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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 102

JAIRO CASTILLO,

Appellant.

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20 Eagle Street  
Albany, New York  
October 17, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Castillo.

3 MR. BOVA: Good afternoon. May it please the  
4 court. Matthew Bova for Mr. Castillo. I would request two  
5 minutes for rebuttal, please.

6 CHIEF JUDGE WILSON: Yep.

7 MR. BOVA: There was a reasonable view of  
8 justification here, and that instruction should have been  
9 provided to the jury so the jury could resolve the classic  
10 questions of fact presented by the justification defense  
11 here.

12 The decedent stood inside a barber shop blocking  
13 the door, told everyone inside that no one could leave,  
14 then turned to Mr. Castillo, who was just a few feet away,  
15 told him that he was not getting out of here, placed a  
16 razor blade up to his face, touching his cheek, and said,  
17 I'm going to cut you from ear to ear. In response, during  
18 - - - during a period of time that lasted no more than a  
19 few seconds, Mr. Castillo fired six shots in self-defense.  
20 On those facts, a reasonable jury could have found that Mr.  
21 Castillo was responding to the threat of imminent and  
22 deadly physical force.

23 Justification did not fade away because of a  
24 split-second spin after the first two shots. The question  
25 is whether a reasonable juror could have found that a

1 sensible person in Mr. Castillo's shoes would have  
2 interpreted that spin as something other than the all-out  
3 abandonment of the attack that the Appellate Division  
4 envisioned. And here, there was more than a reasonable  
5 view that would justify such an interpretation of this  
6 quick, split-second spin.

7 He had just - - - the decedent had just been shot  
8 in the left chest and spun. Any reasonable person would  
9 have interpreted that spin as simply the result of the  
10 force of the bullets to the left chest, not as all-out  
11 abandonment. It is certainly true that - - -

12 CHIEF JUDGE WILSON: So what was the threat that  
13 Mr. Castillo faced at the moment he fired the first shot?

14 MR. BOVA: It was the threat of the razor blade  
15 that was placed to his face and the explicit threat - - -

16 CHIEF JUDGE WILSON: Wait. Hold on. Okay.  
17 Let's back up. Was the razor blade on his face at that  
18 moment?

19 MR. BOVA: At the precise moment of the first  
20 shot, no.

21 CHIEF JUDGE WILSON: He - - - he had stepped  
22 back.

23 MR. BOVA: Yes.

24 CHIEF JUDGE WILSON: So the threat he was facing  
25 was someone armed with a one and half inch razor blade?

1 MR. BOVA: Yes.

2 CHIEF JUDGE WILSON: Who was a couple of feet  
3 away from him?

4 MR. BOVA: Yes.

5 CHIEF JUDGE WILSON: And not armed with a gun?

6 MR. BOVA: He was not armed, but he threatened  
7 him - - -

8 CHIEF JUDGE WILSON: He was armed - - - he was  
9 armed with a - - - with a razor blade?

10 MR. BOVA: Yes. Not armed with a gun, but he was  
11 armed with the razor blade.

12 CHIEF JUDGE WILSON: Uh-huh.

13 MR. BOVA: And not only just - - - it's not only  
14 about being armed. What makes this case unique, too, is  
15 the explicit threat that he lodges. He tells Mr. Castillo,  
16 you're not getting out of here. I'm going to cut you from  
17 ear to ear. That is the same thing, and any reasonable  
18 person would have interpreted that statement as, this  
19 person is going to kill me, and he's very committed to it.  
20 And the fact that Mr. Castillo is able to take one step  
21 back prior to using - - - prior to exercising self-defense,  
22 doesn't take this issue away from the jury, because at that  
23 moment, he's - - - Lebron is readily capable of carrying  
24 out his deadly attack.

25 So the first two shots, there was a question of

1 fact for the jury that should have gone to the jury. The  
2 postman shots, those two, there was a reasonable view that  
3 the threat continued because a spin does not indicate  
4 abandonment, or at least a reasonable person could so find.

5 JUDGE GARCIA: There would be a point, Counsel,  
6 when it would, right? So if he staggered out into the  
7 other room and the person followed them through and shot  
8 them in the back of the head while they were on the floor,  
9 that, you would concede, would not get you a reasonable  
10 view of the evidence.

