OF MASSACHUSETTS

APPEALS COURT

BRISTOL, SS. **NO. 2021-P-1123**

COMMONWEALTH,
Appellee

V.

JEFFREY A. SOUZA,
Defendant-Appellant

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT

BRIEF
OF THE DEFENDANT-APPELLANT

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I. ISSUES PRESENTED

1. Whether the trial court erred by limiting evidence of the decedent's prior violent incidents to the initiation of the incidents where *Adjutant* and *Chambers* allow evidence of the entire incident, not just its initiation?

2. Whether the *Adjutant* jury instructions were erroneous because they: 1) did not define the two meanings of the term "first aggressor"; 2) did not state that the *Adjutant* evidence could be used to determine the identity of *both* types of first aggressor; and, (3) limited use of the evidence to determining who attacked first, rather than for the general purpose of determining if the Commonwealth proved that the defendant did not act in self-defense?

3. Whether trial counsel was ineffective by failing to present other easily obtainable *Adjutant* evidence, reputation evidence, and prior acts of violence evidence known to the defendant?

4. Whether an important misstatement of the evidence in the prosecutor's closing argument created a substantial risk of a miscarriage of justice?

II. STATEMENT OF THE CASE

On March 5, 2015, Jeffrey Souza was charged in indictment numbers 1573CR0049-1 through 4 with murder (Count One), assault and battery with a firearm (Count Two), unlawful possession of a firearm (Count Three), and unlawful possession of a loaded firearm (Count Four). Record Appendix pages 18-25 (hereinafter "RA[page]").

On September 27, 2016, following a jury trial (Garsh., J., presiding), Souza was convicted of murder in the second degree and the other charges. RA11-12; Trial Transcript Volume 11, page 113 (hereinafter "Tr[volume]/[page]").

Souza was sentenced to life imprisonment with the possibility of parole after 15 years for Count One, eight to ten years concurrent for Count Two, three years concurrent for Count Three, and six months from and after Count Three and concurrent with Count One for Count Four. RA13;Tr12/30-32.

A timely notice of appeal was filed. RA129. On January 9, 2018, the case was entered in this Court. RA14.

On March 1, 2019, this Court stayed the direct appeal and granted Souza leave to file a motion for new trial (hereinafter "MNT"), which he filed on December 26, 2019. RA15. Because Judge Garsh had retired, the MNT was assigned to Judge Perrino, who denied it without a hearing on August 4, 2021. Addendum page 64 (hereinafter "AD[page]"). On September 3, 2021, Souza filed a motion for reconsideration which was denied on October 18, 2021. RA16. A timely notice of appeal was filed. RA130. On December 16, 2021, this Court consolidated Souza's direct appeal with his appeal of the denial of the MNT and vacated the stay of appellate proceedings. RA17.

III. STATEMENT OF THE FACTS

On January 1, 2014, two groups of young people converged at Maplewood Park in Fall River. One group was associated with Jeffrey Souza, the other with Kyle Brady. Their meeting resulted in the shooting death of Brady, and Souza's conviction for second degree murder for Brady's death. Each witness's trial testimony concerning the events at the park is unique, as is the consistency of their accounts in their various pre-trial statements. Thus, each witness's trial testimony concerning these events is presented separately, along with their pre-trial statements that differed materially from their trial testimony. The other evidence is organized chronologically.

A. Trial Evidence

1. Brady's Prior Conduct

Souza presented evidence of Brady's prior conduct pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649 (2005).

At 1:15am on April 10, 2010 [sic],[1] Fall River Police officer Paul Carey was working a security detail at Sky Lounge when he saw a man get pushed out of the elevator into the wall. Brady, another man, and some bouncers were fighting in the elevator. Carey removed the man from the elevator; he was bleeding above his eye. Brady continued to fight the bouncers in the elevator. Carey assisted the bouncers and Brady swung and kicked at him. He was able to wrestle Brady to

[1] The transcript lists the year as 2010, but the police and district court documents list it as 2011. RA31-32,36-37,39.

the ground while he continued kicking. The bouncers held his legs while Carey handcuffed and arrested him. TR9/31-34.

At about 1:40am on May 8, 2010, Fall River police officer Bell responded to a fight at Playoff's Pub. He singled out Brady and told him to stop fighting. He did not, so Bell grabbed him and Brady kicked him. TR9/39-42.

At 2:30am on October 3, 2010, Fall River police officer Passoa was working a detail at Al Mac's Diner when Brady became involved in an altercation. Passoa took Brady by the arm and attempted to eject him. Brady ripped his arm away, shoved Passoa, and began fighting him. Passoa tried to handcuff Brady but he grabbed Passoa's shirt. He was able to knock Brady to the ground, but he pulled Passoa down on top of him and attempted to bite him. TR9/44-47.

2. Souza's Prior Conduct

The Commonwealth presented evidence of Souza's prior conduct pursuant to *Commonwealth v. Morales*, 464 Mass. 302 (2013). TR10/90.

On July 6, 2011, Souza pushed his girlfriend Courtney Morrison and took her keys. TR9/58-59;10/91-93.

On January 11, 2012, Souza fought Larry Morrison, Courtney's father. He punched Souza first, then Souza punched Larry. TR10/93-95.

3. Brady and Souza's Relationship

Souza testified to Brady's reputation as a fighter, Brady liked to fight and he fought often. TR9/61-63. They came into conflict when

Brady started dating Morrison, Souza's former girlfriend, in July 2014. TR9/58-59. From August to December, 2014, Brady threatened Souza through phone calls, hundreds of texts, and social media. For example, Brady told him he wanted to "bust [his] head and break [his] neck." He challenged Souza to fight at Brady's friend's house, but Souza declined because he was scared of Brady. TR9/68-69,74-78,109.

4. Christmas Eve 2014

Souza had a gun at Jacob Quintal's party on Christmas Eve 2014. Quintal took the gun and returned it after the party. The gun resembled the one found at the shooting scene. Quintal had known Souza for twelve years and had never seen him with a gun before. TR4/104-107.

5. New Year's Eve 2014

a. Before the Shooting

On December 31, 2014, Brady, his girlfriend Jenna Leverault, Brady's sister Brittany Brady, her fiancé Christopher Sylvia,[2] and other friends were celebrating the New Year at Venus de Milo, a hall/bar in Swansea. TR2/62;TR3/6-11. Around 1:00a.m., Sylvia's cousin Kyle Emond called him twice. Sylvia told Brittany who was calling and she told him not to tell Brady. He handed the phone to Brady instead. Brady became angry, finished the call, and told Sylvia

[2] Brady was Sylvia's best friend, he saw Brady "pretty much every day." TR4/12-13.

he was going to Maplewood to fight Souza. Brittany said, "You're not going alone." TR3/14-15,41-42,45-47;TR4/20-24.

Brady, Sylvia, and Brittany left for Maplewood in her car. Brady had driven his car to the bar but left it behind with his girlfriend and the others. TR3/16-17,47-48. As they were driving "in pursuit" approaching Maplewood, Sylvia received another call from Emond. TR3/48-49;TR4/26-27.

Souza and his friends Randy Bruce, Brandon Paryla, Richard Sylvia,[3] Duarte Botelho, Jared Hutchins, and Jacob Quintal celebrated the New Year at Scotty's Pub in Fall River.[4] TR9/117. At one point, Souza noticed Emond staring at them while texting on his phone. Souza was concerned about this, so he approached Emond to make sure everything was okay. Souza had met Emond before, so he asked if Emond remembered him. Emond said yes, and asked how his kids were doing. Souza told him about what he was going through with Brady. He asked Emond to call Brady to try and make peace. Souza said that whenever he tried this Brady just threatened him. Emond agreed. He called Brady twice, to no avail. Emond said Brady wanted to fight, and if Souza refused to meet him at the park, he was coming to Scotty's. Souza decided to leave and told his friends that they were leaving. Bruce talked to Emond to try and defuse the situation. Bruce then told Souza that they were going to Maplewood to talk to Brady

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[3] No relation to Christopher Sylvia.

[4] Souza had consumed about eight beers and two shots of tequila since he started drinking that afternoon. TR9/119.

and try to make peace. TR9/119-125. So around 1:00am, Souza, Bruce, Paryla, Richard Sylvia, Botelho, and Hutchins drove in Bruce's Altima to Maplewood. TR5/64-67;TR6/106,111-112;TR8/51-53,85,115-116;TR9/126.

Emond's testimony differed.[5] He said that Souza asked him for Brady's phone number. Emond refused and also refused to call Brady. Emond remained nearby and overheard Souza say to a friend something like he "had something for Kyle Brady." TR4/122-124. Emond called Christopher Sylvia briefly. Shortly thereafter Sylvia called Emond back. During this call Souza said, "Tell him to meet me at Maplewood Park." Ten minutes later Emond received another call from Sylvia. Emond then left with his friend Kevin Leverault for Maplewood. Souza and his friends also left. TR4/125-131.

On cross-examination Emond denied speaking to Brady during any of his calls to Sylvia that night. TR5/22-23. However, Sylvia testified that Brady spoke to Emond on Sylvia's phone and Brittany confirmed that Sylvia handed his phone to Brady. TR4/20-23;TR3/14-15, 41-46. When a video of the outside of Scotty's was played, Emond agreed it showed him and Leverault waiting until Souza and his friends came out. Emond was asked if he waited for Souza to make sure that he would leave for Maplewood. He replied, "I don't

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[5] Emond had "a lot" to drink that night, about two beers, three vodka mixed drinks, four straight liquor shots, and a small glass of champagne. Because of all this alcohol, Emond was not "confident to drive." TR4/148;TR5/11-12.

really remember but from the video it looks like I am, yes." TR5/19-21.

b. Stipulations and "Shots Fired" Evidence

The parties stipulated that there were two shots fired at Maplewood about 1:14 a.m. on January 1, 2015, and that Paryla used a knife to inflict the sharp force injury to Brady's right back/flank. TR4/89-90.

The "Shots Fired" acoustic gunshot detection system indicated that the two shots were fired 16.5 seconds apart. TR3/147-148,165.

c. Each Witness's Account(s) of the Shooting

i. Brittany Brady

When Brady arrived at Maplewood with Brittany and Christopher Sylvia, he jumped from the car before it stopped and ran towards the intersection of Albert and Huard Streets. Brittany, prevented by child locks, could not follow until Sylvia parked and let her out. TR3/20-24. As he did so, Brittany heard a gunshot. She ran toward her brother and Souza, who were standing chest to chest in the intersection, wrestling. She heard another gunshot. Brady fell to the ground. Souza remained standing, his left arm outstretched, holding a gun pointed up into the air.[6] She screamed at him to not do this and think about his children, what the "F" was he doing? He pushed her away with enough force to make her take two steps back. TR3/24-26,29-31.

[6] Souza is right-handed. RA98 (affidavit of Jeffrey Souza).

Brittany turned to Brady and unsuccessfully attempted CPR. Paramedics arrived and took over. She waited in the ambulance until the police brought her to the station. TR3/32-35.

Counsel impeached Brittany with her contradictory statements to the police. She claimed she did not remember what she told the police in the ambulance immediately after the shooting. TR3/70-74. Officer Strong testified that Brittany told him that when she arrived she saw Souza fire a shot from a gun he was holding up in the air. She asked, "What the fuck are you doing?," jumped on his back, and put him in a choke hold. She then noticed Brady laying on the ground. She said she heard only one gunshot that night. TR7/87-93. Brittany also claimed no memory of what she told police at the station following the shooting. TR3/56-57,59-61. After viewing the interview videotape, she admitted she told them she did not hear any gunshots before she got out of the car, and she did not think Souza had a loaded gun so she, "just walked up to him," because she would not just walk up "to somebody with a loaded gun." TR3/64-67. Detective McDonald testified that Brittany told him that when she got out of her car she did not see Brady at first, she only saw Souza holding a gun with his hands up in the air. She did not see him fire the gun at any time and she did not hear any gunshots. She went up to him and put him in a bear hug and asked him what he was doing. She did not think the gun was loaded; otherwise she never would have charged up to him. At that time she did not think anyone had been shot, and she did not see

Brady. She thought he was fighting with someone else, but did not know where he was. TR8/40-43.

