SUPREME JUDICIAL COURT

MODEL JURY INSTRUCTIONS ON HOMICIDE

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MASSACHUSETTS SUPREME JUDICIAL COURT
MODEL JURY INSTRUCTIONS ON HOMICIDE[1]

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).

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doubt that the defendant committed the crime with which he[4] 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]

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[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

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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.

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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).

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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

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[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).

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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).

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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]

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[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

[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").

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intensify in him a mental disease or defect that could cause him 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

[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 him 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).

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of his mental disease or defect worse, and even if he knew they would make his symptoms worse.[16]

[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

[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 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").

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alcohol or drug use made the symptoms of his mental disease or defect worse.[17]

[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.

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[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 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").

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Therefore, it is the Commonwealth's burden to prove at least one of the following beyond a reasonable doubt:[18]

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 or 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

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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

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[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).

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use of the substance[s] would interact with his mental disease or defect and cause him to lose such capacity.[19]

[**Consequences of Verdict of Not Guilty by Reason of Lack of Criminal Responsibility.** *Note to Judge: Give at the defendant's request or on the judge's own initiative, absent a defense objection.*[20]]

As I have previously instructed, your decision should be based solely on the evidence and the law of this case. In any case that raises an issue of lack of criminal responsibility, you are entitled to know what happens to a defendant if he is found not guilty by reason of lack of criminal responsibility.

First, the court may order the defendant to be hospitalized at a mental health facility for a period of observation and examination. During this observation period or in any event 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

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

[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)

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defendant to a mental health facility or to Bridgewater State Hospital. If the court concludes that the defendant is mentally ill and that his discharge would create a substantial likelihood of serious harm to himself or others, then the court will grant the petition and commit the defendant to a proper mental facility or to Bridgewater State Hospital, initially for a period of six months. At the end of the six months and every year thereafter, the court reviews the order of commitment. If the defendant is still suffering from a mental disease or defect and is still dangerous, then the court will order the defendant to continue to be committed to the mental facility or to Bridgewater State Hospital. There is no limit to the number of such renewed orders of commitments as long as the defendant continues to be mentally ill and dangerous; if these conditions do continue, the defendant may remain committed for the duration of his life.

If at some point the defendant is no longer mentally ill and dangerous, the court will order him discharged from the mental health facility or from Bridgewater State Hospital after a hearing. 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,

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the final decision on whether to recommit or release the defendant is always made by the court.[22]

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[22] Commonwealth v. Chappell, 473 Mass. 191 (2015) (Appendix).

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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.[23] 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.[24]

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

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[23] 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).

[24] Commonwealth v. Deane, 458 Mass. 43, 50-51 (2010); 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.

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those acts.[25] 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.[26] 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.[27] 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.[28]

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

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[25] 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).

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

[27] 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).

[28] 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).

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confusion], he had the intent required for that crime.[30] 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.[31] 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.[32]

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Mere knowledge that a crime is to be committed is not sufficient to convict the defendant.[33] The Commonwealth must also prove more than mere association with the perpetrator of the crime, either before or after its commission.[34] It must also

[30] 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'").

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

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

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

[34] Commonwealth v. Echavarria, 428 Mass. 593, 598 n.3 (1998).

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prove more than a failure to take appropriate steps to prevent the commission of the crime.[35]

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.[36]

[Where felony-murder is charged and an underlying offense has as one of its elements the use or possession of a weapon]

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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

[35] 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).

[36] 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).

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was armed with a weapon.[37] However, mere knowledge 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.[38]

[Note to Judge: Where the defendant claims withdrawal from knowing participation in the commission of the crime and there is evidence supporting this claim, the judge should give the following instruction.[39]]

[37] Commonwealth v. Britt, 465 Mass. 87, 100 (2013) ("The Commonwealth should only bear the burden of proving that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element"). Therefore, "the requirement of knowledge of a weapon in the context of murder in the first degree on a joint venture theory applies only where the conviction is for felony-murder and the underlying felony has as one of its elements the use or possession of a weapon. Id. Neither possession nor use of a firearm is an element of murder in the first degree based on deliberate premeditation or extreme atrocity or cruelty. Id.

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

[38] Commonwealth v. Akara, 465 Mass. 245, 254 (2013); Commonwealth v. Zanetti, 454 Mass. 449, 467-468 (2009).

[39] Commonwealth v. Rivera, 464 Mass. 56, 74 (2013), quoting Commonwealth v. Miranda, 458 Mass. 100, 118 (2010) (defendant entitled to withdrawal instruction only where there is evidence of "an appreciable interval between the alleged termination and [the commission of the crime], a detachment from the enterprise before the [crime] has become so probable that it cannot reasonably be stayed, and such notice or definite act of detachment that other principals in the attempted crime have opportunity also to abandon it").