11 MR. BOVA: Yes. Yes. I mean, if - - - and if  
12 and here, if the decedent had left the salon, that would  
13 also likely nullify a reasonable view, because at that  
14 point, the threat is no longer imminent. But here, all we  
15 have - - -

16 JUDGE GARCIA: Three to five second, right, I  
17 think is the testimony that this takes place - - - a few  
18 seconds.

19 MR. BOVA: Yes. And we know that from the video  
20 evidence also because we could see people reacting to the  
21 shots, and then we see Mr. Castillo leaving within seconds  
22 of the shots. So yes, we have a split-second moment to  
23 react here. And the questions - - -

24 JUDGE HALLIGAN: Is there - - - is there any  
25 evidence that he advances on him at all?

1 MR. BOVA: So the - - - he reaches across with  
2 his right hand and - - -

3 JUDGE HALLIGAN: Right.

4 MR. BOVA: - - - Lebron does - - - and then  
5 places - - -

6 JUDGE HALLIGAN: Yeah.

7 MR. BOVA: Yes.

8 JUDGE HALLIGAN: But - - - but what does the  
9 record tell us about exactly how far apart they are, if it  
10 tells us anything?

11 MR. BOVA: Well after - - - so the razor is  
12 placed to his cheek, then the testimony - - -

13 JUDGE HALLIGAN: Is it placed on his cheek or  
14 just near - - - I - - - I - - -

15 MR. BOVA: Yes.

16 JUDGE HALLIGAN: - - - I couldn't tell if it was  
17 placed near his face or on his cheek.

18 MR. BOVA: Yes. Garcia's testimony indicates  
19 that it's - - - that it's touching the cheek.

20 JUDGE HALLIGAN: I see. Okay.

21 MR. BOVA: And then - - -

22 JUDGE CANNATARO: I'm sorry. After - - - after  
23 Lebron does that, doesn't he step back away from Lebron?

24 MR. BOVA: Yes. Mr. Castillo takes one step  
25 back, according to Garcia's testimony, and fires the shots.

1 But first of all, the fact that he's able to take a step  
2 back doesn't nullify the threat, because all Lebron has to  
3 do - - - from just basically the distance from here to the  
4 end of the podium here, all he has to do is lunge at him to  
5 act on his threat - - -

6 JUDGE CANNATARO: How do we know that? I - - -  
7 I'm - - - I honestly can't tell from what I've read whether  
8 stepping back makes you three feet apart, six inches apart.  
9 I'm - - - I'm not sure. Is there a record cite that you  
10 could provide to give us sort of a spatial understanding?

11 MR. BOVA: Well, the testimony - - - we - - - we  
12 know that he's right up to him because he places - - -  
13 because he places the razor blade to his face. Then the  
14 testimony from Garcia at A-112 through 114 is that there's  
15 a step back and then he fires the shot. So it's - - - and  
16 Lebron and also Garcia places Lebron right at the door at  
17 the time - - - at the time of this incident. And then also  
18 places Mr. Castillo right there as well. So we're dealing  
19 with a very - - -

20 JUDGE SINGAS: But what was - - -

21 CHIEF JUDGE WILSON: And we know that the - - -  
22 we know that the muzzle of the gun is far enough away from  
23 Lebron that there's no stippling, right?

24 MR. BOVA: Yes.

25 CHIEF JUDGE WILSON: And what does that tell us,

1 if anything, about distance?

2 MR. BOVA: Well, according to the medical  
3 examiner's testimony, it's not that precise. But as the  
4 medical examiner testifies, it just indicates that they may  
5 have been more than two feet away. But that doesn't - - -  
6 that doesn't disprove self-defense as a matter of law.  
7 Perhaps the - - - perhaps the prosecution could make such  
8 an argument to the jury, but it doesn't disprove self-  
9 defense as a matter of law, because at that point, he's  
10 already threatened to kill him. He's already placed the  
11 razor to his face. Any reasonable person would say, this  
12 person is going to act on that threat. I need to use self-  
13 defense in order to protect myself.

14 JUDGE SINGAS: Does he have a duty to retreat?

15 MR. BOVA: No. That issue is not only not  
16 preserved because the prosecution never said anything about  
17 it, but certainly there's no duty to retreat as a matter of  
18 law on these facts because he's not readily capable of  
19 retreating with complete safety. Lebron is blocked - - -

20 JUDGE SINGAS: How many - - - do - - - do we know  
21 how many feet are behind him till the end of the store?  
22 Not going the - - - the direction of the exit, the  
23 direction behind where, I believe, there's another office.  
24 Do we know how big that store is?

