

SUPREME JUDICIAL COURT

MODEL JURY INSTRUCTIONS ON HOMICIDE

April 2018, updated through August 2023¹

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¹ The Supreme Judicial Court’s most recent model homicide instruction has been updated to reflect and be consistent with *Commonwealth v. Souza*, No. SJC-13357 (Aug. 14, 2023), *Commonwealth v. Dunphe*, 485 Mass. 871, 886 (2020), and *Commonwealth v. Castillo*, 485 Mass. 852, 869 (2020).

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MASSACHUSETTS SUPREME JUDICIAL COURT
MODEL JURY INSTRUCTIONS ON HOMICIDE²

Criminal Responsibility

[Note to Judge: Where there is evidence of lack of criminal responsibility, this instruction, at the discretion of the judge, may be given as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction. In deciding when to give this instruction, a judge may wish to consider whether the defendant has conceded that he committed the crime and whether the only live issue for the jury to decide is the defendant's criminal responsibility.]

To prove the defendant guilty of any crime, the Commonwealth must prove beyond a reasonable doubt that the defendant was criminally responsible at the time the alleged crime was committed.³ The burden is not on the defendant to prove a lack of criminal responsibility.⁴ Under the law, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant committed the crime with which he⁵ is charged and also that the defendant is criminally responsible for his conduct.⁶

² Because these Model Jury Instructions on Homicide reflect existing statutory and case law, they will be continually reviewed and revised by the Supreme Judicial Court as the law develops or changes. Comments by judges and attorneys regarding these model instructions may be sent to modelhomicide@jud.state.ma.us and will be considered in future revisions of these instructions.

³ *Commonwealth v. Berry*, 457 Mass. 602, 612 (2010), quoting *Commonwealth v. McHoul*, 352 Mass. 544, 546-547 (1967).

⁴ *Id.*

⁵ We use the pronoun "he" through the instructions. Of course, the judge should insert the appropriate gender pronoun, and, where there are multiple defendants who identify with different genders, the judge should use the appropriate pronouns in referring to the defendants.

⁶ This sentence tracks the language approved in *Commonwealth v. Goudreau*, 422 Mass. 731, 737 ¶ 4 (1996) (promulgating model instruction on criminal responsibility). See *Commonwealth v. Berry*, 457 Mass. at 612, quoting *Commonwealth v. McHoul*, 352 Mass. at 546-547 ("once a defendant raises the issue of criminal responsibility, the Commonwealth has

Criminal responsibility is a legal term. A person is not criminally responsible for his conduct if he has a mental disease or defect, and, as a result of that mental disease or defect, lacks substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law.⁷

The phrase "mental disease or defect" is a legal term, not a medical term; it need not fit into a formal medical diagnosis. The phrase "mental disease or defect" does not include an abnormality characterized only by repeated criminal conduct.⁸ It is for you to determine in light of all the evidence whether the defendant had a mental disease or defect.⁹ If the Commonwealth has proved to you beyond a reasonable doubt that the defendant was not suffering from a mental disease or defect at the time of

the burden to prove, beyond a reasonable doubt, that the defendant did not lack the substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law, as a result of a mental disease or defect. In order to prove that a defendant can 'conform [her] conduct to the requirements of the law,' the prosecution must show that the defendant had a 'substantial ability to behave as the law requires; that is, to obey the law'").

⁷ This paragraph tracks the language approved in *Commonwealth v. Goudreau*, 422 Mass. at 737 ¶ 5 (promulgating model instruction on criminal responsibility). See *Commonwealth v. Berry*, 457 Mass. at 612, quoting *Commonwealth v. McHoul*, 352 Mass. at 546-547 ("that the defendant did not lack the substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law, as a result of a mental disease or defect").

⁸ This sentence tracks the language approved in *Commonwealth v. Goudreau*, 422 Mass. at 737 ¶ 7 (promulgating model instruction on criminal responsibility).

⁹ See *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300, 328 (2010) ("We have previously indicated that a judge is not required to define 'mental disease or defect' but has discretion to provide the instructions that are appropriate to the context"); *Commonwealth v. Fuller*, 421 Mass. 400, 411 (1995) ("This court has declined to impose any obligation on a trial judge to provide a further explanation of the terms in issue here Our unwillingness to impose a mandatory instruction arises not because the term 'mental disease or defect' is so clear on its face that such an explanation would be superfluous. The reason may well be the opposite; the subject is so complex and obscure that any general explanatory formula is likely to mislead and confuse"). Cf. *Commonwealth v. Mulica*, 401 Mass. 812, 816-820 (1988) (mental disease and defect instruction focusing jury on one particular type of mental disease or defect may have limited jury's consideration of other types of mental disease or defects and improperly reduced Commonwealth's burden).

the killing, the Commonwealth has satisfied its burden of proving that the defendant was criminally responsible.

If you have a reasonable doubt whether the defendant had a mental disease or defect at the time of the killing, then you must determine whether, as a result of a mental disease or defect, he lacked substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law. To establish that the defendant had substantial capacity to conform his conduct to the requirements of the law, the Commonwealth must prove beyond a reasonable doubt that any mental disease or defect that may have existed did not deprive the defendant of his ability to behave as the law requires, that is, to obey the law.¹⁰

The word "appreciate" means to understand rather than merely to know. "Criminality" means the legal significance of conduct; "wrongfulness" means the moral significance.¹¹

The Commonwealth must prove that the defendant knew and understood that his conduct was illegal or that it was wrong. It is not enough for the Commonwealth to show that the defendant merely knew or was intellectually aware that his conduct was illegal or wrong; rather, the Commonwealth must prove beyond a reasonable doubt that a mental disease or defect did not deprive the defendant of a meaningful understanding of the legal or moral significance of his conduct. The defendant must have been able to realize, in some meaningful way, that his conduct was illegal or wrong.¹²

¹⁰ This sentence tracks the language approved in *Commonwealth v. Goudreau*, 422 Mass. at 738 ¶ 5 (promulgating model instruction on criminal responsibility).

¹¹ This sentence tracks, with modifications, the language approved in *Commonwealth v. Goudreau*, 422 Mass. at 736, 738 ¶ 3.

¹² This paragraph tracks, with modifications, the language approved in *Commonwealth v. Goudreau*, 422 Mass. at 736, 738 ¶¶ 3-4.

In considering whether the Commonwealth has met its burden of proof, you may consider all the evidence that has been presented at this trial. You may consider the facts underlying the crime and evidence of the defendant's actions before and after the crime. You may consider the opinions of any experts who testified, and give those opinions whatever weight you think they deserve.¹³

[Where there is evidence that a defendant had a mental disease or defect and consumed drugs or alcohol]

A defendant's lack of criminal responsibility must be due to a mental disease or defect. You need not consider the cause or origin of a mental disease or defect. All that you need to determine as to this issue is whether the Commonwealth has proved beyond a reasonable doubt that the defendant did not have a mental disease or defect at the time of the alleged offense. Intoxication caused by the voluntary consumption of alcohol or drugs, by itself, is not a mental disease or defect. But a mental disease or defect might be caused by or result from a defendant's earlier chronic use of alcohol or drugs. Where a defendant lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the law solely as a result of voluntary intoxication, and not from a mental disease or defect, then he is criminally responsible for his conduct.¹⁴ However, the consumption of alcohol or drugs may trigger or intensify (make worse) a defendant's preexisting mental disease or defect. If it did so here, and the mental disease or defect then caused the defendant to lose substantial capacity to appreciate the criminality or

¹³ This paragraph tracks, with modifications, the language approved in *Commonwealth v. Goudreau*, 422 Mass. at 736, 739 ¶ 3.

¹⁴ This paragraph comes from *Commonwealth v. DiPadova*, 460 Mass. 424, 439 (2011) (appendix providing model jury instruction), as modified in *Commonwealth v. Dunphe*, 485 Mass. 871, 886 (2020). See *Commonwealth v. Berry*, 457 Mass. at 617-618, citing *Commonwealth v. Sheehan*, 376 Mass. 765, 770 (1978).

wrongfulness of his conduct or to conform his conduct to the requirements of the law, the defendant is not criminally responsible for his conduct.¹⁵

[Where there is evidence the defendant knew that consumption of drugs or alcohol would trigger or intensify a mental disease or defect]

There is one exception to the principle just stated. A defendant who lost the substantial capacity I have just described when voluntarily intoxicated by drugs or alcohol, and who knew or had reason to know that his intoxication would trigger or intensify in him a mental disease or defect that could cause him to lack that capacity, is criminally responsible for his resulting conduct.¹⁶ In deciding whether the defendant had reason to know about the consequences of his voluntary intoxication from drugs or alcohol, you should consider the question solely from the defendant's point of view, including his mental capacity and his past experience with drugs or alcohol. But you must keep in mind that where a defendant, at the time the crime is committed, had a mental disease or defect that by itself caused him to lack the required substantial capacity, he is not criminally responsible for his

¹⁵ This paragraph comes from *Commonwealth v. DiPadova*, 460 Mass. at 439 (appendix providing model jury instruction), as modified in *Commonwealth v. Dunphe*, 485 Mass. 871, 886 (2020). See *Commonwealth v. Berry*, 457 Mass. at 612-613, quoting *Commonwealth v. Brennan*, 399 Mass. 358, 363 (1987) ("if the jury find that the 'defendant had a latent mental disease or defect which caused the defendant to lose the capacity . . . to conform his conduct to the requirements of the law, lack of criminal responsibility is established even if voluntary consumption of alcohol activated the illness,' as long as the defendant did not know or have reason to know that the activation would occur").

¹⁶ This paragraph comes from *Commonwealth v. DiPadova*, 460 Mass. at 439-440 (appendix providing model jury instruction), as modified in *Dunphe*, 485 Mass. at 888. See *DiPadova* at 436 ("where a defendant's substance abuse interacts with a mental disease or defect, that defendant is criminally responsible only if two conditions are true:

(1) his mental condition alone, prior to the consumption of the drugs, did not render him criminally irresponsible; and (2) he knew or reasonably should have known that this consumption would cause him to lose substantial capacity to appreciate wrongfulness of conduct or to conform him conduct to the law -- that is, would cause him to become criminally irresponsible"); *Commonwealth v. Berry*, 457 Mass. at 612-613, quoting *Commonwealth v. Brennan*, 399 Mass. at 363 (foreknowledge or reason to know that consumption of drugs or alcohol will trigger latent mental defect nullifies defense of lack of capacity).

conduct regardless of whether he used or did not use alcohol or drugs. That is true even if he did use alcohol or drugs and the alcohol or drug use made the symptoms of his mental disease or defect worse, and even if he knew they would make his symptoms worse.¹⁷

[Where there is no evidence the defendant knew that consumption of drugs or alcohol would trigger or intensify a mental disease or defect]

You must also keep in mind that where a defendant, at the time the crime is committed, had a mental disease or defect that by itself caused him to lack the substantial capacity that I have just described, he is not criminally responsible for his conduct regardless of whether he used or did not use alcohol or drugs. That is true even if he did use alcohol or drugs and the alcohol or drug use made the symptoms of his mental disease or defect worse.¹⁸

¹⁷ This paragraph comes from *Commonwealth v. DiPadova*, 460 Mass. at 439-440 (appendix providing model jury instruction). See *id.* at 437 (jury should be instructed that "(1) if the defendant's mental illness did not reach the level of a lack of criminal responsibility until he consumed drugs, he was criminally responsible if he knew [or should have known] that the consumption would have the effect of intensifying or exacerbating his mental condition; and, in contrast, (2) if the defendant's mental illness did reach the level of lack of criminal responsibility even in the absence of his consumption of drugs, it was irrelevant whether he took drugs knowing that they would exacerbate that condition" [emphasis in original]); *Commonwealth v. Berry*, 457 Mass. at 616-618 ("defense of lack of criminal responsibility is not defeated where the defendant also consumed alcohol or drugs, as long as the mental disease or defect was the cause of the lack of criminal responsibility Where a defendant has an active mental disease or defect that caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law, the defendant's consumption of alcohol or another drug cannot preclude the defense of lack of criminal responsibility").

¹⁸ *Commonwealth v. DiPadova*, 460 Mass. at 439-440 (appendix providing model jury instruction). See *id.* at 437 (jury should be instructed that "(1) if the defendant's mental illness did not reach the level of a lack of criminal responsibility until he consumed drugs, he was criminally responsible if he knew [or should have known] that the consumption would have the effect of intensifying or exacerbating his mental condition; and, in contrast, (2) if the defendant's mental illness did reach the level of lack of criminal responsibility even in the absence of his consumption of drugs, it was irrelevant whether he took drugs knowing that they would exacerbate that condition" [emphasis in original]); *Commonwealth v. Berry*, 457 Mass. at 616-618 ("defense of lack of criminal responsibility is not defeated where the

[The following paragraphs finish the charge on the criminal responsibility instruction and should be given whether or not the case involves the consumption of drugs or alcohol]

In a moment, I will instruct you on the elements of the offense[s] that the Commonwealth alleges the defendant has committed. Remember that the Commonwealth must prove to you beyond a reasonable doubt that the defendant was criminally responsible at the time the crime was committed, that is, that the defendant did not lack criminal responsibility at that time. Therefore, it is the Commonwealth's burden to prove at least one of the following beyond a reasonable doubt:¹⁹

1. That at the time of the alleged crime, the defendant did not suffer from a mental disease or defect; or
2. That if the defendant did suffer from a mental disease or defect, he nonetheless retained the substantial capacity to appreciate the wrongfulness or criminality of his conduct and to conform his conduct to the requirements of the law; or
3. **[Where there is evidence the defendant consumed drugs or alcohol]** That, if the defendant lacked the substantial capacity to appreciate the wrongfulness or criminality of his conduct or to conform his conduct to the requirements of the law, his lack of such capacity was solely the result of voluntary intoxication by alcohol or other drugs; or
4. **[Where there is evidence the defendant knew that consumption of drugs or alcohol would trigger or intensify a mental disease or defect]** That, if the defendant lacked the substantial capacity I have just described due to a combination of a mental disease or

defendant also consumed alcohol or drugs, as long as the mental disease or defect was the cause of the lack of criminal responsibility Where a defendant has an active mental disease or defect that caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law, the defendant's consumption of alcohol or another drug cannot preclude the defense of lack of criminal responsibility").

¹⁹ This paragraph and the factors that follow are taken from *Commonwealth v. DiPadova*, 460 Mass. at 439-440 (appendix providing model jury instruction).

defect and his voluntary consumption of alcohol or other drugs, he knew or should have known that his use of the substance[s] would interact with his mental disease or defect and cause him to lose such capacity.²⁰

[Consequences of Verdict of Not Guilty by Reason of Lack of Criminal Responsibility. Note to Judge: Give at the defendant's request or on the judge's own initiative, absent a defense objection.²¹]

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

If a defendant is found not guilty by reason of lack of criminal responsibility, the district attorney or another appropriate authority may, and generally does, petition the court to commit the defendant to a mental health facility or to Bridgewater State Hospital. If the court concludes that the defendant is mentally ill and that his discharge would create a substantial likelihood of serious harm to himself or others, then the court will grant the petition and commit the defendant to a proper mental facility or to Bridgewater State Hospital, initially for a period of six months. At the end of the six months and every year thereafter, the court reviews the order of commitment. If the defendant is still suffering from a mental disease or defect and is still dangerous, then the court will order the defendant to continue to be committed to the mental facility or to Bridgewater State Hospital. There is no limit to the number of such renewed orders of commitment as long as

²⁰ *Commonwealth v. DiPadova*, 460 Mass. at 439-440 (appendix providing model jury instruction).

²¹ *Commonwealth v. Biancardi*, 421 Mass. 251, 251-252 (1995), quoting *Commonwealth v. Mutina*, 366 Mass. 810, 823 n.12 (1975) ("where the defense of insanity [lack of criminal responsibility] is fairly raised, the defendant, on his timely request, is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity"). See *Commonwealth v. Callahan*, 380 Mass. 821, 827 (1980) (judge may give instruction on his or her own initiative where defendant does not object).

the defendant continues to be mentally ill and dangerous; if these conditions do continue, the defendant may remain committed for the duration of his life.

If at some point the defendant is no longer mentally ill and dangerous, the court will order him discharged from the mental health facility or from Bridgewater State Hospital after a hearing. The district attorney must be notified of any hearing concerning whether the person may be released, and the district attorney may be heard at any such hearing. However, the final decision on whether to recommit or release the defendant is always made by the court.²²

²² *Commonwealth v. Chappell*, 473 Mass. 191, 206, 209 (2015) (Appendix).

Joint Venture

[Where there is evidence of joint venture]

The Commonwealth is not required to prove that the defendant himself performed the act that caused the victim's death.²³ However, to establish that a defendant is guilty of murder [or voluntary manslaughter or involuntary manslaughter], the Commonwealth must prove two things beyond a reasonable doubt. First, the Commonwealth must prove that the defendant knowingly participated in the commission of the crime [identify the crime if needed to avoid confusion]. Second, the Commonwealth must prove that he did so with the intent required to commit the crime.²⁴

A defendant may knowingly participate in a crime in several ways. He may personally commit the acts that constitute the crime. He may aid or assist another in those acts.²⁵ He may ask or encourage another person to commit the crime, or help to plan the commission of the crime.²⁶

Alternatively, the defendant may knowingly participate by agreeing to stand by at or near the scene of the crime to act as a lookout, or by providing aid or assistance in committing the crime, or in escaping, if such help becomes necessary.²⁷ An agreement to help if needed does not need to be made

²³ *Commonwealth v. Deane*, 458 Mass. 43, 50-51 (2010) ("Commonwealth is not required to prove exactly how a joint venturer participated in the murders . . . or which of the two did the actual killing"). See *Commonwealth v. Zanetti*, 454 Mass. 449, 467, 470-471 (2009) (promulgating model jury instruction). Cf. *Commonwealth v. Echavarria*, 428 Mass. 593, 598 & n.3 (1998) (giving "exemplary" example, but one that uses obsolete joint venture language).

