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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).
15. **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.

SELF-DEFENSE

Select from the options below to assemble a complete self-defense instruction tailored to the evidence. The introduction to self-defense ([Instruction 9.260](#)) should be read in every case. Then, read one of the following instructions, depending on whether the level of force used by the defendant: (a) was non-deadly as a matter of law ([Instruction 9.261](#)); (b) was deadly as a matter of law ([Instruction 9.262](#)); or (c) could be found by the jury to be non-deadly or deadly, viewing the evidence in the light most favorable to the defendant ([Instruction 9.263](#)). Notes relevant to all three instructions appear with the index at [Instruction 9.260A](#).

*Each instruction addresses the five propositions of self-defense, one of which the Commonwealth must prove beyond a reasonable doubt to establish that the defendant did not act in proper self-defense. See *Commonwealth v. Glacken*, 451 Mass. 163, 167 (2008); Supreme Judicial Court Model Jury Instructions on Homicide 17-18 (2023). The relevant supplemental instructions are included below the explanation of each proposition.*

Where the evidence requires an instruction on Defense of Another ([Instruction 9.264](#)), it may be given before or after the Self-Defense instruction.

INTRODUCTION TO SELF DEFENSE

[Use this introductory instruction in all self-defense cases.]

In this case, there is a question as to whether the defendant lawfully used force to defend against an attack. Therefore, I will provide you with instructions concerning the law of self-defense. A person is not guilty of _[crime(s) alleged]_ if they acted in lawful self-defense.

In addition to proving the elements of the offense beyond a reasonable doubt, it is also the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in lawful self-defense. There is no burden on the defendant to prove that they

were justified in defending themselves. You must find the defendant not guilty if the Commonwealth fails to prove beyond a reasonable doubt that the defendant was not justified to act in self-defense.

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

SELF-DEFENSE: USE OF NON-DEADLY FORCE

[Use this instruction if the level of force used by the defendant was non-deadly as a matter of law. For additional detail on non-deadly versus deadly force, see Note 4 to Instruction 9.260A.]

As I told you, because this case raises a question as to whether the defendant lawfully used force to defend against an attack, the Commonwealth has the burden to prove beyond a reasonable doubt both the elements of the offense and that the defendant did not act in lawful self-defense when using that force.

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

***One*, that the defendant did not actually have a concern for their immediate personal safety.**

***Two*, that a reasonable person in the same circumstances as the defendant would not have had a concern for their immediate personal safety.**

***Three*, that the defendant did not take all reasonable steps to avoid physical combat before resorting to force. (or)**

***Four*, that the defendant used more force to defend themselves than was reasonably necessary in the circumstances. (or)**

[Where there is evidence that the defendant was the first aggressor:]

(Five, that the defendant was the first to use or threaten to use force and did not withdraw from the conflict in good faith and clearly communicate by words or conduct their intention to end the confrontation without any further use of force.)

I will now explain each of these ways in which the Commonwealth can disprove that the defendant acted in self-defense in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the defendant did not act in self-defense by proving at least one of these things beyond a reasonable doubt.

<p style="text-align: center;">Propositions One & Two: Actual and Reasonable Concern for Immediate Personal Safety</p>

One way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt the defendant did not *actually* have a concern for their immediate personal safety. Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that a reasonable person in the same circumstances as the defendant would not have had a reasonable concern for their immediate personal safety.

A person cannot act in lawful self-defense unless they are attacked or are immediately about to be attacked. Therefore, there must be an overt act—words, a gesture, or some other action—that could give rise to an actual and reasonable concern for immediate personal safety. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that there was no overt act that gave rise to those concerns.

The right to self-defense ends when the necessity ends. This means that a person does not act in lawful self-defense when they use force to pursue their attacker to retaliate, or out of anger after an attacker has been neutralized or disarmed, or to prevent a future attack. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and instead used force against their attacker for revenge or to ward off any possibility of attack in the indefinite future.

In considering whether the defendant had a concern for their immediate personal safety and the reasonableness of that concern,

you may consider all the evidence relating to the defendant's state of mind at the time.

SUPPLEMENTAL INSTRUCTIONS

If there is evidence of alleged victim's prior threats or violence against defendant.

To determine the defendant's state of mind, you may consider any threats or acts of violence committed by (the alleged victim), but only if the defendant knew of those threats or acts of violence.

Commonwealth v. Pidge, 400 Mass. 350, 353 (1987); *Commonwealth v. Edmonds*, 365 Mass. 496, 499-501 (1974). While these were homicide cases, the principle is applicable to any self-defense claim. Admission and use of evidence that the defendant has been the victim of abuse and of expert testimony regarding the consequences of abuse is governed by G.L. c. 233, § 23F.

If there is evidence of alleged victim's reputation for violence or quarreling.

To determine the defendant's state of mind, you may consider whether (the alleged victim) had a reputation for violence or quarreling. However, you may only consider it if the defendant knew about that reputation.

"When self-defense is at issue, 'evidence of the "character of [the victim] as a powerful, dangerous, quarrelsome or violent person, if known to the defendant, may be admitted" as evidence of the defendant's "apprehension of his own safety, and the reasonableness of that apprehension.'"
Commonwealth v. Williams, 450 Mass. 879, 891-892 (2008), quoting *Commonwealth v. Edmonds*, 365 Mass. 496, 501 (1974); see also *Commonwealth v. Clemente*, 452 Mass. 295, 308 (2008).

Reputation evidence is admissible only if known to the defendant, in contrast to specific acts of violence, which are admissible regardless of whether known to the defendant, pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649, 664-665 (2005).

In a criminal proceeding, in support of a claim of self-defense, "a defendant may offer evidence known to the defendant prior to the incident in question of the victim's reputation for violence, of

specific instances of the victim's violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the defendant." Mass. G. Evid. § 404(a)(2)(C) (2023); *Commonwealth v. Sok*, 439 Mass. 428, 434 (2003). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 432 (2003); *accord Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Adjutant*, 443 Mass. at 665.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness. *Adjutant*, 443 Mass. at 666 n.19, citing *Commonwealth v. Lapointe*, 402 Mass. 321, 325 (1988).