25 MR. BOVA: I believe it's about fifteen feet.

1 But in any event, there's no - - - there's no indication  
2 whatsoever that Mr. - - - that Mr. Castillo even knew that  
3 there was a bathroom back there.

4 But in any event, what - - - what would be  
5 required here is that in order to retreat, he would have to  
6 have turned his back effectively to his assailant, banked  
7 everything on this hope that he could outrun the assailant  
8 to this bathroom that he doesn't even know about. So  
9 that's not - - - there's no ability here to retreat to  
10 complete safety - - -

11 JUDGE SINGAS: I mean, look, that's your view,  
12 but there's - - - there was a judge here who heard the  
13 witnesses and saw the exhibits, presumably, and listened to  
14 the medical examiner and made a determination the other  
15 way.

16 MR. BOVA: Well, the judge never made any  
17 determination about duty to retreat because the prosecution  
18 never argued it.

19 JUDGE SINGAS: I know. About giving the charge.

20 MR. BOVA: Oh, well, yes. And then the judge - -  
21 - the judge ignored the legal standard. The standard is,  
22 viewing the evidence in light most favorable to Mr.  
23 Castillo, could a reasonable juror have found, on these  
24 compelling facts - - - which the facts are coming from the  
25 prosecution's own witness - - - could a reasonable juror

1 have found that Mr. Castillo was acting in response to the  
2 threat of deadly, imminent physical force? And on these  
3 facts, that was amply established, and it should have gone  
4 to the jury.

5 JUDGE GARCIA: Counsel, could you speak to - - -  
6 if we were to agree with you on justification, the effect  
7 on the possession count?

8 MR. BOVA: Yeah. So the possession count would  
9 also have to be reversed, because the failure to charge  
10 justification infects the jury's assessment of intent to  
11 use unlawfully.

12 JUDGE GARCIA: How so? How so?

13 MR. BOVA: Because the - - - because if Mr.  
14 Castillo's possession is with the intent to use the firearm  
15 lawfully in justification, then he's not guilty of that  
16 count. So because - - - but the issue of justification is  
17 never given to the jury, because the jury's never given the  
18 chance to consider justification.

19 JUDGE GARCIA: It seems as if the charge here is  
20 also somewhat different. And - - - and I - - - and I think  
21 that if I'm correct, the jury was charged that they could -  
22 - - they had to find that if the gun was used unlawfully in  
23 the shooting to find possession with unlawful intent, which  
24 I think makes it more of an aggravator than it even would  
25 be under the standard charge. I think there's almost a

1 mischarge in this case from the standard charge if - - -

2 MR. BOVA: Well, the - - - at the - - - the  
3 bottom line though is that - - - because in this case, if -  
4 - - because there's no other evidence of an intent to use  
5 the firearm unlawfully under the prosecution - - - under  
6 the - - - the only - - - the only thing that could go - - -

7 JUDGE GARCIA: That don't ask for the  
8 presumption, right? There's no presumption.

9 MR. BOVA: Right. Yes. I mean, the only - - -  
10 the only evidence that would support the theory of  
11 possession with intent to use unlawfully would be the jury  
12 finding that Mr. Castillo unlawfully discharged the  
13 firearm.

14 JUDGE CANNATARO: So if his use was justified and  
15 therefore lawful, there is no criminal possession.

16 MR. BOVA: Precisely. Yes.

17 So - - - and all the questions that we're having  
18 right now, all - - - the discussion here, it should have  
19 gone to a jury. The prosecution could have stated its  
20 position in summation. Defense counsel could have stated  
21 its position in summation. The jury would have resolved  
22 these classic questions of fact.

23 And here the argument was not just reasonable, it  
24 was compelling because we're talking about someone who is  
25 dealing with a deadly predicament. Someone has just

1 threatened his life. He has split seconds to react. His  
2 response was reasonable, but at least a rational, properly  
3 charged jury could have so found.

