negligence"); Commonwealth v. Chapman, 433 Mass. 481, 489-490 (2001); Commonwealth v. Godin, 374 Mass. 120, 127, 129 (1977); Commonwealth v. Bouvier, 316 Mass. 489, 495-496 (1944) (defendant's actions in negligently discharging gun that killed husband did not "approach[] in character the wanton or reckless conduct essential to a finding of involuntary manslaughter"). When given, this instruction need not include a definition of negligence or gross negligence. Commonwealth v. Chapman, 433 Mass. 481, 489-490 (2001) ("judge's instruction on wanton or reckless conduct incorporated [but did not define] the concepts of ordinary and gross negligence to illustrate the placement of wanton or reckless conduct on a spectrum of fault. The jury can be presumed to have a sufficient understanding of negligence and gross negligence from their collective experience for purposes of this instruction").

¹⁷⁷ Commonwealth v. Levesque, 436 Mass. 443, 451 (2002) ("defendant's omission when there is a duty to act can constitute manslaughter if the omission is wanton or

special relationship.¹⁷⁸ A duty may also arise where a person creates a situation that poses a grave risk of death or serious injury to another.¹⁷⁹ When such a duty is owed, a failure to act that creates a high degree of likelihood that substantial harm will result to another is wanton and reckless.¹⁸⁰ To prove that the defendant is guilty of involuntary manslaughter by reason of a wanton and reckless failure to act, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. There was a special relationship between the defendant and the victim that gave rise to a duty of care,¹⁸¹ or the

reckless."); Commonwealth v. Twitchell, 416 Mass. 114, 117-118 (1993); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care . . .").

¹⁷⁸ Commonwealth v. Twitchell, 416 Mass. 114, 117-118 (1993) (parent and minor child); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) (nightclub owner and patrons). See Commonwealth v. Godin, 374 Mass. 120, 125-128 (1977) (discussing duty with regard to employer/employee relationship).

¹⁷⁹ Commonwealth v. Levesque, 436 Mass. 443, 448-451 (2002) (discussing duty in context of negligently started fire). See Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832-833 (2010) (discussing duty where one creates "life-threatening condition"); Commonwealth v. Godin, 374 Mass. 120, 126-130 (1977) (discussing duty in context of alleged improper storage of fireworks); Commonwealth v. Atencio, 345 Mass. 627, 629-630 (1963) (discussing duty in context of playing "Russian roulette").

¹⁸⁰ Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences . . .").

¹⁸¹ Commonwealth v. Twitchell, 416 Mass. 114, 117 (1993) (parent and minor child); Commonwealth v. Michaud, 389 Mass. 491, 496 (1983) (same); Commonwealth v. Welansky, 316 Mass. 383, 397

defendant created a situation that posed a grave risk of death or serious injury to another;¹⁸²

2. The defendant's failure to act caused the victim's death;¹⁸³

3. The defendant intentionally failed to act;¹⁸⁴

4. The defendant's failure to act was wanton and reckless.¹⁸⁵

(1944) (nightclub owner and patrons). The existence of a relationship giving rise to a duty is a question of fact for the jury although the duty arising from a relationship is a matter of law. See, e.g., Commonwealth v. Twitchell, 416 Mass. 114, 117 (1993) ("We shall conclude that parents have a duty . . .").

¹⁸² Commonwealth v. Levesque, 436 Mass. 443, 449 (2002) (evidence presented to grand jury sufficient to support indictment for involuntary manslaughter where defendant negligently started fire and intentionally failed to report fire causing death of firefighters). See Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832-833 (2010) (discussing duty where omission creates "life-threatening condition"); Commonwealth v. Godin, 374 Mass. 120, 126-130 (1977) (discussing duty in context of alleged improper storage of fireworks); Commonwealth v. Atencio, 345 Mass. 627, 629-630 (1963) (discussing duty in context of playing "Russian roulette").

