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### NOTES RELEVANT TO ALL SELF-DEFENSE INSTRUCTIONS

1. **Self-defense is a complete exoneration.** “[S]elf-defense and defense of another, if warranted by the circumstances and carried out properly, constitute a complete defense and not merely a mitigating circumstance.” *Commonwealth v. Carlino*, 429 Mass. 692, 694 (1999). Self-defense is available in assault cases as well as homicide cases. *E.g.*, *Commonwealth v. Burbank*, 388 Mass. 789, 795-796 (1983) (assault); *Commonwealth v. Mann*, 116 Mass. 58, 60 (1874) (assault and battery).
2. **When self-defense instruction must be given.** “A defendant is entitled to a self-defense instruction if any view of the evidence would support a reasonable doubt as to whether the prerequisites of self-defense were present.” *Commonwealth v. Pike*, 428 Mass. 393, 395 (1998). The evidence of self-defense may come from the Commonwealth’s case, the defendant’s case, or both. *Commonwealth v. Galvin*, 56 Mass. App. Ct. 698, 699 (2002). All reasonable inferences should be resolved in favor of the defendant, and a judge should err on the side of caution in determining whether self-defense has been raised sufficiently to warrant an instruction. *Pike*, 428 Mass. at 395. A self-defense instruction may be appropriate as to some counts but not as to others. *Commonwealth v. Clark*, 20 Mass. App. Ct. 392, 397 (1985).

If there is an evidentiary basis, a judge should instruct on self-defense *sua sponte*, even absent a defense request. *Galvin*, 56 Mass. App. Ct. at 701.

“Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime,” a judge may choose to instruct on self-defense first and then go on to the elements of the crimes charged. *Commonwealth v. Santiago*, 425 Mass. 491, 506 (1997).

Self-defense is available only where there is an immediate need to resort to force and not where other remedies are available. *Commonwealth v. Lindsey*, 396 Mass. 840, 844-845 (1986) (self-defense unavailable to defendant who unlawfully possessed a firearm in putative self-defense). A self-defense instruction is not required where the defendant entirely denies striking the victim. *Commonwealth v. Vezina*, 13 Mass. App. Ct. 1002, 1002 (1982).

A judge may properly withdraw a self-defense instruction earlier given to the jury if the judge later concludes that there is no evidence to support it. *Commonwealth v. Carrion*, 407 Mass. 263, 268-269 (1990); *see Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 675-676 (2008) (error to withdraw self-defense instruction from jury in case charging indecent assault and battery where defendant’s version of events supported that instruction and where Commonwealth sought instruction on lesser included offense of assault and battery).

3. **Burden of proof and phrasing of instruction.** Self-defense is a sensitive part of jury instructions in a criminal trial. *Commonwealth v. Rodriguez*, 17 Mass. App. Ct. 547, 551 (1984). When the issue of self-defense is properly raised, the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense and this burden of proof should be expressly incorporated into the charge. *Commonwealth v. A Juvenile*, 396 Mass. 108, 113-114 (1985). Self-defense instructions “must be carefully prepared and delivered so as to eliminate any language that might convey to the jury the impression that a defendant must prove that [they] acted in self-defense.” *Commonwealth v. Vidito*, 21 Mass. App. Ct. 332, 339 (1985). Where deadly force was used, “special care must be given to instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt the absence of circumstances justifying the use of deadly force in self-defense.” *Commonwealth v. Fontes*, 396 Mass. 733, 739 (1986).

To avoid any implication that suggests that the defendant bears the burden of proof, a judge should not frame self-defense in terms of a “claim,” “defense,” “right,” or “justification” that requires the jury to

make “findings.” *Commonwealth v. Mejia*, 407 Mass. 493, 494-495 (1990); *Commonwealth v. Simmons*, 383 Mass. 40, 44-45 (1981); *Vidito*, 21 Mass. App. Ct. at 335-340.

If the judge properly instructs the jury on the Commonwealth’s burden of proof with respect to self-defense, the judge is not required to expressly instruct the jury to consider any evidence of self-defense presented by the defendant. As long as the judge does not distinguish between evidence of self-defense presented by the defendant and that presented by the Commonwealth, the jury should not be instructed on the burden of production because it lies outside the function of the jury. *Commonwealth v. Glacken*, 451 Mass. 163, 167-168 (2008).