If there is evidence that the defendant was mentally impaired or under the influence of alcohol or drugs at time of offense.

There has been evidence of the defendant's mental condition at the time of the offense, including (evidence of mental impairment) (or) (evidence of the effect on the defendant of their consumption of alcohol or drugs).

As I have told you, among the ways that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt either that the defendant did not actually have a concern for their immediate personal safety, or that a reasonable person in the defendant's circumstances would not have had that concern.

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. So, in determining whether the defendant actually had a concern for their immediate personal safety, you may consider any evidence of the defendant's mental condition. However, in determining whether a reasonable person in the defendant's position would have had such a concern, the defendant's mental condition is not relevant and you may not consider it.

See Note 7 to Instruction 9.260A for further detail on the use of evidence of the defendant's mental condition in a self-defense case.

If there is evidence defendant had a mistaken belief about their concern for personal safety.

A person with a mistaken belief about having a concern for immediate personal safety may use force to defend themselves, if that mistaken belief was reasonable based on all the circumstances.

Commonwealth v. Pike, 428 Mass. 393, 396-397 (1998); Commonwealth v. Glass, 401 Mass. 799, 808-809 (1988).

**Proposition Three:
Reasonable Steps to Avoid Combat**

Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt 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 force.

A person may use physical force in self-defense only if they could not get out of the situation in some other way that was available and reasonable at the time. The Commonwealth may prove that the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.

In determining whether the defendant exhausted all reasonable alternatives to using force, you may consider any evidence about where the incident took place, whether the defendant might have been able to escape by getting away or otherwise getting to safety or by summoning help if that could have been done in time, or by holding their attacker at bay if the means were available, or by some other method. You may consider whether the use of force seemed to be the only means of protection in the circumstances. You may consider that a person who has a reasonable concern for their immediate personal safety may have to decide what to do quickly and while under emotional strain.

SUPPLEMENTAL INSTRUCTION

If there is evidence that victim was injury-prone.

If a person has exhausted all proper means to avoid physical combat, they may use appropriate force in self-defense if they reasonably believe that their personal safety is in danger, even against someone who is known to be susceptible to injury (such as a person under the influence of alcohol or drugs).

Commonwealth v. Bastarache, 382 Mass. 86, 104-105 (1980).

Proposition Four: Proportional Use of Force

(Another) (A final) way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that the defendant used more force than was reasonably necessary under all the circumstances. How much force is necessary may vary with the situation. The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions. 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,

(whether any weapons were used, when, and by whom,) (the characteristics of any weapons used,) the availability of room to maneuver, the manner in which the force was used, the scope of the threat presented, whether the defendant had to decide how to respond quickly, or any other evidence you deem relevant to the reasonableness of the person’s conduct under the circumstances.

<p style="text-align: center;">Proposition Five: Evidence of Defendant as First Aggressor</p>
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[Where there is evidence that the defendant was the first aggressor.]

The final way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt both: one, that the defendant was the first to use or threaten to use force; and two, that the defendant did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to withdraw and end the confrontation without any (further use of) force. Generally, the first aggressor has no right to use self-defense unless they withdraw from the conflict in good faith and clearly communicate their intention to abandon the conflict.

Commonwealth v. Chambers, 465 Nass, 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.’”); see *Commonwealth v. Barbosa*, 463 Mass. 116, 136 (2012); *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 733 (2007); see also *Commonwealth v. Harris*,

464 Mass. 425, 433-436 & nn.11, 12 (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”).

SUPPLEMENTAL INSTRUCTIONS

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim’s prior acts of violence pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005).

For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the past violent conduct of the alleged victim (or by a third party acting with the alleged victim), whether known or unknown to the defendant.

You may not consider that evidence for any other purpose.

“[W]here the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant” Mass. G. Evid. § 404(a)(2)(B) (2023); *accord Commonwealth v. Pring-Wilson*, 448 Mass. 718, 737 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 664 (2005). The term “first aggressor” includes “both the person who started the fight and the person who first escalated a nondeadly fight into a deadly one by either the threat or use of deadly force.” *Commonwealth v. Souza*, 492 Mass. 615, 622 (2023).

“The admission of *Adjutant* evidence is subject to the careful discretion of the trial judge, who ‘must carefully examine the particular circumstances of the case, and weigh the probative value of such evidence against its prejudicial effect.’” *Souza*, 492 Mass. at 626, quoting *Commonwealth v. Morales*, 464 Mass. 302, 312 n.16 (2013). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim’s reputation for violence. *Adjutant*, 443 Mass. at 665.

Adjutant evidence focuses on the victim’s prior violent behavior. *Souza*, 492 Mass. at 625. Once a defendant satisfies the requirement to show that proposed *Adjutant* evidence involves an instance “where the victim initiated the violence . . . the entirety of the violent event or incident initiated by the victim is potentially admissible.” *Souza*, 429 Mass. at 625-626. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18 (2008).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim's prior threats of violence against the defendant, regardless of whether the defendant was aware of the threats.

In considering who was being attacked by whom, you may take into account whether any threats of violence were made by (the alleged victim) against the defendant and whether (the alleged victim) was trying to carry out those threats during this incident.

"Evidence of the victim's threats of violence against the defendant, even if unknown by a defendant asserting self-defense, is admissible as tending to show that the victim was attempting to carry out his threat and that the defendant was in danger." *Commonwealth v. Fontes*, 396 Mass. 733, 735 (1986), citing *Commonwealth v. Rubin*, 318 Mass. 587, 588-589 (1945).