²⁴ *Commonwealth v. Deane*, 458 Mass. at 50-51; *Commonwealth v. Zanetti*, 454 Mass. at 467-468, 470-471 (promulgating model jury instruction). See *Commonwealth v. Marrero*, 459 Mass. 235, 247 (2011); *Commonwealth v. Housen*, 458 Mass. 702, 706-707 (2010); G. L. c. 274, § 2.

²⁵ *Commonwealth v. Zanetti*, 454 Mass. at 462-464. *Commonwealth v. Santos*, 440 Mass. 281, 290 (2003); *Commonwealth v. Soares*, 377 Mass. 461, 470, cert. denied, 444 U.S. 881 (1979).

²⁶ *Commonwealth v. Zanetti*, 454 Mass. at 462-463; *Commonwealth v. Soares*, 377 Mass. at 470.

²⁷ *Commonwealth v. Mavredakis*, 430 Mass. 848, 863-864 (2000), quoting *Commonwealth v. Colon-Cruz*, 408 Mass. 533, 545 (1990) (escape); *Commonwealth v. Miranda*, 441 Mass. 783, 791-792 (2004), quoting *Commonwealth v. James*, 30 Mass. App. Ct. 490, 499 n.10 (1991) (lookout).

through a formal or explicit written or oral advance plan or agreement; it is enough if the defendant and at least one other person consciously acted together before or during the crime with the intent of making the crime succeed.²⁸

The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime [identify the crime if needed to avoid confusion], he had the intent required for that crime.²⁹ You are permitted, but not required, to infer the defendant's mental state or intent from his knowledge of the circumstances or any subsequent participation in the crime.³⁰ The inferences you draw must be reasonable, and you may rely on your experience and common sense in determining the defendant's knowledge and intent.³¹

Mere knowledge that a crime is to be committed is not sufficient to convict the defendant.³² The Commonwealth must also prove more than mere association with the perpetrator of the crime, either before or after its

²⁸ *Commonwealth v. Zanetti*, 454 Mass. at 466-467; *Commonwealth v. Deane*, 458 Mass. at 50-51; *Commonwealth v. Echavarria*, 428 Mass. at 598 n.3.

²⁹ A joint venturer need not be proved to have committed the murder with extreme atrocity or cruelty, as long as one joint venturer committed the killing with extreme atrocity or cruelty. See *Commonwealth v. Chaleumphong*, 434 Mass. 70, 79-80 (2001), quoting *Commonwealth v. Cunneen*, 389 Mass. 216, 227 (1983) (finding no error in instruction that "[i]t is not necessary for the Commonwealth to prove that [the defendants] had a conscious awareness that the acts were being committed with extreme atrocity or cruelty or that either of them desired the acts to be carried out in that manner We have consistently held that 'proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty'").

³⁰ *Commonwealth v. Carnes*, 457 Mass. 812, 823 (2010), citing *Commonwealth v. Soares*, 377 Mass. at 470.

³¹ *Commonwealth v. Carnes*, 457 Mass. at 837 ("reasonable"); *Commonwealth v. Zanetti*, 454 Mass. at 470.

³² *Commonwealth v. Soares*, 377 Mass. at 471; *Commonwealth v. Perry*, 357 Mass. 149, 151 (1970).

commission.³³ It must also prove more than a failure to take appropriate steps to prevent the commission of the crime.³⁴

Mere presence at the scene of the crime is not enough to find a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and that he had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that he knew about it in advance.³⁵

[Where felony-murder is charged]

Where a defendant is charged with felony-murder, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the underlying crime [identify the life felony to avoid confusion], that he did so with the intent required to commit the underlying crime, and that he had or shared the intent to kill, the intent to cause grievous bodily harm, or the intent to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.³⁶

[Where felony-murder is charged and an underlying offense has as one of its elements the use or possession of a weapon] Where an element of an offense is that a person who committed the crime possessed, carried, or used a weapon, the Commonwealth must prove beyond a reasonable

³³ *Commonwealth v. Echavarria*, 428 Mass. at 598 n.3.

³⁴ *Commonwealth v. Zanetti*, 454 Mass. at 470-471 (appendix providing model jury instruction); *Commonwealth v. Maynard*, 436 Mass. 558, 564-565 (2002), quoting *Commonwealth v. Ortiz*, 424 Mass. 853, 859 (1997).

³⁵ *Commonwealth v. Deane*, 458 Mass. at 58, citing *Commonwealth v. Ortiz*, 424 Mass. at 859; *Commonwealth v. Zanetti*, 454 Mass. at 470-471 (appendix providing model jury instruction).

³⁶ *Commonwealth v. Brown*, 477 Mass 805, 832 (2017).

doubt either that the defendant himself possessed a weapon, or that the defendant knew that a person with whom he participated in the commission of the crime was armed with a weapon.³⁷ However, mere knowledge that a participant in the crime was armed is not sufficient to hold the defendant liable for the acts of that participant. The Commonwealth must also prove that the defendant knowingly participated in the commission of the crime, with the intent required to commit the crime.³⁸

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

The defendant is not guilty of knowingly participating in the commission of the crime if there is a reasonable doubt whether he withdrew from the planned crime in an effective and timely manner.⁴⁰ A defendant withdraws from a planned crime by clearly communicating his intent not to be involved in the crime and ending his involvement.⁴¹ A withdrawal is

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

³⁸ *Commonwealth v. Akara*, 465 Mass. 245, 254 (2013); *Commonwealth v. Zanetti*, 454 Mass. at 467-468.

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

⁴⁰ *Commonwealth v. Fickett*, 403 Mass. 194, 201 n.7 (1988).

⁴¹ *Commonwealth v. Miranda*, 458 Mass. at 118; *Commonwealth v. Fickett*, 403 Mass. at 201.

effective and timely only if: (1) the defendant withdraws from the planned crime before the commission of the crime has begun; (2) the defendant, by words or conduct, clearly communicates his withdrawal to the other participant[s] in the planned crime; and (3) the communication of the withdrawal is done early enough that the other participant[s] has [have] a reasonable opportunity to abandon the crime.⁴² A withdrawal is not timely and effective if it comes so late that the crime cannot reasonably be stopped.⁴³

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

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

⁴² See *Commonwealth v. Rivera*, 464 Mass. at 74, quoting *Commonwealth v. Miranda*, 458 Mass. at 118; *Commonwealth v. Pucillo*, 427 Mass. 108, 116 (1998) (no error where judge instructed jury that "the withdrawal and abandonment must be 'in a timely and effective manner,'" that "if [the] withdrawal comes so late that the crime cannot be stopped, then it is too late and it is not effective," and "that 'a withdrawal is effective only if it is communicated to the other persons in the joint venture'").

⁴³ *Commonwealth v. Pucillo*, 427 Mass. at 116.

⁴⁴ *Commonwealth v. Hogan*, 426 Mass. 424, 434 (1998).

⁴⁵ *Id.*

Self-Defense and Defense of Another

(a) Self-Defense

[Note to Judge: This instruction, at the discretion of the judge, may be given as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction.⁴⁶ The instruction is to be used where the evidence, viewed in the light most favorable to the defendant,⁴⁷ raises an issue of deadly force in self-defense.⁴⁸ An instruction on self-defense is generally not warranted where the theory of murder is felony-murder alone, but might be warranted where the killing occurred during the defendant's escape or attempted escape, or where the defendant was unarmed and the victim was the first to use deadly force.⁴⁹ If the Commonwealth is entitled to

⁴⁶ *Commonwealth v. Santiago*, 425 Mass. 491, 506 (1997) ("Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime, a specific order in jury instructions is not required").

⁴⁷ *Commonwealth v. Espada*, 450 Mass. 687, 692 (2008) ("A defendant is entitled to have the jury . . . instructed on the law relating to self-defense if the evidence, viewed in its light most favorable to him, is sufficient to raise the issue" [citation omitted]).

⁴⁸ See *Commonwealth v. Gonzalez*, 465 Mass. 672, 682-685 (2013) (discussing evidence required for self-defense instruction).

⁴⁹ An instruction on self-defense is generally not available to a defendant where the defendant committed a felony punishable by life imprisonment that provoked a victim to respond with deadly force. See *Commonwealth v. Rogers*, 459 Mass. 249, 260 (2011) ("Generally, in Massachusetts, one who commits an armed robbery cannot assert a claim of self-defense"); *Commonwealth v. Vives*, 447 Mass. 537, 544 n.6 (2006) ("The right to claim self-defense is forfeited by one who commits armed robbery"); *Commonwealth v. Maguire*, 375 Mass. 768, 773 (1978) ("it has been held that the right to claim self-defense may be forfeited by one who commits an armed robbery, even if excessive force is used by the intended victim"). The rationale for this rule is that the nature of the underlying felony marks the defendant as the "initiating and dangerous aggressor." *Commonwealth v. Rogers*, 459 Mass. at 260, quoting *Commonwealth v. Garner*, 59 Mass. App. Ct. 350, 363 n.14 (2003). However, a self-defense instruction might be appropriate where the killing occurred during the defendant's escape or attempted escape, see *Commonwealth v. Rogers*, 459 Mass. at 260-261, or where the defendant was unarmed and the victim was the first to use deadly force. See *Commonwealth v. Chambers*, 465 Mass. 520, 530 (2013) ("critical question in determining whether the Commonwealth proved that the defendant did not act in self-defense when he killed the victim was who first grabbed the kitchen knife that ultimately was the instrument of death, not who shouted first or who struck the first punch"). See generally *Commonwealth v.*

an instruction on murder and felony-murder, the judge should generally instruct the jury that this instruction does not apply to felony-murder because the Commonwealth is not required to prove the absence of self-defense to prove felony-murder.]

Since this case raises a question as to whether the defendant properly used force to defend himself from an attack, I will provide you with instructions concerning the law governing the use of deadly force in self-defense before discussing the elements of the crime of murder.

A person is not guilty of any crime if he acted in proper self-defense.⁵⁰ When I use the term "proper self-defense," I am distinguishing self-defense that is both justified and proportional and therefore a complete defense to the crime, from self-defense that is justified, but where excessive force is used. It is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in proper self-defense.⁵¹ The defendant does not have the burden to prove that he acted in proper self-defense. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in proper self-defense, then you must find the defendant not guilty.⁵²

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

Chambers, 465 Mass. at 528 ("in the context of homicide, a defendant may lose the right to claim self-defense only if he was the first to use or threaten deadly force").

⁵⁰ *Commonwealth v. Rogers*, 459 Mass. at 269-270 ("if the defendant acted with reasonable force in self-defense, he was entitled . . . to a verdict of not guilty").

⁵¹ *Commonwealth v. King*, 460 Mass. 80, 83 (2011) ("Commonwealth bears the burden of proving, beyond a reasonable doubt, that the defendant did not act in self-defense"); *Commonwealth v. Glacken*, 451 Mass. 163, 166-167 (2008), quoting *Commonwealth v. Williams*, 450 Mass. 879, 882 (2008) ("To obtain a conviction of murder '[w]here the evidence raises a question of self-defense, the burden is on the government to prove beyond a reasonable doubt that the defendant did not act in self-defense'").

⁵² See *Commonwealth v. Glacken*, 451 Mass. at 166-167.

⁵³ See *Commonwealth v. Pike*, 428 Mass. 393, 398 (1998) (self-defense theory not submitted to jury where evidence showed defendant used force out of "anger or revenge").

necessity ends.⁵⁴ An individual may only use sufficient force to prevent occurrence or reoccurrence of the attack.⁵⁵ The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions, and is not to be judged too strictly.⁵⁶

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:⁵⁷

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.⁵⁸ Deadly force is force that is intended or likely to cause death or serious bodily harm.⁵⁹
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.⁶⁰

⁵⁴ *Commonwealth v. Santos*, 454 Mass. 770, 782-783 (approving of prior jury instruction); *Commonwealth v. Kendrick*, 351 Mass. 203, 212 (1966) ("right of self-defense arises from necessity, and ends when the necessity ends").

⁵⁵ *Commonwealth v. King*, 460 Mass. 80, 83 (2011) ("force that was used was greater than necessary in all the circumstances of the case"); *Commonwealth v. Kendrick*, 351 Mass. at 211-212.

⁵⁶ *Commonwealth v. Kendrick*, 351 Mass. at 211, quoting *Monize v. Begaso*, 190 Mass. 87, 89 (1906).

⁵⁷ See *Commonwealth v. Glacken*, 451 Mass. at 167 (enumerating required factors for self-defense).

⁵⁸ *Commonwealth v. Wallace*, 460 Mass. 118, 124-125 (2011), quoting *Commonwealth v. Hart*, 428 Mass. 614, 615 (1999) ("If deadly force is used, a self-defense instruction must be given only if the evidence permits at least a reasonable doubt that the defendant reasonably and actually believed that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force"). See *Commonwealth v. Santos*, 454 Mass. at 773; *Commonwealth v. Diaz*, 453 Mass. 266, 280 (2009), quoting *Commonwealth v. Harrington*, 379 Mass. 446, 450 (1980).

⁵⁹ *Commonwealth v. Noble*, 429 Mass. 44, 46 (1999) ("force intended or likely to cause death or serious bodily harm"). *Commonwealth v. Cataldo*, 423 Mass. 318, 321 (1996), quoting *Commonwealth v. Klein*, 372 Mass. 823, 827 (1977).

⁶⁰ *Commonwealth v. Wallace*, 460 Mass. at 124-125; *Commonwealth v. Santos*, 454 Mass. at 773.

3. The defendant did not use or attempt to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force.⁶¹
4. The defendant used more force than was reasonably necessary under all the circumstances.⁶²
5. **[Where there is evidence the defendant was the initial aggressor]** The defendant was the first to use or threaten deadly force, and did not withdraw in good faith from the conflict and clearly communicate by words or conduct to the person (or persons) he provoked his intention to withdraw and end the confrontation without any use of, or additional use of, force.⁶³

I will now discuss each of these four [or five] propositions in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the defendant did not act in proper self-defense by proving any one of these propositions beyond a reasonable doubt:

The first proposition is that the defendant did not actually believe that he was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force.⁶⁴

The second proposition is that a reasonable person in the same circumstances as the defendant would not reasonably have believed that he

⁶¹ *Commonwealth v. Mercado*, 456 Mass. 198, 209 (2010), citing *Commonwealth v. Benoit*, 452 Mass. 212, 226 (2008) ("privilege to use self-defense arises only in circumstances in which the defendant uses all proper means to avoid physical combat").

⁶² *Commonwealth v. Glacken*, 451 Mass. at 167 ("defendant used more force than was reasonably necessary in all the circumstances of the case").

⁶³ *Commonwealth v. Chambers*, 465 Mass. 520, 528 (2013), quoting *Commonwealth v. Maguire*, 375 Mass. 768, 772 (1978) ("a criminal defendant who is found to have been the first aggressor loses the right to claim self-defense unless he 'withdraws in good faith from the conflict and announces his intention to retire'").

⁶⁴ *Commonwealth v. Hart*, 428 Mass. at 615, quoting *Commonwealth v. Wallace*, 460 Mass. at 124-125 ("If deadly force is used, a self-defense instruction must be given only if the evidence permits at least a reasonable doubt that the defendant reasonably and actually believed that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force"). See *Commonwealth v. Santos*, 454 Mass. at 773; *Commonwealth v. Diaz*, 453 Mass. at 280.

was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force.⁶⁵

In considering whether or not the defendant actually believed that he was in immediate danger of death or serious bodily harm, and the reasonableness of that belief that he was in such danger, you may consider all the circumstances bearing on the defendant's state of mind at the time.^{66,67} Moreover, in determining whether the defendant was reasonably in fear of death or serious bodily harm, you may consider any or all of the following:

- evidence of the deceased's reputation as a violent or quarrelsome person, but only if that reputation was known to the defendant;⁶⁸

⁶⁵ *Commonwealth v. Wallace*, 460 Mass. at 124-125; *Commonwealth v. Santos*, 454 Mass. at 773.

⁶⁶ See *Commonwealth v. Santos*, 454 Mass. at 773 ("person using a dangerous weapon [or deadly force] in self-defense must also have actually believed that he was in imminent danger of serious harm or death"); *Commonwealth v. Little*, 431 Mass. 782, 787 (2000).

⁶⁷ In deciding whether the evidence in the case, viewed in the light most favorable to the defendant, raises a question of self-defense, a judge may consider, among other evidence: "(a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; "(b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse."

G. L. c. 233, § 23F. See *Commonwealth v. Anestal*, 463 Mass. 655, 676 (2012) ("psychological consequences of a history of abuse are relevant to the consideration whether the defendant was in fear of serious injury or death").

⁶⁸ *Commonwealth v. Clemente*, 452 Mass. 295, 308 (2008), citing *Commonwealth v. Fontes*, 396 Mass. 733, 734-735 (1986) ("The judge instructed in regard to the reputation evidence that the jury could consider whether the victim had a reputation as a 'violent or quarrelsome person that was known to the defendant before the alleged incident.' That instruction was and is a correct statement of the law").

