**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT NO.**

(APPEALS COURT NO. 2018-P-1054)
(HAMPDEN COUNTY SUPERIOR COURT NO. 1579CR00772)

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**COMMONWEALTH, Appellee**

**v.**

**RICARDO VALENTIN, Appellant**

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# APPLICATION BY APPELLANT RICARDO VALENTIN FOR FURTHER APPELLATE REVIEW

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Date: 6/27/19

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## REQUEST FOR FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Ricardo Valentin requests further appellate review of the decision by the Appeals Court affirming his conviction of second degree murder.

## STATEMENT OF PRIOR PROCEEDINGS

In August-September 2017, Valentin stood trial for the first degree murder of David Guasp in Hampden County Superior Court before Judge Sweeney and a jury. RA/I/3-4. He was assisted by a Spanish language translator throughout the proceedings. RA/I/5-10. Convicted of second degree murder and sentenced to a term of life with parole eligibility after 20 years, Valentin appealed. RA/I/11, 95.

On June 11, 2019, the Appeals Court affirmed Valentin's conviction. A copy of rescript and the decision of the Appeals Court (the amended memorandum and order under Appeals Court Rule 1:28) is appended to this application. No party is seeking reconsideration or modification in the Appeals Court.

## STATEMENT OF FACTS

In addition to the facts stated in the Appeals Court's decision, the following facts are relevant to this appeal:

On August 29, 2015, Valentin (nicknamed "Plomo") and Guasp (nicknamed "Blanco") got into a fight on High Street in Springfield. T/II/96-99. Guasp and Valentin had been friends, but Guasp was angry with Valentin since Valentin had begun a relationship with his ex-girlfriend, Tatiana Miranda. T/II/109-10, 117-19; III/48. Because it was undisputed that Valentin killed Guasp by stabbing him once in the abdomen, T/II/84-94, 97-98; IV/73, 91-119, 162-65,[1] the trial focused on whether he did so in self-defense or was guilty of murder or manslaughter.

### EVIDENCE AT TRIAL[2]

#### Guasp's Violent History with Miranda

Miranda dated Guasp for about a year from 2013-2014. T/III/39, 48. Their relationship was not good

[1] The Medical Examiner determined that the cause of death was a stab wound to the abdomen with perforation of the liver and penetration of the vena cava (a major vessel). T/IV/73.

[2] All of the evidence was presented during the Commonwealth's case. The defense rested without calling witnesses or presenting additional evidence. T/IV/77, 81.

because he was a jealous, very violent man. T/III/51. Miranda suffered a lot because of violent acts Guasp directed at her. T/III/51, 56.

Miranda recounted four such incidents at trial:

- On September 3, 2013, she was at home and Guasp tried to break into her house. T/III/55-56.
- On November 25, 2013, when she wanted Guasp out of her home on Pine Street, Guasp punched her in the mouth, threatened her with a firearm (which she actually saw), and said he was going to do bad things to her. She called the police, but Guasp left before they arrived. T/III/54-55, 60.
- On December 6, 2013, she was driving to McDonald's with Juan Salgado, a disabled friend for whom she was working as a personal care assistant. Guasp threatened Salgado and tried to take him out of the car, but she was able to drive away. T/III/53-54.
- On June 6, 2014, when she was at Guasp's uncle's house and Guasp did not want her to leave, Guasp pinned her, slammed her head to the ground, and threw a smoke detector at her. T/III/51-53.

After these events, Guasp went to jail, which ended Miranda's relationship with Guasp. T/III/56.

Miranda Begins a Relationship with Valentin

While Guasp was in jail, Miranda began a relationship with Valentin. T/III/37-39, 56. Aware that Guasp and Valentin were friends, Miranda told Valentin about her experiences with Guasp so he would know in case of a problem. T/III/39, 48-49, 56-57.

Valentin lived with his family in Springfield, worked in the area, and at times had anxiety issues. T/III/49. Miranda and Valentin had a good relationship and loved each other. T/III/49-50. Valentin treated her well and was never violent or threatening toward her. T/III/50. She never knew Valentin to be violent or to carry weapons. T/III/50.

Trouble Brews Between Guasp and Valentin

Although Guasp started a new relationship with Lizmarie Santana while he was in jail, Guasp was angry with Valentin for getting involved with Miranda. T/II/95-96, 107-10. After being released from jail, Guasp spent two days with Santana, who took him in and bought him a cell phone. T/II/96, 109-13. Santana planned to get him some clothes, but Guasp wanted to go see "his boys" on High Street and Santana went there with him. T/II/96, 111-13. While hanging out with three or four friends in the fenced area behind

90-92 High Street, Guasp was mad and stressed out; his friends were trying to calm him down and advising him to leave the past alone. T/II/114-17.

In the meantime, Valentin and Miranda were at Miranda's apartment at 48 Williams Sands, Jr. Boulevard in Springfield. T/III/36-39. They were planning to celebrate Valentin's birthday, which is August 29. T/III/57-58. But Valentin went unaccompanied to the High Street location about 3.7 miles away, where he also had friends and family. T/III/33-35, 50, 58-60. He drove the car he shared with Miranda and took a kitchen knife from her apartment with him. T/III/39-43, 58.

The Confrontation on High Street

When Guasp and Valentin encountered each other behind the buildings at 90-92 High Street, Guasp screamed to his boys, "He's here, he's here, come here." T/II/97, 122-24. Valentin said, "I heard you was looking for me," adding, "I didn't know that was your girl." T/II/97, 124-25, 133. Amidst a crowd, Guasp and Valentin started arguing, with Guasp pointing at and squaring off against Valentin. T/II/97-98, 121; III/22-23, 25.