A judge is not required to charge that any particular weapon may give rise to self-defense rights. *Commonwealth v. Monico*, 396 Mass. 793, 806-807 (1986) (shod foot).

4. **Non-deadly force and deadly force involve two different standards.** The right to use non-deadly force arises at a “somewhat lower level of danger” than the right to use deadly force. *Commonwealth v. Abubardar*, 482 Mass. 1008, 1010 (2019) (quoting *Commonwealth v. Baseler*, 419 Mass. 500, 502 (1995)). For that reason, the standards for self-defense using non-deadly force and deadly force “are mutually exclusive.” *Commonwealth v. Walker*, 443 Mass. 213, 217 (2005). For the standard for using non-deadly force in self-defense, see, e.g., *Commonwealth v. King*, 460 Mass. 80, 83 (2011). For the standard for using deadly force in self-defense, see, e.g., *Commonwealth v. Ng*, 491 Mass. 247, 258 (2023).

It is reversible error for a judge to give self-defense instructions related to deadly force when the judge should charge on self-defense related to non-deadly force, since doing so lowers the Commonwealth’s burden in proving that the defendant did not act in self-defense. *Baseler*, 419 Mass. at 503-504.

Deadly force is “force intended or likely to cause death or great bodily harm. This tracks our long-standing definition of a ‘dangerous weapon’ viz. an instrument that is likely to produce death or serious bodily injury.” *Commonwealth v. Klein*, 372 Mass. 823, 827 (1977). “Deadly force” refers to the level of force used, not the seriousness of the resulting injury. *Commonwealth v. Noble*, 429 Mass. 44, 46 (1999) (use of fist is non-deadly force even if death results); *Commonwealth v. Pike*, 428 Mass. 393, 396 n.3 (1998) (judge should instruct on standard for non-deadly force if force generally considered non-deadly results in death in particular case); see *Commonwealth v. Grassie*, 476 Mass. 202, 209 & n.6 (2017) (use of a knife is deadly force); see also *Pike*, 428 Mass. at 395-398 (assault with overt threat to cause serious bodily injury sufficient to warrant instruction on deadly force in self-defense). When the only force used was deadly force, the defendant is not entitled to a non-deadly force instruction. *Commonwealth v. Lopes*, 440 Mass. 731, 740 (2004).

Where the level of force cannot be determined as a matter of law, it is a jury issue, and the defendant is entitled to instructions on the use of both deadly and non-deadly force in self-defense. *Walker*, 443 Mass. at 217; e.g., *Noble*, 429 Mass. at 46-47 (whether wrestling headlock was deadly or non-deadly force was question of fact for jury). Where a weapon which may be dangerous was not used in its intended deadly manner, the jury must determine if that use constituted deadly force. *Commonwealth v. Cataldo*, 423 Mass. 318, 322-323 (1996) (where evidence was conflicting whether defendant drew gun and pointed it or did not draw gun or reached for gun in waistband, it was for jury to determine whether defendant has used deadly force).

5. **Retaliation.** A person loses the right to self-defense if they pursue the original aggressor for retribution or to prevent future attacks, *Commonwealth v. Pike*, 428 Mass. 393, 398 (1998), or if they have already disarmed the victim and they retaliate in anger, *Commonwealth v. Clark*, 20 Mass. App. Ct. 392, 397 (1985).
6. **Reasonable apprehension.** A person may use non-deadly force in self-defense when they have “a reasonable concern over [their] personal safety,” *Commonwealth v. Baseler*, 419 Mass. 500,

502-503 (1995), that is based on some overt act by the other person, *Commonwealth v. Alebord*, 49 Mass. App. 915, 916 (2000). The location of the incident, the participants' relative physical characteristics, and the existence of threats and weapons may all be considered as to the reasonableness of the defendant's state of mind. *Commonwealth v. Vidito*, 21 Mass. App. Ct. 332, 338 (1985).