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The defendant is not guilty of knowingly participating in the commission of the crime if there is a reasonable doubt whether he withdrew from the planned crime in an effective and timely manner.[40] A defendant withdraws from a planned crime by clearly communicating his intent not to be involved in the crime and ending his involvement.[41] A withdrawal is effective and timely only if (1) the defendant withdraws from the planned crime before the commission of the crime has begun, (2) the defendant by words or conduct clearly communicates his withdrawal to the other participant[s] in the planned crime, and (3) the communication of the withdrawal is done early enough that the other participant[s] has [have] a reasonable opportunity to abandon the crime.[42] A withdrawal is not timely and effective if it comes so late that the crime cannot reasonably be stopped.[43]

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[40] Commonwealth v. Fickett, 403 Mass. 194, 201 n.7 (1988).
[41] Commonwealth v. Miranda, 458 Mass. 100, 118 (2010); Commonwealth v. Fickett, 403 Mass. 194, 201 (1988).
[42] See Commonwealth v. Rivera, 464 Mass. 56, 74 (2013), quoting Commonwealth v. Miranda, 458 Mass. 100, 118 (2010); Commonwealth v. Pucillo, 427 Mass. 108, 116 (1998) (no error where judge instructed jury that "the withdrawal and abandonment must be 'in a timely and effective manner,'" that "'if [the] withdrawal comes so late that the crime cannot be stopped, then it is too late and it is not effective,'" and "that 'a withdrawal is effective only if it is communicated to the other persons in the joint venture.'").
[43] Commonwealth v. Pucillo, 427 Mass. 108, 116 (1998).

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[Note to Judge: Where there is evidence of multiple crimes and that the defendant withdrew from knowing participation in the commission of a subsequent crime after knowingly participating in one or more earlier crimes, the judge should give the following instruction after the withdrawal instruction.[44]*]*

The defendant is charged with having committed a number of crimes with other participants. For each such crime, the Commonwealth must prove that the defendant was a knowing participant during that crime and did not withdraw in a timely and effective manner. For example, a defendant may knowingly participate in one crime, and thus may be guilty of that offense, but then may withdraw from any later planned crime, and, if the withdrawal is timely and effective, the defendant is not guilty of the later offense.[45]

[44] Commonwealth v. Hogan, 426 Mass. 424, 434 (1998).
[45] Commonwealth v. Hogan, 426 Mass. 424, 434 (1998).

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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.[46] *The instruction is to be used where the evidence raises an issue of deadly force in self-defense,*[47] *and the theory of murder is not felony-murder alone.*[48] *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

[46] 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").

[47] See Commonwealth v. Gonzalez, 465 Mass. 672, 682-685 (2013) (discussing evidence required for self-defense instruction).

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

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use of deadly force in self-defense before discussing the elements of the crime of murder.

A person is not guilty of any crime if he acted in proper self-defense.[49] It is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in proper self-defense.[50] 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.[51]

The law does not permit retaliation or revenge.[52] The proper exercise of self-defense arises from necessity of the moment and ends when the necessity ends.[53] An individual may

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[49] 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").
[50] 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'").
[51] See Commonwealth v. Glacken, 451 Mass. 163, 166-167 (2008).
[52] 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").
[53] 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").

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only use sufficient force to prevent occurrence or reoccurrence of the attack.[54] 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.[55]

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:[56]

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.[57] Deadly force is force that is intended or likely to cause death or serious bodily harm.[58]

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[54] 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).
[55] Commonwealth v. Kendrick, 351 Mass. 203, 211, quoting Monize v. Begaso, 190 Mass. 87, 89 (1906).
[56] See Commonwealth v. Glacken, 451 Mass. 163, 167 (2008) (enumerating required factors for self-defense).
[57] 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).
[58] Commonwealth v. Noble, 429 Mass. 44, 46 (1999) ("force intended or likely to cause death or serious bodily harm").

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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.[59]

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.[60]

4. The defendant used more force than was reasonably necessary under all the circumstances.[61]

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.[62]

Commonwealth v. Cataldo, 423 Mass. 318, 321 (1996), quoting Commonwealth v. Klein, 372 Mass. 823, 827 (1977).

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

[60] 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").

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

[62] Commonwealth v. Chambers, 465 Mass. 520, 528 (2013), quoting Commonwealth v. Maguire, 375 Mass. 768, 772 (1978) ("a criminal defendant who is found to have been the first aggressor loses the right to claim self-defense unless he 'withdraws in good

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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 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.[63]

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.[64]

In considering whether or not the defendant actually believed that he was in immediate danger of death or serious

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faith from the conflict and announces his intention to retire'").

[63] 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).

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

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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.[65] [66] Moreover, in determining whether the defendant was reasonably in fear of death or serious bodily harm, you may consider any or all of the following:

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[65] See Commonwealth v. Santos, 454 Mass. 770, 773 (2009) ("person using a dangerous weapon (or deadly force) in self-defense must also have actually believed that he was in imminent danger of serious harm or death"); Commonwealth v. Little, 431 Mass. 782, 787 (2000).

[66] 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."

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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").

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- evidence of the deceased's reputation as a violent or quarrelsome person, but only if that reputation was known to the defendant;[67]
- evidence of other instances of the deceased's violent conduct, but only if the defendant knew of such conduct;[68] and
- evidence of threats of violence made by the deceased against the defendant, but again, only if the defendant was aware of such threats.[69]

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[67] 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").