- evidence of other instances of the deceased's violent conduct, but only if the defendant knew of such conduct;⁶⁹ and
- evidence of threats of violence made by the deceased against the defendant, but again, only if the defendant was aware of such threats.⁷⁰

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the defendant actually believed that he was in immediate danger of serious bodily harm or death, but not in determining whether a reasonable person in those circumstances would have believed he was in immediate danger.⁷¹

[Where the evidence raises an issue of mistaken belief] A person may use deadly force to defend himself even if he had a mistaken belief that he was in immediate danger of serious bodily harm or death, provided that the

⁶⁹ *Commonwealth v. Adjutant*, 443 Mass. 649, 654 (2005), quoting *Commonwealth v. Fontes*, 396 Mass. at 735, 737 ("Massachusetts has long followed the evidentiary rule that permits the introduction of evidence of the victim's violent character, if known to the defendant, as it bears on the defendant's state of mind and the reasonableness of his actions in claiming to have acted in self-defense"); *Commonwealth v. Rodriguez*, 418 Mass. 1, 5 (1994), quoting *Commonwealth v. Fontes*, 396 Mass. at 735, and *Commonwealth v. Pidge*, 400 Mass. 350, 353 (1987) ("It is well established that a defendant asserting self-defense is allowed to introduce evidence showing 'that at the time of the killing [she] knew of specific violent acts recently committed by the victim'" because such evidence is relevant in determining "whether the defendant acted justifiably in reasonable apprehension of bodily harm").

⁷⁰ *Commonwealth v. Pidge*, 400 Mass. at 353; *Commonwealth v. Edmonds*, 365 Mass. 496, 502 (1974). Where a defendant has been the victim of abuse, evidence of abuse and expert testimony regarding the consequences of abuse are admissible and may be considered by the jury with respect to the reasonableness of a defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of a defendant's belief that he had used all available means to avoid physical combat, and the reasonableness of a defendant's perception of the amount of force needed to deal with the threat. See G. L. c. 233, § 23F.

⁷¹ Cf. *Commonwealth v. Barros*, 425 Mass. 572, 576 (1997) ("determination as to whether a defendant's belief concerning his exposure to danger was reasonable may not take into account his intoxication").

defendant's mistaken belief was reasonable based on all of the circumstances presented in the case.⁷²

The third proposition is that the defendant did not use or attempt to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force.⁷³ Whether a defendant used all reasonable means to avoid physical combat before resorting to the use of deadly force depends on all of the circumstances, including the relative physical capabilities of the combatants, the weapons used, the availability of room to maneuver or escape from the area, and the location of the assault.⁷⁴

[For self-defense cases not under the "castle law," G. L. c. 278, § 8A] A person must retreat unless he reasonably believes that he cannot safely do so. A person need not place himself in danger or use every means of escape short of death before resorting to self-defense.⁷⁵

⁷² *Commonwealth v. Pike*, 428 Mass. at 396-397 ("If the defendant's apprehension of grievous bodily harm or death, though mistaken, was reasonable, his actions in self-defense may be justifiable").

⁷³ *Commonwealth v. Mercado*, 456 Mass. at 209, citing *Commonwealth v. Benoit*, 452 Mass. at 226 ("privilege to use self-defense arises only in circumstances in which the defendant uses all proper means to avoid physical combat").

⁷⁴ *Commonwealth v. Pike*, 428 Mass. at 399 ("Whether a defendant used all reasonable means of escape before acting in self-defense is a factual question dependent on a variety of circumstances, including the relative physical capabilities of the combatants, the weapons used, the availability of maneuver room in, or means of escape from, the area, and the location of the assault").

⁷⁵ *Commonwealth v. Benoit*, 452 Mass. at 226-227, quoting *Commonwealth v. Pike*, 428 Mass. at 398 ("A self-defense instruction is not required unless there is some evidence that the defendant availed himself of all means, proper and reasonable in the circumstances, of retreating from the conflict before resorting to the use of deadly force. 'This rule does not impose an absolute duty to retreat regardless of personal safety considerations; an individual need not place himself in danger nor use every means of escape short of death before resorting to self-defense He must, however, use every reasonable avenue of escape available to him'" [citations omitted]). Cf. *Commonwealth v. Peloquin*, 437 Mass. 204, 212 (2002) (noting in dicta that set of jury "instructions, taken as a whole, explained that a defendant need not retreat unless he can do so in safety, and need not do so when he would increase the danger to his own life").

[For self-defense cases under the "castle law," G. L. c. 278, § 8A] A person who is lawfully residing in his house, apartment or some other dwelling is not required to retreat before using reasonable force against an unlawful intruder, if the resident reasonably believes that the intruder is about to kill or seriously injure him or another person lawfully in the dwelling, and also reasonably believes that such force is necessary to protect himself or the other person lawfully in the dwelling.⁷⁶

The fourth proposition is that the defendant used more force than was reasonably necessary under all the circumstances.⁷⁷ In considering whether the force used by a person was reasonable under the circumstances, you may consider evidence of the relative physical capabilities of the combatants, the number of persons who were involved on each side, the characteristics of any weapons used, the availability of room to maneuver, the manner in which the deadly force was used, the scope of the threat presented, or any other factor you deem relevant to the reasonableness of the person's conduct under the circumstances.⁷⁸

⁷⁶ This instruction is required by G. L. c. 278, § 8A, which provides that, where "an occupant of a dwelling . . . was in his dwelling at the time of the offense and . . . acted in the reasonable belief that the person unlawfully in [the] dwelling was about to inflict great bodily injury or death upon [the] occupant or upon another person lawfully in [the] dwelling, and that [the] occupant used reasonable means to defend himself or such other person lawfully in [the] dwelling[, that] [t]here shall be no duty on [the] occupant to retreat from [the] person unlawfully in [the] dwelling." This instruction is not appropriate where the occupant of a dwelling uses force on another person lawfully in the dwelling. See *Commonwealth v. Peloquin*, 437 Mass. at 208 ("Nothing in G. L. c. 278, § 8A, . . . eliminates the duty on the part of the occupant of the dwelling to retreat from a confrontation with a person who is lawfully on the premises"). See also *Commonwealth v. Carlino*, 449 Mass. 71, 76 (2007) (instruction not warranted where fatal encounter occurs outside of dwelling, in driveway); *Commonwealth v. McKinnon*, 446 Mass. 263, 267-268 (2006) (same; outside stairs and porch).

⁷⁷ *Commonwealth v. Glacken*, 451 Mass. at 167 ("defendant used more force than was reasonably necessary in all the circumstances of the case").

⁷⁸ *Commonwealth v. Walker*, 443 Mass. 213, 218 (2005); *Commonwealth v. King*, 460 Mass. at 83 & n.2, 87, affirming the factors given in *Commonwealth v. Kendrick*, 351 Mass. at 212 ("jury should consider evidence of the relative physical capabilities of the combatants, the characteristics of the weapons used, and the availability of maneuver room in, or means of escape from, the . . . area").

[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.⁷⁹

Self-defense cannot be claimed by a defendant who was the first to use or threaten deadly force, because a defendant must have used or attempted to use all proper and reasonable means under the circumstances to avoid physical combat before resorting to the use of deadly force.⁸⁰ A defendant who was the first to use or threaten deadly force, in order to claim self-defense, must withdraw in good faith from the conflict and announce to the person (or persons) he provoked his intention to withdraw and end the confrontation without the use of force or additional force.⁸¹

[Note to Judge: In appropriate cases, add the following instruction: However, if the defendant was the first to use non-deadly force but the deceased [or a third party acting together with the deceased] was the first to use deadly force, such as by escalating a simple fist-fight into a knife

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

⁸⁰ See *Commonwealth v. Barbosa*, 463 Mass. 116, 136 (2012), quoting *Commonwealth v. Maguire*, 375 Mass. at 772 ("right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault"). See also *Commonwealth v. Harris*, 464 Mass. 425, 435-436 & n.11 (2013) (noting that instruction that "[a] person who provokes or initiates an assault ordinarily cannot claim the right of self-defense" is "potentially overbroad because it does not define what constitutes provocation of the type that results in the forfeiture of a self-defense claim" and advising judges to "make clear that conduct involving only the use of nonthreatening words will not be sufficient to qualify a defendant as a first aggressor").

⁸¹ *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 733 (2007), quoting *Commonwealth v. Maguire*, 375 Mass. at 772 ("right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire").

fight, the defendant may claim self-defense where he responded to the escalation with deadly force.^{82]}

For the purpose of determining who attacked whom first in the altercation, [or who escalated the potential for violence through the use or threat of deadly force],⁸³ 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.⁸⁴ You may not consider such evidence for any other purpose.⁸⁵

[Note to Judge: Where the evidence, viewed in the light most favorable to the defendant, would permit the jury to find that the force used by the defendant in killing the victim was either deadly or non-deadly force, the defendant is entitled to instructions on the use of both deadly and non-deadly force in self-defense and the jury shall decide on the type of force used.^{86]}

Deadly or Non-deadly Force: Deadly force is force that is intended to or likely to cause death or serious bodily harm. Non-deadly force, by contrast, is force that is not intended to or likely to cause death or serious bodily

⁸² *Commonwealth v. Chambers*, 465 Mass. at 528 ("in the context of homicide, a defendant may lose the right to claim self-defense only if he was the first to use or threaten deadly force"). See *Commonwealth v. Harris*, 464 Mass. at 436 n.12 ("when a first aggressor or initial aggressor instruction is given in the context of self-defense we advise that the judge make clear that conduct involving only the use of nonthreatening words will not be sufficient to qualify a defendant as a first aggressor").

⁸³ *Commonwealth v. Souza*, No. SJC-13357, slip op. at 31 & 43 (Aug. 14, 2023).

⁸⁴ *Commonwealth v. Pring-Wilson*, 448 Mass. at 736-738, quoting *Commonwealth v. Adjutant*, 443 Mass. at 664 (evidence of violent conduct, even when defendant did not know of such conduct, admissible to resolve contested identity of likely first attacker; "where the identity of the first aggressor is in dispute and the victim has a history of violence . . . trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated, to support the defendant's claim of self-defense").

⁸⁵ *Commonwealth v. Souza*, No. SJC-13357, slip op. at 31 & 43 (Aug. 14, 2023).

⁸⁶ *Commonwealth v. King*, 460 Mass. at 83.

harm.⁸⁷ You must determine whether the Commonwealth has proved beyond a reasonable doubt that the defendant used deadly force. If you have a reasonable doubt whether the defendant used deadly force, but are convinced that he used some force, then you must consider whether the defendant used non-deadly force in self-defense. If the defendant had reasonable grounds to believe that he was in immediate danger of harm from which he could save himself only by using non-deadly force, and had availed himself of all reasonable means to avoid physical combat before resorting to non-deadly force, then the defendant had the right to use the non-deadly force reasonably necessary to avert the threatened harm, but he could use no more force than was reasonable and proper under the circumstances. You must consider the proportionality of the force used to the threat of immediate harm in assessing the reasonableness of non-deadly force.⁸⁸

(b) Defense of Another

*[Note to Judge: As with self-defense, this instruction may be given, in the discretion of the judge, as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction.]*⁸⁹ *The instruction is to be used where the evidence, viewed in the light most favorable to the*

⁸⁷ *Commonwealth v. Cataldo*, 423 Mass. at 325 ("force neither intended nor likely to cause death or great bodily harm"); *Commonwealth v. Lopes*, 440 Mass. 731, 739 (2004) (using one's fists is non-deadly force).

⁸⁸ *Commonwealth v. King*, 460 Mass. at 83, quoting *Commonwealth v. Franchino*, 61 Mass. App. Ct. 367, 368-369 (2004) ("(1) the defendant had reasonable concern for his personal safety; (2) he used all reasonable means to avoid physical combat; and (3) 'the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness'"); *Commonwealth v. Adams*, 458 Mass. 766, 774 (2011); *Commonwealth v. Lopes*, 440 Mass. at 739, quoting *Commonwealth v. Baseler*, 419 Mass. 500, 502-503 (1995) ("use of non-deadly force is justified at a lower level of danger, in circumstances giving rise to a 'reasonable concern over his personal safety'"); *Commonwealth v. Noble*, 429 Mass. at 46.

⁸⁹ *Commonwealth v. Santiago*, 425 Mass. at 506 ("Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime, a specific order in jury instructions is not required").

defendant,⁹⁰ raises an issue of deadly force in defense of another.⁹¹ An instruction on defense of another is generally not warranted where the theory of murder is felony-murder alone, but might be warranted where the killing occurred during the defendant's escape or attempted escape or where the defendant and the third person were unarmed and the victim was the first to use deadly force.⁹² If the Commonwealth is entitled to an instruction on murder and felony-murder, the judge should generally instruct the jury that this instruction does not apply to felony-murder because the Commonwealth is not generally required to prove the absence of defense of another to prove felony-murder.⁹³

⁹⁰ *Commonwealth v. Okoro*, 471 Mass. 51, 68 (2015) ("A judge must instruct the jury on defense of another where the evidence when viewed in the light most favorable to the defendant could support a finding that the use of force was justified on this basis").

⁹¹ *Commonwealth v. Barbosa*, 463 Mass. at 135-136.

⁹² The law governing self-defense is generally instructive regarding defense of another. An instruction on self-defense is generally not available to a defendant where the defendant committed a felony punishable by life imprisonment that provoked a victim to respond with deadly force. See *Commonwealth v. Rogers*, 459 Mass. 249, 260 (2011) ("Generally, in Massachusetts, one who commits an armed robbery cannot assert a claim of self-defense"); *Commonwealth v. Vives*, 447 Mass. 537, 544 n.6 (2006) ("The right to claim self-defense is forfeited by one who commits armed robbery"); *Commonwealth v. Maguire*, 375 Mass. at 773 ("it has been held that the right to claim self-defense may be forfeited by one who commits an armed robbery, even if excessive force is used by the intended victim"). The rationale for this rule is that the nature of the underlying felony marks the defendant as the "initiating and dangerous aggressor." *Commonwealth v. Rogers*, 459 Mass. at 260, quoting *Commonwealth v. Garner*, 59 Mass. App. Ct. 350, 363 n.14 (2003). However, a self-defense instruction might be appropriate where the killing occurred during the defendant's escape or attempted escape, see *Commonwealth v. Rogers*, 459 Mass. at 260-261, or where the defendant was unarmed and the victim was the first to use deadly force. See *Commonwealth v. Chambers*, 465 Mass. at 530 ("critical question in determining whether the Commonwealth proved that the defendant did not act in self-defense when he killed the victim was who first grabbed the kitchen knife that ultimately was the instrument of death, not who shouted first or who struck the first punch"). See generally *Commonwealth v. Chambers*, 465 Mass. at 528 ("in the context of homicide, a defendant may lose the right to claim self-defense only if he was the first to use or threaten deadly force").

⁹³ If the evidence, viewed in the light most favorable to the defendant, supports a finding that the defendant acted in proper defense of another, the court must instruct the jury on defense of another, including cases where the Commonwealth is proceeding on a theory of felony-

Because the issue of defense of another generally arises where there is also an issue of self-defense, the instruction below is premised on the jury having earlier been instructed as to the law of self-defense. Where an issue of defense of another arises without an issue of self-defense, the judge may still need to explain the law of self-defense to assist the jury in understanding the law of defense of another, because the jury are required to determine whether, based on the circumstances known to the defendant, a reasonable person would believe that the other person was justified in using deadly force to protect himself.]

A person is not guilty of any crime if he acted in proper defense of another. It is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in proper defense of another. The defendant does not have the burden to prove that he acted in proper defense of another. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in proper defense of another, then you must find the defendant not guilty.⁹⁴

The Commonwealth may satisfy its burden of proving that the defendant did not act in proper defense of another by proving any one of the following three propositions beyond a reasonable doubt:⁹⁵

1. The defendant did not actually believe that the other person was in immediate danger of death or serious bodily harm from which the other person could save himself only by using deadly force. You need not determine whether the other person actually believed himself to be in immediate danger of death or serious

murder. See generally *Commonwealth v. Brown*, 477 Mass. 805 (2017); *Commonwealth v. Fantauzzi*, 91 Mass. App. Ct. 194 (2017) (where underlying felony is the unlawful possession of a firearm, Commonwealth in some circumstances may need to prove the absence of self-defense). If the Commonwealth is proceeding on a theory of felony-murder, a separate instruction regarding proper defense of another may be required where defense of another is raised in connection with the underlying felony.

⁹⁴ See *Commonwealth v. Glacken*, 451 Mass. at 166-167.

⁹⁵ See *Commonwealth v. Young*, 461 Mass. 198, 208 (2012) (enumerating required factors for defense of another); *Commonwealth v. Martin*, 369 Mass. 640, 649 (1976) (same).

bodily harm; you must focus instead on whether the defendant actually had that belief.⁹⁶

2. A reasonable person in the circumstances known to the defendant would not have believed that the other person was in immediate danger of death or serious bodily harm from which the other person could save himself only by using deadly force. You need not determine whether a reasonable person in the circumstances known to the other person would have believed himself to be in immediate danger of death or serious bodily harm; you must focus instead on what a reasonable person in the circumstances known to the defendant would have believed.⁹⁷
3. A reasonable person in the circumstances known to the defendant would not have believed that the other person was justified in using deadly force to protect himself.⁹⁸

[Note to Judge: Where the evidence, viewed in the light most favorable to the defendant, would permit the jury to find that the force used by the defendant in killing the victim was either deadly or non-deadly force, the defendant is entitled to instructions on the use of both deadly and non-deadly force in defense of another and the jury shall decide on the type of force used.⁹⁹]

Deadly or Non-deadly Force: Deadly force is force that is intended to or likely to cause death or serious bodily harm. Non-deadly force, by contrast, is force that is not intended to or likely to cause death or serious bodily

⁹⁶ See *Commonwealth v. Barbosa*, 463 Mass. at 135-136; *Commonwealth v. Young*, 461 Mass. at 209 & n.19; *Commonwealth v. Martin*, 369 Mass. at 649.

⁹⁷ See *Commonwealth v. Young*, 461 Mass. at 209 & n.19 (circumstances must be viewed from perspective of intervening defendant, not third party; "whether the third party was, in retrospect, actually entitled to use self-defense is not a consideration"). See also *Commonwealth v. Barbosa*, 463 Mass. at 135-136.

⁹⁸ See *Commonwealth v. Young*, 461 Mass. at 208, quoting *Commonwealth v. Martin*, 369 Mass. at 649. See also *Commonwealth v. Barbosa*, 463 Mass. at 135-136.

