

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

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*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.”<sup>1</sup>*

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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

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<sup>1</sup> 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).

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” <sup>2</sup>] and “reasonably believes.” <sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> See Penal Law § 35.20(3) and Penal Law §§ 140.20 and 140.25(2).

<sup>5</sup> 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.

commission of a burglary by another individual when the following two circumstances exist:<sup>6</sup>

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. 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*).<sup>7</sup>

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<sup>6</sup> *People v Goetz*, 68 NY2d 96 (1986).

<sup>7</sup> *People v. Feuer*, 11 AD3d 633 (2d Dept. 2004); *People v Roberts*, 208 AD2d 415 (1<sup>st</sup> Dept 2001); *People v Higgins*, 188 AD2d 839, 840-841 (3d Dept 1992); *People v Castro*, 131 AD2d 771, 773 (2d Dept 1987).