



Introduction to Juvenile Specific Jury Instructions

Children are different. Acknowledging the neuroscience that supports this fact, the United States Supreme Court has pronounced that in certain legal applications age and its attendant characteristics must be taken into account. The Massachusetts Supreme Judicial Court has followed suit and has recognized the hallmark differences between children and adults - they lack maturity and a sense of responsibility, they are more susceptible to negative influences and outside pressures, and their character is more transitory. We can see the change in the landscape; juveniles are able to receive a continuance without a finding after a jury trial, the legislature has raised the age of juvenile court jurisdiction, and juveniles may seek dismissal of a case prior to arraignment. We, as juvenile defenders, must push trial courts to apply the law as established by the U.S. Supreme Court and the Supreme Judicial Court. Requesting juvenile specific jury instructions is a natural and necessary next step.

Crafting jury instructions is an important part of trial preparation. Jury instructions inform the jury about the law and juries are presumed to follow and understand these instructions. While the Trial Court has adopted “model” jury instructions to be used in certain cases, we should file our own requests as these “model instructions” often fall short, are wrong, or do not keep up with changes in the law.

We have drafted a select number of juvenile specific jury instructions. Recognizing that courts may be reluctant to depart from the model instructions, we have incorporated the juvenile specific language into those instructions. The added language is in ***bold and italic***. These instructions are a place to begin and they are in a “word document” so you can revise them to address your particular case. An instruction on Reasonable Child is included and, while there is no corresponding model instruction, we suggest that you request this instruction be given wherever the words “reasonable person” appear.

Request for Juvenile Specific Jury Instructions

As part of this packet, we have included a sample Request for Juvenile Specific Jury Instructions. Such a request should accompany the jury instructions that you are asking the judge to give to the jury.

Use of Certain Language in the Juvenile Instructions

In these instructions you will see the following –“defendant/juvenile,” “guilty/not delinquent,” “youth/child.” There are pros and cons to using these terms in a juvenile case. Some jurors might think that juvenile court does not impose serious consequences and using the terms “juvenile” or “not delinquent” in the instructions could foster that opinion. On the other hand, you may have a young looking client and using the word “defendant” might convey how detrimental a conviction can be. You may also want to use your client’s first and last name instead of using the words “defendant” or

“juvenile” as this can humanize your client to the jury. In addition, using the word “youth/child” for an older looking client could have the desired impact that your client is still a kid. Whatever language you chose to use, it is important to think about the facts of your case and your theory of defense.

Requests for Voir Dire

Your decision about what language to use can be clarified by carefully crafted voir dire questions. These may be used to test a potential juror’s attitudes about juvenile defendants. Here are some suggestions for questions to propose in a jury voir dire request:¹

- i. Do you consider the purpose of this proceeding to determine whether a child is accountable their actions?
- ii. Do you consider the purpose of this proceeding to determine whether a child should receive treatment?
- iii. Do you have an opinion about whether juveniles (persons under 18) should be treated differently than adults for the same crimes?
- iv. Do you believe that juveniles who commit violent crimes should be treated the same way as adults who commit such crimes?
- v. Do you believe that there are certain crimes committed by juveniles where the juvenile offender should be treated the same way as an adult who commits that crime?
- vi. Do you believe that people should be treated the same way by the courts for crimes they are charged with committing regardless of their age?
- vii. Do you believe that there are differences between juveniles and adults that should be taken into account when they are charged with committing crimes?
- viii. Do you feel that cases tried in Juvenile Court are less serious than those tried in adult court?
- ix. Do you feel that courts are too lenient on juveniles accused or convicted of crimes?
- x. Do you believe that juveniles tend to act more impulsively and have less self-control than adults?
- xi. Do you believe that juveniles are less able than adults to think through and understand the consequences of their actions?
- xii. Do you believe that juveniles are less able than adults to make mature and responsible decisions?
- xiii. Do you agree with laws that prohibit juveniles from purchasing tobacco and intoxicating beverages, from voting, from sitting on juries and from doing many other things which adults can do?

¹ Thanks to Patricia Garin, Esq. for contributing to these questions.

Attorney Conducted Voir Dire

The legislature recently amended Mass. G.L. c. 234, § 28 (Examination of Jurors) stating that there **shall** be attorney conducted voir dire, when requested, in superior court jury trials. While the amendment does not mention juvenile court jury trials, we believe juvenile defenders should be asking the courts to allow attorney conducted voir dire. Mass. G.L. c. 234, § 28 has never prohibited attorney conducted voir dire. It is always been within the discretion of the judge. In addition, Mass. G. L. c. 119, § 56 (d) and (e) provide that juvenile court judges have the same powers and duties as superior court judges presiding over jury trials and the law applicable to jury trials in superior court shall also apply in juvenile court. When making this second argument, be aware of *Commonwealth v. Russ R.* 433 Mass. 515 (2001) in which the SJC stated that the statute allowing a superior court judge to grant immunity does not allow a juvenile court judge to grant immunity. A further rationale for allowing attorney conducted voir dire in juvenile court is that an adolescent who is charged as a youthful offender and tried with adult co-defendants in superior court is permitted to have attorney conducted voir dire. It does not make sense that another individual charged as a youthful offender but tried in juvenile court would not have attorney conducted voir dire. Both individuals face adult sentences if convicted and are tried before a jury of twelve.

Conclusion

Remember to ask for a jury charge conference on the record before your closing and OBJECT if you do not get the instruction you requested at the charge conference. You must OBJECT again after the jury is instructed.

The instructions that follow are the result of the collaborative work from the authors listed below. This is our first group of instructions. We are working on additional instructions and they will be forwarded to you when complete. It is our hope that you will share with us your experience using juvenile specific instructions (please e-mail Wendy Wolf at wwolf@publiccounsel.net and/or Holly Smith at hsmith@publiccounsel.net).

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Bold italics = juvenile specific additions.

Both “must/may” appear in some of the added language. Counsel should pick the appropriate word for each given circumstance.

AIDING OR ABETTING
(formerly JOINT VENTURE)

The Supreme Judicial Court recommends that judges incorporate instructions regarding aiding and abetting into the elements of the crime. “For instance, in cases charging murder in the first degree where two or more persons may have participated in the killing, the first element, ‘that the defendant/juvenile committed an unlawful killing,’ should be changed to ‘that the defendant/juvenile knowingly participated in the commission of an unlawful killing.’” Commonwealth v. Zanetti, 454 Mass. 449 (2009). The following instruction may be given following the judge’s explanation of the elements of the specific offense.

Where there is evidence that more than one person may have participated in the commission of a crime, the Commonwealth must prove two things beyond a reasonable doubt:

First: that the defendant/**juvenile** knowingly and intentionally participated in some meaningful way in the commission of the alleged offense, alone or with (another) (others), and *Second:* that he (she) did so with the intent required for that offense.

The Commonwealth must prove that the defendant/**juvenile** intentionally participated in the commission of a crime as something he (she) wished to bring about, and sought by his (her) actions to make succeed. Such participation may take the form of

(personally committing the acts that constitute the crime) or

(aiding or assisting another person in those acts) or

(asking or encouraging another person to commit the crime) or

(helping to plan the commission of the crime) or

(agreeing to stand by, or near, the scene of the crime to act as lookout)

or

(agreeing to provide aid or assistance in committing the crime) or

(agreeing to help in escaping if such help becomes necessary).

An agreement to help if needed does not need to be made through a formal or explicit written or oral advance plan or agreement. It is enough to act consciously together before or during the crime with the intent of making the crime succeed. ***You are to recognize that the person charged in this case is a juvenile and therefore acts differently from an adult in respect to whether he makes conscious and deliberate decisions.***¹

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

When deciding the question of the Juvenile's intent, one must/may consider what is expected from an adolescent of similar age and development. Special caution must be taken when determining whether a Juvenile acted with the intent required for this offense. Anybody who is familiar with adolescent behavior knows intuitively that adolescents do not necessarily think or behave like adults.²These behavioral differences are pervasive and scientifically documented. Their judgments, thought patterns and emotions are different from adults'. Moreover, their brains are physiologically underdeveloped in the areas that control impulses, foresee

¹ See Miller v. Alabama, 132 S.Ct. 2455, 2465-66 (2012).

² See, Roper v. Simmons, 543 U.S. 551, 569 (2005).

*consequences, and temper emotions. They handle information processing and the management of emotions differently from adults.*³

When you consider what, if any, reasonable inference to draw from the defendant/juvenile's actions, you may consider that the defendant/juvenile is ___ years old. Juveniles are different from adults in many ways. Two "general" differences are:

- 1) "A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young" and "these qualities often result in impetuous and ill-considered actions and decisions;"⁴" and*
- 2) Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" and "[t]his is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."⁵*

1. Mere presence.

Our law does not allow for guilt by association. Mere presence at the scene of the crime is not enough to find a defendant/**juvenile** guilty/**delinquent**. Presence alone does not establish a defendant/**juvenile's** knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant/**juvenile** guilty/**delinquent**, there must be proof that the defendant/**juvenile** intentionally participated in some fashion in committing that particular crime and had or shared the intent required to commit the crime. It is not enough to show that the defendant/**juvenile** simply was present when the crime was committed or that he (she) knew about it in advance. There must be proof that the defendant/**juvenile** intentionally participated in committing the particular crime, not just that he (she) was there or knew

³ See *Miller v. Alabama*, 132 S.Ct. 2455, 2465-66 (2012).