⁹⁹ *Commonwealth v. King*, 460 Mass. at 83.

harm.¹⁰⁰ If the defendant, based on the circumstances known to the defendant, had reasonable grounds to believe (1) that the other person was in immediate danger of harm from which the other person could save himself only by using non-deadly force, and (2) that the other person was justified in using non-deadly force to protect himself, then the defendant had the right to use whatever non-deadly means were reasonably necessary to avert the threatened harm, but he could use no more force than was reasonable and proper under the circumstances. You must consider the proportionality of the force used to the threat of immediate harm in assessing the reasonableness of non-deadly force.¹⁰¹

¹⁰⁰ *Commonwealth v. Cataldo*, 423 Mass. at 325 ("force neither intended nor likely to cause death or great bodily harm"). See *Commonwealth v. Lopes*, 440 Mass. at 739 (using one's fists is non-deadly force).

¹⁰¹ See *Commonwealth v. King*, 460 Mass. at 83 ("(1) the defendant had reasonable concern for his personal safety; (2) he used all reasonable means to avoid physical combat; and (3) 'the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness'"); *Commonwealth v. Adams*, 458 Mass. at 774; *Commonwealth v. Lopes*, 440 Mass. at 739 ("use of non-deadly force is justified at a lower level of danger, in circumstances giving rise to a 'reasonable concern over his personal safety'"); *Commonwealth v. Noble*, 429 Mass. at 46.

Murder In The First Degree

There are two different degrees of murder: murder in the first degree and murder in the second degree. If you find the defendant guilty of murder, you shall decide the degree of murder.

The Commonwealth alleges that the defendant committed murder in the first degree on the following theories: [list theory or theories as follows: murder with deliberate premeditation, murder with extreme atrocity or cruelty, and/or murder in the commission or attempted commission of a felony punishable by a maximum sentence of life.]

To find the defendant guilty on this theory [any of these theories] of murder, you must be unanimous, that is, all the deliberating jurors must agree that the Commonwealth has met its burden of proving every required element of that theory beyond a reasonable doubt. You should check the appropriate box or boxes on the verdict slip as to each theory on which you agree unanimously.

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

[Where the jury are to be instructed on voluntary and/or involuntary manslaughter] If you are unable to agree unanimously that the Commonwealth has met its burden to prove beyond a reasonable doubt that the defendant is guilty of murder in the first degree or murder in the second degree, you shall consider whether the Commonwealth has proved the defendant guilty beyond a reasonable doubt of the lesser offenses of voluntary manslaughter or involuntary manslaughter.¹⁰²

¹⁰² *Commonwealth v. Figueroa*, 468 Mass. 204, 229 n.11 (2014).

I will begin by instructing you on the elements [and additional requirements of proof] for each of these theories of murder in the first degree. I will next instruct you on murder in the second degree. [I will then instruct you on voluntary manslaughter and involuntary manslaughter.] I will then review the verdict slip with you.

(a) Murder with Deliberate Premeditation

I will first define the elements of murder in the first degree with deliberate premeditation. To prove the defendant guilty of murder in the first degree with deliberate premeditation, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. The defendant caused the death of [victim's name].
2. The defendant intended to kill [victim's name], that is, the defendant consciously and purposefully intended to cause [victim's name] death.
3. The defendant committed the killing with deliberate premeditation, that is, he decided to kill after a period of reflection.
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.
5. **[Where there is evidence of mitigating circumstances]** In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances.

I will now discuss each of these requirements in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.¹⁰³

¹⁰³ See *Commonwealth v. Rhoades*, 379 Mass. 810, 825 (1980).

The second element is that the defendant intended to kill [the victim], that is, the defendant consciously and purposefully intended to cause [the victim's] death.¹⁰⁴

[Where there is evidence of accident] If you have a reasonable doubt as to whether the victim's death was accidental, because the death was caused by a negligent, careless, or mistaken act of the defendant, or resulted from a cause separate from the defendant's conduct, you may not find that the Commonwealth has proved this element of intent to kill the victim.¹⁰⁵

[Where there is evidence of transferred intent] If the defendant intends to kill a person and, in attempting to do so, mistakenly kills another person, such as a bystander, the defendant is treated under the law as if he intended to kill the actual victim. This is referred to as transferred intent under the law. For example, if I aim and fire a gun at one person intending to kill him but instead mistakenly kill another person, the law treats me as if I intended to kill the actual victim. My intent to kill the intended victim is transferred to the actual victim.¹⁰⁶

The third element is that the defendant committed the killing with deliberate premeditation, that is, he decided to kill after a period of reflection. Deliberate premeditation does not require any particular length

¹⁰⁴ See *Commonwealth v. Zanetti*, 454 Mass. at 455 ("mental state or intent for deliberately premeditated murder [is] an intent to kill"); *Commonwealth v. Jenks*, 426 Mass. 582, 585 (1998) ("Where only deliberate premeditation is offered to the jury as a basis for murder in the first degree, the inclusion of instructions on second and third prong malice, even if justified for other reasons, could be confusing . . .").

¹⁰⁵ See *Commonwealth v. Palmariello*, 392 Mass. 126, 145 & n.4 (1984) (Commonwealth has burden of proof to show beyond a reasonable doubt that death was not accident).

¹⁰⁶ *Commonwealth v. Taylor*, 463 Mass. 857, 863 (2012) ("A transferred intent instruction provides that if a defendant intends to kill a person and in attempting to do so mistakenly kills another person, such as a bystander, the defendant is treated under the law as if he intended to kill the bystander"); *Commonwealth v. Shea*, 460 Mass. 163, 172-174 (2011) (discussing proper jury instructions on transferred intent); *Commonwealth v. Castro*, 438 Mass. 160, 165-166 (2002), quoting *Commonwealth v. Fisher*, 433 Mass. 340, 344-345 (2001) ("to find murder based on a theory of transferred intent, the jury need only find that the defendant 'intended to kill one person and, in the course of an attempt to do so, killed another'").

of time of reflection. A decision to kill may be formed over a period of days, hours, or even a few seconds.¹⁰⁷ The key is the sequence of the thought process: first the consideration whether to kill; second, the decision to kill; and third, the killing arising from the decision.¹⁰⁸ There is no deliberate premeditation where the action is taken so quickly that a defendant takes no time to reflect on the action and then decides to do it.¹⁰⁹

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant intended to kill the victim and whether he formed that intent with deliberate premeditation, you may consider any credible evidence that the defendant suffered from a mental impairment¹¹⁰ or was affected by his consumption of alcohol or drugs. A defendant may form the required intent and act with deliberate premeditation even if he suffered from a mental impairment or consumed alcohol or drugs,¹¹¹ but you may consider such evidence in determining whether the Commonwealth has proved these elements.¹¹²

¹⁰⁷ See, e.g., *Commonwealth v. Gambora*, 457 Mass. 715, 733 (2010), quoting *Commonwealth v. Coleman*, 434 Mass. 165, 168 (2001) ("no particular period of reflection is required, and . . . a plan to murder may be formed in seconds"). See *Commonwealth v. Tucker*, 189 Mass. 457, 487 (1905) (including extracts from instructions to jury on this subject in numerous earlier trials).

¹⁰⁸ See *Commonwealth v. McMahon*, 443 Mass. 409, 418 (2005) (correct instruction explains that sequence of events began with "deliberation and premeditation, then the decision to kill, and lastly, the killing in furtherance of the decision").

¹⁰⁹ See *Commonwealth v. Stewart*, 460 Mass. 817, 826 (2012) (proper to instruct "that the defendant's resolution to kill resulted from reflection over some span of time; and that the act could not have been undertaken so quickly as to preclude such reflection"); *Commonwealth v. McInerney*, 373 Mass. 136, 153-154 (1977).

¹¹⁰ *Commonwealth v. The Ngoc Tran*, 471 Mass. 179, 187 (2015) ("we cannot say that the term 'mental impairment' is so obscure that a reasonable jury would be unable to rely on the usual and accepted meanings of these words to determine whether the defendant was capable of forming the required intent").

¹¹¹ *Commonwealth v. Figueroa*, 468 Mass. at 222 ("Where a defendant claims diminished capacity because of intoxication, the Commonwealth is required to prove only that the defendant was not so intoxicated that he was incapable of forming the requisite intent").

¹¹² *Commonwealth v. Mercado*, 456 Mass. at 207, quoting *Commonwealth v. Sires*, 413 Mass. 292, 300 (1992) ("All that we have ever required' be said to juries about the effect of mental

[Where there is evidence of self-defense or defense of another] The next element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you as to the circumstances under which a person properly may act in self-defense or in the defense of another.

[Where there is evidence of mitigating circumstances] Finally, the Commonwealth is also required to prove beyond a reasonable doubt that there were no mitigating circumstances. The law recognizes that in certain circumstances, which we refer to as mitigating circumstances, the crime is a lesser offense than it would have been in the absence of a mitigating circumstance. A killing that would otherwise be murder in the first or second degree is reduced to the lesser offense of voluntary manslaughter if the defendant killed someone under mitigating circumstances.

Not every circumstance you may think to be mitigating is recognized as mitigating under the law. In this case, the mitigating circumstance[s] that you must consider is/are:

1. heat of passion on a reasonable provocation;
2. heat of passion induced by sudden combat;
3. excessive use of force in self-defense or in defense of another.

To prove the defendant guilty of murder in the first degree with deliberate premeditation, the Commonwealth must prove beyond a reasonable doubt that there were no mitigating circumstances. [I will instruct you on this

impairment on a defendant's intent or knowledge is 'satisfied by a simple instruction that the jury may consider credible evidence' of the mental impairment 'in deciding whether the Commonwealth had met its burden of proving the defendant's state of mind beyond a reasonable doubt"). See *Commonwealth v. Herbert*, 421 Mass. 307, 316 (1995) (instruction regarding intoxication warranted where "evidence raised a reasonable doubt whether the defendant was so intoxicated at the time of the incident that he was incapable of forming the intent that is a necessary element of the crimes charged"). Cf. *Commonwealth v. Johnson*, 435 Mass. 113, 121-122 (2001) (reversal due to erroneous instruction on premeditation where mental impairment was live issue).

(each of these) mitigating circumstance(s) in more detail later, when I discuss voluntary manslaughter.]

(b) Murder with Extreme Atrocity or Cruelty

Next, I will define the elements of murder in the first degree with extreme atrocity or cruelty.

[Where the Commonwealth has also charged murder in the first degree with deliberate premeditation] You shall consider this theory of murder in the first degree regardless of whether or not you find that the Commonwealth has proved murder in the first degree with deliberate premeditation.¹¹³

To prove the defendant guilty of murder with extreme atrocity or cruelty, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant caused the death of [victim's name];
2. The defendant either:
 - a. intended to kill [victim's name]; or
 - b. intended to cause grievous bodily harm to [victim's name]; or
 - c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.
3. The killing was committed with extreme atrocity or cruelty.
4. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.
5. **[Where there is evidence of mitigating circumstances]** In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances.

¹¹³ See *Commonwealth v. Candelario*, 446 Mass. 847, 859-860 (2006), citing *Commonwealth v. Caputo*, 439 Mass. 153, 168 (2003) (jury may find defendant guilty on any theory of murder in first degree advanced by Commonwealth).

I will now discuss each of these requirements in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.¹¹⁴

The second element is that the defendant:

- a. intended to kill [victim's name]; or
- b. intended to cause grievous bodily harm to [victim's name]; or
- c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

As you can see, this second element has three sub-elements, which I shall call prongs, and the Commonwealth satisfies its burden of proof if it proves any one of the three prongs beyond a reasonable doubt.¹¹⁵

The first prong – the defendant intended to kill – is the same as the second element of murder in the first degree with deliberate premeditation. The second and third prongs are different from any element of murder in the first degree with deliberate premeditation.

The second prong is that the defendant intended to cause grievous bodily harm to [victim's name]. Grievous bodily harm means severe injury to the body.¹¹⁶

The third prong is that the defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. Let me help you understand how to analyze this third prong. You must first determine whether the defendant intended to perform the act that caused

¹¹⁴ See *Commonwealth v. Rhoades*, 379 Mass. at 825.

¹¹⁵ See *Commonwealth v. Townsend*, 453 Mass. 413, 428-429 (2009) (under extreme atrocity or cruelty theory the second element may be satisfied by any one of three prongs).

¹¹⁶ See *Commonwealth v. Reed*, 427 Mass. 100, 105 (1998).

the victim's death. If you find that he intended to perform the act, you must then determine what the defendant himself actually knew about the relevant circumstances at the time he acted. Then you must determine whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result.¹¹⁷

[Where there is evidence of accident] If you have a reasonable doubt as to whether the victim's death was accidental, because the death was caused by a negligent, careless, or mistaken act of the defendant, or resulted from a cause separate from the defendant's conduct, you may not find that the Commonwealth has proved that the defendant intended to kill, intended to cause grievous bodily harm, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.¹¹⁸

[Where there is evidence of transferred intent] If the defendant intends to kill a person or cause him grievous bodily harm and in attempting to do so mistakenly kills another person, such as a bystander, the defendant is treated under the law as if he intended to kill or cause grievous bodily harm to the actual victim. This is referred to as transferred intent under the law. For example, if I aim and fire a gun at one person intending to kill him but instead mistakenly kill another person, the law treats me as if I intended to kill the actual victim. My intent to kill or cause grievous bodily harm to the intended victim is transferred to the actual victim.¹¹⁹

¹¹⁷ See *Commonwealth v. Robidoux*, 450 Mass. 144, 162 nn.8 & 9 (2007).

¹¹⁸ See *Commonwealth v. Palmariello*, 392 Mass. at 145 & n.4 (Commonwealth has burden of proof to show beyond a reasonable doubt that death was not accident).

¹¹⁹ *Commonwealth v. Taylor*, 463 Mass. 857, 863 (2012) ("A transferred intent instruction provides that if a defendant intends to kill a person and in attempting to do so mistakenly kills another person, such as a bystander, the defendant is treated under the law as if he intended to kill the bystander"); *Commonwealth v. Shea*, 460 Mass. 163, 172-174 (2011) (discussing proper jury instructions on transferred intent); *Commonwealth v. Castro*, 438 Mass. 160, 165-166 (2002), quoting *Commonwealth v. Fisher*, 433 Mass. 340, 344-345 (2001) ("to find murder

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant intended to kill, intended to cause grievous bodily harm, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result, you may consider any credible evidence that the defendant suffered from a mental impairment or was affected by his consumption of alcohol or drugs.¹²⁰

The third element is that the killing was committed with extreme atrocity or cruelty.¹²¹ Extreme atrocity means an act that is extremely wicked or brutal, appalling, horrifying, or utterly revolting.¹²² Extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life.¹²³ You must determine whether the method or mode of a killing is so shocking as to amount to murder with extreme atrocity or cruelty.¹²⁴ The inquiry focuses on the defendant's action in terms of the manner and means of inflicting death, and on the resulting effect on the victim.¹²⁵

based on a theory of transferred intent, the jury need only find that the defendant 'intended to kill one person and, in the course of an attempt to do so, killed another'").

¹²⁰ See generally *Commonwealth v. Mercado*, 456 Mass. at 207-208; *Commonwealth v. Herbert*, 421 Mass. at 316; *Commonwealth v. Sires*, 413 Mass. at 300.

¹²¹ The following instructions on extreme atrocity or cruelty were revised in *Commonwealth v. Castillo*, 485 Mass. 852, 869 (2020).

¹²² See, e.g., *Commonwealth v. Linton*, 456 Mass. 534, 546-547 (2010); *Commonwealth v. Perry*, 432 Mass. 214, 219-220, 224-227 (2000).

¹²³ See *Commonwealth v. Noeun Sok*, 439 Mass. 428, 437 (2003) ("judge correctly impressed on the jury that '[e]xtreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of human life'" [emphasis in original]).

¹²⁴ See, e.g., *Commonwealth v. Hunter*, 416 Mass. 831, 837 (1994), quoting *Commonwealth v. Connolly*, 356 Mass. 617, 628, cert. denied, 400 U.S. 843 (1970) ("mode").

¹²⁵ See, e.g., *Commonwealth v. Barros*, 425 Mass. at 581, quoting *Commonwealth v. Gould*, 380 Mass. 672, 684 (1980) ("inquiry focuses both on the defendant's actions, in terms of the manner and means of inflicting death, and on the resulting effect on the victim").

In deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant caused the death of the deceased with extreme atrocity or cruelty, you must consider the following [three] factors:¹²⁶

1. Whether the defendant was indifferent to or took pleasure in the suffering of the deceased;¹²⁷
2. Whether the defendant's method or means of killing the deceased was reasonably likely to substantially increase or prolong the conscious suffering of the victim;¹²⁸ or
3. Whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person.¹²⁹

In considering whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person, you may consider:

- a. the extent of the injuries to the deceased;¹³⁰
- b. the number of blows delivered;¹³¹
- c. the manner, degree, and severity of the force used;¹³² and

¹²⁶ *Commonwealth v. Castillo*, 485 Mass. 852, 860–866 (2020) (revising factors articulated in *Commonwealth v. Cunneen*, 389 Mass. 216, 227 [1983]).

¹²⁷ See, e.g., *Commonwealth v. Roy*, 464 Mass. 818, 825 (2013) (defendant mimicked victim's pleading while describing how he "choked her out"); *Commonwealth v. Anderson*, 445 Mass. 195, 202 (2005) (defendant bragged about brutal murder after crime); *Commonwealth v. Noeun Sok*, 439 Mass. at 431.

¹²⁸ See, e.g., *Commonwealth v. Linton*, 456 Mass. at 546–547 (defendant's use of strangulation, "a method of killing that is by its nature slow and painful," increased victim's conscious suffering); *Commonwealth v. Glass*, 401 Mass. 799, 802–803 (1988) (defendant stabbed victim and twisted blade to inflict greater injury).

