No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

FAGBEMI MIRANDA, Petitioner

v.

MASSACHUSETTS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SJC-11690

COMMONWEALTH vs. FAGBEMI MIRANDA.

Bristol. October 7, 2019. - June 9, 2020.

Present: Gants, C.J., Lenk, Lowy, Budd, & Kafker, JJ.

Homicide. Self-Defense. Constitutional Law, Assistance of counsel, Indictment, Grand jury, Admissions and confessions, Voluntariness of statement. Evidence, Self-defense, Indictment, Grand jury proceedings, Admissions and confessions, Voluntariness of statement. Grand Jury. Practice, Criminal, Capital case, Assistance of counsel, Indictment, Grand jury proceedings, Motion to suppress, Admissions and confessions, Voluntariness of statement.

Indictments found and returned in the Superior Court Department on March 19, 2008.

A pretrial motion to dismiss was heard by Robert C. Cosgrove, J.; a pretrial motion to suppress evidence was heard by Gary A. Nickerson, J.; the cases were tried before D. Lloyd Macdonald, J.; and a motion for a new trial, filed on January 30, 2017, was heard by Thomas F. McGuire, Jr., J.

Susan J. Baronoff for the defendant.
Stephen C. Nadeau, Jr., Assistant District Attorney, for the Commonwealth.

KAFKER, J. A jury convicted the defendant, Fagbemi Miranda, of murder in the first degree on a theory of deliberate premeditation in connection with the 2005 shooting death of Christopher Barros.[1] The victim and the defendant had been engaged in a raucous verbal argument in the street outside the defendant's New Bedford home, when the defendant's younger brother, Wayne,[2] intervened with a handgun. The victim fled across the street and down a neighboring driveway, with Wayne in pursuit; the defendant, who had yelled for Wayne to stop, then dashed down the driveway. Wayne passed the gun to the defendant, who fired two shots at the fleeing victim, one of them fatal. Police arrested Wayne later that night, as multiple witnesses had seen him with the gun chasing the victim, and his indictment for the victim's murder followed roughly one month thereafter.[3] The defendant's indictment and arrest did not follow for more than two years, after a percipient witness (neighbor), who recently had been arrested on unrelated drug

[1] The jury also convicted the defendant of assault and battery by means of a dangerous weapon and unlicensed possession of a firearm.

[2] To avoid confusion, we refer to Wayne Miranda by his first name.

[3] In July 2008, a jury convicted Wayne of murder in the second degree, and the judge imposed a sentence of life imprisonment.

charges, proffered her cooperating testimony identifying the defendant for the first time as the shooter.

On appeal, the defendant challenges the trial judge's failure to instruct the jury on self-defense, and raises numerous other issues, including ineffective assistance of counsel, interference with his right to testify, and improper denial of his motions to dismiss the grand jury indictments and to suppress evidence. For the reasons explained infra, we affirm the defendant's convictions as well as the orders denying his pretrial and postconviction motions, and decline to grant extraordinary relief pursuant to G. L. c. 278, § 33E.

Background. 1. Facts. We summarize the facts the jury could have found based on the Commonwealth's evidence, reserving certain topics for later discussion. Not long before 8:30 P.M. on the evening of October 10, 2005, the defendant and the victim engaged in a loud verbal argument on the pavement outside the house where the defendant lived with his family (Miranda home).[4] Their shouting drew the attention of several neighbors. The defendant assumed an aggressive stance, pointing and coming in close to the victim's face, and both men gestured with their hands as they screamed at each other, but they never made

[4] The defendant's younger brother, Wayne, their mother, their grandmother, and a cousin also then resided at the Miranda home.

physical contact. A third, unidentified man stood looking on nearby, next to a sedan parked on the street outside the Miranda home.

The defendant's younger brother, Wayne, soon ran out the front door of the Miranda home and down the stairs into the street, joining the fracas. The defendant inched back and looked on as Wayne approached within inches of the victim's face and shouted angrily into the victim's ear for several minutes. Wayne then ran back inside the Miranda home. The defendant raised his fists, and the shouting match with the victim resumed.

About one minute later, Wayne reemerged from the front door, still angry, a black handgun now visible in his right hand. Following close behind, Wayne's grandmother yelled at him to stop and get back into the house, and she then tried to block his path and grab him. Ignoring her directive, he proceeded halfway down the porch stairs and then jumped over the bannister down onto the pavement. As Wayne landed next to the defendant, the victim looked at Wayne and yelled: "Are you serious, Waynie? Are you serious? It's like that? It's like that?" Shouting back, Wayne pointed the handgun at the victim's forehead at very close range. The victim stepped back, holding his hands up by his shoulders, palms facing out, while saying "No." The defendant tried to get the gun away from Wayne, and

then attempted to push him to go back into the house, while yelling for Wayne to stop and repeatedly shouting "no."

The victim ran across the street and into the open driveway alongside the neighbor's house, proceeding down the narrow path between the right side of the house and a car parked in the middle of the driveway. Wayne chased after him, along the same path. The defendant dashed down the driveway after Wayne, using the wider path along the other side of the car. The unidentified man followed last.

From where it met the sidewalk on the east side of the street, the twelve-foot width of driveway led straight back, alongside the house and then about twenty feet further, where it ended in front of a long multibay garage that formed the rear perimeter of the property. To the left of the driveway was a small back yard, about forty feet wide, which filled the space between the rear of the house and the garage, with a wooden picket fence running along its north boundary, opposite the driveway. There was a large tree growing in the yard, right up against the fence, roughly ten feet west of the garage.[5]

[5] The jury participated in a view of the crime scene and its surrounding vicinity, which would have informed their spatial understanding of the various photographs, diagrams, and other evidence introduced at trial relative to the layout of the crime scenes.

As the victim raced down the driveway with Wayne in close pursuit, the neighbor, who lived on the second floor of the house on that property, opened an adjacent window and yelled out, "No, Waynie, no. Think of your daughter."[6] Still running, the Miranda brothers converged in front of the parked car, and together they continued down the length of the driveway, coming to a halt near some garbage cans in front of the garage. Following a brief exchange of words, Wayne passed the gun to the defendant. The neighbor saw the defendant raise the gun and point it toward the picket fence on the far side of the yard. The sound of two gunshots rang out in quick succession, emanating from the direction of the yard. The victim's body was later found on the opposite side of the picket fence.

Seconds later, another neighborhood resident (first reporter) observed both Miranda brothers and the unidentified man emerge from the driveway onto the sidewalk, where one of the brothers passed the gun to the other brother. The two brothers then proceeded back across the street and inside the Miranda home, while the unidentified man got into a black car and drove

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[6] The neighbor had lived on the second floor of the house for about four or five years, with her two school-age children; the house belonged to her grandfather, who lived on the first floor. The neighbor was friendly with Wayne and knew the rest of the Miranda family. She recognized the victim, because Wayne had been outside talking with the neighbor on her porch about two weeks before the shooting, when the victim showed up on their block and Wayne introduced him to the neighbor.

off. Perched on a friend's fourth-floor apartment balcony with a view up the street, the first reporter noted the victim's failure to reemerge from the driveway. He also observed that the black car sped off without stopping anywhere in the vicinity to pick up anyone.[7]

About five minutes later, when police responded to an 8:32 P.M. dispatch of shots fired in the area,[8] the defendant was standing by himself on the porch of the Miranda home. A marked police cruiser stopped in front of the Miranda home, and one of the arriving officers asked the defendant if he had heard any gunshots. The defendant replied that he just had been the target of gunshots. The officer climbed the porch stairs, seeking additional details. The defendant appeared jittery as he told the officer that he had been walking to the house from his nearby parked car, when a black Ford vehicle stopped near

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[7] Police located the car later that evening, parked at the home of the victim's sister, on the opposite end of the city. No weapons were found when the police searched the vehicle.

[8] Two neighbors who witnessed parts of the altercation before the shooting and heard (but did not see) the gunfire called 911 to report the incident. The initial caller was the first reporter. From certain of the windows and a balcony in his friend's apartment, he had a clear view to the north, in the area of the street near the Miranda home (without visibility into the driveway or yard of the neighbor's house). The first reporter telephoned police when he and his friend (who both knew the Miranda family, but did not recognize the victim) saw Wayne come out onto the porch of the Miranda home with the gun. The neighbor initiated the second 911 call from her house, right after she heard the shots fired in her yard.

him on the street. Someone called to him from the back seat shortly before a man wearing a mask jumped out of the vehicle and pursued the defendant across the street, down the driveway next to the neighbor's house, and into the back yard. As the defendant climbed over the fence into a neighboring yard, the man fired two shots at him. The officer asked the defendant to come across the street and point out the fence he was climbing when the man fired at him. The defendant stated that his grandmother was upset, and he wanted to go speak with her; the officer assured him that it would only take a moment, so the defendant agreed.

The defendant accompanied the officer across the street, into the neighbor's driveway, and down to the edge of the yard, where four or five other law enforcement officers were searching the area for evidence with flashlights.[9] He pointed to the picket fence on the north side of the yard and identified it as the one he was climbing when the masked man fired. He then asked the officer if he could leave and see his grandmother; following an affirmative response, he departed.

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[9] Police located two spent bullet casings on the ground in the area near the garbage cans. At the defendant's trial, the Commonwealth's ballistics expert testified that both casings were of the same caliber and manufacturer, and he opined, based upon his analysis, that both were shot from the same unknown weapon. He also stated that most common handguns that shoot that type of ammunition eject spent cartridge casings to the right.

Police soon located the victim's unconscious body on the other side of the picket fence, in the corner of the adjacent residential lot.[10] The victim was lying belly down and partly rolled over onto the left side, with his head turned to face the picket fence. The victim was unarmed. No weapons were found nearby. A bullet wound was visible under his left arm, and his jeans were stained with blood. Despite resuscitation efforts, the victim remained unresponsive, and was pronounced dead upon arrival at the hospital.[11]

Meanwhile, the neighbor was pacing between the rooms of her second-floor residence when she glimpsed the beams of police flashlights in the driveway and yard. From her bathroom window,

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[10] Some of the pickets in the part of the fence near the body were missing, and others were broken. Just over that part of the fence, on the ground in the neighbor's back yard, police found a broken picket, stained with what looked like blood.

[11] The autopsy confirmed that the victim was shot twice and identified a cut on his left palm near the wrist. The first shot, which was fatal, entered the front of the left bicep at about a forty-five degree downward angle, piercing both lobes of the left lung and the spinal column. The second bullet entered through the back of the victim's left upper thigh, left through the victim's "right groin area," and got caught in the victim's clothing. In the expert opinion of the Commonwealth's medical examiner, the damage from the first bullet would have caused death in "some number of minutes," which the victim likely spent coughing up blood and struggling to breath. The projectiles recovered from the victim's body and clothing were of a caliber consistent with the discharged cartridge casings found in the neighbor's back yard. The Commonwealth's expert was unable to opine whether they were shot from the same weapon, because that conclusion would require access to the gun that shot them. Police never found the murder weapon.

the neighbor caught the attention of an officer. The neighbor spoke to the officer for about two minutes, but did not report what she had seen in the driveway and yard before the gun shots. When the officer asked the neighbor to come to the police station to make a formal statement, she refused because, as she later testified, she was scared of the Mirandas.[12]

On the street, a number of people had gathered in the vicinity of the crime scene. Officers located the defendant among them and told him that detectives would want to speak with him at the station. They escorted him to the marked police cruiser that was parked along the curb outside the Miranda home, and he got into the back seat without protest. An officer then drove the defendant to the station, escorted him inside, and left.

At about 10:30 P.M., another officer met the defendant in the lobby of the police station. The defendant agreed to speak with the officer, and accompanied him to an interview room in the detective unit. The officer did not provide the defendant with Miranda warnings, and made no effort to record the interview. The defendant told the officer essentially the same story he had reported to officers earlier that evening, about a

[12] After the shooting, the neighbor received multiple telephone calls from the Miranda home; there were "a lot" of calls, but she answered none.

masked man who pursued him across the street and shot at him as he fled over a neighbor's fence. The defendant also admitted that he knew the victim, but not well, and had not seen him for three to five days. After the interview, the defendant consented to submit to a gunshot primer residue test of his hands, which a detective performed, with the defendant's cooperation, at about 11:15 P.M. The detective who secured the gunshot residue sample from the defendant's hands had performed the same test on Wayne about one hour earlier. The record does not reflect precisely when Wayne arrived at the station or whether the defendant knew he was there. Subsequent test results indicated the presence of gunshot residue on both the defendant's hands, and also on Wayne's left hand.

After submitting to the test, the defendant did not leave the station. More than one hour later, he was seated alone inside a conference room when a State police trooper entered and asked to speak with him. The defendant agreed to speak with the trooper, who neither read him Miranda rights nor attempted to record their conversation. The defendant told the trooper the same basic story he had provided to officers twice previously, with minor discrepancies. He admitted that both he and Wayne knew the victim but did not "have any problems" with him. When the trooper told the defendant that Wayne had been arrested, the

defendant stated that he thought Wayne was inside the house during the shooting. The defendant was not arrested.

The next morning, the neighbor left her home around 5:30 A.M. and walked to meet a friend for a ride to work. As she crossed the street, the defendant and his cousin met her on the sidewalk. The defendant "grabbed" her and whispered in her ear that he wanted to talk to her, and the cousin whispered in the other ear that she would be all right. She continued walking, and met her friend, but could only work for three hours, because she "was an emotional wreck." Later that same day, the neighbor answered a knock at her front door and found two police officers on the doorstep. They were canvassing the neighborhood, seeking information in their ongoing homicide investigation. The officers noted that her entire body began shaking when she opened the door and realized they were police. They were unable to obtain any information from her, because "she was stammering and stuttering her words."

Approximately eighteen months later, in April 2007, police executed a search warrant at the neighbor's home, leading to the arrests of the neighbor and her then boyfriend (who lived with her at that time) for trafficking cocaine in a school zone, and related charges. The neighbor was arraigned and released on bail, and later filed a motion to suppress evidence in her case, which was denied. During the two-year period between the

shooting and the order denying her suppression motion, the neighbor and her daughter continued to reside at that house, and saw the defendant "constantly."

The neighbor entered into a cooperation agreement with the Commonwealth whereby she would avoid incarceration in connection with the pending drug charges and receive relocation assistance through witness protection[13] in exchange for her truthful testimony in connection with the shooting. She later testified as a witness for the Commonwealth on three occasions: first, in March 2008, during proceedings before the grand jury that returned the indictments against the defendant; again, four months later, at Wayne's trial; and finally, almost five years later, at the defendant's trial.

