

**JUSTIFICATION:
USE OF DEADLY PHYSICAL FORCE
TO PREVENT BURGLARY
PENAL LAW 35.20(3)**

NOTE: This charge should precede the instructions for the crime(s) to which the defense applies, and then, the final element of any such crime should read as follows:

“and, #. That the defendant was not justified.”¹

With respect to count(s) (specify count(s) and name(s) of crime(s)), one of the elements that the People must prove beyond a reasonable doubt is that the defendant was not justified. The defendant is not required to prove that he/she was justified; the People must prove that he/she was not.

I will now explain when, under our law, a person is justified in using deadly physical force to prevent or terminate a burglary or attempted burglary.

Under our law, a person in possession or control of [or licensed or privileged to be in] a dwelling [or an occupied building], who reasonably believes that another individual is committing or attempting to commit a burglary of such dwelling [or occupied building], may use deadly physical force upon that individual when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.

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: “burglary,” “deadly physical force,” [person licensed or privileged” ^{2]} and “reasonably believes.” ³

A person commits BURGLARY when that person knowingly enters or remains unlawfully in a dwelling [or occupied building] with the intent to commit a crime therein.⁴

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.⁵

A defendant REASONABLY BELIEVES deadly physical force to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission of a burglary by another individual when the following two circumstances exist:⁶

First, the defendant actually believes that another individual is committing or attempting to commit a burglary, and also actually believes that his or her use of deadly physical force is necessary to prevent or terminate the commission or attempted commission of that burglary. It does not matter whether those beliefs are mistaken, provided the defendant actually holds them.

Second, a “reasonable person” in the defendant’s position, knowing what the defendant knows and being in the same circumstances, would also hold those same beliefs.

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 (7). 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 CJI2d 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. See *People v McManus*, 67 NY2d 541, 549 (1986); *People v Higgins*, 188 AD2d 839, 840 (3d Dept 1992); *People v. Feuer*, 11 AD3d 633 (2d Dept. 2004).
2. The definition of persons “licensed or privileged” to be in buildings is set forth in Penal Law § 35.25(4)(b) and may be added as necessary.
3. The justification statute [Penal Law § 35.20(4)(a)] incorporates by reference the definition of building set forth in Penal Law § 140.00(2), and the definition of dwelling set forth in Penal Law § 140.00(3) and the appropriate definition may be added as necessary.
4. See Penal Law § 35.20(3) and Penal Law §§ 140.20 and 140.25(2).
5. Penal Law §10.00(11). The definition of serious physical injury is set forth in Penal Law § 10.00(10) and may be added as necessary.
6. *People v Goetz*, 68 NY2d 96 (1986).
7. 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”).