⁴ *Roper v. Simmons*, 543 Mass. 551 U.S. 551, 569 (2005), quoting *Johnson v. Texas*, 509 U.S. 350, 637 (1993).

⁵ *Id.*, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115(1982)("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage").

about it. ***Adolescents routinely travel in groups with no nefarious intent and this fact should be considered in your deliberations. You may also consider that juveniles have less control, or less experience with control, over their own environment and lack the ability to extricate themselves from certain settings.***⁶

2. Mere knowledge.

Mere knowledge that the crime was to be committed is not sufficient to convict the defendant/***juvenile***. The Commonwealth must prove more than mere association with a perpetrator of the crime, either before or after its commission. (Even evidence that the defendant/***juvenile*** agreed with another person to commit the crime would be insufficient to support a conviction if the defendant/***juvenile*** did nothing more.) The Commonwealth must prove more than a failure to take appropriate steps to prevent the commission of the crime. Some active participation in, or furtherance of, the criminal enterprise is required in order to prove the defendant/***juvenile*** guilty/***delinquent***, ***and the same must be proved beyond a reasonable doubt.***

3. Withdrawal from joint venture.

The defendant/***juvenile*** is not guilty/***not delinquent*** of a crime if he (she) withdrew from or abandoned it in a timely and effective manner. A withdrawal is effective only if it is communicated to the other persons involved, and only if it is communicated to them early enough so that they have a reasonable opportunity to abandon the crime as well. If the withdrawal comes so late that the crime cannot be stopped, it is too late and is ineffective.

If the evidence raises a question whether the defendant/***juvenile*** withdrew from participation, then the Commonwealth has the burden of proving to you beyond a reasonable

⁶ Miller v. Alabama, 132 Mass. 2455, 2464 (2012), citing *Roper* at 570.

doubt that the defendant/**juvenile** did not withdraw it. If the Commonwealth does not do so, then you must find the defendant/**juvenile** not guilty/**not delinquent**.

Commonwealth v. Hogan, 426 Mass. 424, 434 n.12, 688 N.E.2d 977, 984 n.12 (1998); *Commonwealth v. Cook*, 419 Mass. 192, 201-202, 644 N.E.2d 203, 209-210 (1994) (instruction required only where supported by evidence, viewed in light most favorable to defendant/juvenile); *Commonwealth v. Galford*, 413 Mass. 364, 372, 597 N.E.2d 410, 415 (1992) (where raised by evidence, Commonwealth must prove beyond a reasonable doubt the absence of abandonment); *Commonwealth v. Fickett*, 403 Mass. 194, 201 n.7, 526 N.E.2d 1064, 1069 n.7 (1988) (same); *Commonwealth v. Graves*, 363 Mass. 863, 866-868, 299 N.E.2d 711, 713-714 (1973); *Commonwealth v. Green*, 302 Mass. 547, 555, 20 N.E.2d 417, 421-422 (1939); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 428, 467 N.E.2d 214, 221 (1984); *Commonwealth v. Farnkoff*, 16 Mass. App. Ct. 433, 447, 452 N.E.2d 249, 258 (1983); *Commonwealth v. Mangula*, 2 Mass. App. Ct. 785, 792 n.6, 322 N.E.2d 177, 182 n.6 (1975). See *Hogan*, 426 Mass. at 434, 688 N.E.2d at 984 (“In the case of multiple crimes committed by joint venturers and the issue of withdrawal, an instruction about withdrawal should point out, when the evidence warrants, that a defendant/juvenile can be found guilty/not delinquent as a joint venturer of an initial crime but then can effectively withdraw so as to avoid culpability for a subsequent crime.”); *Commonwealth v. Fickett*, 403 Mass. 194, 201, 526 N.E.2d 1064, 1069 (1988) (defendant/juvenile may argue to jury, alternately, that he never entered a joint venture and that if he did he also timely withdrew)

Bold italics= juvenile specific additions.

Stricken language should not be read in cases involving a juvenile defendant

Both must/may appear in some of the added language. Counsel should pick the appropriate word for each given circumstance.

***if the language “at the time of the offense” conflicts with your defense, for example if your defense is alibi, then you may wish to ask the judge to strike this language.

INTENT

I. SPECIFIC INTENT

I have already instructed you that one of the things that the Commonwealth must prove beyond a reasonable doubt is that at the time of the offense the defendant/***juvenile*** intended to _____. A person’s intent is his or her purpose or objective.

This requires you to make a decision about the defendant/***juvenile’s*** state of mind at that time. It is obviously impossible to look directly into a person’s mind. But in our everyday affairs, we often must decide from the actions of others what their state of mind is. In this case, you may examine the defendant/***juvenile’s*** actions and words, and all of the surrounding circumstances, to help you determine what the defendant/***juvenile’s*** intent was at that time.

As a general rule, it is reasonable to infer that a person, ***due to his age and experience***, ordinarily intends the natural and probable consequences of any acts that he does intentionally. ~~You may draw such an inference, unless there is evidence that convinces you otherwise.~~ ***However, the law recognizes the reality that juveniles are not adults and a juvenile cannot be compared to an adult in this regard.¹ An adult is presumed to be in full possession of his senses and knowledgeable of the consequences of his actions.***

¹ J.D.B. v. North Carolina, 131 S.Ct. 2394, 2403 (2010).

Juveniles are not.² Anybody who is familiar with adolescent behavior knows intuitively that adolescents do not necessarily think or behave like adults.³ Their brains are not fully developed in the areas that control impulses, foresee consequences, and temper emotions. The juvenile brain processes information and manages emotion differently than the adult brain.⁴

You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant/**juvenile** acted with the intent to_____.

Specific intent is “a conscious act with the determination of the mind to do an act. It is contemplation rather than reflection and it must precede the act.” *Commonwealth v. Nickerson*, 388 Mass. 246, 253-254, 446 N.E.2d 68, 73 (1983). It is a person’s purpose or objective, *Commonwealth v. Blow*, 370 Mass. 401, 407, 348 N.E.2d 794, 798 (1976), and corresponds loosely with the Model Penal Code term “purpose,” *United States v. Bailey*, 444 U.S. 394, 405, 100 S.Ct. 624, 632 (1980). Specific intent means that “a defendant must not only have consciously intended to take certain actions, but that he also consciously intended certain consequences.” *Commonwealth v. Gunter*, 427 Mass. 259, 269, 692 N.E.2d 515, 523 (1998). It is usually proved by circumstantial evidence, since there is no way to look directly into a person’s mind. *Commonwealth v. Blake*, 409 Mass. 146, 150, 564 N.E.2d 1006, 1010 (1991); *Commonwealth v. Niziolek*, 380 Mass. 513, 528, 404 N.E.2d 643, 651 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982); *Commonwealth v. Scanlon*, 373 Mass. 11, 17-19, 364 N.E.2d 1196, 1199-1200 (1977); *Commonwealth v. Sandler*, 368 Mass. 729, 741, 335 N.E.2d 903, 911 (1975); *Commonwealth v. Eppich*, 342 Mass. 487, 493, 174 N.E.2d 31, 34 (1961); *Commonwealth v. Ronchetti*, 333 Mass. 78, 81, 128 N.E.2d 334, 336 (1955); *Commonwealth v. Kelly*, 1 Mass. App. Ct. 441, 448-449, 300 N.E.2d 443, 448 (1973).

In defining specific intent, “[w]e see no need for a judge to refer to the defendant’s *specific* intent to do something as an element of a crime. A reference to intent is sufficient.” *Commonwealth v. Sires*, 413 Mass. 292, 301 n.8, 596 N.E.2d 1018, 1024 n.8 (1992). Nor should a judge define specific intent by contrasting it with “general intent,” in the sense of unconscious or reflex actions. Such *noncriminal* “general intent” (which differs from *criminal* general intent, or “scienter”) does not refer to any mental state which is required for the conviction of a crime, and its use in a specific intent definition is “unnecessary and confusing.” *Commonwealth v. Sibinich*, 33 Mass. App. Ct. 246, 249 nn.1&2, 598 N.E.2d 673, 675 nn.1&2 (1992).

The judge may properly charge that the jury may draw a permissive inference that a person intends the natural and probable consequences of acts knowingly done. *Commonwealth v. Doucette*, 391 Mass. 443, 450-452, 462 N.E.2d 1084, 1093 (1984); *Commonwealth v. Ely*, 388 Mass. 69, 75-76, 444 N.E.2d 1276, 1280-1281 (1983); *Lannon v. Commonwealth*, 379 Mass. 786, 793, 400 N.E.2d 862, 866-867 (1980). But it is error to charge that a person is “presumed” to intend the natural and probable consequences of his or her acts, since this unconstitutionally shifts the burden of proof to the defendant, *Sandstrom v. Montana*, 442 U.S.

² *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

³ See, *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

⁴ See *Miller v. Alabama*, 132 S.Ct. 2455, 2465-66 (2012).

510, 524, 99 S.Ct. 2450, 2459 (1979); *DeJoinville v. Commonwealth*, 381 Mass. 246, 408 N.E.2d 1353 (1980), even if the judge indicates that the “presumption” is rebuttable, *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985), and such a charge is harmless error only if intent is not a live issue, *Connecticut v. Johnson*, 460 U.S. 73, 87-88, 103 S.Ct. 969, 978 (1983).

