

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

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.”¹

[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 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 [unlawful²] physical force by such individual.

The determination of whether a person REASONABLY BELIEVES 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 physical force by another individual requires the application of a two-part test.³ 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 physical force against him/her [*or someone else*], and that the defendant's own use of

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.

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 as applicable:

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

Select appropriate alternative(s):

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

[Add if applicable:

except, that the defendant’s use of physical force would nevertheless be justified if he/she had withdrawn from the encounter and effectively communicated such withdrawal to (specify) but (specify) persisted in continuing the incident by the use or threatened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 (unlawful⁴) physical force.]

“Initial aggressor” means the person who first attacks or threatens to attack; that is, the first person who uses or threatens the imminent use of offensive 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 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 physical force, so long as he/she reasonably believed it was about to be used against him/her [or someone else]. He/she is then not considered to be the “initial aggressor,” even though he/she strikes the first blow or inflicts the first wound. 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.

(2) 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*).

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

(4) A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a police officer or peace officer when it would reasonably appear that the latter is a police officer or peace officer.⁵

The People are required to prove beyond a reasonable doubt that the defendant was not justified. It is thus an element of [each] count [*specify*] 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 [all] count(s) [*specify*].⁶

1. See *People v. McManus*, 67 N.Y.2d 541, 549 (1986); *People v. Higgins*, 188 A.D.2d 839, 840 (3rd Dept. 1992).
2. If the lawfulness of this physical force is in issue, then include the word “unlawful,” which appears in the statute [Penal Law § 35.15(1)], and explain how it applies to the case.
3. *People v. Goetz*, 68 N.Y.2d 96 (1986).
4. If the lawfulness of this physical force is in issue, then include the word “unlawful,” which appears in the statute [Penal Law § 35.15(1)(b)], and explain how it applies to the case.
5. Penal Law § 35.27.
6. *People v. Roberts*, 280 A.D.2d 415 (1st Dept. 2001); *People v. Higgins*, 188 A.D.2d 839, 840-841 (3d Dept. 1992); *People v. Castro*, 131 A.D.2d 771, 773 (2nd Dept. 1987).