2. The defense case at trial. At trial, defense counsel sought to raise reasonable doubt that the defendant intended to cause the victim's death through vigorous cross-examination targeting the neighbor's credibility and the reliability of her identification of the defendant as the shooter. Specifically, counsel concentrated on (1) her initial failure to cooperate with police, and sudden change of heart more than two years later, while confronting the prospect of a nearly certain

[13] The assistance included a cash payment in the amount of $400 to the neighbor and direct payment of living expenses (temporary lodging, moving, rent, etc.) in the amount of $13,863.59.

conviction on charges carrying a sentence of imprisonment; and (2) the more than $14,000 the Commonwealth expended in connection with her relocation under the terms of the plea deal, which led counsel to characterize her as "a paid witness." During cross-examination of the first reporter and his friend, defense counsel focused on drawing out facts to support an inference that Wayne had been the shooter, including his intense displays of anger toward the victim, and observations of him holding the gun upon entering the driveway and again upon leaving it, shortly after the sound of gunshots. It was for these reasons that the first reporter had told the 911 operator unequivocally that Wayne shot someone. Both the first reporter and his friend testified that soon after Wayne emerged from the Miranda home holding the gun, the defendant tried to stop him: he said "no, no, no" and tried to push Wayne to go back in the house, but Wayne refused. Defense counsel also questioned the reliability of any inference to be drawn from the gunshot residue test results, by examining the expert as to numerous alternative scenarios that could yield positive residue test results, apart from pulling the trigger.

Against the advice of counsel, the defendant chose to testify. He was the only witness for the defense and testified in uninterrupted narrative form, for reasons explained infra, without objection from the Commonwealth. Defense counsel's

associate asked him: "[W]hat would you like to tell the jury?" The defendant replied: "I would like to tell the jury my -- the truth that happened that night on October 10th, 2005." He then proceeded to narrate his version of events, without questions from counsel or the associate to direct his account.

The defendant testified as follows: That evening, he drove home after dinner at a nearby restaurant and parked his car on the west side of the street. When he got out of the car, he noticed an unfamiliar black vehicle parked across the street from the Miranda home. As he neared home on foot, the defendant recognized the victim as the driver of the unfamiliar car, and approached with his hand extended in greeting. The victim got out of the car and "for no apparent reason" punched the defendant on the left side of his face, with enough force that the defendant stumbled. When the defendant regained his balance, he shouted at the victim to explain himself. Rather than explain, the victim spewed expletives at the defendant, and the two men continued shouting at each other in the middle of the street, posturing with their "fists" up to fight, but not coming to blows.

As the defendant "went to swing" a punch, the victim backed up, and the defendant noticed another man (unidentified man) coming around from the passenger side of the black car to stand in the street in front of the vehicle. Although the defendant

did not see any weapon on the unidentified man or the victim, he sensed he was outnumbered and yelled out, in hopes that one of his brothers would come outside to his aid. Soon thereafter, Wayne ran out the front door of the Miranda home with the gun,[14] and then jumped down into the street, "in defense of" the defendant.

Although Wayne knew "nothing about what happened," there had been "a lot" of shootings in the neighborhood.[15] As Wayne came down into the street, the victim said, "Mother-fucker, I'm going to kill you. Come at me with that, I'm going kill you." Still holding the gun, Wayne moved in an attempt "to get [the victim] away from [the defendant]." At that point, the victim "runs and takes off" across the street, with Wayne behind him, and the defendant "trying to tell [Wayne], 'No, don't, don't follow him. Don't. Don't.'"

When the defendant yelled at him, Wayne stopped at the entrance to the driveway alongside the neighbor's house. Just ahead of him, the victim ran down the driveway, and "kicked out

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[14] The defendant admitted that the semiautomatic handgun was "my illegal gun," and that he knew it was real, operable, and loaded.

[15] "[M]y brother had nothing to do with the situation, he just came over in defense of me because he didn't know what was happening with two people around me, what could have transpired because of the neighborhood that we live in."

the basement window" of the neighbor's house, alongside a parked car.[16] The driveway was the only one on the street without a gate and, consequently, according to the defendant, "a known stash spot area" for weapons and drugs. Just as the defendant caught up to Wayne at the entrance to the driveway, it "looked like [the victim] went to go reach for something" underneath the parked car. While the victim was "reaching," the defendant "thought [he] saw [the victim] grab something," and immediately reflected, "I hope he ain't reaching for a weapon, I hope not."

At the entrance to the driveway, the defendant took the firearm from Wayne. The defendant followed the victim all the way down the driveway and into the dark yard, running perpendicular to the driveway. By the time the defendant reached the driveway's end, the victim was already the whole way across the yard, "sideways" on a "platform" near the picket fence, and it looked like the victim was reaching for a firearm. The defendant thought he saw a "nickel-plated" firearm in the victim's hand as the victim was "coming back around." The defendant "aimed [and shot] at [the victim's] arm and his leg.

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[16] At trial, one of the Commonwealth's police witnesses who responded to the call of shots fired, and assisted with the investigation at the crime scene, testified to observing that a basement window on the ground level near the driveway entrance was broken. Police obtained the homeowner's consent to enter and search the basement on the night of the shooting, but did not locate anything of interest to the investigation.

Never intentionally for the body, just to disarm him and stop the mobility there, that's all." The defendant told the jury that he did not intend to kill the victim, insisting that he was not "a bad person."

On cross-examination, the defendant expressly admitted that he, and not Wayne, had shot the victim. He denied that the victim had put his hands in the air, but admitted that he could see no indication that the victim had a weapon, either while on the street or after he thought he saw the victim "grab something" from under the car in the driveway. The defendant also denied that he "chased" the victim, but admitted to "following" him, explaining that it "happened all so fast" that "there was no conscious decision." Although still insisting that he did not intend to kill the victim, the defendant stated that he held the gun in "two hands to get a steady aim," and then admitted that he intentionally shot at the victim, twice, while the victim was climbing over the fence. At the court's direction, he complied with the prosecutor's request to "show the jury how [he] aimed the gun when [he] killed [the victim]."

In response to cross-examination questions designed to demonstrate that nothing prevented the defendant or Wayne from stopping chasing the victim or going back into their home, the defendant became indignant:

> "I'm not going to run away. I'm going to protect my house. That's my house, that's my grandmother, that's my baby brother. I'm not going to run away. I'm going to protect my house. I got the right as a man, as the man of the household, the oldest in the household, I'm going to sit in front of my house and no one is going to come near my house."

He also told the prosecutor that the driveway entrance was "directly across" from the front door to the Miranda home: "[I]f [the victim] would have came out of that driveway while we were walking in the house and started shooting," then the defendant, Wayne, and their grandmother all would have been "caught in the crossfire."[17] The defendant admitted lying to police and claimed he had hidden the gun in the basement of the Miranda home. He also acknowledged that he had not testified at Wayne's trial in 2008, and that he had several previous criminal convictions, including of cocaine distribution, witness intimidation and obstruction of justice, resisting arrest, and assault and battery of a police officer. Defense counsel objected during cross-examination more than ten times, but rested the defense immediately after the recess that followed

[17] Trial exhibits showing aerial photographs of the relevant block of the street demonstrate that the driveway entrance was not directly across the street from the front door of the Miranda home, but rather further north, more in line with the gated driveway along the north side of the Miranda home. The facade of the Miranda home faced east, with the front door located north of its midline. The front door is visible, however, in other photographs introduced at trial, which show the view looking west from about halfway down the driveway.

the defendant's cross-examination, without performing redirect examination or introducing any other evidence.

Discussion. 1. Omission of self-defense instruction. On appeal, the defendant contends that there was sufficient trial evidence to raise the question whether he was legally justified in using deadly force to protect himself or another person, and assigns prejudicial error to the judge's decision not to instruct the jury on self-defense.[18] We disagree.

To gauge the sufficiency of evidence to justify instructing the jury as to the Commonwealth's burden to prove that the defendant did not act in self-defense, we "consider the evidence, from any source, and resolve all reasonable inferences in favor of the defendant," Commonwealth v. Ortega, 480 Mass. 603, 610 (2018), without "balanc[ing] the testimony of the witnesses for each side" or "consider[ing] the credibility of the evidence," Commonwealth v. Santos, 454 Mass. 770, 773 (2009), including the defendant's own testimony, which we must presume to be true, no matter how incredible, Commonwealth v.

[18] We note the trial judge's initial unprompted inclination, immediately following the defendant's testimony, that a self-defense instruction would be "appropriate." This prompted protest from the prosecutor, and responsive argument from defense counsel in support of giving the instruction. Ultimately, after hearing closing argument and further researching the question, the judge ruled that he would not give the instruction. Defense counsel objected and made legal argument in support of the instruction.

Pike, 428 Mass. 393, 395 (1998), citing Commonwealth v. Vanderpool, 367 Mass. 743, 746 (1975). Under this standard, we consider whether there is any record evidence to support at least a reasonable doubt that the defendant (1) both actually and reasonably believed himself in imminent danger of death or serious bodily harm avoidable only by using deadly force; (2) sought to avoid confrontation with the victim by using all proper means and reasonably available avenues of escape prior to resorting to deadly force; and (3) used only that level of force reasonably necessary to prevent occurrence or reoccurrence of attack. See Commonwealth v. Harrington, 379 Mass. 446, 450 (1980); Model Jury Instructions on Homicide 24-25 (2018), and cases cited. None of these requirements is met in the instant case. In particular, we emphasize that the defendant had multiple opportunities to disengage before the shooting.

Here, all the record evidence, including the defendant's own testimony, indicates that when the victim "[took] off" across the street and away from the Miranda brothers, the defendant had no reasonable basis for concluding that the victim was armed. At the time the victim began to run, Wayne was the only person holding a gun, and according to the defendant's testimony, he took that gun from Wayne before entering the driveway. Thus armed, the defendant voluntarily pursued the fleeing victim, advancing down the entire length of the driveway

past a parked car and into the yard running perpendicular to the driveway. Along this way, he had at his disposal numerous proper means and reasonably available avenues of escape to avoid confrontation.[19] See Commonwealth v. Mercado, 456 Mass. 198, 209 (2010), citing Commonwealth v. Benoit, 452 Mass. 212, 226 (2008) ("privilege to use self-defense arises only in circumstances in which the defendant uses all proper means to avoid physical combat"); Commonwealth v. Bertrand, 385 Mass. 356, 362 (1982) (no basis for self-defense instruction where defendant's testimony indicated no attempt to avoid fight with victim). Indeed, the defendant testified that he had no intention of trying to "escape" or "run away." For these reasons, the judge properly denied a self-defense instruction. See, e.g., Commonwealth v. Espada, 450 Mass. 687, 693 (2008) (no self-defense instruction warranted where, over one hour after victim-initiated fight, defendant emerged from behind Dumpster and made armed approach toward victim's departing car, rather than

[19] "Whether a defendant used all reasonable means of escape before acting in self-defense is a factual question dependent on a variety of circumstances, including the relative physical capabilities of the combatants, the weapons used, the availability of maneuver room in, or means of escape from, the area, and the location of the assault. Before that question may go to the jury, however, there must be some evidence that the defendant attempted to retreat or that no reasonable means of escape was available." Commonwealth v. Pike, 428 Mass. 393, 399 (1998), citing Commonwealth v. Maguire, 375 Mass. 768, 772, (1978).

remaining safely hidden); Commonwealth v. Maguire, 375 Mass. 768, 769-772 (1978) (judge could have declined to instruct jury on self-defense where, instead of returning inside and locking door after threat from armed victim at his own doorstep, defendant and his brother disarmed victim, chased him downstairs, broke down his door, and assaulted him).

In reaching this conclusion, we recognize the defendant's conjecture that, immediately after threatening to kill Wayne, the victim ran down the driveway toward a potential "stash" that might contain a weapon. Nonetheless, the defendant's suggestion that the victim might have retrieved a weapon from inside the broken basement window, underneath the parked car, or somewhere else along the driveway was pure speculation. The victim's body was found on the other side of the fence without a weapon, and the police did not locate any weapon in proximity to his body, or anywhere else in the vicinity. There was, as the prosecutor correctly emphasized in closing, no evidence that the victim was armed.

Regardless, even if that speculation had some reasonable basis, the defendant had numerous opportunities to retreat and avoid the confrontation once the victim fled across the street.[20]

[20] The defendant faults trial counsel for failure to properly investigate his proposed defense. In the affidavit submitted with his motion for a new trial, he stated:

> "I requested that [trial counsel] file motions for police reports concerning shootings and weapons stashed in the neighborhood in the year or so before [the victim] was killed (including the shooting at my brother on [that street] by an unknown person two weeks before [the victim] was killed, to which the police responded). [Trial counsel] declined to do so. . . . I requested that [he] obtain and use [the victim]'s criminal record, which the court had ordered produced in May 2008 in response to [my prior counsel's] motion for criminal records. [Trial counsel] did not obtain and use [the victim]'s criminal record."

In his motion for a new trial, the defendant explains in detail how this evidence would have corroborated the reasonableness of his belief that the victim had a gun and posed a real threat to him.

In the affidavit defense counsel submitted along with his motion to withdraw, he reported "explaining to [the defendant] that chasing an unarmed man with a gun and firing two rounds at him, one which causes death, is not self-defense nor is there a legitimate basis for 'necessity.'" This is correct. The discovery that the defendant sought that defense counsel declined to pursue would not have changed this analysis:

> "[C]ounsel need not chase wild factual geese when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial . . . as a matter of fact and of the realities of proof, procedure, and trial tactics."

Commonwealth v. Tuitt, 393 Mass. 801, 805 n.2 (1985), quoting Cepulonis v. Ponte, 699 F.2d 573, 575 (1st Cir. 1983). Where defense counsel told the judge, "I've done my due diligence," and none of the evidence the defendant sought could have changed the fact that he never tried to retreat before resorting to use of deadly force, "[c]ounsel's decision to forgo further investigation of the defendant's [proposed theory] was an informed exercise of his prerogative to decide on the defense strategy." Commonwealth v. Kolenovic, 471 Mass. 664, 675 (2015), S.C., 478 Mass. 189 (2017). See Strickland v. Washington, 466 U.S. 668, 691 (1984) (limited extent of defense counsel's investigation of self-defense reasonable to extent based upon reasonable professional judgment).

Instead, the defendant armed himself with a gun and pursued the fleeing victim across the street, down the driveway, past a parked car, and into the back yard. Before the driveway's end, the victim made a left turn and ran north, across the yard, where he climbed the picket fence. All along this way, the defendant could have retreated and avoided shooting the victim.

Finally, even accepting the defendant's testimony that at the time he fired the gun, the victim was not "going away" but rather "coming back around," while apparently holding a "nickel-plated" "firearm," the law would not excuse the defendant's use of deadly force in self-defense at that point, where the defendant's own aggression and failure to retreat created that situation. The defendant and his brother should have disengaged from the confrontation long before that moment, and had numerous opportunities to do so. This combined failure to retreat and unnecessary escalation of conflict necessarily precludes a finding of self-defense.[21] See, e.g., Espada, 450 Mass. at 694 (self-defense instruction unwarranted where "defendant's own

[21] The defendant's reliance on Commonwealth v. Ortega, 480 Mass. 603 (2018), is misplaced. There, we announced that "[i]f a person is threatened with death or serious bodily injury by an aggressor armed with a firearm, in open space away from cover or safety, it would be unreasonable to impose a categorical rule that requires him or her to be shot in the back in a fruitless attempt to retreat." Id. at 611. Here, in contrast, the defendant was the armed aggressor, any belief that the victim had a gun was purely speculative, and the defendant had multiple opportunities to seek cover and safety.

evidence [demonstrated] . . . that he initiated the altercation and created the circumstances by which he alleges he could not retreat").

