COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

PLYMOUTH COUNTY **SJC-13223**

COMMONWEALTH
(Appellee)

v.

ANILDO CORREIA
(Appellant)

ON APPEAL FROM CONVICTION
IN THE PLYMOUTH SUPERIOR COURT

BRIEF OF THE APPELLANT

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ISSUES PRESENTED

I. Evidence is inadmissible when it is irrelevant, unfairly prejudicial, or is a prior bad act with no purpose other than to show criminal propensity. But the trial judge admitted Correia's violence-themed rap lyrics without limitation, although they were inadmissible in these three separate ways. Was allowing the jury unfettered consideration of these lyrics prejudicial error?

II. Modern discovery rules were developed to prevent trial by ambush. But the prosecution surprised Correia with his rap lyrics during cross-examination, despite its obligation to disclose the contents of any statements of the defendant. Did this discovery violation prevent Correia from making effective use of the rap-lyric evidence in preparing and presenting his case?

III. The foundation of a fair trial is impartial jurors. But a juror who admitted that she associated Correia with intimidation, stated that she was comfortable because Correia would not be in the community, and placed herself in personal opposition to Correia was a member of the deliberating jury. Did the trial judge commit reversible error in failing to excuse this juror?

IV. Correia had no obligation to speak to the police prior to arrest. But the prosecution elicited that he did not contact the police ten times from witnesses and noted it in closing. Did the prosecution's conduct constitute impermissible comment on Correia's prearrest silence creating a substantial risk of a miscarriage of justice?

V. From the doctrine's origin, manslaughter by excessive force in self-defense required that the prosecution prove that the defendant used "manifestly disproportionate violence." But the model instruction only required that the defendant used "more force than was reasonably necessary under the circumstances." Was the instruction error and did it cause a substantial risk of a miscarriage of justice?

VI. Alternatively, the combined prejudice from several errors can require reversal, even if no error is alone sufficient. Here, four of the errors impacted the jury's assessment of whether Correia used excessive force in self-defense. Did a combination of errors prejudice Correia?

STATEMENT OF THE CASE

On June 16th, 2015, Anildo Correia was indicted for first-degree murder, G.L. c. 265, § 1. A jury convicted Correia of the lesser-included offense of voluntary manslaughter. Tr.4/9:6.[1] The trial judge sentenced him to 10 to 12 years in prison. Tr.6/17:22.

STATEMENT OF FACTS

On April 22, 2015, at approximately 5:00 P.M. tensions between dozens of adolescents exploded into a melee at James Edgar Park in Brockton ("the park"). Tr.3/25:91, Tr.3/26:191. Several of the adolescents involved suffered injuries, including stab wounds. Tr.3/27:88. Anildo Correia fought with Ywron Martins during this melee and killed him using a small pocketknife. Correia and Martins were both barely eighteen years old. Tr.3/20:352, Tr.4/2:217. The prosecution alleged that Correia committed first-degree murder with deliberate premeditation or extreme atrocity and cruelty. See, e.g., Tr.4/3:172. Correia presented evidence that he killed Martins in self-defense because he reasonably believed that Martins was going to shoot him. See, e.g., Tr.4/2:269, Tr.4/3:114.

[1] Cites are: (1) Transcript: Tr.[date]:[page], (2) Record appendix: RA[page], (3) Add.[page], (4) video exhibits provided on CD to the court Ex.[number].

I. Martins' social media and a specific act of violence.

In the early hours of the morning on April 22, Martins changed his Facebook cover photograph to him with a handgun on his lap. Tr.4/2:230–232, RA.42. Also, at 3:46 P.M., Martins posted a photograph of himself on Facebook holding a taser, and at 3:47 P.M. he captioned it: "Don't let a sneakdissin to a murder". RA.41. Correia understood the caption to mean: "don't get killed over talking behind somebody's back." Tr.4/2:234. Correia saw all of that Facebook activity before he went to the park on April 22. Tr.4/2:232.

Correia also saw photographs on Martins' Facebook pages between late 2014 and April 22, 2015 that included Martins: (1) holding a handgun, (2) wearing a "Vance" hat and covering his face with a longer gun tucked behind him, and (3) making a rude gesture and holding a knife. Tr.4/2:222, 224–230, RA.44–46.

A former DYS employee testified that on March 22, 2015, Martins, who was committed to DYS, walked up to another committed youth and punched him in the face without provocation. Tr.4/2:70–73. Martins started it. Tr.4/2:72.

II. The fight

Martins arrived at the park approximately 30 minutes to an hour before the fight. Tr.3/26:188. There were photographs of Martins with Jose Arias after he got to the park. Tr.3/26:190. Martins was wearing a grey sweatshirt with the hood up, a black knit Vance hat, a black facemask, and black gloves. Tr.3/26:189–190, 200,

RA.30–32. He had a backpack. Tr.3/26:200, RA.30–32. One of the adolescents there wore shorts "so it probably wasn't too too cold." Tr.3/26:209.

A youth who recorded part of the fight reported that those who fought were not playing basketball beforehand. Tr.3/25:72. They arrived in a bunch of different groups. Tr.3/25:72–73. The fight involved many people and it was chaotic. Tr.3:25:78, 96, Tr.3/26:210, Ex. 6, 7. There were at least forty adolescents and there may have been hundreds. Tr.3/20:320, Tr.3/25:96, 140, Tr.3/26:156–157. When the police arrived, there were numerous fights in progress. Tr.3/25:120.

Five witnesses testified to firsthand observations of the altercation between Correia and Martins: Trooper Stephen Johnson, Sergeant Walter Foley, Terance Taylor,[2] Pilan White,[3] and Correia. Taylor, White, and their friends participated in the fight. Tr.3/25:142, Tr.4/1:122–123. Both Taylor and White and said that there was no plan for a fight and that they went to play basketball and hang out. Tr.3/25:134,135, Tr.4/1:105–106. But Taylor acknowledged that he had discussed

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[2] Taylor testified that he did not remember the fight between Martins and Correia due to the passage of time and head injuries suffered during car accidents. Tr.3/25:150, 180–181. The court found that Taylor was feigning memory loss and admitted his grand jury testimony. *Id*. at 185–187.

[3] White testified that she did not remember very much about the day of the fight or testifying at the grand jury. Tr.4/1:58. She also testified that her grand jury testimony was about things she heard, not her personal observations. Tr.4/1:152–153. The court found that White was feigning memory loss and admitted her grand jury testimony. *Id*. at 94–95.

wanting to be involved in a fight on April 22. Tr.3/26:64. And someone using his phone texted with his friends about violent retaliation after the fight. Tr.3/26:66.

Correia went to the park in response to a phone call from his 14-year-old cousin, Etimilson.[4] Tr.4/3:240. Etimilson told Correia that he was at the park and that there were kids there that he might have a problem with. *Id.* Correia told Etimilson to leave, but the call ended abruptly, and Etimilson did not pick up return calls. Tr.4/2:241, 243. Correia implored a friend to take him to the park to help Etimilson, and they went. Tr.4/2:243. Etimilson called back while they were driving and Correia found out exactly where Etilmilson was. Tr.4/2:243. Correia had no knowledge of anything that was happening at the park before Etimilson called. Tr.4/2:249. Correia had a small folding pocket knife with him that his uncle had given him for camping. Tr.4/2:251, RA.36. He always had the knife on his person. Tr.4/2:316. He did not get the knife in anticipation of going to the park. *Id*. And he did not think a knife that small could cause fatal damage. Tr.4/2:324–325.

When Correia arrived, he walked into the park and looked for Etimilson. Tr.4/2:247. Etimilson was across the basketball court from Correia, standing near Correia's friends, Saveion Brandon ("Savy") and Donte. Tr.4/2:248. The energy was tense. Tr.4/2:250. Fights broke out immediately after he arrived. Tr.4/2:258.

[4] Etimilson is referred to as "Milly" as well. Tr.4/2:255.

Next, Correia's attention was drawn to Martins, although Correia did not know it was him because his head and face were covered. Tr.4/2:258–259, 261, RA.32. White confirmed that Martins pulled his ski mask over his face as the fight began. Tr.4/1:116. Martins' attire made Correia uneasy because gloves and a ski mask were unnecessary for the temperature. Tr.4/2:260. He inferred that Martins was there to make trouble. Tr.4/2:261.

Martins was watching a fight between Jose and Savy. Tr.4/2:119. Next, Correia saw Martins move as if he was going to join the fight, so Correia stepped in front of him. Tr.4/2:262. Martins swung at Correia first and they exchanged punches. Tr.4/2:262–265 (Correia), Tr.3/26:265 (Taylor); but see Tr.4/1:117 (White saw Correia punch first).[5] Martins was getting the better of Correia as they fought. Tr.4/1:122, 3/25:265, 266.