[68] 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. Rodriquez, 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").

[69] 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

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[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 serious bodily harm or death, but not in determining whether a reasonable person in those circumstances would have believed he was in immediate danger.[70]

[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.[71]

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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.

[70] 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").

[71] 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").

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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.[72] 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 used, the availability of room to maneuver or escape from the area, and the location of the assault.[73]

[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.[74]

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[72] 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").

[73] 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").

[74] 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

[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 dwelling, and also reasonably believes that such force is necessary to protect himself or the other person lawfully in the dwelling.[75]

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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. Peloquin, 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").

[75] 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. Peloquin, 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);

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The fourth proposition is that the defendant used more force than was reasonably necessary under all the circumstances.[76] 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 deem relevant to the reasonableness of the person's conduct under the circumstances.[77]

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, and did not withdraw in good faith from the conflict and announce to the person (or

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Commonwealth v. McKinnon, 446 Mass. 263, 267-268 (2006) (same; outside stairs and porch).

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

[77] 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").

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persons) he provoked his intention to withdraw and end the confrontation without any use of or additional use of force.[79]

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.[80] A defendant 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.[81] For the purpose of determining who attacked whom first

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[79] Commonwealth v. Chambers, 465 Mass. 520, 528 (2013), quoting Commonwealth v. Maguire, 375 Mass. 768, 772 (1978) ("a criminal defendant who is found to have been the first aggressor loses the right to claim self-defense unless he 'withdraws in good faith from the conflict and announces his intention to retire'").

[80] 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").

[81] Commonwealth v. Pring-Wilson, 448 Mass. 718, 733 (2007), *quoting* Commonwealth v. Maguire, 375 Mass. 768, 772 (1978)

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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.[82]

[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 self-defense and the jury shall decide on the type of force used.[83]]

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.[84] You must

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("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").

[82] 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").

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

[84] Commonwealth v. Cataldo, 423 Mass. 318, 325 (1996) ("force neither intended nor likely to cause death or great bodily

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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 immediate harm in assessing the reasonableness of nondeadly force.[85]

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harm"). See Commonwealth v. Lopes, 440 Mass. 731, 739 (2004) (using one's fists is nondeadly force).

[85] 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

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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.[86] *The instruction is to be used where the evidence raises an issue of deadly force in defense of another,*[87] *and the theory of murder is not felony-murder alone.*[88] *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 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

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over his personal safety'"); Commonwealth v. Noble, 429 Mass. 44, 46 (1999).

[86] 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").

[87] See Commonwealth v. Barbosa, 463 Mass. 116, 135-136 (2012).

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

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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.[89]

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:[90]

1. The defendant did not actually believe that the other person was in immediate danger of death or serious bodily harm

[89] See Commonwealth v. Glacken, 451 Mass. 163, 166-167 (2008).
[90] 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).

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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.[91]

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 harm; you must focus instead on what a reasonable person in the circumstances known to the defendant would have believed.[92]

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[91] 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).

[92] 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).

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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.[93]

[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.[94]]

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.[95] If the 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

[93] 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).
[94] Commonwealth v. King, 460 Mass. 80, 83 (2011).
[95] 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).

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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.[96]

[96] 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).

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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. If you find the defendant guilty of murder, you shall decide the degree of murder.

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.]

To find the defendant guilty on this theory [any of these theories] of murder, 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.

If you are unable to agree unanimously that the Commonwealth has met its burden to prove beyond a reasonable doubt any [either] of these theories of first degree murder, you shall consider whether the Commonwealth has proved the defendant guilty beyond a reasonable doubt of murder in the second degree.

Deleted: [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.¶

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[Where the jury is to be instructed on voluntary and/or involuntary manslaughter] If you are unable to agree unanimously that the Commonwealth has met its burden to prove beyond a reasonable doubt that the defendant is 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.[97]

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].

[97] Commonwealth v. Figueroa, 468 Mass. 204, 229 n.11 (2014).

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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.

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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 death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.[98]

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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.[99]

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[98] See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).
[99] See Commonwealth v. Zanetti, 454 Mass. 449, 455 (2009) ("mental state or intent for deliberately premeditated murder

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[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, 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.[100]

[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

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[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 . . ."). [100] 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).

victim. My intent to kill the intended victim is transferred to the actual victim.[101]

The third element is that the defendant committed the killing with deliberate premeditation, that is, he decided to 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.[102] 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.[103] There is no deliberate premeditation where the

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[101] 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'").

[102] 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).

[103] See Commonwealth v. McMahon, 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").

action is taken so quickly that a defendant takes no time to reflect on the action and then decides to do it.[104]

[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[105] or was affected by his consumption of alcohol or 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,[106] but you may consider such evidence in determining whether the Commonwealth has proved these elements.[107]

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[104] 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).

[105] Commonwealth v. The Ngoc Tran, 471 Mass. 179, 187 (2015) ("we cannot say that the term 'mental impairment' is so obscure that a reasonable jury would be unable to rely on the usual and accepted meanings of these words to determine whether the defendant was capable of forming the required intent").