2. Constitutional claims. The defendant asserts violations of his State and Federal constitutional rights, including his right to testify in his own behalf, his right to the effective assistance of counsel, and his right to control his own defense. The defendant independently made two critical constitutional choices, as was his exclusive right. First, he chose to be represented by appointed counsel rather than represent himself, necessarily limiting the extent of his direct personal control over trial management decisions. Against the advice of counsel, he also chose to testify at trial, thereby waiving his privilege against self-incrimination and ultimately incriminating himself. The defendant was permitted to testify to his version of the facts as desired, albeit in uninterrupted narrative form, without direction from counsel. Although it was error to require that the defendant's testimony take narrative form without his attorney's express prior invocation of Mass. R. Prof. C. 3.3 (e), 426 Mass. 1383 (1998), see Commonwealth v. Mitchell, 438 Mass. 535, 546, cert. denied, 539 U.S. 907 (2003) (requiring defense counsel's good faith determination, "based on objective circumstances firmly rooted in fact," that defendant intends to perjure him- or herself, prior to invoking rule and

seeking court's guidance), we conclude that there was no substantial likelihood of a miscarriage of justice arising out of this error. Once the defendant insisted on testifying to an intentional killing where there was no viable self-defense claim, the form of the testimony was of no significance. In sum, the jury's verdicts were the ultimate consequence of the defendant's own informed choices, and there was no substantial likelihood of a miscarriage of justice arising out of the error regarding the form of his testimony.

a. Relevant procedural context. We begin with the necessary background that informs our discussion.

i. First motion to withdraw. At the defendant's request, his first counsel filed a motion to withdraw as the defendant's counsel on December 15, 2011, citing breakdown of the attorney-client relationship "with no reasonable chance of repair." At an in camera hearing, the defendant's first counsel described the defendant's case as "very, very defensible," given the neighbor's significant credibility problems, where she alone had identified the defendant as the shooter. The defendant objected to this counsel's proposed strategy, insisting he fired the gun in self-defense and would so testify, thereby corroborating the neighbor's most significant testimony and "undercut[ting]" the strategy his counsel, in exercise of his professional judgment, deemed best. Although the first counsel had helped the

defendant obtain some of the discovery materials he believed he needed for his defense, the defendant explained that his first counsel would not proceed to trial in the manner the defendant wanted the case to be tried. The defendant told the judge that he was already thirty-five, and "[a]t the end of the day, this is my life. This is if I go home."

A judge ultimately allowed the first counsel's motion to withdraw. The judge also expressly warned the defendant that should he encounter similar divergence with new counsel, any request for further replacement counsel was all but destined for denial, and that the defendant risked facing a finite choice between proceeding with his second counsel and representing himself. The defendant said he understood and immediately requested a new attorney. He received new appointed counsel, who ultimately tried his case.

ii. Second motion to withdraw. One and one-half years later, the defendant and trial counsel in this case also found themselves before the trial judge, in camera, on another motion to withdraw. [22] The defendant sought new counsel. He had filed a pro se motion for a 120-day continuance more than one month

[22] Although the relief requested in the motion was permission to withdraw or to take on the role of standby counsel, defense counsel expressly requested "guidance from this Honorable Court regarding a breakdown in communication that has occurred with the Defendant as to how to defend this matter."

earlier.[23] In that pro se motion, he contended that his defense could not be prepared adequately without first obtaining additional discovery.[24] Counsel told the judge that he had "a good relationship" with the defendant, but the defendant wished to proceed on a "suicidal" theory of defense "not based upon the

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[23] On April 24, 2013, the court mailed the defendant a copy of a docket entry referencing his motion, stating: "The Court does not act on motions where the defendant has counsel when the motion is filed pro se." During a subsequent final pretrial hearing in his case, the defendant asked to address the court directly; the judge replied that he should speak with his lawyer. After a brief private exchange with the defendant, defense counsel stated, "for the [c]ourt's record," that the defendant had provided him with certain additional motions, but counsel declined to file them, because they undercut the defense strategy counsel had decided to pursue at trial. As the hearing neared an end, the defendant asked counsel to make an oral motion to withdraw. After hearing from both parties, the court explained that, "[t]o the extent [counsel] has not made certain filings, counsel may do that because, in their view, it is simply not helpful to a strategy of the case or that they are frivolous." The court then denied the defendant's motion insofar as it constituted a request for new counsel, and advised the defendant that his counsel was "an extremely experienced and very good counsel" who had filed "thorough papers" on the defendant's behalf.

[24] The defendant reported that he had asked counsel to file motions "to introduce evidence of police reports of firearms found in hidden locations around the vicinity and police reports of shootings that happened in the vicinity a week prior and a shooting that had occurred at my residence." Counsel declined, and instead filed a motion in limine to introduce Wayne's gunshot residue test results "against my wishes not to." The defendant asserted that this was a denial of due process and effective assistance of counsel, and that this was why he had asked counsel to move to withdraw. With respect to the motions the defendant wanted filed, counsel explained: "They were all based on his theory of defense. . . . I was certainly not going to file those motions while having, at the same time, absolutely no anticipation of going down that path on his behalf."

facts of the case as [counsel knew] them to be," and lacked any legal foundation. During their last meeting, counsel had explained to the defendant why asserting self-defense or necessity defenses at trial was "unsound strategy," noting that he "certainly would not partake in any subornation of perjury." Counsel had formulated an evidence-based defense, and declined to pursue a legally inviable strategy "simply because [the defendant] chose to have that as his defense." In response, the defendant cited his long-standing, consistently communicated intent to testify that he shot the victim in self-defense, and told the judge that he could not accept a strategy that would "place the guilt" on Wayne, because the defendant "[knew] what really happened" and that Wayne did not shoot anyone.

The judge ultimately told the defendant that given the age of the case, the defendant's apparent history of losing confidence in "highly experienced, highly competent" defense counsel, and the one hundred jurors waiting to be empanelled, "[t]his case has got to be tried." When asked, the defendant told the judge, in no uncertain terms, that he did not want and was not prepared to try the case pro se, even with defense counsel serving as standby counsel.

The trial judge acknowledged the defendant's position, but told him that it would not change the effect of "an attorney coming before the Court and saying that they can't ethically

pursue that trial strategy even though they know that it's the preference of their client." Given that the defendant had expressly stated that he was not prepared to represent himself, and there was "no reasonable prospect" that different defense counsel would come to any different conclusions with respect to strategy or the wisdom of the defendant's intention to testify, the judge denied the motion. In terms of guidance for defense counsel, the judge stated: "until such time as [the defendant] testifies, at least on my current view of the evidence, . . . an aggressive pursuit of the strategy which you have . . . indicated that you wish to follow would not be inconsistent with what I understand to be [the defendant's] testimony."[25]

iii. Motion for a new trial. Following his convictions, the defendant, who was represented by new counsel, filed a motion for a new trial. His primary argument was that trial counsel had contradicted the defendant's testimony that he shot the victim in self-defense, depriving him of a meaningful opportunity to exercise his right to testify and constituting ineffective assistance. He asserted that this alleged injustice was exacerbated by the judge's failure to instruct the jury on the law of self-defense, which the defendant contended his

[25] Indeed, at a sidebar conference at trial, the defendant recognized that "trial counsel's cross-examination was excellent, but I still wish to exercise my right to testify."

testimony required.[26] A different judge (motion judge) was assigned to hear the motion, as the trial judge had retired by the time the motion was filed. Following a nonevidentiary hearing, the motion judge entered an order denying relief, based upon review of the record and the documentary evidence filed with the motion. Although counsel provided the court with the transcripts of the relevant in camera hearings and a conference between trial counsel and the defendant in a closed court room, trial counsel did not submit any affidavit, and was not called to testify at an evidentiary hearing.

Although the judge "accept[ed] the proposition that a defendant's right to testify can be 'effectively negated,' by his attorney's contradiction of the defendant's testimony," the judge disagreed with the defendant that counsel had done that in the defendant's case (citation omitted). First, the judge explained, "[t]he defendant had a full and unfettered opportunity to tell the jury everything he wanted to tell them," and although counsel had not filed the defendant's discovery motions, an attorney's "failure to introduce [additional]

[26] The defendant also argued that his attorney provided ineffective assistance by failing to move for a continuance or a change of venue due to the then-recent Boston Marathon bombing and by failing to challenge the racial makeup of the jury venire. These issues are without merit and were not raised on appeal.

evidence corroborating a defendant's testimony is not the same as an attorney's contradiction of that testimony."

Next, the judge found that the defendant had not been "abandoned" by counsel during his testimony, where the defense associate helped introduce him to the jury, asked him to tell his story, and ensured that he had nothing else to add. According to the motion judge, the narrative form of testimony "promote[d]" the defendant's right to testify and adequately protected his right to present his own version of events. "The defendant's decision to assert that he, and not his brother, shot and killed [the victim] in self-defense" was a fair exercise of "Sixth Amendment-secured autonomy," but was ultimately "a poor choice," since it did not support a self-defense instruction, just as counsel had warned him it would not.

The motion judge stated that counsel is not permitted to argue a defense that is not supported by the evidence, and found that "arguing in the alternative is an appropriate way for defense counsel to handle the difficult situation that rises when a client seeks to pursue a defense that counsel knows is unwise." Counsel never "encouraged the jury to reject [the defendant]'s testimony" in closing. Instead, "[o]nce the defendant testified that he, and not his brother, shot and killed [the victim], [defense counsel] made the best of a

difficult situation by properly arguing in the alternative that if the jury believed the defendant, they could not find premeditation and if they disbelieved him, the remaining evidence was insufficient to convict." Defense counsel also raised the possibility that the defendant's testimony was motivated by his love for his brother. The alternative arguments were "based on the evidence and the law," and neither directly contradicted the defendant's testimony nor "violate[d] the defendant's right to testify." As explained infra, despite one legal error related to the form of the defendant's testimony, the motion judge properly denied the defendant's motion for a new trial.

b. Allocation of authority between counsel and defendant. The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights each provide criminal defendants with a "right to choose between pleading through a lawyer and representing oneself."[27] Faretta v. California, 422 U.S. 806, 828 (1975). See Commonwealth v. Tuitt, 393 Mass. 801, 807 (1985); S.J.C. Rule 3:10, § 3, as

[27] In Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 234 (2004), this court held that "art. 12 provides a defendant with at least the same safeguards as the Sixth Amendment" in terms of the accused's right to counsel. "It is a right upon which the essential element of fairness in the administration of justice depends." Guerin v. Commonwealth, 339 Mass. 731, 734 (1959).

appearing in 475 Mass. 1301 (2016). By choosing to proceed with counsel, the defendant chose to "protect [himself] from conviction resulting from his own ignorance of his legal and constitutional rights," Johnson v. Zerbst, 304 U.S. 458, 465 (1938), and necessarily placed certain limitations on his right to control his defense. See McKaskle v. Wiggins, 465 U.S. 168, 174, 183 (1984) (only defendant proceeding pro se is guaranteed right actually and personally to "control the organization and content of his own defense"). Those limitations, as explained infra, empowered defense counsel to determine trial management strategy and tactics, including whether a legal argument was viable and ethical to pursue. At the same time, the defendant always retained exclusive authority to make "certain fundamental decisions" regarding his own defense, including whether to insist on his innocence or accept responsibility for a lesser offense, and whether to testify on his own behalf. Jones v. Barnes, 463 U.S. 745, 751 (1983) (recognizing defendant as "ultimate authority" on "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"). See McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) (recognizing defendant's prerogative to determine that objective of his defense is asserting innocence).

As the United States Supreme Court recently explained in McCoy, 138 S. Ct. at 1508:

> "The choice [between representation by counsel and self-representation] is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in grant[ing] to the accused personally the right to make his defense, speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant" (quotations and citation omitted).

In delineating the respective rights of the defendant and responsibilities of counsel, the Court juxtaposed (i) the handful of fundamental decisions always reserved to the defendant, "notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal," with (ii) "the lawyer's province" of trial management: "Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence" (quotation and citation omitted). Id. See Gonzalez v. United States, 553 U.S. 242, 249 (2008) (elaborating why "[g]iving the attorney control of trial management matters is a practical necessity"); New York v. Hill, 528 U.S. 110, 114-115 (2000), quoting Taylor v. Illinois, 484 U.S. 400, 417-418 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has -- and must have -- full authority to manage the conduct of the trial"); Faretta, 422 U.S. at 820 ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the

power to make binding decisions of trial strategy in many areas"). See also Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015) (mandating that defense counsel "shall abide by" certain fundamental decisions belonging to client).

This division of authority is not always clear,[28] particularly when the views of defense counsel and the client diverge. In drawing the line between decisions reserved for the defendant and those left to counsel, the Court has emphasized that "[a]utonomy to decide that the objective of the defense is to assert innocence belongs" to the defendant. McCoy, 138 S. Ct. at 1508.

> "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence [at trial]. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are."

Id. Once the client identifies the objective of the defense as asserting innocence, however, deciding which strategy and tactics to deploy in achieving that objective remains a task

[28] The Supreme Court has not established any precise test to determine whether a particular decision is "tactical" as opposed to "fundamental" in this respect. At least one vocal critic has characterized this "tactical-fundamental dichotomy" as a "vague" and inadequate approach to establishing "reasonable limits upon the right of agency in criminal trials." Gonzalez v. United States, 553 U.S. 242, 256-258 (2008) (Scalia, J., concurring in judgment).

properly reserved to counsel -- at least where those decisions require knowledge of the law or compliance with professional ethical requirements.

Further complicating this question of the extent and nature of a represented defendant's retained decision-making authority is the defendant's absolute right to testify. Deciding between exercise or waiver of this right is one of those settled choices reserved for the defendant, personally. Still, "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." Brooks v. Tennessee, 406 U.S. 605, 612 (1972). In making strategic and tactical choices about how best to achieve the defendant's objective of maintaining innocence, then, defense counsel must therefore respect and account for the defendant's right and desire to participate in his own defense by testifying.[29] As a matter of professional judgment, defense counsel may strongly advise the defendant not to testify, but the ultimate decision between remaining silent (requiring the prosecution to prove its case

[29] "That is not to say that the defendant can mandate, through his desire to testify, that his attorneys adopt specific trial strategies. Nor do we mean that counsel's actions cannot be in tension with the substance of the defendant's desired testimony: it is permissible for an attorney to adopt trial strategies that effectively argue in the alternative to the thrust of the defendant's testimony. Rather, defense counsel cannot, through their trial actions, reduce their client's constitutional right [to testify] to a nullity." People v. Bergerud, 223 P.3d 686, 702 (Col. 2010).

based upon independent evidence) and telling his story in his own voice (opening himself to cross-examination and the introduction of prior convictions) belongs to the defendant. As "[o]ften, the decision is made only as the trial unfolds," Commonwealth v. Waters, 399 Mass. 708, 716, S.C., 400 Mass. 1106 (1987), after the defense has the full "opportunity to evaluate the actual worth of [its] evidence," Brooks, 406 U.S. at 612, defense counsel's task in planning strategy is made even more difficult. This requires a certain amount of flexibility on the part of counsel to address multiple contingencies.