I will now briefly summarize the instruction on self-defense that I have just given you. Since this case raises a question as to whether the defendant lawfully used force to defend against an attack, the Commonwealth has the additional burden to prove that the defendant did not act in self-defense by proving at least one of the following things beyond a reasonable doubt:

***One*, that the defendant did not actually have a concern for their immediate personal safety.**

***Two*, that a reasonable person in the same circumstances as the defendant would not have had a concern for their immediate personal safety.**

Three, that the defendant did not take all reasonable steps to avoid physical combat before resorting to force. (or)

Four, that the defendant used more force to defend themselves than was reasonably necessary in the circumstances. (or)

[Where there is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use force and did not withdraw from the conflict in good faith and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

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

SELF-DEFENSE: USE OF DEADLY FORCE

[Use this instruction if the level of force used by the defendant was deadly as a matter of law. For additional detail on non-deadly versus deadly force, see Note 4 to Instruction 9.260A.]

As I told you, because this case raises a question as to whether the defendant lawfully used deadly force to defend against an attack, the Commonwealth has the burden to prove beyond a reasonable doubt both the elements of the offense and that the defendant did not act in lawful self-defense when using that deadly force. (I instruct you, as a matter of law, that _____ is deadly force.)

To prove that the defendant did not act in self-defense when using deadly force, the Commonwealth must prove at least one of the following things beyond a reasonable doubt:

***One*, that the defendant did not actually believe that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.**

***Two*, that a reasonable person in the same circumstances as the defendant would not reasonably have believed that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.**

Three, 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. (or)

Four, that the defendant used more force than was reasonably necessary in the circumstances. (or)

[Where there is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use deadly force and did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

I will now explain each of these ways in which the Commonwealth can disprove that the defendant acted in self-defense in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the defendant did not act in self-defense by proving at least one of these things beyond a reasonable doubt.

<p>Propositions One & Two: Actual and Reasonable Belief of Immediate Danger of Death or Serious Bodily Harm</p>
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One way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt the defendant did not actually believe that they were in immediate

danger of death or serious bodily harm from which they could save themselves only by using deadly force. Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that a reasonable person in the same circumstances as the defendant would not reasonably have believed that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.

A person cannot lawfully act in self-defense unless they are attacked or are immediately about to be attacked, and there must be an overt act—words, a gesture, or some other action—that could give rise to an actual and reasonable belief of immediate danger of death or serious bodily harm. The Commonwealth may prove that there was not an actual or reasonable belief of immediate danger of death or serious bodily harm by proving beyond a reasonable doubt that there was no overt act that gave rise to those beliefs.

The right to self-defense ends when the necessity ends. This means that a person does not act in lawful self-defense when they use force to pursue their attacker to retaliate, or out of anger after an attacker has been neutralized or disarmed, or to prevent a future

attack. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and instead used force against their attacker for revenge or to ward off any possibility of attack in the indefinite future.

In considering whether the defendant actually believed that they were in immediate danger of death or serious bodily harm, and the reasonableness of the belief that they were in that danger, you may consider all the evidence relating to the defendant's state of mind at the time.

SUPPLEMENTAL INSTRUCTIONS

If there is evidence of the alleged victim's prior threats or violence against the defendant.

To determine the defendant's state of mind, you may consider any threats or acts of violence committed by (the alleged victim), but only if the defendant knew of those threats or acts of violence.

Commonwealth v. Pidge, 400 Mass. 350, 353 (1987); Commonwealth v. Edmonds, 365 Mass. 496, 499-501 (1974). While these were homicide cases, the principle is applicable to any self-defense claim. Admission and use of evidence that the defendant has been the victim of abuse and of expert testimony regarding the consequences of abuse is governed by G.L. c. 233, § 23F.

If there is evidence of the alleged victim's reputation for violence or quarreling.

To determine the defendant's state of mind, you may consider whether (the alleged victim) had a reputation for violence or quarreling. However, you may only consider it if the defendant knew about that reputation.

"When self-defense is at issue, 'evidence of the "character of [the victim] as a powerful, dangerous, quarrelsome or violent person, if known to the defendant, may be admitted" as evidence of the defendant's "apprehension of his own safety, and the reasonableness of that apprehension."'” *Commonwealth v. Williams*, 450 Mass. 879, 891-892 (2008) (quoting *Commonwealth v. Edmonds*, 365 Mass. 496, 501 (1974)); see also *Commonwealth v. Clemente*, 452 Mass. 295, 308 (2008).

Reputation evidence is admissible only if known to the defendant, in contrast to specific acts of violence, which are admissible regardless of whether known to the defendant, pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649, 664-665 (2005).

In a criminal proceeding, in support of a claim of self-defense, "a defendant may offer evidence known to the defendant prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the defendant." Mass. G. Evid. § 404(a)(2)(C) (2023); *Commonwealth v. Sok*, 439 Mass. 428, 434 (2003). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 432 (2003); accord *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Adjutant*, 443 Mass. at 665.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness. *Adjutant*, 443 Mass. at 666 n.19 (citing *Commonwealth v. Lapointe*, 402 Mass. 321, 325 (1988)).

If there is evidence that the defendant was mentally impaired or under the influence of alcohol or drugs at time of offense.

There has been evidence of the defendant's mental condition at the time of the offense, including (evidence of mental impairment) (or) (evidence of the effect on the defendant of their consumption of alcohol or drugs).

As I have told you, among the ways that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt either that the defendant did not actually have a concern for their immediate personal safety, or that a reasonable person in the defendant's circumstances would not have had that concern.

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. So, in determining whether the defendant actually had a concern for their immediate personal safety, you may consider any evidence of the defendant's mental condition. However, in determining whether a reasonable person in the defendant's position would have had such a concern, you may not consider evidence of the defendant's mental condition.

See Note 7 to Instruction 9.260A for further detail on the use of evidence of the defendant's mental condition in a self-defense case.

If there is evidence that the defendant had a mistaken belief about being in immediate danger.

A person with a mistaken belief about being in immediate danger of serious bodily harm or death may use deadly force to defend themselves, if their mistaken belief was reasonable based on all the circumstances.

Commonwealth v. Pike, 428 Mass. 393, 396-397 (1998); *Commonwealth v. Glass*, 401 Mass. 799, 808-809 (1988).

**Proposition Three:
Reasonable Steps to Avoid Combat**

Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt 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. In determining whether the defendant used all reasonable means to avoid physical combat before resorting to the use of deadly force depends on all 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.