Counsel also cross-examined Brittany about her trial-testimony version of the shooting. She testified that as Brady and Souza stood chest to chest, wrestling, they were alone; no one was around them. She had no idea where Sylvia was, even though she testified that he had just let her out of the car. She also did not see Emond. TR3/79-80.

ii. Christopher Sylvia

As Sylvia was exiting his car at Maplewood he heard a gunshot. He let Brittany out and she ran toward the intersection of Albert and Huard streets. Sylvia went in the opposite direction toward the front of his car so he could put it between himself and the gunshot. Fifteen seconds later he heard another gunshot. He saw Brady lying in the intersection. Two people were standing over him, punching him. Sylvia ran up, tackled one of them to the ground, and choked him. To this point Sylvia had not seen Brittany, Souza, Emond, Leverault, or anyone else anywhere in the area. He then heard Brittany screaming that Brady was shot, so Sylvia stopped choking the person and he ran away. He saw Souza trying to get into a car that was pulling away, but the driver told him he could not. Sylvia saw some unknown people running away down Huard Street. He did not see where Souza went. TR4/32-41.

Brady lay on the ground in Brittany's arms. Sylvia had not seen Brittany since she exited the car. He saw a gun on the ground near

Brady. Souza had been very close to it, it seemed like he was trying to pick it up or "let it go on the ground." At this point Sylvia did not see anyone else except for Leverault. He did not see Emond until just before the police arrived. TR4/41-47.

On cross-examination, Sylvia said that he did not see where Brady went after he jumped from the car. He also did not see anybody else there. TR4/66-67. When Sylvia exited his car he did not watch to see where Brittany went even though he had just heard a gunshot. He did not look up from behind his car until he heard another gunshot. TR4/68-72. He then looked up the street and saw Brady laying on the ground, but he did not see Brittany at all. He did not see her until after he released the "kid" he tackled. He did not see Souza at all until he was refused entry from the car pulling away. TR4/80-81. This contradicted his testimony that he saw Souza "very close" to the gun and he was "trying to pick it up." TR4/44.

iii. Kyle Emond

After Emond arrived at Maplewood, Sylvia arrived. Shortly after this Emond exited his car and heard Brittany screaming, "Let me out." He also heard Brady and a gunshot. Emond went toward the sound of the gunshot. He saw Souza and Brady about ten feet apart, approaching each other. Brady said something like, "You're not going to shoot me, pussy." Emond then noticed some "guys" he did not recognize running from the woods near the ballfield. He approached and tried to cut them off. Emond heard Brittany screaming and his attention was

drawn to her and Sylvia, who were hovering over Brady, who was now face down on the ground. They were alone. Before that moment he had not seen Brittany and Sylvia. A gun was on the ground a few inches from Brady. Emond kicked it away. He did not see Sylvia or Brittany fighting with anyone; he also did not fight with anyone. Emond heard only one gunshot. TR4/134-143.

Emond altered his story on cross-examination; he testified that he actually first saw Brittany and Sylvia right after he heard the gun-shot—they were approaching Brady as he confronted Sousa, before Brady was lying on the ground. TR5/31-32.

Emond told the police that he may have kicked the gun out of Souza's hand, as it came out of his hand, or when it was on the ground—he was not sure which. In any case that would have placed him very close to Souza. Yet his trial testimony was that he did not even remember seeing Souza there at that time. TR5/36-41.

iv. Duarte Botelho

When Commonwealth witness Botelho[7] arrived at Maplewood with Souza and his other friends, he did not see any other people. Botelho went to the ballfield and urinated. He heard a gunshot and ran back to the street. Emond approached, challenged him to fight, and punched him in the eye. Botelho backed away. He noticed a group of people at the corner of Albert and Huard Streets. Emond kept coming

[7] Botelho drank "a lot" of whiskey that evening. TR6/118-119.

at him so Botelho turned around and walked home. Botelho heard only one gunshot that night. TR6/111-112,116-122.

On cross-examination, Botelho testified that when he ran back to the street he saw Brady and Souza "wrestling around"—Souza was lying on his back with Brady on his knees, straddling him. Brady was "getting the better" of Souza. He observed this briefly before he was distracted by Emond. TR6/136-140.

v. Randall Bruce

When Bruce arrived at Maplewood, his friends went to the ballfield to urinate while he talked to Emond. Bruce hoped to prevent the fight by talking to Aaron Pavao, Brady's best friend, but Bruce was unable to reach Pavao with the phone numbers Emond gave him. TR8/52-59,99-100.

Bruce returned to his car. Souza was in the passenger seat. Seconds later, Brady, a female and a male arrived. Brady ran to Bruce's car and opened the door. Souza jumped out and they both ran off. TR8/63-7189-90103-106.

Bruce then saw "a bunch of people fighting" at Albert and Huard Streets. Brady and the male and female that came with him began hitting Souza. They all ended up on the ground, "rolling around." Brady was on top of Souza, swinging at him, as were the other male and the female. Bruce described it as "a big fight," and a "pile of kids fighting." Bruce then heard (only one) gunshot and drove away. TR8/71-76,108-111.

Bruce agreed that when questioned at the grand jury if he saw, "anyone who was involved in that group that was fighting?," he answered, "no." TR8/97.

vi. Richard Sylvia

When Sylvia[8] arrived at Maplewood he went to urinate while Bruce talked to Emond about cancelling the fight. TR8/121-129. Sylvia heard two gunshots 20-30 seconds apart. He ran back to the street and saw several people running around and fighting. Souza was on the ground on his back. Brady was kneeling on the ground straddled over him, hitting him. He had something in his hand, and he and Souza were "kind of wrestling, arm wrestling. Like he was—[Souza] was moving his hand away from his face." Brittany had her right arm around Souza's neck, holding him from behind while screaming at him and punching and scratching his face with her left hand. Christopher Sylvia, Emond, and Paryla were standing nearby. TR8/129-135.

As Richard Sylvia tried to break up the fight, Emond challenged him to fight. Sylvia said, "I'm not here for that." Emond swung at Botelho instead. Souza was screaming for help. Sylvia managed to pull Brittany and then Brady off him. Brady screamed; he was bleeding heavily from a chest wound. Sylvia tried to stop the bleeding, but Brady pushed his hand away and started to crawl away. Sylvia stood and watched briefly, then walked away. TR8/135-142.

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[8] Silvia's name is misspelled as "Silva" in trial transcript volume 8 (FTR). That night he drank about eight beers and "a bunch" of shots. TR8/146-147.

On cross-examination, Sylvia agreed he told the police "they were side by side holding each other wrestling," he "didn't even know who was on the ground," and "[n]obody had anything in their hands," yet he testified that when they were on the ground wrestling he saw a gun in Brady's hands. TR9/11-12.

vii. Jeffrey Souza

Shortly after Souza arrived at Maplewood he decided to leave because Emond only gave Bruce some "wrong phone numbers." Bruce said he was staying to try and talk things out and asked Souza to take Bruce's gun with him. Souza reluctantly agreed, figuring he could dump it in Richard Sylvia's trash barrel at his nearby house. Souza stuck the gun under his armpit and walked away. Another car arrived. When Souza reached the intersection of Albert and Huard streets he was suddenly tackled from behind by an unseen assailant. He got up and saw Brady, Emond, Brittany, and Christopher Sylvia running toward him. Souza pointed the gun upwards and yelled at them to stop. They kept coming, so he fired a warning shot into the air. They were not deterred. Brittany jumped on Souza's back and put him in a choke hold. Brady yelled, "I'm going to fucking kill you kid," grabbed Souza's shirt, and started punching him in the face. Souza held the gun by the barrel and tried to hit Brady in the head with it. As Brittany continued to choke him and Brady continued punching him, Souza passed out. TR9/134-140.

After what seemed like a few seconds, Souza came to. Brady was on top of him, punching him in the face and pinning him to the ground with his knees under Souza's armpits. Brittany was still choking him from behind. Emond yelled, "the gun." Souza reached out, felt the gun, and grabbed it with his right hand. He tried to bring it close to him, but Christopher Sylvia tried to pry his fingers away while Emond stomped on the gun. Souza attempted to throw Brady off him by "flailing around" and bucking his hips. As Sylvia continued trying to pry Souza's fingers off the gun and Emond continued trying to stomp it out of his hand, Souza heard the gun go off, and then hit the ground. Souza reached out, found it, and stuck it on his chest so that no one else would get it. Brady continued punching him and began bleeding all over him. Souza held the gun away from everyone, but Emond kicked it out of his hand. Brady stopped punching Souza and fell off him. Brittany continued choking him and screaming at him. With his hands now free, he managed to pry her hands off his throat and stand up. As he did so, Sylvia punched him in the face. Souza saw Bruce's car and ran to it. Bruce said he could not take him, but Souza entered anyway and they drove away. TR9/140-144.

d. After the Shooting

Souza returned home. His grandmother testified that his face was "all swollen" and red. She said, "Jeffrey, look at your face." He responded, "Vovoa, I'm going to jail for the rest of my life." TR3/172,176-177. Souza's cousin testified that his "face was all

messed up," "all red," and swollen out about three inches. His clothes were bloody. Souza changed clothes and his cousins took him to Rhode Island to see his mother before he turned himself in. TR8/19-21,27;TR9/145.

Post-shooting, there were multiple outgoing calls and texts from Souza's telephone, including: "I killed someone," and, "Tell my kids I love them and hope you bring them to see me every weekend." TR10/96-108.

The next morning Souza was arrested with his mother in Newport, R.I. The arresting officer noticed bruising and a scratch on his face, a scrape or laceration on his forehead, and dried blood on his neck and right pinky finger. Booking photographs of these injuries were admitted at trial, as were photographs taken four days later. TR6/76,83-85,90-92;9/150-151;RA.73-81,84-86.

6. Investigation

A revolver was recovered about three feet from Brady, and a knife another foot beyond that. TR7/102-104;RA71-72. The revolver and the ammunition inside it were "completely covered" with blood stains, "So much so that there weren't unstained areas of the firearm." TR7/41,43-44;RA.82-83. The knife only had blood stains at the tip of the blade. TR7/36-39.

The paramedic noted that the cauterized burn marks around the bullet wound indicated it was very close-range. TR3/91,93.

The M.E., Dr. Hull, described a single gunshot wound to Brady's chest. The black skin around the wound was seared or burned from the heat of the gun barrel and the gas emerging from it, indicating it was "close-range." The bullet traveled downward through Brady's body from front to back; a fragment ended up in the lower back about seven inches below the entrance wound. TR6/14-16,47-53,55-57. The bullet caused death within seconds to minutes, during which time Brady could have continued punching someone. TR6/24-25,38,58.

Hull observed blunt force injuries to Brady's head and torso, and scrapes and bruises on his hands, elbows, and forearms, including the knuckles of his right hand. Hull opined that these could have been caused by Brady punching someone in the head; the abrasion in the palm of his right hand could have been caused by being pulled across the broken, rough edge of the hammer of the revolver recovered near him. TR6/31-36,41-43,53. Hull noted injuries to Brady's legs, including bruises and abrasions to his knees that could have been caused by rubbing against pavement. TR6/33,54.

Brady's post-mortem alcohol level was .18 percent in the pooled cavity blood and .22 percent in the eye fluid. The legal blood alcohol level for driving is .08 percent. TR6/43-44,46.

B. Other Evidence

1. *Adjutant* Evidence Excluded at Trial

The defense's examination of two of their *Adjutant* witnesses was cut off by the trial court. Based on the police reports, further questioning would have produced the following evidence.