4 Thank you.

5 CHIEF JUDGE WILSON: Thank you.

6 MS. CARLSON: Good afternoon. May it please the  
7 court. Cynthia Carlson for the People of the State of New  
8 York. The trial evidence showed that the imminent use of  
9 deadly physical force had ended by the time that the  
10 defendant fired his first shot. The evidence established  
11 that while the victim held a razor blade to the defendant's  
12 cheek - - -

13 JUDGE TROUTMAN: So did he have to wait until he  
14 was cut?

15 MS. CARLSON: He did not have to wait until he  
16 was cut, but he stepped back. That's key - - -

17 JUDGE TROUTMAN: Does it matter what transpired  
18 between - - - allegedly transpired between the victim of  
19 the shooting and the defendant earlier?

20 MS. CARLSON: Yes. From the - - - the start of  
21 the confrontation, when the - - -

22 JUDGE TROUTMAN: But even before that, his  
23 returning, his insistence.

24 MS. CARLSON: Okay. If the defendant knew about  
25 it, it could certainly go to the - - - the reasonableness

1 of his response to the defendant. And - - -

2 JUDGE GARCIA: But here is there any proof in the  
3 record that this defendant knew the circumstances before he  
4 went into the shop?

5 MS. CARLSON: We know that there are phone calls  
6 made between the co-defendant who was interacting with the  
7 defendant or the victim all day, and that within six  
8 minutes of the last phone call between the co-defendant and  
9 the defendant, the defendant is showing up armed with a  
10 secreted gun and then pulls it on the victim when he enters  
11 into - - - or after he enters into the shop. But  
12 importantly - - -

13 JUDGE GARCIA: Going to - - - but just going to  
14 Judge Cannataro's question before, is there anything in the  
15 record that shows how far they were apart when the  
16 defendant took the step back?

17 MS. CARLSON: There is. There are a few  
18 indicators in the record. The initial part is the ME's  
19 testimony. The ME testifies that there's no stippling or  
20 fouling to the victim's body, which - - -

21 JUDGE CANNATARO: So that's two or three feet?

22 MS. CARLSON: When she - - - when asked, she says  
23 that it means it's greater than a few feet, not two feet,  
24 but greater than a few feet. And we're also talking about  
25 a razor blade, a razor blade that's not sheathed. It's one

1 and five-eighths inches. And the force to be able to use a  
2 razor blade to cause death has to be so great that even  
3 three feet is significant.

4 I would also note that on pages A 131 to 132 of  
5 the transcript - - -

6 CHIEF JUDGE WILSON: So let me - - - let me just  
7 test that for a second. So I'm walking down the street,  
8 minding my own business, and somebody comes up to me with a  
9 razor blade of that size and says, give me your wallet or  
10 else, right? And it's three feet away from me. I happen  
11 to have a gun, and I shoot the person. No justification  
12 defense?

13 MS. CARLSON: Not necessarily.

14 CHIEF JUDGE WILSON: Well, suppose I can't  
15 retreat?

16 MS. CARLSON: Not necessarily. You - - -

17 CHIEF JUDGE WILSON: Okay. Then why?

18 MS. CARLSON: Because the distance between the  
19 victim and the defendant matters. And you - - -

20 JUDGE TROUTMAN: So again, are you - - -

21 JUDGE RIVERA: Why isn't that a jury question?

22 MS. CARLSON: It's not a jury question because  
23 the - - - the requirement that this court has set forth is  
24 that the threshold inquiry has to be made by the judge.  
25 There has to be a baseline. There has to be a limited

1 amount - - -

2 JUDGE TROUTMAN: What about how you're supposed  
3 to view the evidence in the light most favorable to the  
4 defendant.

5 MS. CARLSON: But it has to be - - - yes, it's a  
6 light most favorable to the defendant, but it has to be a  
7 reasonable view. It can't be - - -

8 JUDGE HALLIGAN: But what about the fact that the  
9 razor was placed up against him, and they're very close  
10 together at that point. Why isn't that the relevant  
11 reference point, not him backing up to pull out the gun?

12 MS. CARLSON: Because the defendant stepped back.  
13 And - - -

14 JUDGE HALLIGAN: I understand that, but why - - -  
15 in measuring the extent of danger to him - - - well, let me  
16 ask - - - let me ask a different question. If the  
17 defendant had not stepped back and the razor blade was  
18 against his skin, would you need to give the charge then?