As the fistfight continued, Correia landed a punch that caused Martins to stumble back. Tr.4/2:265, 267, Tr.3/25:266.[6] Correia laughed and asked Martins if

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[5] White joined the fight between Savy and Jose and thus did not see the whole fight between Martins and Correia. Tr.4/1:123. She described two encounters that no one else reported. First, she said she saw Martins and Correia on the ground about two minutes after they started fighting, and Savy ran over and kicked Martins in the face. Tr.4/1:126–127. Also, after Correia left, White saw Savy run up to Martins and push his arm forward and upwards toward the left side of Martins' body. Tr.4/1:136.

[6] Taylor's account sharply diverged from Correia's starting here. Taylor asserted that Correia rushed Martins while he was still dazed, lifted Martins' shirt over his head, and began stabbing him. Tr.9/25:267–268. The jury appears to have rejected

"that's all he got." Tr.4/2:265, 267. Martin responded by saying "Nigga, do you know how the hot shit feel." Tr.4/2:265. Correia recognized this as a lyric from a song about killing someone and specifically as reference to how it feels to get shot, "burn from the bullets." Tr.4/2:267. Correia understood Martins' words to be a threat to shoot him. Tr.4/2:269.

As Martins and Correia were trading punches initially, Martins' mask had slipped off. Tr.4/2:269. Correia knew Martins and they were friends. Tr.4/2:219–220. They used to hang out with mutual friends together. *Id*. Additionally, Correia recognized Martins' voice when he said "Nigga, do you know how the hot shit feel." Tr.4/2:269. Right after Martins referenced "the hot shit", he tried to unzip his backpack, which he had taken off. Tr.4/2:268–270. In those split seconds, the combination of Martins' Facebook posts with guns and mentioning murder, his attire that day, threat to shoot Correia, and the fact that Martins was trying to unzip his backpack made Correia fear that Martins was going get a gun from his backpack and shoot Correia. Tr.4/2:269–270.

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this version of the facts because it convicted Correia only of voluntary manslaughter. Taylor's version also did not match objective facts. There were cuts in Martins' grey sweatshirt suggesting a knife went through it. Tr.4/3:156–157. Taylor said he saw Correia slice open Martins' throat, but Martin did not have wounds to his throat. Tr.3/25:268. Taylor stated that Correia left from the closest exit, Tr.3/25:270, which was contradicted by other evidence. RA.46, 3/27:137–140. Taylor said that Correia had on a yellow Ralph Lauren sweatshirt, 3/25:271, but Correia's sweatshirt was camouflage. RA.34, 4/2:257.

Correia knew he could not let Martins open his backpack, so he lunged at Martins with his knife. Tr.4/2:270. He stabbed Martins in his arm, but Martins did not drop the backpack. Tr.4/2:271. Martins continued to try to open the backpack. Tr.4/2:272–273. In response, Correia continued swinging the knife toward Martins but did not know where he made contact or that he had seriously injured Martins. Tr.4/2:273, 275. Correia feared running away because he believed Martins would shoot him in the back. Tr.4/2:274. Correia stopped swinging the knife because Correia cut his own thumb and Martins dropped his backpack.[7] Tr.4/2:275, 4/3:116, 122.

Correia then heard someone yell "police" and he turned to run. Tr.4/2:275. But Martins grabbed his sweatshirt and would not let go. Tr.4/2:276–277. Correia then grabbed onto the shoulder of Martins' hoodie and punched him until Martins let go. Tr.4/2:276. Correia ran. Tr.4/2:278.

White looked back at Martins and Correia during this last encounter, and it looked like Martins was against the fence and Correia had his left forearm on Martins. Tr.4/2:128. Johnson and Foley also saw the end of the altercation. Tr.3/25:100–102, 3/26:149. Johnson saw Martins against a fence, and Correia held

[7] Someone removed Martins' backpack from the park. Ex. 7. It was not recovered.

Martins' sweatshirt with his left hand[8] and punched him three to four times. Tr.3/25:101. Five to ten seconds later, Johnson saw Correia punch Martins two or three more times. Tr.3/25:104. Johnson never saw a weapon. Tr.3/25:102, 108, 129. Foley saw Martins' sweatshirt over his head and Martins was bent over somewhat, but he could not see Martins hands. Tr.3/26:149–150. Johnson and Foley saw Correia flee. Tr.3/25:108, Tr.3/16:159.

Martins took his shirt off and tried to chase Correia. Tr.3/25:109, Tr.4/1:138–139, Tr.3/16:160. He looked mad. Tr.3/16:160. He stayed upright briefly, but then he fell and someone may have caught him. Tr.3/25:112, Tr.3/26:160 (no one caught him), 272 (Taylor caught him), Tr.4/1:139 (Alex caught him). Martins had blood coming out of his mouth but his eyes were open. Tr.3/25:272–273. Martins' eyes then started rolling back in his head. Tr.3/25:272–273, Tr.3/25:113, Tr.4/1:139. Police rendered aid. Tr.3/25:112–113, 272–273.

Correia took his sweatshirt off as he ran and wrapped it around his bleeding hand, but he dropped it and the knife as he ran. Tr.4/2:279.[9] He sprinted to a friend's house. Tr.4/2:278. Savy showed up and told Correia that he thought

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[8] At trial, Johnson testified that Martins' sweater or sweatshirt was over his head, but at the grand jury Johnson testified that he did not see the shirt over Martin's head. Tr.3/25:101, 123–124.

[9] DNA testing on the knife and sweatshirt were consistent with Correia's testimony that he cut Martins and himself then wrapped his hand in his sweatshirt. Tr.3/27:29, 31.

Martins died. Tr.4/2:280. Correia was shocked, upset, confused, and in disbelief. Tr.4/2:281. He kept checking Facebook to see if it was true. Tr.4/2:282. Savy called someone and sent Correia to Savy's uncle's house in Fall River. Tr.4/2:280–281. The police arrested him in Fall River four days later. Tr.4/1:14–16.

III. Martins' injuries

Correia inflicted twelve knife wounds upon Martins, six of which were on Martin's hands, and no more than one sixteenth of an inch deep. Tr.3/25:215–223, RA.27–29. He also inflicted a shallow vertical wound above Martins' left ear. Tr. 3/25:223. He inflicted deeper wounds to Martins' left cheek, chest, upper abdomen, upper left arm, and left forearm, although both the chest and forearm wounds could not be classified as stab wounds. Tr.3/25:200–215. The wound path from the chest indicated that the knife entered Martins' heart and made a one-eighth-inch defect in the tricuspid valve of the heart. Tr.3/25:209. The wound path from the abdomen went into Martins' liver. Tr.3/25:211. The wound to the heart needed the most immediate attention, but the wound to the liver was also serious. Tr.3/25:228–229. These wounds would not have immediately incapacitated Martins. Tr.3/25:233.

IV. Correia's rap lyrics

During cross-examination, the prosecution indicated that it planned to introduce lyrics from Correia's rap songs posted on YouTube. Tr.4/2:293. Defense

counsel did not know that the prosecution intended to use Correia's rap songs. Tr.4/2:295–296, 4/3:7.

The jury heard lyrics from songs posted at unknown times before the killing including: "living this life of crime," "friends turn to enemies, enemies turn to memories," "and the police can't stop us." Tr.4/3:303–304. There were also lyrics about being from the "south side" and being "at war with the north side." And there were lyrics about guns including, "I love my glock, pop, now you're dead." Tr.4/3:304. The prosecution also introduced a cover image of one song: a cartoon of someone wearing a t-shirt with an image of an AK-47. Tr.4/3:305. The jury also heard lyrics from a song, "Heaven and Hell," that Correia posted to YouTube eleven days before the killing with the lyric: "I keep my weapons everywhere in the field." Tr.4/2:306.

The prosecution elicited from Correia that many of his friends were from the south side of Brockton and that one of Martins' friends, Devin Cunningham, was from the north side of Brockton. Tr.4/2:292–296. Martins, however, grew up on the south side. Tr.4/2:297. And Etimilson grew up on the north side. Tr.4/2:297.