In McCoy, the Court held that defense counsel improperly intruded on rights reserved personally to the defendant, when, during the guilt phase of the defendant's capital murder trial, over "intransigent and unambiguous [client] objection," counsel admitted that the defendant was the killer, anticipating improved odds that a sentencing-phase plea "urg[ing] mercy in view of [his client]'s serious mental and emotional issues" would succeed. McCoy, 138 S. Ct. at 1507, 1512. Despite counsel's opening statement conceding the defendant's guilt, and against counsel's advice, the defendant testified in his own behalf during the trial's guilt phase, "maintaining his innocence and pressing an alibi difficult to fathom."[30] Id. at

[30] Although the alibi was highly implausible, defense counsel had no doubt that the defendant sincerely believed it,

1507. The Louisiana Supreme Court had upheld the jury's three death verdicts based on counsel's reasonable belief that admitting guilt provided his client the best chance at avoiding a death sentence. The United States Supreme Court granted certiorari to resolve "a division of opinion among state courts of last resort" concerning defense counsel's ability to concede guilt over the defendant's objection,[31] and reversed on the ground that defense counsel's concession of guilt had interfered with his client's right to insist on his innocence. Id. at 1507, 1512.

In the instant case, unlike in McCoy, or certain of the State court cases cited therein, defense counsel and the defendant shared the same principal objective: outright

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such that professional ethics rules regarding client perjury were not implicated. See McCoy, 138 S. Ct. at 1510. After the defendant's testimony, during the guilt-phase closing argument, counsel "reiterated that [the defendant] was the killer." Id. at 1507.

[31] For comparison, the Court cited two State supreme court decisions ordering new trials in cases where a defense counsel advanced a guilt-based "defense" over his or her client's protestations of innocence. McCoy, 138 S. Ct. at 1507, citing Cooke v. State, 977 A.2d 803, 842-846 (Del. 2009), cert. denied, 559 U.S. 962 (2010), and State v. Carter, 270 Kan. 426, 440 (2000). Additionally, the Court cited a 2010 decision of the Colorado Supreme Court remanding for further fact finding where, upon denial of a request for appointment of new counsel, the indigent defendant reluctantly had opted to proceed pro se, on a self-defense theory, rather than proceed to trial represented by counsel who planned to advance a mental impairment defense over the defendant's express objection. Id. at 1510, citing People v. Bergerud, 223 P.3d 686, 690-691 (Col. 2010).

acquittal. They differed as to what strategic and tactical approach should be used to achieve that end. Trial counsel, and the defendant's first counsel, each correctly concluded that the defendant had a viable defense: that the Commonwealth's evidence left reasonable doubt whether the defendant was the shooter, where the neighbor's testimony could be significantly undermined through cross-examination, and the first reporter and his friend, who could not see past the driveway entrance, described Wayne's "angry" demeanor prior to and during his pursuit of the unarmed victim, gun in hand, and the defendant saying "no, no, no" and trying to push Wayne back toward the house.

At the in camera hearing, the defendant objected to this strategy, which he characterized as "blam[ing] it all on [his brother]," whom he wanted to protect and defend.[32] Instead, the

[32] As defense counsel recognized, and the defendant himself acknowledged during the in camera hearing, Wayne already had been convicted of murder in the second degree and was serving a life sentence. Furthermore, the defendant had not testified at Wayne's trial that he was the shooter, nor was it in anyway evident how such testimony could benefit Wayne, particularly given this court's decision upholding the jury's general guilty verdict in Wayne's case, upon finding sufficient evidence to convict him as either a principal or joint venturer. See Commonwealth v. Miranda, 458 Mass. 100, 113-114 (2010), cert. denied, 565 U.S. 1013 (2011), S.C., 474 Mass. 1008 (2016) ("[I]t [did] not matter [which brother] shot the victim" where sufficient evidence supported conclusion that defendant knowingly participated in shooting with requisite intent for murder in second degree, either as principal or joint venturer).

defendant wanted to pursue a self-defense strategy in which he would testify to being the shooter. However, the defendant and defense counsel differed on whether there was a viable self-defense claim. As explained supra, defense counsel was clearly correct; no such claim existed, because the defendant had numerous opportunities to retreat, but chose not to. Analysis of the law as applied to the facts of a defendant's case is the clear responsibility of counsel, not the defendant.[33]

We discern no constitutional error in counsel's decision to decline to build the defense on a meritless legal argument, particularly in light of his apparent concerns about the possibility of perjury, discussed infra. The Supreme Court has never required that such arguments be made or pursued. "[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the

[33] The defendant had clearly performed his own, incorrect analysis of the self-defense doctrine, especially as it applies to defense of the home. See, e.g., Commonwealth v. McKinnon, 446 Mass. 263, 267-268 (2006) (open porch and outside stairs of defendant's home, where defendant stabbed and struck victim with baseball bat, held not to constitute "dwelling" within meaning of statutory "castle law" defense, G. L. c. 278, § 8A); Commonwealth v. Carlino, 429 Mass. 692, 697 (1999), S.C., 449 Mass. 71 (2007) ("so-called 'castle' law, which relieves a defendant from the duty to retreat when attacked in his or her own home," not applicable where fatal encounter occurred in defendant's driveway).

interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 656 n.19 (1984).

Here, defense counsel did not concede the defendant's guilt over objection or alleviate the prosecution's burden of proof on any elements of the charges: counsel's strategy was to create reasonable doubt regarding the defendant's guilt, by undermining the prosecution's limited evidence that the defendant, and not his brother, was the shooter.[34] This strategy had a real possibility of success, as recognized by two capable and experienced defense counsel. It also avoided any need for the defendant's own testimony, which trial counsel correctly understood would result in conviction, as there was no viable self-defense claim. This also allowed counsel to steer well clear of introducing testimony from his client that raised concerns about possible perjury, thereby fully complying with his own professional responsibilities.[35] It also left the door

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[34] The defendant indicates concern that counsel's strategy did not address the Commonwealth's joint venture theory -- that if Wayne was the shooter, the defendant still could have shared the requisite intent for murder. Before he testified, however, the defendant was in a different position from that of his brother. Witnesses had testified to him saying "no" and trying to restrain his brother. His identity as the shooter, as well as his shared intent to kill, were based on the testimony of the neighbor, who saw the brothers converge in the driveway and exchange words prior to the shooting.

[35] Rule 3.1 of the Massachusetts Rules of Professional Conduct, as appearing in 471 Mass. 1414 (2015), provides: "A lawyer shall not . . . assert or controvert an issue . . .

open to the defendant's testimony, if he chose to exercise his right to testify, contrary to counsel's advice. We address that testimony infra.

We recognize that once the defendant ignored counsel's advice and testified, the viable defense strategy that counsel had developed was significantly undermined. This was, however, a problem of the defendant's own making. Although, in developing a strategy to achieve his client's objective of maintaining his innocence, counsel was required to consider the defendant's persistent insistence that he would testify, we cannot, with one exception, discussed infra, fault counsel's step-by-step approach here.[36] The defendant had the right to insist on his innocence and could represent himself any way he saw fit, but he could not insist that counsel base the defense

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unless there is a basis in law and fact for doing so that is not frivolous . . . . A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established."

[36] First, counsel offered to withdraw, and allow the defendant to proceed pro se, with or without his assistance as "stand-by counsel." Then, once the defendant rejected that offer, and the trial judge denied the motion to withdraw, counsel attacked the Commonwealth's case based upon the neighbor's doubtful credibility. Throughout this time, defense counsel continued to advise the defendant that testifying was against the defendant's best interest, but emphasized that the final decision was his. And ultimately, when the defendant rejected defense counsel's good advice, counsel responded to the defendant's testimony with a closing argument encompassing alternatives. This step-by-step approach was sensible and not ineffective.

on a self-defense argument that was not viable and raised concerns about possible perjured testimony.

In order "to make the adversarial testing process work in the particular case," Strickland v. Washington, 466 U.S. 668, 690 (1984), defense counsel must be allowed adequate leeway to exercise professional judgement. "Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point." United States v. Burke, 257 F.3d 1321, 1323 (11th Cir. 2001). Rather, defense counsel is "an officer of the court and a professional advocate pursuing a result . . . within the confines of the law." Id. This requires the "exercise [of] . . . professional judgment to decide tactics." Id. During the in camera hearing, the trial judge explained this to the defendant succinctly:

> "Attorneys aren't mouthpieces. . . . [A]ttorneys are professionals who are trained in the dynamic of the criminal courtroom and are bound by the [rules] of professional responsibility and to, you know, do their best for their clients but within the limits of plausible testimony."

Importantly, the judge also offered the defendant the opportunity to present his own defense, which would have allowed him to pursue his self-defense theory without limitation. He expressly declined that opportunity, however, because he

believed it would "be detrimental to [his] case."[37] In sum, the rights of the defendant to insist on his innocence, and the responsibilities of counsel to establish a trial strategy and tactics to achieve that objective were properly recognized and respected in the instant case.

c. The defendant's right to testify and be fully heard in his defense. As was his right, and contrary to the advice of counsel, the defendant chose to testify. The right of an accused to testify in a criminal case is one of those "certain decisions regarding the exercise or waiver of basic trial rights . . . of such moment that they cannot be made for the defendant by a surrogate." Florida v. Nixon, 543 U.S. 175, 187 (2004). The defendant always retains the ultimate authority to decide whether to testify, regardless of whether he has elected representation by counsel. See Harris v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so"); Opinion of the Justices, 300 Mass. 620, 625 (1938) ("It rests wholly upon the volition of the defendant whether he shall fail to interpose

[37] The defendant stated that he did not have the experience to appear pro se before the jury and would not understand the proceedings and rules to follow. "I can't say that I am prepared to go pro se and have standby counsel because it will be detrimental to my case." Instead, he requested another attorney, who would file the discovery motions he believed were necessary for his defense, and another year to prepare.

[the 'positive and unequivocal' art. 12 'shield' against self-incrimination], or not"). See also Mass. R. Prof. C. 1.2 (a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify"); Commonwealth v. Jenkins, 458 Mass. 791, 803 (2011) ("The decision whether to testify is an important strategic one to be made by the defendant in consultation with his attorney").

The defendant's decision followed a personal colloquy with the judge,[38] and the defendant does not dispute on appeal that he understood the risks of testifying to his version of the facts. Neither the judge nor counsel placed any limitation on the substance of the defendant's testimony, and he was provided the opportunity to present his version of events to the jury.[39] The challenge on appeal concerns whether (i) the limitation imposed on the form of testimony, and (ii) the content of counsel's closing argument so undermined the defendant's testimony as functionally to negate his exercise of the right. See, e.g.,

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[38] Notably, the trial judge did not include any information in his colloquy with respect to the risks of testifying in narrative form. This risk also should have been explained to the defendant, either by counsel or the judge. See Commonwealth v. Leiva, 484 Mass. , (2020).

[39] As the motion judge highlighted, once the defendant had finished his narrative testimony, defense counsel's associate asked him: "Anything else?" The defendant replied, "No, that's it."

Commonwealth v. Salazar, 481 Mass. 105, 115 n.7 (2018) ("should the defendant decide to testify to his or her side of the story, respect for the defendant's personal autonomy requires that the defendant's own attorney not undermine that decision").

i. Narrative testimony. The trial judge granted defense counsel's request to have the defendant testify in narrative form, rather than in the form of responding to directed questioning. Although the defendant appears to have been present at sidebar at the time of this request, he voiced no objection. This all transpired after the judge's direct colloquy with the defendant concerning his decision to testify, and the defendant's confirmation of his decision. The record does not reflect whether defense counsel previously discussed the arrangement with his client, or warned him about what its effect might be upon the jury. Nor does it demonstrate that counsel prepared the defendant to testify, although counsel clearly explained the law of self-defense and the dangers of testifying given the law of self-defense.[40]

We have allowed defense counsel's request to have a defendant testify in narrative form in the circumstances governed by Mass. R. Prof. C. 3.3 (e), as appearing in 471 Mass. 1416 (2015), and associated decisions of this court. See

[40] At sidebar defense counsel stated that he did not know exactly what the defendant would say on the stand.

Commonwealth v. Leiva, 484 Mass. , (2020); Mitchell, 438 Mass. at 547-549. That rule, entitled "Candor Toward the Tribunal," sets forth the professional expectations of "defense counsel who knows that the defendant, the client, intends to testify falsely."[41] Mass. R. Prof. C. 3.3 (e). Seventeen years ago, in Mitchell, this court held that a defense counsel's own determination that counsel "knows" the defendant intends to perjure himself must be made "in good faith based on objective circumstances firmly rooted in fact." Mitchell, supra at 546. Although counsel is not permitted to "ignore an obvious

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[41] In pertinent part, the text of that rule states:

> "In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. . . . If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals."

Mass. R. Prof. C. 3.3 (e).

falsehood," the standard is a high one, requiring counsel to "resolve doubts about the veracity of testimony or other evidence in favor of the client."[42] Mass. R. Prof. C. 3.3 comment 8. In Leiva, which is issued along with our opinion here, we reiterate and reaffirm these requirements. It is only after making this determination, and failing counsel's best efforts to dissuade the defendant from testifying falsely, that counsel may formally invoke rule 3.3 (e) in the defendant's presence at sidebar. After appropriate inquiry, see Leiva, supra at ; Mitchell, supra, the court must then decide how the trial should proceed, which may include allowing the defendant to testify in narrative form.

Although defense counsel here alluded to concerns about possible perjury, he did not satisfy the necessary prerequisites to invoke rule 3.3 (e) as we initially set forth in Mitchell and later affirmed and expanded in Leiva. Counsel did not make the formal invocation of rule 3.3 (e), indicative of his having made

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[42] "Conjecture or speculation that the defendant intends to testify falsely are not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in counsel's mind that the defendant is equivocating and is not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient. Counsel can rely on facts made known to him and is under no duty to conduct an independent investigation." Mitchell, 438 Mass. at 552.

a good faith determination, based upon circumstances firmly rooted in fact, that the defendant intended to bear false witness. Rather, counsel equivocated: "[B]ecause of what I could anticipate the testimony being to an extent, I'm . . . a little uneasy, as to directly questioning [the defendant] . . . . [C]learly, I wasn't there at the time, so I can't obviously, nor would I ever, vouch for the credibility of any witness." In the absence of defense counsel's good faith determination that there was a firm basis in fact to conclude his client was about to perjure himself,[43] counsel and the court should not have restricted the form of the defendant's testimony to an undirected narrative.

Where, as here, circumstances do not support defense counsel's invocation of rule 3.3 (e), the defendant remains entitled to the "guiding hand of counsel at every step in the proceedings against him," including his own critical testimony.

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[43] The defendant stated several times, on the record, that he was going to tell the truth. Given that the defendant's determination to pursue a self-defense strategy based upon his personal testimony dates to before trial counsel's appointment, it is unlikely that the defendant changed his story during the course of the representation. Without an affidavit from counsel, there is no way to know what circumstances caused him to become "uneasy." We do note, however, that following the in camera hearing on the motion to withdraw, defense counsel had the opportunity to create a private record, in a closed court room, with only the defendant and necessary court security personnel present (along with the court reporter). That record is uninformative and certainly does not satisfy the requirements of our rule 3.3 (e) doctrine.

Powell v. Alabama, 287 U.S. 45, 69 (1932). Here, defense counsel should have prepared the defendant to testify. On that basis, defense counsel then should have directed the defendant's trial testimony, deploying professional judgment, skill, and legal knowledge to assist the defendant in presenting his version of events to the jury. It was error not to do so.