¹²⁹ See, e.g., *Commonwealth v. Moses*, 436 Mass. 598, 601 (2002) (after victim raised arms in act of surrender, defendant shot at victim seven times, hitting him four times; two wounds were potentially fatal).

¹³⁰ See, e.g., *Commonwealth v. Barbosa*, 457 Mass. at 802–803 (photograph depicting depressed skull fracture highly probative on extent of injury victim sustained).

¹³¹ See, e.g., *Commonwealth v. Miller*, 457 Mass. 69, 71 (2010) (evidence consistent with twenty-five blows from hammer to victim's head).

¹³² See, e.g., *Commonwealth v. Roy*, 464 Mass. at 825 (victim was hit in back of head with hard, flat object); *Commonwealth v. Carlson*, 448 Mass. 501, 502–503 (2007) (defendant "stomped

d. the nature of the weapon, instrument, or method used.¹³³

You cannot make a finding of extreme atrocity or cruelty unless it is based on one or more of the three factors I have just listed.¹³⁴ [***Where there is evidence of only a single blow.***] A murder committed by a single blow may be extremely cruel or atrocious where there is evidence of one or more of these three factors.¹³⁵

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant committed the killing with extreme atrocity or cruelty.¹³⁶

[Where there is evidence of self-defense or defense of another] The fourth element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you about when a person properly may act in self-defense or in the defense of another.

on [victim's] abdomen, kicked her in the groin, and slammed her head on the floor ten times"; autopsy revealed "'massive contusions' in the abdomen and genitalia that required a degree of force that might occur in an automobile accident").

¹³³ See, e.g., *Commonwealth v. Garuti*, 454 Mass. 48, 55 (2009) (defendant used sport utility vehicle to strike former wife and then drive back over her).

¹³⁴ See *Commonwealth v. Castillo*, 485 Mass. 852, 866 (2020).

¹³⁵ See, e.g., *Commonwealth v. Glass*, 401 Mass. 799, 802–803 (1988) (defendant stabbed victim and twisted blade to inflict greater injury); *Commonwealth v. Golston*, 373 Mass. 249, 260 (1977), cert. denied, 434 U.S. 1039 (1978) (single blow with baseball bat showed "evidence of great and unusual violence in the blow, which caused a four-inch cut on the side of the skull"); *Commonwealth v. Eisen*, 358 Mass. 740, 746 (1971) (victim "died as the result of an extensive head wound inflicted by a heavy, blunt instrument, perhaps an axe, applied with moderate to severe force").

¹³⁶ See *Commonwealth v. Gonzalez*, 469 Mass. 410, 421–422 (2014); *Commonwealth v. Rutkowski*, 459 Mass. 794, 798 (2011), citing *Commonwealth v. Rosenthal*, 432 Mass. 124, 130 (2000), and *Commonwealth v. Gould*, 380 Mass. at 683–686.

[Where there is evidence of mitigating circumstances] In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances. I have already mentioned that I will instruct you on mitigating circumstances later, when I discuss voluntary manslaughter.

(c) Felony-Murder in the First Degree

Next, I will define the elements of felony-murder in the first degree.

[Where other theories of murder in the first degree are charged] You shall consider this theory of murder in the first degree regardless whether or not you find that the Commonwealth has proved murder in the first degree with deliberate premeditation, or with extreme atrocity or cruelty, or both.

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

1. The defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life.¹³⁷
2. The death was caused by an act of the defendant [or a person participating with him] in the commission or attempted commission of the underlying felony.¹³⁸
3. The act that caused the death occurred during the commission or attempted commission of the underlying felony.^{139,140}
4. The defendant:

¹³⁷ G. L. c. 265, § 1. See, e.g., *Commonwealth v. Cannon*, 449 Mass. 462, 471 (2007).

¹³⁸ See *Commonwealth v. Tejada*, 473 Mass. 269, 269-270, 279 (2015) (defendant not guilty of felony-murder where accomplice was killed by robbery victim who was seeking to thwart commission of underlying felony).

¹³⁹ G. L. c. 265, § 1. See, e.g., *Commonwealth v. Cannon*, 449 Mass. at 471.

¹⁴⁰ Previously, it was described as an element of felony-murder, both in the first and second degrees, that the killing must have been a "natural and probable consequence" of the felony. See, e.g., *Commonwealth v. Matchett*, 386 Mass. 492, 505 (1982). Since 1999, however, the Supreme Judicial Court has recommended that the language not be used "as it is superfluous to the other elements of felony-murder." *Commonwealth v. Rolon*, 438 Mass. 808, 818 n.11 (2003). See Model Jury Instructions on Homicide at 67-68 n.8 (1999).

- a. intended to kill [victim's name]; or
- b. intended to cause grievous bodily harm to [victim's name]; or
- c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.¹⁴¹

5. **[Where there is evidence of self-defense or defense of another]**

The defendant did not act in proper self-defense or in the proper defense of another.

[Note to Judge: An instruction on self-defense is generally not warranted where the theory of murder is felony-murder alone, but might be warranted where the killing occurred during the defendant's escape or attempted escape, or where the defendant was unarmed and the victim was the first to use deadly force.¹⁴²]

¹⁴¹ *Commonwealth v. Brown*, 477 Mass. 805, 825 (2017).

¹⁴² An instruction on self-defense is generally not available to a defendant where the defendant committed a felony punishable by life imprisonment that provoked a victim to respond with deadly force. See *Commonwealth v. Rogers*, 459 Mass. 249, 260 (2011) ("Generally, in Massachusetts, one who commits an armed robbery cannot assert a claim of self-defense"); *Commonwealth v. Vives*, 447 Mass. 537, 544 n.6 (2006) ("The right to claim self-defense is forfeited by one who commits armed robbery"); *Commonwealth v. Maguire*, 375 Mass. 768, 773 (1978) ("it has been held that the right to claim self-defense may be forfeited by one who commits an armed robbery, even if excessive force is used by the intended victim"). The rationale for this rule is that the nature of the underlying felony marks the defendant as the "initiating and dangerous aggressor." *Commonwealth v. Rogers*, 459 Mass. at 260, quoting *Commonwealth v. Garner*, 59 Mass. App. Ct. 350, 363 n.14 (2003). However, a self-defense instruction might be appropriate where the killing occurred during the defendant's escape or attempted escape, see *Commonwealth v. Rogers*, 459 Mass. at 260-261, or where the defendant was unarmed and the victim was the first to use deadly force. See *Commonwealth v. Chambers*, 465 Mass. at 530 ("critical question in determining whether the Commonwealth proved that the defendant did not act in self-defense when he killed the victim was who first grabbed the kitchen knife that ultimately was the instrument of death, not who shouted first or who struck the first punch"). See generally *Commonwealth v. Chambers*, 465 Mass. at 528 ("in the context of homicide, a defendant may lose the right to claim self-defense only if he was the first to use or threaten deadly force").

6. **[Where there is evidence of mitigating circumstances]** In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances.

[Note to Judge: We can imagine few circumstances where an instruction regarding the absence of mitigating circumstances would be warranted by the evidence where the killing occurred during the alleged commission of a felony punishable by life imprisonment.]

I will now explain each element in more detail. The first element is that the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life. The Commonwealth alleges that the defendant committed [or attempted to commit] [name of crime[s]]. I instruct you that this crime is a felony with a maximum sentence of life imprisonment.

In order for you to decide whether [name of the crime[s]] actually occurred in this case, I must instruct you on all elements of this [these] underlying offense[s].

[Note to Judge: Define all the elements of the substantive felonies alleged. In appropriate cases, a definition of "attempt" must be included. If more than one felony is alleged, the jury must be instructed that they must be unanimous with regard to the underlying felony in order to return a verdict of guilty of felony-murder in the first degree.¹⁴³ Where an underlying felony has as one of its elements the use or possession of a weapon, the jury must be instructed that the defendant must have possessed a weapon or known that a joint venturer possessed a weapon, see pp. 17-18.]

[Where there is evidence the defendant at the time of the offense had a mental impairment or was under the influence of alcohol or drugs] You may

¹⁴³ *Commonwealth v. Wadlington*, 467 Mass. 192, 208 n.14 (2014) ("[w]here a required element of felony-murder in the first degree is that the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life . . . the jury must agree as to the felony committed, even if each of the alternative underlying felonies are life felonies").

consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment or the effect on the defendant of his consumption of alcohol or drugs, in determining whether the defendant had the intent required in the underlying offense or the intent to kill, cause grievous bodily harm, or 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.¹⁴⁴

[Merger instruction where (1) the underlying felony contains an element of assault and (2) the underlying felony, by its nature, does not have an intent or purpose separate and distinct from the act causing physical injury or death. The crimes of robbery, rape, and kidnapping are examples of crimes that do not implicate the merger doctrine because each felony has an underlying intent that is independent from the act resulting in death: robbery (intent to steal),¹⁴⁵ rape (intent to engage in sexual intercourse, without consent),¹⁴⁶ and kidnapping (intent to forcibly confine or imprison)^{147,148}]

¹⁴⁴ *Commonwealth v. Herbert*, 421 Mass. at 316 (instruction regarding intoxication warranted where "evidence raised a reasonable doubt whether the defendant was so intoxicated at the time of the incident that he was incapable of forming the intent that is a necessary element of the crimes charged"). See, e.g., *Commonwealth v. Rasmusen*, 444 Mass. 657, 665-666 (2005).

¹⁴⁵ See *Commonwealth v. Christian*, 430 Mass. 552, 556 (2000) ("[w]e can envision no situation in which an armed robbery would not support a conviction of [felony-murder]"). See also *Commonwealth v. Morin*, 478 Mass. 415, 430-431 (2017) (merger instruction was not required where underlying felony in felony- murder was unarmed robbery).

¹⁴⁶ See *Commonwealth v. Wade*, 428 Mass. 147, 152 (1998) ("[T]he intent to commit the rape, not the intent to inflict serious bodily harm, was the substitute for the malice requirement of murder.").

¹⁴⁷ See *Commonwealth v. Oberle*, 476 Mass. 539, 548 (2017) ("[T]he essential element of kidnapping is not the [assaultive element] but rather the defendant's forcible or secret confinement or imprisonment of the victim against [her] will").

¹⁴⁸ Under the merger doctrine, if the only felony committed was the assault upon the victim which resulted in the victim's death, the assault merges with the killing and cannot be relied on by the Commonwealth to support felony-murder. In *Commonwealth v. Morin*, 478 Mass. 415, 430-431 (2017), the Supreme Judicial Court declared:

"We have relied upon the merger doctrine to ensure that "not every assault that results in death will serve as a basis for murder in the first degree on the theory of felony-murder." *Commonwealth v. Scott*, 472 Mass. 815, 819 (2015). The Commonwealth therefore is required to prove that "the conduct which constitutes the felony be 'separate from the acts of personal violence which constitute a necessary part of the homicide itself.'" *Commonwealth v. Gunter*, 427 Mass. 259, 272 (1998), S.C., 459 Mass. 480 (1998), cert. denied, 565 U.S. 868 (2011), quoting *Commonwealth v. Quigley*, 391 Mass. 461, 466 (1984), cert. denied, 471 U.S. 1115 (1985). See *Commonwealth v. Bell*, 460 Mass. 294, 301 (2011) (no merger between homicide and predicate felony of armed assault in dwelling where defendant assaulted multiple occupants in dwelling in addition to homicide victim); *Commonwealth v. Kilburn*, 438 Mass. 356, 362 (2003) (no merger between fatal shooting and predicate felony of armed assault in dwelling based on evidence of earlier assault on victim)."

The merger doctrine does not apply "where the predicate felony has an intent or purpose separate and distinct from the act causing physical injury or death." *Morin, supra* at 431. Thus, the felony of armed robbery may serve as the underlying felony for felony-murder and is not barred by the merger doctrine because stealing or taking the property of another is an element of armed robbery. See *Commonwealth v. Christian*, 430 Mass. 552, 556 (2000). A robber who kills the victim may be found guilty of felony-murder regardless of whether he shot the victim before or after taking the victim's property. See *id.* See *Commonwealth v. Holley*, 478 Mass. 508 (2017). Similarly, the merger doctrine does not apply where the underlying felony is robbery, rape, or kidnapping. See *Morin, supra*.

Where the underlying felony contains an element of assault, the judge must ensure that the felony found by the jury is independent of the act that resulted in the death of the victim. Where the murder indictment does not specify an independent felonious assault and there is a risk that the jury may find the underlying felony to include the assault that resulted in the victim's death, the Commonwealth, in advance of trial, should identify the independent felonious assault or assaults that it intends to rely on at trial to prove felony-murder. For instance, if the underlying felony is armed assault in a dwelling, and two other persons apart from the homicide victim were in the dwelling at the time of the armed assault, the judge must explain that, to prove this first element of felony-murder, the Commonwealth must prove beyond a reasonable doubt the felony of armed assault in a dwelling of a person other than the homicide victim.

To diminish the risk of confusion, the verdict form may require the jury to specify the person (or persons) other than the homicide victim that they concluded was (or were) assaulted. See *Commonwealth v. Gunter*, 427 Mass. at 274 ("Absent specification of an independent felonious assault in the murder indictment or absent a separate indictment on an independent assault, however, it is advisable in the future that the prosecution seek jury questions specifying the independent felonious assault pursuant to G. L. c. 265, § 18A, that it contends supports a felony-murder conviction").

If the underlying felony is armed assault in a dwelling or armed home invasion and the homicide victim was alone in the dwelling, but the Commonwealth contends that there was an earlier assault of the homicide victim in the dwelling that did not cause his death prior to the assault that did cause his death, the judge in instructing the jury must explain that, to satisfy the first element of felony-murder, the Commonwealth must prove beyond a

The act of violence that is an element of the underlying felony may not be the same act that caused the victim's death.¹⁴⁹ Where an act of violence is an element of the underlying felony, you may find felony-murder only if you find an act that is separate and distinct from the violent act that resulted in the victim's death.¹⁵⁰ In this case, the Commonwealth alleges the following separate and distinct acts: [list qualifying underlying acts.] You may find felony-murder only if you find that the Commonwealth has proved beyond a reasonable doubt one of these separate and distinct acts. [If there was more than one separate and distinct act that may satisfy an element of the underlying felony, you may find the underlying felony only if you unanimously find the Commonwealth has proved the same act beyond a reasonable doubt.¹⁵¹]

If you find the defendant guilty of felony-murder, I require you to answer the following question[s]. [Recite special question or questions specific to the case.]

The second element is that the killing was caused by an act of the defendant or a person participating with him in the commission or attempted commission of the underlying felony.¹⁵²

The third element is that the act that caused the death occurred during the commission or attempted commission of the felony.¹⁵³ The Commonwealth

reasonable doubt the felony of armed assault in a dwelling or armed home invasion, with the assault being the first alleged assault of the victim, not the assault that allegedly resulted in the victim's death. See *Commonwealth v. Kilburn*, 438 Mass. at 359-360.

¹⁴⁹ See, e.g., *Commonwealth v. Kilburn*, 438 Mass. at 359-360; *Commonwealth v. Gunter*, 427 Mass. at 272-274.

¹⁵⁰ See, e.g., *Commonwealth v. Morin*, 478 Mass. at 430-431; *Commonwealth v. Holley*, 478 Mass. at 519-520.

¹⁵¹ *Commonwealth v. Morin*, 478 Mass. at 430-431; *Commonwealth v. Holley*, 478 Mass. at 519.

¹⁵² *Commonwealth v. Tejada*, 473 Mass. at 269-270, 279 (defendant not guilty of felony-murder where accomplice was killed by robbery victim who was seeking to thwart commission of underlying felony).

¹⁵³ See, e.g., *Commonwealth v. Roderick*, 429 Mass. at 277 (felony-murder applies where killing occurred during commission of or attempt to commit felony).

must prove beyond a reasonable doubt that the act that caused the death occurred during the commission of the felony and at substantially the same time and place.¹⁵⁴ [A killing may be found to occur during the commission of the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony.]¹⁵⁵

The fourth element is that the defendant:

- a. intended to kill [victim's name]; or
- b. intended to cause grievous bodily harm to [victim's name]; or
- c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

[If murder with extreme atrocity or cruelty is also charged, then the judge should explain the three prongs of malice in the following manner.]

As you can see, this fourth element is the same as the second element of murder with extreme atrocity or cruelty, which I explained earlier. Just as for murder with extreme atrocity or cruelty, the Commonwealth satisfies its burden of proof if it proves any one of the three prongs beyond a reasonable doubt.¹⁵⁶

[If murder with extreme atrocity or cruelty is not also charged, then the judge should explain the three prongs of malice in the following manner.]

As you can see, this fourth element has three sub-elements, which I shall call prongs, and the Commonwealth satisfies its burden of proof if it proves any one of the three prongs beyond a reasonable doubt.¹⁵⁷

¹⁵⁴ See *Commonwealth v. Gunter*, 459 Mass. at 488, quoting *Commonwealth v. Ortiz*, 408 Mass. 463, 466 (1990).

¹⁵⁵ See *Commonwealth v. Gordon*, 422 Mass. 816, 850 (1996).

¹⁵⁶ See *Commonwealth v. Townsend*, 453 Mass. 413, 428-429 (2009) (under extreme atrocity or cruelty theory the fourth element may be satisfied by any one of three prongs).

¹⁵⁷ See *Commonwealth v. Townsend*, 453 Mass. at 428-429 (under extreme atrocity or cruelty theory the fourth element may be satisfied by any one of three prongs).

The first prong -- the defendant intended to kill -- is the same as the second element of murder in the first degree with deliberate premeditation. The second and third prongs are different from any element of murder in the first degree with deliberate premeditation.