For two excellent discussions of intent, see R. Bishop, *Prima Facie Case, Proof and Defense* § 1362 (1970), and G. Mottla, *Proof of Cases in Massachusetts* § 1201 (2d ed. 1966).

II. GENERAL INTENT

In determining whether the defendant/*juvenile* acted “intentionally,” you should give the word its ordinary meaning of acting voluntarily and deliberately, and not because of accident or negligence. ***A deliberate act is one “characterized by or resulting from careful and thorough consideration” or one “characterized by awareness of the consequences.”⁵ The defendant here is an adolescent and one of the differences between adults and adolescents is that adolescents’ brains are not fully developed in the areas that control impulses, foresee consequences, and temper emotions.⁶ Adolescents are susceptible to acting impetuously with little thought or consideration of consequences, a fact shown by brain development research as well as common sense.⁷ You must/may consider these attributes of adolescence when determining whether the defendant acted intentionally.***

It is not necessary that the defendant/*juvenile* knew that he (she) was breaking the law, but it is necessary that he (she) intended the act to occur which constitutes the offense.

This instruction is recommended for use only in response to a jury question, since in instructing on a general intent crime, the judge is not required to charge on the defendant’s intent as if it were a separate element of the crime. *Commonwealth v. Lefkowitz*, 20 Mass. App. Ct. 513, 519 & n.12, 481 N.E.2d 227, 231 & n.12 (1985). One way to describe general intent is whether

⁵ Miriam-Webster Dictionary (2014 edition).

⁶ See *Miller v. Alabama*, 132 S.Ct. 2455, 2465-66 (2012).

⁷“Our decisions rested not only on common sense – on what ‘any parent knows’ – but on science and social science as well.” *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012), quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005); see also *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 669 n.14 (2013).

the defendant “intended the act to occur,” as contrasted with an accident. See *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117, 122, 535 N.E.2d 607, 610 (1989); *Commonwealth v. Fuller*, 22 Mass. App. Ct. 152, 159, 491 N.E.2d 1083, 1087 (1986). General intent corresponds loosely with the Model Penal Code term “knowingly.” *Bailey, supra*. Criminal mens rea is normally required for all criminal offenses, except for minor, strict-liability “public order” offenses clearly so designated by statute. *Commonwealth v. Buckley*, 354 Mass. 508, 510-511, 238 N.E.2d 335, 337 (1968); *Commonwealth v. Murphy*, 342 Mass. 393, 397, 173 N.E.2d 630, 632 (1961); *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 363-364, 439 N.E.2d 848, 852 (1982).

NOTES:

1. **Intoxication or mental disease as negating intent.** Where supported by the evidence, the defendant is entitled to an instruction that alcohol or drug intoxication, or mental condition, may negate specific intent. See Instructions 9.180 (Intoxication with Alcohol or Drugs) and 9.220 (Mental Impairment Short of Insanity).
2. **Wanton or reckless conduct. Wanton or reckless conduct is often equivalent to intentional conduct.** See Instructions 6.140 (Assault and Battery) and 5.140 and 5.160 (Homicide by a Motor Vehicle).
3. **Wilful conduct.** While the term “wilful” was traditionally defined as knowledge with an evil intent or “bad purpose,” in modern times it is appropriate to charge a jury that “wilful means intentional” (as opposed to accidental) without making reference to any ill will or malevolence. *Commonwealth v. Luna*, 418 Mass. 749, 753, 641 N.E.2d 1050, 1053 (1994). For the definition of “wilful and malicious” with respect to property destruction, see Instruction 8.280 (Wilful and Malicious Destruction of Property).

COMMONWEALTH OF MASSACHUSETTS

COUNTY, ss

JUVENILE COURT
Docket No.

Commonwealth

v.

Juvenile

Juvenile's Request for Jury Instructions

Now comes XXX, the juvenile in the above captioned matter, and hereby submits his request for the following juvenile-specific jury instructions:

- 1) Preliminary Jury Instructions.
- 2)
- 3)
- 4)

The requested juvenile specific language is incorporated into each Model Jury Instruction and appears in ***bold italics***. The requested instructions are attached hereto.

As reasons therefore, the defendant in this matter is a ____ year old juvenile. The Supreme Court, in a string of cases decided over the last decade, has opined that juveniles are different than adults and any application of the law to them must take their age and attendant characteristics into account. Accordingly, the model jury instructions that were drafted to be used in adult cases are not sufficient for use in juvenile cases.

These Supreme Court cases, followed by cases from our own jurisdiction, fold into jurisprudence something that has been evident for decades: Juveniles are different than adults and a child's age is far

“more than a chronological fact.” JDB v. North Carolina, 131 S.Ct 2394, 2403 (2011)(citations omitted). “It is a fact that “generates commonsense conclusions about behavior and perception.” Id. Such conclusions apply broadly to children as a class. Id. Children “generally are less mature and responsible than adults,” they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and they “are more vulnerable or susceptible to . . . outside pressures” than adults. Id.

These cases have identified three crucial differences between juveniles and adults: 1) juveniles lack maturity and a sense of responsibility; 2) juveniles are more susceptible to negative influences and outside pressures; and 3) the character of a juvenile is more transitory than that of an adult. Commonwealth v. Walczak, 463 Mass. 808, 831 n. 26 (2012)(Lenk, J., concurring), citing Roper v. Simmons, 125 S. Ct. 1183 (2005). The law has historically reflected that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. JDB, supra at 2404.

Accordingly, the Model Jury Instructions drafted with adult defendants in mind are not legally sufficient for use in cases involving juveniles. The purpose of jury instructions is to instruct the jury as to the law pertinent to the issues in the case. Mass. R. Crim. P. 24. A child’s age and attendant circumstances must be taken into account and the attached requested jury instruction(s) are necessary to ensure that the jury does so.

Respectfully submitted,

The Juvenile,
By his Attorney,

Bold italics= juvenile specific additions

Both “must/may” appear in some of the added language. Counsel should pick the appropriate word for each given circumstance.

Stricken language should not be read in cases involving a juvenile defendant

MENTAL IMPAIRMENT SHORT OF INSANITY

(for specific intent crimes only)

You have heard evidence about the defendant/***juvenile’s*** mental condition ***[replace with actual condition]*** at the time of the alleged offense. ***You may consider the defendant/juvenile’s [condition] in deciding whether he/she formed the requisite intent required for _____.***

Where the jury was also instructed on lack of criminal responsibility.

If you find that the Commonwealth has proved beyond a reasonable doubt that the defendant was sane at the time of the offense, such evidence may still be relevant to your deliberations on another issue.

A mental impairment that does not rise to the level of lack of criminal responsibility (~~what is sometimes referred to as insanity~~) is not an excuse or justification for a criminal act. However, the defendant/***juvenile’s*** ~~mental condition~~ ***[insert condition]*** may be relevant to your deliberations on the issue of whether the defendant/***juvenile*** had the criminal intent that is required for conviction of this offense.

I have told you that one of the elements of [offense charged] which the Commonwealth must prove beyond a reasonable doubt is that the defendant/***juvenile*** specifically intended to [describe required specific intent]. The defendant/***juvenile*** cannot be guilty of this offense without that intent. When you consider whether or not the Commonwealth has

proved that the defendant/**juvenile** had the necessary intent, you may take into account any evidence about the defendant/**juvenile's** mental condition **[insert condition]**.

Sometimes a person's mental condition **[insert condition]** may be such that he or she is not capable of having the necessary intent to commit the crime. Such a defendant/**juvenile** must be acquitted/**found not delinquent**. In other cases, a person may have some mental impairment, but may still be able to form the necessary intent. Such a defendant/**juvenile** may be convicted/**found delinquent**, since mental impairment short of insanity is not an excuse for a crime if the defendant was able to, and did, form the required intent., **only if the Commonwealth proves beyond a reasonable doubt that the juvenile was able to, and did, form the requisite intent.**

I have told you that one of the elements of () which the Commonwealth must prove beyond a reasonable doubt is that the defendant/juvenile specifically intended to (). The defendant/juvenile cannot be found guilty/delinquent of () without that specific intent.

I have already instructed you on the definition of specific intent. The questions of the defendant's/juvenile's intent, as opposed to an adult, however, must be decided with consideration of what we know about adolescents of similar age and development. Special caution must be taken when determining whether the juvenile acted with the intent required for this offense. Adolescents are susceptible of acting impetuously with little thought or consideration of consequences, a fact shown by brain development research as well as common sense.¹ Adolescents' decisions often reflect an inability to

¹“Our decisions rested not only on common sense – on what ‘any parent knows’ – but on science and social science as well.” Miller v. Alabama, 132 S.Ct. 2455, 2464 (2012), quoting Roper v. Simmons, 543 U.S. 551, 569 (2005); see also Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655, 669 n.14 (2013).

adequately consider their options and appreciate consequences.² They often fail to appreciate the risks associated with their actions and have unreasonable belief that their actions are unlikely to cause harm.³

When you consider whether or not the Commonwealth has proved that the juvenile had the necessary intent, you may take into account any evidence about the juvenile’s mental condition. Special consideration must be taken, however, when considering whether a juvenile with a mental impairment, as opposed to an adult with the same impairment, is able to form the specific intent required for a finding of delinquency. Studies of adolescents lead to the conclusion that they cannot be expected to operate with the level of maturity, judgment, risk aversion, or impulse control of an adult.⁴ Adolescents cannot be expected to transcend their own psychological or biological capacities. An adolescent who suffers from a mental impairment cannot be presumed to operate even at standard levels for adolescents.