Trial counsel contemporaneously objected to the introduction of Correia's rap lyrics as prior bad acts. Tr.4/2:295–296. The next day, trial counsel moved for a mistrial based upon the introduction of Correia's rap lyrics. Tr.4/3:7. Counsel argued the rap lyrics were irrelevant and prejudicial. Tr.4/317–19. She also argued

that she was denied proper notice that the prosecution intended to use the lyrics, which were statements of the defendant and therefore mandatory discovery under Mass. R. Crim. P. 14. Tr.4/3:23. The trial judge denied the mistrial because he determined that Correia's rap lyrics were "probative on the question of whether it's reasonable for someone like this defendant to interpret Mr. Martins' postings as so threatening to him that at the point in time when he met Mr. Martins at the James Edgar Playground on April 22, 2015 he had to repeatedly stab him in self-defense" Tr.4/3:21–22 (emphasis added). Trial counsel noted that Correia's rights were preserved on the rap lyrics issues. Tr.4/3:39. The judge did not provide any limiting instructions regarding the rap lyrics evidence. Thus, the jurors were permitted to use them for any purpose.

SUMMARY OF THE ARGUMENT

Several errors undermine the justice of Correia's conviction. First, the trial judge admitted considerably prejudicial rap-lyric evidence Correia authored of no or minimal probative value describing numerous prior bad acts without limitation. Pp. 20–31. Second, trial counsel was unable to prepare for that evidence because the prosecution did not disclose it in advance, as required. Pp. 31–36. Third, the trial judge did not excuse a juror who was openly antagonistic to Correia and feared his release. Pp. 36–40. Fourth, the prosecution's repeated comments on Correia's prearrest silence were improper evidence that Correia felt guilty of

wrongdoing. Pp. 40–45. Fifth, the model instruction on excessive force in self-defense defines excessive force improperly and vaguely. Pp. 45–52. Sixth and alternatively, the combined prejudice of four errors warrants reversal. P. 52.

ARGUMENT

I. The judge committed prejudicial error in admitting and allowing the jury to consider Correia's rap lyrics without limitation despite the fact that the lyrics were irrelevant to any issue in the case, wildly prejudicial, and described prior bad acts that jurors could have used as propensity evidence.

Using rap music as evidence in criminal cases is fraught because most American people view rap negatively and associate it with criminality and violence. Here, the judge erred in admitting Correia's rap lyrics and cover art into evidence and allowing the jurors to consider that evidence without limitation. Correira's rap lyrics and cover art were inadmissible for three separate reasons; they were (1) irrelevant, (2) substantially more prejudicial than probative, and (3) prejudicial prior bad acts. Their introduction was prejudicial error.

A. Standard of review.

A judge's evidentiary rulings are reviewed for abuse of discretion. *Commonwealth v. Gray*, 463 Mass. 731 (2012). A judge abuses his discretion where his decision is unreasonable based upon a "clear error in judgment in weighing the factors relevant to the decision." *L.L. v. Commonwealth*, 470 Mass. 169, 185 n. 27 (2014) (citation omitted).

Defense counsel objected to this evidence on relevance, prejudice, and prior-bad-acts grounds. Tr.4/2:296, Tr.4/3:37. She also moved for a mistrial, Tr.4/3:9, and asked that the evidence be struck. Tr.4/3:44. Thus, the prejudicial error standard applies. *Commonwealth v. Cruz*, 445 Mass. 589, 591 (2005). "An error is not prejudicial if it 'did not influence the jury, or had but very slight effect'; however, if we cannot find 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,' then it is prejudicial." *Id*., quoting *Commonwealth v. Flebotte*, 417 Mass. 348, 353 (1994) , overruled on other grounds by *Commonwealth v. King*, 445 Mass. 217 (2005).

B. The rap lyrics were irrelevant.

The very nature of rap music diminishes its relevance in criminal cases. Rap arises from the Black American tradition of oral storytelling and "signifying," a verbal competition "that privileges exaggeration, metaphor, and, above all, wordplay." Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars as Amici Curiae Supporting Petitioner at 3, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983). Fundamental to the concept of "signifying" is the practice of deliberately manipulating language to exploit the gaps between the literal and figurative, and harnessing ambiguity to send an intentionally complex message. *Id*. When combined with rap's use of Black vernacular slang, and its

tendency to create new words and attribute varied meanings to common words, this practice makes rap *particularly susceptible to misinterpretation*. *Id*.

Indeed, in addressing rap lyrics written by a person other than the defendant, the Court "discern[ed] no reason why rap music lyrics, unlike any other musical form, should be singled out and viewed sui generis as literal statements of fact or intent." *Gray*, at 463 Mass. at 755. "[M]usical lyrics and poetic conventions [are] figurative expressions …which means they are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory." *People v. Coneal*, 254 Cal.Rptr.3d 653, 666 (2019) (internal citations and quotations omitted). Accordingly, "in trademark, copyright, and obscenity cases, courts routinely permit expert testimony regarding the meaning, interpretation, and poetics of rap music lyrics. This is itself an acknowledgment that rap music lyrics are not literal and self-defining." Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 38–39 (2007), citing *United States v. Wilson*, 493 F. Supp. 2d 484, 489–490 (E.D.N.Y 2006). Further, rap personas ubiquitously emphasize hypermasculinity and violence, regardless of the actual character of the artist. See generally Nicholas Stoia, Kyle Adams & Kevin Drakulich, Rap Lyrics as Evidence: What Can Music Theory Tell Us? 8 RACE & JUST. 330 (2018). Absent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis to

construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth is minimal." *Coneal*, 254 Cal. Rptr.3d at 666 (quoting *In re George T.*, 93 P.3d 1007, 1017 (Cal. 2004)) (internal citations and quotations omitted).

Accordingly, courts have confined the introduction of rap songs to situations in which the lyrics have a "concrete connection" to the charged activity in the case, *United States v. Johnson*, 469 F.Supp.3d 193, 221 (S.D.N.Y 2019), or put another way, if "the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged[.]" *State v. Skinner*, 95 A.3d 236, 238-239 (N.J. 2014). Here, the connection between the art and the incident was too tenuous for the lyrics to be relevant.

First, the songs were posted to the YouTube channel prior to the incident. The prosecution offered no evidence that Correia planned to engage in or knew about the April 22 fight at the time he posted the songs. And plainly, they were not a confession or admission to the facts of the actual event. Second, some of the lyrics and the cover image related to guns, but the defendant used a knife in the fight. The prosecution presented no evidence that Correia possessed a gun or that Correia's prior possession of a gun was relevant to any issue in the case. Finally, the Commonwealth laid inadequate foundation that a feud between "north side" and "south side" groups precipitated this fight or contributed to the killing. Correia

testified that both he and Martins were from the south side and that Etimilson was from the north side. Tr.4/2:297. Thus, in contrast to the rap lyrics, Correia arrived to protect his cousin from the north side and killed Martins, a fellow south-side resident.

Without a strong nexus between the rap lyrics and the incident, the lyrics should not have been used as statements of fact or intent. See *Gray*, 463 Mass. at 755 (minimally probative "without contextual information vital to a complete understanding of the evidence"). Rap lyrics are not relevant when they serve to prove that the defendant "was a violent thug with a propensity to commit the crimes for which he was on trial." *Hannah v. State*, 23 A.3d 192, 196, 202 (Md. 2011). Evidence that serves "to paint the defendant as a violent person of bad character" should not be admitted. *Commonwealth v. Santos*, 463 Mass. 273, 296 (2012).

The trial judge found that the lyrics were relevant to whether "someone like [Correia]," presumably meaning someone who posts rap songs with violent themes on social media, would interpret Martins' Facebook posts holding firearms and talking about murder shortly before leaving for the park as threatening. Tr.4/3:21. The judge missed the mark. Correia did not testify that he found Martins posts, alone, to be threatening. Tr.4/2:269, 312, Tr.4/3:85–86. He testified that when Martins threatened him with "the hot shit" Martins' demonstrated access to

weapons on Facebook became relevant: "he had just posted a picture with a gun…, he just threatened to shoot me so he starts to reach for his bag. I'm not going to let him get into it." Tr.4/2:269, Tr.4/3:86. This was not a case where Correia reacted solely to violence-themed posts on social media. Tr.4/3:85–86.

The judge's decision that the evidence was relevant to rebut a factual premise that Correia did not raise, especially when it was a form of art particularly incorporative of hyperbole and therefore misinterpretation, posted before the fight, and that referenced nothing particular to the fight, especially without limiting instruction, was a clear error in judgment and therefore an abuse of discretion. The evidence should have been struck as irrelevant.