¹⁸³ Commonwealth v. Levesque, 436 Mass. 443, 447-448, 454 (2002) (causation through omission). Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("Involuntary manslaughter is 'an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct'" [citations omitted]). See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980) (discussing causation of death in murder case)

¹⁸⁴ Commonwealth v. Levesque, 436 Mass. 443, 451-453 (2002) (intentional failure to report negligently started fire causing death of responding firefighters would constitute wanton and reckless conduct); Commonwealth v. Twitchell, 416 Mass. 114, 117-118 (1993) (intentional failure to provide medical care leading to child's death constituted wanton and reckless conduct).

I will now discuss each element in more detail.

The first element is that there was a special relationship between the defendant and the victim that gave rise to a duty of care¹⁸⁶ or the defendant created a situation that posed a grave risk of death or serious injury to another.¹⁸⁷ I instruct you that the relationship between [defendant's name] and [victim's name] is a special relationship that gives rise to a duty of care.¹⁸⁸ If you find that the defendant had this relationship with the victim, then you shall find that the defendant had a

¹⁸⁵ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010); Commonwealth v. Levesque, 436 Mass. 443, 451-453 (2002); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("[Commonwealth] based its case on involuntary manslaughter through wanton or reckless conduct [which] may consist of intentional failure to take such care . . .").

¹⁸⁶ Commonwealth v. Twitchell, 416 Mass. 114, 117 (1993) (parent and minor child); Commonwealth v. Michaud, 389 Mass. 491, 496 (1983) (same); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) (nightclub owner and patrons).

¹⁸⁷ Commonwealth v. Levesque, 436 Mass. 443, 449 (2002) (evidence presented to grand jury sufficient to support indictment for involuntary manslaughter where defendant negligently started fire and intentionally failed to report fire causing death of firefighters). See Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832-833 (2010) (discussing duty where omission creates "life-threatening condition"); Commonwealth v. Godin, 374 Mass. 120, 126-130 (1977) (discussing duty in context of alleged improper storage of fireworks); Commonwealth v. Atencio, 345 Mass. 627, 629-630 (1963) (discussing duty in context of playing "Russian roulette").

¹⁸⁸ The existence of a relationship giving rise to a duty is a question of fact for the jury although the duty arising from a relationship is a matter of law. See, e.g., Commonwealth v. Twitchell, 416 Mass. 114, 117 (1993) ("We shall conclude that parents have a duty . . .").

special relationship with the victim that gave rise to a duty of care.

The second element is that the defendant's failure to act caused the death of [victim's name]. A defendant's failure to act is the cause of [victim's] death where the failure to act, in a natural and continuous sequence, results in death, and without which death would not have occurred.¹⁸⁹

The third element is that the defendant intentionally failed to act.¹⁹⁰ The Commonwealth is not required to prove that the defendant intended to cause the death.¹⁹¹

The fourth element is that the defendant's failure to act was wanton and reckless.¹⁹² A failure to act is wanton and reckless where there is a duty to prevent probable harm to another, and the defendant could have taken reasonable steps to

¹⁸⁹ See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

¹⁹⁰ Commonwealth v. Levesque, 436 Mass. 443, 451-453 (2002) (intentional failure to report negligently started fire causing death of responding firefighters would constitute wanton and reckless conduct); Commonwealth v. Twitchell, 416 Mass. 114, 117-118 (1993) (intentional failure to provide medical care leading to child's death constituted wanton and reckless conduct).

¹⁹¹ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("[R]eckless conduct does not require that the actor intend the specific result of his or her conduct, but only that he or she intended to do the reckless act").

¹⁹² Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010); Commonwealth v. Levesque, 436 Mass. 443, 451-453 (2002); Commonwealth v. Welansky, 316 Mass. 383, 397 (1944) ("[Commonwealth] based its case on involuntary manslaughter through wanton or reckless conduct [which] may consist of intentional failure to take such care . . .").

minimize the risk to the person to whom the duty is owed.¹⁹³ A failure to act that is wanton and reckless involves a high degree of likelihood that substantial harm will result to the person to whom the duty is owed.¹⁹⁴ It is a failure to act that amounts to indifference to or disregard of the consequences to the person to whom the duty is owed.¹⁹⁵ Whether the defendant's failure to act was wanton and reckless depends on the circumstances and the steps that a person could reasonably be expected to take to minimize the risk to the person to whom the duty is owed.¹⁹⁶ Wanton and reckless conduct depends either on

¹⁹³ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("Wanton or reckless conduct generally involves a wilful act that is undertaken in disregard of the probable harm to others that may result. . . . If an individual's actions create a life-threatening condition, there is a duty to take reasonable steps to alleviate the risk created, and the failure to do so may rise to the level of recklessness necessary for involuntary manslaughter"); Commonwealth v. Levesque, 436 Mass. 443, 450-451 (2002). See Commonwealth v. Michaud, 389 Mass. 491, 495-496, 499 (1983).