You may therefore consider any evidence of the juvenile’s mental condition, along with all the other evidence in the case, in deciding whether the Commonwealth has proved beyond a reasonable doubt that the juvenile acted with the intent to (). If you have a reasonable doubt that juvenile’s mental condition or impairment rendered her or him unable to form the intent to commit () then you must find him or her not delinquent.

² “[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller, at 2468.

³ “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” Diatchenko, at 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

⁴ See Miller v. Alabama, 132 S.Ct. 2455, 2465-66 (2012).

The jury should be permitted to consider any evidence of the defendant's mental impairment at the time of the crime, but which does not rise to the level of an insanity defense, in determining whether the Commonwealth has proved a specific intent that is required for the crime. If there is such evidence, failure to give such a charge on request is reversible error. *Commonwealth v. Grey*, 399 Mass. 469, 470-472, 505 N.E.2d 171, 173-174 (1987); *Commonwealth v. Gasset*, 30 Mass. App. Ct. 57, 565 N.E.2d 1226 (1991). See McMahon, "Recognizing Diminished Capacity," 78 Mass. L. Rev. 41 (1993).

NOTE:

Individual voir dire of prospective jurors not required. Individual voir dire of prospective jurors is in the judge's discretion, and not automatically required, when there will be evidence of mental illness or impairment but no claim of lack of criminal responsibility. In such a case, a judge appropriately indicated to the entire venire that evidence might be introduced about the defendant's mental condition and its impact on his ability to commit the crime, and asked if any prospective juror had "any opinions about mental illness or about evidence concerning mental illness on the part of a defendant that you think might interfere with your ability to listen to the evidence and to be a fair and an impartial juror, deciding the case based only on the evidence and the instructions of law that I will give to you." Jurors who responded affirmatively were then questioned individually as to whether they could listen to the evidence with an open mind and consider fairly whether the defendant did or did not have the capacity to form the necessary specific intent to commit the crime. If any prospective juror had difficulty understanding the question or hesitated in answering, the judge inquired further. *Commonwealth v. Ashman*, 430 Mass. 736, 738-740, 723 N.E.2d 510, 513-514 (2000).

Bold italics = juvenile specific additions.

Both “must/may” appear in some of the added language. Counsel should pick the appropriate word for each given circumstance.

Counsel should request that the judge include the following section in cases involving children and adolescents when giving his preliminary jury instructions and read the amended Jury’s function section charge set forth below

PRELIMINARY INSTRUCTION TO JURY BEFORE TRIAL

Cases Involving Children and Teens

This is a case where the accused is a child. The United States Supreme Court has determined, based on science and common sense, that children are different than adults in three significant ways: first, children lack maturity and a sense of responsibility; second, children are more susceptible to negative influences and outside pressures; and third, a child’s character is not as full-formed as an adult.

Anyone who remembers being a teenager, who has been the parent or caretaker of a teenager, or who has observed adolescent behavior, knows intuitively what scientific research shows - that adolescents do not think or behave like adults; their brains are not yet fully developed in the areas that control impulses, ability to foresee the consequences of their actions, and to temper their emotions. These differences are characteristics that you may consider as you listen to the evidence in this case.¹

¹ Miller v. Alabama, 132 S.Ct. 2455, 2464 - 2466 (2012), J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403-2405 (2011), Graham v. Florida, 560 U.S. 48, 68 – 69 (2010), Roper at 569 – 570.

Jury's function.

Your function as the jury is to determine the facts. You are the sole and exclusive judges of the facts. You alone determine what evidence to believe, how important any evidence is that you *do* believe, and what conclusions all the believable evidence leads you to. You will have to consider and weigh the testimony of all the witnesses who will appear before you, and you alone will determine whether to believe any witness and the extent to which you believe any witness. ***In your considerations you must/may take into account the defendant/juvenile's age and its attendant characteristics as I outlined to you earlier.***² It is ***also*** part of your responsibility to resolve any conflicts in testimony that may arise during the course of the trial and to determine where the truth lies. Ultimately, you must determine whether or not the Commonwealth has proved the charge(s) beyond a reasonable doubt.

² J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

[Reasonable Child – this instruction should be read when the words “reasonable person” appear in an instruction]

REASONABLE CHILD

In determining whether a child/adolescent has acted reasonably you must/may consider that a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. These attributes/qualities of youth often result in impetuous and ill-considered actions and decisions.¹ [Depending on your case you may or may not wish to add the following sentence]. Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.²

¹ Roper v. Simmons, 543 U.S. 551, 569 (2005).

² Id.

Bold Italics = juvenile specific additions.

Both “must/may” appear in some of the added language. Counsel should pick the appropriate word for each given circumstance.

You should consider using the reasonable juvenile standard instruction along with self-defense.

SELF-DEFENSE; DEFENSE OF ANOTHER;
DEFENSE OF PROPERTY

I. SELF-DEFENSE

INTRODUCTION

A person is allowed to act in self-defense. If evidence of self-defense is present, the Commonwealth must prove beyond a reasonable doubt that the defendant/**juvenile** did *not* act in self-defense. In other words, if you have a reasonable doubt whether or not the defendant/**juvenile** acted in self-defense, your verdict must be not guilty/**delinquent**.

Here instruct either on “A. Use of Non-Deadly Force” or “B. Use of Deadly Force.” In the occasional situation in which the level of force cannot be determined as a matter of law, the jury must be instructed on both. See note 4, infra.

A. USE OF NON-DEADLY FORCE

To prove that the defendant/**juvenile** did not act in self-defense, the Commonwealth must prove one of the following things beyond a reasonable doubt:

First, that the defendant/**juvenile** did not reasonably believe he (she) was being attacked or immediately about to be attacked, and that his (her) safety was in immediate danger; *or*

Second, that the defendant/**juvenile** did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; *or*

Third, that the defendant/**juvenile** used more force to defend himself (herself) than was reasonably necessary in the circumstances.

When evaluating what was reasonable in any of these three things you should consider what was reasonable from the perspective a juvenile. When evaluating what was reasonable, you must/may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate risks and consequences.¹

B. USE OF DEADLY FORCE

If the defendant/**juvenile** (used deadly force, which is force intended or likely to cause death or great bodily harm) (or) (used a dangerous weapon in a manner intended or likely to cause death or great bodily harm), the Commonwealth must prove one of the following three things beyond a reasonable doubt:

First, that the defendant/**juvenile** did not reasonably and actually believe that he (she) was in immediate danger of great bodily harm or death; *or*

Second, that the defendant/**juvenile** did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; *or*

¹“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

Third, that the defendant/**juvenile** used more force to defend himself (herself) than was reasonably necessary in the circumstances.

When evaluating what was reasonable in any of these three things you should consider what was reasonable from the perspective a juvenile. When evaluating what was reasonable, you must/may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate risks and consequences.²

In conclusion, to obtain a conviction for the offense(s) of _____, the Commonwealth must prove each element of the offense beyond a reasonable doubt. If there is evidence of self-defense, the Commonwealth also has the burden to prove beyond a reasonable doubt that the defendant/**juvenile** did not act in self-defense.

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

²“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

SUPPLEMENTAL INSTRUCTIONS

1. Reasonable apprehension.

A person cannot lawfully act in self-defense unless he (she) is attacked or is immediately about to be attacked. The Commonwealth may prove that the defendant/*juvenile* did not act in self-defense by proving beyond a reasonable doubt that there was no overt act — either words, a gesture, or some other action — that gave rise to a reasonable belief of attack or immediate danger. ***When evaluating whether the juvenile’s belief of attack or immediate danger was reasonable, you must/may consider what was reasonable from the perspective of a juvenile. You must/may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate risks and consequences.***³

Where use of deadly force is at issue add: of great bodily harm or death.

2. Duty to retreat.

A person cannot lawfully act in self-defense unless he or she has exhausted all other reasonable alternatives before resorting to force. A person may use physical force in self-defense only if he (she) could not get out of the situation in some other way that was available

³“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

and reasonable at the time. The Commonwealth may prove the defendant/**juvenile** did not act in self-defense by proving beyond a reasonable doubt that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger. ***In evaluating reasonable alternatives or whether avenues of escape were reasonably available, you must/may consider what was reasonable from the perspective of a juvenile. You must/may consider the juvenile's age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents' decisions often reflect an inability to adequately consider their options and appreciate risks and consequences.***⁴

You may consider any evidence about where the incident took place, whether or not the defendant/**juvenile** might have been able to escape by walking away or otherwise getting to safety or by summoning help if that could be done in time, or by holding the attacker at bay if the means were available, or by some other method. You may consider whether the use of force reasonably seemed to be the only means of protection in the circumstances. You may take into account that a person who is attacked may have to decide what to do quickly and while under emotional strain.