C. The rap lyrics were unfairly prejudicial.

Under Mass. R. Evid. § 403, "trial judges must take care to avoid exposing the jury unnecessarily to inflammatory material[.]" *Commonwealth v. Berry*, 420 Mass. 95, 109 (1995). Even "relevant evidence is inadmissible if "its probative value is substantially outweighed by its prejudicial effect." *Gray*, 463 Mass. at 751. And when evidence is "inherently prejudicial",[10] it is inadmissible if "its probative

[10] This Court has not explicitly classified evidence beyond prior bad acts as "inherently prejudicial." But violent rap lyrics that center conflict between two groups of young people combine prior bad acts and gang affiliation with the negative perception of rap lyrics that pervades society and this Court should classify rap-lyric evidence as inherently prejudicial for the purpose of the Rule 403 analysis.

value is outweighed by the risk of unfair prejudice to the defendant." *Commonwealth v. Crayton*, 470 Mass. 228, 249 n. 27 (2014). The trial judge found that the lyrics were more probative than prejudicial, "to the extent there is any prejudice associated with it." Tr.4/3:22. The judge made a clear error in judgment by finding that the lyrics were not or only minimally prejudicial and in weighing the prejudicial effect and probative value.

Correia's rap lyrics were about gun violence, eliminating enemies, and a war between two groups of young people. This and other courts have held this type of rap lyrics to be unfairly prejudicial. *Gray*, 463 Mass. at 756 ("[L]yrics such as 'forty-four by my side,' accompanied by images of stereotypical 'gangsta thugs,' some of whose faces are covered by bandanas, could not but have had a prejudicial impact on the jury."); *United States v. Gamory*, 635 F.3d 480 (11th Cir. 2011) ("heavily prejudicial. The lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle"); *Coneal*, 254 Cal.Rptr.3d at 653; *Hannah*, 23 A.3d at 196, 202 (ten rap lyrics written by the defendant in a murder trial about possessing and using guns to shoot people were "highly prejudicial"). And empirical evidence demonstrates that jurors presented with a defendant's violent rap lyrics view the defendant as more likely to have committed murder. *Id*. Andrea L. Dennis, *Poetic (In)Justice? Rap Music*

Lyrics as Art, Life, and Criminal Evidence, 31 Colum. J.L. & Arts 1, 27–30 (2007), citing Stuart Fischoff, Gangsta Rap and A Murder in Bakersfield, 294 J. of Applied Soc. Psychology 795 (1999).

Also, without using the word "gang," the Commonwealth used Correia's lyrics about the north side and south side to paint this as a gang-related conflict. The SJC has "recognized repeatedly that evidence of a defendant's gang membership risks prejudice to the defendant in that it may suggest a propensity to criminality or violence." *Commonwealth v. Phim*, 462 Mass. 470, 477 (2012).

Finally, the rap-lyric evidence prejudicially intertwined with negative perceptions of Black boys and men prevalent in society. The New Jersey Supreme Court has recognized that rap is "a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture." *Skinner*, 95 A.3d at 238–239. But more than that; "[o]ver two decades of research has shown that the mere association with rap music can create a strong negative bias in jurors and that violent lyrics are uniquely viewed as threatening, offensive, dangerous, and literal compared to violent lyrics from other music genres." Jack I. Lerner, Charis E. Kubrin et al., Rap on Trial Legal Guide 2–3 (July 2021) [hereinafter Lerner] ; see also Kristen Henning, *The Rage of Innocence; How America Criminalizes Black Youth*, Pantheon Books 68 (2021) , citing Adam Dunbar et al., *The Threatening Nature of 'Rap' Music*, 22 Psychol. Pub. Pol'y & L.

280, 288 (2016). That effect was amplified when the artist was Black rather than white. Lerner at 2–3, citing Carrie B. Fried, Bad Rap for Rap: Bias in Reactions to Music Lyrics, 26 J. APPLIED SOC. PSYCH. 2135, 2136 (1996) at 2140-41. In short, using rap lyrics in criminal prosecution is prejudicial because it "capitalize[s] on fears and racial stereotypes about the genre." Henning, at 71. There was a real danger that Correia's rap music primed the jurors to see him as more violent and more criminal.

The judge completely missed the prejudice occasioned by jury exposure to a Black defendant's violent rap lyrics that included gang imagery. This evidence was wildly prejudicial in a murder case. And the lyrics were, if anything, minimally probative: how Correia perceived violence-themed social media posts generally was not at issue because Martins' posts only raised a concern for Correia after Martins' direct threat to shoot Correia. The judge's misperception of the prejudice of these lyrics was a clear and unreasonable error in weighing the relevant factors and constituted an abuse of discretion whether this Court views the rap-lyric evidence as inherently prejudicial or not. The evidence should have been struck as unfairly prejudicial.

D. The rap lyrics described inadmissible prior bad acts that were more prejudicial than probative.

Without any limitation imposed by the trial judge, the jurors could have taken Correia's rap lyrics literally: Correia possessed and used guns and other

weapons to harm people, had an ongoing feud with the "north side," and eliminated enemies. See Lerner at 2–3. The trial judge did not recognize this and did nothing to mitigate the "implicit[ly]… "high risk of prejudice to the defendant" from this prior-bad-acts evidence. *Commonwealth v. Dorazio*, 472 Mass. 535, 540 (2015).

"It is well settled that the prosecution may not introduce evidence of [] defendant's prior...bad acts for the purpose of demonstrating bad character or propensity to commit the crime charged." *Commonwealth v. Barrett*, 418 Mass. 788, 793 (1994). However, such evidence may be admissible "to establish a common scheme or plan, pattern of operation, intent, motive, or state of mind at the time of the crime." *Commonwealth v. Cardarelli*, 433 Mass. 427, 434 (2001). See Mass. G. Evid. § 404(b)(2) (2019). These prior bad acts were not relevant. The prosecution offered no evidence that the acts described in Correia's songs influenced the fight with Martins, including a failure to lay adequate foundation for the relevance of any conflict between the north side and south side. The prior bad acts referenced in the lyrics "served merely to paint the defendant as a violent person of bad character." *Santos*, 463 Mass. at 296.

Even if relevant, however, the evidence's prejudicial effect must not outweigh its probative value. *Commonwealth v. Peno*, 485 Mass. 378, 386 (2020). The prejudicial effect need not substantially outweigh the probative value.

Crayton, 470 Mass. at 249 n. 27.[11] And it is "quite important that the judge should instruct the jury of the limited purposes for which such evidence could properly be considered by them." *Commonwealth v. Mills*, 47 Mass. App. Ct. 500 (1999) (conviction overturned where bad acts admitted without limiting instructions); contrast *Commonwealth v. Gomes*, 475 Mass. 775, 785 (2016) (when the question was close, a contemporaneous and final instruction that specifically instructed the jurors not to consider the evidence for criminal personality or bad character tipped the balance in favor of admissibility).

Without limitation, any minimal probative value the rap lyrics may have had is surely outweighed by the prejudice that flowed from the jury being permitted to use the rap lyrics as admissions to prior bad acts and therefore an indication of Correia's violent propensity and bad character. This is especially so in a self-defense case, where the identity of first-aggressor, amount of force used, and whether Correia avoided the conflict if possible were all critical questions.

The judge failed to recognize that the jurors could use the evidence as admissions of prior bad acts and that the lyrics were prejudicial, and failed to mitigate the prejudice by providing limiting instructions to the jurors. *Commonwealth v. Wardsworth*, 482 Mass. 454, 472 (2019). This was clear error in

[11] This is a more "exacting" standard than that for determining whether evidence is inadmissible under Rule 403 because prior bad acts evidence is "inherently prejudicial." *Crayton*, 470 Mass. at 249 n. 27.

every phase of the prior-bad-acts analysis and constituted an abuse of discretion. The evidence should not have been admitted.

E. The rap evidence prejudiced Correia.

The judge gave no contemporaneous or final curative instructions with respect to the rap evidence. Thus, the jury were permitted to consider Correia's rap lyrics for any purpose – as evidence of prior bas acts, criminal propensity, gang membership, and a violent disposition. All of these uses of the rap evidence carried a great danger of unfair prejudice. *Crayton*, 470 Mass. at 249 & n. 27 (prior bad acts, propensity, character), *Phim*, 462 Mass. at 477 (gang affiliation). The jury's verdict of voluntary manslaughter indicates that they likely believed that Correia used excessive force in self-defense. The rap evidence went directly to the issue of excessive force; the jury may have believed that a violent person with a propensity for criminal behavior who saw himself to be at war with another group would have used more force than necessary to repel an attack.

The line between proper and excessive force can be difficult to draw. See, e.g., *Commonwealth v. Adams*, 416 Mass. 558, 567–568 (1993) (discussing that line in the context of police use of force against a suspect). Colored by improper evidence that painted Correia as violent and criminal, the jurors may have been influenced to draw that line at a different point. Accordingly, this Court cannot be sure that that the erroneous introduction of this irrelevant and inflammatory

evidence did not influence the jury. *Flebotte*, 417 Mass. at 35. Correia's conviction must be vacated and a new trial ordered.

II. The prosecution violated its discovery obligations by ambushing Correia with his rap lyrics during cross-examination, which impaired defense counsel's preparation.