This initial phase of the confrontation was photographed in part by a camera mounted on a building at 34 Myrtle Street, which yielded a choppy video without audio. T/III/19-21, 26-27, 29-30; Ex. 17. What happened next was captured in part in a video taken on a bystander's cellular phone, Ex. 1a; a transcript was made of some of the audio portion, Ex. 1b. T/II/99-101. In the videos, Guasp is wearing a blue and white striped shirt and Valentin is wearing an olive shirt, long pants, and white shoes; Santana is wearing a white shirt and pants. T/II/99-101; III/21-24. See also T/II/105-06; III/24-26. Still photos were made in addition to the videos. Exs. 4, 18a-18e, 24, 32-36.[3]

After the initial phase of the confrontation, Valentin left the back area and walked away from Guasp. T/II/127-28. Guasp raised his hands toward Valentin as Valentin backed out of the alleyway. T/III/23-24. Valentin went up the alleyway and took a right on High Street, with Guasp behind him. T/II/133-35. Guasp yelled "cabron," which could mean cheater. T/II/128-29. Guasp screamed at Valentin

[3] Valentin was 5'3" to 5'4" and weighed 120-130 pounds. T/III/110. Guasp was 5'4" and weighed 158 pounds. T/IV/66, 74.

that this was his block and if he didn't want to die, put it away.[4]

Many people were watching. T/II/132-33. Santana unsuccessfully tried to stop Guasp from fighting, asking him to "[d]o it [stop] for your family," and saying, "Please, can we just leave?" T/II/129-30. The third person who got between Guasp and Valentin was not identified. T/II/106, 132; III/45-47.

Based on the video, the Appeals Court observed that Guasp then "[took] a quick step toward [Valentin] and [took] a fighting stance [with his hands raised in fists] again," but whether Guasp "pause[d] for a moment" before Valentin stabbed him is debatable. In any event Guasp did not back off. Ex. 1a.

Guasp made his way to a porch at the back of the buildings, where he collapsed. T/II/101-02. Police

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[4] The transcript and translation of part of this confrontation into English is as follows:
Speaker 1: Ivan told me, papi. Ivan told me. Take off what you have there (inaudible) that knife. This is my block, papi. If you don't want to die, take that off. Take that off. Take that off. Yo, te-tell this foo to take that off, nigger. Take that… You're a motherfucker, bastard. You don't want to take that off. You're a motherfucker, bastard. You don't want to take that off. I'll remember you, nigger. Tell that foo to take that off. Take that off, bastard. Take that off, bastard. I said take that off, bastard. Take that off.
Speaker 2: (inaudible)
RA/II/3-4--Ex. 1b.

and medical personnel responded and arranged to transport Guasp to Baystate Medical Center. T/II/102, 136-50; III/6-19, 27-29, 75-78, 101-02. Some of the events on the porch were captured in another video, which also recorded the end of the fight. Ex. 2.

Valentin's Subsequent Conduct and Statements

Valentin returned to Miranda's apartment. T/III/40. He looked anxious and sad. T/III/40, 59. Valentin told Miranda that he went to High Street to confront Guasp and tried to resolve the situation by calming him down and talking. T/III/40, 59. Guasp did not want to talk but wanted to fight. T/III/40. He (Valentin) "didn't want to do it." T/III/59.

Valentin put a kitchen knife with blood on it on the kitchen counter. T/III/40-41, 43. He tried to break the knife and get rid of it. T/III/41, 47. Miranda noticed no injuries on Valentin, who left without taking any belongings. T/III/43, 47. Miranda did not see Valentin after that, and their relationship ended, although she continued to care about him. T/III/47-48, 61.

On September 8, 2015, Valentin was arrested while running from a backyard in New London, Connecticut. T/III/96-100. Three Springfield Detectives, Jose

Canini, Kevin Lee and Anthony Pioggia, went to New London to interview Valentin. T/III/85-86, 102-03. Canini, who speaks Spanish fluently, assisted Lee and Pioggia by giving Valentin his Miranda rights in Spanish and translating. T/III/78-82, 86-88, 103-04. Valentin waived his Miranda rights, spoke freely and voluntarily, and was cooperative throughout the interview. T/III/82, 86-89, 104. The interview was conducted in Spanish, recorded by video and audio, and translated into English. T/III/80, 103-04, 106; IV/5-6; Ex. 30; RA/I/20-83; RA/II/5-69—Ex. 37. The interview recording and transcript were redacted, in accordance with the trial judge's pretrial rulings and over the defendant's objections. T/III/106; IV/4-5; Compare RA/I/20-83 (unredacted transcript) with RA/II/5-69—Ex. 37 (redacted transcript).[5]

Valentin, who was born in 1991, finished school in ninth grade, and reads and writes in Spanish, told police that Guasp (Blanco) was always threatening him, ever since Guasp found out he was with Miranda.

[5] The trial judge instructed the jury that what they heard on the video (as opposed to the captions and the transcript) controlled and that the transcript was a "tool," but that conversations between Detectives Canini and Pioggia were not evidence. T/III/104-07; IV/4-5. However, references in this section are to the transcript, RA/II/5-69—Ex. 37.

RA/II/8, 11-13, 16-17, 61-62.[6] Everyone would call him to tell him Guasp was looking for him, wanted to jump him, and was threatening to kill him and Miranda. RA/II/13-15, 17, 52. Miranda had problems with Guasp, who was obsessed with her and assaulted, threatened, and pulled a gun on her; he was locked up for domestic violence because of her. RA/II/15, 17, 53-54.