In considering these factors, you must/may consider the juvenile's age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. You

⁴“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

should keep in mind that as a group, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. As compared to adults, adolescents are not as well equipped to make judgments in emotional and stressful situations.⁵

3. Excessive force.

A person cannot lawfully act in self-defense if one uses more force than necessary in the circumstances to defend oneself. How much force is necessary may vary with the situation. Exactness is not always possible. You may consider whether the defendant/***juvenile*** had to decide how to respond quickly under pressure. The Commonwealth may prove the defendant/***juvenile*** did not act in self-defense by proving beyond a reasonable doubt that the defendant/***juvenile*** used clearly excessive and unreasonable force. You may also consider any evidence about the relative size or strength of the persons involved, where the incident took place, (and what kind of weapons, if any, were used), among other things.

In evaluating how much force was necessary, you must/may consider what was reasonable from the perspective of a juvenile. You must/may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate consequences. They often fail to appreciate the risks

⁵“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

associated with their actions and have unreasonable beliefs that their actions are unlikely to cause harm.⁶

4. Retaliation.

A person cannot lawfully act in self-defense when one uses force in retaliation. The right to self-defense arises from necessity and ends when the necessity ends. The Commonwealth may prove the defendant/**juvenile** did not act in self-defense by proving beyond a reasonable doubt that the defendant/**juvenile** was no longer in any immediate danger and was just pursuing his (her) attacker for revenge or to ward off any possibility of attack in the indefinite future.

5. The “Castle Rule” retreat not required in a dwelling.

A person lawfully occupying a house, apartment or other dwelling is not required to retreat from or use other means to avoid combat with an unlawful intruder, if two circumstances exist:

First, the occupant reasonably believes that the intruder is about to inflict great bodily injury or death on him (her) or on another person lawfully in the dwelling; *and*

Second, the occupant uses only reasonable means to defend himself (herself) or the other person lawfully in the dwelling. ***In evaluating what is reasonable, you must/may consider what was reasonable from the perspective of a juvenile. You must/may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and***

⁶“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents' decisions often reflect an inability to adequately consider their options and appreciate risks and consequences.⁷

A “dwelling” is a place where a person lives; a place where one is “temporarily or permanently residing and which is in [one’s] exclusive possession.” The term includes all buildings or parts of buildings used as dwellings, including (apartment houses) (tenement houses) (hotels) (boarding houses) (dormitories) (hospitals) (institutions) (sanitoriums) (or) (other buildings where people reside).

The term “dwelling” does not extend to common areas such as common hallways in an apartment building. In multi- unit housing, the “dwelling” only extends to areas over which the person has a right of exclusive control.

The Commonwealth may prove that the defendant/***juvenile*** did not act in self-defense in a dwelling by proving beyond a reasonable doubt:

First, that (the premises were not a dwelling) (or) (the defendant/***juvenile*** was not a lawful occupant of the premises) (or) (the alleged victim was not an unlawful intruder) (or) (the defendant/***juvenile*** did not reasonably believe that the alleged victim was about to inflict great bodily injury or death on him (her) or on another person lawfully in the dwelling) (or) (the defendant/***juvenile*** used clearly excessive force to defend himself (herself) or the other person lawfully in the dwelling); and

⁷“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

Second, that the defendant/juvenile resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant/juvenile to further danger. In evaluating whether the juvenile reasonably believed that the alleged victim [or use name of CW] was about to inflict great bodily injury or death, you may consider what was reasonable from the perspective of a juvenile. You may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate risks and consequences. ⁸

If there is an issue as to whether the alleged victim was an unlawful intruder, the jury must be instructed on trespass (Instruction 8.220) or given other appropriate instructions.

6. Defendant as original aggressor.

Generally, the original aggressor has no right of self-defense unless he (she) withdraws from the conflict in good faith and announces his (her) intention of abandoning the fight.

Commonwealth v. Naylor, 407 Mass. 333, 553 N.E.2d 542 (1990);
Commonwealth v. Evans, 390 Mass. 144, 152-154, 454 N.E.2d 458 (1983);
Commonwealth v. Walden, 380 Mass. 724, 405 N.E.2d 939 (1980);
Commonwealth v. Johnson, 379 Mass. 177, 396 N.E.2d 974 (1979);
Commonwealth v. Maguire, 375 Mass. 768, 772, 378 N.E.2d 445 (1978). See
Commonwealth v. Harrington, 379 Mass. 446, 454, 399 N.E.2d 475 (1980)

⁸“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller v. Alabama*, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *D.A. v. Diatchenko*, 466 Mass. 655, 660 (2013), quoting *Miller*, at 2464; see also *Commonwealth v. Walczak*, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

(defendant not required to prove that he was not the aggressor as prerequisite to self-defense claim).

7. Victim's prior threats and violence against defendant.

In considering who was being attacked by whom, you may take into account any prior threats of violence made by [the alleged victim] against the defendant/**juvenile** and whether, as the defendant/**juvenile** contends, [the alleged victim] was trying to carry out such threats during this incident. If the defendant/**juvenile** was aware, at the time of the incident, that such threats had been made, you may also consider them in determining whether the defendant/**juvenile** was reasonably afraid for his (her) own safety. ***In evaluating whether the defendant/juvenile was reasonably afraid for his own safety, you may consider what was reasonable from the perspective of a juvenile.***

Commonwealth v. Edmonds, 365 Mass. 496, 499-501, 313 N.E.2d 429 (1974); *Commonwealth v. Rubin*, 318 Mass. 587, 63 N.E.2d 344 (1945). See also G.L. c.233, § 23F as to the use of evidence of past or present physical, sexual or psychological harm or abuse of the defendant.

You may also consider any specific, recent acts of violence that were committed by [the alleged victim] against the defendant/**juvenile** and that were known to the defendant/**juvenile**, on the issue of whether the defendant/**juvenile** was reasonably afraid for his (her) own safety.

Commonwealth v. Rodriguez, 418 Mass. 1, 633 N.E.2d 1039 (1994); *Commonwealth v. Pidge*, 400 Mass. 350, 509 N.E.2d 281 (1987); *Fontes*, 396 Mass. at 735-736, 488 N.E.2d 760. These three were all homicide cases, but it is likely that the rule is applicable to all self-defense claims.

8. Victim's prior acts of violence unknown to defendant.

In considering who was being attacked by whom, you may take into account any act (acts) of violence that may have been initiated by [the alleged victim] on (a prior occasion) (prior occasions), even if the defendant/**juvenile** did not know of (that act) (those acts) of violence at the time of this incident. You may consider that evidence on the issue of whether _____ [the alleged victim] initiated this incident.

"Where the identity of the first aggressor is in dispute, the accused may offer evidence of specific incidents of violence allegedly initiated by the victim, or a third party acting in concert with or to assist the victim, whether known or unknown to the accused, and the prosecution may rebut the same in reputation form only." Mass. G. Evid. § 404(a)(2)(B) (2008-2009). Accord, *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 863 N.E.2d 936 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim's reputation for violence. *Adjutant, supra*. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18, 893 N.E.2d 19, 32 & n.8 (2008).

9. Victim's prior acts of violence known to defendant.

You may consider whether _____ [the alleged victim] had a reputation for violence or quarreling that was known to the defendant on the issue of whether the defendant/**juvenile** was reasonably (and actually) afraid for his (her) own safety.

With respect to a claim of self-defense, the jury may consider whether the victim had a reputation for violence or being quarrelsome that was known to the defendant prior to the alleged incident. *Commonwealth v. Clemente*, 452 Mass. 295, 308, 893N.E.2d 19, 33 (2008). *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005), did not alter the rule that (unlike specific acts of violence) such reputation evidence is admissible only if known to the defendant. *Id.*

"In a criminal proceeding, in support of a claim of self-defense, the accused may offer evidence known to the accused prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made to the victim that caused reasonable apprehension of violence on the part of the accused." Mass. G. Evid. § 404(a)(2)(A) (2008-2009). *Commonwealth v. Dilone*, 385 Mass. 281, 431 N.E.2d 576 (1982); *Commonwealth v. Simmons*, 383 Mass 40, 43, 417 N.E.2d 430 (1981); *Commonwealth v. Edmonds*, 365 Mass. 496, 313 N.E.2d 429 (1974); *Commonwealth v. Rubin*, 318 Mass. 587, 63 N.E.2d 344 (1945);

Commonwealth v. Kamishlian, 21 Mass. App. Ct. 931, 486 N.E.2d 743 (1985) (defendant's nickname suggesting he was violent or quarrelsome); *Commonwealth v. MacMurtry*, 20 Mass. App. Ct. 629, 633, 482 N.E.2d 332 (1985); *Commonwealth v. Marler*, 11 Mass. App. Ct. 1014, 419 N.E.2d 854 (1981). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 790 N.E.2d 739 (2003). Accord, *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Commonwealth v. Adjutant, supra*.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness, *Adjutant, supra*; *Lapointe*, 402 Mass. at 324-5, 522 N.E.2d 937.

10. Mutual combat.

When two people engage in a fist fight by agreement, generally neither of them is acting in self-defense because they have not used all reasonable means to avoid combat. But a person regains the right of self-defense if during the fight he (she) reasonably concludes that the other person, contrary to their mutual understanding, has escalated the fight by introducing deadly force.

Commonwealth v. Bertrand, 385 Mass. 356, 432 N.E.2d 78 (1982); *Commonwealth v. Collberg*, 119 Mass. 350 (1876); *Commonwealth v. Barber*, 18 Mass. App. Ct. 460, 466 N.E.2d 531 (1984), *aff'd*, 394 Mass. 1013, 477 N.E.2d 587 (1985).