The second prong is that the defendant intended to cause grievous bodily harm to [victim's name]. Grievous bodily harm means severe injury to the body.¹⁵⁸

The third prong is that the defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. Let me help you understand how to analyze this third prong. You must first determine whether the defendant intended to perform the act that caused the victim's death. If you find that he intended to perform the act, you must then determine what the defendant himself actually knew about the relevant circumstances at the time he acted. Then you must determine whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result.¹⁵⁹

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant intended to kill, intended to cause grievous bodily harm, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result, you may consider any credible evidence that the defendant suffered from a mental impairment or was affected by his consumption of alcohol or drugs.¹⁶⁰

¹⁵⁸ See *Commonwealth v. Reed*, 427 Mass. at 105.

¹⁵⁹ See *Commonwealth v. Robidoux*, 450 Mass. at 162 nn.8 & 9.

¹⁶⁰ See generally *Commonwealth v. Mercado*, 456 Mass. at 207-208; *Commonwealth v. Herbert*, 421 Mass. at 316; *Commonwealth v. Sires*, 413 Mass. at 300.

[Where there is evidence of self-defense or defense of another] The fifth element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you about when a person properly may act in self-defense or in the proper defense of another.

[Where there is evidence of mitigating circumstances] In addition to these elements, the Commonwealth must also prove that there were no mitigating circumstances. I will instruct you on mitigating circumstances later, when I discuss voluntary manslaughter.

[Note to Judge: As a consequence of the Supreme Judicial Court's decision in Commonwealth v. Brown, 477 Mass. 805, 832 (2017), there is no longer a crime of second degree felony-murder. However, a defendant charged with murder in the first degree on a theory of felony-murder is likely to be entitled to an instruction on second degree murder as a lesser included offense to first degree murder based upon evidence that the defendant caused the victim's death with an intent that satisfied one or more of the three prongs of malice. The defendant may also be entitled to an instruction on voluntary manslaughter or involuntary manslaughter if any view of the evidence supports these lesser included offenses.]

Murder in the Second Degree

In order to prove murder in the second degree, the Commonwealth must prove the following elements:¹⁶¹

1. The defendant caused the death of [victim's name].
2. The defendant:
 - a. intended to kill [victim's name]; or
 - b. intended to cause grievous bodily harm to [victim's name]; or
 - c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.¹⁶²

[Note to Judge: There is no longer a separate theory of felony-murder in the second degree. See Commonwealth v. Brown, 477 Mass. 805, 832 (2017).]

3. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.
4. **[Where there is evidence of mitigating circumstances]** In addition to these elements, the Commonwealth must also prove that

¹⁶¹ *Commonwealth v. Berry*, 466 Mass. 763, 772 n.16 (2014) ("[t]he intent necessary to be proved for a conviction of murder in the first degree committed with extreme atrocity or cruelty, defined by three alternate prongs, is the same as the intent necessary for murder in the second degree").

¹⁶² See *Commonwealth v. Earle*, 458 Mass. 341, 346-347 & n.9, 350 (2010) (finding evidence legally insufficient to support conviction for murder in second degree under theory that parent's intentional failure to act, in circumstances known to parent, created "plain and strong likelihood" of child's death); *Commonwealth v. Grey*, 399 Mass. 469, 470 n.1, 472 n.4 (1987) (in instructing jury regarding whether, in circumstances known to defendant, reasonably prudent person would have known of plain and strong likelihood of death, judge erred in instructing jury that malice was determined by objective standard, as objective reasonable person test is applied to circumstances defendant knew). See also *Commonwealth v. Lyons*, 444 Mass. 289, 293-294 (2005) (discussing distinction between murder in second degree based on "plain and strong likelihood of death" and involuntary manslaughter based on "high degree of likelihood of substantial harm"; concluding judge erred in reducing conviction to involuntary manslaughter).

there were no mitigating circumstances. If the Commonwealth proves all the required elements, but fails to prove beyond a reasonable doubt that there were no mitigating circumstances, you must find the defendant not guilty of murder, but you shall return a verdict of voluntary manslaughter.

[Where the defendant is charged with murder in the first degree with extreme atrocity or cruelty] The requirements of proof for murder in the second degree are the same as for murder in the first degree with extreme atrocity or cruelty, but without the element that the killing was committed with extreme atrocity or cruelty.

[Note to Judge: Where the defendant is not charged with murder in the first degree with extreme atrocity, the judge must give the detailed instructions for each element of murder in the second degree that are set forth in the instructions for murder in the first degree with extreme atrocity or cruelty.]

Voluntary Manslaughter

(a) Voluntary Manslaughter (Lesser Included Offense to Murder)¹⁶³

To prove the defendant guilty of murder in the first or second degree], the Commonwealth is required to prove beyond a reasonable doubt that there were no mitigating circumstances that reduce the defendant's culpability. A mitigating circumstance is a circumstance that reduces the seriousness of the offense in the eyes of the law. A killing that would otherwise be murder in the first or second degree is reduced to the lesser offense of voluntary manslaughter where the Commonwealth has failed to prove that there were no mitigating circumstances. Therefore, if the Commonwealth proves all the required elements of murder, but fails to prove beyond a reasonable doubt that there were no mitigating circumstances, you must not find the defendant guilty of murder, but you shall find the defendant guilty of voluntary manslaughter.

I will now instruct you on this (each of these) mitigating circumstance(s).

¹⁶³ "If any view of the evidence . . . would permit a verdict of manslaughter rather than murder, a manslaughter charge should be given." *Commonwealth v. Brooks*, 422 Mass. 574, 578 (1996). See *Commonwealth v. Glover*, 459 Mass. 836, 842 (2011) ("Because the theories [of reasonable provocation and excessive use of force in self-defense] are distinct, a defendant is entitled to jury instructions on voluntary manslaughter based on both theories where the evidence supports them"). "If the question whether to give a manslaughter instruction is at all close, especially . . . where the defendant testifies, prudence favors giving the instruction." *Commonwealth v. Felix*, 476 Mass. 750, 757 (2017).

(1) Heat of passion on reasonable provocation

Heat of passion includes the states of mind of passion, anger, fear, fright, and nervous excitement.¹⁶⁴

Reasonable provocation is provocation by the person killed¹⁶⁵ that would be likely to produce such a state of passion, anger, fear, fright, or nervous excitement in a reasonable person as would overwhelm his capacity for reflection or restraint and did actually produce such a state of mind in the defendant.¹⁶⁶ The provocation must be such that a reasonable person would have become incapable of reflection or restraint and would not have cooled off by the time of the killing, and that the defendant himself was so provoked and did not cool off at the time of the killing.¹⁶⁷ In addition, there

¹⁶⁴ *Commonwealth v. Walden*, 380 Mass. 724, 728 (1980) ("in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and . . . actually . . . produce such a state of mind in the defendant").

¹⁶⁵ *Commonwealth v. Hinds*, 457 Mass. 83, 90-91 (2010), quoting *Commonwealth v. Ruiz*, 442 Mass. 826, 838-839 (2004) ("provocation must come from the victim"). Note, however, that the doctrine of transferred intent can apply where the evidence raises the possibility of reasonable provocation, in which case the provocation could arise from someone other than the victim. See *Commonwealth v. Camacho*, 472 Mass. 587, 603 (2015) (noting, in dicta, "agree[ment] with th[e] general proposition" that, "in circumstances where one (A) who is reasonably and actually provoked by another person (B) into a passion to kill B, shoots at B but accidentally hits and kills an innocent bystander, A's crime is voluntary manslaughter"), quoting *Commonwealth v. LeClair*, 445 Mass. 734, 743 n.3 (2006).

¹⁶⁶ *Commonwealth v. Burgess*, 450 Mass. 422, 439 (2008), quoting *Commonwealth v. Walden*, 380 Mass. at 728 ("in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and . . . actually . . . produce such a state of mind in the defendant"); *Commonwealth v. Colon*, 449 Mass. 207, 220 (2007) (provocation must be sufficient to cause accused to "lose his self-control in the heat of passion"); *Commonwealth v. Lacava*, 438 Mass. 708, 721 n.15 (2003), quoting *Commonwealth v. Walden*, 380 Mass. at 728 (provocation must "eclipse . . . capacity for reflection or restraint").

¹⁶⁷ *Commonwealth v. Glover*, 459 Mass. at 841, quoting *Commonwealth v. Acevedo*, 446 Mass. 435, 443 (2006) ("defendant's actions must be both objectively and subjectively reasonable. That is, the jury must be able to infer that a reasonable person would have become sufficiently provoked and would not have 'cooled off' by the time of the homicide, and that in fact a defendant was provoked and did not cool off" [internal quotation omitted]); *Commonwealth v. Garabedian*, 399 Mass. 304, 313 (1987) ("reasonable person would have become sufficiently provoked and that, in fact, the defendant was provoked").

must be a causal connection between the provocation, the heat of passion, and the killing.¹⁶⁸ The killing must occur after the provocation and before there is sufficient time for the emotion to cool, and must be the result of the state of mind induced by the provocation rather than by a preexisting intent to kill or grievously injure, or an intent to kill formed after the capacity for reflection or restraint has returned.¹⁶⁹

Mere words, no matter how insulting or abusive, do not ordinarily by themselves constitute reasonable provocation.¹⁷⁰ [But there may be reasonable provocation where the person killed discloses information that would cause a reasonable person to lose his self-control and learning of the matter disclosed did actually cause the defendant to do so.]¹⁷¹

Reasonable provocation does not require physical contact.¹⁷² But 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 and on whether the defendant was

¹⁶⁸ *Commonwealth v. Burgess*, 450 Mass. at 437-438, quoting *Commonwealth v. Garabedian*, 399 Mass. at 313 ("voluntary manslaughter requires the trier of fact to conclude that there is a causal connection between the provocation, the heat of passion, and the killing").

¹⁶⁹ *Commonwealth v. Anderson*, 408 Mass. 803, 805 n.1 (1990) (judge's instructions to this effect upheld).

¹⁷⁰ *Commonwealth v. Tu Trinh*, 458 Mass. 776, 783 (2011), quoting *Commonwealth v. Vick*, 454 Mass. 418, 429 (2009); *Commonwealth v. Mercado*, 452 Mass. 662, 672 (2008) (proper instruction explained "the distinction between mere words, which 'no matter how insulting or abusive, standing alone do not constitute reasonable provocation,' and statements that convey information 'of the nature to cause a reasonable person to lose his or her self-control and did actually cause the defendant to do so . . .'").

¹⁷¹ *Commonwealth v. Schnapps*, 383 Mass. 178, 180-181 (1981) (wife's sudden admission of ongoing adultery sufficient provocation to warrant instruction on voluntary manslaughter); *Commonwealth v. Bermudez*, 370 Mass. 438, 441-442 (1976) ("A reasonable man can be expected to control the feelings aroused by an insult or an argument, but certain incidents may be as provocative when disclosed by words as when witnessed personally"). Generally, for words or statements to incite heat of passion, they must contain new information as distinct from mere insults, taunts, or previously known, if inflammatory, information. See *Commonwealth v. Ruiz*, 442 Mass. at 839-840.

¹⁷² *Commonwealth v. Morales*, 70 Mass. App. 526, 532-533 (2007).

in fact so provoked.¹⁷³ The heat of passion must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion before he regained control of his emotions.¹⁷⁴

If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion on reasonable provocation, the Commonwealth has not proved that the defendant committed the crime of murder.

(2) Heat of Passion Induced by Sudden Combat

Sudden combat involves a sudden assault by the person killed and the defendant upon each other. In sudden combat, physical contact, even a single blow, may amount to reasonable provocation.¹⁷⁵ 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 and on whether the defendant was in fact so provoked.¹⁷⁶ 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.¹⁷⁷

¹⁷³ *Commonwealth v. Felix*, 476 Mass. at 757 (physical contact between defendant and victim not always sufficient to warrant manslaughter instruction, especially "where the defendant outweighs the victim and is physically far more powerful").

¹⁷⁴ *Commonwealth v. Smith*, 460 Mass. at 325, quoting *Commonwealth v. Colon*, 449 Mass. at 220 ("Provocation and 'cooling off' time must meet both a subjective and an objective standard"); *Commonwealth v. Acevedo*, 446 Mass. at 444-445. Cf. *Acevedo* at 444 n.14, citing *Commonwealth v. Ruiz*, 442 Mass. at 839 (where victim's slaps and physical contact never posed threat of serious harm to defendant, this did not "warrant a manslaughter instruction, even when the victim initiated the contact").

¹⁷⁵ *Commonwealth v. Espada*, 450 Mass. 687, 696-697 (2008) (sudden combat as basis for voluntary manslaughter requires that "victim . . . attack the defendant or at least strike a blow against the defendant").

¹⁷⁶ *Commonwealth v. Espada*, 450 Mass. at 697 (assault must pose real threat of serious harm).

¹⁷⁷ See, e.g., *Commonwealth v. Vick*, 454 Mass. at 429; *Commonwealth v. Amaral*, 389 Mass. 184, 188 (1983), quoting *Commonwealth v. Webster*, 59 Mass. 295, 307 (1850) ("whenever . . . the blood has had reasonable time or opportunity to cool . . . it will be murder [rather than

If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion induced by sudden combat, the Commonwealth has not proved that the defendant committed the crime of murder.

In summary, a killing that would otherwise be murder is reduced to the lesser offense of voluntary manslaughter if the defendant killed someone because of heat of passion on reasonable provocation or heat of passion induced by sudden combat. The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of heat of passion on reasonable provocation or heat of passion induced by sudden combat. If the Commonwealth fails to meet this burden, the defendant is not guilty of murder, but you shall find the defendant guilty of voluntary manslaughter if the Commonwealth has proved the other required elements.

(3) Excessive use of force in self-defense or defense of another

As I have explained to you earlier, a person is not guilty of any crime if he acted in proper self-defense [or defense of another]. The Commonwealth must prove beyond a reasonable doubt that the defendant did not act in the proper exercise of self-defense [or defense of another]. If the Commonwealth fails to do so, then you must find the defendant not guilty because an element of the crime that the Commonwealth must prove beyond a reasonable doubt is that the defendant did not act in the proper exercise of self-defense [or defense of another].¹⁷⁸

manslaughter]"); *Commonwealth v. Acevedo*, 446 Mass. at 443 ("jury must be able to infer that a reasonable person would have become sufficiently provoked and would not have 'cooled off' by the time of the homicide, and that in fact a defendant was provoked and did not cool off").

¹⁷⁸ *Commonwealth v. Santos*, 454 Mass. at 772-777 (extensive discussion of murder instructions regarding self-defense); *Commonwealth v. Silva*, 455 Mass. 503, 525-526 (2009) ("One of the elements of self-defense is the reasonableness of the force used to defend oneself, and if the Commonwealth fails to disprove all the elements of self-defense except the element of reasonableness of the force used, i.e., that the defendant used excessive force in self-defense, then self-defense does not lie, but excessive force in self-defense will mitigate murder to voluntary manslaughter"); *Commonwealth v. Glacken*, 451 Mass. at 167 ("To

In this case, you must consider whether the defendant used excessive force in defending himself [or another]. The term excessive force in self-defense means that, considering all the circumstances, the defendant used more force than was reasonably necessary to defend himself [or another]. In considering the reasonableness of any force used by the defendant, you may consider any factors you deem relevant to the reasonableness of the defendant's conduct under the circumstances, including evidence of the relative physical capabilities of the combatants, the number of persons who were involved on each side, the characteristics of any weapons used, the availability of room to maneuver, the manner in which the deadly force was used, the scope of the threat presented, or any other factor you deem relevant to the reasonableness of the defendant's conduct under the circumstances.¹⁷⁹

I have already told you that to prove the defendant guilty of murder, the Commonwealth is required to prove beyond a reasonable doubt that the defendant did not act in the proper exercise of self-defense [or the defense of another]. If the Commonwealth proves that the defendant did not act in proper self-defense [or in the proper defense of another] solely because the defendant used more force than was reasonably necessary, then the Commonwealth has not proved that the defendant committed the crime of

establish that the defendant did not act in proper self-defense, the Commonwealth must prove at least one of the following propositions beyond a reasonable doubt: (1) the defendant did not have a reasonable ground to believe, and did not believe, that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force; or (2) the defendant had not availed himself of all proper means to avoid physical combat before resorting to the use of deadly force; or (3) the defendant used more force than was reasonably necessary in all the circumstances of the case. If the Commonwealth fails to prove either (1) or (2), but does prove (3) -- that is, does prove beyond a reasonable doubt that in his exercise of self-defense the defendant used excessive force -- then the jury must return a verdict of not guilty of murder and would be warranted in returning a verdict of guilty of voluntary manslaughter").

¹⁷⁹ *Commonwealth v. Kendrick*, 351 Mass. at 212.

murder but, if the Commonwealth has proved the other required elements, you shall find the defendant guilty of voluntary manslaughter.¹⁸⁰

(b) Voluntary Manslaughter (Absent a Murder Charge)

In this case, the defendant is charged with voluntary manslaughter. To prove the defendant guilty of voluntary manslaughter, the Commonwealth must prove beyond a reasonable doubt the following elements:¹⁸¹

1. The defendant intentionally inflicted an injury or injuries on the victim likely to cause death.
2. The defendant caused the death of the victim.
3. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.

¹⁸⁰ *Commonwealth v. Santos*, 454 Mass. at 776 ("permissive language should not be used where mandatory language is required If the defendant killed the victim by the use of excessive force in self-defense, the defendant must be found guilty of manslaughter; the jury cannot be given the option of considering that a murder has been committed"); *Commonwealth v. Torres*, 420 Mass. 479, 491-492 (1995) (in comparable charge, "judge should have used the mandatory word 'shall' rather than the permissive 'may'").

¹⁸¹ See *Commonwealth v. Ware*, 438 Mass. 1014, 1015 (2003).