SUPPLEMENTAL INSTRUCTIONS

In self-defense cases not under the “castle law,” G.L. c. 278, § 8A.

A person must retreat unless they reasonably believe that they cannot safely do so. A person need not place themselves in danger or use every means of escape short of death before resorting to self-defense.

Commonwealth v. Benoit, 452 Mass. 212, 226-227 (2008), quoting *Commonwealth v. Pike*, 428 Mass. 393, 398 (1998) (“A self-defense instruction is not required unless there is some evidence that the defendant availed himself of all means, proper and reasonable in the circumstances, of retreating from the conflict before resorting to the use of deadly force. ‘This rule does not impose an absolute duty to retreat regardless of personal safety considerations; an individual need not place himself in danger nor use every means of escape short of death before resorting to self-defense He must, however, use every reasonable avenue of escape available to him.’”); *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”).

In self-defense cases under the “castle law,” G.L. c. 278, § 8A.

A lawful resident of a dwelling, such as a house or apartment, 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 them or another person lawfully in the dwelling, and also reasonably believes that force is necessary to protect themselves or the other person lawfully in the dwelling.

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 occurred in driveway outside of dwelling); *Commonwealth v. McKinnon*, 446 Mass. 263, 267-268 (2006) (instruction not warranted where fatal encounter occurred on stairs and porch outside dwelling).

See Note 11 to Instruction 9.260A for additional detail on self-defense cases under the “castle law.”

If there is evidence that the alleged victim was injury-prone.

If a person has exhausted all proper means to avoid physical combat, they may use appropriate deadly force in self-defense if they reasonably believe that they are in immediate danger of serious bodily injury or death, even against someone who is known to be susceptible to injury(, such as a person under the influence of alcohol or drugs).

Commonwealth v. Bastarache, 382 Mass. 86 (1980).

**Proposition Four:
Proportional Use of Force**

(Another) (A final) way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that the defendant used more force than was reasonably necessary under all the circumstances. How much force is necessary may vary with the situation. The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions. 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, whether any weapons were used, when, and by whom, the characteristics of any weapons used, the availability of room to maneuver, the manner in which the force was used, the scope of the threat presented, whether the defendant had to decide how to respond quickly, or any other evidence you deem relevant to the reasonableness of the person's conduct under the circumstances.

<p style="text-align: center;">Proposition Five: Evidence of Defendant as First Aggressor</p>
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[Where there is evidence that the defendant was the first aggressor.]

A final way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt both: one, that the defendant was the first to use or threaten to use deadly force; and two, that the defendant did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to withdraw and end the confrontation without any (use of) (additional use of) force. 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.

Commonwealth v. Pring-Wilson, 448 Mass. 718, 733 (2007), quoting *Commonwealth v. Maguire*, 375 Mass. 768, 772 (1978) (“right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire”); see also *Commonwealth v. Harris*, 464 Mass. 425, 433-436 & nn.11, 12 (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”).

SUPPLEMENTAL INSTRUCTIONS

If there is evidence that the defendant used non-deadly force first and the victim escalated to using deadly force.

If the defendant was the first to use non-deadly force but the alleged victim was the first to use deadly force, (such as by escalating a simple fistfight into a knife fight,) the defendant may claim self-defense where they responded to the escalation with deadly force.

Commonwealth v. Chambers, 465 Mass. 520, 528 (2013) (“[I]n the context of homicide, a defendant may lose the right to claim self-defense only if he was the first to use or threaten deadly force.”); see *Commonwealth v. Harris*, 464 Mass. 425, 436 n.12 (2013) (“[W]hen a first aggressor or initial aggressor instruction is given in the context of self-defense we advise that the judge make clear that conduct involving only the use of nonthreatening words will not be sufficient to qualify a defendant as a first aggressor.”).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim's prior acts of violence pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005).

For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the past violent conduct of the alleged victim (or by a third party acting with the alleged victim), whether known or unknown to the defendant.

You may not consider that evidence for any other purpose.

“[W]here the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant” Mass. G. Evid. § 404(a)(2)(B) (2023); *accord Commonwealth v. Pring-Wilson*, 448 Mass. 718, 737 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 664 (2005). The term “first aggressor” includes “both the person who started the fight and the person who first escalated a nondeadly fight into a deadly one by either the threat or use of deadly force.” *Commonwealth v. Souza*, 492 Mass. 615, 622 (2023).

“The admission of *Adjutant* evidence is subject to the careful discretion of the trial judge, who ‘must carefully examine the particular circumstances of the case, and weigh the probative value of such evidence against its prejudicial effect.’” *Souza*, 492 Mass. at 626, quoting *Commonwealth v. Morales*, 464 Mass. 302, 312 n.16 (2013). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim’s reputation for violence. *Adjutant*, 443 Mass. at 665.

Adjutant evidence focuses on the victim’s prior violent behavior. *Souza*, 492 Mass. at 625. Once a defendant satisfies the requirement to show that proposed *Adjutant* evidence involves an instance “where the victim initiated the violence . . . the entirety of the violent event or incident initiated by the victim is potentially admissible.” *Souza*, 429 Mass. at 625-626. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18 (2008).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim's prior threats of violence against the defendant, regardless of whether the defendant was aware of the threats.

In considering who was being attacked by whom, you may take into account any threats of violence made by

(the alleged victim) against the defendant and whether
(the alleged victim) was trying to carry out those threats during
this incident.

“Evidence of the victim's threats of violence against the defendant, even if unknown by a defendant asserting self-defense, is admissible as tending to show that the victim was attempting to carry out his threat and that the defendant was in danger.” *Commonwealth v. Fontes*, 396 Mass. 733, 735 (1986), citing *Commonwealth v. Rubin*, 318 Mass. 587, 588-589 (1945).

I will now briefly summarize the instruction on self-defense that I have just given you. Since this case raises a question as to whether the defendant lawfully used deadly force to defend against an attack, the Commonwealth has the additional burden of proving that the defendant did not act in self-defense by proving at least one of the following things beyond a reasonable doubt:

One, that the defendant did not actually believe that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.