Valentin further recounted that on the day in question, which was his birthday, he washed the car and went to the barber shop; he took two or three Oxycodone pills that had been prescribed for back pain. RA/II/31-35. Friends on High Street called him to say Guasp was there and looking for him. RA/II/17-18, 56. Both of them often went to High Street, where Valentin's grandmother lives, and both knew many people there. RA/II/17-19, 21, 28, 45, 50-51. Valentin drove to High Street in the car he shared with Miranda, and he took a knife from Miranda's house with him just in case. RA/II/18-21. Frightened by calls that Guasp was looking for him, Valentin did not want to fight Guasp but to protect himself in case he ran into Guasp and Guasp was armed. RA/II/52-54, 57.

[6] Valentin said he lived with Miranda and called her his wife. RA/II/19-20.

According to Valentin, he was on his way to see a friend called Bebo (the husband of his ex's sister) when he ran into Guasp, who was with a lot of people (perhaps as many as 15-20) behind the building at 92 High Street. RA/II/21, 28-29, 45-47, 51-65. Guasp tried to jump him and got on top of him, went crazy and screamed at him, and threatened to kill him while making motions toward him with his shirt. RA/II/29, 52, 57-58, 62. Valentin left, but Guasp chased him down the street to the front of the building, came up behind him, and tried to jump, hit and grab him. RA/II/28-29, 41, 44.

Valentin described what happened this way:

> I told him [Guasp], "don't get close to me." And when he came up to me, I said, "don't get close to me, you know? Because I don't know what you have on you." And he said-- oh, and he, like, squared up on me. So I thought that he had a gun or something, because people on the street, you know, everyone always has a gun…. And I started saying, "well, don't get near me." And like this, coming up on me. [I said,] "I'm not going to fight over a woman. I'm not going to be fighting over a woman." And like this, like trying to jump me. So, I got scared, when I saw another man who got in the middle. And around then is when--so, you know? But I didn't want to kill him or anything. You understand? I'm not like that. I'm not a person who wants to kill anyone else, because . . .

RA/II/21-22. See also RA/II/23-24, 29, 44, 53, 57. When someone got in the middle, everyone came out and tried to get him; frightened, Valentin started swinging wildly with the knife and must have hit Guasp. RA/II/22-26, 43-44. Valentin was just trying to scare Guasp and did not think anything had happened; but when Guasp came out running, everyone was screaming at him, and Valentin thought all of the people were going to attack him, Valentin ran and left. RA/II/42.

Valentin recalled that he returned to Miranda's apartment and threw the knife away near the house, but was unsure what he did with the clothes he was wearing. RA/II/38-40, 42-43. He told Miranda what happened and took a taxi to a hotel in Hartford. RA/II/48-50.

JURY DELIBERATIONS

Having been instructed on self-defense, manslaughter with the excessive use of force in self-defense and upon sudden combat (but not upon reasonable provocation), second degree murder, and first degree murder with deliberate premeditation, the jury deliberated for about an hour on the afternoon of August 31, 2017 and resumed deliberating

at about 9:19 AM on September 1, 2017. T/IV/135-54, 162-67; V/1-4.

At 2:43 PM on September 1, 2017, the court reconvened to discuss the jury's note asking for a definition of "sudden assault." T/V/4-5; RA/II/80—Ex. D-ID. The trial judge rejected defense counsel's request that she instruct the jury on the legal meaning of "assault." T/V/8-9. In delivering her supplemental instruction, the trial judge did not tell the jury to consider it together with her previous instructions. T/V/11-14. The jury resumed deliberations at 2:58 PM. T/V/12. At 4:06 PM, just before the start of the Labor Day weekend, the jury returned a verdict that Valentin was guilty of murder in the second degree. T/V/14-15.

## STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

I. Whether the trial judge's erroneous supplemental instruction on sudden combat and refusal to instruct on reasonable provocation prejudiced the defense and, together with other defects in the jury instructions, made a manslaughter verdict or acquittal less likely and denied Valentin due process of law and a fair trial.

II. Whether the trial judge's erroneous evidentiary rulings excluding certain statements by Valentin to Miranda and the police further prejudiced the defense by making making a manslaughter verdict or acquittal less likely and denied Valentin due process of law and a fair trial.

## STATEMENT OF REASONS THAT FURTHER APPELLATE REVIEW IS APPROPRIATE

### I. Further appellate review is necessary to remedy deficiencies in sudden combat instructions and the omission of reasonable provocation instructions (as well as other instructional errors) in this and other cases, to assure people tried for murder a fair opportunity for a manslaughter verdict or acquittal.

A. Sudden Combat

The Appeals Court correctly held that the trial judge's supplemental instruction on sudden combat was erroneous, but unjustifiably concluded that Valentin was not prejudiced because "'the jury would inevitably have reached the same result if the judge had omitted the challenged instruction.'" (citation omitted). The Appeals Court's decision was flawed.

In the first place, the Appeals Court ignored the fact that the jury's question itself indicated it was considering a manslaughter verdict, the trial judge failed to instruct the jury to consider the supplemental instruction along with her instructions as a whole, the supplemental instruction was the last thing the jury heard, and the jury returned a second degree murder verdict only about an hour after returning to deliberate. Furthermore, the supplemental instruction was more onerous to the defense than the Model Instruction previously given,

because it required that both parties had to enter into combat "willingly" and to fight "on equal terms" and that the accused did not instigate the fight and his retaliation was not "disproportionate" to the provocation. The Appeals Court's confidence that the jury would have convicted Valentin of second degree murder if the supplemental instruction had not been given was unfounded. *Commonwealth v. Skinner*, 408 Mass. 88, 97 (1990); *Commonwealth v. Morales*, 70 Mass. App. Ct. 526, 531-34 (2007) (erroneous supplemental instructions required reversal).

