

**JUSTIFICATION:
USE OF PHYSICAL FORCE
IN DEFENSE OF A PERSON
PENAL LAW 35.15 (1)
(Effective Sept. 1, 1980)
(Revised Jan. 2015; Feb. 2016; and July 2016)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 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] 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.⁴ 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 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 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 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*).⁵

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 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 (unlawful⁶) 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 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.

[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.^{7]}

[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.^{8]}

[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.^{9]}

(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.¹⁰

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*].¹¹

NOTE: The trial judge must take special note of the foregoing paragraph. As the cases in endnote ten dictate, any instructions, as well as the verdict sheet, as relate to the defense of justification, must convey to the jury that once the jury has determined that the People have failed to prove lack of justification, they must find the defendant not guilty of each and every count for which proof of lack of justification is an element. See CJI2d Model Verdict Sheet for Justification.

1. The 2015 revision added the section dealing with evidence of a party's reputation for violence. In February 2016, a supplemental instruction for situations involving an intervener was added to accord with *People v Walker*, 26 NY3d 170 (2015); See endnote 8. A Note was also added at the end of the charge. In July 2016, the charge was revised to include instructions regarding the consideration of evidence of threats made by the deceased against the defendant.

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 physical force is in issue, then include the word “unlawful,” which appears in the statute (see Penal Law § 35.15 [1]), and explain how it applies to the case.
4. See *People v Goetz*, 68 NY2d 96, 115 (1986).
5. See *People v Miller*, 39 NY2d 543, 550-551 (1976).
6. If the lawfulness of this 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.
7. See *People v Walker*, 26 NY3d 170,177 (2015).
8. 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]).
9. See *People v Petty*, 7 NY3d 277 (2006).
10. Penal Law § 35.27
11. See *People v Velez*, 131 AD3d 129, 134 (1st Dept 2015) ("Considered as a whole, the instructions and verdict sheet at issue did not adequately convey the principle that if the jury found defendant not guilty of the greater charge on the basis of justification, it was not to consider any lesser counts"); *People v Feuer*, 11 AD3d 633, 634 (2d Dept 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 Roberts*, 280 AD2d 415, 416 (1st Dept 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”); *People v Bracetty*, 216 AD2d 479, 480 (2d Dept 1995) (“The court failed to instruct the jury that a finding of not guilty by reason of justification [see, Penal Law § 35.05 (2)] on the count of manslaughter in the second degree would preclude a verdict of guilty with regard to the lesser-included offense of criminally negligent homicide, and 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”); *People v Higgins*, 188 AD2d 839, 840-841 (3d Dept 1992) (“The court repeatedly and consistently instructed the jury that a finding of justification would preclude a guilty verdict on any of the offenses charged; furthermore, when the lesser included offenses were discussed, the court reiterated 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”); *People v Castro*, 131 AD2d 771, 773 (2d Dept 1987) (“[A]lthough the court properly permitted the jury to consider justification with respect to each of the three counts submitted [murder, and manslaughter in the first and second degrees], the jury should also have been instructed that a finding of not guilty by reason of justification as to any of the counts would preclude a verdict of guilty as to its lesser included offenses” [internal citations omitted]).