Two, that a reasonable person in the same circumstances as the defendant would not reasonably have believed that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.

Three, 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. (or)

Four, that the defendant used more force than was reasonably necessary in the circumstances. (or)

[Where there is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use deadly force and did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

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

SELF-DEFENSE: LEVEL OF FORCE IS A MATTER OF FACT FOR THE JURY

The force that a person may use in self-defense depends on whether the person is defending themselves against deadly force or non-deadly force. Deadly force is force that is intended to or likely to cause death or serious bodily harm. Non-deadly force, in contrast, is force that is not intended to or not likely to cause death or serious bodily harm.

If the Commonwealth has proved beyond a reasonable doubt all the elements of the offense, then you must determine whether the degree of any force used by the defendant was deadly or non-deadly. If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant used deadly force, then you must follow my instructions pertaining to the Commonwealth's burden of proof on deadly force. If you have a reasonable doubt that the defendant used deadly force but are convinced that the defendant used some force, then you must follow my instructions pertaining to the Commonwealth's burden of proof on non-deadly force.

I will first instruct you on the Commonwealth's burden of proof as to deadly force. I will then instruct you on the Commonwealth's burden of proof as to non-deadly force.

DEADLY FORCE IN SELF-DEFENSE

If you determine beyond a reasonable doubt that the defendant used deadly force, then the Commonwealth has the burden to prove beyond a reasonable doubt that the defendant did not act in lawful self-defense when they used deadly force. Deadly force is force that is intended to or likely to cause death or serious bodily injury.

To prove that the defendant did not act in self-defense when using deadly force, the Commonwealth must prove at least one of the following things beyond a reasonable doubt:

***One*, that the defendant did not actually believe that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.**

***Two*, that a reasonable person in the same circumstances as the defendant would not reasonably have believed that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.**

Three, 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. (or)

Four, that the defendant used more force than was reasonably necessary in the circumstances. (or)

[Where there is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use deadly force and did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

I will now explain each of these ways in which the Commonwealth can disprove that the defendant acted in self-defense in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the defendant did not act in self-defense by proving at least one of these things beyond a reasonable doubt.

<p style="text-align: center;">Deadly Force Propositions One & Two: Actual and Reasonable Belief of Immediate Danger of Death or Serious Bodily Harm</p>

One way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt the defendant did not actually believe that they were in immediate

danger of death or serious bodily harm from which they could save themselves only by using deadly force. Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that a reasonable person in the same circumstances as the defendant would not reasonably have believed that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.

A person cannot lawfully act in self-defense unless they are attacked or are immediately about to be attacked, and there must be an overt act—words, a gesture, or some other action—that could give rise to an actual and reasonable belief of immediate danger of death or serious bodily harm. The Commonwealth may prove that there was not an actual or reasonable belief of immediate danger of death or serious bodily harm by proving beyond a reasonable doubt that there was no overt act that gave rise to those beliefs.

The right to self-defense ends when the necessity ends. This means that a person does not act in lawful self-defense when they use force to pursue their attacker to retaliate, or out of anger after an attacker has been neutralized or disarmed, or to prevent a future

attack. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and instead used force against their attacker for revenge or to ward off any possibility of attack in the indefinite future.

In considering whether the defendant actually believed that they were in immediate danger of death or serious bodily harm, and the reasonableness of the belief that they were in that danger, you may consider all the evidence relating to the defendant's state of mind at the time.

SUPPLEMENTAL INSTRUCTIONS

If there is evidence of the alleged victim's prior threats or violence against the defendant.

To determine the defendant's state of mind, you may consider any threats or acts of violence committed by (the alleged victim), but only if the defendant knew of those threats or acts of violence.

Commonwealth v. Pidge, 400 Mass. 350, 353 (1987); Commonwealth v. Edmonds, 365 Mass. 496, 499-501 (1974). While these were homicide cases, the principle is applicable to any self-defense claim. Admission and use of evidence that the defendant has been the victim of abuse and of expert testimony regarding the consequences of abuse is governed by G.L. c. 233, § 23F.

If there is evidence of the alleged victim's reputation for violence or quarreling.

To determine the defendant's state of mind, you may consider whether (the alleged victim) had a reputation for violence or quarreling. However, you may only consider it if the defendant knew about that reputation.

"When self-defense is at issue, 'evidence of the "character of [the victim] as a powerful, dangerous, quarrelsome or violent person, if known to the defendant, may be admitted" as evidence of the defendant's "apprehension of his own safety, and the reasonableness of that apprehension."'” *Commonwealth v. Williams*, 450 Mass. 879, 891-892 (2008), quoting *Commonwealth v. Edmonds*, 365 Mass. 496, 501 (1974); see also *Commonwealth v. Clemente*, 452 Mass. 295, 308 (2008).

Reputation evidence is admissible only if known to the defendant, in contrast to specific acts of violence, which are admissible regardless of whether known to the defendant, pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649, 664-665 (2005).

In a criminal proceeding, in support of a claim of self-defense, "a defendant may offer evidence known to the defendant prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the defendant." Mass. G. Evid. § 404(a)(2)(C) (2023); *Commonwealth v. Sok*, 439 Mass. 428, 434 (2003). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 432 (2003); accord *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Adjutant*, 443 Mass. at 665.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness. *Adjutant*, 443 Mass. at 666 n.19, citing *Commonwealth v. Lapointe*, 402 Mass. 321, 325 (1988).

If there is evidence that the defendant was mentally impaired or under the influence of alcohol or drugs at time of offense.

There has been evidence of the defendant's mental condition at the time of the offense, including (evidence of mental impairment) (or) (evidence of the effect on the defendant of their consumption of alcohol or drugs).

As I have told you, among the ways that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt either that the defendant did not actually have a concern for their immediate personal safety, or that a reasonable person in the defendant's circumstances would not have had that concern.

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. So, in determining whether the defendant actually had a concern for their immediate personal safety, you may consider any evidence of the defendant's mental condition. However, in determining whether a reasonable person in the defendant's position would have had such a concern, you may not consider evidence of the defendant's mental condition.