Second, although the Appeals Court thought the record as a whole, particularly the video of the stabbing, presented "strong evidence that the defendant did not kill the victim as a result of heat of passion induced by sudden combat," it did not disagree with the trial judge, the Commonwealth, and the defense that the evidence warranted a charge on sudden combat. The issue was for the jury, especially where the evidence as a whole, taken in the light most favorable to the defendant, was that Guasp approached Valentin, threatened to kill him, followed him when Valentin backed away, pointed at him and squared off in a prizefighter stance, kept approaching Valentin

although he saw he had a knife, and at one point made a motion with his shirt. Additional evidence, including that Valentin knew Guasp had been threatening to kill him and Miranda, had been violent and carried a gun and threatened Miranda with it in the past, and feared Guasp and the gathering crowd, further suggested Valentin acted in the heat of passion. There was more than a "reasonable possibility" that the erroneous supplemental error might have contributed to the jury verdict. *Commonwealth v. Wolfe,* 478 Mass. 142, 150 (2017).

Third, the Appeals Court's decision rests on the mistaken notion that the combat could not have been sudden because Valentin sought out Guasp and brought a knife to High Street. There was evidence, in Valentin's statements to Miranda and the police, that Valentin went to see High Street not wanting to fight or kill Guasp but rather to try to talk to him and only brought a knife for protection. If the jury credited that evidence, it could have convicted of manslaughter based on sudden combat. *Cf. Commonwealth v. Fortini,* 68 Mass. App. Ct. 701, 706 (2007) and cases cited (reasonable provocation instruction warranted).

The Appeals Court's decision was not only incorrect but also demonstrates the need for more guidance from this Court to trial judges on how to instruct on sudden combat. While another trial judge may be unlikely to derive a supplemental instruction about sudden combat from a federal district court case decided under Illinois law, the Model Jury Instructions on Homicide ("Model Instructions") do not equip Massachusetts trial judges to answer a question such as the one posed by this jury. The Model Instruction on sudden combat uses but does not define the term "sudden assault." Nor does it define "assault," which under Massachusetts law is an attempted or threatened battery and does not require actual physical contact. *Commonwealth v. Porro*, 458 Mass. 526, 530 (2010). Unlike the revised 2018 Model Instruction on reasonable provocation, the Model Instruction on sudden combat does not clarify that actual physical contact is not required. Trial judges would have to consult case law, summarized most recently in *Commonwealth v. Howard,* 479 Mass. 52, 58-59 (2018), to determine and instruct that sudden combat could involve an attack that is an overt act or physical gesture indicating intended violence.

The Appeals Court's suggestion that the trial judge should have declined to give any further instruction on sudden combat, or provided dictionary or Massachusetts legal definitions in accordance with the "plain meaning" of the words in the phrase, is not helpful. The phrase "sudden assault" has no "plain meaning," and the trial judge rejected defense counsel's request to provide the legal definition of "assault" to the jury.

B. Reasonable Provocation

Although the Appeals Court recognized that sudden combat is among the circumstances constituting reasonable provocation, it upheld the trial judge's refusal to charge on reasonable provocation. In doing so, it got off on the wrong foot by dismissing Valentin's reliance on language in *Howard* because that case was decided after Valentin's trial. This Court did not make new law in *Howard*, but rather discussed and clarified its previous decisions.

The Appeals Court then concluded that Valentin failed to identify conduct meriting a reasonable provocation instruction. In doing so, it failed to account fully for evidence in the record that Guasp approached Valentin, yelling threats to kill him even

after seeing Valentin had a knife; Valentin believed Guasp, who had carried and used a gun in the past, could have a gun; and Guasp engaged in hostile behavior including raising his fists, pointing, and making motions with his shirt while he threatened to kill Valentin. Guasp's hostile words and actions are very similar to those of the victim in *Commonwealth v. Little,* 431 Mass. 782, 783-87 (2000), in which this Court held a reasonable provocation instruction was required.

In addition, this case points to the need for further guidance from this Court on when, if ever, it would be appropriate to instruct a jury on sudden combat but not reasonable provocation. This Court's statement in *Howard* that reasonable provocation "encompasses a wider range of circumstances likely to cause an individual to lose self-control in the heat of passion than does sudden combat" suggests that a reasonable provocation instruction should accompany a sudden combat instruction.

C. Other Instructional Errors

Although further appellate review is warranted solely because of the above defects in the jury instructions, this Court should also consider other

problems with the charge that further undermined Valentin's effort to avoid a murder conviction. The trial judge omitted portions of the Model Instructions on excessive use of force in self-defense and on mistaken but reasonable belief in self-defense, and defense counsel sufficiently alerted her to the first error. The trial judge should have instructed on involuntary manslaughter as defense counsel originally requested, based on evidence that Valentin told police he was swinging the knife wildly in an attempt to scare Guasp and he inflicted only a single, though deep, blow. This Court should be concerned that trial judges still fail to give full Model Instructions provided for homicide cases since 1999 and involuntary manslaughter instructions supported by any view of the evidence. *See Commonwealth v. Martinez*, 393 Mass. 612, 613-14 (1985).

D. Miscarriage of Justice/Constitutional Considerations

As explained above, this case presents substantial reasons for further appellate review affecting the interests of justice and the public interest. Trial counsel undeniably preserved objections to defects in the sudden combat and

reasonable provocation instructions. These errors were serious enough to deprive Valentin of due process of law, and cannot be considered harmless beyond a reasonable doubt. *Skinner,* 408 Mass. at 96, *citing Chapman v. California,* 386 U.S. 18, 24 (1967). *See Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). Even unobjected to errors in manslaughter instructions present a substantial risk of miscarriage of justice if as a result a defendant is serving a life sentence for murder. *See Commonwealth v. McLaughlin,* 433 Mass. 558, 564 (2001). Both this Court and the public have an interest in making sure people tried for murder receive a fair trial and a sentence proportionate to their culpability, if any.