Brady continued to resist after he was handcuffed by Officer Carey during the Sky Lounge incident. When four additional officers arrived Brady continued to kick and resist them. They carried him to the elevator and placed him on the floor to limit his ability to kick. On the way to the station Brady banged his head on the cruiser cage and attempted to kick out the side window. Upon removal from the cruiser he continued to resist and kick. When two officers removed one hand cuff and attempted to cuff him to the hook in his holding cell, he started to fight and was taken to the floor. He said, "I will see you motherfuckers on the street and I am going to fucking get you." At booking he started to resist again, so was returned to the cell without being booked, fingerprinted, or photographed. He was told to kneel on the bed so his handcuffs and coat could be removed. He refused and spun around on his back and continued to resist. He was forced onto his stomach and his outer garments were removed. RA39-40.

In the Playoff's Pub incident, Sergeant Bell reported that he Tased Brady after Brady kicked him. Brady then attempted to kick Bell away and struck him on his arm. Bell attempted to subdue Brady by Tasering him at least two to four more times. Brady finally stopped resisting and was handcuffed and brought to the station. RA60-63.

2. *Adjutant* Evidence Not Offered at Trial

a. Chad Nobles' Affidavit

According to Nobles, he would have testified that he was a good friend of Brady for over twenty years. He often went to bars and clubs with him. He always knew Brady to be a very violent person. Almost every time they went out Brady would instigate a fight. Nobles worked out with Brady. He was one of the best fighters (UFC—mixed martial arts) at the gym and trained regularly. When Brady was sparring with someone, the trainer had to constantly yell at him to ease up and remind him that he was just training. RA102.

b. Tiffany Charron's Affidavit

According to Charron, she would have testified that she knew Brady for over twenty years. She socialized with him with mutual friends, including her boyfriend. She always knew Brady to be a very violent person. Every time they went out Brady would end up in some kind of altercation, usually provoked by him. Charron saw him instigate multiple bar fights. Brady was a good fighter. He was dangerous with his hands. RA104.

c. David Costa's Statement

According to Costa,[9] he would have testified that he witnessed Brady fighting in bars, and Brady threatened to "break his neck" because Costa befriended Brady's child's mother on Facebook. RA105.

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[9] Souza obtained this statement when he was incarcerated with Costa and was unable to obtain an affidavit before filing his MNT.

3. *Fontes* and Reputation Evidence Not Offered at Trial

a. Jeffrey Souza's Affidavit

According to Souza, had he been asked he would have testified that he personally witnessed two violent incidents involving Brady. On April 10, 2010, Souza was jailed at the Fall River police station. He saw four officers fighting with Brady, he was violently kicking and punching them. They had to physically pick him up by all four limbs and force him into his cell. He continued acting violently, so four officers entered his cell to restrain him. Afterwards Souza asked Brady what had happened. He said he was fighting at the Sky Lounge. This was the same incident that Officer Carey testified to at trial (see Section III(A)(1) above). RA106.

In 2013 Souza was at a park in Tiverton, R.I. A fight broke out during a softball game. Souza saw Brady being pulled off of another man. While Brady was being restrained by several men, he broke loose and punched the other man in the face. RA107.

Souza's also would have testified to Brady's extremely violent reputation as a bully who frequently started fights, especially when drinking. He usually won those fights, as he was a very strong and skilled fighter. He was relentlessly tough and did not give up, to the point where it would take multiple people to subdue him. Even the police had a hard time restraining him. RA107.

Souza discussed Brady's violent history and reputation with counsel before trial. At trial, counsel did not ask Souza about Brady's

history and only asked one brief question about his reputation. RA107.

b. Reputation Witnesses

According to the affidavits of Nobles, Charron, Richard Silvia, Joshua Pacheco, David Faria, and Lucia Souza, and to Costa's statement, Brady had a reputation for extreme violence. RA102-105,108-112.

IV. SUMMARY OF ARGUMENT

It was error for the trial court to limit evidence of the decedent's prior violent incidents to the initiation of those incidents. Under *Commonwealth v. Adjutant*, evidence of a decedent's prior violent acts are admissible to show that he was the "first aggressor" against the defendant, thus justifying the defendant's use of force in self-defense. Although the decedent's act is not admissible unless he initiated it, its relevance is not limited to the fact that he initiated it. The entirety of the decedent's violent act is admissible to show his propensity for violence, to help the jury decide the specific questions of who initiated the violence and who first used deadly force, and the general question of whether the Commonwealth has proven that the defendant did not act in proper self-defense. Here, the complete accounts of Brady's violent behavior would have provided highly probative evidence of his violent and powerful nature, and could have made a real difference in the jury's determination of these questions, especially given the weak evidence of guilt. P30.

The jury instructions improperly foreclosed the use of the *Adjutant* evidence for determining the issue of self-defense because they limited the jury to determining who attacked whom first and they did not differentiate between first attacker and first to use deadly force. P42.

Trial counsel failed to present compelling and easily obtainable evidence of Brady's prior acts of violence and extremely violent reputation. This evidence is different in kind (and therefore non-cumulative) from that presented at trial, because it: 1) came from close friends of Brady who had intimate knowledge of his ferocity and skill as a fighter; 2) came from Souza himself so was relevant to his actual belief of the threat posed by Brady; and, 3) the reputation evidence came from multiple neutral sources rather than Souza himself. Counsel's failure to present this evidence deprived Souza of a substantial ground of defense. A hearing is required to determine the strength of this evidence and if trial counsel could have obtained it. P50.

The prosecutor misstated the evidence by mischaracterizing a cryptic statement from Souza to a friend as a threat directed from Souza to Brady. P55.

V. ARGUMENT

A. Limiting the evidence of the decedent's prior violent incidents to the initiation of the incidents was erroneous because *Adjutant* and *Chambers* allow evidence of the entire incident, not just its initiation.

1. Introduction and Standard of Review

To support his self-defense claim, Souza proffered "evidence of specific acts of prior violent conduct" that were initiated by Kyle Brady. *Commonwealth v. Adjutant*, 443 Mass. 649, 664 (2005). The judge allowed evidence of three of these incidents through the testimony of three police officers, but truncated the evidence by largely restricting the testimony to Brady's initial blows against the officers. She excluded any testimony about Brady's continued assaults on the officers, where he continued to violently resist them until he was jailed at the police station in one case, and repeatedly Tased in another. TR9/33-35,41-42,46-48;RA39-40,60-62. The judge's exclusion of this evidence deprived Souza of his common law and constitutional rights to present this evidence pursuant to *Adjutant*, the Fifth and Fourteenth Amendments to the United States Constitution, and Article 12 of the Declaration of Rights. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

This issue was preserved by Souza filing a Notice of Intent to Use Specific Acts of Violence per *Adjutant*, and arguing against the court's truncation of this evidence at trial. RA26,TR9/33-34,41-42,47. Thus, the nonprejudicial error standard applies, i.e., whether the

exclusion of the evidence " 'had, or might have had, an effect on the jury and …contributed to or might have contributed to the verdicts.' " *Adjutant*, *supra* at 666 (quoting *Commonwealth v. Perrot*, 407 Mass. 539, 549 (1990)).

2. *Commonwealth v. Adjutant*

Adjutant authorizes the admission of evidence of prior violent acts initiated by the decedent because they are relevant to the question of whether he or the defendant initiated the violence in the case at bar. That is, if the decedent had shown a propensity for violence in the past, he was more likely to have acted in conformity with that propensity by attacking the defendant. "Testimony about the victim's prior acts of violence can be convincing and reliable evidence of the victim's *propensity for violence*." *Adjutant*, *supra* at 662 (emphasis added). "While the court largely avoids the use of the term 'character evidence,' the evidence to be admitted after today is precisely that: evidence of a person's prior acts used to show his or her propensity to commit such acts." *Id*. at 668 (Cowin, J., dissenting) (citation omitted). Therefore the judge here was wrong when she curtailed defense counsel's attempts to show that, "Kyle Brady is not an individual who stops, it takes a lot to subdue him." TR9/33-34. She was correct that such evidence was "[p]rior conduct showing a propensity," but incorrect that it was "not *Adjutant*." TR9/35.

There is nothing in *Adjutant* and its progeny to support limiting evidence of the decedent's violent incidents to his initiation of those

incidents. This incorrect interpretation of *Adjutant* is probably caused by confusion over the requirement that only violent incidents that were initiated by the decedent are admissible. This is not the same as limiting the evidence of the violent incident to its initiation. Incidents where the decedent acted violently to defend himself are excluded because they do not show a tendency to initiate violence, since the decedent did not initiate the violence, his attacker did. This is fundamentally different from Brady's continuation of violence after he struck the first blow against the police officers. He was not acting to defend himself from the police each time he attacked them and thwarted their efforts to subdue him by Taser, handcuffs, or otherwise. Each violent act by Brady shows his combative and powerful nature, and supports Souza's contention that Brady attacked him first.

The relevance of Brady's battles with the police did not end at the point where he struck the first blow against them. The witnesses' full accounts of their protracted struggles to subdue Brady would have helped the jury decide whether Brady or Souza was the aggressor that night. If the jury knew of Brady's fearlessness and ability to resist multiple police officers, they would be more likely to believe Souza's testimony that Brady ignored the warning shot and attacked him. *See Commonwealth v. Baker*, 346 Mass. 107, 118 (1963) (verdict reduced to manslaughter where decedent ignored warning shots and attacked defendant). Further examination of the officers may have also revealed that Brady was intoxicated during these late-night clashes in bars and

a diner, as he was in this case. TR6/43-44,46 (Brady's BAC about twice the legal limit). *See Adjutant*, *supra* at 657-658 ("The evidence, if admitted, would have supported the inference that Whiting, with a history of violent and aggressive behavior while intoxicated, probably acted in conformity with that history by attacking Adjutant, and that the defendant's story of self-defense was truthful."). In general, *Adjutant* holds that a defendant's right to admit evidence of the alleged victim's violent behavior should be expanded, rather than limited as the judge did here. This results in the least amount of prejudice to the defendant, and increases the likelihood of the jury finding the truth in closely contested situations such as this.

> We share the preference of the Supreme Court of Illinois that the jury should have as complete a picture of the (often fatal) altercation as possible before deciding on the defendant's guilt: "[T]he evidence of what happened here, as is often the case where self-defense is raised, is both incomplete and conflicting. Everything happened in an instant…. The witnesses could hardly analyze the scene in any great detail, or remember and describe it with precision. They could only form quick impressions. To decide what really occurred the jury needed all the available facts, including evidence of [the victim's prior violence]. We hold that when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it."

Id. at 658-659 (quoting *People v. Lynch*, 104 Ill. 2d 194, 200 (1984)).

3. *Commonwealth v. Chambers*

The evidence in this case is as incomplete and conflicting as in *Lynch* and *Adjutant*. Just as the excluded evidence of the violent pasts

of the decedents in those cases would have helped those juries find the truth, the complete evidence of Brady's violent clashes with the police would have helped this jury decide if Souza had justifiably defended himself against Brady. Thus, the trial court here incorrectly excluded this evidence. This becomes especially clear in light of *Commonwealth v. Chambers*, 465 Mass. 520 (2013). *Chambers* clarified that in a homicide case the term "first aggressor" as used in *Adjutant* refers to both the person who provoked or initiated the assault, and the person "who unreasonably escalated it by initiating the use or threat of deadly force." *Id*. at 530. Here, the *Adjutant* evidence of Brady's fighting prowess and ferocity after he struck the first blow were especially relevant to the latter question of who first used deadly force. If the jury knew that Brady was so powerful and relentless that it took multiple officers and Taser blasts to subdue him, they would have been more likely to find that his attack on Souza was so severe that it amounted to deadly force, to which Souza justifiably responded in kind. The truncation of the *Adjutant* incidents to the first blow, however, mostly drained them of their power to help the jury decide whether Brady or Souza was the first to use deadly force.

