

**JUSTIFICATION:
USE OF DEADLY PHYSICAL FORCE
IN DEFENSE OF A PERSON
PENAL LAW 35.15 (2)
(Effective Sept. 1, 1980)**

(Revised Jan. 2013; Feb. & July 2016; Jan. 2018)¹

NOTE: This charge should precede the reading of the elements of the charged crime, and then, the final element of the crime charged should read as follows:

“and, #. That the defendant was not justified.”²

[With respect to count(s) (*specify*),] [T]he defendant has raised the defense of justification, also known as self-defense. The defendant, however, is not required to prove that he was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.

I will now explain our law's definition of the defense of justification as it applies to this case.

Under our law, a person may use deadly physical force upon another individual when, and to the extent that, he/she reasonably believes it to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of [unlawful³] deadly physical force by such individual.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "deadly physical force" and "reasonably believes."

DEADLY PHYSICAL FORCE means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.⁴ [Serious physical injury means impairment of a person's physical condition which creates a substantial risk of death, or which causes death or

serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.^{5]}

The determination of whether a person REASONABLY BELIEVES deadly physical force to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of deadly physical force by another individual requires the application of a two-part test.⁶ That test applies to this case in the following way:

First, the defendant must have actually believed that (specify) was using or was about to use deadly physical force against him/her [or someone else], and that the defendant's own use of deadly physical force was necessary to defend himself/herself [or someone else] from it; and

Second, a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have had those same beliefs.

Thus, under our law of justification, it is not sufficient that the defendant honestly believed in his own mind that he was faced with defending himself/herself [or someone else] against the use or imminent use of deadly physical force. An honest belief, no matter how genuine or sincere, may yet be unreasonable.

To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself [or someone else] from what he/she honestly believed to be the use or imminent use of such force by (specify), and a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have believed that too.

On the question of whether the defendant did reasonably believe that deadly physical force was necessary to defend himself/herself [or someone else] from what he/she reasonably

believed to be the use or imminent use of such force by (specify), it does not matter that the defendant was or may have been mistaken in his/her belief; provided that such belief was both honestly held and reasonable.

[Add if there was evidence of a party's reputation for violence:

Now, you have heard testimony that (specify) had a reputation for violence and engaged in violent acts. Normally, the law does not permit such testimony. The reason is that every person, regardless of that person's relative worth to the community, has the right to live undisturbed by an unlawful assault.

However, in assessing whether the defendant did "reasonably believe" that the deadly physical force he/she used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" to be the use or imminent use of such force by (specify), you may consider whether the defendant knew that (specify) had a reputation for violence or had engaged in violent acts. If so, you may then consider to what extent, if any, that knowledge contributed to a "reasonable belief" that the deadly physical force the defendant used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" was the use or imminent use of such force by (specify).⁷

Further, provided the defendant believed (specify) had such reputation or engaged in such acts, it does not matter whether that belief was correct.]

[Add as applicable:

Notwithstanding the rules I have just explained, the defendant would not be justified in using deadly physical force under the following circumstances:

Select appropriate alternative(s):

(1) The defendant would not be justified if he/she was the initial aggressor of deadly physical force;

[Add if applicable:

except, that the defendant's use of deadly physical force would nevertheless be justified if he/she had withdrawn from the encounter and effectively communicated such withdrawal to *(specify)* but *(specify)* persisted in continuing the incident by the use or threatened imminent use of (unlawful⁸) deadly physical force.]

[Arguing, using abusive language, calling a person names, or the like, unaccompanied by physical threats or acts, does not make a person an initial aggressor and does not justify physical force.]

"Initial aggressor" means the first person who uses, or threatens the imminent use of, deadly physical force.

The actual striking of the first blow or inflicting of the first wound, however, does not necessarily determine who was the initial aggressor.

A person who reasonably believes that another is about to use deadly physical force upon him/her need not wait until he/she is struck or wounded. He/she may, in such circumstances, be the first to use deadly physical force, so long as he/she reasonably believed it was about to be used against him/her. He/she is then not considered to be the "initial aggressor," even though he/she strikes the first blow or inflicts the first wound.

[Add if there was evidence of deadly force responding to non-deadly force:

If a person initially uses or threatens the use of *non-deadly physical* force against another who, in response, uses or threatens the imminent use of *deadly* physical force, then that person who first used or threatened the imminent use of *deadly* physical force is the initial aggressor.^{9]}

[Add if there was evidence that the defendant was an intervenor:

If a person intervenes in a conflict in defense of another, that person is an initial aggressor only if he/she somehow initiated or participated in the initiation of the original use of [deadly] physical force or the threat to use it, or reasonably should have known that the person he/she was defending initiated it. On the other hand, if he/she neither initiated, nor participated in the initiation of [deadly] physical force, or the threat to use it, and had no reason to know who initiated it, then he/she is not the initial aggressor.^{10]}

[Add if there was evidence of a reputation for violence:

A person cannot be considered the initial aggressor simply because he/she has a reputation for violence or has previously engaged in violent acts.^{11]}

[Add if there was evidence of threats:

You may (however) consider whether the deceased made threats against the defendant prior to the time in question and whether such threats indicated an intent to act upon them as the initial aggressor. In making that assessment, it does not matter whether the defendant was aware of the threats.^{12]}

Add if applicable¹³

(2) The defendant would not be justified if he/she knew that he/she could with complete safety to himself/herself and others avoid the necessity of using deadly physical force by retreating.