"Modern rules of discovery were created to permit defense counsel to learn, through discovery of the government's evidence, what the defendant faces in standing trial, and to assist in preventing trial by ambush." *Commonwealth v. Eneh*, 76 Mass. App. Ct. 672, 678 (2010). Here, the prosecution ambushed Correia with cross-examination featuring statements he made in rap songs and cover art posted to YouTube.[12] Defense counsel objected to the lack of notice, Tr.4/3:7,8,15,23,26-27,29,35, based specifically on Mass. R. Crim. P. 14, Tr.4/4:26, and requested a mistrial, Tr.4/3:7.

A. Correia's rap lyrics were subject to mandatory discovery.

"Any written or recorded statements, and the substance of any oral statements, made by the defendant" in the custody or control of the prosecutor must be produced to the defense. Mass. R. Crim. P. 14, as amended, 444 Mass.

[12] A police report provided in discovery reported that a witness knew Correia to have rap music under the name AC$TACK$ on YouTube. RA.47, Tr.4/3/2019:25. A fleeting reference on page 63 of a single police report did not disclose the "substance" of any oral statement by the defendant and therefore did not comply with the discovery requirement. The reference was more appreciably relevant to identification which was challenged pre-trial. Several witnesses knew Correia only through social media.

1501 (2005). See also *Commonwealth v. Lewinski*, 367 Mass. 889, 903 (1975) ("Written statements and the substance of any oral statements of a defendant, *available to* the prosecution, shall be delivered as matter of course to counsel for that defendant[.]" (emphasis added)). This is an ongoing obligation. *Id*.

Here, the trial judge questioned but did not resolve whether a defendant's rap lyrics posted to YouTube were "statements" in "the custody and control" of the prosecution for the purposes of Mass. R. Crim. P. 14(a)(1)(A)(i). Tr.4/3:31–33. Although, the prosecutor conceded that the rap lyrics were statements of the defendant. Tr.4/3:27. The meaning of terms in the Massachusetts Rules of Criminal Procedure is a question of law which a reviewing court considers de novo. See *Commonwealth v. Aldana*, 477 Mass. 790, 801 (2017) (meaning of terms in a regulation).

The 2004 revisions to Mass. R. Crim. P. 14(a)(1)(A)(i) "added 'the substance of any oral statements' of the defendant...reflect[ing] the *broader* discovery requirement established by case law," Reporters Notes to 2004 Revision of Mass. R. Crim. P. 14 (emphasis added), which prevented prosecutors from electing which of the defendants' statements to turn over based solely upon the form of the statement. See *Commonwealth v. Gilbert*, 377 Mass. 887, 893 (1979) (discovery obligation cannot turn on whether the prosecutor decides to reduce a statement to writing), see also *Commonwealth v. Lopes*, 25 Mass. App. Ct. 988,

989 (1988). Indeed it "make[s] no difference that the statement reached the prosecutor in oral rather than written form." *Commonwealth v. Janard*, 16 Mass. App. Ct. 931, 933 (1983).

The rap-lyric statements reached the prosecution orally via YouTube and it introduced them to undermine the heart of the defendant's case: that he acted in self-defense. In doing so, it subverted the purpose of the discovery rules "to prevent the admission of 'surprise' evidence and the concomitant prejudice often associated with same." *Eneh*, 76 Mass. App. Ct. at 677, quoting *Commonwealth v. Figueroa*, 74 Mass. App. Ct. 784, 792 (2009) The case law heartily disapproves of the prosecution's use of artful description or design to subvert a defendant's access to what he faces in standing trial. *Gilbert*, 377 Mass. at 893. At the very least, when the prosecution intends to use a statement of the defendant that reached it via a social media platform, that statement must fall under the automatic discovery provisions of Mass. R. Crim. P. 14(a)(1)(A)(i). Otherwise, the prosecution would be able to employ trial by ambush, particularly against young people in an increasingly digital world.[13]

[13] It is of no consequence that Correia likely knew his own rap lyrics. "Our system of jurisprudence…has made clear that the obligations imposed on the prosecution to ensure that a criminal defendant receives a fair trial do not, and cannot, depend on something as unpredictable as the facts a criminal defendant chooses to disclose to his or her attorney." *Eneh*, 76 Mass. App. Ct. at 678.

Alternatively, the prosecutor listened to and introduced several passages from different songs. Tr.4/3:24. She appeared to have written those statements down for her cross-examination. See Tr.4/3:24–25. Thus, she possessed verbatim written statements of the defendant, which are subject to mandatory disclosure. See Mass. R. Crim. P. 14(a)(1)(A)(i) & (d).

B. The late disclosure of Correia's rap lyrics prejudiced his defense.

Absent a showing of bad faith by the prosecutor, the prejudice analysis considers the consequences of the delay in disclosure, not the likely impact of the evidence. *Commonwealth v. Nolin*, 448 Mass. 207, 224–225 (2007). Specifically, this Court asks whether the prosecution's disclosure was sufficiently timely to allow the defendant to make effective use of the evidence in preparing and presenting his case. *Id*.

The fact that the prosecutor intended to use the lyrics was disclosed during cross-examination of Correia and the lyrics were disclosed as the prosecutor cross-examined Correia with them. Tr.4/2:302–307. Had counsel known that Correia would be confronted with the lyrics, she "would have made different decisions about whether [her] client would take [the] stand." Tr.4/3:37, see also Tr.4/3:9, 23. Counsel was also unable to prepare Correia to testify in light of the lyrics. And counsel was unable to research and file a motion in limine to exclude Correia's rap lyrics or prepare a robust contemporaneous objection to their introduction. The

utility of even a small amount of additional research on the topic is illustrated by counsel's more comprehensive objection and citation to *Commonwealth v. Gray*, 463 Mass. 731 (2012) the following day. Tr.4/3:7–44. In short, defense counsel was entirely prevented from strategizing around the rap lyric evidence and could have made "effective use of the evidence in preparing and presenting his case" had it been disclosed. *Eneh*, 76 Mass. App. Ct. at 681.

Additionally, as in *Eneh*, "the consequences of the delayed disclosure impugned the defendant's credibility and went to the heart of the defense theory, hindering the defense from raising a reasonable doubt in the minds of the jurors[.]" *Eneh*, 76 Mass. App. Ct. at 682. Correia testified that he arrived at the park to aid Etimilson, reacted proportionally to Martins' threats, and killed Martins in self-defense. Tr.4/2:267–269. But the jury could have concluded from the lyrics that Correia misrepresented his motives, knowledge, and the extent of the force he used. Correia was prejudiced by being unable to strategize around these lyrics. His conviction must be vacated and a new trial ordered.

III. The trial judge violated Correia's constitutional right to a fair trial by allowing a juror who associated Correia with intimidation, stated that she was comfortable because Correia would not be in the community, and placed herself in personal opposition to Correia to become a member of the deliberating jury.

Correia had a Sixth Amendment and article 12 right to a trial by an unbiased jury with jurors that were "impartial and indifferent". *Murphy v. Florida*, 421 U.S.

794, 799 (1978); *Commonwealth v. Guisti*, 434 Mass. 245, 251 (2001), S.C., 449 Mass. 1018 (2007). The presence of even one partial juror violates this right." *Guisti*, 434 Mass. at 251; *United States v. Blitch*, 622 F.3d 658, 665 (7th Cir. 2010) (even one juror's peace of mind affected can deprive defendant of a fair trial). But the juror in seat sixteen ("Seat 16") associated Correia with intimidation, expressed opposition to him, and intimated that she felt safe only because he would not be out in the community. Verdicts must be based on the evidence admitted at trial, not on fear. Cf. *Commonwealth v. Ward*, 28 Mass. App. Ct. 292, 295–296 (1990) (reversible error where prosecutor's closing argument "pandered to [jury's] fears"). And "the 'trial court must be zealous to protect the rights of an accused.'" *Commonwealth v. Long*, 419 Mass. 798, 803 (1995), quoting *Wainwright v. Witt*, 469 U.S. 412, 430 (1985). Seat 16 should have been excused the from the jury to protect Correia's right to a fair trial.

A. Relevant facts

On the seventh day of trial, some of the jurors reported that they were feeling intimidated by court spectators staring at them and that a court spectator drove alongside a juror and pointed at her as she was leaving the previous day. Tr.3/28:6–7, 34–35. The trial judge conducted individual voir dire of the jurors. Tr.3/28:50–217. He excluded the juror in seat 13 who saw a spectator point at another juror. Tr.3/28:171.