Involuntary Manslaughter

[Where the Commonwealth has proceeded on the theory of involuntary manslaughter caused by wanton or reckless conduct] ¹⁸²

Involuntary manslaughter is an unlawful killing unintentionally caused by wanton or reckless conduct.¹⁸³

[Where the Commonwealth has proceeded on the theory of involuntary manslaughter as an unlawful killing unintentionally caused by a battery]

Involuntary manslaughter is [also] an unlawful killing unintentionally caused by a battery that the defendant knew or should have known created a high degree of likelihood that substantial harm will result to another.¹⁸⁴

[Note to judge: If a defendant is charged with felony-murder in the first degree, but the evidence would support a finding of involuntary

¹⁸² An instruction on involuntary manslaughter is required where any reasonable view of the evidence will permit the jury to find that the defendant engaged in wanton or reckless conduct resulting in death. *Commonwealth v. Tavares*, 471 Mass. 430, 438 (2015); *Commonwealth v. Braley*, 449 Mass. 316, 331 (2007).

¹⁸³ The Supreme Judicial Court "has described conduct amounting to involuntary manslaughter as both 'wanton or reckless' and 'wanton and reckless.'" *Commonwealth v. Pagan*, 471 Mass. 537, 547 n.18 (2015), quoting *Commonwealth v. Tavares*, 471 Mass. at 437 n.13. But expressed either way, "[t]he standard . . . is one standard, not two, and describes intentional conduct where 'there is a high degree of likelihood that substantial harm will result to another.'" *Commonwealth v. Chase*, 433 Mass. 293, 301 (2001), quoting *Commonwealth v. Cruz*, 430 Mass. 182, 186 (1999). See *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944) ("[I]ntentional conduct to which either word applies is followed by the same legal consequences as though both words applied" [emphasis added]). Because a jury may understand wanton to mean something slightly different than reckless, we describe the standard as "wanton or reckless" in these instructions. See *Welansky, supra* ("The words 'wanton' and 'reckless' are practically synonymous in this connection, although the word 'wanton' may contain a suggestion of arrogance or insolence or heartlessness that is lacking in the word 'reckless'").

¹⁸⁴ *Commonwealth v. Sneed*, 413 Mass. 387, 393-394 (1992) ("each type of involuntary manslaughter requires a showing that the defendant knew, or should have known, that his conduct created a high degree of likelihood that substantial harm would result to another"); *Commonwealth v. Braley*, 449 Mass. at 331.

manslaughter rather than murder, the judge must instruct the jury that they can find the defendant guilty of involuntary manslaughter.^{185]}

(a) Involuntary Manslaughter Caused by Wanton or Reckless Conduct¹⁸⁶

Wanton or reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person. Wanton or reckless conduct usually involves an affirmative act.¹⁸⁷ An omission or failure to act may constitute wanton or reckless conduct where the defendant has a duty to act.¹⁸⁸

[Where the Commonwealth alleges that the defendant committed an affirmative act that was wanton or reckless] To prove that the defendant is guilty of involuntary manslaughter because of wanton or reckless conduct, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant caused the victim's death;¹⁸⁹

¹⁸⁵ *Commonwealth v. Sires*, 413 Mass. 292, 301 (1992) ("An instruction on [involuntary] manslaughter is required where any view of the evidence will permit a finding of manslaughter and not murder"). See *Commonwealth v. Brown*, 477 Mass. 805, 832-833 (2017).

¹⁸⁶ *Commonwealth v. Earle*, 458 Mass. at 347; *Commonwealth v. Walker*, 442 Mass. at 191-192.

¹⁸⁷ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. 826, 832 (2010) ("Wanton or reckless conduct generally involves a wilful act that is undertaken in disregard of the probable harm to others that may result"); *Commonwealth v. Welansky*, 316 Mass. at 397 ("Usually wanton or reckless conduct consists of an affirmative act . . .").

¹⁸⁸ *Commonwealth v. Levesque*, 436 Mass. 443, 451 (2002) ("defendant's omission when there is a duty to act can constitute manslaughter if the omission is wanton or reckless"); *Commonwealth v. Twitchell*, 416 Mass. 114, 117-118 (1993); *Commonwealth v. Welansky*, 316 Mass. 383, 397 (1944) ("But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care . . .").

¹⁸⁹ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("Involuntary manslaughter is 'an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct'" [citations omitted]).

2. The defendant intended the conduct that caused the victim's death;¹⁹⁰
3. The defendant's conduct was wanton or reckless;¹⁹¹
4. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.

I will now discuss each element in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.¹⁹²

The second element is that the defendant intended the conduct that caused the death.¹⁹³ The Commonwealth is not required to prove that the defendant intended to cause the death.¹⁹⁴

The third element is that the defendant's conduct was wanton or reckless.¹⁹⁵ Wanton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another.¹⁹⁶ It is conduct

¹⁹⁰ *Id.* ("when we refer to the intent required to support a conviction of involuntary manslaughter, we refer to the intent to perform the act that causes death and not the intent that a death occur").

¹⁹¹ *Id.*; *Commonwealth v. Welansky*, 316 Mass. at 397 ("[Commonwealth] based its case on involuntary manslaughter through wanton or reckless conduct . . . Usually wanton or reckless conduct consists of an affirmative act").

¹⁹² See *Commonwealth v. Rhoades*, 379 Mass. at 825.

¹⁹³ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("when we refer to the intent required to support a conviction of involuntary manslaughter, we refer to the intent to perform the act that causes death and not the intent that a death occur"). See *Commonwealth v. Earle*, 458 Mass. at 347; *Commonwealth v. Walker*, 442 Mass. at 191-192; *Commonwealth v. Catalina*, 407 Mass. 779, 789 (1990); *Commonwealth v. Welansky*, 316 Mass. at 398.

¹⁹⁴ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("reckless conduct does not require that the actor intend the specific result of his or her conduct, but only that he or she intended to do the reckless act"); *Commonwealth v. Walker*, 442 Mass. at 192-193.

¹⁹⁵ *Commonwealth v. Welansky*, 316 Mass. at 396-397.

¹⁹⁶ *Commonwealth v. Earle*, 458 Mass. at 347, quoting *Commonwealth v. Welansky*, 316 Mass. at 399 ("conduct [that] involves a high degree of likelihood that substantial harm will result to

involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct.¹⁹⁷ Whether conduct is wanton or reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew.¹⁹⁸ If the defendant realized the grave risk created by his conduct, his subsequent act amounts to wanton or reckless conduct whether or not a reasonable person would have realized the risk of grave danger.¹⁹⁹ Even if the defendant himself did not realize the grave risk of

another"); *Commonwealth v. Tolan*, 453 Mass. 634, 648-649 (2009) ("wanton or reckless conduct that creates a high degree of likelihood that substantial harm will result to another"); *Commonwealth v. Walker*, 442 Mass. at 192.

- ¹⁹⁷ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("act causing death must be undertaken in disregard of probable harm to others in circumstances where there is a high likelihood that such harm will result"); *Commonwealth v. Godin*, 374 Mass. 120, 129 (1977), quoting *Commonwealth v. Welansky*, 316 Mass. at 399 ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences"); *Commonwealth v. Welansky*, *supra* at 398 ("judge charged the jury correctly when he said, 'To constitute wanton or reckless conduct . . . grave danger to others must have been apparent, and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm'").
- ¹⁹⁸ *Commonwealth v. Earle*, 458 Mass. at 347 n.9, citing *Commonwealth v. Welansky*, 316 Mass. at 398 ("relevant inquiry is whether a defendant knew of facts that would cause a reasonable person to know of the relevant danger, or whether the defendant in fact knew of the danger"; "judge charged the jury correctly when he said . . . 'If the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not. But even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'"); *Commonwealth v. Catalina*, 407 Mass. at 789, citing *Welansky*, 316 Mass. at 398-399 ("defendant's subjective awareness of the reckless nature of his conduct is sufficient, but not necessary, to convict him of involuntary manslaughter. Conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice as well"); *Commonwealth v. Godin*, 374 Mass. at 129 ("standard necessary for a conviction is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards").
- ¹⁹⁹ *Commonwealth v. Chapman*, 433 Mass. 481, 490 (2001), citing *Commonwealth v. Welansky*, 316 Mass. at 398 ("judge charged the jury correctly when he said, . . . 'If the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused

harm to another, the act would constitute wanton or reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another.²⁰⁰

It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted.²⁰¹ The Commonwealth must prove that the defendant's actions went beyond negligence and amounted to wanton or reckless conduct as I have defined that term.

[Where there is evidence of self-defense or defense of another] The fourth element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you as to when a person properly may act in self-defense or in the defense of another.

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant knew, or should have known,

the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not").

²⁰⁰ *Commonwealth v. Walker*, 442 Mass. at 192, citing *Commonwealth v. Catalina*, 407 Mass. at 789 ("Conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice . . ."), and citing *Commonwealth v. Welansky*, 316 Mass. at 398-399 ("judge charged the jury correctly when he said . . . 'But even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'").

²⁰¹ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832, citing *Commonwealth v. Welansky*, 316 Mass. at 397-401 ("Conviction of involuntary manslaughter requires more than negligence or gross negligence"); *Commonwealth v. Chapman*, 433 Mass. at 489-490; *Commonwealth v. Godin*, 374 Mass. at 127, 129; *Commonwealth v. Bouvier*, 316 Mass. 489, 495-496 (1944) (defendant's actions in negligently discharging gun that killed husband did not "approach[] in character the wanton or reckless conduct essential to a finding of involuntary manslaughter"). When given, this instruction need not include a definition of negligence or gross negligence. See *Commonwealth v. Chapman*, 433 Mass. at 489-490 ("judge's instruction on wanton or reckless conduct incorporated [but did not define] the concepts of ordinary and gross negligence to illustrate the placement of wanton or reckless conduct on a spectrum of fault. The jury can be presumed to have a sufficient understanding of negligence and gross negligence from their collective experience for purposes of this instruction").

his conduct created a high degree of likelihood that substantial harm would result to another, you may consider any credible evidence that the defendant suffered from a mental impairment or was affected by his consumption of alcohol or drugs.²⁰² A defendant may have the requisite knowledge even if he suffered from a mental impairment or consumed alcohol or drugs, but you may consider such evidence in determining whether the Commonwealth has proved this element.

[Where the Commonwealth alleges that the defendant's failure to act was wanton or reckless] An intentional omission or failure to act that creates a high degree of likelihood that substantial harm will result to another may constitute involuntary manslaughter where the defendant has a duty to act.²⁰³ Such a duty may arise out of a special relationship.²⁰⁴ A duty may also arise where a person creates a situation that poses a grave risk of death or serious injury to another.²⁰⁵ When such a duty is owed, a failure to act that creates a high degree of likelihood that substantial harm will result to another is wanton or reckless.²⁰⁶ To prove that the defendant is guilty of involuntary manslaughter by reason of a wanton or reckless failure to act,

²⁰² *Commonwealth v. Iacoviello*, 90 Mass. App. Ct. 231, 243-245 (2016).

²⁰³ *Commonwealth v. Levesque*, 436 Mass. at 451 ("defendant's omission when there is a duty to act can constitute manslaughter if the omission is wanton or reckless"); *Commonwealth v. Twitchell*, 416 Mass. at 117-118; *Commonwealth v. Welansky*, 316 Mass. at 397 ("But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care . . .").

²⁰⁴ *Commonwealth v. Twitchell*, 416 Mass. at 117 (parent and minor child); *Commonwealth v. Welansky*, 316 Mass. at 397 (nightclub owner and patrons); *Commonwealth v. Godin*, 374 Mass. at 125-128 (discussing duty with regard to employer/employee relationship).

²⁰⁵ *Commonwealth v. Levesque*, 436 Mass. at 448-451 (discussing duty in context of negligently started fire); *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832-833 (discussing duty where one creates "life-threatening condition"); *Commonwealth v. Godin*, 374 Mass. at 126-130 (discussing duty in context of alleged improper storage of fireworks); *Commonwealth v. Atencio*, 345 Mass. 627, 629-630 (1963) (discussing duty in context of playing "Russian roulette").

²⁰⁶ *Commonwealth v. Welansky*, 316 Mass. at 397 ("But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences . . .").

the Commonwealth must prove beyond a reasonable doubt the following elements:

1. There was a special relationship between the defendant and the victim that gave rise to a duty of care,²⁰⁷ or the defendant created a situation that posed a grave risk of death or serious injury to another;²⁰⁸
2. The defendant's failure to act caused the victim's death;²⁰⁹
3. The defendant intentionally failed to act;²¹⁰
4. The defendant's failure to act was wanton or reckless.²¹¹

I will now discuss each element in more detail.

²⁰⁷ *Commonwealth v. Twitchell*, 416 Mass. at 117 (parent and minor child); *Commonwealth v. Michaud*, 389 Mass. 491, 496 (1983) (same); *Commonwealth v. Welansky*, 316 Mass. at 397 (nightclub owner and patrons). The existence of a relationship giving rise to a duty is a question of fact for the jury although the duty arising from a relationship is a matter of law. See, e.g., *Twitchell*, *supra* ("We shall conclude that parents have a duty . . .").

²⁰⁸ *Commonwealth v. Levesque*, 436 Mass. at 449 (evidence presented to grand jury sufficient to support indictment for involuntary manslaughter where defendant negligently started fire and intentionally failed to report fire causing death of firefighters); *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832-833 (discussing duty where omission creates "life-threatening condition"); *Commonwealth v. Godin*, 374 Mass. at 126-130 (discussing duty in context of alleged improper storage of fireworks); *Commonwealth v. Atencio*, 345 Mass. at 629-630 (discussing duty in context of playing "Russian roulette").

²⁰⁹ *Commonwealth v. Levesque*, 436 Mass. at 447-448, 454 (causation through omission); *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("Involuntary manslaughter is 'an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct'" [citations omitted]); *Commonwealth v. Rhoades*, 379 Mass. at 825 (discussing causation of death in murder case).

²¹⁰ *Commonwealth v. Levesque*, 436 Mass. at 451-453 (intentional failure to report negligently started fire causing death of responding firefighters would constitute wanton and reckless conduct); *Commonwealth v. Twitchell*, 416 Mass. at 117-118 (intentional failure to provide medical care leading to child's death constituted wanton and reckless conduct).

²¹¹ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832; *Commonwealth v. Levesque*, 436 Mass. at 451-453; *Commonwealth v. Welansky*, 316 Mass. at 397 ("[Commonwealth] based its case on involuntary manslaughter through wanton or reckless conduct [which] may consist of intentional failure to take such care . . .").

The first element is that there was a special relationship between the defendant and the victim that gave rise to a duty of care²¹² or the defendant created a situation that posed a grave risk of death or serious injury to another.²¹³ I instruct you that the relationship between [identify specific relationship, e.g., parent and minor child] is a special relationship that gives rise to a duty of care.²¹⁴ If you find that the defendant had this relationship with the victim, then you shall find that the defendant had a special relationship with the victim that gave rise to a duty of care.

The second element is that the defendant's failure to act caused the death of [victim's name]. A defendant's failure to act is the cause of death where the failure to act, in a natural and continuous sequence, results in death, and without which death would not have occurred.²¹⁵

²¹² *Commonwealth v. Twitchell*, 416 Mass. at 117 (parent and minor child); *Commonwealth v. Michaud*, 389 Mass. at 496 (same); *Commonwealth v. Welansky*, 316 Mass. at 397 (nightclub owner and patrons).

²¹³ *Commonwealth v. Levesque*, 436 Mass. at 449 (evidence presented to grand jury sufficient to support indictment for involuntary manslaughter where defendant negligently started fire and intentionally failed to report fire causing death of firefighters); *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832-833 (discussing duty where omission creates "life-threatening condition"); *Commonwealth v. Godin*, 374 Mass. at 126-130 (discussing duty in context of alleged improper storage of fireworks); *Commonwealth v. Atencio*, 345 Mass. at 629-630 (discussing duty in context of playing "Russian roulette").

²¹⁴ The existence of a relationship giving rise to a duty is a question of fact for the jury although the duty arising from a relationship is a matter of law. See, e.g., *Commonwealth v. Twitchell*, 416 Mass. at 117 ("We shall conclude that parents have a duty . . .").

²¹⁵ See *Commonwealth v. Rhoades*, 379 Mass. at 825.

The third element is that the defendant intentionally failed to act.²¹⁶ The Commonwealth is not required to prove that the defendant intended to cause the death.²¹⁷

The fourth element is that the defendant's failure to act was wanton or reckless.²¹⁸ A failure to act is wanton or reckless where there is a duty to prevent probable harm to another, and the defendant could have taken reasonable steps to minimize the risk to the person to whom the duty is owed.²¹⁹ A failure to act that is wanton or reckless involves a high degree of likelihood that substantial harm will result to the person to whom the duty is owed.²²⁰ It is a failure to act that amounts to indifference to or disregard of the consequences to the person to whom the duty is owed.²²¹ Whether the defendant's failure to act was wanton or reckless depends on the circumstances and the steps that a person could reasonably be expected to

²¹⁶ *Commonwealth v. Levesque*, 436 Mass. at 451-453 (intentional failure to report negligently started fire causing death of responding firefighters would constitute wanton and reckless conduct); *Commonwealth v. Twitchell*, 416 Mass. at 117-118 (intentional failure to provide medical care leading to child's death constituted wanton and reckless conduct).

²¹⁷ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("[R]eckless conduct does not require that the actor intend the specific result of his or her conduct, but only that he or she intended to do the reckless act").

²¹⁸ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832; *Commonwealth v. Levesque*, 436 Mass. at 451-453; *Commonwealth v. Welansky*, 316 Mass. at 397 ("[Commonwealth] based its case on involuntary manslaughter through wanton or reckless conduct [which] may consist of intentional failure to take such care . . .").

²¹⁹ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832 ("Wanton or reckless conduct generally involves a wilful act that is undertaken in disregard of the probable harm to others that may result If an individual's actions create a life-threatening condition, there is a duty to take reasonable steps to alleviate the risk created, and the failure to do so may rise to the level of recklessness necessary for involuntary manslaughter"); *Commonwealth v. Levesque*, 436 Mass. at 450-451; *Commonwealth v. Michaud*, 389 Mass. at 495-496, 499.