That being said, once the defendant insisted that he actually testify, admitted he was the shooter as he wanted to do, and explained that he fired the shots intentionally after following the victim into the back yard, there was little that any defense counsel could have done to mitigate the resulting damage. It was the substance of the testimony the defendant insisted on conveying, and not the form of the testimony, that undermined the defendant's opportunity for acquittal. As explained in detail supra, self-defense simply was not a legal defense available to this defendant, even accepting his testimony as true. The key decision here was whether or not to testify. Defense counsel effectively advised the defendant that it was against the defendant's best interest to do so, but appropriately deferred to the defendant's ultimate decision to the contrary. Counsel's mistake was in not directing that testimony to the best of his ability, even when the client had eschewed his advice.

We have yet to consider the appropriate standard of review for a violation of rule 3.3 (e). As we have explained supra, the defendant's right to determine the over-all objective of his defense -- outright acquittal -- was not violated in this case. See McCoy, 138 S. Ct. at 1508. He also was not prevented from testifying, as he did so. Id. Either of these violations would have constituted structural error, requiring reversal, but neither occurred here.[44]

Moreover, neither the court nor defense counsel forced the defendant to choose between exercising the right to testify and the right to continued representation by counsel. Compare United States v. Midgett, 342 F.3d 321, 323 (4th Cir. 2003), where the trial judge required the defendant to make "the choice of either acceding to defense counsel's refusal to put him on the stand or representing himself without further assistance of counsel," and Brown v. Commonwealth, 226 S.W.3d 74, 78, 86 (Ky. 2007), wherein defense counsel "shook hands with the prosecutors and left the courtroom," thereby "completely abandon[ing] defendant during his narrative statement, cross-examination and

[44] There is a difference between preventing the defendant from testifying and placing limitations or restrictions on that testimony. The rules of evidence, and rules such as Mass. R. Prof. C. 3.3 (e), impose limitations or restrictions. They do not deprive the defendant of the right to testify.

closing argument in the guilt phase of the trial."[45] Here, defense counsel continued to represent the defendant throughout the trial, provided the defendant with careful advice regarding the decision to testify, and ultimately deferred to the defendant's desire to testify, although contrary to that advice. More specifically, counsel correctly explained the law of self-defense to the defendant and advised him not to testify, astutely counselling that his testimony would result in his conviction and not his objective, which was acquittal. Defense counsel also had concerns about suborning perjury, which clearly influenced his decision to request narrative and not directed testimony, but he did not make the necessary representations required under our rule 3.3 (e) jurisprudence. Thus, when the defendant rejected defense counsel's good advice, counsel either should have determined what the defendant wanted to tell the jury and then guided the defendant's testimony through direct examination, or made the necessary representations required by our rule 3.3 (e) doctrine. The question presented is what standard of review applies to this type of error by counsel.

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[45] More commonly, a defendant faced with such a choice instead elects to proceed with counsel, and courts have reversed based upon the unfair total deprivation of the opportunity to exercise the right to testify. See generally Midgett, 342 F.3d at 325; United States v. Scott, 909 F.2d 488, 493-494 (11th Cir. 1990); United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120-121 (3d Cir. 1977).

We conclude that this type of error by counsel is not structural. Rather, it is properly analyzed as an issue of ineffective assistance of counsel.[46] Mitchell, 438 Mass. at 546 n.6 ("With respect to appellate review, we examine the defendant's constitutional claims [relating to rule 3.3 (e) violations] on effective assistance of counsel under G. L. c 278, § 33E, which is more favorable to a defendant than

[46] To establish a violation of the Sixth Amendment right to counsel, a defendant must show both (1) that considering all the circumstances, counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficiency prejudiced the defense to the point of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-688, 694. Unless the defendant can demonstrate "how specific errors of counsel undermined the reliability of the finding of guilt," there is generally no basis to find a Sixth Amendment violation. Cronic, 466 U.S. at 659 n.26. Our own test applicable to assess ineffective assistance of counsel, established nearly a decade before the Strickland standard, requires a defendant to show that (1) there has been "serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer"; and (2) counsel's poor performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "[A] defense is 'substantial' for Saferian purposes where [the court has] a serious doubt whether the jury verdict would have been the same had the defense been presented." Commonwealth v. Millien, 474 Mass. 417, 432 (2016). An informed strategic decision amounts to ineffective assistance "only if it was manifestly unreasonable when made." Commonwealth v. Martin, 427 Mass. 816, 822 (1998). We have further explained that "the prejudice standard under the Massachusetts Constitution 'is at least as favorable to a defendant as is the Federal standard.'" Millien, supra at 431, quoting Commonwealth v. Curtis, 417 Mass. 619, 624 n.4 (1994).

are the Federal or State constitutional standards"). Cf. McCoy, 138 S. Ct. at 1510-1511 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence"). Thus, "[w]here the claim of ineffective assistance is raised in a motion for a new trial that has been denied, and where the appeal from the denial of that motion is raised in conjunction with a direct appeal under G. L. c. 278, § 33E, [we employ the substantial likelihood of a miscarriage of justice standard and] review to determine whether any conduct or omission by counsel 'was likely to have influenced the jury's conclusion.'" Commonwealth v. Morales, 453 Mass. 40, 44 (2009), quoting Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). We conclude that there is no such likelihood in the instant case. The problem here was not the narrative form of the testimony, but the testimony itself. As he had no viable self-defense claim, regardless of whether the testimony was presented in narrative or directed form, there was no likelihood that counsel's error prejudiced the defendant.[47]

[47] Indeed, the error here would satisfy the higher standard of harmless beyond a reasonable doubt. In the absence of any viable self-defense claim, the defendant's armed pursuit of the victim through the alley and around the corner, conclusively established by the defendant's own testimony, compelled the verdict in the instant case. Directed, or undirected, the result would have been the same beyond a reasonable doubt.

ii. Defense counsel's summation. During his closing argument, defense counsel emphasized to the jury that they were the arbiters of witness credibility. "[Y]ou can credit all of what they said, you can credit none of what they said, that's up to you." The Commonwealth had not even pursued charges against the defendant for years after the shooting, he argued, until the neighbor, "who couldn't be bothered for those years . . . because there was nothing at stake," decided to come forward as a cooperating witness: when she was caught trafficking cocaine, had lost her suppression motion, and faced nearly certain incarceration. She was essentially a "paid witness," he continued, given that the Commonwealth had expended more than $14,000 to her benefit to relocate her under the terms of the plea deal. Defense counsel pointed out that the other percipient witnesses, who had come forward right away, reported seeing Wayne enter the driveway behind the victim with the gun in his hand, and then, after the gunfire, seeing Wayne hand the gun to the defendant upon their emergence from the driveway: these reports led to Wayne's arrest. It was only two years after the shooting, counsel stressed, when the neighbor experienced an "epiphany" to come forward and "to say what she saw so she wouldn't have to go to prison," that charges were brought against the defendant.

Defense counsel then addressed the defendant's testimony: "[Y]ou can credit everything [the defendant] said. You can do that. Take it at face value, that's what he did, that's what happened." Counsel further stated that, if that was what the jury were going to do, they should carefully weigh the evidence suggesting that this was not a premeditated murder; it all happened fast, the defendant was angry, he did not have time to think -- he just acted. In the alternative, counsel continued,

> "[Y]ou also have the option of not crediting [the defendant] at all. That's up to you. . . . Maybe [you think] he's doing that . . . to protect Wayne, his baby brother. [The prosecutor] asked [the defendant] himself, 'You loved your brother?' Answer: 'Yeah, I love him, he's my baby brother.' . . . [M]aybe you think this guy is just out there protecting his brother."

Counsel did not mention the defendant's testimony that he fired in self-defense because he thought he saw the victim with a gun, or the defendant's repeated testimony that it was not his intent to kill the victim. Defense counsel placed final emphasis on the enormity of the burden of proof beyond a reasonable doubt, and urged the jury to weigh the evidence, "piece by piece, witness by witness, and come to a conclusion."

The defendant contends that this closing violated his right to testify, because it suggested that his own counsel did not credit his story, and effectively negated the version of events he related on the witness stand -- that he had acted in self-

defense, and never intended to kill the victim. Defense counsel's closing was more subtle. As a skilled defense lawyer, he knew the defendant's claim of self-defense was not viable. He had also not forsaken or contradicted his client, even going so far as to advocate for a self-defense instruction, which the judge correctly rejected. At the same time, counsel had to make the best argument he could on the defendant's behalf given the defendant's own testimony describing an intentional shooting. Defense counsel did so by relying on reasonable doubt; the credibility problems of the primary witness against the defendant (besides himself); the suggestion that the defendant might just be trying to protect his younger brother; and finally, the lack of premeditation if the jury did credit the defendant's testimony that he shot the victim.

This is not a case where counsel failed to put the Commonwealth to its proof by conceding guilt, or even admitting some element of the charges, over the objection of a defendant claiming factual innocence. See, e.g., McCoy, 138 S. Ct. at 1509 (vacating death penalty verdict where attorney argued jury should find defendant guilty but mentally ill over objection of defendant whose testimony asserted factual innocence); Commonwealth v. Triplett, 398 Mass. 561, 569 (1986) (entirely and affirmatively abandoning insanity defense in closing by conceding defendant had capacity for premeditation, also

undermining remaining defense theory); Cooke v. State, 977 A.2d 803, 843-844 (Del. 2009), cert. denied, 559 U.S. 962 (2010) (fundamental right to testify effectively negated by objective of defense counsel to have jury find defendant guilty but mentally ill). Rather, as the motion judge properly concluded, defense counsel made the best arguments he could under the circumstances when confronted with the defendant's admission of an intentional shooting and the absence of a viable claim of self-defense. He made proper argument in the alternative, providing the jury a path to an acquittal if the jury decided to believe that the defendant's testimony was designed to protect his younger brother, or to a verdict of less than murder in the first degree if the jury credited the defendant's testimony. Contrast Triplett, supra (urging jury to credit testimony of defendant's mother "a hundred percent," and implicitly to reject defendant's wholly contrary story, not only undermined plausibility of defendant's self-defense narrative, but also eroded counsel's own voluntary manslaughter strategy); People v. Bergerud, 223 P.3d 686, 706 (Col. 2010) (remanding for further fact finding as to possible counsel threats to "completely contradict [defendant's] testimony were he to offer it, or . . . otherwise persist in wholly undermining the believability of his testimony"). In so doing, defense counsel did the best he could to secure the defendant's acquittal, and avoid his conviction of

murder in the first degree, while respecting the defendant's right to testify as he so desired.

3. Grand jury. The defendant filed a pretrial motion to dismiss the indictments in November 2009, contending that the Commonwealth's deliberately misleading presentation of evidence impaired the integrity of the grand jury proceedings. Specifically, he alleged that the prosecutor (i) intentionally deemphasized some and omitted other material evidence that would have greatly undermined the credibility of the Commonwealth's key witness, and (ii) chose to incorporate segments of a video-recorded witness interview containing irrelevant and unfairly prejudicial statements. Following a January 2010 evidentiary hearing and subsequent supplemental briefing, a judge entered an order and memorandum denying the motion. The judge reasoned that the Commonwealth had satisfied its disclosure obligations by eliciting the essential circumstances of the neighbor's cooperating testimony, and that while certain statements "of dubious relevance . . . should have been excised" from the challenged recording, none was so prejudicial that the grand jury probably would not otherwise have indicted the defendant.

The judge did not err in denying the defendant's motion to dismiss. The grand jury heard sufficient evidence to understand the crux of the issue bearing on the neighbor's credibility -- that she faced pending drug charges and had offered her truthful

testimony in exchange for avoiding jail time. This was enough to allow a meaningful opportunity for the grand jury to consider the neighbor's status as a cooperating witness when weighing her credibility.

While it was error to play portions of the video recording of the first reporter's interview with police wherein he expressed concern for his safety and fear of retaliation by the Mirandas, as well as his desire to see the killer brought to justice, we agree with the motion judge's conclusion that, although these irrelevant statements should have been redacted, they were not so inflammatory as to impair the integrity of the grand jury proceeding. Witnesses in murder cases often fear retaliation and aspire to see a killer brought to justice. We are confident that the grand jury would have indicted the defendant notwithstanding the impropriety here.

4. Motion to suppress statements. The defendant challenges the admission of certain statements he made to officers at the New Bedford police station without the benefit of prior Miranda warnings. He contends that his pretrial motion to suppress these statements should have been allowed.[48] We

[48] The hearing also concerned defense challenges to the results of a skin test for gunshot residue, which the defendant submitted to while at the police station on the night of the shooting. The challenges on appeal do not extend to this additional evidence, which was, in any event, properly admitted.

disagree. The determination by the judge who heard the motion to suppress that the defendant made the challenged statements voluntarily and under noncustodial circumstances is supported by the judge's subsidiary findings and a correct interpretation of the applicable law.

When reviewing the denial of a motion to suppress, we defer to the judge's determination of "the weight and credibility to be given oral testimony presented at the motion hearing," and accept the judge's findings of fact absent clear error, but perform an independent review of the judge's legal determinations. Commonwealth v. Wilson, 441 Mass. 390, 393 (2004). An interrogation is custodial if, based upon an objective evaluation of the circumstances, Commonwealth v. Larkin, 429 Mass. 426, 432 (1999), "a reasonable person in the defendant's shoes would have perceived the environment as coercive," Commonwealth v. Wadsworth, 482 Mass. 454, 481 (2019). The judge properly applied the guidance of Commonwealth v. Groome, 435 Mass. 201, 212 (2001), using the four factors set out in that decision to guide his analysis.[49]

[49] In Groome we identified four, nonexclusive factors to consider: "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the

The judge found that only one of the four Groome factors weighed in favor of a custody finding: the place of interrogation, the New Bedford police station. The defendant was not taken to the station against his will. An officer told the defendant that other officers would want to question him, and asked the defendant to get into the back seat of his cruiser. When the defendant complied, he was not handcuffed, and he was not placed under arrest. See Commonwealth v. Cruz, 373 Mass. 676, 682 (1977) (evidence supported finding that "defendant consented to enter the police cruiser and to go to the station for questioning"). The officers considered him "a potential witness." They also did not appear to communicate to the defendant that he was a suspect.[50] The motion judge found

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interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest." Commonwealth v. Groome, 435 Mass. 201, 211-212 (2001).

[50] The motion judge's finding that one officer told the defendant he was not a suspect was, however, clearly erroneous. At the motion hearing, the officer testified that when he first met with the defendant, as far as he was concerned, the defendant was not a suspect, and he would have characterized the questioning as an interview of a potential witness at that time. The officer also stated that the defendant "was not a suspect" to explain why he did not read the defendant Miranda rights prior to the interview, and why he did not record or offer to record the interview. On the other hand, at the end of the interview, the officer remarked that submitting to the gunshot residue test, which the defendant had twice previously refused, would be "a good way to get [the defendant] off the suspect list." Since the officer posed no further questions to the defendant following this remark, however, it could not have

that the questioning was conversational; the officers' approach was of an informational nature and their questioning was not accusatory but "investigatory in nature." They asked the defendant whether he would speak with them, and he consented without hesitation. Finally, and most importantly, the defendant was free to leave: indeed, he left after the questioning ended, and police did not arrest him until more than two years later. The evidence did not support a finding of custodial interrogation, and the judge found that failure to administer Miranda warnings was of no consequence. The judge properly denied the motion to suppress the defendant's statements.