Seat 16 reported that spectators in the courtroom were looking "very intently" at her and other jurors. Tr.3/28:193, 195. She talked to other jurors about this and they confirmed it. Tr.3/28:197. She also felt distracted by those same spectators talking to one another. Tr.3/28:195. The juror assumed that the spectators who stared at the jurors were associated with the defendant because they were not with a group that had been crying during trial. Tr.3/28:201. In response to the judge's questions about whether she could remain impartial she stated "I don't think [the defendant's] going to be out there. I don't know if he is trying to intimidate me but I'm not going to be intimidated." Tr.3/28:211. Counsel objected to this juror continuing to sit on the jury. Tr.3/28:211–212. The judge found the juror to be very earnest in asserting her impartiality. Tr.3/28:212. And he had no qualms about her comments on intimidation, finding them to be laudable. *Id*. He instructed Seat 16 to disregard her impression that the concerning spectators were associated with the defendant and to decide the case based upon the evidence. Tr.3/28:215–217.

B. Standard of review

A reviewing court will not disturb a judge's findings of impartiality, or a judge's finding that a juror is unbiased, absent a clear showing of an abuse of discretion or that the finding was clearly erroneous." *Commonwealth v. Colon*, 482 Mass. 162, 168 (2019) (cleaned up). It is "not an abuse of discretion simply

because a reviewing court would have reached a different result." *L.L.*, 470 Mass. at 185 n. 27. But if "the judge made 'a clear error of judgment in weighing' the factors relevant to the decision" such that the decision is unreasonable it is an abuse of discretion. *Id*., quoting *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 15 (1st Cir.2008). If an actually or implicitly biased juror deliberates on the case, "the error is structural and [the defendant] need not show that the verdicts were thereby affected." *Commonwealth v. Hampton*, 457 Mass. 152, 163 (2010).

C. The trial judge denied Correia a fair trial by allowing Seat 16 to remain on the jury.

Despite the judge's discretion, when a juror discloses fear of the defendant during trial, that juror should be dismissed. *Colon*, 482 Mass. at 169; see also *Commonwealth v. Francis*, 432 Mass. 353, 369 (2000) ("a juror's expression of fear and potential prejudice would have furnished a sufficient basis for excusing her…during trial but prior to deliberations"); *Commonwealth v. Maldonado*, 429 Mass. 502, 506–507 (1999) (trial judge's handling of gang evidence deemed "exemplary" where a juror who became fearful mid-trial was removed); see also *Commonwealth v. Angiulo*, 415 Mass. 502, 538 n.8 (1993) (Nolan, J., dissenting), quoting *United States v. Barnes*, 604 F.2d 121, 140–141 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (fear of harm from a defendant necessarily indicates partiality).

Here, the juror associated intimidating conduct with Correia and placed herself in opposition to Correia by saying that she refused to be intimidated by him. Tr.3/28:211. She also intimated that she felt safe because Correia would not be in the community. *Id*. It was unreasonable to find that this juror was impartial. In particular, by saying that she thought that the defendant would not be in the community, she simultaneously expressed fear of him and the idea that she already made up her mind that he should be found guilty of something such that he would be incarcerated. The fact that she also associated him with intimidation and placed herself in personal opposition to that intimidation, indicated that she was no longer neutral with respect to both parties. She was antagonistic to Correia.

The trial judge's instruction did not mitigate Seat 16's partiality. He should have "particularly … tailored" the instruction to the partialities expressed by Seat 16. *Commonwealth v. Adamides*, 37 Mass. App. Ct. 339, 343 n. 4 (1994). But he failed to address the juror's antagonism toward Correia or her comment that she was not uncomfortable because Correia was not going to "be out there." Thus, there can be no assurance that the juror did not act upon fear of or bias toward Correia in her deliberations.

Seat 16 demonstrated that she was partial and biased based on her reaction to the actions by members of the gallery. She was part of the deliberating jury.

Tr.4/4:282. Correia's conviction must be vacated without inquiry into whether the verdict was affected. *Hampton*, 457 Mass. at 163.

IV. The prosecutor's repeated references to Correia's prearrest silence created a substantial risk of a miscarriage of justice because it allowed the jury to consider Correia's failure to go to the police as an admission of wrongdoing.

Correia's defense was that his killing of Martins was justified. Thus, improper evidence that Correia believed he was guilty of criminal wrongdoing struck at the heart of his defense and prejudiced him.

A. Relevant facts

The prosecutor asked four police officers and Correia if Correia contacted the police after the killing a combined ten times.[14] Tr.3/20:365–366, 393, 407, Tr.3/25:249, Tr.4/3:87–89, 91, 98, 99,104. After the police officers testified that Correia had not contacted them, defense counsel elicited from Correia that he did not contact the police because he was afraid, did not think they would believe him, and did not want to deal with the police. Tr.4/2:281–283. The prosecutor followed up by asking Correia if he contacted the police five times. Tr.4/3:87–89, 91, 98, 99, 104. He provided similar responses. *Id*. In closing, the prosecutor stated that Correia did not want to deal with the police. Tr.4/3:176. She suggested that Correia's reluctance to seek police assistance was consciousness of guilt. *Id*.

[14] She also asked Correia if he called the police when he arrived at the park. Tr.4/3:64.

B. The prosecutor's questions and closing were improper comment on Correia's prearrest silence.

Correia was under no obligation to contact or speak with the police and had no duty to provide incriminating evidence against himself. *Commonwealth v. Nickerson*, 386 Mass. 54, 61 (1982). "To permit the use of [the defendant's] prearrest silence, if only for impeachment purposes, suggests that the defendant had a duty to provide incriminating evidence against himself and burdens his right to testify in his own defense." *Id*., see also *Commonwealth v. Springer*, 49 Mass. App. Ct. 469, 478 (2000). It is also of "minimal probative value." *Commonwealth v. Gardner*, 479 Mass. 764, 773 (2018).[15] Accordingly, admitting a prosecutor's comment on the defendant's prearrest silence by cross examination or in closing argument is error. *Id*., accord *Commonwealth v. Niemic*, 472 Mass. 665, 673 (2015).

The only exception to this rule is where a defendant does not seek out the police for medical assistance when it would be expected. *Commonwealth v.*

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[15] For Correia, an 18-year-old, young, Black man it would be particularly inappropriate to treat prearrest silence as an admission of guilt, because Black boys often grow-up in over-policed neighborhoods where they develop fear of police officers, Kristin Henning, *The Reasonable Black Child: Race, Adolescence and the Fourth Amendment,* 67 Am. U. L. Rev. 1513, 1555–1556 (2018), and experience stereotype threat: concern about being judged and treated unfairly by police because of the stereotype linking Blackness and criminality. Cynthia J. Najdowski, Bette L. Bottoms, Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 J. Law & Human Behavior 463 (2015); accord *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016).

Barnoski, 418 Mass. 523, 536 (1994) ("if the defendant's story were true, he naturally would have contacted the police to get help for his wounded friend, not to tell them his exculpatory story"). But here where Correia acted in self-defense "it would not have been natural for him to seek out police to tell his exculpatory story." *Niemic*, 472 Mass. at 673 (error to impeach defendant with failure to contact police in self-defense stabbing case); accord *Gardner*, 479 Mass. at 772 (same). When Correia left the park, he knew that the police were there and would give aid to the victim if needed. Tr.4/2:275.

C. The prosecutor's comments on Correia's prearrest silence caused a substantial risk of a miscarriage of justice.

Trial counsel objected to only two of the improper questions and did not object to the reference in closing. Tr.3/20:407, Tr.4/3:87. Thus, Correia is entitled to a new trial if there is "a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth v. Millien*, 474 Mass. 417, 432 (2016), quoting *Commonwealth v. Azar*, 435 Mass. 675, 685 (2002).

Defendants are harmed by the admission into evidence of prearrest silence because "[j]urors…may overvalue such evidence and 'construe such silence as an admission and, as a consequence, may draw an unwarranted inference of guilt.'" *Gardner*, 479 Mass. at 769, quoting *Nickerson*, 386 Mass. at 61 n. 6. The prosecution's questions begged the conclusion that Correia's prearrest silence was an admission to some wrongdoing, and the prosecution explicitly asked the jurors

to infer consciousness of guilt from Correia not wanting to deal with the police. Reference in closing enhances prejudice. *Contrast Niemic*, 472 Mass. at 673 (prejudice minimal because not in closing).

Further, the error is more likely to be prejudicial if the defendant's credibility is an important issue in the case, as it was here. *Nickerson*, 386 Mass. at 62–63 (prejudicial error even though the Commonwealth presented a "strong case"). Without Correia's testimony, he could not have raised reasonable doubt regarding self-defense or mitigation. And the jurors found him incredible, at least in part, to convict him of voluntary manslaughter.