¹⁹⁴ Commonwealth v. Levesque, 436 Mass. 443, 451-452 (2002) , quoting Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) ("words 'wanton' and 'reckless' constitute conduct that is . . . 'intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another'").

¹⁹⁵ Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832-833 (2010); Commonwealth v. Levesque, 436 Mass. 443, 448 (2002).

¹⁹⁶ Commonwealth v. Levesque, 436 Mass. 443, 450-451 (2002) ("Whether a defendant has satisfied this duty will depend on the circumstances of the particular case and the steps that the defendant can reasonably be expected to take to minimize the risk"); Commonwealth v. Welansky, 316 Mass. 383, 397-401 (1944). Compare Commonwealth v. Twitchell, 416 Mass. 114, 117-118 (1993) (failure to provide medical care for child for religious reasons could sustain involuntary manslaughter conviction), with

what the defendant knew, or how a reasonable person would have acted knowing what the defendant knew.¹⁹⁷ If the defendant realized the grave danger and could have taken reasonable steps to minimize the risk, his subsequent failure to act is wanton and reckless whether or not a reasonable person would have realized the risk of grave danger.¹⁹⁸ Even if the defendant himself did not realize the grave danger of harm to another, his failure to act would be wanton and reckless if a reasonable

Commonwealth v. Michaud, 389 Mass. 491, 495-499 (1983) (failure to provide medical care for child in circumstances where child was doing well shortly before child's death insufficient to sustain involuntary manslaughter conviction).

¹⁹⁷ Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("judge charged the jury correctly when he said . . . '[i]f the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not. But even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'").

¹⁹⁸ Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("judge charged the jury correctly when he said . . . '[i]f the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not'"). See Commonwealth v. Levesque, 436 Mass. 443, 451 (2002) ("Whether a defendant has satisfied this duty will depend on the circumstances of the particular case and the steps that the defendant can reasonably be expected to take to minimize the risk").

person in like circumstances would have realized the grave danger and taken steps to minimize the risk.¹⁹⁹

It is not enough for the Commonwealth to prove the defendant was negligent in failing to act, that is, that a reasonably careful person would have acted.²⁰⁰ The Commonwealth must prove that the defendant's failure to act went beyond negligence, and was wanton and reckless as I have defined that term.

¹⁹⁹ Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("judge charged the jury correctly when he said . . . '[b]ut even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger"). Commonwealth v. Levesque, 436 Mass. 443, 451 (2002) ("Although, in this case, the defendants apparently could not have successfully put out the fire, they could have given reasonable notice of the danger they created"). See Commonwealth v. Michaud, 389 Mass. 491, 495-499 (1983).

²⁰⁰ Commonwealth v. Levesque, 436 Mass. 443, 451-452 (2002) ("words 'wanton' and 'reckless' constitute conduct that is 'different in kind' than negligence or gross negligence"); Commonwealth v. Welansky, 316 Mass. 383, 400 (1944) ("conduct does not become criminal until it passes the borders of negligence and gross negligence and enters into the domain of wanton or reckless conduct"). Compare Commonwealth v. Twitchell, 416 Mass. 114, 115-117, 122 (1993) (parental failure to seek medical treatment for child for religious reasons could sustain involuntary manslaughter conviction), with Commonwealth v. Michaud, 389 Mass. 491, 498-499 (1983) (parental failure to feed adequately and to seek proper medical treatment for child who appeared to be in good health shortly prior to child's death, even if negligent, insufficient to establish reckless culpability for involuntary manslaughter).