## II. Further appellate review should include the trial judge's erroneous evidentiary rulings, which prevented the jury from hearing more of what Valentin told Miranda and police and further deprived him of a fair opportunity for a manslaughter conviction or acquittal.

### A. Statement to Miranda

In ruling that Valentin's statement to Miranda ("I felt like he was the one that was going to do it to me") was inadmissible hearsay, the Appeals Court ignored his argument that the statement would not be hearsay if offered to prove circumstantially his state

of mind (that he feared Guasp was going to kill him). Mass. Guide Evid. 801(c) and Note. Appellant's Brief at 46. The exclusion of this evidence was damaging to Valentin's claim that he acted in self-defense or at most committed manslaughter. What Valentin told Miranda right after the incident was significant, because the prosecutor argued that Valentin had about ten days to make up a story ("all lies and half truths") before his arrest. T/IV/112-16.

B. Statement to Police

Redacted portions of Valentin's statement to police were also significant and went beyond "cumulative evidence, cross-talk between detectives, multilayered hearsay, and statements which were otherwise irrelevant." Compare RA/I/20-83 with RAII/5-69. It was necessary to a fair and full understanding of Valentin's statement to hear he was told immediately upon his arrival at High Street that Guasp was there looking for him and wanting to kill him, he was scared "out of his mind" for himself, Miranda and his family, he thought Guasp was going to kill him and he needed to save his life, he told Miranda immediately after the incident that Guasp tried to kill him, and he left town because he thought

Guasp's friends wanted to kill him and everyone was against him. These additional portions of Valentin's statement, which put into context the admitted parts and explained what Valentin said about leaving town, were admissible under the doctrine of completeness. *See Commonwealth v. Tennison*, 440 Mass. 553, 564 (2003); *Commonwealth v. Eugene*, 438 Mass. 343, 351 (2003). Because Valentin had a 9th grade education, spoke little English, struggled to express himself, and gave a statement that required translation into English, and because the prosecutor argued his flight showed consciousness of guilt, T/IV/111, it was vital for the jury to hear more of what Valentin said.

C. Miscarriage of Justice/Constitutional Considerations

The exclusion of statements Valentin made to Miranda and the police was error significant enough to violate his due process right to present a full defense and cannot be considered harmless beyond a reasonable doubt. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Commonwealth v. Gray*, 463 Mass. 731, 750 (2012). Further appellate review of these evidentiary rulings would advance the interests of justice.

## CONCLUSION

For the reasons given above, Valentin's application for further appellate review should be granted.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, under the pains and penalties of perjury, that this application for further appellate review complies with Massachusetts Rules of Appellate Procedure 16(k), 20(a) and 27.1. The application was prepared using the Courier New 12 font and contains no more than 10 pages of text in the statement of reasons that further appellate review is appropriate.

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**CERTIFICATE OF SERVICE**

Pursuant to Mass. R. App. P. 13(d), I hereby certify, under the penalties of perjury, that on June 27, 2019, I have made service of this Application for Further Appellate Review through the electronic filing system on:

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-154

COMMONWEALTH

vs.

RICARDO VALENTIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from his conviction for murder in the second degree, the defendant claims that the trial judge made multiple errors in the jury instructions and that she erroneously excluded evidence of his statement to a witness and portions of his statement to the police. We affirm.

1. Jury instructions. a. Supplemental instruction on sudden combat. The defendant claims error in the judge's supplemental instruction on mitigation by reason of sudden combat. During deliberations, the jury sent a question: "Is there a precise or clear definition of quote/unquote 'sudden assault,' beyond what is provided in the charge? If yes, can we hear it?" The phrase "sudden assault" appeared only a single time in the judge's instructions, in the portion discussing

sudden combat.[1] Over the defendant's objection, the judge answered the jury as follows:

> "Mutual combat or sudden assault is defined as one into which both parties enter willingly. Or in which two

[1] The defendant does not challenge the judge's initial instruction on sudden combat, which he concedes was consistent with the Model Jury Instructions on Homicide § 2.5(2) (2018). The original instruction on sudden combat, in full, was as follows:

> "Sudden combat involves a sudden assault by the deceased and the defendant upon each other. In sudden combat, physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person, under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection on whether the defendant was in fact so provoked.
>
> "The heat of passion induced by sudden combat must also be sudden. That is the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion without cooling off at the time of the killing.
>
> "If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion induced by sudden combat, the Commonwealth has not proved that the defendant committed the crime of murder.
>
> "In summary, a killing that would otherwise be murder is reduced to the lesser offense of voluntary manslaughter if the defendant killed someone because of heat of passion induced by sudden combat. The Commonwealth has the burden of proving beyond a reasonable doubt the defendant did not kill as a result of heat of passion and induced by sudden combat.
>
> "If the Commonwealth fails to meet this burden, the defendant is not guilty of murder, but you are required to find the defendant guilty of manslaughter if the Commonwealth has proved the other required element[s]." (Emphasis added.)

> persons, upon sudden quarrel, [a]nd in hot blood mutually fight upon equal terms.
>
> "Two conditions must be satisfied as well. One, the accused cannot have instigated the fight; and two, retaliation by the accused must not be disproportionate to the provocation."

The language of this instruction was derived from a definition of mutual combat under Illinois law, as provided in United States ex rel. Bacon v. DeRobertis, 551 F. Supp. 269 (N.D. Ill. 1982). The phrase "sudden assault" does not appear in the case.