[106] Commonwealth v. Figueroa, 468 Mass. 204, 222 (2014) ("Where a defendant claims diminished capacity because of intoxication, the Commonwealth is required to prove only that the defendant was not so intoxicated that he was incapable of forming the requisite intent").

[107] 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

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[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 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.

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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"). Cf. Commonwealth v. Johnson, 435 Mass. 113, 121-122 (2001) (reversal due to erroneous instruction on premeditation where mental impairment was a live issue).

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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 of whether or not you find that the Commonwealth has proved murder in the first degree with deliberate premeditation.[108]

[108] See Commonwealth v. Candelario, 446 Mass. 847, 859-860 (2006), citing Commonwealth v. Caputo, 439 Mass. 153, 168 (2003)

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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.

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

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(jury may find defendant guilty on any theory of murder in first degree advanced by Commonwealth).

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death of [victim's name]. A defendant's act is the cause of death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.[109]

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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.[110]

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.

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[109] See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).
[110] 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).

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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.[111]

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.[112]

[**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

[111] See Commonwealth v. Reed, 427 Mass. 100, 105 (1998).
[112] See Commonwealth v. Robidoux, 450 Mass. 144, 162 nn.8 & 9 (2007).

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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.[113]

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.[114] 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.[115] You must determine whether the method or mode of a killing is so shocking as to amount to murder with extreme atrocity or cruelty.[116] The inquiry focuses on the defendant's action in terms of the manner

[113] 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).

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

[115] 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]).

[116] 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").

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and means of inflicting death, and on the resulting effect on the victim.[117]

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:[118]

1. whether the defendant was indifferent to or took pleasure in the suffering of the deceased;[119]

2. the consciousness and degree of suffering of the deceased;[120]

3. the extent of the injuries to the deceased;[121]

4. the number of blows delivered;[122]

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[117] 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").

[118] 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. Akara, 465 Mass. 245, 259-260 (2013); Commonwealth v. Stroyny, 435 Mass. 635, 651 (2002).

[119] See, e.g., Commonwealth v. Roy, 464 Mass. 818, 825 (2013) (defendant mimicked victim's pleading while describing how he "choked her out"); Commonwealth v. Anderson, 445 Mass. 195, 202 (2005) (defendant bragged about brutal murder after crime); Commonwealth v. Sok, 439 Mass. 428, 431 (2003).

[120] 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).

[121] 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).

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5. the manner, degree and severity of the force used;[123]

6. the nature of the weapon, instrument, or method used;[124] and

7. the disproportion between the means needed to cause death and those employed.[125] 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.[126]

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

[123] See, e.g., Commonwealth v. Roy, 464 Mass. 818, 825 (2013) (victim was hit in the back of the head with a hard, flat object); 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").

[124] 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).

[125] 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).

[126] See Commonwealth v. Akara, 465 Mass. 245, 259-260 (2013), quoting Commonwealth v. Whitaker, 460 Mass. 409, 417-418 (2011), and Commonwealth v. Szlachta, 463 Mass. 37, 46 (2012) ("Although no single Cunneen factor is 'indispensible' to a determination of extreme atrocity or cruelty . . . , 'conviction of murder in the first degree on a theory of extreme atrocity or cruelty must be based on evidence of at least one of the [Cunneen] factors");

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[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.[127]

[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.

[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

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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"). See also 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]).

[127] See Commonwealth v. Gonzalez, 469 Mass. 410, 421-422 (2014); Commonwealth v. Rutkowski, 459 Mass. 794, 798 (2011), citing Commonwealth v. Rosenthal, 432 Mass. 124, 130 (2000), and Commonwealth v. Gould, 380 Mass. 672, 683-686 (1980).

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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 first degree if the Commonwealth has proved beyond a reasonable doubt that the victim was killed by the defendant or a person participating with him in the commission of a felony[129] with a maximum sentence of life imprisonment and that the killing was caused by an act that occurred during the commission or attempted commission[130] of that felony.[131]

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[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

[129] Commonwealth v. Tejeda, 473 Mass. 269, 269-270, 279 (2015) (defendant not guilty of felony-murder where accomplice was killed by robbery victim who was seeking to thwart commission of underlying felony).

[130] 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).

[131] See, e.g., Commonwealth v. Petetabella, 459 Mass. 177, 191 (2011).

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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.[132]

To prove the defendant guilty of felony-murder in the first degree, the Commonwealth must prove the following elements beyond a reasonable doubt:[133]

1. The defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life.[134]

2. The killing was caused by an act of the defendant or a person participating with him in the commission or attempted commission of the underlying felony.[135]

3. The act that caused the killing occurred during the commission or attempted commission of the felony.[136]

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[132] See, e.g., Commonwealth v. Petetabella, 459 Mass. 177, 191 (2011), citing Commonwealth v. Gricus, 317 Mass. 403, 411–412 (1944).

[133] 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. 808, 818 n.11 (2003). See Model Jury Instructions on Homicide at 67-68 n.8 (1999).