5. Review under G. L. c. 278, § 33E. "It is our statutory duty 'to consider broadly the whole case on the law and the facts to determine whether the verdict is consonant with justice.'" Salazar, 481 Mass. at 118-119, quoting Commonwealth v. Vargas, 475 Mass. 338, 363-364 (2016). Upon review of the entire record as required under G. L. c. 278, § 33E, we are confident that our adversary system functioned effectively to produce a just result in this case. The defendant's convictions, as well as the orders denying his pretrial and postconviction motions, are affirmed.

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affected the circumstances of the interrogation. Before the defendant submitted to the test, he was free to leave.

So ordered.

LENK, J. (concurring). I agree with the court that a new trial is unwarranted. I write separately only to underscore that the erroneous use of narrative testimony, because it was a misstep solely attributable to counsel, properly is viewed through the lens of ineffective assistance of counsel.

As the court rightly notes, trial counsel lacked a good faith basis to believe that his client intended to commit perjury, a necessary prerequisite for invoking Mass. R. Prof. C. 3.3 (e), as appearing in 471 Mass. 1416 (2015). Rather, counsel sought permission for the defendant to give narrative testimony simply because he did not know what his client intended to say on the stand. Counsel's lack of awareness was reflected in a conversation between the judge and defense counsel that occurred at sidebar:

> Defense counsel: "I'm going to ask the Court if it would allow me by way of presenting [the defendant], if I could introduce him to the jury and then have him give a narration as opposed to being directly questioned by me, and that way he would have an opportunity to express what he wishes to express."
>
> The judge: "You mean as opposed to going question by question?"
>
> Defense counsel: "Yes. I would prefer the Court's --"
>
> The judge: "Well, let's wait and see how that goes. I'm inclined to permit that."
>
> Defense counsel: "Just simply, because of what I could anticipate the testimony being to an extent, I'm not fully aware, despite my best efforts to extract every nook and cranny, which makes me a little uneasy, as to directly

> questioning him, hence, if he wishes to exercise his right, I think it may be best suited for him to do his narration."
>
> The judge: "Your concern being because you're not completely confident about what [the defendant] is going to be saying --"
>
> Defense counsel: "Correct."

Once the trial judge received this request, it was reasonable to rely on counsel's representation that direct examination would not be a sufficient vehicle for vindicating the defendant's right to testify and present his defense. Cf. Commonwealth v. Mitchell, 438 Mass. 535, 552, cert. denied, 539 U.S. 907 (2003) ("In evaluating the situation, the judge will have to rely on the representations of counsel, which of necessity will be cryptic, because counsel is the one who must make the disclosure while maintaining client confidences and allowing for continued zealous advocacy at trial"). Under these rather unique circumstances, the trial judge did not err by permitting -- not mandating -- the use of narrative testimony. Cf. State v. Francis, 317 Conn. 450, 465-467 (2015) ("the court effectively conveyed to the defendant that he had two, and only two, choices: [1] testify and self-represent; or [2] relinquish the right to testify and maintain the assistance of counsel"); Brown v. Commonwealth, 226 S.W.3d 74, 85 (Ky. 2007) (accord).

Had the judge instead, acting under the aegis of Mass. R. Prof. C. 3.3 (e), erroneously prevented counsel from conducting

a direct examination of the defendant, I could not view this error through the lens of ineffective assistance of counsel. Applying that standard would recognize only part of the problem, and thereby would fail to capture the effect that the judge's error would have had on the structure of the trial itself.

Rather, as this court and the United States Supreme Court long have held, when the State completely deprives a defendant of the right to counsel at a critical stage, that is reversible structural error. See Garza v. Idaho, 139 S. Ct. 738, 744 (2019) ("no showing of prejudice is necessary 'if the accused is denied counsel at a critical stage of his trial'"), quoting United States v. Cronic, 465 U.S. 648, 659 & n.25 (1984) ("[The United States Supreme Court] has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"); Ferguson v. Georgia, 365 U.S. 570, 595-596 (1961) (statute mandating narrative testimony violated right to assistance of counsel); Commonwealth v. Valentin, 470 Mass. 186, 194 (2014) ("denials of counsel constitute structural error and require no showing of prejudice to warrant reversal").

Here, however, it was counsel, and not the judge, who improperly limited his own ability to assist the defendant through direct examination. Where that unilateral misstep did

not entirely deprive the defendant of his right to the assistance of counsel at a critical stage, cf. McCoy v. Louisiana, 138 S. Ct. 1500, 1509 (2018), the ineffective assistance of counsel standard properly assesses both the nature and impact of this error.

#177.

**COMMONWEALTH OF MASSACHUSETTS**
**THE TRIAL COURT**
**SUPERIOR COURT DEPARTMENT**

**BRISTOL, ss.**



Docket No. 1373CR0325

**COMMONWEALTH**



**v.**

**FAGBEMI MIRANDA**

**MEMORANDUM OF DECISION AND ORDER ON**
**DEFENDANT'S MOTION FOR NEW TRIAL**

On October 10, 2005, Christopher Barros was shot to death in New Bedford. On June 5, 2013, a jury (Macdonald, J. presiding) convicted the defendant, Fagbemi Miranda, of first degree murder of Barros with deliberate premeditation. He was also convicted of assault and battery with a dangerous weapon and possession of a firearm without a firearms identification card.

The defendant has moved for a new trial pursuant to rule 30 (b) of the Massachusetts Rules of Criminal Procedure. His primary argument is that his trial attorney contradicted his testimony that he shot Barros in self-defense and that the judge failed to instruct the jury on the law of self-defense, defense of another and manslaughter based on excessive use of force in self-defense. He also argues that his attorney provided ineffective assistance by failing to move for a continuance or a change of venue due to the then-recent Boston Marathon bombing and by failing to challenge the racial makeup of the jury venire.

**EVIDENCE PRESENTED AT TRIAL**

On October 10, 2005, a confrontation occurred on Purchase Street in New Bedford, outside the defendant's home, between the defendant and Christopher Barros. Four witnesses, including the defendant, testified to what occurred during the confrontation.

**Kim Reis**

Kim Reis testified that on the day of the killing she lived in a second-floor apartment at 444 Purchase Street, across the street from the Miranda family home. At about 8:30 p.m., she heard an argument and looked out her apartment window. She saw the defendant, who she knew, and Christopher Barros, who she had recently met, arguing outside the Miranda home. A third man, who she did not know, was with them.

About two or three minutes later, Reis heard noise coming from the porch on the Mirandas' house and again looked out the window. She saw the defendant's grandmother blocking the defendant's brother, Wayne, from coming down the outside porch steps. Wayne jumped over the railing onto the sidewalk. He was holding a gun. The gun was pointed down. Barros said, "Are you serious, Waynie? Are you serious? It's like that? It's like that?" She did not see Barros with a weapon.

Barros then ran down Reis' driveway, with Wayne Miranda chasing him. Reis yelled out the window, "No, Waynie, no. Think of your daughter. Think of Jalexis." She then saw the defendant running down the driveway. Reis lost sight of Barros. She saw Wayne and the defendant meet near some garbage cans. Wayne passed the gun to the defendant. The defendant raised the gun, pointing it toward the backyard. Reis closed her eyes and pulled back from the window. She heard two gunshots. She got her phone and called the police.

When police arrived, Reis got the attention of an officer but did not tell him everything she had seen. In April of 2007, Reis was arrested for trafficking in cocaine. She entered into a witness cooperation agreement with the District Attorney's office in which she was promised she would not be incarcerated in exchange for her truthful testimony. The District Attorney's office also paid expenses for her relocation.

**Carmen Rodriguez**

Carmen Rodriguez lived in an apartment in the same neighborhood. She knew the Miranda family. At about 8:30 p.m. on October 10, 2005, she heard an argument outside. When she looked out her apartment window, she saw the defendant in the street outside the Mirandas' house arguing with a man she did not know. A third man was standing near a car. The defendant had a clenched fist. Wayne Miranda came out of the house and joined the argument. He then returned to the house.

Wayne Miranda and his grandmother came out of the house. The grandmother yelled at Wayne to go back in the house and tried to grab him. Wayne jumped over a fence and went toward the man who was arguing with the defendant. Wayne was holding a handgun and aimed it at the man who was arguing. The man in the argument raised his hands to about shoulder height with his palms toward Wayne. The man's hands were empty.

The man who argued with the defendant ran out of Rodriguez' view. Wayne Miranda, and then the defendant, followed the man, "walking awfully fast." Trial Tr. vol. 4, p. 30. The fourth man followed them. Rodriguez heard two gunshots. The defendant and Wayne Miranda returned into view and walked to their house. The fourth man got into a car and drove away.

**John "Buddy" Andrade**

On the night of the shooting, John "Buddy" Andrade was visiting Rodriguez at her apartment. He was in the living room while she was on the computer in another room. He also knew the Miranda family.

When the argument started outside, Andrade looked out the window and saw the defendant, who was in the street near a car, arguing with another man, who was on the sidewalk. A third man was also present.

Wayne Miranda came out of the Miranda home onto the porch. His grandmother tried to hold him back and told him to stop. However, Wayne jumped over a fence and pointed a gun at the man on the sidewalk. The defendant told Wayne, "No, no, no." The man on the sidewalk backed up, put his hands in the air and said, "No." The man on the sidewalk was not holding a weapon.

The man on the sidewalk ran north. Wayne Miranda chased after him. The defendant followed Wayne. The fourth man followed the defendant. They entered the driveway of a house and moved out of Andrade's view. About ten to fifteen seconds later Andrade heard two gunshots. He called police and reported that Wayne Miranda just shot someone.

Wayne Miranda, the defendant and the fourth man then walked out of the driveway, back into Andrade's view. Andrade saw the gun being passed between Wayne Miranda and the defendant. Although on direct examination he said that he did not know which one passed the gun to the other, on cross-examination he testified that Wayne was the closest to him and that Wayne passed the gun to the defendant. Andrade then saw Wayne Miranda and the defendant walk into the Miranda home. The fourth man got into a car and left.

**The Defendant**

The defendant testified that on the night of the shooting he saw Christopher Barros driving a car on Purchase Street. The defendant went to greet Barros, who he knew. Barros got out of the car. The defendant put his hand out and Barros "for no apparent reason whatsoever" punched the defendant. Trial Tr. vol. 6, p. 13. The defendant stumbled, got up and said, "Why the fuck did you punch me?" *Id.* Barros replied, "Fuck you, you bitch." *Id.* The defendant put his "hands up to fight" when he saw another man get out of the passenger side of Barros' vehicle.

The defendant called for one of his brothers, who he hoped was inside their house. His brother, Wayne Miranda, came out of the house and approached Barros with a gun. Trial Tr. vol. 6, p. 14. Barros said, "Mother-fucker, I'm going to kill you. Come at me with that, I'm going kill you." *Id.* Barros ran. The defendant told his brother, "No, don't, don't follow him. Don't. Don't." *Id.* Wayne Miranda stopped at the beginning of the driveway of 444 Purchase Street while Barros ran down the driveway.

Barros "looked like he went to go reach for something" and kicked out the basement window of 444 Purchase Street. There were "a lot of shootings around [the] neighborhood." *Id.* The defendant thought Barros was retrieving a weapon, so he took the gun from Wayne and put himself between Barros, who was in front of him, and Wayne and their grandmother, who was "screaming hysterically," behind him. *Id.* at 15. The defendant testified to what happened next:

> So I follow him in the yard. It's dark in there, I follow him in the yard and, basically, there's the tree, and there's the fence and it parts. And on this side, it's on this side, he's on the fence, but there's a platform so it looked like he's reaching. So I just aim for his leg and his arm, I don't know if I hit him or not. Well, obviously I did, but at that point in time I didn't know. For everything I love, I never intended to kill that kid, that wasn't my intention. I never intended. I knew him.
>
> ***
>
> I will protect my family by any means necessary, and I'm not trying to be proud about it, but I thought he was reaching for a firearm, that's why I aimed at his arm and his leg. Never intentionally for the body, just to disarm him and stop the mobility there, that's all.
>
> Trial Tr., vol. 6, p. 15 – 16.

On cross-examination by the Commonwealth, the defendant denied that Barros ever raised his hands. He admitted the gun belonged to him and that he had no license for it. He claimed that he could not retreat because he, his brother and their grandmother could be shot by Barros and it was his intention to protect them. When asked if Barros had a gun, the defendant

replied, "I didn't know because it's a known stash area, if you know what a stash area is." Trial Tr. vol. 6, p. 46. The defendant testified that "when he was on the platform it looked like he had a firearm in his arm, that's why I aimed for his leg and his arm, not with the intention of killing him, with the intention of disarming him and stopping his process." *Id.*

The defendant admitted that after the shooting he lied to police when he claimed that a masked man chased him down the driveway and fired two shots at him. He also admitted that he hid the gun in his basement so police would not find it.

**Additional Evidence**

The police found Barros on the ground on the opposite side of the fence behind 444 Purchase Street. He had been shot twice, once through his left arm and into the left armpit area and the other just below the left buttock area. Police found no weapon in the area.

Evidence was also presented that gunshot residue tests were performed on both Wayne Miranda and the defendant. Wayne Miranda's left hand tested positive. His right hand tested negative. Both of the defendant's hands tested positive for gunshot residue.

**TRIAL PROCEDURE**

According to the defendant's affidavit, prior to trial he informed his attorney, Frank Camera, that he "wished to pursue a defense of self-defense and/or necessity and to testify in [his] own behalf." F. Miranda Aff., par. 3. He requested that his attorney (1) file a motion "for police reports concerning shootings and weapons stashed in the neighborhood in the year or so before Mr. Barros was killed;" (2) gather information about Barros' enemies; and (3) obtain Barros' criminal record. *Id.* at par. 4. Attorney Camera told the defendant that he disagreed with that strategy and declined to obtain the documents and information the defendant requested. *Id.* at par. 3 & 4.

At a pretrial hearing on May 9, 2013, the defendant asked to address the court. The judge (Garsh, J.) directed him to speak to his attorney. After consulting the defendant, Attorney Camera reported that the defendant asked that he file certain motions but that he had decided not to file them. Pretrial Hearing, May 9, 2013, p. 9. Attorney Camera filed motions to prohibit reference to the defendant's neighborhood as a "high crime area" and to permit the introduction of the results of Wayne Miranda's gunshot residue test. Both of those motions were allowed without objection. *Id.* at pp. 10 – 11.