The defendant argues that this supplemental instruction "neither elucidated nor was consistent with Massachusetts case law," and therefore was improper. "Where, as here, a defendant raises a timely objection to a judge's instruction to the jury, we review the claim for prejudicial error." Commonwealth v. Kelly, 470 Mass. 682, 687 (2015). In reviewing the defendant's claim, we are mindful that "[t]he proper response to a jury question must remain within the discretion of the trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions accordingly." Commonwealth v. Waite, 422 Mass. 792, 807 n.11 (1996). A judge's discretion to formulate such a response is broad. See id. When providing supplemental instructions in response to jury questions, judges "need not repeat all or any part of the original instructions." Commonwealth v. Stokes, 440 Mass. 741, 750 (2004). "The judge's additional instructions, . . . although delivered after a period

of jury deliberation, must be read in light of the entire charge." Commonwealth v. Sellon, 380 Mass. 220, 233-234 (1980).

Here, the jury, which had with them the written jury instructions, sought a clearer definition of the phrase "sudden assault." Finding "nothing in Massachusetts other than the plain meaning of the word[s]," the judge puzzlingly resorted to a United States District Court case defining "mutual combat" for purposes of Illinois State law to provide a response to the jury's question.[2] The judge's response to the jury constituted error.

We have found no requirement in Massachusetts law, nor has the Commonwealth suggested any, that parties must enter into sudden combat "willingly," or fight upon "equal terms," a phrase whose meaning is itself somewhat elusive. Certainly, the comparative attributes of the parties involved may be a factor considered in determining whether an incident constitutes sudden combat. See, e.g., Commonwealth v. Bianchi, 435 Mass. 316, 329 (2001) (no adequate provocation where victim called defendant

[2] A judge "risks much mischief by going beyond the facial content of a deliberating jury's question in an effort to provide assistance on a subject that he or she infers is 'really' troubling them." Commonwealth v. Murphy, 57 Mass. App. Ct. 586, 593 (2003). Among the alternatives available to the judge in responding to the jury's question here were declining to give any instruction exceeding the already-provided sudden combat instruction, or providing dictionary or Massachusetts legal definitions in accordance with the "plain meaning" of the words in the phrase.

obscenity and punched defendant in face, where defendant was weightlifter, outweighed victim by over 170 pounds, was armed, and was violating protective order in pursuing victim); Commonwealth v. Parker, 402 Mass. 333, 344-345 (1988) (allegation of two blows struck by seventy-nine year old handicapped victim insufficient evidence of sudden combat); Commonwealth v. Walden, 380 Mass. 724, 726 (1980) (several blows by eighty-four year old victim and scratches from second victim insufficient evidence of sudden combat). Nonetheless, there is no strict requirement of "equality" between the combatants at issue.

Similarly, under our law of sudden combat, proportionality of response is not a necessary element of the defense, but is instead a factor often considered in analysis of the issue.[3] See, e.g., Commonwealth v. Ruiz, 442 Mass. 826, 839 (2004) (no sudden combat instruction merited where victim slapped and jumped on defendant, which "presented no threat of serious harm to him"); Commonwealth v. Garabedian, 399 Mass. 304, 313-314 (1987) (scratches to face of male attacker by woman victim was evidence "hardly of a type which would entitle the defendant to an instruction on voluntary manslaughter"); Commonwealth v.

[3] The Commonwealth conceded at oral argument that inclusion of this requirement in the supplemental instruction was an inaccurate statement of Massachusetts law.

Brown, 387 Mass. 220, 227 (1982) (evidence that victim choked husband with shirt insufficient, where husband stabbed wife twenty-seven times).

As to the requirement in the supplemental instruction that a defendant not have "instigated" the fight, it is true that "provocation must come from the victim," Ruiz, 442 Mass. at 838-839, and "the victim generally must attack the defendant, or at least strike a blow against the defendant in order to warrant a manslaughter instruction." Commonwealth v. Lugo, 482 Mass. 94, 104-105 (2019). Passing on the question whether this instigation requirement was precisely correct as stated, as discussed infra, any error in this portion of the supplemental instruction was without prejudice.

In reviewing an error for prejudice, we "inquire[] whether there is a reasonable possibility that the error might have contributed to the jury's verdict." Commonwealth v. Wolfe, 478 Mass. 142, 150 (2017), quoting Commonwealth v. Alphas, 430 Mass. 8, 23 (1999) (Greaney, J., concurring). In doing so, we examine the jury instructions as a whole, as well as the strength of the Commonwealth's case. See Commonwealth v. Asher, 471 Mass. 580, 590 (2015). We discern no prejudice from the erroneous supplemental instruction here.

The record as a whole, but particularly the video recording (video) of the stabbing, presents strong evidence that the

defendant did not kill the victim as a result of heat of passion induced by sudden combat. In the video, the two walk down the street, exchanging heated words, with the victim demanding repeatedly that the defendant "take off" his knife. The two square off, the victim in a fighting stance with his hands raised in fists. A third party separates the two for a few moments as they continue exchanging words. Then the victim takes a quick step toward the defendant, and takes a fighting stance again. The victim pauses for a moment, and the defendant then lunges toward him, stabbing him a single time before the victim flees, with the defendant chasing after him.

The record "contains nothing to suggest that the defendant ever experienced a moment of such sudden passion that his capacity for self-control was eclipsed," Commonwealth v. Benson, 453 Mass. 90, 97 (2009), nor does it depict any objectively reasonable provocation sufficient to justify the defendant's actions. See Commonwealth v. Groome, 435 Mass. 201, 220 (2001) (defendant's actions must be "both objectively and subjectively reasonable"). The video reflects that, though the two engaged in a heated conflict, the victim did not strike the defendant, and, indeed, that the victim paused for a moment before the defendant stabbed him.