11. Injury prone victim.

If a person has exhausted all proper means to avoid physical combat, he (she) may use appropriate non-deadly force in self-defense if he (she) reasonably believes that his (her) personal safety is in danger, even against someone, like a drunk, who is known to be susceptible to injury.

Commonwealth v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980)

12. Police privilege resisting arrest.

Because of the nature of the job, a police officer is permitted to use force in carrying out his (her) official duties if such force is necessary and reasonable. A person who is arrested by someone who he (she) knows is a police officer is not allowed to resist that arrest with force, whether the arrest is lawful or not. Even if the arrest is illegal, the person must resort to the legal system to restore his (her) liberty.

However, if a police officer uses excessive or unnecessary force to make an arrest — whether the arrest is legal or illegal — the person who is being arrested may defend himself (herself) with as much force as reasonably appears to be necessary. The person arrested is required to stop resisting once he (she) knows or should know that if he (she) stops resisting, the officer will also stop using excessive or unnecessary force. The Commonwealth must prove beyond a reasonable doubt that the police officer did not use excessive or unnecessary force in making the arrest.

In evaluating the amount of force that reasonably appears necessary to defend oneself, and in evaluating when a person is required to stop resisting, you may evaluate from the perspective of a juvenile. You may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate risks and consequences.⁹

⁹“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831

Commonwealth v. Moreira, 388 Mass. 596, 447 N.E.2d 1224 (1983) (resisting unlawful arrest); *Commonwealth v. Martin*, 369 Mass. 640, 341 N.E.2d 885 (1976) (police privilege); *Commonwealth v. Urkiel*, 63 Mass. App. Ct. 445, 826 N.E.2d 769 (2005) (unconstitutional entry into dwelling does not itself constitute excessive force giving rise to right to resist); *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 511 N.E.2d 38 (1987) (knowledge of officer's identity); *Commonwealth v. McMurtry*, 20 Mass. App. Ct. 629, 632, 482 N.E.2d 332 (1985). G.L. c. 111B, § 8, sixth par. (police privilege in protective custody situations). See also G. L. c. 268, § 32B (resisting arrest).

The Commonwealth has the burden of proof on the issue of whether the police used excessive force. *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 818 N.E.2d 1069 (2004).

13. Deadly force during citizen's arrest.

A person may use deadly force to make a citizen's arrest only if:

First, he (she) believes that such force is necessary to make a lawful arrest;

Second, the arrest is for a felony;

Third, either he (she) announces the purpose of the arrest or believes it is already known to the person being arrested or believes it cannot reasonably be made known to the person being arrested;

Fourth, either he (she) is assisting a person whom he (she) believes is a peace officer; or he (she) is a peace officer;

Fifth, he (she) believes there is no substantial risk of injury to innocent persons;

Sixth, he (she) believes that the person being arrested used or threatened to use force in committing the felony;

Seventh, he (she) believes that there is a substantial risk that the person being arrested will cause death or serious bodily harm to someone if he (she) is not immediately arrested.

(If made pursuant to a warrant:

n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

and *Eighth* that the warrant was valid or was believed by the citizen to be valid.)

Crimes that may be punished with a state prison sentence are called “felonies,” while other crimes are called “misdemeanors.”

I instruct you as a matter of law that _____ [the relevant crime] is a (felony) (misdemeanor).

Deadly force is force that is (intended or likely to cause death or great bodily harm) (or) (applied using a dangerous weapon likely to cause death or serious injury). It is the level of force used, not to the degree of injury caused, if any, that determines whether it is deadly force.

(If a warrantless arrest was made by a police officer outside his/her jurisdiction:

A police officer who makes a warrantless arrest outside of his [her] jurisdiction acts as a private citizen. The officer must have probable cause to believe that a felony was committed and that this person committed it.)

14. Non-deadly force during citizen’s arrest.

A person may use reasonable force to make a citizen’s arrest only if:

First, he (she) believes that such force is immediately necessary to make a lawful arrest;

Second, he (she) announces the purpose of the arrest or believes that it is already known to the person being arrested or believes that it cannot reasonably be made known to the person being arrested, *and*

Choose appropriate instruction below:

A. If the arrest was made pursuant to a warrant:

Third, the arrest was made pursuant to a valid warrant or the citizen making the arrest believed it was valid.

B. If the arrest was made without a warrant:

Third, the arrest made without a warrant was for a felony. Crimes that may be punished with a state prison sentence are called “felonies” while other crimes are called “misdemeanors.”

C. If warrantless arrest was made by a police officer outside his/her jurisdiction.

Third, the police officer made a warrantless arrest outside of his (her) jurisdiction and had probable cause to believe a felony was committed and that it was committed by this person.

I instruct you as a matter of law that _____ [relevant crime] _____ is a (felony) (misdemeanor).

Commonwealth v. Grise, 398 Mass. 247, 496 N.E.2d 162 (1986) (warrantless citizen arrests limited to felonies only); *Commonwealth v. Klein*, 372 Mass. 823, 828-832, 363 N.E.2d 1313 (1977) (burden of proof on Commonwealth); *Commonwealth v. Lussier*, 333 Mass. 83, 128 N.E.2d 569 (1955). Extra-territorial arrests by police are limited to felonies. *Commonwealth v. Twombly*, 435 Mass. 440, 758 N.E.2d 1051 (2001); *Commonwealth v. Savage*, 430 Mass. 341, 719 N.E.2d 473 (1999); *Commonwealth v. Clairborne*, 423 Mass. 275, 667 N.E.2d 873 (1996); *Commonwealth v. Morrissey*, 422 Mass. 1, 660 N.E.2d 376 (1996). On arrest by a bail surety, see *Commonwealth v. Cabral*, 443 Mass. 171, 819 N.E.2d 951 (2005)

II. DEFENSE OF ANOTHER

Society wishes to encourage all of us to come to the aid of each other when that is necessary. Therefore, a person may use reasonable force when that is necessary to help

another person, if it reasonably appears that the person being aided is in a situation where the law would allow him to act in self-defense himself.

When evaluating what was reasonable in this circumstance, you should consider what was reasonable from the perspective a juvenile. When evaluating what was reasonable, you may consider the juvenile’s age, maturity, and the fact that juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents’ decisions often reflect an inability to adequately consider their options and appreciate consequences.¹⁰

If there is any evidence in this case that the defendant/**juvenile** may have been coming to the aid of another person, you must find the defendant/**juvenile** not guilty/**not delinquent** unless the Commonwealth proves beyond a reasonable doubt at least *one* of the following two things:

First: That a reasonable person in the defendant/**juvenile**’s position would *not* have believed that his (her) use of force was necessary in order to protect _____ [third party] ; or

Second: That to a reasonable person in the defendant/**juvenile**’s position would *not* have believed that _____ [third party] was justified in using such force in his (her) own self-defense.

¹⁰“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

Again, when evaluating what was reasonable, you may consider what was reasonable from the perspective a juvenile.

So when does a person have a right to act in self-defense?

Here instruct on self-defense.

Defense of another is a complete defense. *Commonwealth v. Johnson*, 412 Mass. 368, 589 N.E.2d 311 (1992). The legal principles regarding defense of another “are not unlike those which control the use of self-defense.” As with self-defense, in determining whether there is sufficient evidence to raise the issue of defense of another, all reasonable inferences should be resolved in favor of the defendant. *Commonwealth v. Green*, 55 Mass. App. Ct. 376, 379, 770 N.E.2d 995 (2002). Where defense of another has been properly raised, the Commonwealth has the burden of disproving the defense beyond a reasonable doubt. *Id.*; *Commonwealth v. Monico*, 373 Mass. 298, 302-304, 366 N.E.2d 1241, 1244 (1977) (defense not limited to persons related to defendant); *Commonwealth v. Martin*, 369 Mass. at 649, 341 N.E.2d at 891; *Commonwealth v. Montes*, 49 Mass. App. Ct. 789, 794-796, 733 N.E.2d 1068 (2000) (absent excessive force by police, defendant cannot assist another in resisting even an unlawful arrest; doubtful that common-law right to resist an unlawful arrest, now abolished in Massachusetts, ever permitted third parties to assist another in resisting an unlawful arrest); *Commonwealth v. McClendon*, 39 Mass. App. Ct. 122, 125-126, 653 N.E.2d 1138 (1995) (use of force justified only in response to immediate danger to third person). Where defense of others is relied on by the defendant and the evidence is sufficient to raise the issue, an instruction is required, even absent a request by the defendant. *Commonwealth v. Kivlehan*, 57 Mass. App. Ct. 793, 795- 796, 786 N.E.2d 431 (2003).

III. DEFENSE OF PROPERTY

A person may use reasonable force, but not deadly force, to defend his lawful property against someone who has no right to it.

A person may also use reasonable force, but not deadly force, to regain lawful possession of his property where his (her) possession has been momentarily interrupted by someone with no right to the property.

Finally, a person may also use reasonable force, but not deadly force, to remove a trespasser from his property after the trespasser has been requested to leave and has refused to do so.