During the same hearing, the defendant asked Attorney Camera to withdraw due to a breakdown in communication. *Id.* at p. 35. The defendant pointed out that Attorney Camera refused to file motions that the defendant requested. *Id.* Attorney Camera responded that he was "fully prepared" for trial and did not believe there had been a breakdown in communication. *Id.* at 36 -37. The judge explained, "To the extent he has not made certain filings, counsel may do that because, in their view, it is simply not helpful to a strategy of the case or that they are frivolous." *Id.* The court denied the motion insofar as it sought new counsel. *Id.*

On the first day of trial, Attorney Camera again moved to withdraw. The court held an *in camera* hearing on the motion. *In Camera* Hearing, May 28, 2013, p. 3, *et seq.* Attorney Camera reported that although he had a "good relationship" with the defendant, the defendant wished to proceed on a defense that was not based on the evidence and, in Attorney Camera's opinion, would be "suicidal." *Id.* at pp. 4 – 5. He explained to the court:

> He had expressed to me the desire and his wish to proceed on a self-defense and/or necessity defense; and I explained to him that based on cases and the law as it stands, that there was nothing that I saw and there was nothing based upon the testimony of the witnesses that would give rise to that as being a viable strategy.
>
> ***

> But I explained to him that I'm certainly not compelled nor would I just take on a defense because he tells me to, particularly one in which I see no validity to, and I certainly am not prepared to pursue that line of defense.
>
> *Id.* at pp. 8 - 11.

The defendant responded that he intended to testify and would testify to facts that would establish that he acted in self-defense and out of necessity. *Id.* at pp. 11 & 14.

Based on the fact that the defendant's prior attorney, John Moses, withdrew from the case for substantially the same reason, the court concluded that appointing another lawyer would be unlikely to resolve the impasse. *Id.* at p. 25. The judge asked if the defendant wished to proceed *pro se* with Attorney Camera as stand-by counsel but the defendant responded that he was not able to do that. *Id.* at p. 22. The court denied the motion to withdraw. *Id.* at p. 31.

Jury empanelment commenced the same day. After the jury was sworn and the judge completed his pre-charge, the defendant raised an issue of racial imbalance on the jury:

> MR. CAMERA: Your Honor, Mr. Miranda wishes me to make an objection as it pertains to the racial imbalance of the jury. As you can see, Mr. Miranda is a person of color and he has made it aware that there appears to not be anybody of color that's been seated on the jury.
>
> THE COURT: That may or may not be so. But having been through the impanelment process there were a number of people of color that were called who were excused for various reasons, and I don't see any basis for doubting the fairness of the process of the jury being selected or any basis for being concerned that this jury is not capable of being entirely fair and objective in evaluating the evidence, but your point is noted. Your objection is noted.
>
> MR. CAMERA: Thank you, your Honor.
>
> Trial Tr. vol. 2, pp. 157 – 158.

During his opening statement, Attorney Camera described the altercation on the street:

> And at some point, out of the house at 439 Purchase Street comes Wayne Miranda, Fagbemi Miranda's brother. And he's hot. His temper's up. He

> sees his brother with another guy, Mr. Barros. He doesn't know what's going to happen.
>
> In that heat of the moment, he comes out of that house. And his grandmother's there. His grandmother's there trying to stop him. Can't do it. He's hot. He, sort of, gets the grandmother out of the way, jumps over the little porch area and is now involved. And he's involved with what was prior to that just a verbal, sort of, altercation.
>
> And at this point, Wayne Miranda has a gun. And he's got the gun. And at some point, you're going to hear testimony that that gun was raised and pointed at Christopher Barros, not by Fagbemi Miranda but by Wayne Miranda. And he's still hot. His grandmother can't stop him.
>
> And at that point, Barros, Mr. Barros raises his hands. Bolts. Runs. And who's chasing after him? Wayne Miranda with the gun. He's still hot. And behind him is his brother. And behind Mr. Miranda, Fagbemi Miranda, is this other person.
>
> Trial Tr. vol. 3, pp. 40 – 41.

Attorney Camera also told the jury that Buddy Andrade would testify that when the defendant and his brother exited the driveway after the gunshots, Wayne Miranda still had possession of the gun. He also informed the jury that there would be expert testimony that a person could have gunshot residue on his or her hands either because that person fired a gun, because that person was in the vicinity of a gun that was fired or because that person handled the gun after it was fired. Attorney Camera did not say whether his client would testify or whether his client shot Barros.

After the Commonwealth rested, Attorney Camera asked the court to recess until the next day to give the defendant a further opportunity to think about whether he wished to testify. The court granted that request. The next day, Attorney Camera informed the court that after "extensive conversation" with the defendant, the defendant had decided to testify. Trial Tr. vol. 6, p. 3. The court conducted a colloquy with the defendant and counsel at sidebar. During the

colloquy the defendant acknowledged that Attorney Camera had advised him against testifying. However, the defendant insisted on testifying. *Id.* at pp. 5 – 6.

While at sidebar, Attorney Camera requested permission to allow the defendant to testify in narrative form, rather than by interrogation. He explained that he was not confident that he would be able to elicit everything the defendant wished to say in his defense. The court allowed that request. The court found that the defendant was competent to decide whether to testify and had been fully advised of the potential adverse consequences of testifying. The court allowed the request that the defendant testify in narrative form. *Id.* at p. 7.

Attorney Frates, who also represented the defendant, introduced the testimony by asking the defendant his name and asking him what he would like to tell the jury. *Id.* at p. 13. The defendant testified in narrative form to the facts as described above. He was cross-examined and impeached (as he had been forewarned) with his prior convictions.

After the defendant's testimony, the judge told counsel that he thought an instruction on self-defense was appropriate. *Id.* at p. 61. He also indicated that he would instruct on voluntary manslaughter in the heat of passion, as Attorney Camera had requested. *Id.* (Paper # 99.)

In his closing argument, Attorney Camera addressed the result the jury should reach if they believed the defendant and the result they should reach if they disbelieved him. Attorney Camera argued that if they believed the defendant, they could not find premeditation:

> So if you believe that, and you believe what Mr. Miranda said, then again the question is, was this first degree? I'm going to suggest to you that it wasn't. There was no premeditation, there was no malice. This is, Mr. Miranda in the heat of passion loses his cool, loses his temper, he's hot, and he makes a judgment, that fast. There was a consequence to his judgment. Nobody is suggesting it was the right judgment. But this isn't some reflection he had where he sat back, thought and premeditated the shooting and the killing of Christopher Barros. This is somebody, if you credit his testimony, that at that time he made a decision, and it was an instant, too much of an instant to form that premeditation.

> There was mitigating circumstances. And mitigating circumstances were what you heard Mr. Miranda say. You heard his version of events, and that based upon that heat of passion, based upon him being angry, no time to cool off, in that moment he made that decision.
>
> Trial Tr. vol. 6, pp. 74 – 75.

Attorney Camera also argued that disbelief of the defendant was insufficient to prove the crime and that the prosecution witnesses either were not credible or failed to support the conclusion that the defendant shot Barros:

> Now, you also have the option of not crediting Mr. Miranda at all. That's up to you. You could say to yourself, I don't believe him. Maybe he's doing that based upon my common sense, meaning yours, and what he said to protect Wayne, his baby brother. Mr. Hourihan asked him himself, "You loved your brother? Answer: "Yeah, I love him, he's my baby brother."
>
> So maybe you don't credit him, maybe you think this guy is just out there protecting his brother. At which point then who do you credit? Do you credit Kim Reis who comes in here as a paid witness for this prosecution who certainly had a lot to lose, and go to state prison....
>
> ***
>
> How about John Buddy Andrade, do you credit him? The prosecution wants you to credit him up until the point where he says that he saw the gun being transferred from Wayne to Fagbemi. And I can assure you at that point they don't want to put too much attention on that.
>
> And credit Mr. Drugan until which point he talks about the transference of gunshot residue because that doesn't help them out too much either.
>
> *Id.* at p. 76.

After closing arguments and a recess, the judge informed counsel that he had changed his mind and would not instruct the jury on self-defense. *Id.* at p. 94. Attorney Camera objected and gave detailed reasons for his objection but the court ruled that there was no "reasonable basis in the evidence for the use of deadly force under the principles of self-defense...." *Id.* at pp. 95.

The court charged the jury on the law of first and second degree murder and voluntary manslaughter. In regard to voluntary manslaughter, the court instructed on the mitigating circumstances of heat of passion on reasonable provocation and heat of passion induced by sudden combat. *Id.* at pp. 130 – 133. The court did not instruct the jury on the law of self-defense, defense of another or voluntary manslaughter based on excessive use of force in self-defense.

The following day, the jury returned guilty verdicts on first degree murder with deliberate premeditation, assault and battery with a dangerous weapon and possession of a firearm without a firearms identification card. The jury found the defendant not guilty of first degree murder based on extreme atrocity or cruelty.

## ANALYSIS

The defendant contends that he is entitled to a new trial due to errors committed by Attorney Camera and the trial judge. He makes essentially five arguments.

### I. Conflict Between Counsel's Defense and the Defendant's Trial Testimony.

The defendant first contends that Attorney Camera violated his constitutional rights to testify and to the effective assistance of counsel by failing to pursue defenses of self-defense, defense of another and manslaughter based on excessive use of force in self-defense, all of which, he claims, were supported by his trial testimony.

#### A. Right to Testify

"A criminal defendant has a fundamental right to testify on his own behalf. That right arises from several provisions of the United States Constitution. It is embodied in the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment giving a defendant the right to call witnesses in his favor, and the Fifth Amendment's guarantee

against compelled self-incrimination." *Commonwealth v. Freeman,* 29 Mass. App. Ct. 635, 640-641 (1990). *Rock v. Arkansas,* 483 U.S. 44, 51-52 (1987). The right is also guaranteed by art. 12 of the Massachusetts Declaration of Rights. *Commonwealth v. Novo,* 442 Mass. 262, 268-269 (2004). "The decision whether to testify is to be made personally by the defendant in consultation with his counsel." *Commonwealth v. Degro,* 432 Mass. 319, 335 (2000), quoting *Freeman, supra. Jones v. Barnes,* 463 U.S. 745, 751 (1983).

The defendant testified on his own behalf at trial. His attorney asked him what he would like to tell the jury and he responded by telling the jury how the shooting occurred. He was not restricted in his testimony by the court. His testimony did not elicit a single objection by the Commonwealth. Nevertheless, he contends that his right to testify was infringed by his attorney. The defendant relies on three out-of-State cases for the proposition that an attorney's choice of a defense that conflicts with the defendant's version of the facts can deprive the defendant of his right to testify.

In *New York v. Mason,* 263 A.D.2d 73, 706 NYS2d 1 (2000), the defendant and his attorney disagreed on whether he should testify. The attorney rested without calling the defendant and gave her closing argument. In response, the defendant told the jury "That's not true. They wouldn't allow me to get on the stand and tell my side of the story." *Id.* at 76. The judge ruled that the defendant could testify. Defense counsel objected in front of the jury. The defendant testified and defense counsel was allowed to make a second closing argument. *Id.* The appellate court held that the trial judge erred in ruling initially that counsel, rather than the defendant, could decide whether the defendant would testify. *Id.* at 77. The court held that the defendant was prejudiced by this error because "the jury may very well have concluded that neither the court, nor his own attorney, had faith in his story." *Id.* at 77-78.

In *Cooke v. Delaware,* 977 A.2d 803 (2009), defense counsel at the guilt phase of a death penalty case argued that the defendant was guilty but mentally ill and refused to call the defendant to the witness stand. The defendant insisted that he was innocent. Although the trial judge allowed the defendant to testify, the Delaware Supreme Court ruled that the defendant's decision to testify that he was innocent was "effectively negated" by his attorney's argument that the defendant was guilty but mentally ill. *Id.* The court ordered a new trial.

In *Colorado v. Bergerud,* 223 P.3d 686 (2010), defense counsel made an opening statement focused on the defendant's low intelligence and intoxication at the time of two murders. Defense counsel added that the defendant "was so confused he likely did not know or accurately remember what happened on the night of the killings." *Id.* at 692. The defendant informed the judge that he wanted to argue self-defense and asked for a new attorney. The trial judge gave the defendant the choice of keeping his attorneys or proceeding *pro se.* The defendant represented himself. On appeal, the Colorado Supreme Court ruled that a defendant cannot be forced to choose between his constitutional rights to testify and to be represented by counsel. *Id.* at 701-703. The court remanded for a further hearing on the validity of his waiver of counsel.

Although there is no Massachusetts precedent on this issue, this court accepts the proposition that a defendant's right to testify can be "effectively negated," *Cooke, supra,* by his attorney's contradiction of the defendant's testimony. However, the court disagrees with the defendant's contention that Attorney Camera contradicted his testimony.

The defendant contends that Attorney Camera infringed on his right to testify by: (1) failing "to pave the way" for the defendant's testimony; (2) "disassociat[ing] himself" from the defendant's testimony by having the defendant testify in narrative form; and (3) "encourage[ing] the jury to reject Mr. Miranda's testimony" rather than arguing self-defense. Defendant's Memo, pp. 19-20.

The defendant faults Attorney Camera for failing to introduce evidence in support of the defendant's self-defense argument. This evidence consists of information that other shootings had occurred in the neighborhood; that other individuals had stashed weapons in the neighborhood; that Barros had enemies other than the defendant; that Barros had been involved in other altercations; that Barros was a drug dealer; and that the basement window facing the driveway where the shooting took place had recently been broken. Defendant's Memo, pp. 25-26.

Even assuming that all of this information would have been admitted had it been offered, Attorney Camera's failure to introduce it did not infringe on the defendant's right to testify. The defendant had a full and unfettered opportunity to tell the jury everything he wanted to tell them. An attorney's failure to introduce evidence corroborating a defendant's testimony is not the same as an attorney's contradiction of that testimony.

Likewise, Attorney Camera did not infringe on the defendant's right to testify, by contradiction or otherwise, by having the defendant testify in narrative form. As Attorney Camera explained to the trial judge, the choice of that form was designed to promote the defendant's right to testify by ensuring that the defendant was able to testify to everything he wished. Trial Tr. vol. 6, pp. 6-7.

Counsel did not abandon the defendant. He was called to the stand by one of his attorneys, who had him introduce himself and then asked him, "Mr. Miranda, what would you like to tell the jury?" *Id.* at pp. 12-13. When the defendant finished, his counsel asked him, "Anything else, Mr. Miranda?" *Id.* at p. 16. The defendant replied, "No, that's it, Mr. Frates." *Id.* at p. 17. The defendant had a full opportunity to tell his side of the story. The use of the narrative form protected his right to testify as he wished.

Finally, Attorney Camera never "encouraged the jury to reject Mr. Miranda's testimony." Defendant's Memo, p. 20. He properly noted that the jury could believe or disbelieve the defendant and argued, in the alternative, that the evidence failed to prove the defendant guilty of first-degree murder in either event.

> Now, things changed. Things changed because you heard from Fagbemi Miranda. How does that fit in? Well, yet again, you can credit everything Mr. Miranda said. You can do that. Take it at face value, that's what he did, that's what happened. But let's talk about that for a minute. If that's your decision and that's what you choose to do, then ask yourself, and I'm going to suggest to you, that this wasn't murder in the first degree? There was no premeditation, there was no thought. This wasn't a time for which Mr. Miranda was able to reflect. This was in the heat of passion.
>
> ***
>
> So if you believe that, and you believe what Mr. Miranda said, then again the question is, was this first degree? I'm going to suggest to you that it wasn't. There was no premeditation, there was no malice. This is, Mr. Miranda in the heat of passion loses his cool, loses his temper, he's hot, and he makes a judgment, that fast. There was a consequence to his judgment. Nobody is suggesting it was the right judgment. But this isn't some reflection he had where he sat back, thought and premeditated the shooting and the killing of Christopher Barros. This is somebody, if you credit his testimony, that at that time he made a decision, and it was an instant, too much of an instant to form that premeditation.