To use deadly force in self-defense, a person must have reasonable cause to believe and actually believe that they were in imminent danger of death or serious bodily harm from which they could save themselves only by using deadly force. *Commonwealth v. Grassie*, 476 Mass. 202, 210 (2017). An instruction on deadly force in self-defense is required "[i]f an assault includes the threat of an action that would cause the defendant serious bodily injury . . . . Self-defense using deadly force is not justified in absence of such a threat." *Commonwealth v. Pike*, 428 Mass. 393, 396 (1998).

7. **Evidence that defendant was mentally impaired or under the influence of drugs or alcohol at the time of the offense.** Evidence of the defendant's mental condition at the time of the offense is relevant to determining the defendant's subjective belief about the harm they faced, but such evidence is not relevant to determining whether the defendant's belief was objectively reasonable.

Accordingly, when determining the defendant's actual belief, the jury may consider evidence of the defendant's mental impairment or the effect on the defendant of their consumption of alcohol or drugs at the time of the offense. See *Commonwealth v. Mercado*, 456 Mass. 198, 207 (2010) (quoting *Commonwealth v. Sires*, 413 Mass. 292, 300 (1992)) ("All that we have ever required' be said to juries about the effect of mental impairment on a defendant's intent or knowledge is 'satisfied by a simple instruction that the jury may consider credible evidence' of the mental impairment 'in deciding whether the Commonwealth had met its burden of proving the defendant's state of mind beyond a reasonable doubt.'").

In contrast, when determining whether the defendant's belief was reasonable, the jury may not consider evidence of the defendant's mental condition. See *Commonwealth v. Barros*, 425 Mass. 572, 576 (1997) ("The defendant's belief [about the imminent harm] cannot be deemed reasonable on the ground that, due to intoxication, he misapprehended the situation. . . . A determination as to whether a defendant's belief concerning his exposure to danger was reasonable may not take into account his intoxication."); accord *Commonwealth v. Ramirez*, 44 Mass. App. Ct. 799, 801 (1998).

The Supreme Judicial Court's model homicide instructions include the following instruction (modified as indicated) on the use of evidence of the defendant's mental condition in a self-defense case:

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 [their] consumption of alcohol or drugs, in determining whether the defendant actually [had an immediate concern for their safety] [believed that they were in immediate danger of serious bodily harm or death], but not in determining whether a reasonable person in those circumstances would have [had an immediate concern for their safety] [believed they were in immediate danger].

8. **Mistaken but reasonable apprehension.** A defendant is entitled to a self-defense instruction if they had a mistaken but reasonable belief that death or serious bodily injury was imminent, or that they had used all available means to avoid physical combat, or as to the amount of force necessary to deal with the perceived threat, provided that there is some evidence of the other elements of self-defense. *Commonwealth v. Glass*, 401 Mass. 799, 808-809 (1988). "For such a belief to be reasonable, the victim must have committed some overt act [assault or threat] against the defendant' and there must be some evidence that 'the defendant availed himself of all means, proper and reasonable under the circumstances, of retreating from the conflict before resorting to the use of deadly force.'" *Commonwealth v. Wallace*, 460 Mass. 118, 124-125 (2011) (quoting *Commonwealth v. Pike*, 428 Mass. 393, 396, 398 (1998)).

9. **“Battered person’s syndrome.”** General Laws c. 233, § 23F permits a criminal defendant in a self-defense case to introduce “(a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; [and] (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.” That evidence is admissible to establish “the reasonableness of the defendant’s apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant’s belief that [they] had availed [themselves] of all available means to avoid physical combat or the reasonableness of a defendant’s perception of the amount of force necessary to deal with the perceived threat . . . .” G.L. c. 233, § 23F. Massachusetts common law essentially establishes the same rule. *Commonwealth v. Rodriguez*, 418 Mass. 1, 7 (1994).

The Commonwealth may also offer such testimony “to help explain the conduct of a victim or a complainant over the course of an abusive relationship.” *Commonwealth v. Goetzendanner*, 42 Mass. App. Ct. 637, 645 (1997). The expert’s testimony must be confined to the general pattern of behavioral and emotional characteristics typical of victims who have been battered, and may not discuss the symptoms exhibited by the particular victim, nor opine on whether the particular victim suffers from that syndrome, nor describe or profile the typical attributes of batterers. *Id.* at 640-646.