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

[135] Commonwealth v. Tejeda, 473 Mass. 269, 269-270, 279 (2015).

[136] 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).

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4. The underlying felony was inherently dangerous [or the defendant committed the underlying felony with a conscious disregard for the risk to human life.[137]]

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].

[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.[138] Where an

[137] 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).

[138] Commonwealth v. Wadlington, 467 Mass. 192, 208 n.14 (2014) ("[w]here a required element of felony-murder in the first degree is that the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life . . .

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underlying felony has as one of its elements the use or possession of a weapon, the jury must be instructed that the defendant must have possessed a weapon or known that a joint venturer possessed a weapon, see p. 17-18.]

[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.[139]

[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 that the defendant committed a separate and distinct attack upon the deceased][141]

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the jury must agree as to the felony committed, even if each of the alternative underlying felonies are life felonies").

[139] 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"). See, e.g., Commonwealth v. Rasmusen, 444 Mass. 657, 665-666 (2005).

[141] 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

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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).

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The felony of armed robbery may serve as the predicate for felony-murder and is not barred by the merger doctrine because stealing or taking the property of another is an element of armed robbery. Commonwealth v. Christian, 430 Mass. 552, 556 (2000). A robber who kills the victim may be found guilty of

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The act of violence that is an element of the underlying felony may not be the same act that caused the victim's death.[142] 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.[143] 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.[144]]

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.]

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felony-murder regardless of whether he shot the victim before or after taking the victim's property. Id.

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

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

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

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The second element is that the killing was caused by an act of the defendant or a person participating with him in the commission or attempted commission of the underlying felony.[145]

The third element is that the act that caused the death occurred during the commission or attempted commission of the felony.[146] The Commonwealth must prove beyond a reasonable doubt that the act that caused the death occurred during the commission of the felony and at substantially the same time and place.[147] [A killing may be found to occur during the commission of the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony.][148]

[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.[149] 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

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[145] Commonwealth v. Tejeda, 473 Mass. 269, 269-270, 279 (2015) (defendant not guilty of felony-murder where accomplice was killed by robbery victim who was seeking to thwart commission of underlying felony).

[146] 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).

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

[148] See Commonwealth v. Gordon, 422 Mass. 816, 850 (1996).

[149] See Commonwealth v. Griffith, 404 Mass. 256, 264 (1989).

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felony-murder.[150] *However, it may be necessary to instruct on self-defense in connection with the underlying felony.]*

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

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[Give one of the following two instructions:]

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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.[151]

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.[152] You may find that the defendant committed or attempted to commit the felony with a conscious disregard for the risk to human life if

[150] 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).
[151] See, e.g., Commonwealth v. Tevlin, 433 Mass. 305, 314 (2001) (armed robbery).
[152] 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").

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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.

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MURDER IN THE SECOND DEGREE

In order to prove murder in the second degree, the Commonwealth must prove the following elements:[153]

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.[154]

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[153] Commonwealth v. Berry, 466 Mass. 763, 772 n.16 (2014) ("[t]he intent necessary to be proved for a conviction of murder in the first degree committed with extreme atrocity or cruelty, defined by three alternate prongs, is the same as the intent necessary for murder in the second degree").

[154] 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

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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]** 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.]

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likelihood of substantial harm"; concluding judge erred in reducing conviction to involuntary manslaughter).

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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.[155]*]*

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 by the defendant or a person participating with him in the commission of a felony[156] with a

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[155] 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). See Commonwealth v. Benitez, 464 Mass. 686, 693-694 & n.12 (2013). 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").

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[156] Commonwealth v. Tejeda, 473 Mass. 269, 269-270, 279 (2015) (defendant not guilty of felony-murder where accomplice was

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maximum sentence of less than life imprisonment and that the killing was caused by an act that occurred during the commission or attempted commission of that felony. To prove the defendant guilty of felony-murder in the second degree, the Commonwealth must prove the following elements beyond a reasonable doubt:[157]

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

2. The killing was caused by an act of the defendant or a person participating with him in the commission or attempted commission of the underlying felony.[158]

3. The act that caused the killing occurred during the commission or attempted commission of the felony.[159]

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killed by robbery victim who was seeking to thwart commission of underlying felony).

[157] 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. 808, 818 n.11 (2003). See Model Jury Instructions on Homicide at 67-68 n.8 (1999).

[158] Commonwealth v. Tejeda, 473 Mass. 269, 269-270, 279 (2015) (defendant not guilty of felony-murder where accomplice was killed by robbery victim who was seeking to thwart commission of underlying felony).

[159] 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).

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4. The underlying felony was inherently dangerous [or the defendant committed the underlying felony with a conscious disregard for the risk to human life.[160]]

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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.[161] The Commonwealth alleges that the defendant 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.]

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[160] 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").

[161] 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).

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[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 an underlying felony has as one of its elements the use or possession of a weapon, the jury must be instructed that the defendant must have possessed a weapon or known that a joint venturer possessed a weapon, see p. 17-18. 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][162]

[162] 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

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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.