4. Error of Law Not Abuse of Discretion

When the trial judge cut off the questioning of the *Adjutant* witnesses it was clear that she believed this was required by *Adjutant*, so she did not have the discretion to do otherwise. For example, when counsel argued that it was important to present the full story of the

Sky Lounge incident because it showed Kyle Brady's violent tenaciousness, the judge responded: "That's not *Adjutant*, that's—… Prior conduct showing a propensity, that's not *Adjutant*. *Adjutant* you get to show that someone was the first to act in a violent manner toward someone else. You have done that." TR9/34-35. This is an incorrect reading of *Adjutant* and *Chambers*, not just an abuse of discretion.

Under *Adjutant*, trial judges have the discretion to admit so much of a defendant's proffered evidence as is "noncumulative and relevant to the defendant's self-defense claim." *Adjutant*, 443 Mass. at 663. None of the truncated evidence was cumulative and all of it was relevant to Souza's self-defense claim, so it was an error of law to exclude it. *See Id*. at 666 ("Here, the proffered evidence went directly to the heart of the case's central dispute—whether Whiting was the initial aggressor in his final altercation with Adjutant…. 'Where the record shows that the judge has failed to exercise discretion, there exists an error of law requiring reversal.'") (quoting *Commonwealth v. Boyer*, 400 Mass. 52, 57 (1987)); *Commonwealth v. Papadinis*, 23 Mass. App. Ct. 570, 574 (1988) ("Failing to recognize a discretionary right to make a ruling and, therefore, not exercising that right is error as a matter of law.").

5. Prejudice

As in *Adjutant*, the excluded evidence of Brady's violent battles with the police went directly to the questions at the heart of the case: 1) who was the initial aggressor?; 2) who was the first to use deadly

force?; and 3) the overall question of did the Commonwealth prove that Souza did not act in proper self-defense? (*See infra* §V(B)). The more important the evidence is to the defense, the more the defense is prejudiced by its exclusion. *See Adjutant* 443 Mass. at 659-660. The full scope of the *Adjutant* evidence was fundamentally important to Souza. This is shown by counsel's repeated references to Brady's ruthlessness. Indeed, it was the overarching theme of counsel's defense. In his opening statement, he told the jury that "Nothing stops Kyle Brady" (TR2/70), and "If ever there was an occasion for a person to say, 'I am in fear for my life,' if ever there was an occasion for a person to say, 'I have a real fear that I could suffer serious bodily injury,' if ever there was an occasion for a person to say, 'I need to use deadly force,' this is that case." TR2/67. In his closing, counsel repeated the phrase, "nothing stops Kyle Brady," six more times. TR11/5-6,7,21,28.

Counsel attempted to argue that Brady's violence against the police was mirrored by his violence against Souza. Counsel was not allowed to prove his point however, because the officers' testimony was cut off at the point where Brady struck his first blows against them. The jury did not hear any evidence that Brady "could not be stopped." There was a fundamental disconnect between counsel's theory of the case that Brady was an unstoppable force, and the paltry evidence of this that counsel was allowed to present. TR11/5-6. Thus Souza was hamstrung by the truncation of the *Adjutant* evidence.

The prosecutor was able to exploit this situation in his closing by characterizing the *Adjutant* incidents as just "some scraps," and downplaying Brady's copious threatening messages as harmless talk that was a far cry from action. TR11/40. The full accounts of Brady's attacks on the police would have neutralized this strategy. Thus, cutting the *Adjutant* evidence furthered the Commonwealth's goal of discrediting Souza's version of events. *See Chambers*, 465 Mass. at 531 n.11 (2013) (the prosecutor "repeatedly attacked the credibility of the defendant's entire version of events ….").

During deliberations, the jury asked a question which indicated further harm to Souza from the limitation of the *Adjutant* testimony. They asked about "mitigating circumstances," i.e., the "mitigation" of murder to manslaughter if excessive force is used in self-defense. TR11/106,75,80-83,106-111. This shows that the jury was considering this issue and needed more guidance on it. The curtailing of the *Adjutant* testimony excluded highly probative evidence of Brady's ruthless tenacity and power and skill as a fighter, which could have helped the jury decide the excessive force/manslaughter issue. *See* Model Jury Instructions on Homicide 64,70 (2013) (Model Instructions) ("In considering the reasonableness of any force used by the defendant, you may consider any factors you deem relevant to the reasonableness of the defendant's conduct under the circumstances, including evidence of *the relative physical capabilities of the combatants* …[*and*] *the scope of the threat presented* …." (emphasis added)).

The excluded evidence would have also helped the jury decide how to consider the "warning shot" evidence. At the final pretrial conference held on September 1, 2016, the judge said it was up to the jury to decide whether Souza's shot into the air was just a warning, or a threat of deadly force that negated his right to self-defense (at pages 21-22 of hearing transcript). The full stories of Brady's battles with the police would have helped the jury decide this and other questions raised by the warning shot evidence. For example, if they had heard these accounts of Brady's fearlessness and recklessness (especially when intoxicated), they would be more likely to believe Souza's testimony that Brady ignored the warning shot and viciously attacked him.

The cutting of Souza's *Adjutant* evidence violates a core principle of *Adjutant*, i.e., because the decedent is not on trial, prejudice to him from the admission of evidence of his violence is not a factor. "'Where the victim's propensity for violence is in question … the danger of prejudice to the defendant lies in refusing to admit such evidence.' " *Adjutant* 443 Mass. at 659 (quoting *Lynch*, 104 Ill. 2d at 201).

In addition to the importance of the excluded evidence to the defendant, another factor in determining prejudice is the strength of the Commonwealth's case, which was very weak here, far weaker than in *Adjutant* itself. There the evidence was much less conflicting,

with much more unequivocal evidence of guilt. *See Id.* at 651-652 & n.2.

As detailed in the statement of facts above, there was very little consistency among the various witnesses' trial testimony about the shooting, and between some of those witnesses' trial testimony and pre-trial statements. The Commonwealth's principal witness, Brittany Brady, gave three different accounts of the shooting. These accounts contradict each other and the account given by her fiancé, Christopher Sylvia. His account is self-contradictory. Their accounts are also contradicted by the third major Commonwealth witness, Kyle Emond. His direct testimony is contradicted by his cross-examination and his statement to the police. *See supra* §§III(A)(5)(c)(i-iii).

The most striking thing about the testimony of these three witnesses (other than its complete lack of agreement), is that only Brittany testified that she actually witnessed the fatal shot, and this was only in one of her three different versions of the shooting. It should be clear to any objective observer that the picture painted of the shooting by these three witnesses cannot be an accurate one. It is not even a coherent one, there is no consistency among the various accounts. Even if one were to accept as true the only account in which the witness claimed to be actually looking at Brady and Souza when the fatal shot was fired (i.e., the account Brittany told on direct examination), liability for murder would not be proven. That version, in which the fatal shot occurred as Brady and Souza were wres-

tling, is more supportive of a finding of accident, self-defense, or, at most, manslaughter, than of murder.

Compared to the testimony of the Commonwealth's witnesses, the testimony of the defense witnesses (and Botelho) about the shooting was relatively consistent. They all described the same basic scenario of a physical fight involving Souza and Brady. Only Bruce's testimony was contradicted on this, by his admission that he answered "no" when asked at the grand jury if he saw anyone fighting.

Much of Souza's testimony was corroborated by witnesses from both sides and by other evidence. His warning shot testimony was corroborated by Brittany's statement to Officer Strong and partially corroborated by her statement to Detective McDonald. *See supra* §III(A)(5)(c)(i). Souza's testimony that Brady was undaunted by the warning shot and yelled "I'm going to fucking kill you kid," was partially corroborated by Emond's testimony that he heard a gunshot and then saw Brady, Brittany, and Christopher Sylvia standing in front of Souza, and Brady said, "you're not going to shoot me pussy." TR9/139;5/33. Souza's testimony that Brittany jumped on his back and put him in a choke hold was corroborated by Brittany's statement to Strong and Richard Sylvia's testimony. TR9/139;7/92;8/133. Souza's testimony that Brady straddled him while punching him in the face was corroborated by Botelho, Bruce and Sylvia's testimony. TR6/137-138;8/73-74,131-132. Souza's testimony that Brittany was also hitting him was corroborated by Bruce and Sylvia's testimony;

and Souza's testimony that Brittany had her arm around his neck while she hit him was corroborated by Sylvia. TR8/71-72,132-133.

Souza testified that after the gun went off, Brady bled all over him and the gun while he was on the ground under Brady. TR9/142. This is corroborated by the forensic scientist's testimony that the gun and ammunition inside it were "completely covered" with stains from blood that had soaked into the gun. TR7/41,42-44;RA82-83. This evidence contradicts Brittany's testimony that Brady and Souza were standing chest to chest when the gun went off, then Brady fell to the ground while Souza remained standing with the gun in his hand. TR3/29-30. If this had actually happened there would have been very little if any blood on the gun since the blood could not have spurted up from Brady to cover and soak into the gun. There is also no evidence to support the possibility that blood soaked into the gun from a pool of blood on the ground, since photographs show that the blood-stained gun was found on dry ground, about two feet from the body and the blood next to it. RA71. The knife was also found on dry ground about two feet from the gun, and it was only bloodstained at the blade tip. TR7/36-38;RA72. This shows that the blood was deposited on the knife when it pierced Brady, and like the gun, not from blood on the ground.

Botelho, Bruce, Sylvia and Souza testified that Brady kneeled on the street, straddling Souza, which was corroborated by Dr. Hull's testimony that the bruises and abrasions on Brady's knees could have

been caused by rubbing against the pavement with force. TR6/33,54. The testimony that Brady repeatedly punched Souza in the head, and Souza's testimony that he may have struck Brady in the head with the gun, were corroborated by the scrapes and bruises on Brady's hands and the blunt force injuries to his head. TR6/32-33,40-41,53;TR9/139.

Souza's version of the fight was also corroborated by evidence of his injuries: testimony that his "face was all messed up," "all red," and "all swollen" out about three inches, and photographs showing his injuries at booking and five days later. TR3/176-177;TR8/18-20,27;TR9/150-51;RA73-81,84-86.

B. The *Adjutant* jury instructions were erroneous because they: 1) did not define the two meanings of the term "first aggressor"; 2) did not state that the *Adjutant* evidence could be used to determine the identity of *both* types of first aggressor; and, (3) limited use of the evidence to determining who attacked first, rather than for the general purpose of determining if the Commonwealth proved that the defendant did not act in self-defense.

1. Introduction and Standard of Review

The trial judge's error in truncating the *Adjutant* evidence was compounded by the errors in her *Adjutant* jury instructions. These instructions were taken from the Model Instructions with the addition of a limiting sentence from the judge. Both components of these instructions were incorrect. The language taken from the Model Instructions was incorrect because it did not state that, as clarified by *Commonwealth v. Chambers*, 465 Mass. 520 (2013), the *Adjutant* term "first aggressor" refers to both the initial aggressor and the first to use

deadly force. As also clarified by *Chambers*, it was incorrect because it did not state that the *Adjutant* evidence should be used to determine the overall question of whether the Commonwealth proved that the defendant did not act in proper self-defense. The trial judge's limiting sentence was incorrect because it reiterated and amplified the errors in the Model Instructions. These errors negated the probative value of the *Adjutant* evidence, thus depriving Souza of his common law and constitutional rights to present this evidence pursuant to *Adjutant*, the Fifth and Fourteenth Amendments to the United States Constitution, and Article 12 of the Declaration of Rights. This issue is unpreserved so the substantial risk of a miscarriage of justice standard of review applies.

2. *Chambers* and the Self-Defense Instruction

Chambers clarified two major aspects of the *Adjutant* decision. The first was that the term "first aggressor" refers to both "the person who provoked or initiated the assault" and the person who was the "first to use or threaten deadly force." *Chambers*, *supra* at 528. The identity of *both* of these first aggressors is relevant to the issue of whether the defendant's claim of self-defense is justified.

> Where a victim's prior act or acts of violence demonstrate a propensity for violence, we conclude that *Adjutant* evidence is as relevant to the issue of who initiated the use or threat of deadly force as it is to the issue of who initiated an earlier nondeadly assault, and such evidence may be admitted to assist the jury where either issue is in dispute, because the resolution of both issues may assist the jury in deciding whether the prosecution

> has met its burden of proving that the defendant did not act in self-defense.