When evaluating what was reasonable in any of these situations, you should consider what was reasonable from the perspective a juvenile. When evaluating what was reasonable, you may consider the juvenile’s age, maturity, and the fact that

juveniles do not make decisions in the same manner as adults. Adolescents do not act with the same control and foresight as adults. As compared to adults, adolescents are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions. Adolescents' decisions often reflect an inability to adequately consider their options and appreciate consequences. ¹¹

See Instruction 8.220 (Trespass).

If there is evidence in this case that the defendant/**juvenile** used force in (that situation) (any of those situations), you must find the defendant/**juvenile** not guilty/**not delinquent** unless the Commonwealth has proved one of two things beyond a reasonable doubt:

either that a reasonable person in the defendant/**juvenile's** position would *not* have believed that force was necessary in order to (defend) (regain possession of) (remove a trespasser from) his (her) property;

or that the defendant/**juvenile** used force that was deadly or unreasonable. Deadly force is force that is intended to, or likely to, kill or seriously injure someone. It refers to the level of force the defendant/**juvenile** used, not to the degree of injury, if any, to [alleged victim]_____.

How much force is reasonable may vary with the situation. Exactness is not always possible and you may take into account whether the defendant had to decide how to respond quickly under pressure. A person who uses what is clearly excessive and unreasonable force becomes an aggressor and loses the right to act in defense of his (her) property.

¹¹“[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Miller v. Alabama, 132 S.Ct.2455, 2468. “[C]hildren demonstrate a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” D.A. v. Diatchenko, 466 Mass. 655, 660 (2013), quoting Miller, at 2464; see also Commonwealth v. Walczak, 463 Mass. 808, 831 n.26 (2012) (“[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult”).

Commonwealth v. Donohue, 148 Mass. 529, 531-532, 20 N.E. 171, 172 (1889); *Low v. Elwell*, 121 Mass. 309 (1876); *Commonwealth v. Clark*, 2 Metc. 23, 25 (1840); *Commonwealth v. Kennard*, 8 Pick, 133 (1829). But see G.L. c. 186, § 14 and G.L. c. 266, § 120 (residential landlord may not evict tenant except through court proceedings). See also *Klein, supra*, (citing Model Penal Code on defense of property); *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 248 n.2 & 249, 770 N.E.2d 440 (1999) (person may use reasonable non-deadly force to defend personal property from theft or destruction and real property from unwelcome invasion).

Once more, when evaluating what was reasonable in any of these circumstances you must/may consider what was reasonable from the perspective a juvenile. When evaluating what was reasonable, you must/may consider the juvenile's age, maturity, and the fact that juveniles do not make decisions in the same manner as adults.

NOTES:

1. **Self-defense is a complete exoneration.** *Commonwealth v. Corlino*, 429 Mass. 692, 710 N.E.2d 967 (1999); *Commonwealth v. Evans*, 390 Mass. 144, 454 N.E.2d 458 (1983). Self-defense is available in assault cases as well as homicide cases. *Commonwealth v. Burbank*, 388 Mass. 789, 448 N.E.2d 735 (1983) (assault and battery with dangerous weapon); *Commonwealth v. Mann*, 116 Mass. 58 (1874) (assault and battery). Self-defense is available only where there is an immediate need to resort to force and not where other remedies are available. *Commonwealth v. Lindsey*, 396 Mass. 840, 489 N.E.2d 666 (1986) (unlawfully carrying a firearm in putative self-defense); *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982) (unlawful attempt to shut down nuclear power plant).

2. **When self-defense instruction must be given.** A defendant is entitled to an instruction on self-defense if the evidence, viewed in the light most favorable to the defendant, warrants at least a reasonable doubt about whether the elements of self-defense may be present. *Commonwealth v. Harrington*, 379 Mass. 446, 399 N.E.2d 475 (1980). The evidence of self-defense may come from the Commonwealth's case, the defendant's case or both. *Commonwealth v. Galvin*, 56 Mass. App. Ct. 698, 779 N.E.2d 998 (2002). All reasonable inferences should be resolved in favor of the defendant, and a judge should err on the side of caution in determining whether self-defense has been raised sufficiently to warrant an instruction. *Commonwealth v. Pike*, 428 Mass. 393, 701 N.E.2d 951 (1998); *Commonwealth v. Galvin*, 56 Mass. App. Ct. at 701, 779 N.E.2d at 1001; *Commonwealth v. Toon*, 55 Mass. App. Ct. 642, 644, 773 N.E.2d 993, 998 (2002). A self-defense instruction may be appropriate as to some counts but not as to others. *Commonwealth v. Clark*, 20 Mass. App. Ct. 392, 480 N.E.2d 1034 (1985). If there is an evidentiary basis, a judge should instruct on self-defense sua sponte, even absent a defense request. *Commonwealth v. Galvin, supra*. "Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime," a judge may choose to instruct on self-defense first and then on the elements of the crimes charged. *Commonwealth v. Santiago*, 425 Mass. 491, 506, 681 N.E.2d 1205, 1216 (1997). A self-defense instruction is not required where the defendant entirely denies striking the victim. *Commonwealth v. Vezina*, 13 Mass. App. Ct. 1002, 433 N.E.2d 99 (1982). A judge may properly withdraw a self-defense instruction earlier given to the jury if the judge later concludes that there is no evidence to support it. *Commonwealth v. Carrion*, 407 Mass. 263, 552 N.E.2d 558 (1990). See *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 675-676, 885 N.E.2d 848, 851-852 (2008) (where defendant was charged with indecent assault and battery, and the Commonwealth requested an instruction on lesser included offense of assault and battery,) court erred in withdrawing self-defense instruction because

evidence permitted view that contact occurred only when defendant tried to push complainant away during scuffle.

3. **Burden of proof and phrasing of instruction.** Self-defense is “probably the most sensitive part of jury instructions in a criminal trial.” *Commonwealth v. Deagle*, 10 Mass. App. Ct. 748, 751, 412 N.E.2d 911, 914 (1980). When the issue of self-defense is properly raised, the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense and this burden of proof should be expressly incorporated into the charge. *Commonwealth v. A Juvenile*, 396 Mass. 108, 483 N.E.2d 822 (1985). Self-defense instructions “must be carefully prepared and delivered so as to eliminate any language that might convey to the jury the impression that a defendant must prove that he acted in self-defense.” *Commonwealth v. Vidito*, 21 Mass. App. Ct. 332, 487 N.E.2d 206 (1985). Where deadly force was used, special care must be taken to instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt the absence of circumstances justifying deadly force in self-defense. *Commonwealth v. Fontes*, 396 Mass. 733, 488 N.E.2d 760 (1986).

If the judge properly instructs the jury on the Commonwealth’s burden of proof with respect to self-defense, the judge is not required also to expressly instruct the jury to consider any evidence of self-defense presented by the defendant. As long as the judge does not distinguish between evidence of self-defense presented by the defendant and that presented by the Commonwealth, the jury should not be instructed on the burden of production because it lies outside the function of the jury. *Commonwealth v. Glacken*, 451 Mass. 163, 883 N.E.2d 1228 (2008).

A judge should not (1) suggest that self-defense is a “defense” or that it must be established “to your satisfaction”, *Commonwealth v. Simmons*, 383 Mass. 40, 417 N.E.2d 430 (1981), nor (2) use “if you find” or “the defendant claims” language, *Commonwealth v. Mejia*, 407 Mass. 493, 554 N.E.2d 1186 (1990), nor (3) refer to self-defense as a “legal justification for conduct which would otherwise constitute a crime,” *Commonwealth v. Vidito, supra*. However, a judge may tell the jury that they must first “determine” or “find” whether self-defense exists, *Id.*, 21 Mass. App. Ct. at 338, 487 N.E.2d at 210. A judge should avoid any explicit analogy with the “prudent person” standard of negligence law. *Commonwealth v. Doucette*, 391 Mass. 443, 462 N.E.2d 1084 (1984). A judge is not required to charge that any particular weapon may give rise to self-defense rights, *Commonwealth v. Monico*, 396 Mass. 793, 806-807, 488 N.E.2d 1168, 1177 (1986) (shod foot).

4. **Deadly force and non-deadly force involve two different standards.** The right to use non-deadly force arises at a “somewhat lower level of danger” than the right to use deadly force. *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955. For that reason, the standards for self-defense using deadly force and non-deadly force “are mutually exclusive.” *Commonwealth v. Walker*, 443 Mass. 213, 820 N.E.2d 195 (2005). It is reversible error for a judge to give self-defense instructions related to deadly force when he or she should charge on self-defense related to non-deadly force, since doing so lowers the Commonwealth’s burden in proving that the defendant did not act in self-defense. *Commonwealth v. Baseler*, 419 Mass. 500, 503-504, 645 N.E.2d 1179, 1181 (1995). Where the level of force cannot be determined as a matter of law, it is a jury issue and the defendant is entitled to instructions on both use of deadly force and non-deadly force in self-defense. Where a weapon which may be dangerous was not used in its intended deadly manner, the jury must determine if it was deadly force. *Commonwealth v. Walker, supra*; *Commonwealth v. Cataldo*, 423 Mass. 318, 668 N.E.2d 762 (1996) (conflicting evidence about whether defendant who threatened aggressor with gun but did not shoot, intended to do so); *Commonwealth v. Baseler, supra* (conflicting evidence about whether defended himself by drawing gun or only by struggling). When the only force used was deadly force, the defendant is not entitled to a non-deadly force instruction. *Commonwealth v. Lopes*, 440 Mass. 731, 802 N.E.2d 97 (2004).