²²⁰ *Commonwealth v. Levesque*, 436 Mass. at 451-452, quoting *Commonwealth v. Welansky*, 316 Mass. at 399 ("words 'wanton' and 'reckless' constitute conduct that is . . . 'intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another'").

²²¹ *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832-833; *Commonwealth v. Levesque*, 436 Mass. at 448.

take to minimize the risk to the person to whom the duty is owed.²²²

Wanton or reckless conduct depends either on what the defendant knew, or how a reasonable person would have acted knowing what the defendant knew.²²³ If the defendant realized the grave danger and could have taken reasonable steps to minimize the risk, his subsequent failure to act is wanton or reckless whether or not a reasonable person would have realized the risk of grave danger.²²⁴ Even if the defendant himself did not realize the grave danger of harm to another, his failure to act would be wanton or reckless if a reasonable person in like circumstances would have realized the grave danger and taken steps to minimize the risk.²²⁵

²²² *Commonwealth v. Levesque*, 436 Mass. at 450-451 ("Whether a defendant has satisfied this duty will depend on the circumstances of the particular case and the steps that the defendant can reasonably be expected to take to minimize the risk"); *Commonwealth v. Welansky*, 316 Mass. at 397-401. Compare *Commonwealth v. Twitchell*, 416 Mass. at 117-118 (failure to provide medical care for child for religious reasons could sustain involuntary manslaughter conviction), with *Commonwealth v. Michaud*, 389 Mass. at 495-499 (failure to provide medical care for child in circumstances where child was doing well shortly before child's death insufficient to sustain involuntary manslaughter conviction).

²²³ *Commonwealth v. Welansky*, 316 Mass. at 398 ("judge charged the jury correctly when he said . . . '[i]f the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not. But even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'").

²²⁴ *Commonwealth v. Welansky*, 316 Mass. at 398 ("judge charged the jury correctly when he said . . . '[i]f the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not'"); *Commonwealth v. Levesque*, 436 Mass. at 451 ("Whether a defendant has satisfied this duty will depend on the circumstances of the particular case and the steps that the defendant can reasonably be expected to take to minimize the risk").

²²⁵ *Commonwealth v. Welansky*, 316 Mass. at 398 ("judge charged the jury correctly when he said . . . '[b]ut even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary man under the same circumstances would have realized the gravity of the danger'"); *Commonwealth v. Levesque*, 436 Mass. 443, 451 (2002) ("Although, in this case, the defendants apparently could not have successfully put out the fire, they

It is not enough for the Commonwealth to prove the defendant was negligent in failing to act, that is, that a reasonably careful person would have acted.²²⁶ The Commonwealth must prove that the defendant's failure to act went beyond negligence, and was wanton or reckless as I have defined that term.

[Where there is evidence of mental impairment or consumption of alcohol or drugs] In deciding whether the defendant knew, or should have known, his conduct created a high degree of likelihood that substantial harm would result to another, you may consider any credible evidence that the defendant suffered from a mental impairment or was affected by his consumption of alcohol or drugs.²²⁷ A defendant may have the requisite knowledge even if he suffered from a mental impairment or consumed alcohol or drugs, but you may consider such evidence in determining whether the Commonwealth has proved this element.

could have given reasonable notice of the danger they created"); *Commonwealth v. Michaud*, 389 Mass. 491, 495-499 (1983).

²²⁶ *Commonwealth v. Levesque*, 436 Mass. 443, 451-452 (2002) ("words 'wanton' and 'reckless' constitute conduct that is 'different in kind' than negligence or gross negligence"); *Commonwealth v. Welansky*, 316 Mass. 383, 400 (1944) ("conduct does not become criminal until it passes the borders of negligence and gross negligence and enters into the domain of wanton or reckless conduct"). Compare *Commonwealth v. Twitchell*, 416 Mass. 114, 115-117, 122 (1993) (parental failure to seek medical treatment for child for religious reasons could sustain involuntary manslaughter conviction), with *Commonwealth v. Michaud*, 389 Mass. 491, 498-499 (1983) (parental failure to feed adequately and seek proper medical treatment for child who appeared to be in good health shortly prior to child's death, even if negligent, insufficient to establish reckless culpability for involuntary manslaughter).

²²⁷ *Commonwealth v. Iacoviello*, 90 Mass. App. Ct. at 243-245.

(b) Involuntary Manslaughter Unintentionally Caused by a Battery

[Note to judge: Our case law limits this instruction to a battery that is not a felony.²²⁸]

Involuntary manslaughter is [also] an unlawful killing unintentionally caused by a battery²²⁹ that the defendant knew or should have known endangered human life.²³⁰ To prove the defendant is guilty of involuntary manslaughter by reason of a battery, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. The defendant caused the victim's death.²³¹
2. The defendant intentionally committed a battery upon the victim that endangered human life.²³²
3. The defendant knew or reasonably should have known that the battery endangered human life.²³³

²²⁸ See *Commonwealth v. Simpson*, 434 Mass. 570, 590 (2001) ("battery not amounting to a felony which the defendant knew or should have known endangered human life"); *Commonwealth v. Catalina*, 407 Mass. at 784, 788-789.

²²⁹ *Commonwealth v. Catalina*, 407 Mass. at 788-789, citing *Commonwealth v. Sheppard*, 404 Mass. 774, 775-776 (1989); *Commonwealth v. Welansky*, 316 Mass. at 401.

²³⁰ *Commonwealth v. Fitzmeyer*, 414 Mass. 540, 547 (1993) ("knew or should have known that the battery he was committing endangered human life"); *Commonwealth v. Sneed*, 413 Mass. at 394, quoting *Commonwealth v. Welansky*, 316 Mass. at 399, 401 ("high degree of likelihood that substantial harm will result to another").

²³¹ *Commonwealth v. Catalina*, 407 Mass. at 789 ("person henceforth may be prosecuted for involuntary manslaughter only for causing an unintentional death . . . "); *Commonwealth v. Sheppard*, 404 Mass. at 776.

²³² *Commonwealth v. Braley*, 449 Mass. at 331; *Commonwealth v. Reed*, 427 Mass. at 104; *Commonwealth v. Fitzmeyer*, 414 Mass. at 547; *Commonwealth v. Sires*, 413 Mass. at 302 n.10.

²³³ *Commonwealth v. Linton*, 456 Mass. at 552; *Commonwealth v. Braley*, 449 Mass. at 331, quoting *Commonwealth v. Simpson*, 434 Mass. at 590 ("battery not amounting to a felony which the defendant knew or should have known endangered human life"); *Commonwealth v. Sires*, 413 Mass. at 302 n.10, 303 n.14 ("defendant knew or should have known that the battery he was committing endangered human life").

4. **[Where there is evidence of self-defense or defense of another]**

The defendant did not act in proper self-defense or in the proper defense of another.

I will now discuss each element in more detail. The first element is that the defendant caused the death of [victim's name]. A defendant's act is the cause of death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.²³⁴

The second element is that the defendant intentionally committed a battery on the victim that endangered human life.²³⁵ A battery is the intentional or unjustified use of force upon the person of another. To satisfy this element, the Commonwealth must prove that the battery created a high degree of likelihood that substantial harm would result to the victim.²³⁶ Because the essence of manslaughter is an unintentional killing, the Commonwealth need not prove that the defendant intended the death that resulted from the battery.

The third element is that the defendant knew or reasonably should have known that the battery endangered human life in that it created a high degree of likelihood that substantial harm would result to the victim.²³⁷ In

²³⁴ See *Commonwealth v. Rhoades*, 379 Mass. at 825.

²³⁵ *Commonwealth v. Braley*, 449 Mass. at 331; *Commonwealth v. Fitzmeyer*, 414 Mass. at 547, citing *Commonwealth v. Sires*, 413 Mass. at 302 n.10; *Commonwealth v. Catalina*, 407 Mass. at 783-784, 788-789; *Commonwealth v. Sheppard*, 404 Mass. at 776; *Commonwealth v. Welansky*, 316 Mass. at 401.

²³⁶ *Commonwealth v. Sneed*, 413 Mass. at 394, quoting *Commonwealth v. Welansky*, 316 Mass. at 399 ("level of the risk of physical harm that the evidence must show to warrant an instruction on involuntary manslaughter battery causing death is . . . 'a high degree of likelihood that substantial harm will result to another'"). The model instruction harmonizes the line of cases that defined this element in terms of endangering human life with cases that focused on the likelihood of substantial harm. Compare, e.g., *Commonwealth v. Fitzmeyer*, 414 Mass. at 547 ("knew or should have known that the battery he was committing endangered human life"), with *Commonwealth v. Sneed*, *supra* at 394 & n.5. The model instruction retains the "endangered human life" element and explains the element in terms of whether the defendant created "a high degree of likelihood that substantial harm will result to another."

²³⁷ *Commonwealth v. Braley*, 449 Mass. at 331, quoting *Commonwealth v. Simpson*, 434 Mass. at 590 ("battery not amounting to a felony which the defendant knew or should have known

determining whether the defendant reasonably should have known that the battery created a high degree of likelihood that substantial harm would result to another, you must consider the nature and extent of the defendant's knowledge at the time he acted and whether, in the circumstances known by the defendant, a reasonable person would have recognized that the battery created a high degree of likelihood that substantial harm would result to another.²³⁸

[Where there is evidence of self-defense or defense of another] The fourth element is that the defendant did not act in proper self-defense or in the proper defense of another. I have already instructed you about when a person properly may act in self-defense or in the defense of another.

endangered human life"); *Commonwealth v. Sneed*, 13 Mass. at 394, quoting *Commonwealth v. Welansky*, 316 Mass. at 399 ("level of the risk of physical harm that the evidence must show to warrant an instruction on involuntary manslaughter battery causing death is . . . 'a high degree of likelihood that substantial harm will result to another'"); *Commonwealth v. Sires*, 413 Mass. at 302 n.10, 303 n.14 ("defendant knew or should have known that the battery he was committing endangered human life").

²³⁸ See *id.* ("degree of risk of physical harm that a reasonable person would recognize was created by particular conduct, based on what the defendant knew").

Supplemental Instructions

(a) Charging a Minor with Murder

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

(b) Definition of Death

Death occurs when the heart has stopped long enough to result in complete and permanent loss of brain function. This complete and permanent loss of brain function occurs when, in the opinion of a licensed physician based on ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.²³⁹

(c) Object of Killing Must Be a Human Being

A killing is not murder unless a human being has been killed. A viable fetus is a human being under the common law of homicide.²⁴⁰

(d) Use of Dangerous Weapon

[Where the judge determines from the evidence at trial that the nature of the dangerous weapon used and the manner of its use reasonably supports

²³⁹ *Commonwealth v. Golston*, 373 Mass. 249, 252-255 (1977) (affirming instruction on "brain death" that "occurs when, in the opinion of a licensed physician, based on ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions").

²⁴⁰ *Commonwealth v. Crawford*, 430 Mass. 683, 689 (2000) ("killing a 'viable fetus,' as defined in the common law, is a punishable offense"); *Commonwealth v. Lawrence*, 404 Mass. 378, 383-384 (1989) (viable fetus is human being for purposes of crime of murder); *Commonwealth v. Cass*, 392 Mass. 799, 807 (1984) ("We think that the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide").

the following inference, the judge may give the following instruction.] As a general rule, you are permitted (but not required) to infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person, or cause him grievous bodily harm, or intends to do an act which, in the circumstances known to him, a reasonable person would know creates a plain and strong likelihood that death would result.²⁴¹

[Note to Judge: It may not in all circumstances be reasonable to infer the intent required for murder in the first or second degree merely from the intentional use of a dangerous weapon. Before giving this instruction, a judge should consider the type of dangerous weapon and the manner in which it was used in the circumstances of the case, and should only give this instruction where the nature of the weapon and the manner of its use reasonably supports the inference.]

(e) Questions from Jury

(1) Before supplemental instructions

Members of the jury, I am about to give you some additional instructions. In response to your question, I am going to further clarify some areas of the law for you. These new instruction(s) are no more or less important than the other instructions I gave you originally. When you [begin/resume] deliberations, you are to consider all of my instructions together as a whole.²⁴²

²⁴¹ See *Commonwealth v. Tu Trinh*, 458 Mass. at 784 & nn.12 & 13 (instruction that "[a]s a general rule you are permitted to infer that a person who intentionally uses a dangerous weapon on another person is acting with malice" was "proper," but noting that "[b]ecause a firearm is inherently dangerous, we do not need to decide whether such an instruction permitting an inference of malice to be drawn would be proper if the weapon at issue were less dangerous -- a shod foot, for example").

²⁴² *Commonwealth v. Hicks*, 22 Mass. App. Ct. 139, 144-145 (1986) ("At the beginning and again at the end of the supplemental instructions, the judge should advise the jurors that all of the instructions are to be considered as a whole and that the supplemental instructions are to be considered along with the main charge, unless, of course, the supplemental instructions are given to correct an error in the main charge"); *Commonwealth v. Green*, 55 Mass. App. Ct. 376, 383 (2002).

(2) After supplemental instructions

Remember in your deliberations you are to consider all of my instructions together as a whole – those I gave you before and those I have just given you.

(f) Jury's Obligation on Guilt or Innocence

If the evidence convinces you beyond a reasonable doubt that the defendant is guilty of a criminal offense, you have a duty to find the defendant guilty of the most serious offense that the Commonwealth has proved beyond a reasonable doubt.²⁴³ If the evidence does not prove beyond a reasonable doubt that the defendant is guilty of any offense charged, you must find him not guilty.

(g) After Jury Reports Deadlock on Murder in the First Degree

[Note to Judge: This instruction should only be given when the jury explicitly reports that they are deadlocked on murder in the first degree, and not, for instance, when they simply state that they are deadlocked.]

Your present inability to reach agreement as to murder in the first degree does not mean that you are a hung jury. If, after all reasonable efforts, you are unable to reach agreement as to murder in the first degree, or if you reach agreement that the defendant is not guilty of murder in the first degree, you should move on to consider murder in the second degree.²⁴⁴

²⁴³ *Commonwealth v. Rivera*, 445 Mass. 119, 131 (2013) (jury required by law to return verdict of highest degree of murder proved beyond a reasonable doubt); *Commonwealth v. Anderson*, 408 Mass. at 808 (judge entitled to inform jury of duty to return guilty verdict for highest crime proved beyond a reasonable doubt); *Commonwealth v. Nelson*, 468 Mass. 1, 16-17 (2014) (no error where judge reinstructed jury on duty to find defendant guilty of most serious offense proved beyond reasonable doubt).

²⁴⁴ *Commonwealth v. Figueroa*, 468 Mass. at 228-229 (upon receiving note that jury was deadlocked as to murder in first degree, "the judge should have instructed the jury that they were not a hung jury and that if, after all reasonable efforts, they were unable to reach agreement as to murder in the first degree [or if they reached agreement that the defendant was not guilty of murder in the first degree], they should move on to consider murder in the second degree").

Appendix—Chalk—Requirements of Proof for Homicide

SUPREME JUDICIAL COURT CHALK: REQUIREMENTS OF PROOF FOR HOMICIDE

I. MURDER IN THE FIRST DEGREE

A. Murder with Deliberate Premeditation

1. The defendant caused the death of [name of victim].
2. The defendant intended to kill.
3. The defendant committed the killing with deliberate premeditation.
4. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.
5. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

B. Murder with Extreme Atrocity or Cruelty

1. The defendant caused the death of [name of victim].
2. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.
3. The killing was committed with extreme atrocity or cruelty.
4. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.
5. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

C. Felony-Murder

1. The defendant committed or attempted to commit [name of crime], a felony with a maximum sentence of life imprisonment.
2. The killing was caused by an act of the defendant [or a person participating with the defendant] in the commission or attempted commission of the underlying felony.
3. The act that caused the killing occurred during the commission or attempted commission of the felony.
4. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.
5. **[Where there is evidence of self-defense or defense of another]** The defendant did not act in proper self-defense or in the proper defense of another.
6. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

II. MURDER IN THE SECOND DEGREE

A. Murder

1. The defendant caused the death of [name of victim].
2. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.

3. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.
4. **[Where there is evidence of mitigating circumstances]** There were no mitigating circumstances.

III. VOLUNTARY MANSLAUGHTER

A. Voluntary Manslaughter as a Lesser Included Offense

1. The defendant caused the death of [name of victim].
2. The defendant either:
 - a. intended to kill; or
 - b. intended to cause grievous bodily harm; or
 - c. intended to do an act which, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that death would result.
3. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.

B. Voluntary Manslaughter Absent a Murder Charge

1. The defendant intentionally inflicted an injury or injuries on [name of victim] likely to cause death.
2. The defendant caused the death of [name of victim].
3. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.

IV. INVOLUNTARY MANSLAUGHTER

A. Death Caused by Wanton or Reckless Conduct

1. The defendant caused the death of [name of victim].
2. The defendant intended the conduct that caused the death of [name of victim].

3. The defendant's conduct was wanton or reckless.
4. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.

B. Death Caused by Wanton or Reckless Failure to Act

1. There was a special relationship between the defendant and [name of victim] which gave rise to a duty of care, or the defendant created a situation that posed a grave risk of death or serious injury to another.
2. The defendant's failure to act caused the death of [name of victim].
3. The defendant intentionally failed to act.
4. The defendant's failure to act was wanton or reckless.

C. Death Unintentionally Caused by a Battery

1. The defendant caused the death of [name of victim].
2. The defendant intentionally committed a battery upon [name of victim] that endangered human life.
3. The defendant knew or reasonably should have known that the battery endangered human life.
4. **[Where there is evidence of self-defense or defense of another]**
The defendant did not act in proper self-defense or in the proper defense of another.