The comment on prearrest silence was repeated though five different witnesses and the prosecution used it in closing as evidence of Correia's consciousness of guilt. *Contrast Springer*, 49 Mass. App. Ct. at 478 (not prejudicial because vague, fleeting and made only in closing). There is a serious doubt that the jury's verdict might have been different if Correia's testimony, which was the single most important evidence in the case, had not been undermined by his prearrest silence which erroneously attributed to Correia an admission of wrongdoing. *Nickerson*, 386 Mass. at 62–63.

V. The trial judge erred in giving the model instruction on excessive force in self-defense because it is incorrect and constitutionally infirm.

The 2018 Model Jury Instructions on Homicide define excessive force in self-defense as "more force than was reasonably necessary under all the circumstances." Add.67, 74, 80, 81. The model instruction should be modified to "substantially more force" because it incorporates an error in the development of the common law and because it does not provide an explicit standard for the jury to apply to the definition of excessive force.

A. Standard of review

In cases in which a judge adheres to the model instructions, this Court determines whether the instructions "created a substantial risk of juror confusion regarding the law." *Commonwealth v. Dunphe*, 485 Mass. 871, 884 (2020). Provision of a constitutionally infirm instruction is also error. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Defense counsel requested that the trial judge instruct the jurors that excessive force was "substantially more force than was reasonably necessary under all the circumstances" but only as to the initial charge on self-defense. RA.54. In the excessive force in self-defense section, trial counsel requested the model instruction. RA. 61–62. Thus, any error is reviewed for a substantial likelihood of a

miscarriage of justice because counsel did not fully preserve her objection to the model instruction.

B. The model instruction incorporates a mistake in the jurisprudence that inadvertently confused the definition of excessive force.

The model instruction uses a phrase never scrutinized by this Court that misrepresents the definition of excessive force as developed in the case law. The addition of the word "substantially," to the definition of excessive force in self-defense would correct this error, allay juror confusion, and reflect "what [the] case law declares by [the] model jury instructions to not." *Dunphe*, 485 Mass. at 880.

Manslaughter by excessive force in self-defense was added into the criminal law by *Commonwealth v. Kendrick*, 351 Mass. 203, 211 (1966), which is cited in the model instructions.[16] Add.66, 74, 80. This Court in *Kendrick* held that "the question how far a party may properly go in self-defense…[is] not to be judged of very nicely, but with due regard to the infirmity of human impulses and passions." *Kendrick*, 351 Mass. at 211, quoting *Monize v. Bagaso*, 190 Mass. 87, 89 (1906).

[16] Excessive force in self-defense has not always been a theory of manslaughter under the common law. *Commonwealth v. Webster*, 59 Mass. 295, 304 (1850) (abrogated on other grounds by *Commonwealth v. Russell*, 470 Mass. 464 (2015)). The first mention of the doctrine appears in *Monize*, a tort case concerning behavior that clearly exceeded the bounds of self-defense and appeared to be retaliation. 190 Mass. at 89 (initial attack ended but defendant retaliated by boarded the plaintiff's boat and punching him eight or nine times as hard as he could).

Kendrick further held that a verdict of manslaughter is appropriate where the defendant used "manifestly disproportionate violence[,]" or put another way, "unreasonable and clearly excessive [force] in light of the existing circumstances." *Kendrick*, 351 Mass. at 211. Indeed, a person only goes too far in self-defense if he "continu[es] the assault when it was *evident* that he was no longer required to do so for the purposes of self-defense." *Monize*, 190 Mass. at 89 (emphasis added).

These descriptions of the permitted force preserved the understanding expressed in this Court's earliest discussions of self-defense, which might include striking "wildly" in alarm and hitting "vulnerable part[s]" of an aggressor "without intending to do so." *Commonwealth v. Woodward*, 102 Mass. 155, 163 (1869) (defendant struck deceased with whipstock and should have been able to testify that he feared a shovel blow and intended only to hit the victim's shoulder). They also fit with the fact that "there is an inherent right of self-defense" within the Second Amendment upon which "severe restriction" is not permitted. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628–629 (2008) "The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible." *Id*. at 606, citing St. George Tucker's version of Blackstone's Commentaries.

The SJC in *Kendrick* does not use the phrase found in the model instruction: "more force than was reasonably necessary."[17] "More" means merely "greater in size, amount, extent, or degree." American Heritage Dictionary, 5th Edition (2020). Thus, the model instruction transforms even a minute amount of force above what a jury deems "necessary" into manslaughter. As is evident, the phrase cannot be squared with the language in *Kendrick*, which requires "manifestly disproportionate violence" or "clearly excessive force." *Kendrick*, 351 Mass. at 211. The SJC in *Kendrick* recognized that people should not be judged too harshly when fighting for their lives. *Id*.

The phrase from the model instruction first appears in the context of excessive force in self-defense in *Commonwealth v. Harris*, 376 Mass. 201, 210 (1978). It was part of a jury instruction that this Court analyzed on other grounds. *Id*. at 208. And this Court in *Harris* cited to *Kendrick* and specifically stated that its holdings in *Harris* were in accord with *Kendrick*. *Id*. at 209–210. This Court has never accounted for the difference between "more force than was reasonably necessary" and the holdings of *Kendrick*. *Id*. at 208. Thus, it appears that the

[17] This phrase appears to originate from a line of cases describing the force with which a person could resist unlawful search or arrest. *Commonwealth v. Certain Intoxicating Liquors*, 105 Mass. 178 (1870), citing *Commonwealth v. Crotty*, 92 Mass. 403 (1865) (abrogated by *Commonwealth v. Moreira*, 388 Mass. 596 (1983)). It was also used to describe the amount of force permitted in defense of another. *Commonwealth v. Malone*, 114 Mass. 295 (1873). Both of these situations are different in kind from repelling a deadly attack against one's own person.

language from *Harris* made its way into the common law and the model instructions in error and without scrutiny.[18] Accordingly, the model instruction does not adequately convey the definition of excessive force in self-defense, it merely repeats an oft-quoted mistake.

Requiring the jury to find that the defendant used *substantially* more force than was reasonably necessary will ensure that the jury considers the amount of force used by a defendant "with due regard to the infirmity of human impulses and passions" and also clarifies their task. *Kendrick*, 351 Mass. at 211.[19] It is easier to determine that something is clearly excessive, rather than merely excessive. It also honors the constitutional right to self-defense and ensures that a person facing death or serious injury at the hands of another need not carefully parse out how much force is slightly or marginally more than necessary in an undoubtedly adrenaline-fueled moment.

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[18] There are 31 opinions authored by this Court that use this language with regard to excessive force in self-defense. Without exception, they can be followed back to *Harris*. The most oft cited case for the proposition is *Harrington*, which borrows the phrase from *Harris* without examination and endorses *Kendrick*. *Commonwealth v. Harrington*, 379 Mass. 446, 450 (1980).

[19] *Kendrick* continues to be cited with approval by this Court. See, e.g., *Commonwealth v. Grassie*, 476 Mass. 202 (2017).

C. The definition of excessive force in the model instructions is vague.

The model instruction is constitutionally infirm because it does not sufficiently define the boundary between proper and excessive force.

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to…judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. Rockford, 408 U.S. 104, 108–109 (1972).

"[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Commonwealth v. Repoza*, 400 Mass. 516, 518 (1987), quoting *Sandstrom*, 442 U.S. at 514. The reasonable juror could have interpreted the model instruction to mean that the excessive force element required only a modicum of additional force. This could include things as minimal as an extra non-fatal blow or a slightly harder punch. The reasonable juror might believe that a defendant has to pause between blows to assess whether he had applied just enough force. In short, the instruction asks the jurors to separate conduct along a razor thin margin, which undoubtedly leads to inconsistent and arbitrary application of the standard, and delegates this policy matter to the jurors.

D. The model instruction caused a substantial risk of a miscarriage of justice.

Correia testified that he stabbed Martins because he thought Martins was going to shoot him. Counsel began her closing with: "When a person appears in a full facemask with gloves on and a backpack and you know them to have a weapon and they say that they're going to shoot you, you have a right as they reach for what you believe to be a gun to defend yourself with the use of force." Tr.4/3:132. Neither Correia nor counsel alleged that Correia was incited to violence by sudden combat or reasonable provocation. Correia relied entirely on self-defense.

To rebut this theory, the prosecutor focused on the number of wounds Correia inflicted upon Martins in opening, cross and closing. Tr.3/20:272, 274, 282, 288, Tr.4/3:107,123,165, 169,172,173. In-so-doing the prosecution repeatedly misrepresented the wounds by calling them "twelve stab wounds", four times in opening, twice on cross, and four times in closing. *Id*. The medical examiner's testimony was that Correia stabbed Martins three times and inflicted nine wounds that were classified as sharp wounds or incise wounds. Tr.3/25:200–223. Six of the wounds were reminiscent of paper cuts, no more than a sixteenth of an inch deep. Tr.3/25:215–223.