> ***
>
> Now, you also have the option of not crediting Mr. Miranda at all. That's up to you. You could say to yourself, I don't believe him. Maybe he's doing that based upon my common sense, meaning yours, and what he said to protect Wayne, his baby brother. Mr. Hourihan asked him himself, "You loved your brother? Answer: "Yeah, I love him, he's my baby brother."
>
> So maybe you don't credit him, maybe you think this guy is just out there protecting his brother. At which point then who do you credit? Do you credit Kim Reis who comes in here as a paid witness for this prosecution who certainly had a lot to lose, and go to state prison....
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> ***
>
> How about John Buddy Andrade, do you credit him? The prosecution wants you to credit him up until the point where he says that he saw the gun being transferred from Wayne to Fagbemi. And I can assure you at that point they don't want to put too much attention on that.
>
> And credit Mr. Drugan until which point he talks about the transference of gunshot residue because that doesn't help them out too much either.
>
> Trial Tr. vol. 6, p. 74-76.

As the court in *Bergerud* explained, arguing in the alternative is an appropriate way for defense counsel to handle the difficult situation that arises when a client seeks to pursue a defense that counsel knows is unwise:

> Defense attorneys must often begin a trial without knowing whether their client will exercise his right to testify. In such situations, it is the defense attorney's constitutional duty to present arguments in such a way that will leave that door open to the defendant. That is not to say that the defendant can mandate, through his desire to testify, that his attorneys adopt specific trial strategies. Nor do we mean that counsel's actions cannot be in tension with the substance of the defendant's desired testimony: ***it is permissible for an***

> ***attorney to adopt trial strategies that effectively argue in the alternative to the thrust of the defendant's testimony.*** Rather, defense counsel cannot, through their trial actions, reduce their client's constitutional right to a nullity.
>
> *Bergerud* at 702 (emphasis supplied).

It is true, as the defendant points out, that Attorney Camera did not argue that the defendant was innocent because he acted in self-defense. He could not. On this evidence, self-defense was not a viable argument.

"'A defendant is entitled to have the jury ... instructed on the law relating to self-defense if the evidence, viewed in its light most favorable to him, is sufficient to raise the issue.' ... There must be evidence that 'permits at least a reasonable doubt that the defendant reasonably and actually believed that he was in "imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force."' ... For a defendant to have such a reasonable belief, the victim must have committed some overt act constituting an assault or threat against the defendant. ... Moreover, there must be 'some evidence that the defendant availed himself of all means, proper and reasonable under the circumstances, of retreating from the conflict before resorting to the use of deadly force.'" *Commonwealth v. Espada,* 450 Mass. 687, 692 (2008) (citations omitted).

The defendant testified that he shot Barros as Barros was running away. Viewing the evidence in the light most favorable to the defendant, he was not entitled to an instruction on self-defense. Based on his own testimony, the defendant had an opportunity to retreat and failed to do so. "[I]f a defendant has an opportunity to retreat

but fails to do so, the defendant has no privilege to use force in self-defense." *Commonwealth v. Niemic,* 427 Mass. 718, 722 (1998). *Commonwealth v. Curtis,* 417 Mass. 619, 632-633 (1994) (no right to self-defense where victim was walking away at time of defendant's use of deadly force). Defense counsel may not argue a defense that is not supported by the evidence. *Commonwealth v. Mattson,* 6 Mass. App. Ct. 893 (1978) (trial court properly refused to allow defendant to argue insanity in absence of evidence on that issue).

Likewise, Attorney Camera could not argue that the defendant was not guilty because he acted in defense of his brother and grandmother. "The elements of defense of another are well settled: 'An actor is justified in using force against another to protect a third person when (a) a reasonable person in the actor's position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself.'" *Commonwealth v. Allen,* 474 Mass. 162, 168 (2016), quoting *Commonwealth v. Young,* 461 Mass. 198, 208 (2012) and *Commonwealth v. Martin,* 369 Mass. 640, 649 (1976). A reasonable person in the defendant's position would have known, as the defendant did, that Barros was running away at the time of the shooting. In those circumstances, neither Wayne Miranda nor the brothers' grandmother would have been justified in using deadly force against him.

In order to argue that the defendant used excessive force in self-defense or defense of another and that the killing was therefore reduced to manslaughter, there must have been evidence that the defendant was justified in using reasonable force in his own

defense or in defense of another. "To receive an instruction on the excessive use of force in self-defense, 'the defendant must be entitled to act in self-defense,' ... but 'used more force than was reasonably necessary in all the circumstances of the case.'" *Commonwealth v. Anestal,* 463 Mass. 655, 674 (2012), quoting *Commonwealth v. Berry,* 431 Mass. 326, 335 (2000) and *Commonwealth v. Glacken,* 451 Mass. 163, 167 (2008). At the time of the shooting, Barros was running away; there was no justification for the defendant's use of deadly force.

Defense counsel may infringe on a defendant's constitutional right to testify by refusing to allow his client to testify or by contradicting his client's testimony but Attorney Camera did neither. Although he advised the defendant not to testify, he did not impede that testimony. Once the defendant testified that he, and not his brother, shot and killed Barros, Attorney Camera made the best of a difficult situation by properly arguing in the alternative that if the jury believed the defendant, they could not find premeditation and if they disbelieved him, the remaining evidence was insufficient to convict. This argument, which was based on the evidence and the law, did not violate the defendant's right to testify.

**B. Ineffective Assistance of Counsel**

The defendant also contends that defense counsel's failure to argue self-defense violated his right under the Sixth Amendment to the effective assistance of counsel. After the argument in this case the United States Supreme Court handed down its decision in *McCoy v. Louisiana,* ___ U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018). That decision changed the constitutional analysis for Sixth Amendment claims based on disagreement over defense strategy.

In *McCoy,* defense counsel at the guilt phase of a death penalty case conceded that the defendant murdered three people, as part of a strategy to avoid the death penalty. This concession was made over the defendant's objection and his demand that counsel argue that the defendant was innocent of the murders. The Court held that under the Sixth Amendment's guarantee of the assistance of counsel, "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at 138 S.Ct. 1505. The Court explained that the assistance of counsel guarantee requires that some decisions be made by defense counsel while certain other, fundamental decisions must be made by the defendant:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." ... Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. ... Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.
>
> *Id.* at 138 S.Ct. 1508.

The Court further held that violation of the constitutional right to client autonomy is structural error that is not subject to ineffective assistance of counsel analysis:

> Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington,* 466 U.S. 668 (1984).... To gain redress for attorney error, a defendant ordinarily must show prejudice. ... Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review.
>
> *Id.* at 138 S.Ct. 1510-1511.

The defendant's decision to assert that he, and not his brother, shot and killed Barros in self-defense was within his right "to decide that the objective of the defense [was] to assert

innocence." *Id.* at 138 S.Ct. 1508. As Attorney Camera had warned, the facts to which the defendant testified were insufficient to raise the issue of self-defense. That was not the fault of counsel. Attorney Camera respected the defendant's "Sixth Amendment-secured autonomy." *Id.* at 138 S.Ct. 1510-1511. The defendant simply made a poor choice.

**II. Counsel's Failure to Move for a Continuance or Change of Venue.**

The defendant next contends that Attorney Camera deprived him of his rights to a fair trial and to the effective assistance of counsel by failing to move for a continuance or a change of venue due to the then-recent Boston Marathon bombing.

"Where a new trial motion is based on ineffective assistance of counsel, the familiar standard used to analyze such a claim is 'whether there has been serious incompetency, inefficiency, or inattention of counsel-behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer-and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence.' ... The burden of proving entitlement to a new trial based on ineffective assistance of counsel rests on the defendant. ... A defendant must show that better work might have accomplished something material for the defense. ... A strategic or tactical decision by counsel will not be considered ineffective assistance unless the decision was 'manifestly unreasonable' when made. ... Further, mere speculation, without more, is insufficient to establish ineffective representation." *Commonwealth v. Watson,* 455 Mass. 246, 256 (2009) (citations omitted). *Commonwealth v. Saferian,* 366 Mass. 89, 96 (1974).

Defense counsel's decision not to seek a continuance or change of venue was a strategic decision that warrants a new trial only if it was "manifestly unreasonable." "Reasonableness in the context of an ineffective assistance of counsel claim is an objective standard that measures

counsel's conduct against that which 'lawyers of ordinary training and skill in the criminal law' would consider competent. ... [R]easonableness does not demand perfection. ... Nor is reasonableness informed by what hindsight may reveal as a superior or better strategy. ... Counsel may strive for perfection, but only competence or the avoidance of a serious incompetency is required. ... The manifestly unreasonable test, therefore, is essentially a search for rationality in counsel's strategic decisions, taking into account all the circumstances known or that should have been known to counsel in the exercise of his duty to provide effective representation to the client and not whether counsel could have made alternative choices." *Commonwealth v. Kolenovic,* 471 Mass. 664, 674-675 (2015) (citations and internal quotation marks omitted).

The Boston Marathon bombing occurred on April 15, 2013. The defendant's trial was originally scheduled for April 22, 2013 but was continued to May 28, 2013. The trial was held in Fall River. The defendant contends he was prejudiced because of two similarities between the two cases. First, both crimes were committed by brothers. That is a superficial similarity, however. There was never any suggestion the defendant was involved with terrorism or mass killings. Second, both the defendant and one of the bombers, Dzhokar Tsarnaev, had attended the University of Massachusetts at Dartmouth. That fact, however, never came up at trial.

In light of the circumstances of only a single superficial similarity between the cases, the continuance of the trial to May 28th, the location of the trial in Fall River and the lack of any indication that the Boston Marathon bombing influenced the jury in any way, counsel's decision not to seek a further continuance or change of venue was not "manifestly unreasonable." Therefore, the defendant was not deprived of his constitutional right to the effective assistance of counsel.

**III. Counsel's Failure to Challenge the Racial Composition of the Jury Venire.**

The defendant also contends that Attorney Camera violated his rights to a fair trial and to the effective assistance of counsel by failing to challenge the racial composition of the jury venire.

Attorney Camera objected to the racial composition of the jury, at the defendant's request, only after the jury had been impaneled. At that point, the trial judge, who was in the best position to determine the matter, said:

> [H]aving been through the impanelment process there were a number of people of color that were called who were excused for various reasons, and I don't see any basis for doubting the fairness of the process of the jury being selected or any basis for being concerned that this jury is not capable of being entirely fair and objective in evaluating the evidence, but your point is noted. Your objection is noted.
>
> Trial Tr. vol. 2, pp. 157 – 158.

There is no evidence before the court of any racial imbalance or other problem with the jury venire or the impanelment process. The defendant is not entitled to a new trial on that ground.

**IV. Errors by the Trial Judge.**

The defendant argues that the trial judge erred by: (1) denying Attorney Camera's motion to withdraw; (2) allowing the defendant to testify in narrative form; and (3) failing to instruct the jury on self-defense, defense of another and manslaughter based on excessive use of force in self-defense.

***Motion to Withdraw.*** The trial judge's denial of Attorney Camera's motion to withdraw was well within the proper exercise of his discretion. The motion was made on the first day of trial. The trial judge provided both defense counsel and the defendant with a full opportunity to be heard on the issue *in camera.* Defense counsel informed the judge that he had a "good

relationship" with the defendant and that the issue was a disagreement over trial strategy. The judge noted that prior defense counsel had withdrawn for the same reason and the appointment of new counsel would therefore be unlikely to resolve the impasse. The court gave the defendant the option to proceed *pro se* with Attorney Camera as stand-by counsel but the defendant declined. In these circumstances, it was unlikely that allowance of the motion would have resolved the problem. The trial judge therefore had good reason to deny the motion. *Commonwealth v. Melo,* 472 Mass. 278, 304-306 (2015).

***Narrative Testimony.*** The court has discretion to control the manner of examining witnesses. Mass. G. Evid. § 611 (2018 ed.) Here, the trial judge exercised that discretion, at the request of defense counsel, to allow the defendant to testify in narrative form. The purpose of that ruling was to scrupulously safeguard the defendant's constitutional right to testify as he wished. Faced with a divergence of views between defense counsel and the defendant on trial strategy, this was a reasonable method of protecting the defendant's right to testify. There was no error.

***Failure to Instruct on Self-Defense.*** The evidence, taken in the light most favorable to the defendant, was that the defendant could have retreated but failed to do so. Therefore, the evidence did not raise an issue of self-defense and the defendant was not entitled to a jury instruction on that issue. *Espada, supra. Niemic, supra. Curtis, supra.* As explained above, the evidence also did not raise issues of defense of another or manslaughter by excessive force in self-defense. *Commonwealth v. Barbosa,* 463 Mass. 116, 135-136 (2012) (defense of another). "The same prerequisites for self-defense apply whether the defendant is seeking an instruction on justification by self-defense, or an instruction on manslaughter by excessive force in self-defense." *Commonwealth v. Pasteur,* 66 Mass. App. Ct. 812, 819-820 n. 7 (2006), citing

*Commonwealth v. Walker,* 443 Mass. 213, 216 (2005). The trial judge properly refrained from giving those instructions.

**V. Closed Courtroom.**

In a footnote in his memorandum of law and in a supplemental memorandum, the defendant contends that Attorney Camera provided ineffective assistance of counsel by failing to object to the exclusion of the public during the judge's jury charge. That argument fails for three reasons.

First, the claim is not adequately supported by affidavits filed under Mass. R. Crim. P. 30 (c) (3). The defendant's affidavit contains a single sentence concerning the claim: "Further, Attorney Camera failed to notice or object when my cousin and friend were excluded from the courtroom during jury instructions." F. Miranda Aff., par. 12. The defendant has not filed affidavits from his cousin, his friend or Attorney Camera. His own affidavit is conclusory. It does not explain what, if anything, the defendant personally observed or what, if anything, he was told about the alleged exclusion. *Commonwealth v. Jewett,* 442 Mass. 356, 365-356 (2004) (no substantial issue raised where affidavits inadequate).

Second, the defendant's affidavit indicates that his cousin and friend were kept out of the court room during jury instructions. If they were in fact denied entrance to the court room at that point, it is likely that the court merely prohibited members of the public from entering or exiting the court room during the jury charge. That is a customary practice designed to protect the jury from distractions. Since anyone may attend the jury charge – so long as they enter the room prior to commencement of the charge – this practice does not constitute a closure of the courtroom in violation of the Sixth Amendment. *Commonwealth v. Dykens,* 438 Mass. 827, 835-836 (2003). *Commonwealth v. Patry,* 48 Mass. App. Ct. 470, 476 n. 5 (2000).

Third, in a case decided after the filing of briefs in this case, the United States Supreme Court decided that a defendant who raises a claim of ineffective assistance of counsel based on failure to object to court room closure, in a motion for new trial rather than on direct appeal, must establish prejudice. *Weaver v. Massachusetts,* ___ U.S. ___, ___, 137 S.Ct. 1899, 1913, 198 L.Ed.2d 420 (2017). The defendant has not demonstrated that he suffered any prejudice as a result of Attorney Camera's failure to object to the claimed closure of the court room.

**ORDER**

The defendant's motion for new trial (Paper # 171) is **DENIED**.

August 20, 2018

Thomas F. McGuire, Jr.
Justice of the Superior Court