See Note 7 to Instruction 9.260A for further detail on the use of evidence of the defendant's mental condition in a self-defense case.

If there is evidence that the defendant had a mistaken belief about being in immediate danger.

A person with a mistaken belief about being in immediate danger of serious bodily harm or death may use deadly force to defend themselves, if their mistaken belief was reasonable based on all the circumstances.

Commonwealth v. Pike, 428 Mass. 393, 396-397 (1998); Commonwealth v. Glass, 401 Mass. 799, 808-809 (1988).

**Deadly Force Proposition Three:
Reasonable Steps to Avoid Combat**

Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt 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. In determining whether the defendant used all reasonable means to avoid physical combat before resorting to the use of deadly force depends on all 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.

SUPPLEMENTAL INSTRUCTIONS

In self-defense cases not under the “castle law,” G.L. c. 278, § 8A.

A person must retreat unless they reasonably believe that they cannot safely do so. A person need not place themselves in danger or use every means of escape short of death before resorting to self-defense.

Commonwealth v. Benoit, 452 Mass. 212, 226-227 (2008), quoting *Commonwealth v. Pike*, 428 Mass. 393, 398 (1998) (“A self-defense instruction is not required unless there is some evidence that the defendant availed himself of all means, proper and reasonable in the circumstances, of retreating from the conflict before resorting to the use of deadly force. ‘This rule does not impose an absolute duty to retreat regardless of personal safety considerations; an individual need not place himself in danger nor use every means of escape short of death before resorting to self-defense He must, however, use every reasonable avenue of escape available to him.”); *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”).

In self-defense cases under the “castle law,” G.L. c. 278, § 8A.

A lawful resident of a dwelling, such as a house or apartment, 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 them or another person lawfully in the dwelling, and also reasonably believes that force is necessary to protect themselves or the other person lawfully in the dwelling.

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 occurred in driveway outside of dwelling); *Commonwealth v. McKinnon*, 446 Mass. 263, 267-268 (2006) (instruction not warranted where fatal encounter occurred on stairs and porch outside dwelling).

See Note 11 to Instruction 9.260A for additional detail on self-defense cases under the “castle law.”

If there is evidence that the alleged victim was injury-prone.

If a person has exhausted all proper means to avoid physical combat, they may use appropriate deadly force in self-defense if they reasonably believe that they are in immediate danger of serious bodily injury or death, even against someone who is known to be susceptible to injury(, such as a person under the influence of alcohol or drugs).

Commonwealth v. Bastarache, 382 Mass. 86 (1980).

**Deadly Force Proposition Four:
Proportional Use of Force**

(Another) (A final) way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that the defendant used more force than was reasonably necessary under all the circumstances. How much force is

necessary may vary with the situation. The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions. 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, whether any weapons were used, when, and by whom, the characteristics of any weapons used, the availability of room to maneuver, the manner in which the force was used, the scope of the threat presented, whether the defendant had to decide how to respond quickly, or any other evidence you deem relevant to the reasonableness of the person's conduct under the circumstances.

**Deadly Force Proposition Five:
Evidence of Defendant as First Aggressor**

[Where there is evidence that the defendant was the first aggressor.]

A final way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt both: one, that the defendant was the first to use or threaten to use deadly force; and two, that the defendant did not withdraw in good faith from the conflict and clearly communicate by

words or conduct their intention to withdraw and end the confrontation without any (use of) (additional use of) force. 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.

Commonwealth v. Pring-Wilson, 448 Mass. 718, 733 (2007), quoting *Commonwealth v. Maguire*, 375 Mass. 768, 772 (1978) (“right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire”); see also *Commonwealth v. Harris*, 464 Mass. 425, 433-436 & nn.11, 12 (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”).

SUPPLEMENTAL INSTRUCTIONS

If there is evidence that the defendant used non-deadly force first and the victim escalated to using deadly force.

If the defendant was the first to use non-deadly force but the alleged victim was the first to use deadly force, (such as by escalating a simple fistfight into a knife fight,) the defendant may claim self-defense where they responded to the escalation with deadly force.

Commonwealth v. Chambers, 465 Mass. 520, 528 (2013) (“[I]n the context of homicide, a defendant may lose the right to claim self-defense only if he was the first to use or threaten deadly force.”); see *Commonwealth v. Harris*, 464 Mass. 425, 436 n.12 (2013) (“[W]hen a first aggressor or initial aggressor instruction is given in the context of self-defense we advise that the judge make clear

that conduct involving only the use of nonthreatening words will not be sufficient to qualify a defendant as a first aggressor.”).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim’s prior acts of violence pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005).

For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the past violent conduct of the alleged victim (or by a third party acting with the alleged victim), whether known or unknown to the defendant.

You may not consider that evidence for any other purpose.

“[W]here the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant” Mass. G. Evid. § 404(a)(2)(B) (2023); *accord Commonwealth v. Pring-Wilson*, 448 Mass. 718, 737 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 664 (2005). The term “first aggressor” includes “both the person who started the fight and the person who first escalated a nondeadly fight into a deadly one by either the threat or use of deadly force.” *Commonwealth v. Souza*, 492 Mass. 615, 622 (2023).

“The admission of *Adjutant* evidence is subject to the careful discretion of the trial judge, who ‘must carefully examine the particular circumstances of the case, and weigh the probative value of such evidence against its prejudicial effect.’” *Souza*, 492 Mass. at 626, quoting *Commonwealth v. Morales*, 464 Mass. 302, 312 n.16 (2013). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim’s reputation for violence. *Adjutant*, 443 Mass. at 665.

Adjutant evidence focuses on the victim’s prior violent behavior. *Souza*, 492 Mass. at 625. Once a defendant satisfies the requirement to show that proposed *Adjutant* evidence involves an instance “where the victim initiated the violence . . . the entirety of the violent event or incident initiated by the victim is potentially admissible.” *Souza*, 429 Mass. at 625-626. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18 (2008).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim’s prior threats of violence against the defendant, regardless of whether the defendant was aware of the threats.