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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 felony of armed robbery may serve as the predicate for felony-murder. Commonwealth v. Christian, 430 Mass. 552, 556 (2000). A robber who kills the victim may be found guilty of felony-murder regardless of whether he shot the victim before or after taking the victim's property. Id.

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The act of violence that is an element of the underlying felony may not be the same act that caused the victim's death.[163] 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.[164] 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.[165]]

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

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[163] See, e.g., Commonwealth v. Kilburn, 438 Mass. 359-360 (2003); Commonwealth v. Gunter, 427 Mass. 259, 272-274 (1998).
[164] See, e.g., Commonwealth v. Bell, 460 Mass. 294, 300-302 (2011).
[165] Commonwealth v. Bell, 460 Mass. 294, 302 n. 13(2011), citing Commonwealth v. Gunter, 427 Mass. 259, 274 (1998).

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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.[166]

[166] See Commonwealth v. Fickett, 403 Mass. 194, 201-202 (1988).

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VOLUNTARY MANSLAUGHTER (LESSER INCLUDED OFFENSE TO MURDER)[167]

To prove the defendant guilty of murder in the first or second degree [on any theory other than felony-murder[168]], 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 [on any theory other than felony-murder] is reduced to the lesser offense of voluntary manslaughter where the Commonwealth has failed to prove that there were no mitigating circumstances. Therefore, [except for felony-murder,] 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 not find the defendant guilty of murder, but you shall find the defendant guilty of voluntary manslaughter.

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[167] "If any view of the evidence . . . would permit a verdict of manslaughter rather than murder, a manslaughter charge should be given." Commonwealth v. Brooks, 422 Mass. 574, 578 (1996). See Commonwealth v. Glover, 459 Mass. 836, 842 (2011) ("Because the theories [of reasonable provocation and excessive use of force in self-defense] are distinct, a defendant is entitled to jury instructions on voluntary manslaughter based on both theories where the evidence supports them").

[168] See, e.g., Commonwealth v. Alcequiecz, 465 Mass. 557, 563-564 (2013), quoting Commonwealth v. Rolon, 438 Mass. 808, 823 (2003) ("Heat of passion operates to negate malice; thus it is immaterial to felony-murder, 'where malice need not be shown'").

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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.[169]

Reasonable provocation is provocation by the person killed[170] 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.[171] The provocation must be such that a reasonable

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[169] 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").

[170] 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"). Note, however, that the doctrine of transferred intent can apply where the evidence raises the possibility of reasonable provocation, in which case the provocation could arise from someone other than the victim. See Commonwealth v. Camacho, 472 Mass. 587, 603 (2015) (noting, in dicta, "agree[ment] with th[e] general proposition" that, "in circumstances where one (A) who is reasonably and actually provoked by another person (B) into a passion to kill B, shoots at B but accidentally hits and kills an innocent bystander, A's crime is voluntary manslaughter."), quoting Commonwealth v. LeClair, 445 Mass. 734, 743 n.3 (2006).

[171] 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

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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.[172] In addition, there must be a causal connection between the provocation, the heat of passion, and the killing.[173] 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.[174]

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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").

[172] 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").

[173] 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").

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

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Mere words, no matter how insulting or abusive, do not by themselves constitute reasonable provocation.[175] [However, the existence of sufficient provocation is not foreclosed where a defendant learns of a fact from a statement rather than from personal observation.[176] If the information conveyed is of the 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

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[175] 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 . . .").

[176] 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 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).

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rather than reasoned reflection and on whether the defendant was in fact so provoked. 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 and the defendant must have acted in the heat of passion before he regained control of his emotions.[178]

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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, even a single blow, may amount to reasonable provocation.[179] Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been

[178] Commonwealth v. Smith, 460 Mass. 318, 325 (2011), quoting Commonwealth v. Colon, 449 Mass. 207, 220, cert. denied, 552 U.S. 1079 (2007) ("Provocation and `cooling off' time must meet both a subjective and an objective standard"); Commonwealth v. Acevedo, 446 Mass. 435, 444-445 (2006). Cf. Acevedo 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").

[179] 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").

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provoked to act out of emotion rather than reasoned reflection and on whether the defendant was in fact so provoked.[180] 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.[181] 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 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

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

[181] 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").

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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].[182]

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[182] 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 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

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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 deem relevant to the reasonableness of the defendant's conduct under the circumstances.[183]

I have already told you that to prove the defendant guilty of murder, the Commonwealth is required to prove beyond a

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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").

[183] Commonwealth v. Kendrick, 351 Mass. 203, 212 (1966).

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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.[184]

A. VOLUNTARY MANSLAUGHTER (ABSENT A MURDER CHARGE)

In this case, the defendant is charged with voluntary manslaughter. To prove the defendant guilty of voluntary manslaughter, the Commonwealth must prove beyond a reasonable doubt the following elements:[185]

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.

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[184] 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'").

[185] See Commonwealth v. Ware, 438 Mass. 1014, 1015 (2003).

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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.