Id. at 529-530. *See also Commonwealth v. Camacho*, 472 Mass. 587, 591-592 (2015) ("In *Chambers* we held that the definition of 'first aggressor' included not only the person who initiated the confrontation, but also the person who initiated the use or threat of deadly Force …."); *Commonwealth v. Deconnick*, 480 Mass. 254, 263 (2018).

The second major aspect of *Adjutant* clarified by *Chambers* is that evidence of a decedent's propensity for violence is not only admitted for the specific purpose of determining whether a defendant has lost the right to claim self-defense because he was the first to use or threaten deadly force. *Chambers*, *supra* at 529. Loss of the right to claim self-defense for this reason is the fifth of the five specific "propositions" that the Commonwealth can prove to satisfy its burden of proving that the defendant did not act in proper self-defense. Model Instructions 20-21.

> It is important to note that, although *Adjutant* evidence may assist a jury to determine whether the defendant has lost the right of self-defense, it is not limited to this purpose. In the *Adjutant* case, as in this case, the jury were not instructed that a first aggressor loses the right to claim self-defense, so we reasonably may infer that the contested evidence was not admitted for the purpose of addressing that issue. Rather, it was admitted for the broader purpose of giving the jury relevant information regarding the victim's prior acts of violence that may help them to evaluate the conflicting evidence, to arrive at the truth regarding the events that led to the victim's death, and ultimately to determine whether the prosecu-

> tion has met its burden of proving that the defendant did not act in self-defense.

Chambers, *supra* (citing *Commonwealth v. Adjutant*, 443 Mass. 649, 658–659 (2005) ("[J]ury should have as complete a picture of the [often fatal] altercation as possible before deciding on the defendant's guilt.").

Here, the instructions on the *Adjutant* testimony did not properly inform the jury how to consider this evidence pursuant to *Adjutant* as clarified by *Chambers*. Immediately after the first *Adjutant* witness testified, the judge instructed the jury on this *Adjutant* testimony and self-defense. RA87-88. These instructions were adapted from pages 28-29 of the Model Instructions, which sets forth the fifth proposition that the Commonwealth can prove to satisfy its burden of proving that the defendant did not act in proper self-defense. AD62. They are essentially the same as the Model Instructions, including a verbatim quote of the *Adjutant*-inspired sentence that ends the Model Instruction. The trial judge adds to that, however, with her own sentence that the jury "cannot consider such evidence for any other purpose whatsoever."[10] These instructions were erroneous because of both the trial court's additional sentence and flaws in the Model Instructions.

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[10] The trial judge gave *Adjutant/Morales* instructions six separate times: after the testimony of the three *Adjutant* witnesses and the two *Morales* witnesses, and in her final charge. TR9/36-37,42-43,48;TR10/92-93,96;TR11/70-71;RA87-101. Some of these instructions were shorter than others, e.g., after Officer Passoa's testimony she told the jury they "may use the evidence for the limited purpose to determine who attacked whom first on January 1, 2015." TR9/48.

The flaws in the Model Instruction become apparent when viewed through the lens of *Chambers*, which was published three months after them. That is, before *Chambers*, it was not clear that the *Adjutant* term "first aggressor" refers to both the person who initiated the confrontation and the person who initiated the use or threat of deadly force. It was also not explicitly clear before *Chambers* that *Adjutant* evidence was admissible for the "broader purpose" of helping the jury decide whether the defendant acted in proper self-defense. Thus, the Model *Adjutant* Instruction only mentions first use of deadly force, and only in the context of determining whether the defendant has lost his right to claim self-defense pursuant to the fifth proposition. Model Instructions 28-29(AD62). It makes no mention of the first aggressor as the person who initiated the confrontation, and makes no mention of either type of first aggressor as relevant to determining the overall question of whether the Commonwealth has proven that the defendant did not act in proper self-defense. Rather, the segregation of the *Adjutant* language within the fifth proposition of the self-defense instruction limits the use of *Adjutant* evidence to deciding the question of who first attacked whom, to the exclusion of using it to decide the other propositions or whether the Commonwealth has disproved self-defense generally. In this case, for example, the *Adjutant* evidence of Brady's skill and power as a fighter and ability to resist multiple bouncers and officers was directly relevant to the "relative physical capabilities of the combatants," which is specif-

ically listed as a factor in determining the third proposition, i.e., whether the defendant exhausted all reasonable means of avoiding "physical combat before resorting to the use of deadly force." Model Instructions 25. It was also relevant to that same factor and "the scope of the threat presented" in determining the fourth proposition, i.e., whether "the defendant used more force than was reasonably necessary under all the circumstances." *Id*. at 27.

Also, the Model Instructions' lack of a binary definition for the term "initial aggressor" renders the phrase, "For purposes of determining who attacked whom first in the altercation," ambiguous. *Id*. at 28. Does the word "attacked" mean the first use of any force in the confrontation, or just the first use of deadly force? If the jury limits it to the former meaning, this would rob the *Adjutant* evidence of most of its probative value, since the question of who first used deadly force is much more important, both because if the jury finds the defendant was first he automatically forfeits his right to self-defense under the fifth proposition, and if they find the decedent was first they would probably vote to acquit. The more straightforward interpretation is that the phrase refers to the first to use any force, rather than deadly force, because in most fight situations involving self-defense (as in this case) the fight begins with non-deadly force and escalates from there. *See e.g.*, *Chambers*, 465 Mass. at 529 n.9. This is also the more straightforward interpretation because one would expect that if the use of the *Adjutant* evidence was relevant to the question of who first used

deadly force the instruction would specifically state that, especially since the instruction specifically refers to first use of deadly force three times in the preceding three sentences. Thus, under this post-*Adjutant* and pre-*Chambers* version of the Model Instructions a defendant can lose most of the probative value of his *Adjutant* evidence, a result that the *Chambers* decision specifically stated was erroneous. *See Id.* at 521 ("The judge here … mistakenly understood that *Adjutant* evidence was admissible only where there was a dispute as to who threatened or struck the first blow.").

3. 2018 Model Instructions

Post-trial in 2018, the Model Instructions were revised to state that if a defendant was the first to use non-deadly force but the deceased was the first to use deadly force, "the defendant may claim self-defense where he responded to the escalation with deadly force." Model Instructions 34 (2018). Although this change clearly tells the jury that, "a defendant may lose the right to claim self-defense only if he 'was the first to use or threaten deadly force' " (*Chambers*, 465 Mass. at 528 (quoting Model Instructions 25 (2013))), the *Adjutant* language has not been changed at all. Thus the 2018 Model Instructions do not reflect the *Chambers* clarifications and contain the same errors as the 2013 Instructions, i.e., they do not state that the *Adjutant* evidence can be used to determine both the initiator of the conflict and the first to use deadly force, and they do not instruct that the *Adjutant* evidence is admitted for the "broader purpose" of determining wheth-

er the defendant did not act in self-defense, and not just to determine whether he has lost the right to self-defense under the fifth proposition. The meaning of the word "attacked" in the phrase, "For the purpose of determining who attacked whom first in the altercation" remains ambiguous, and the 2018 Model Instructions overall are as ineffectual for instructing the jury on how to use the *Adjutant* evidence as the 2013 Model Instructions.

4. Trial Judge's Limiting Instruction

The *Adjutant* instructions here include all the above-discussed errors from the 2013 Model Instructions, and lack even the minor addition regarding the fifth proposition from the 2018 Model Instructions. These errors were greatly exacerbated by the trial court's additional instruction that the jury could not "consider [the *Adjutant*] evidence for any other purpose whatsoever." RA88,89-90,91,100-101. Although this language was probably added to avoid the prejudicial use of the evidence, in this context it confirmed the Model Instructions' limitation of its use to determining whether the defendant lost his right to self-defense under the fifth proposition by initiating the use of deadly force. It completely forecloses any chance of the jury using the *Adjutant* evidence for the general purpose of deciding "whether the prosecution has met its burden of proving that the defendant did not act in self-defense." *Chambers*, 465 Mass. at 529 (citing *Adjutant*, 443 Mass. at 658–659).

5. Conclusion

The combination of the faulty Model Instructions, the addition of the judge's limiting phrase, and the judge's truncation of the *Adjutant* evidence rendered it almost worthless for helping the jury decide both who was the initial aggressor and who was the first to use deadly force, and the overall question of whether the Commonwealth proved that Souza did not act in proper self-defense. Given the importance of the *Adjutant* evidence to the defense and the weakness of the Commonwealth's case (*see supra* §V(A)(5), the diminishment of this evidence greatly increased the likelihood of a conviction, thus the erroneous jury instructions created a substantial risk of a miscarriage of justice.

C. Trial counsel provided ineffective assistance by failing to present other easily obtainable *Adjutant* evidence, reputation evidence, and prior acts of violence evidence known to the defendant.

The main theme of trial counsel's defense strategy was that Brady was an extremely violent and powerful person who viciously attacked Souza with deadly force, forcing him to justifiably respond in kind to save his own life. Counsel opened his case by arguing that Brady was "a tough, violent person with a history of getting into fights," and "Nothing stops Kyle Brady." TR2/68,70. Yet the only evidence counsel presented of these assertions was one line of testimony from Souza that Brady "got into a lot of fights, he liked to fight" (TR9/63), and *Adjutant* testimony from three police officers that Brady struck initial

blows against them. TR9/31-34,39-42,44-47. Counsel failed to present easily obtainable testimony from witnesses who were friends of Brady and saw him engage in numerous acts of violence, testimony from several witnesses that could testify to Brady's extremely violent character, and testimony from Souza himself that he personally witnessed two instances of Brady's prior violent behavior. These failures deprived Souza of his rights to a fair trial and the effective assistance of counsel as secured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Declaration of Rights. The motion judge abused his discretion by ruling that counsel was not ineffective because the proffered evidence is merely "cumulative of evidence the jury already heard." AD75**.**

The motion judge is incorrect because the additional evidence is different in kind from the evidence adduced at trial. Souza has obtained six affidavits and one statement from witnesses who would have testified at trial if asked. Three of these witnesses would have testified to prior acts of violence Brady initiated (i.e., *Adjutant* witnesses), and to his reputation for violence. RA102-105. Four other witnesses would have testified to Brady's reputation for violence. RA108-112. Souza has also submitted his own affidavit recounting two violent incidents involving Brady that Souza witnessed (one of these was a part of the same incident that the first *Adjutant* witness Officer Paul Carey saw but was not allowed to testify to). RA106-107;TR9/31-34;RA39-40.

The *Adjutant* evidence is different from the police testimony at trial because it comes from close friends of Brady who knew him very well for many years, so could testify that he was a uniquely violent and dangerous person, not just a drunk who started fights on three occasions. Chad Nobles' information about Brady's skill and ferocity as a martial arts fighter is particularly compelling and different from the police testimony. RA102.

Souza's proposed testimony about the two occasions when he personally witnessed Brady's violence is also not cumulative of any evidence produced at trial. RA106-107. Souza saw these episodes himself so he could have testified to them pursuant to *Commonwealth v. Fontes*, 396 Mass. 733, 735-736 (1986). This evidence would have been particularly valuable to the defense, because unlike the truncated *Adjutant* testimony presented by trial counsel, the jury could have used it to decide whether the Commonwealth had satisfied its burden of proving that Souza did not act in proper self-defense by proving the first or second proposition of the Model Instructions. AD62. That is, since Souza was aware of these violent episodes, they were relevant to his actual belief of the threat posed by Brady and whether that belief was reasonable. This evidence would have been particularly useful to the jury in evaluating the warning shot evidence. If the jury knew that Souza was aware of Brady's ferocity as demonstrated by these incidents, they would have been more likely to find that Souza was justified in firing a warning shot rather than running away, because he had

an actual and reasonable fear that Brady would otherwise not hesitate to chase him down and beat him savagely. See TR11/31-32 (prosecutor argued that Souza could have easily run away from Brady).