Additionally, and importantly, "[t]he fight was not sudden and unexpected, but rather . . . prepared for by the defendant.

The deadly weapon was not carried incidentally, but was brought purposely to the fight for protection." Commonwealth v. Gaouette, 66 Mass. App. Ct. 633, 641 (2006). According to the defendant's own statement, before proceeding to High Street -- the location of the fight -- that day, the defendant was told that the victim, who "knows a lot of people," was looking for him and wanted to jump him, and that the victim would be on High Street that day. The defendant "armed himself in preparation for a fatal confrontation and, carrying a . . . deadly weapon, went to a location where he knew he would find the victim[]. Although [the defendant] may have feared the victim[], he sought [him] out." Commonwealth v. Clemente, 452 Mass. 295, 321 (2008) (defendant ineligible for manslaughter instruction). "Courts are reluctant to find mitigation . . . on a lesser included offense when the defendant confronts the victim while armed with a deadly weapon." Commonwealth v. Vick, 454 Mass. 418, 429 (2009). See Commonwealth v. Rodriquez, 461 Mass. 100, 108-109 (2011), quoting Walden, 380 Mass. at 727 ("'physical contact between a defendant and a victim is not always sufficient to warrant a manslaughter instruction' . . . . This is particularly so when a defendant is armed with a deadly instrument and a victim is not").

Based on our review of the record, we are confident that "the jury would have inevitably reached the same result if the

judge had omitted the challenged instruction." Wolfe, 478 Mass. at 151, quoting Commonwealth v. Buiel, 391 Mass. 744, 747 (1984). The error does not require reversal.

b. Reasonable provocation. The defendant additionally challenges the judge's refusal of his request to instruct the jury on reasonable provocation. For a reasonable provocation instruction to be appropriate, "[t]here must be evidence that would warrant a reasonable doubt that something happened which would have been likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and that what happened actually did produce such a state of mind in the defendant." Commmonwealth v. Avila, 454 Mass. 744, 768 (2009), quoting Walden, 380 Mass. at 728. "[S]udden combat is among those circumstances constituting reasonable provocation," and accordingly, "much of our case law treats them indistinguishably." Commonwealth v. Camacho, 472 Mass. 587, 601 n.19 (2015), quoting Commonwealth v. Walczak, 463 Mass. 808, 820 (2012) (Lenk, J., concurring). "Reasonable provocation," however, "encompasses a wider range of circumstances likely to cause an individual to lose self-control in the heat of passion than does sudden combat." Commonwealth v. Howard, 479 Mass. 52, 58 (2018).

The defendant argues that the victim's threatening words and gestures were sufficiently confrontational and inflammatory that they merited a separate instruction on reasonable provocation, relying substantially on language in Howard, supra at 58-62. The defendant's reliance on Howard is inapposite, as it was decided after trial in this case. See Commonwealth v. Bastaldo, 472 Mass. 16, 31 (2015) ("[W]e evaluate the alleged errors under the existing law at the time of trial"). Regardless, the defendant has failed to identify conduct not covered under sudden combat that merited a reasonable provocation instruction.

To the extent that the victim was verbally aggressive to the defendant in the minutes immediately preceding the stabbing, such conduct does not support a reasonable provocation instruction. See Commonwealth v. Carrion, 407 Mass. 263, 267 (1990), quoting Commonwealth v. Zukoski, 370 Mass. 23, 28 (1976) ("Insults or quarrelling alone cannot provide a reasonable provocation"). Here, particularly, we also note that the victim's aggressive language was in the context of his demands that the defendant drop his knife.

The record additionally fails to reflect any evidence that the victim made a threatening gesture of a nature which has been held to give rise to a reasonable provocation instruction. See, e.g., Commonwealth v. Little, 431 Mass. 782, 785, 786-787 (2000)

(reasonable provocation where victim, who was known to carry gun, threatened defendant and "made a motion like he was going for his hip," which defendant believed was attempt to draw his gun). Though the defendant stated that he believed the victim had a gun, "because people on the street . . . everyone always has a gun," there was no evidence in the record that the victim made any gesture as though to reach for a gun, or that the victim otherwise indicated that he intended to use a gun at the time the defendant stabbed the victim. The judge did not err in declining to give a reasonable provocation instruction.

c. Excessive use of force in self-defense. The judge in her instructions mistakenly omitted the following paragraph of the model instructions describing excessive use of force in self-defense:

> "If the Commonwealth proves that the defendant did not act in proper self-defense . . . solely because the defendant used more force than was reasonably necessary, then the Commonwealth has not proved that the defendant committed the crime of murder but, if the Commonwealth has proved the other required elements, you shall find the defendant guilty of voluntary manslaughter."

See Model Jury Instructions on Homicide, supra at § 2.5(3). After the instructions, the defendant requested a supplemental instruction on excessive use of force in self-defense drawn from Commonwealth v. Grassie, 476 Mass. 202, 210 (2017). The judge declined, indicating her mistaken belief that she had "given the S[upreme] J[udicial] C[ourt] approved instructions . . . and

that [she] used the exact instructions." The defendant did not correct this misapprehension.

The defendant argues that, because of this omission, the jury could have found that the Commonwealth failed to prove that the defendant acted in self-defense only because he used excessive force in stabbing the victim. Assuming without deciding that the defendant's claim was preserved, there was no prejudicial error. When reviewing a judge's instructions to a jury, "[w]e evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the judge's words." Commonwealth v. Niemic, 427 Mass. 718, 720 (1998), quoting Commonwealth v. Trapp, 423 Mass. 356, 361 (1996).