In considering who was being attacked by whom, you may take into account any threats of violence made by

(the alleged victim) **against the defendant and whether**
(the alleged victim) **was trying to carry out those threats during**
this incident.

“Evidence of the victim's threats of violence against the defendant, even if unknown by a defendant asserting self-defense, is admissible as tending to show that the victim was attempting to carry out his threat and that the defendant was in danger.” *Commonwealth v. Fontes*, 396 Mass. 733, 735 (1986) (citing *Commonwealth v. Rubin*, 318 Mass. 587, 588-589 (1945)).

To briefly summarize, if you determine beyond a reasonable doubt that the defendant used deadly force, then the Commonwealth has the additional burden to prove beyond a reasonable doubt that the defendant did not act in self-defense when they used deadly force by proving at least one of the following things beyond a reasonable doubt:

***One*, that the defendant did not actually believe that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.**

***Two*, that a reasonable person in the same circumstances as the defendant would not reasonably have believed that they were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force.**

Three, 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. (or)

Four, that the defendant used more force than was reasonably necessary in the circumstances. (or)

[Where there is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use deadly force and did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

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

NON-DEADLY FORCE IN SELF-DEFENSE

If you have a reasonable doubt whether the defendant used deadly force, but are convinced that the defendant used some force,

then the Commonwealth has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense when using non-deadly force. Non-deadly force is force that is not intended to or not likely to cause death or serious bodily injury.

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

***One*, that the defendant did not actually have a concern for their immediate personal safety.**

***Two*, that a reasonable person in the same circumstances as the defendant would not have had a concern for their immediate personal safety.**

***Three*, that the defendant did not take all reasonable steps to avoid physical combat before resorting to force. (or)**

***Four*, that the defendant used more force to defend themselves than was reasonably necessary in the circumstances. (or)**

[Where there is evidence that the defendant was the first aggressor.]

***(Five*, that the defendant was the first to use or threaten to use force and did not withdraw from the conflict in good faith and clearly**

communicate by words or conduct their intention to end the confrontation without any further use of force.)

I will now explain each of these ways in which the Commonwealth can disprove that the defendant acted in self-defense in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the defendant did not act in self-defense by proving at least one of these things beyond a reasonable doubt.

<p style="text-align: center;">Non-Deadly Force Propositions One & Two: Actual and Reasonable Concern for Immediate Personal Safety</p>
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One way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt the defendant did not actually have a concern for their immediate personal safety. Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that a reasonable person in the same circumstances as the defendant would not have had a reasonable concern for their immediate personal safety.

A person cannot act in lawful self-defense unless they are attacked or are immediately about to be attacked, and there must be an overt act—words, a gesture, or some other action—that could give

rise to an actual and reasonable concern for immediate personal safety. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that there was no overt act that gave rise to those concerns.

The right to self-defense ends when the necessity ends. This means that a person does not act in lawful self-defense when they use force to pursue their attacker to retaliate, or out of anger after an attacker has been neutralized or disarmed, or to prevent a future attack. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and instead used force against their attacker for revenge or to ward off any possibility of attack in the indefinite future.

In considering whether the defendant had a concern for their immediate personal safety and the reasonableness of that concern, you may consider all the evidence relating to the defendant's state of mind at the time.

SUPPLEMENTAL INSTRUCTIONS

If there is evidence of alleged victim's prior threats or violence against defendant.

To determine the defendant's state of mind, you may consider any threats or acts of violence committed by (the alleged victim), but only if the defendant knew of those threats or acts of violence.

Commonwealth v. Pidge, 400 Mass. 350, 353 (1987); *Commonwealth v. Edmonds*, 365 Mass. 496, 499-501 (1974). While these were homicide cases, the principle is applicable to any self-defense claim. Admission and use of evidence that the defendant has been the victim of abuse and of expert testimony regarding the consequences of abuse is governed by G.L. c. 233, § 23F.

If there is evidence of alleged victim's reputation for violence or quarreling.

To determine the defendant's state of mind, you may consider whether (the alleged victim) had a reputation for violence or quarreling. However, you may only consider it if the defendant knew about that reputation.

"When self-defense is at issue, 'evidence of the "character of [the victim] as a powerful, dangerous, quarrelsome or violent person, if known to the defendant, may be admitted" as evidence of the defendant's "apprehension of his own safety, and the reasonableness of that apprehension.'" *Commonwealth v. Williams*, 450 Mass. 879, 891-892 (2008), quoting *Commonwealth v. Edmonds*, 365 Mass. 496, 501 (1974); see also *Commonwealth v. Clemente*, 452 Mass. 295, 308 (2008).

Reputation evidence is admissible only if known to the defendant, in contrast to specific acts of violence, which are admissible regardless of whether known to the defendant, pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649, 664-665 (2005).

In a criminal proceeding, in support of a claim of self-defense, "a defendant may offer evidence known to the defendant prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the defendant." Mass. G. Evid. § 404(a)(2)(C) (2023); *Commonwealth v. Sok*, 439 Mass. 428, 434 (2003). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 432 (2003); accord *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Adjutant*, 443 Mass. at 665.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness. *Adjutant*, 443 Mass. at 666 n.19, citing *Commonwealth v. Lapointe*, 402 Mass. 321, 325 (1988).

If there is evidence that the defendant was mentally impaired or under the influence of alcohol or drugs at time of offense.

There has been evidence of the defendant's mental condition at the time of the offense, including (evidence of mental impairment) (or) (evidence of the effect on the defendant of their consumption of alcohol or drugs).

As I have told you, among the ways that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt either that the defendant did not actually have a concern for their immediate personal safety, or that a reasonable person in the defendant's circumstances would not have had that concern.

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. So, in determining whether the defendant actually had a concern for their immediate personal safety, you may consider any evidence of the defendant's mental condition.

However, in determining whether a reasonable person in the defendant's position would have had such a concern, you may not consider evidence of the defendant's mental condition.