Brady had a reputation for violence that was commensurate with his extensive history of violence. Yet trial counsel failed to call any character witnesses, the only evidence of Brady's reputation that he presented was one line of testimony from Souza himself. Other, less biased character witnesses were plentiful and easily obtainable, as shown by the seven attached affidavits from others containing testimony to Brady's widespread reputation for extreme violence. In addition to being much more detailed and comprehensive than Souza's one line of character testimony, this evidence was fundamentally different because it did not come from Souza himself. Brady's reputation was so pervasive and atrocious that evidence of it would have transcended the usual limitations of character evidence.

Prior to trial Souza told counsel about the violent acts he had witnessed and about Brady's widespread reputation for violence, and how he (Souza) believed it would be relatively easy to find witnesses to testify to both Brady's reputation for violence and prior acts of violence. RA107. Souza submitted an affidavit of trial counsel with his motion for reconsideration of his motion for post-conviction relief. RA16 (Docket #157),128. Counsel avers that he has no memory of Souza telling him about this evidence, and that if he did he has no memory of Souza providing contact information for the witnesses or

of them contacting counsel. Even if counsel's memory is accurate, he was ineffective for failing to obtain this evidence on his own. A hearing is required to decide these factual issues.

The evidence presented with the MNT is compelling and was easy to obtain. It would have supported trial counsel's theme that Kyle Brady was a powerful, ferocious force that "nothing stops." *See* TR2/70,71;TR11/5,6,7,21,28. Counsel's failure to present this evidence amounted to behavior "falling measurably below that which might be expected from an ordinary fallible lawyer," and consequently Souza was deprived "of an otherwise available, substantial ground of defence." *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). This is especially clear in light of the weakness of the Commonwealth's case as discussed in Section V(A)(5) above. "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). Trial counsel's errors markedly decreased the likelihood of the jury finding Souza not guilty of murder. Thus, he has been deprived of his rights to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Declaration of Rights, and this Court should reverse the motion court's denial of this issue.

D. An important misstatement of the evidence in the prosecutor's closing argument created a substantial risk of a miscarriage of justice.

The prosecutor began his closing argument by misstating the evidence: " 'Tell Kyle Brady I've got something for him. Tell Kyle Brady I've got something for him.' Those are the words that this defendant used outside of Scotties Pub when he was talking to Kyle [Emond]."[11] TR11/29. This misstated the evidence in two crucial ways that fundamentally changed the character and meaning of Souza's words.

The prosecutor was referring to an interaction that occurred between Souza, one of his friends, and Emond. Emond testified that he was outside the pub when Souza approached him and they had a friendly conversation. Souza asked him if he knew Kyle Brady. Emond replied affirmatively, and Souza asked him for Brady's phone number and if Emond could call Brady. Emond refused both requests, but remained nearby. He testified that he overheard Souza tell his friend that "he had something for Kyle Brady, along those lines." TR4/123-124.

The prosecutor fundamentally changed the meaning of Emond's testimony by incorrectly stating that Souza was talking to Emond and by adding the phrase, "[t]ell Kyle Brady." Emond actually testified that Souza was telling his friend that he had something for Kyle Brady. Emond did not testify that Souza told him to tell Kyle Brady that he had something for him. Thus the prosecutor mischaracterized a

[11] Emond's name is misspelled as "Limon" in trial transcript volume 11 (FTR).

cryptic statement between Souza and his friend as a threat directed by Souza against his enemy Kyle Brady.

"A prosecutor may not 'misstate the evidence or refer to facts not in evidence.' " *Commonwealth v. Lao*, 460 Mass. 12, 22 (2011) (quoting *Commonwealth v. Kozec*, 399 Mass. 514, 516 (1987)). *See also United States v. Liriano*, 761 F.3d 131, 138 (1st Cir. 2014). The prosecutor here misstated the testimony of a key witness on the major issue of whether Souza or Brady was the aggressor in the fight that erupted between them that night. This prosecutorial error denied Souza's right to due process of law as secured by the Fifth and Fourteenth Amendments to the United States Constitution and Article 12 of the Declaration of Rights.

The following four part test is used to determine when reversal is required to remedy prosecutorial error in closing argument:

> Did the defendant seasonably object to the argument? Was the prosecutor's error limited to "collateral issues" or did it go to the heart of the case? What did the judge tell the jury, generally or specifically, that may have mitigated the prosecutor's mistake, and generally did the error in the circumstances possibly make a difference in the jury's conclusions?

Kozec, 399 Mass. at 518 (citations omitted).

As to the first prong of the *Kozec* test, counsel failed to object, so the substantial risk of a miscarriage of justice standard of review applies. *Commonwealth v. Achorn*, 25 Mass. App. Ct. 247, 248 (1988).

Regarding the second prong of the test, the Commonwealth's theory was that Souza was the aggressor; he armed himself and lured Brady to

Maplewood to shoot him and end the feud between them. TR11/29-31. The prosecutor's misstatement supported that theory by converting an offhand remark between Souza and his friend into a threat explicitly directed from Souza to Brady. The fact that the Commonwealth began their closing by repeating this misstatement twice shows how important it was to their case. Thus the misstatement clearly went to the heart of the case and was not limited to collateral issues.

The curative effect, if any, of the judge's instructions is the third prong of the *Kozec* test. There was no objection to the improper argument, so the resulting prejudice was not mitigated by curative instructions. The judge gave the standard instruction that closing arguments are not evidence. TR11/60. This instruction did not address the misstatement of the evidence, therefore it "did not specifically address the impropriet[y]. The general charge could not have neutralized the prejudicial effect of the prosecutor's argument." *Commonwealth v. Person*, 400 Mass. 136, 143 (1987). When one considers the evidence in this case, the lack of curative instructions becomes even more significant. *See Commonwealth v. Buzzell*, 53 Mass. App. Ct. 362, 371-72 (2001) ("This is not a case in which the evidence of the defendant's guilt was so powerful that the improper remarks in the closing could be deemed harmless.").

An assessment of the evidence is required for the final factor of the *Kozec* test, *i.e.*, "whether the error *possibly* made a difference in the jury's conclusions." *Commonwealth v. Roberts*, 433 Mass. 45, 54

(2000) (emphasis added). This prong establishes a very low standard for evaluating the prejudicial effect of the impropriety. This standard is easily met here. As argued above, the Commonwealth's case was very weak. The clear majority of the testimony and other evidence does not support the Commonwealth's contention that Souza attacked Brady; it supports the opposite conclusion that Brady and his friends were the aggressors who attacked and beat Souza. Thus the fourth prong of the *Kozec* test is met here because if the prosecutor had not mischaracterized Souza's ambiguous remark as a direct threat, the jury may not have found that he maliciously caused Brady's death. It is clear that the prosecutor's error "possibly [made] a difference in the jury's conclusions." *Kozec*, 399 Mass. at 518. *See also Commonwealth v. Sevieri*, 21 Mass. App. Ct. 745, 755 (1986) ("It should be understood by now that the closer the case, the more careful the summation must be."). Here, considering the serious credibility problems with the Commonwealth's witnesses and the other weaknesses in its case, characterizing the evidence as "close" is being charitable to the Commonwealth. Also, the prosecutor used the misstatement as a focal point in his summation, indeed he led off with it. "This was not a case in which overreaching argument was confined to collateral issues only, wherein either overwhelming evidence of the defendant's guilt or adequate curative instructions from the judge might have rendered the prosecutorial error harmless. *Commonwealth v. Shelley*, 374 Mass.

466, 470, 471 (1978), and cases cited." *Commonwealth v. Clary*, 388 Mass. 583, 593 (1983).

Although the substantial risk of a miscarriage of justice standard of review, and not harmless error, applies here, that standard has been met because of the importance of the misstatement to the Commonwealth's case, the lack of curative instructions, and the weakness of the Commonwealth's case.

VI. CONCLUSION

For the reasons set forth in the foregoing issues, considered individually or cumulatively (*See Commonwealth v. Dwyer*, 448 Mass. 122, 138-139 (2006)), the judgments of the trial court should be reversed.

Respectfully submitted,

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April 7, 2022

ADDENDUM

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United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Fourteenth Amendment Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Declaration of Rights, Article 12

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to

him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be at arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Model Jury Instructions on Homicide 20-21 (2013)

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

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

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

Model Jury Instructions on Homicide 28-29 (2013)

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

additional use of force. The right of self-defense cannot be claimed by a defendant who was the first to use or threaten deadly force, because a defendant must have used or attempted to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force. A defendant who provokes or initiates such a confrontation must withdraw in good faith from the conflict and announce to the person (or persons) he provoked his intention to withdraw and end the confrontation without the use of force or additional force. For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the deceased's [and a third party acting together with the deceased's] past violent conduct, whether or not the defendant knew of it.

#155

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1573CR00049

COMMONWEALTH

vs.

JEFFREY SOUZA

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

On September 27, 2016, a jury convicted Jeffrey Souza ("Souza" or the "defendant") of second-degree murder, among other crimes.[1, 2] The defendant moves for post-conviction relief seeking to have a new trial, pursuant to Mass. R. Crim. P. 30(b), or a reduction in the verdict, pursuant to Mass. R. Crim. P. 25(b)(2).[3] After careful consideration of the record and memoranda, the defendant's motion for post-conviction relief is **DENIED**.

BACKGROUND[4]

By way of a brief overview, in the early morning hours of January 1, 2015, Silva and Kyle Brady ("Brady") fought at Maplewood Park in Fall River, near Huard and Albert Streets. Both individuals had a group of friends and family accompany them to watch the fight, and the jury heard various accounts of how the fight transpired. Silva carried a gun. Shot Spotter identified two gunshots in the area at the time of the fight. Silva shot Brady, who ultimately died from a gunshot wound to his chest.[5] Brady's sister and her then-fiancé identified Souza as the

[1] The jury also returned guilty verdicts on charges of assault and battery with a firearm, unlawful possession of a firearm, and unlawful possession of a loaded firearm.
[2] The trial judge, (Garsh, J.), has since retired.
[3] The Appeals Court stayed the defendant's direct appeal pending the defendant's motion for post-conviction relief.
[4] The court reserves a further, detailed discussion of the evidence for the Discussion section.
[5] The autopsy results showed that Brady suffered a knife would and other injuries. The parties stipulated that Joseph Brandon Paryla, also known as "Fat Boy," armed himself with a knife and used it to injure Brady. Fall River police recovered the firearm and knife from the crime scene.

shooter to Fall River police. On January 1, 2015, shortly after 11:00 a.m., Newport, R.I. police officers stopped a motor vehicle carrying Souza and arrested him.

DISCUSSION

Pursuant to Mass. R. Crim. P. 30(b), a judge may grant a new trial "only if it appears that justice may not have been done." *Commonwealth* v. *DiCicco*, 470 Mass. 720, 728 (2015). "Judges are to apply the standard set forth in rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." *Commonwealth* v. *Wheeler*, 52 Mass. App. Ct. 631, 635-636 (2001), citing *Commonwealth* v. *Fanelli*, 412 Mass. 497, 504 (1992), and cases cited therein.

I. Evidentiary Hearing

In considering a new trial motion, the court may base its decision entirely on the motion and accompanying exhibits, unless it determines that a substantial issue was raised by the submissions which requires an evidentiary hearing. Mass. R. Crim. P. 30(c)(3); *Commonwealth* v. *Stewart*, 383 Mass. 253, 259-260 (1981). "In determining whether a substantial issue meriting an evidentiary hearing under rule 30 has been raised, [the court] look[s] not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue[s] raised." *Stewart*, 383 Mass. at 257-258 (internal quotation marks omitted). "A defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, but they must contain sufficient credible information to cast doubt on the issue. A judge may also consider whether holding a hearing will add anything to the information that has been presented in the motion and affidavits." *Commonwealth* v. *Goodreau*, 442 Mass. 341, 348 (2004) (internal quotation marks and citations omitted).