B. INVOLUNTARY MANSLAUGHTER UNINTENTIONALLY CAUSED BY A BATTERY

[Note to judge: Our case law limits this instruction to a battery that is not a felony.²⁰¹]

Involuntary manslaughter is [also] an unlawful killing unintentionally caused by a battery²⁰² that the defendant knew or should have known endangered human life.²⁰³ To prove the defendant is guilty of involuntary manslaughter by reason of a battery, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. The defendant caused the victim's death.²⁰⁴
2. The defendant intentionally committed a battery upon the victim that endangered human life.²⁰⁵

²⁰¹ See Commonwealth v. Simpson, 434 Mass. 570, 590 (2001) ("battery not amounting to a felony which the defendant knew or should have known endangered human life"); Commonwealth v. Catalina, 407 Mass. 779, 784, 788-789 (1990).

²⁰² Commonwealth v. Catalina, 407 Mass. 779, 784, 788-789, (1990), citing Commonwealth v. Sheppard, 404 Mass. 774, 775-776 (1989); Commonwealth v. Welansky, 316 Mass. 383, 401 (1944).

²⁰³ Commonwealth v. Fitzmeyer, 414 Mass. 540, 547 (1993) ("knew or should have known that the battery he was committing endangered human life"); Commonwealth v. Sneed, 413 Mass. 387, 394 (1992), quoting Commonwealth v. Welansky, 316 Mass. 383, 399, 401 (1944) ("high degree of likelihood that substantial harm will result to another").

²⁰⁴ Commonwealth v. Catalina, 407 Mass. 779, 784, 788-789 (1990) ("person henceforth may be prosecuted for involuntary manslaughter only for causing an unintentional death . . ."); Commonwealth v. Sheppard, 404 Mass. 774, 776 (1989).

²⁰⁵ Commonwealth v. Braley, 449 Mass. 316, 331 (2007) Commonwealth v. Reed, 427 Mass. 100, 104 (1998); Commonwealth v. Fitzmeyer, 414 Mass. 540, 547 (1993); Commonwealth v. Sires, 413 Mass. 292, 302 n. 10 (1992).

3. The defendant knew or reasonably should have known that the battery endangered human life.²⁰⁶

4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

I will now discuss each element in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of [victim's] death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.²⁰⁷

The second element is that the defendant intentionally committed a battery on the victim that endangered human life.²⁰⁸ A battery is the intentional or unjustified use of force upon the person of another. To satisfy this element, the Commonwealth must prove that the battery created a high degree of likelihood that substantial harm would result to the

²⁰⁶ Commonwealth v. Linton, 456 Mass. 534, 552 (2010); Commonwealth v. Braley, 449 Mass. 316, 331 (2007), quoting Commonwealth v. Simpson, 434 Mass. 570, 590 (2001) ("battery not amounting to a felony which the defendant knew or should have known endangered human life"); Commonwealth v. Sires, 413 Mass. 292, 302 n.10, 303 n.14 (1992) ("defendant knew or should have known that the battery he was committing endangered human life").

²⁰⁷ See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

²⁰⁸ Commonwealth v. Braley, 449 Mass. 316, 331 (2007); Commonwealth v. Fitzmeyer, 414 Mass. 540, 547 (1993), citing Commonwealth v. Sires, 413 Mass. 292, 302 n. 10 (1992). See Commonwealth v. Catalina, 407 Mass. 779, 783-784, 788-789 (1990); Commonwealth v. Sheppard, 404 Mass. 774, 776 (1989); Commonwealth v. Welansky, 316 Mass. 383, 401 (1944).

victim.²⁰⁹ Because the essence of manslaughter is an unintentional killing, the Commonwealth need not prove that the defendant intended the death that resulted from the battery.

The third element is that the defendant knew or reasonably should have known that the battery endangered human life in that it created a high degree of likelihood that substantial harm would result to the victim.²¹⁰ In determining whether the defendant reasonably should have known that the battery created a high degree of likelihood that substantial harm would result to another, you must consider the nature and extent of the

²⁰⁹ Commonwealth v. Sneed, 413 Mass. 387, 394 (1992), quoting Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) ("level of the risk of physical harm that the evidence must show to warrant an instruction on involuntary manslaughter battery causing death is . . . 'a high degree of likelihood that substantial harm will result to another'"). The model instruction harmonizes the line of cases that defined this element in terms of endangering human life with cases that focused on the likelihood of substantial harm. Compare, e.g., Commonwealth v. Fitzmeyer, 414 Mass. 540, 547 (1993) ("knew or should have known that the battery he was committing endangered human life") with Commonwealth v. Sneed, 413 Mass. 387, 394 & 394 n.5 (1992). The model instruction retains the "endangered human life" element and explains the element in terms of whether the defendant created "a high degree of likelihood that substantial harm will result to another."