The judge fully and properly instructed the jury on self-defense. She then instructed the jury multiple times that it was the Commonwealth's burden to prove the lack of mitigating circumstances, and if it proved the required elements of murder, but failed to prove a lack of mitigating circumstances, the defendant must be found guilty of voluntary manslaughter. The judge instructed the jury that they must consider two categories of mitigating circumstances, and that one of them was excessive force in self-defense. She then properly described excessive force in self-defense, and enumerated the factors to consider in evaluating the reasonableness of the defendant's conduct. Given the charge as a whole, there was no prejudicial error.

d. Mistaken belief. Without objection, the judge omitted the portion of the model instructions dealing with mistaken but reasonable belief in self-defense. The defendant argues that this omission was erroneous, because there was evidence that he had a mistaken but reasonable belief that the victim had a gun. Because the defendant did not object to the omission of the instruction, we review for a substantial likelihood of a miscarriage of justice, and find none. See Commonwealth v. Glacken, 451 Mass. 163, 166 (2008). "[T]he judge told the jury on the question of self-defense that they should consider whether the defendant was about to be physically attacked or reasonably believed that he was about to be physically attacked. That instruction, repeated in substance more than once, covered the concept of a mistaken but reasonable belief" (emphasis added). Commonwealth v. Glass, 401 Mass. 799, 809 (1988).

e. Involuntary manslaughter. Prior to the close of evidence, the trial judge denied the defendant's request for a jury instruction on involuntary manslaughter. The defendant did not subsequently renew his request or otherwise revisit the issue. He now argues that omission of the instruction constituted reversible error.

"Involuntary manslaughter is defined as an unlawful homicide unintentionally caused by an act that constitutes such a disregard of the probable harmful consequences to another as

to amount to wanton or reckless conduct." Commonwealth v. Jones, 382 Mass. 387, 389 (1981). The defendant contends that the jury had a basis to believe that he acted wantonly or recklessly, based on his statement to police that when he stabbed the victim, he was merely "swinging [his knife] wildly" without the intent to kill him.

Assuming without deciding that the issue was preserved, and that the omission of the instruction was error, there was no prejudice from the omission of the instruction. The evidence that the stabbing was intentional was overwhelming. The victim's stab wound was one inch long, and almost seven inches deep, and the video depicting the stabbing, as described above, provides robust evidence that the homicide was voluntary.

2. Defendant's statements. a. Statement to girlfriend. While cross-examining the defendant's former girlfriend, defense counsel attempted to elicit that, after the offense, the defendant had told her that he "felt like [the victim] was the one that was going to do it to [him]." The Commonwealth's objection to the question was sustained. On appeal, the defendant argues that the statement was evidence of his state of mind, and thus relevant to his claim of self-defense. At the time of the objection, "[w]hen the judge noted that the statement was hearsay, the defendant made no claim, as he now does, that the state of mind exception to the hearsay rule

applied. The issue argued to us was not properly preserved for appellate review and does not involve a substantial likelihood of a miscarriage of justice." Commonwealth v. Casavant, 426 Mass. 368, 369-370 (1998). Regardless, the statement was inadmissible hearsay. "An extrajudicial statement of a declarant is not ordinarily admissible if it is a statement of memory or belief to prove the fact remembered or believed." Commonwealth v. Lowe, 391 Mass. 97, 104 (1984). The defendant's self-serving out-of-court statement relaying his own belief about the victim was not admissible to prove the matter asserted. There was no error.

b. Statement to police. The defendant argues that his statement to police was, in part, unfairly redacted in a manner prejudicial to the defense. He contends that redacted portions of the statement should have been admitted under the doctrine of verbal completeness, and that his statements were admissible hearsay because they were relevant to prove the defendant's state of mind.

"Under the doctrine of verbal completeness, '[w]hen a party introduces a portion of a statement or writing in evidence,' a judge has the discretion to 'allow[] admission of other relevant portions of the same statement or writing which serve to "clarify the context" of the admitted portion.'" Commonwealth v. Aviles, 461 Mass. 60, 75 (2011), quoting Commonwealth v.

Carmona, 428 Mass. 268, 272 (1998). "The rule is limited; the defendant cannot compel the admission of an entire statement simply because the Commonwealth offers a part of it." Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 479 (1986). "To be admitted, 'the additional portions of the statement must be (1) on the same subject as the admitted statement; (2) part of the same conversation as the admitted statement; and (3) necessary to the understanding of the admitted statement.'" Aviles, supra, quoting Commonwealth v. Eugene, 438 Mass. 343, 350-351 (2003).

Here, the redacted portions of the interview largely consisted of cumulative evidence, cross-talk between detectives, multilayered hearsay, and statements which were otherwise irrelevant. The redacted statements were not necessary to the fair understanding of the statements introduced in evidence. Accordingly, the doctrine of verbal completeness did not apply. See Eugene, 438 Mass. at 351 ("the mere fact that the Commonwealth has introduced a portion of the defendant's statement, or the mere fact that the omitted portions are relevant to the case, does not provide a sufficient basis for admissibility").

The defendant's argument that his statements were alternatively admissible must also fail. "None of the assertions was admissible either as a statement of his then

present intent or state of mind because they followed the incident." Commonwealth v. Garrey, 436 Mass. 422, 437 (2002). A statement "purporting to explain past conduct is not admissible under the state of mind exception to the hearsay rule." Bianchi, 435 Mass. at 327. Accordingly, the judge properly excluded the redacted statements of the defendant as inadmissible self-serving hearsay not offered by a party opponent. There was no error.

Judgment affirmed.

By the Court (Green, C.J., Neyman & Henry, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 11, 2019.

[4] The panelists are listed in order of seniority.