Non-deadly force. Non-deadly force is justified in self-defense if (1) the defendant had a reasonable concern for his or her safety, (2) the defendant pursued all possible alternatives to combat, and (3) the force used was no greater than required in the circumstances. *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999). “A defendant is entitled to an instruction on the use of non-deadly force if any view of the evidence, regardless of its

credibility, and resolving all reasonable inferences in favor of the defendant, would support a finding that non- deadly force was, in fact, used in self-defense.” *Lopes, supra*. There is no right to use non-deadly force if there was no overt act against the defendant. *Commonwealth v. Alebord*, 49 Mass. App. 915, 733 N.E.2d 169 (2000).

Deadly force. When deadly force is used, the first two prongs of self-defense are the same, but (3) is instead that the defendant had a reasonable fear that he or she was in imminent danger of death or serious bodily harm, and that no other means would suffice to prevent such harm. *Id.* Where deadly force was used, to show that “the defendant did not act in proper self-defense, the Commonwealth must prove at least one of the following propositions beyond a reasonable doubt: (1) the defendant did not have a reasonable ground to believe, and did not believe, that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force; or (2) the defendant had not availed himself of all proper means to avoid physical combat before resorting to the use of deadly force; or (3) the defendant used more force than was reasonably necessary in all the circumstances of the case.” *Commonwealth v. Glacken*, 451 Mass. 163, 883 N.E.2d 1228 (2008). Deadly force is “force intended or likely to cause death or great bodily harm. This tracks our long-standing definition of a ‘dangerous weapon’.” *Commonwealth v. Klein*, 372 Mass. 823, 827, 363 N.E.2d 1313 (1977). “Deadly force” refers to the level of force used, not the seriousness of the resulting injury. *Commonwealth v. Noble*, 429 Mass. 44, 707 N.E.2d 819 (1999) (use of fist is non-deadly force even if death results); *Commonwealth v. Pike*, 428 Mass. at 396 n.3, 701 N.E.2d at 955 n.3 (judge should instruct on standard for non-deadly force if force generally considered non-deadly results in death in particular case); *Commonwealth v. Wolmart*, 57 Mass. App. Ct. 780, 786 N.E.2d 427 (2002) (use of knife was deadly force despite relatively minor injury). For when deadly force may be used in self-defense, see *Commonwealth v. Berry*, 431 Mass. 326, 727 N.E.2d 517 (2000); *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955 (assault with overt threat to cause serious bodily injury sufficient to warrant instruction on deadly force in self-defense); *Commonwealth v. Barber*, 394 Mass. 1013, 477 N.E.2d 587 (1985); *Commonwealth v. Harrington*, 379 Mass. 446, 399 N.E.2d 475 (1980); *Commonwealth v. Hartford*, 346 Mass. 482, 194 N.E.2d 401 (1963); *Commonwealth v. Houston*, 332 Mass. 687, 127 N.E.2d 294 (1955).

5. **Retaliation.** A person loses the right to self-defense if he or she pursues the original aggressor for retribution or to prevent future attacks, *Commonwealth v. Barber*, 394 Mass. 1013, 477 N.E.2d 587 (1985), or where if he or she has already disarmed the victim and retaliates in anger, *Clark, supra*.

6. **Reasonable apprehension.** A person may use non-deadly force in self-defense when he “has a reasonable concern over his personal safety,” *Commonwealth v. Baseler, supra*; *Commonwealth v. Bastarache*, 382 Mass. 86, 414 N.E.2d 984 (1980), based on some overt act by the other, *Commonwealth v. Alebord*, 49 Mass. App. 915, 733 N.E.2d 169 (2000). Location, physical attributes, threats and weapons may be considered as to the reasonableness of the defendant’s state of mind. *Vidito*, 21 Mass. App. Ct. at 338, 487 N.E.2d at 210.

To use deadly force in self-defense, a person must have reasonable cause to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force. *Commonwealth v. Berry*, 431 Mass. 326, 727 N.E.2d 517 (2000). A first strike can be justified on a reasonable belief that the victim is reaching for a deadly weapon, *Commonwealth v. Bray*, 19 Mass. App. Ct. 751, 477 N.E.2d 596 (1985), but not on mere fear of a non-imminent assault, *Commonwealth v. Hartford*, 346 Mass. 482, 194 N.E.2d 401 (1963).

7. **Mistaken but reasonable apprehension.** A defendant is entitled to a self-defense instruction if he had a mistaken but reasonable belief that death or serious bodily injury was imminent, or that he had used all available means to avoid physical combat, or as to the amount of force necessary to deal with the perceived threat, provided that there is some evidence of the other elements of self-defense. *Commonwealth v. Glass*, 401 Mass. 799, 809; 519 N.E.2d 1311, 1318 (1988). See also *Commonwealth v. Walker, supra*; *Commonwealth v. Toon, supra*. For

such a belief to be reasonable, the victim must have committed some overt act, including threats, against the defendant. *Commonwealth v. Walker, supra*.

8. **“Battered person’s syndrome.”** General Laws c. 233, § 23E provides that in self-defense cases, the defendant may introduce (1) evidence that he or she has been “the victim of acts of physical, sexual or psychological harm or abuse” and (2) 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” on the issues of the reasonableness of: (1) the defendant’s apprehension of danger, (2) the defendant’s belief that he or she had used all available means to avoid physical combat, and (3) the defendant’s perception of the amount of force necessary. In essence, the same rule is also now the common law of this Commonwealth. *Commonwealth v. Rodriguez*, 418 Mass. 1, 7, 633 N.E.2d 1039, 1042 (1994). The Commonwealth may also offer such testimony “to help explain the conduct of a victim or a complainant over the course of an abusive relationship.” The expert’s testimony must be confined to the general pattern of behavioral and emotional characteristics shared by typical battering victims, and may not discuss the symptoms exhibited by the particular victim, nor opine on whether the particular victim suffers from that syndrome, nor describe or profile the typical attributes of batterers. *Commonwealth v. Goetzendanner*, 42 Mass. App. Ct. 637, 640-646, 679 N.E.2d 240, 243-246 (1997).

9. **Duty to retreat.** A person must generally use all proper means of escape before resorting to physical combat. *Commonwealth v. Niemic*, 427 Mass. 718, 696 N.E.2d 117 (1998); *Commonwealth v. Gagne*, 367 Mass. 519, 326 N.E.2d 907 (1975). The location of an assault is “an element of major importance” in determining whether all proper means have been taken to avoid deadly force. *Commonwealth v. Shaffer*, 367 Mass. 508 at 512, 326 N.E.2d 880 (1975). See also *Commonwealth v. Williams*, 53 Mass. App. Ct. 719, 761 N.E.2d 1005 (2000) (little effort to avoid combat).

10. **Retreat not required in dwelling.** The retreat requirement has been modified by the “castle law,” G.L. c. 278, § 8A, which provides that an occupant of a dwelling need not retreat before using reasonable means to defend himself or other occupants against an unlawful intruder whom the occupant reasonably believes is about to inflict great bodily injury or death on him or another lawful occupant. Nor is the occupant required to exhaust any other means of avoiding combat in such circumstances; the statutory term “retreat” encompasses all such means. *Commonwealth v. Peloquin*, 437 Mass. 204, 208, 770 N.E.2d 440 (2002); *Commonwealth v. Gregory*, 17 Mass. App. Ct. 651, 461 N.E.2d 831 (1984).

The word “dwelling” is given its usual common law meaning and therefore excludes common areas of a multiple dwelling, *Commonwealth v. Albert*, 391 Mass. 853, 862; 466 N.E.2d 78, 85 (1984), an open porch and outside stairs, *Commonwealth v. McKinnon*, 446 Mass. 263; 843 N.E.2d 1020 (2006), and driveways, *Commonwealth v. Bennett*, 41 Mass. App. 920, 671 N.E.2d 966 (1996). This statute does not eliminate the duty to retreat from a confrontation with a person lawfully on the premises, *Commonwealth v. Lapointe*, 402 Mass. 321, 522 N.E.2d 937 (1988), even when that guest launches a life-threatening assault on the defendant. *Commonwealth v. Peloquin, supra*; *Commonwealth v. Painten*, 429 Mass. 536, 709 N.E.2d 423 (1999). There is no right under the “castle law” to resist unlawful entry by police into one’s residence, *Commonwealth v. Gomes*, 59 Mass. App. Ct. 332, 795 N.E.2d 1217 (2003), or to resist unlawful arrest unless excessive force is used and the occupant is unable to retreat, *Commonwealth v. Peterson*, 53 Mass. App. Ct. 388, 759 N.E.2d 719 (2001).

The jury should be instructed on how to determine if the victim was an unlawful intruder. *Commonwealth v. Noble*, 429 Mass. 44, 707 N.E.2d 819 (1999). A person who enters lawfully but refuses to leave is a trespasser. *Commonwealth v. Peloquin*, 437 Mass. 204, 209, 770 N.E.2d 440 (2002). A person may use no more force than reasonably necessary to remove a trespasser, *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999).

11. **Excessive force.** The defendant may be found guilty if his use of deadly force was unreasonable and clearly excessive in the circumstances. *Commonwealth v. Stokes*, 374 Mass. 583, 374 N.E.2d 87 (1978). *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999) (objectively unreasonable belief that deadly force was required).