²¹⁰ Commonwealth v. Braley, 449 Mass. 316, 331 (2007), quoting Commonwealth v. Simpson, 434 Mass. 570, 590 (2001) ("battery not amounting to a felony which the defendant knew or should have known endangered human life"); Commonwealth v. Sneed, 413 Mass. 387, 394 (1992), quoting Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) ("level of the risk of physical harm that the evidence must show to warrant an instruction on involuntary manslaughter battery causing death is . . . 'a high degree of likelihood that substantial harm will result to another'"); Commonwealth v. Sires, 413 Mass. 292, 302 n.10, 303 n.14 (1992) ("defendant knew or should have known that the battery he was committing endangered human life").

defendant's knowledge at the time he acted and whether, in the circumstances known by the defendant, a reasonable person would have recognized that the battery created a high degree of likelihood that substantial harm would result to another.²¹¹

[Where there is evidence of self-defense or defense of another] The fourth element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you about when a person properly may act in self-defense or in the defense of another.

²¹¹ See Commonwealth v. Sires, 413 Mass. 292, 302 n.10, 303 n.14 (1992) ("degree of risk of physical harm that a reasonable person would recognize was created by particular conduct, based on what the defendant knew").

SUPPLEMENTAL INSTRUCTIONS

A. Definition of Death.

Death occurs when the heart has stopped long enough to result in complete and permanent loss of brain function. This complete and permanent loss of brain function occurs when, in the opinion of a licensed physician based on ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.²¹²

B. Object of Killing Must Be a Human Being.

A killing is not murder unless a human being has been killed. A viable fetus is a human being under the common law of homicide.²¹³

²¹² Commonwealth v. Golston, 373 Mass. 249, 252-255 (1977) (affirming instruction on "brain death" that "occurs when, in the opinion of a licensed physician, based on ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions").

²¹³ Commonwealth v. Crawford, 430 Mass. 683, 689 (2000) ("killing a 'viable fetus,' as defined in the common law, is a punishable offense"); Commonwealth v. Lawrence, 404 Mass. 378, 383-384 (1989) (viable fetus is human being for purposes of crime of murder); Commonwealth v. Cass, 392 Mass. 799, (1984) ("We think that the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide").

C. Use of Dangerous Weapon.

[Where the judge determines from the evidence at trial that the nature of the dangerous weapon used and the manner of its use reasonably supports the following inference, the judge may instruct]

As a general rule, you are permitted (but not required) to infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person, or cause him grievous bodily harm, or intends to do an act which, in the circumstances known to him, a reasonable person would know creates a plain and strong likelihood that death would result.²¹⁴

[Note to Judge: It may not in all circumstances be reasonable to infer the intent required for murder in the first or second degree merely from the intentional use of a dangerous weapon. Before giving this instruction, a judge should consider the type of dangerous weapon and the manner in which it was used in the circumstances of the case, and should only give this instruction where the nature of the weapon and the manner of its use reasonably supports the inference.]

²¹⁴ See Commonwealth v. Tu Trinh, 458 Mass. 776, 784 & n.12 & n.13 (2011) (instruction that "[a]s a general rule you are permitted to infer that a person who intentionally uses a dangerous weapon on another person is acting with malice" was "proper," but noting that "[b]ecause a firearm is inherently dangerous, we do not need to decide whether such an instruction permitting an inference of malice to be drawn would be proper if the weapon at issue were less dangerous - a shod foot, for example").

D. Questions from Jury.

1. Before supplemental instructions.

Members of the jury, I am about to give you some additional instructions. In response to your question, I am going to further clarify some areas of the law for you. These new instruction(s) are no more or less important than the other instructions I gave you originally. When you [begin/resume] deliberations, you are to consider all of my instructions together as a whole.²¹⁵

2. After supplemental instructions.

Remember in your deliberations you are to consider all of my instructions together as a whole -- those I gave you before and those I have just given you.