See Note 7 to Instruction 9.260A for further detail on the use of evidence of the defendant's mental condition in a self-defense case.

If there is evidence defendant had a mistaken belief about their concern for personal safety.

A person with a mistaken belief about having a concern for immediate personal safety may use force to defend themselves, if their mistaken belief was reasonable based on all the circumstances.

Commonwealth v. Pike, 428 Mass. 393, 396-397 (1998); *Commonwealth v. Glass*, 401 Mass. 799, 808-809 (1988).

Non-Deadly Force Proposition Three: Reasonable Steps to Avoid Combat

Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt 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 force.

A person may use physical force in self-defense only if they could not get out of the situation in some other way that was available

and reasonable at the time. The Commonwealth may prove that the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.

In determining whether the defendant exhausted all reasonable alternatives to using force, you may consider any evidence about where the incident took place, whether the defendant might have been able to escape by getting away or otherwise getting to safety or by summoning help if that could have been done in time, or by holding their attacker at bay if the means were available, or by some other method. You may consider whether the use of force seemed to be the only means of protection in the circumstances. You may consider that a person who has a reasonable concern for their immediate personal safety may have to decide what to do quickly and while under emotional strain.

SUPPLEMENTAL INSTRUCTION

If there is evidence that victim was injury-prone.

If a person has exhausted all proper means to avoid physical combat, they may use appropriate force in self-defense if they

reasonably believe that their personal safety is in danger, even against someone who is known to be susceptible to injury, such as a person under the influence of alcohol or drugs).

Commonwealth v. Bastarache, 382 Mass. 86, 104-105 (1980).

**Non-Deadly Force Proposition Four:
Proportional Use of Force**

(Another) (A final) way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that the defendant used more force than was reasonably necessary under all the circumstances. How much force is necessary may vary with the situation. The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions. 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, (whether any weapons were used, when, and by whom,) (the characteristics of any weapons used), the availability of room to maneuver, the manner in which the force was used, the scope of the threat presented, whether the defendant had to decide how to

respond quickly, or any other evidence you deem relevant to the reasonableness of the person's conduct under the circumstances.

**Non-Deadly Force Proposition Five:
Evidence of Defendant as First Aggressor**

[Where there is evidence that the defendant was the first aggressor.]

The final way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt both: one, that the defendant was the first to use or threaten to use force; and two, that the defendant did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to withdraw and end the confrontation without any (further use of) force. Generally, the first aggressor has no right to use self-defense unless they withdraw from the conflict in good faith and clearly communicate their intention to abandon the fight.

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.’”); see *Commonwealth v. Barbosa*, 463 Mass. 116, 136 (2012); *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 733 (2007); see also *Commonwealth v. Harris*, 464 Mass. 425, 433-436 & nn.11, 12 (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”).

SUPPLEMENTAL INSTRUCTIONS

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim's prior acts of violence pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005).

For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the past violent conduct of the alleged victim (or by a third party acting with the alleged victim), whether known or unknown to the defendant.

You may not consider that evidence for any other purpose.

“[W]here the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant” Mass. G. Evid. § 404(a)(2)(B) (2023); *accord Commonwealth v. Pring-Wilson*, 448 Mass. 718, 737 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 664 (2005). The term “first aggressor” includes “both the person who started the fight and the person who first escalated a nondeadly fight into a deadly one by either the threat or use of deadly force.” *Commonwealth v. Souza*, 492 Mass. 615, 622 (2023).

“The admission of *Adjutant* evidence is subject to the careful discretion of the trial judge, who ‘must carefully examine the particular circumstances of the case, and weigh the probative value of such evidence against its prejudicial effect.’” *Souza*, 492 Mass. at 626, quoting *Commonwealth v. Morales*, 464 Mass. 302, 312 n.16 (2013). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim’s reputation for violence. *Adjutant*, 443 Mass. at 665.

Adjutant evidence focuses on the victim’s prior violent behavior. *Souza*, 492 Mass. at 625. Once a defendant satisfies the requirement to show that proposed *Adjutant* evidence involves an instance “where the victim initiated the violence . . . the entirety of the violent event or incident initiated by the victim is potentially admissible.” *Souza*, 429 Mass. at 625-626. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18 (2008).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim's prior threats of violence against the defendant, regardless of whether the defendant was aware of the threats.

In considering who was being attacked by whom, you may take into account whether any threats of violence were made by

(the alleged victim) **against the defendant and whether**
(the alleged victim) **was trying to carry out those threats during**
this incident.

“Evidence of the victim's threats of violence against the defendant, even if unknown by a defendant asserting self-defense, is admissible as tending to show that the victim was attempting to carry out his threat and that the defendant was in danger.” *Commonwealth v. Fontes*, 396 Mass. 733, 735 (1986), citing *Commonwealth v. Rubin*, 318 Mass. 587, 588-589 (1945).

To briefly summarize, if you have a reasonable doubt whether the defendant used deadly force, but are convinced that the defendant used some force, the Commonwealth has the additional burden to prove that the defendant did not act in self-defense by proving at least one of the following things beyond a reasonable doubt:

***One*, that the defendant did not actually have a concern for their immediate personal safety.**

***Two*, that a reasonable person in the same circumstances as the defendant would not have had a concern for their immediate personal safety.**

***Three*, that the defendant did not take all reasonable steps to avoid physical combat before resorting to force. (or)**

***Four*, that the defendant used more force to defend themselves than was reasonably necessary in the circumstances. (or)**

[Where is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use force and did not withdraw from the conflict in good faith and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

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

I will now summarize the entire self-defense instruction that I have just given you:

- If the Commonwealth has proved beyond a reasonable doubt all the elements of the offense, then you must determine whether the degree of any force used by the defendant was non-deadly or deadly.**
- If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant used deadly force, then**

you must follow my instructions pertaining to the Commonwealth's burden of proof on deadly force.

- **If you have a reasonable doubt that the defendant used deadly force but are convinced that the defendant used some force, then you must follow my instructions pertaining to the Commonwealth's burden of proof on non-deadly force.**