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INVOLUNTARY MANSLAUGHTER[186]

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

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Involuntary manslaughter is an unlawful killing unintentionally caused by wanton or reckless conduct.[187]

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[186] "[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). See Commonwealth v. Horne, 466 Mass. 440, 443-444 (2013), quoting Commonwealth v. Lyons, 444 Mass. 289, 293 (2005) ("fine line" separates murder based on third prong malice from lesser offense of involuntary manslaughter). See also Commonwealth v. Jessup, 471 Mass. 121, 135-136 (2015).

[187] The Supreme Judicial Court "has described conduct amounting to involuntary manslaughter as both 'wanton or reckless' and 'wanton and reckless.'" Commonwealth v. Pagan, 471 Mass. 537, 547 n.18 (2015), quoting Commonwealth v. Tavares, 471 Mass. 430, 437 n.13 (2015). But expressed either way, "[t]he standard . . . 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). See Commonwealth v. Welansky, 316 Mass. 383, 398 (1944) ("[I]ntentional conduct to which either word applies is followed by the same legal consequences as though both words applied" [emphasis added]). 185, 191-192 (2004). Because a jury may understand wanton to mean something slightly different than reckless, we describe the standard as "wanton or reckless" in these instructions. See Welansky, 316 Mass. at 398 ("The words 'wanton' and 'reckless' are practically synonymous in this connection, although the word 'wanton' may contain a suggestion of arrogance or insolence or heartlessness that is lacking in the word 'reckless.'").

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[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.[188]

[188] 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).

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A. INVOLUNTARY MANSLAUGHTER CAUSED BY WANTON OR RECKLESS CONDUCT.

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Wanton or reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person.[190] Wanton or reckless conduct usually involves an affirmative act.[191] An omission or failure to act may constitute wanton or reckless conduct where the defendant has a duty to act.[192]

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

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

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

[191] 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 . . .").

[192] 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 . . .").

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1. The defendant caused the victim's death;[193]

2. The defendant intended the conduct that caused the victim's death;[194]

3. The defendant's conduct was wanton or reckless;[195]

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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 death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.[196]

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[193] 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]).
[194] 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").
[195] 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").
[196] See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

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The second element is that the defendant intended the conduct that caused the death.[197] The Commonwealth is not required to prove that the defendant intended to cause the death.[198]

The third element is that the defendant's conduct was wanton or reckless.[199] Wanton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another.[200] It is conduct involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct.[201] Whether

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[197] 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).

[198] 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).

[199] Commonwealth v. Welansky, 316 Mass. 383, 396-397 (1944).

[200] 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).

[201] 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.

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conduct is wanton or reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew.[202] If the defendant realized the grave risk created by his conduct, his subsequent act

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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'").

[202] 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 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").

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amounts to wanton or reckless conduct whether or not a reasonable person would have realized the risk of grave danger.[203] Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton or reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another.[204]

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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.[205] The

[203] 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").

[204] 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'").

[205] 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 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

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

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[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 or reckless]

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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.[206] Such a duty may arise out of a

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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").

[206] 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

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special relationship.[207] A duty may also arise where a person creates a situation that poses a grave risk of death or serious injury to another.[208] 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 or reckless.[209] To prove that the defendant is guilty of involuntary manslaughter by reason of a wanton or reckless failure to act, the Commonwealth must prove beyond a reasonable doubt the following elements:

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1. There was a special relationship between the defendant and the victim that gave rise to a duty of care,[210] or the

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reckless conduct may consist of intentional failure to take such care . . .").

[207] 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).

[208] 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").

[209] 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 . . .").

[210] 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). The existence of a relationship giving rise to a duty is a question of fact for the

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defendant created a situation that posed a grave risk of death or serious injury to another;[211]

2. The defendant's failure to act caused the victim's death;[212]

3. The defendant intentionally failed to act;[213]

4. The defendant's failure to act was wanton or reckless.[214]

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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 . . ."). [211] 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").

[212] 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)

[213] 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).

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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 care[215] or the defendant created a situation that posed a grave risk of death or serious injury to another.[216] I instruct you that the relationship between [identify specific relationship, e.g., parent and minor child] is a special relationship that gives rise to a duty of care.[217] If you find that the defendant had this relationship with the victim, then you shall find that

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[214] 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 . . .").

[215] 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).

[216] 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").

[217] 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 . . .").

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the defendant had a 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 death where the failure to act, in a natural and continuous sequence, results in death, and without which death would not have occurred.[218]

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The third element is that the defendant intentionally failed to act.[219] The Commonwealth is not required to prove that the defendant intended to cause the death.[220]

The fourth element is that the defendant's failure to act was wanton or reckless.[221] A failure to act is wanton or reckless where there is a duty to prevent probable harm to another, and the defendant could have taken reasonable steps to

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[218] See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).
[219] 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).
[220] 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").
[221] 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 . . .").

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minimize the risk to the person to whom the duty is owed.[222] A failure to act that is wanton or reckless involves a high degree of likelihood that substantial harm will result to the person to whom the duty is owed.[223] 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.[224] Whether the defendant's failure to act was wanton or 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.[225]

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[222] 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).