The defendant's submissions have not raised a substantial issue requiring an evidentiary hearing and a hearing would not add anything to the motion and affidavits he presented. His motion raises questions of law; namely, whether the trial judge improperly limited evidence relating to *Commonwealth* v. *Adjutant*, 443 Mass. 649 (2005) and whether the jury heard sufficient evidence to convict him of second-degree murder.

The defendant also presents various claims of ineffective assistance of counsel. However, he provides no affidavit from trial counsel in support of his motion. See *Commonwealth* v. *Diaz*, 448 Mass. 286, 289 (2007) (new trial motion claiming ineffective assistance of counsel in its "weakest form" when affidavit from counsel fails to accompany motion). See also *Goodreau*, 442 Mass. at 354 ("the judge may take into account the suspicious failure to provide pertinent information from an expected and available source"). Moreover, the defendant has filed self-serving affidavits from himself and Richard Silvia, who both testified for the defense at trial, which are insufficient to create a substantial issue.[6] See *Commonwealth* v. *Scoggins*, 439 Mass. 571, 578 (2003) ("The defendant's self-serving affidavits and assertions are not sufficient, on their own, to raise a substantial issue."). See also *Commonwealth* v. *Savage*, 51 Mass. App. Ct. 500, 506 (2001) (affidavit from defendant's wife possessed same self-serving and conclusory characteristics as defendant's affidavit). Accordingly, the court decides his motion for new trial entirely on the papers.

II. Motion for New Trial

a. Scope of *Adjutant* Evidence

The defendant argues that the trial judge improperly limited the testimony of Brady's prior violent acts to his initiation of the incidents. He further argues that *Adjutant*, 443 Mass. at

[6] The affidavits provided by Brady's friends, as provided in further detail herein, are cumulative of other evidence presented at trial.

664 and *Commonwealth* v. *Chambers*, 465 Mass. 520, 529-530 (2013) require evidence of the entire incident to show Brady's propensity for violence generally, as opposed to his propensity to initiate violence.

In *Adjutant*, the Supreme Judicial Court ("SJC") held that "where the identity of the first aggressor is in dispute and the victim has a history of violence, . . . the trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated[ ] to support the defendant's claim of self-defense." 443 Mass. at 664. *Chambers* extended *Adjutant* to instances where a question exists as to who initiated the threat or use of deadly force. 465 Mass. at 529-530. Accordingly, such evidence may also "help the fact finder determine . . . who unreasonably escalated [the violence] by initiating the use or threat of deadly force."). *Id.* at 530.

Fall River Police Officers Paul Carey ("Carey"), Gregory Bell ("Bell"), and Michael Passoa ("Passoa") testified at trial for the defense. Tr. 9, 30.23-48.15.[7] Carey testified that on April 10, 2010, at Sky Lounge in Fall River, Brady kicked him. Tr. 9, 31.12-35.24. Carey, who worked that night as a paid detail, described an altercation involving Brady where, after bouncers broke up a fight, Brady kicked Carey "a couple of times." Tr. 9, 31.12-33.16. Shortly after this testimony, counsel went to side bar, where the judge ruled that the defense could not offer into evidence further details of the incident because the defense had already established that Brady initiated the violence against Carey, and the other details exceeded *Adjutant*'s scope. Tr. 9, 34.10-35.11. When Carey finished testifying, the trial judge gave the jury a limiting instruction.[8]

[7] Citations to the Transcript will be formatted by the abbreviation "Tr." followed by the volume and page numbers.
[8] "Let me give you some instructions. It's the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in proper [self-defense]. If the Commonwealth satisfies its burden of proving that the defendant did not act in proper [self-defense], if it proves any one of five propositions beyond a reasonable doubt. One of those propositions is that the defendant was the first to use or threaten deadly force and did not withdraw in good faith from the conflict and announce to the person or persons he provoked his intention to withdraw and end

Next, Bell testified that on May 8, 2010, at Player's Pub in Fall River, Brady kicked Bell while Bell tried to intervene in a fight involving Brady. Tr. 9, 39.6-41.18.[9] Passoa then testified that on October 3, 2010, at approximately 2:30 a.m. at Al Mac's Diner in Fall River, he broke up a fight involving Brady and Brady then "ripped his arm away from [Passoa], . . . shoved [Passoa], and at that point a physical altercation between [Passoa and Brady] ensued." Tr. 9, 44.19-47-15. After Bell[10] and Passoa[11] testified, the trial judge provided limiting instructions.

Here, the trial judge properly limited the officers' testimony to Brady's identity as the first aggressor in these prior incidents. At trial, a question existed as to who initiated the threat or use of deadly force during the altercation between Souza and Brady.[12] Evidence showing that Brady initiated other fights, thereby serving as evidence to suggest that he initiated the threat or use of deadly force in his altercation with Souza, was permissible under *Adjutant* and *Chambers*. However, the details beyond Brady's identification as the first aggressor fall outside of *Adjutant*'s scope. See *Commonwealth* v. *DeConnick*, 480 Mass. 254, 263 (2018) ("Adjutant evidence is relevant to the issue which person *initiated* the hostilities, and also as to which

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the confrontation without any use or additional use of force. Deadly force is force that is intended or likely to cause death or severe bodily harm. For purposes of determining who attacked whom first in the altercation, you may consider evidence of the deceased's prior past violent conduct, whether or not the defendant knew of it. You cannot consider such evidence for any other purpose whatsoever. At the end of the trial[,] I'll be giving much more detailed instructions." Tr. 9, 36.13-37.8.

[9] At side bar, as with the limitations to Carey's testimony, the trial judge again limited Bell's testimony to his identification of Brady as the first aggressor. Tr. 9, 41.23-42.8.

[10] After Bell's testimony, the trial judge instructed the jury as follows: "Once again, you may consider such evidence, whether or not the defendant knew of it, solely for the purpose of determining who attacked whom first in the altercation in connection with your assessment as to whether the Commonwealth has proved beyond a reasonable doubt that the defendant was the first to use or threaten deadly force and did not withdraw in good faith from the conflict and announce to the person or persons who provoked his attention to withdraw and end the confrontation without any use or additional use of force, which is one means that the Commonwealth has of satisfying its burden of proving that the defendant did not act in proper [self-defense]." Tr. 9, 42.24-43.11.

[11] After Passoa's testimony, the trial judge provided the following instruction: "Again, you may use such evidence for the limited purpose to determine who attacked whom first on January 1, 2015." Tr. 9, 48.7-48.9.

[12] At the final pretrial hearing, the trial judge framed the issue as, "Well, isn't the issue as to whether a warning shot in the air is a threat of deadly force?" Final Pretrial Conference, 21.12-21.15. Later, the trial judge indicated that *Adjutant* "is in the context of who was the first to threaten or use deadly force." Final Pretrial Conference, 23.17-23.19.

person *escalated* the potential for violence through the use or threat of deadly force.") (emphasis added). Accordingly, the trial judge properly limited the scope of the *Adjutant* evidence.

b. Weight of the Evidence

The defendant argues that in the interests of justice, pursuant to Mass. R. Crim. P. 25(b)(2), the weight and integrity of the evidence support a reduction of his verdict to manslaughter or a not guilty.

Rule 25(b)(2) provides in pertinent part that "[i]f a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty . . .." See *Commonwealth* v. *Coleman*, 434 Mass. 165, 170 (2001) (rule gives judge discretionary authority to reduce verdict where "lesser verdict is required in the interests of justice"). "This authority overlap[s] in significant respects with that granted under rule 30(b) . . . [and] is comparable to the power vested in [the SJC] pursuant to G. L. c. 278, § 33E . . .." *Commonwealth* v. *Sanchez*, 485 Mass. 491, 503 (2020) (internal quotation marks and citations omitted). See Reporter's Notes to Mass. R. Crim. P. 25(b)(2).

On a motion pursuant to Rule 25(b)(2), the judge "assess[es] the legal sufficiency of the evidence," pursuant to *Commonwealth* v. *Latimore*, 378 Mass. 671 (1979). See *Latimore*, 378 Mass. at 676-677 (court "determine[s] whether the evidence, in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant, is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged . . .."). A judge should not "second-guess" the jury's decision. *Commonwealth* v. *Millyan*, 399 Mass. 171, 188 (1987). See *Coleman*, 434 Mass. at 170 (judge should exercise authority under Rule 25(b)(2) "sparingly").

"Malice is what distinguishes murder from manslaughter." *Commonwealth* v. *Vicarrondo*, 427 Mass. 392, 396 (1998), *S.C.*, 431 Mass. 360 (2000). To prove malice, the Commonwealth must prove one of three prongs beyond a reasonable doubt: "(1) an intent to kill the victim; (2) an intent to cause grievous bodily harm to the victim; or (3) commission of an act that, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood of death." *Commonwealth* v. *Pagan*, 471 Mass. 537, 546-547 (2015), quoting *Commonwealth* v. *Riley*, 467 Mass. 799, 821-822 (2014).

Here, the weight of the evidence supported the jury's verdict and does not require a reduction. The trial judge instructed the jury that to prove second-degree murder, the Commonwealth needed to prove that the defendant (1) caused Brady's death; (2) intended to kill Brady, cause grievous bodily harm to him, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result; and (3) did not act in proper self-defense.[13] Tr. 11, 80.10-80.18. In addition to these three elements, the Commonwealth also needed to prove the absence of mitigating circumstances. Tr. 11, 80.19-80.20.[14]

The evidence at trial demonstrated that Souza had a gun in his hand during his fight with Brady and remained in close proximity to Brady when the second bullet discharged from the firearm. Tr. 3, 25.11-26.10, 29.14-30.17; Tr. 9, 140.24-142.16. Dr. Mindy Hull, the

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[13] Prior to instructing the jury on homicide, the trial judge instructed them on self-defense. Tr. 11, 65.23-71.5.

[14] In defining mitigating circumstances, the trial judge instructed the jury that "[Y]ou must consider whether the defendant used excessive force in defending himself. The term excessive force in self-defense means that considering all the circumstances, the defendant used more force than was reasonably necessary to defend himself. In considering the reasonableness of any force used by the defendant, you may consider any factors you deem relevant to the reasonableness of the defendant's conduct under the circumstances including evidence of the relative physical capabilities of the combatants, the number of persons who were involved on each side, the characteristics of any weapons used, the availability of room to maneuver, the manner in which deadly force was used, the scope of the threat presented or any other factor you deem relevant to the reasonableness of the defendant's conduct under the circumstances." Tr. 11, 82.12-83.1.

Commonwealth's medical examiner, also testified that she observed searing and soot deposition on Brady's gunshot wound, indicating that the shot came from "close range." Tr. 6, 14.21-15.6.

The parties stipulated, and the evidence demonstrated, that two shots were fired within approximately sixteen and one-half seconds of one another. See Tr. 2, 74.17-76.25; Tr. 3, 3.16-3.20. See also Tr. 3, 157.12-158.2 (Paul Greene, a forensic service manager at SST Incorporated, testified that the shots occurred approximately sixteen and one-half seconds apart). Souza testified he discharged a "warning shot." Tr. 9, 138.18-138.21. Based on his own testimony, the jury could have determined that Souza's firing of a warning shot established that, as per the judge's instruction, he was "the first to use or threaten deadly force and [he] did not withdraw in good faith from the conflict and announce to the person or persons he provoked his intention to withdraw and end the confrontation without any use of or additional use of force." Tr. 11, 67.11-67.15.

The defendant is correct that the jury received evidence of varying accounts of the altercation. However, the jury decides which version of events to credit, and the evidence in the light most favorable to the Commonwealth supports the jury's decision that the defendant did not act in proper self-defense because he initiated deadly force by discharging the firearm. See *Latimore*, 378 Mass. at 676-677.