NOTE on Exception to Retreat in a Dwelling: Whether a defendant is in his or her dwelling and required to retreat may be either a question of fact for the jury [People v Cotto, 172 AD3d 595, 595-96 [1st Dept 2019] ["The evidence introduced by both sides, viewed as a whole, presented a jury issue as to whether defendant had a duty to retreat"], or a question of law for the court to decide, and upon the court deciding that there was no duty to retreat, requires, at least upon request of the defendant, an instruction that the defendant had no duty to retreat. People v Delisme, 208 AD3d 1063 [1st Dept 2022] ["Defendant and the complainant lived in a housing complex where they each had a separate room that gave them access to a shared bathroom to which no one else had access. The court should have granted the defense's request for a jury instruction that defendant . . . had no duty to retreat from the bathroom he shared with the complainant as a matter of law"]. Cf. People v Aiken, 4 NY3d 324, 325 [2005] [While the defendant was "entitled to the justification charge, he was not entitled to a jury instruction that he had no duty to retreat," given that the defendant was standing in the doorway "between his apartment and the common hall of multi-unit building" and could have retreated into his apartment]; People v Smith, 54 AD3d 421, 422 [2d Dept 2008] ["the trial court properly refused to charge . . . that the defendant did not have a duty to retreat, as the shooting took place on his driveway, the front yard, the sidewalk, and the street, places that were not his 'dwelling'." See footnote 15 for cases on the meaning of dwelling].

Add if applicable:

[The defendant, however, would not be required to retreat if the defendant was in his/her dwelling and was not the initial aggressor.¹⁴

The term, "dwelling," encompasses a house, an apartment or a part of a structure where the defendant lives [alone / shares with another/others] and where others are ordinarily excluded. (The determination of whether a particular location is part of a defendant's dwelling depends on the extent to which the defendant [and persons actually

sharing living quarters with the defendant] exercise(s) exclusive possession and control over the area in question.)^{15]}

(3) The defendant would not be justified if (specify's) conduct was provoked by the defendant himself/herself with intent to cause physical injury to (specify).

(4) The defendant would not be justified if the deadly physical force involved was the product of a combat by agreement not specifically authorized by law.]

The People are required to prove beyond a reasonable doubt that the defendant was not justified.

NOTE: At this point, the trial court must select the appropriate alternative set forth below to fulfill the mandate of appellate decisions. See endnote (¹⁶). Those decisions require that in a case with multiple counts, in which some or all of the counts include the same definition of justification as an element, the trial court's instructions (as well as its verdict sheet) need to convey to the jury that once the jury has determined that the People have failed to prove that the defendant was not justified as to a count, the jury must not reconsider that same justification defense as to any other count and they must find the defendant not guilty of each and every count for which that same definition of justification is an element. (For a sample verdict sheet, see CJ12d Model Verdict Sheet for Justification.)

Select appropriate alternative:

(1) If justification applies to only one count, add the following:

It is thus an element of count [specify number and name of offense] that the defendant was not justified. As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of that count.

(2) If justification applies to more than one count submitted to the jury on the verdict sheet, add the following:

It is thus an element of counts [specify numbers and names of the offenses on verdict sheet] that the defendant was not justified. As a result, if you find, as to the first of those counts that you consider pursuant to my instructions, that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of that count and of the remaining count(s) to which that same definition of justification applies.

(3) If there are additional counts for which justification is not an element, add the following:

If you find the defendant not guilty of counts (specify numbers and names of the offenses for which lack of justification was an element), you still must consider the count(s) (specify name of count) for which the People are not required to prove that the defendant was not justified.

1. In January 2013, the definition of initial aggressor was revised to include language to better accommodate the dictates of *People v McWilliams*, 48 AD3d 1266, 1267 (4th Dept 2008) ("We agree with defendant that, where there is a

reasonable view of the evidence that the defendant initiates nondeadly offensive force and is met with deadly physical force, the defendant may be justified in the use of defensive deadly physical force and that, in such cases, the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force").

The February 2016 revision added a supplemental instruction for situations involving an intervener to accord with *People v Walker*, 26 NY3d 170 (2015); See endnote 11. A Note was also added at the end of the charge.

The July 2016 revision included instructions regarding the consideration of evidence of threats made by the deceased against the defendant.