E. Jurors' Obligation on Guilt or Innocence.

If the evidence convinces you beyond a reasonable doubt that the defendant is guilty of a criminal offense, you have a duty to find the defendant guilty of the most serious offense that the Commonwealth has proved beyond a reasonable doubt.²¹⁶

²¹⁵ Commonwealth v. Hicks, 22 Mass. App. Ct. 139, 144-145 (1986) ("At the beginning and again at the end of the supplemental instructions, the judge should advise the jurors that all of the instructions are to be considered as a whole and that the supplemental instructions are to be considered along with the main charge, unless, of course, the supplemental instructions are given to correct an error in the main charge"). See Commonwealth v. Green, 55 Mass. App. Ct. 376, 383 (2002).

²¹⁶ See Commonwealth v. Paulding, 438 Mass. 1, 8-9 (2002), quoting Commonwealth v. Dickerson, 372 Mass. 783, 812 (Quirico,

If the evidence does not prove beyond a reasonable doubt that the defendant is guilty of any offense charged, you must find him not guilty.

J., concurring) ("It is my conclusion that G. L. c. 265, § 1, . . . requires [a jury] to return a just verdict on the basis of the facts found by them and the law applicable thereto as stated by the judge").

**SUPREME JUDICIAL COURT
CHALK: REQUIREMENTS OF PROOF FOR HOMICIDE**

I. MURDER IN THE FIRST DEGREE

A. Murder with Deliberate Premeditation

1. The defendant caused the death of [name of victim].
2. The defendant intended to kill.
3. The defendant committed the killing with deliberate premeditation.
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.
5. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

B. Murder with Extreme Atrocity or Cruelty

1. The defendant caused the death of [name of victim].
2. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.
3. The killing was committed with extreme atrocity or cruelty.

4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.
5. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

C. Felony-Murder

1. The defendant committed or attempted to commit [name of crime], a felony with a maximum sentence of life imprisonment.
2. The death occurred during the commission or attempted commission of the underlying felony.
3. a. The underlying felony was inherently dangerous; or
b. The defendant acted with a conscious disregard for the risk to human life.

II. **MURDER IN THE SECOND DEGREE**

A. Murder

1. The defendant caused the death of [name of victim].
2. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.
3. **[Where there is evidence of self-defense or**

defense of another] The defendant did not act in proper self-defense or in the proper defense of another.

4. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

B. Felony-Murder

1. The defendant committed or attempted to commit [name of crime], a felony with a maximum sentence of less than life imprisonment.
2. The death occurred during the commission or attempted commission of the underlying felony.
3.
 - a. The underlying felony was inherently dangerous; or
 - b. The defendant acted with a conscious disregard for the risk to human life.

III. **VOLUNTARY MANSLAUGHTER**

A. Voluntary Manslaughter as a Lesser Included Offense

1. The defendant caused the death of [name of victim].
2. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.
3. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

B. Voluntary Manslaughter Absent a Murder Charge

1. The defendant intentionally inflicted an injury or injuries on [name of victim] likely to cause death.
2. The defendant caused the death of [name of victim].
3. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

IV. **INVOLUNTARY MANSLAUGHTER**

A. Death Caused by Wanton or Reckless Conduct

1. The defendant caused the death of [name of victim].
2. The defendant intended the conduct that caused The death of [name of victim].
3. The defendant's conduct was wanton or reckless.
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.

B. Death Caused by Wanton or Reckless Failure to Act

1. The defendant's failure to act caused the death of [name of victim].
2. There was a special relationship between the defendant and [name of victim] which gave rise to a duty of care, or the defendant created a situation that posed grave risk of death or serious injury to another.
3. The defendant intended the failure to act that caused the death of [name of victim].

4. The defendant's failure to act was wanton or reckless.

C. Death Unintentionally Caused by a Battery

1. The defendant caused the death of [name of victim].
2. The defendant intentionally committed a battery upon [name of victim] that endangered human life.
3. The defendant knew or reasonably should have known that the battery endangered human life.
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.