Considering Correia's defense, the jury likely determined that the Commonwealth proved beyond a reasonable doubt that he used excessive force in self-defense. There is a substantial doubt that if the jurors had to find beyond a

reasonable doubt that Correia used substantially more force than necessary might have influenced their verdict. The difference between what was just enough force to get away from Martins and what was substantially more force than needed to get away from Martins is materially different on its face. And on these facts, there is no way to tell if the jurors believed that Correia used manifestly disproportionate force or if he struck but one additional punch, slice, or blow that was merely more force than necessary to ensure that Martins did not shoot him. *Accord Commonwealth v. Vizcarrondo*, 427 Mass. 392, 397 (1998) (on specific facts of case SMLJ).

Further, where the jurors were surely considering the number of blows, the risk of prejudice was amplified by the prosecutor's misrepresentation of the severity of Martins' wounds and therefore the amount of force that Correia used. Correia's conviction must be vacated and a new trial ordered.

VI. The cumulative prejudice of several errors requires reversal.

In the absence of individual reversible error, the combination of errors one, two, four and five require reversal because they each went to the contested issue of whether Correia used proper or excessive force in self-defense. *Commonwealth v. Yang*, 98 Mass. App. Ct. 446, 454 (2020).

CONCLUSION

Correia's conviction must be vacated and a new trial ordered.

Dated: January 11, 2022

Respectfully Submitted,

Anildo Correia
By his attorney,

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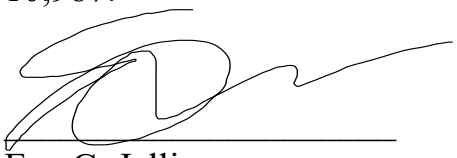
CERTIFICATE OF COMPLIANCE

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The brief was prepared using Microsoft Word and size 14 Times New Roman font. The word count for the relevant sections under Rules 16 and 20 is: 10,987.



Eva G. Jellison

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

PLYMOUTH COUNTY **SJC-13223**

COMMONWEALTH
(Appellee)

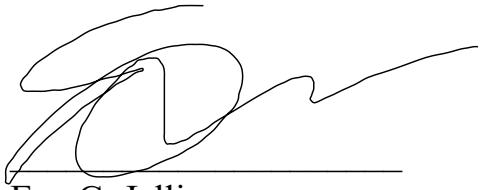
v.

ANILDO CORREIA
(Appellant)

BRIEF OF THE APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2022, I served the defendant/appellant's brief and record appendix by Tyler e-file upon ADA Bridget Middleton.



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ADDENDUM TABLE OF CONTENTS

Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 14

Rule 14. Pretrial Discovery

(a) Procedures for Discovery.

(1) *Automatic Discovery.*

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) *Motions for Discovery.* The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) *Certificate of Compliance.* When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) *Continuing Duty.* If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) *Work Product.* This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) *Protective Orders.* Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) *Amendment of Discovery Orders.* Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) *Notice of Alibi.*

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to

subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) *Mental Health Issues.*

(A) Notice. If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical, psychiatric, and psychological tests as the court- appointed examiner (examiner) deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course

of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

At the time the report of the examiner is disclosed to the parties, the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

If these reports contain both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(C) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B).

(i) If the judge orders the defendant to submit to an examination under Rule 14(b)(2)(B), the defendant shall, within fourteen days of the court's designation of the examiner, make available to the examiner the following:

(a) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession;

(b) All medical records concerning the defendant in defense counsel's possession; and

(c) All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

(ii) The defendant's duty of production set forth in Rule 14(b)(2)(C)(i) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

(iii) In addition to the records provided under Rule 14(b)(2) (C)(i) and (ii), the examiner may request records from any person or entity by filing with the court under seal, in such form as the Court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant.

Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14(b)(2)(C)(iii). Within thirty days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the court, in its discretion, determines that it would be unfairly prejudicial to the defendant to do so.

If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the Court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14(b)(2)(B)(iii). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial.

(iv) Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the Commonwealth's examiner or at the request of the Commonwealth's examiner.

(D) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

(3) *Notice of Other Defenses.* If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(4) *Self Defense and First Aggressor.*

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

(c) Sanctions for Noncompliance.

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) *Exclusion of Evidence.* The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

Credits

Amended March 8, 2004, effective September 7, 2004; April 4, 2005, effective May 1, 2005; December 17, 2008, effective April 1, 2009; June 26, 2012, effective September 17, 2012; November 5, 2015, effective January 1, 2016.

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.[45] The instruction is to be used where the evidence, viewed in the light most favorable to the defendant,[46] raises an issue of deadly force in self-defense.[47] 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.[48] If the Commonwealth is entitled to an instruction on

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[45] 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").

[46] 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]).

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

[48] 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.

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.

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. 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").

A person is not guilty of any crime if he acted in proper self-defense.[49] 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.[50] 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.[51]

The law does not permit retaliation or revenge.[52] The proper exercise of self-defense arises from necessity of the

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[49] 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").

[50] 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'").

[51] See Commonwealth v. Glacken, 451 Mass. at 166-167.

[52] 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").

moment and ends when the necessity ends.[53] An individual may only use sufficient force to prevent occurrence or reoccurrence of the attack.[54] 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.[55]

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:[56]

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.[57] Deadly force is

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[53] 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").

[54] 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.

[55] Commonwealth v. Kendrick, 351 Mass. at 211, quoting Monize v. Begaso, 190 Mass. 87, 89 (1906).

[56] See Commonwealth v. Glacken, 451 Mass. at 167 (enumerating required factors for self-defense).

[57] 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).

force that is intended or likely to cause death or serious bodily harm.[58]

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.[59]

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.[60]

4. The defendant used more force than was reasonably necessary under all the circumstances.[61]

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

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[58] 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).

[59] Commonwealth v. Wallace, 460 Mass. at 124-125; Commonwealth v. Santos, 454 Mass. at 773.

[60] 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").

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

end the confrontation without any use of, or additional use of, force.[62]

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.[63]

The second proposition is that 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

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[62] 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'").

[63] 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.

bodily harm from which he could save himself only by using deadly force.[64]

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.[65,66] Moreover, in determining whether the defendant was reasonably in fear of

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[64] Commonwealth v. Wallace, 460 Mass. at 124-125; Commonwealth v. Santos, 454 Mass. at 773.

[65] 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).

[66] 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").

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;[67]
- evidence of other instances of the deceased's violent conduct, but only if the defendant knew of such conduct;[68] and
- evidence of threats of violence made by the deceased against the defendant, but again, only if the defendant was aware of such threats.[69]

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[67] 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").

[68] 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. Rodriquez, 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").

[69] 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

[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.[70]

[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 defendant's mistaken belief was reasonable based on all of the circumstances presented in the case.[71]

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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.

[70] 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").

[71] Commonwealth v. Pike, 428 Mass. at 396-397 ("If the defendant's apprehension of grievous bodily harm or death,

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.[72] 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.[73]

[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.[74]

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though mistaken, was reasonable, his actions in self-defense may be justifiable").

[72] 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").

[73] 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").

[74] 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

[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.[75]

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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").

[75] 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

The fourth proposition is that the defendant used more force than was reasonably necessary under all the circumstances.[76] 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.[77]

[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

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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).

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

[77] 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").

persons) he provoked his intention to withdraw and end the confrontation without any use of or additional use of force.[78]

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.[79] 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.[80]

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[78] 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'").

[79] 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").

[80] 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

[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 fight, the defendant may claim self-defense where he responded to the escalation with deadly force.[81]]

For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the deceased's [and a third party acting together with the deceased's] past violent conduct, whether or not the defendant knew of it.[82]

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provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire").

[81] 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").

[82] 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").

[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.[83]]

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 harm.[84] 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

[83] Commonwealth v. King, 460 Mass. at 83.
[84] 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).

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.[85]

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.[86] The instruction is to be used where the evidence, viewed in the light most favorable to the

[85] 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.

[86] 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").

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].[173]

[173] 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 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

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.[174]

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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").

[174] Commonwealth v. Kendrick, 351 Mass. at 212.

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 murder but, if the Commonwealth has proved the other required elements, you shall find the defendant guilty of voluntary manslaughter.[175]

A. 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:[176]

1. The defendant intentionally inflicted an injury or injuries on the victim likely to cause death.

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[175] 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'").

[176] See Commonwealth v. Ware, 438 Mass. 1014, 1015 (2003).