The January 2018 revision provided more detailed instructions at the end of the charge on how to instruct the jury to consider counts with the lack of justification as an element. See text associate with endnote 15.

2. See *People v McManus*, 67 NY2d 541, 549 (1986); *People v Higgins*, 188 AD2d 839, 840 (3d Dept 1992).

3. If the lawfulness of this deadly physical force is in issue, then include the word "unlawful," which appears in the statute (see Penal Law § 35.15 [1] [b]), and explain how it applies to the case.

4. Penal Law § 10.00 (11).

5. See Penal Law § 10.00 (9) & (10).

6. See *People v Goetz*, 68 NY2d 96, 115 (1986).

7. See *People v Miller*, 39 NY2d 543, 550-551 (1976).

8. If the lawfulness of this deadly physical force is in issue, then include the word "unlawful," which appears in the statute (see Penal Law § 35.15 [1] [b]), and explain how it applies to the case.

9. See *People v Walker*, 26 NY3d 170, 177 (2015) and see endnote number 1.

10. See *People v Walker*, 26 NY3d 170, 177 (2015).

11. While evidence of the defendant's knowledge of the victim's reputation for violence or specific acts of violence is admissible to show that the defendant's fears were reasonable, the evidence is not admissible "to show that the deceased was the aggressor, for if competent for that purpose, similar evidence could be given as to the reputation of the defendant as bearing on the probability that he was the aggressor" (*People v Rodawald*, 177 NY 408, 423 [1904]); see Prince, Richardson On Evidence, § 4-409, p172 (11th ed. Farrell).

12. See *People v Petty*, 7 NY3d 277 (2006).

13. See *Matter of Y.K.*, 87 N.Y.2d 430 (1996), where the defendant was on the ground being assaulted by a group of people, she was not able to retreat safely.

14. Penal Law § 35.15 (2) (a) (i). That statute also provides an exception to the duty to retreat for a police officer or peace officer, or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to Penal Law § 35.30 (see Penal Law § 35.15 [2] [a] [ii]).

15. See *People v Hernandez*, 98 NY2d 175, 182-183 [2002] ["the word "dwelling," as used in Penal Law § 35.15 (2) (a) (i), refers to a person's residence . . . the determination of whether a particular location is part of a defendant's dwelling depends on the extent to which defendant (and persons actually sharing living quarters with defendant) exercises exclusive possession and control over the area in question. The term encompasses a house, an apartment or a part of a structure where defendant lives and where others are ordinarily excluded--the antithesis of which is routine access to or use of an area by strangers"]; *People v Jones*, 3 NY3d 491, 493 [2004] ["the exception (to having to retreat) applies when the assailant and the defender (boyfriend/girlfriend) share the same dwelling"]; *Hernandez*, 98 NY2d at 177 [the "lobby and stairwell areas (where the incident took place) were used multiple times each day by tenants of the six-story apartment building and their guests. These areas were not under defendant's exclusive possession and could not fairly be characterized as defendant's living quarters"]; *People v Mickens*, 219 AD2d 543, 544 [1st Dept 1995] ["there is no merit to defendant's contention that the hotel corridor where the altercation took place was part of his dwelling and not a public place"]; *People v McCurdy*, 86 AD2d 493, 497-98, 450 NYS2d 507 [2d Dept 1982] ["In this case the hallway (where the incident took place) was located in a brownstone. Access to the hallway was limited to residents of the building and their guests. A locked front door insured this security. The incident itself took place at the foot of the stairs leading to the apartment. The degree of privacy of the brownstone and its hallway compels us to conclude that the jury should have been told that defendant had no duty to retreat"].

16. See (1) *Appellate Division, First Department: People v. Blackwood*, 147 A.D.3d 462 (2017) ("the court's charge did not convey to the jury that an acquittal on the top count. . . based on a finding of justification would preclude consideration of the other charges" for which the lack of justification was an element); *People v Roberts*, 280 AD2d 415, 416 (2001) ("Although the court instructed the jurors that justification was a defense to all of the counts, it did not instruct them that if they were to find defendant not guilty by reason of justification on a count, they were not to consider any lesser crimes").

(2) *Appellate Division, Second Department: People v Feuer*, 11 AD3d 633, 634 (2004) ("[T]he error committed by the trial court in failing to instruct the jurors that if they found the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts, is of such nature and degree so as to constitute reversible error"); ; *People v Bracetty*, 216 AD2d 479, 480 (1995) ("The court failed to instruct the jury...that the jurors were only to consider the lesser offense if they found the defendant not guilty of the greater offense for a reason other than justification").

(3) *Appellate Division, Third Department: People v Higgins*, 188 AD2d 839, 840-

841 (1992) (The trial court properly informed the jury that “only if defendant was found not guilty of the greater offense for a reason other than justification, was the jury to consider the lesser offense”).