10. **Duty to retreat.** A person must generally use all reasonable means to avoid physical combat before resorting to using force. *Commonwealth v. Mercado*, 456 Mass. 198, 209 (2010). The factual question of whether a person has availed themselves of all reasonable means to avoid combat is dependent on the totality of the circumstances. *Commonwealth v. Pike*, 428 Mass. 393, 399 (1998).
11. **Self-defense cases under the “castle law,” G.L. c. 278, § 8A.** General Laws c. 278, § 8A, the “castle law,” provides that an occupant of a dwelling is not required to retreat nor to exhaust all reasonable means of avoiding combat before using reasonable means to defend themselves or other occupants against an unlawful intruder whom the occupant reasonably believes is about to inflict great bodily injury or death on the occupant or another person lawfully present in the dwelling. *Commonwealth v. Peloquin*, 437 Mass. 204, 208 (2002).

Definition of “dwelling.” Consistent with the common law definition, a “dwelling” is a place where a person is “temporarily or permanently residing and which is in [one’s] exclusive possession.” *Commonwealth v. Albert*, 391 Mass. 853, 862 (1984). In multi-unit housing, “dwelling” only extends to areas over which the person has a right of exclusive control, and not to common areas such as the hallways of an apartment building. *Albert*, 391 Mass. at 862. A “dwelling” does not include the open porch and outside stairs of a house, *Commonwealth v. McKinnon*, 446 Mass. 263, 267-268 (2006), nor does “dwelling” include a driveway, *Commonwealth v. Carlino*, 449 Mass. 71, 76 (2007).

Lawful vs. unlawful intruders. While the castle law eliminates an occupant’s duty to retreat from a confrontation with an unlawful intruder, the statute does not eliminate the duty to retreat from a person lawfully on the premises, “even when that guest launches a life-threatening assault on the defendant.” *Peloquin*, 437 Mass. at 208; *see also Commonwealth v. Painten*, 429 Mass. 536, 545-546 (1999); *Commonwealth v. Lapointe*, 402 Mass. 321, 328-329 (1988). The jury should be instructed on how to determine if the victim was an unlawful intruder, using the law of trespass (Instruction 8.220) as a guide. *Commonwealth v. Noble*, 429 Mass. 44, 48-49 (1999). A person who enters lawfully but refuses to leave is a trespasser. G.L. c. 266, § 120; *Peloquin*, 437 Mass. at 209. A person may use no more force than reasonably necessary to remove a trespasser. *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 250 (1999).

Encounters with police. There is no right under the castle law to resist unlawful entry by police into one’s residence, *Commonwealth v. Gomes*, 59 Mass. App. Ct. 332, 340-341 (2003), or to resist

unlawful arrest unless excessive force is used and the occupant is unable to retreat, *Commonwealth v. Peterson*, 53 Mass. App. Ct. 388, 390-391 (2001).

12. **Excessive force.** The defendant may be found guilty if his use of deadly force was unreasonable and clearly excessive in the circumstances. *Commonwealth v. Stokes*, 374 Mass. 583, 594 (1978); *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 249-250 (1999) (objectively unreasonable belief that deadly force was required).
13. **Mutual combat.** When two people engage in a fist-fight by agreement, generally neither of them is acting in self-defense because they have not used all reasonable means to avoid combat. See *Commonwealth v. Bertrand*, 385 Mass. 356, 362 (1982). But a person regains the right of self-defense if during the fight they reasonably conclude that the other person, contrary to their mutual understanding, has escalated the fight by introducing deadly force. *Commonwealth v. Barber*, 18 Mass. App. Ct. 460, 463 (1984), S.C., 394 Mass. 1013, 1013 (1985).
14. **Self-defense in specialized contexts.** For self-defense used against a police officer, refer to Assault and Battery on a Police Officer / Public Employee (Instruction 6.210) and Resisting Arrest (Instruction 7.460). For self-defense used against a correctional officer, refer to Assault and Battery on a Correctional Officer or Employee (Instruction 6.215). For self-defense against a medical professional, refer to Assault and Battery on an Emergency Medical Technician, Ambulance Operator or Attendant, or Health Care Provider (Instruction 6.217).

**Defense of Another and Defense of Property.** Refer to Defense of Another (Instruction 9.264) and Defense of Property (Instruction 9.265) for these related issues.