As to mitigating circumstances, the evidence also supported the jury's determination that the defendant used excessive force. Dr. Mindy Hull testified that Brady suffered more than the fatal gunshot wound; he had also suffered a stab wound and blunt-force injuries to his head, torso, arms, and legs. Tr. 6, 25.12-36.6. This evidence directly called into doubt the defendant's version of the altercation; namely, that the firearm discharged, with Brady on top of him and hitting him, while others tried taking the firearm out of his hand. Tr. 9, 141.1-142.22.

Accordingly, the weight of the evidence does not require a reduction of the jury's verdict.

c. Ineffective Assistance of Counsel

To prevail on a motion for new trial alleging ineffective assistance of counsel, the defendant must demonstrate two things: (1) a "serious incompetency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer;" and (2) "counsel's poor performance likely deprived the defendant of an otherwise available, substantial ground of [defense]." *Commonwealth* v. *Epps*, 474 Mass. 743, 756-757 (2016) (internal quotation marks and citation omitted). See *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974). If counsel made a strategic decision, the court asks whether the decision was "manifestly unreasonable." *Commonwealth* v. *LaBrie*, 473 Mass. 754, 771 (2016).

i. Failure to object to *Adjutant* Jury Instruction

The defendant argues that his counsel provided ineffective assistance by failing to object to the trial judge's *Adjutant* jury instruction. Specifically, he argues that the jury instruction failed to define the two meanings of the term "first aggressor" as clarified in *Chambers* and did not state that the *Adjutant* evidence could be used to determine the identity of both types of first aggressor, rather than for the general purpose of determining if the Commonwealth had proven that the defendant did not act in self-defense.

Since trial counsel did not object to the instruction, the court's review is limited to whether the instruction "was so erroneous that it created a substantial risk of a miscarriage of justice." *Commonwealth* v. *Preziosi*, 399 Mass. 748, 751 (1987) (internal quotation marks omitted). A "substantial risk of a miscarriage of justice" means "a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth* v.

Brescia, 471 Mass. 381, 389 (2015). See *Commonwealth* v. *Randolph*, 438 Mass. 290, 297 (2002) ("Errors of this magnitude are extraordinary events and relief is seldom granted."). Under this standard, the court "view[s] the absence of any objections to the instructions as relevant." *Commonwealth* v. *Ely*, 388 Mass. 69, 73-74 (1983), citing *Commonwealth* v. *Tavares*, 385 Mass. 140, 148, cert. denied, 457 U.S. 1137 (1982).

Other than the limiting instructions provided after the three officers' testimony on Brady's prior violent acts, the trial judge instructed the jury as follows in her final jury instructions:

> For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the deceased's past violent conduct, whether or not the defendant knew of it, and you may consider evidence of the defendant's past violent conduct. You cannot consider such evidence for any other purpose whatsoever.

Tr. 11, 70.25-71-.5.

The defendant correctly states that *Chambers* expanded the definition of "first aggressor" to not just instances where the initial aggressor is in dispute, but also to where a question exists as to who initiated the use or threat of deadly force. 465 Mass. at 530. The *Adjutant* instruction that the trial judge provided did not so clarify and only stated "who attacked whom first in the altercation."

However, prior to instructing the jury on *Adjutant*, the trial judge instructed the jury on self-defense and instructed that "[t]he right of self-defense cannot be claimed by a defendant who was the first to use or threaten deadly force, because a defendant must have used or attempted to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force." Tr. 11, 70.15-70.19. See *Commonwealth* v. *Torres*, 420 Mass. 479, 490-491 (1995) (instructions considered in context of entire charge). As the defendant acknowledges, the judge's instruction followed the language of the Model Jury

Instructions on Homicide 28-29 & n.68 (2013). As such, the "judge's instruction was legally correct and appropriate where, as here, the question as to who was the first to use or threaten deadly force was a contested issue." See *Commonwealth* v. *MacDonald*, 92 Mass. App. Ct. 1115, 2017 WL 5709491, at *2 (2017) (Rule 1:28), rev. denied, 478 Mass. 1109 (2018) (finding no error in judge's instruction). Therefore, trial counsel's failure to object to the closing instruction did not create a substantial risk of a miscarriage of justice.

ii. Failure to Provide Other Evidence

The defendant argues that trial counsel provided ineffective assistance for failing to present other *Adjutant* evidence, reputation evidence, and prior acts of violence evidence. He faults trial counsel for failing to call Chad Nobles, Tiffany Charron, David Costa,[15] Joshua Pacheco, David Faria, and Lucia Souza as witnesses, who could have testified about Brady's reputation for fighting in Fall River.[16] Additionally, the defendant attests that trial counsel did not elicit additional testimony from him regarding fights he allegedly observed Brady initiate.

Trial counsel's failure to provide this additional evidence was not manifestly unreasonable. "The failure to offer cumulative evidence is not ineffective assistance of counsel." *Commonwealth* v. *Drew*, 447 Mass. 635, 650 (2006), cert. denied, 550 U.S. 943 (2007). In trial counsel's opening statement, he argued that Brady was "a violent person with a history of getting into fights;" "really "like[d] to fight;" and "[n]othing stop[ped] Kyle Brady." Tr. 2, 68.21-68.23; 70.6-70.7; 71.6. Souza testified that Brady "got into a lot of fights" and "liked to fight." Tr. 9, 63.6. Moreover, as detailed, the defense offered testimony from three police officers who broke up fights involving Brady where Brady attacked the officers. The summation of this testimony

[15] The court notes that David Costa provided a signed statement as opposed to an affidavit. His submission of an affidavit would not alter the court's decision.

[16] Richard Silvia, Souza's friend who testified at trial, also provided an affidavit that he informed trial counsel of Brady's reputation for violence and would have testified to that effect if trial counsel asked him.

demonstrated Brady's propensity for violence. Offering additional testimony of Brady's propensity would have been cumulative of evidence the jury already heard. See *Commonwealth* v. *Britt*, 465 Mass. 87, 94 (2013) ("The decision not to raise cumulative evidence merely for quantity's sake does not constitute ineffective assistance of counsel."). Accordingly, trial counsel's failure to call these additional witnesses or elicit additional testimony regarding Brady's reputation for violence was not manifestly unreasonable.

iii. Failing to Object to Misstatement in Prosecutor's Closing Instruction and Requesting Curative Instruction

The defendant argues that trial counsel provided ineffective assistance for failing to request a curative instruction based on a misstatement in the prosecutor's closing argument.

"When a defendant raises a claim of error regarding a prosecutor's closing argument, [the court] consider[s] (1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions." *Commonwealth* v. *Diaz*, 478 Mass. 481, 492 (2017), quoting *Commonwealth* v. *Kater*, 432 Mass. 404, 422-423 (2000), citing *Commonwealth* v. *Kozec*, 399 Mass. 514, 518 (1987). Here, since trial counsel made no objection to the prosecutor's closing argument, the court's review is limited to whether the error created a substantial likelihood of a miscarriage of justice. *Kater*, 432 Mass. at 423. See *Commonwealth* v. *Walters*, 485 Mass. 271, 292 (2020).

Kyle Emond testified that on December 31, 2014, while outside of Scottie's Pub, Souza approached him and asked Emond if Emond could give Souza Brady's cell phone number. Tr. 4, 117.4-123.11. Emond refused, but when Souza asked, Emond called Brady for him. Tr. 4, 123.11-123.20. While on the phone, Emond overheard a conversation between Souza and

another man whom Emond could not identify. Tr. 4, 123.21-124.04. The following testimony then occurred:

ADA Walsh:	Not what you think [Souza] was upset about, did he tell you anything? Did he say anything?
Emond:	He didn't say it to me.
Mr. Badwey:	Objection.
The Court:	Overruled.
ADA Walsh:	You can answer, sir.
Emond:	He was talking to the other gentleman about it.
ADA Walsh:	What was he saying?
Emond:	Just basically along the lines —
Mr. Badwey:	Objection, your Honor
The Court:	Overruled. If you recall the substance of what he said, even what was said, if not the exact words.
Emond:	He pretty much was saying that he had something for Kyle Brady, along those lines.
ADA Walsh:	Did he explain further what he meant by that?
Emond:	No?

Tr. 4, 124.7-124.23.

At the beginning of the Commonwealth's closing argument, the prosecutor stated that Emond[17] overhead Souza make the following statement outside of Scottie's Pub, "Tell Kyle Brad I've got something for him. Tell Kyle Brady I've got something for him." Tr. 11, 29.16-29.17.

While the prosecutor's closing argument did not correctly state Emond's testimony by inserting the word "Tell," the prosecutor's misstatement did not create a substantial likelihood of a miscarriage of justice. Emond testified that he could not remember the exact words Souza used, but provided the substance of Souza's statements. The court considers the prosecutor's closing argument in its entirety. He referenced Edmond's testimony only once, thereby limiting any effect the misstatement had on the jury. Cf. *Commonwealth* v. *Burns*, 49 Mass. App. Ct. 677, 683, rev. denied, 432 Mass. 1107 (2000) (in light of entire argument, instructions, and evidence, no substantial risk of miscarriage of justice where prosecutor misstated witness's

[17] As the defendant identifies, and the Commonwealth does not argue to the contrary, the transcript misstates Emond's name as "Kyle Limon."

testimony). Furthermore, "[i]t is also significant that the jury did not blindly accept the prosecutor's arguments, as evidenced by their decision not to convict the defendant [of first-degree murder]." *Commonwealth* v. *Rutherford*, 476 Mass. 639, 648 (2017) (internal quotation marks and citations omitted).

Additionally, the trial judge's instructions mitigated any error. The trial judge explicitly instructed the jury in both the pre-charge and final instructions to consider the witnesses' testimony, that counsel's opening and closing statements were not evidence, and that their collective memory of the evidence controlled, as opposed to the lawyers' memory. Tr. 2, 62.1-62.10; Tr. 11, 48.11-48.13, 60.7-60.12, 62.14-62.15. These instructions sufficiently cured any misstatement by the prosecutor. See *Commonwealth* v. *Imbert*, 479 Mass. 575, 586-587 (2018) (judge's instruction mitigated any error in prosecutor's closing where judge instructed jury closing arguments were not evidence, their recollection of evidence controls, and only facts they could consider were evidence from witnesses). See also *Commonwealth* v. *Montez*, 450 Mass. 736, 746 (2008), citing *Commonwealth* v. *Johnson*, 45 Mass. App. Ct. 473, 479 (1998) ("jurors are presumed to follow a judge's instructions").

iv. Confluence of Factors and Cumulative Effect of Errors Require a New Trial

The defendant seeks a new trial based on a confluence of factors and the cumulative effect of errors. However, for the reasons herein, the defendant received a fair trial. *Brescia*, 471 Mass. at 391 ("defendant is entitled to a fair trial, but not a perfect one, for there are not perfect trials") (internal quotation marks and citations omitted).

ORDER

It is hereby **ORDERED** that the Defendant's Motion for Post-Conviction Relief is **DENIED**.

Thomas J. Perrino
Justice of the Superior Court

August 4, 2021

CERTIFICATE OF COMPLIANCE

I, Matthew V. Soares, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rules 16(a)(13), 16(e), 18, 20 and 21. This brief complies with the length and typeface limitations in Rule 20(a)(2) and 20(a)(4) because it is in the proportional font Times New Roman at size 14, and contains 12,997 total non-excluded words as set forth in Rule 20(a)(2)(D), and as permitted by this Court pursuant to Souza's Motion for Leave to File Brief in Excess of 11,000 words, as counted using the word count feature of Microsoft Word 2003.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS SEVENTH DAY OF APRIL 2022.

/s/ Matthew V. Soares
Matthew V. Soares

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

APPEALS COURT
NO. 2021-P-1123

COMMONWEALTH

V.

JEFFREY A. SOUZA

CERTIFICATE OF SERVICE

I, Matthew V. Soares, hereby certify that I gave notice of the Appellant's Brief and Record Appendix by electronically transmitting copies of same on the date hereof to David B. Mark, Assistant District Attorney, 888 Purchase Street, New Bedford, MA 02740

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS SEVENTH DAY OF APRIL, 2022.

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