[223] 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'").

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

[225] 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 Commonwealth v. Michaud, 389 Mass. 491, 495-499 (1983) (failure

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Wanton or reckless conduct depends either on what the defendant knew, or how a reasonable person would have acted knowing what the defendant knew.[226] If the defendant realized the grave danger and could have taken reasonable steps to minimize the risk, his subsequent failure to act is wanton or reckless whether or not a reasonable person would have realized the risk of grave danger.[227] Even if the defendant himself did not realize the grave danger of harm to another, his failure to act would be wanton or reckless if a reasonable person in like

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to provide medical care for child in circumstances where child was doing well shortly before child's death insufficient to sustain involuntary manslaughter conviction).

[226] 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'").

[227] 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").

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circumstances would have realized the grave danger and taken steps to minimize the risk.[228]

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.[229] The Commonwealth must prove that the defendant's failure to act went beyond negligence, and was wanton or reckless as I have defined that term.

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[228] 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).

[229] 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).

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B. INVOLUNTARY MANSLAUGHTER UNINTENTIONALLY CAUSED BY A BATTERY

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[Note to judge: Our case law limits this instruction to a battery that is not a felony.[230]]

Involuntary manslaughter is [also] an unlawful killing unintentionally caused by a battery[231] that the defendant knew or should have known endangered human life.[232] 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.[233]

2. The defendant intentionally committed a battery upon the victim that endangered human life.[234]

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[230] 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).

[231] 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).

[232] 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").

[233] 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).

[234] 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).

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3. The defendant knew or reasonably should have known that the battery endangered human life.[235]

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 death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.[236]

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The second element is that the defendant intentionally committed a battery on the victim that endangered human life.[237] 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

[235] 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").

[236] See Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

[237] 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).

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of likelihood that substantial harm would result to the victim.[238] 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.[239] In determining whether the defendant reasonably should have known that the battery created

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[238] 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."

[239] 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").

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a high degree of likelihood that substantial harm would result to another, you must consider the nature and extent of the 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.[240]

[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.

[240] 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").

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SUPPLEMENTAL INSTRUCTIONS

A. Charging a Minor with Murder. The Massachusetts Legislature has determined that all persons fourteen years or older who are charged with murder are to be tried as adults. That the defendant is being tried as an adult has nothing to do with this individual defendant, his alleged role in this case, or the strength of the evidence.

B. 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.[241]

C. Object of Killing Must Be a Human Being.

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[241] 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").

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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.[242]

D. Use of Dangerous Weapon.

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[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 give the following instruction.]

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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.[243]

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[242] 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").

[243] See Commonwealth v. Tu Trinh, 458 Mass. 776, 784 & nn.12-13 (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").

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[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.]

E. Questions from Jury.

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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.[244]

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2. After supplemental instructions.

[244] 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).

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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.

F. Jury's 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.[245] 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.

G. After Jury Reports Deadlock on Murder in the First Degree. *[Note to judge: This instruction should only be given when the jury explicitly reports that they are deadlocked on murder in the first degree, and not, for instance, when they simply state that they are deadlocked.]*

Your present inability to reach agreement as to murder in the first degree does not mean that you are a hung jury. If,

[245] Commonwealth v. Rivera, 445 Mass. 119, 131 (2013) (jury required by law to return a verdict of the highest degree of murder proved beyond a reasonable doubt); Commonwealth v. Anderson, 408 Mass. 803, 808 (1990) (judge entitled to inform jury of duty to return guilty verdict for highest crime proved beyond a reasonable doubt). See Commonwealth v. Nelson, 468 Mass. 1, 16-17 (2014) (no error where judge reinstructed jury on their duty to find defendant guilty of most serious offense proved beyond reasonable doubt).

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after all reasonable efforts, you are unable to reach agreement as to murder in the first degree, or if you reach agreement that the defendant is not guilty of murder in the first degree, you should move on to consider murder in the second degree.[246]

[246] Commonwealth v. Figueroa, 468 Mass. 204, 228-229 (2014) (upon receiving note that jury is deadlocked as to murder in first degree, "the judge should have instructed the jury that they were not a hung jury and that if, after all reasonable efforts, they were unable to reach agreement as to murder in the first degree (or if they reached agreement that the defendant was not guilty of murder in the first degree), they should move on to consider murder in the second degree").

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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.

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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 killing was caused by an act of the defendant or a person participating with the defendant in the commission or attempted commission of the underlying felony.

3. The act that caused the killing occurred during the commission or attempted commission of the felony.

4. The underlying felony was:

a. inherently dangerous or

b. the defendant committed the underlying felony with a conscious disregard for the risk to human life.

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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

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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 killing was committed by the defendant or a person participating with the defendant in the commission or attempted commission of the underlying felony.

3. The killing was committed during the commission or attempted commission of the felony.

4. The underlying felony was:

a. inherently dangerous or

b. the defendant committed the underlying felony with a conscious disregard for the risk to human life.

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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

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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.

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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.

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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].

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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

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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].

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

C. Death Unintentionally Caused by a Battery

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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.

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