19 MS. CARLSON: That's - - - then that charge could  
20 be given.

21 JUDGE HALLIGAN: Would have to be given, do you -  
22 - - would you say?

23 MS. CARLSON: If the - - - if the victim cannot  
24 step back - - - if the victim can't reasonably, yes - - -

25 JUDGE HALLIGAN: You're if - - - if - - - if - -

1 - if - - - the - - -

2 MS. CARLSON: Yes.

3 JUDGE HALLIGAN: And so then I take it the - - -  
4 your view is by stepping back, the defendant deprives  
5 himself of a justification defense. Is that - - -

6 MS. CARLSON: He doesn't deprive himself of the  
7 justification defense. Instead, he does what he's supposed  
8 to do for a justification defense. 3515 says that when  
9 you're faced with deadly physical force, you have a duty to  
10 retreat. And the defendant did it. He stepped back, we  
11 know, a couple of feet - - - greater than a couple of feet.

12 JUDGE HALLIGAN: But wait, why do we know he  
13 stepped back greater than a couple of feet?

14 MS. CARLSON: A few - - - a few reasons. The  
15 first is because the medical examiner says that - - -

16 JUDGE HALLIGAN: Says a few feet, right?  
17 Whatever that means, two or three - - -

18 MS. CARLSON: She says greater than a few feet.  
19 Yes.

20 JUDGE HALLIGAN: Okay.

21 MS. CARLSON: And then what we also know is based  
22 on pages A-131 to 132 of Denny Garcia's testimony, she is  
23 asked - - - she's shown the picture - - -

24 JUDGE HALLIGAN: Uh-huh.

25 MS. CARLSON: - - - of the inside of the salon,

1 and she's asked where is the defendant and where is the  
2 victim in relation to the shooting. And what she says - -  
3 - and that photograph is on 1358 of the - - - the record.  
4 She says that the victim is to the left of a blue pillar by  
5 the orange cone. And she says that the defendant - - - I'm  
6 - - - I'm sorry - - - to the right of the blue pillar - - -

7 JUDGE HALLIGAN: I mean, all of this suggests to  
8 me that - - - that these are points that you could well  
9 make to a jury, and maybe you'd prevail. But why isn't it  
10 something that needs to go to the jury?

11 MS. CARLSON: Because it rests on speculation  
12 otherwise. It doesn't go to the jury because the defendant  
13 hasn't established that at the moment he used the deadly  
14 physical force - - -

15 JUDGE CANNATARO: I'm sorry. Before we get too  
16 far away from this, with respect to Denny Garcia, my  
17 recollection is that her testimony was kind of all over the  
18 place. That there were some inconsistencies. Was she - -  
19 - what's the word I'm looking for? Was she consistent with  
20 respect to this distance description that you're talking  
21 about at A-131 to 132?

22 MS. CARLSON: She says - - - reading her  
23 testimony as a whole, as your - - - as one would be  
24 required to do - - - she says that he's standing at the  
25 blue pole. The victim is - - - excuse me - - - the victim

1 is standing at the - - - by the blue pillar. When asked in  
2 relation to the orange cones, she says next to the orange  
3 cone. And then she says - - -

4 JUDGE CANNATARO: And she never equivocates on  
5 this?

6 MS. CARLSON: There's some confusion, I think,  
7 when start - - - she starts to compare it to other  
8 photographs that were entered into evidence. But her - - -  
9 her point was that the victim was still by the blue pillar,  
10 by the entrance. And the defendant - - -

11 JUDGE TROUTMAN: Did the People - - -

12 CHIEF JUDGE WILSON: She had originally - - - she  
13 had originally said she wasn't in the room at all, right?

14 MS. CARLSON: I'm sorry.

15 CHIEF JUDGE WILSON: She had originally said she  
16 wasn't in the room at all when this happened - - -

17 MS. CARLSON: That's correct. She did say that  
18 she initially wasn't there. But that - - - if she wasn't  
19 there, that wouldn't establish justification for the  
20 defendant and he wouldn't be entitled to the judgement.

21 JUDGE TROUTMAN: Did the People preserve duty to  
22 retreat?

23 MS. CARLSON: I'm sorry?

24 JUDGE TROUTMAN: Did the People preserve their  
25 claim that he was required to retreat?

1 MS. CARLSON: Yes, in the sense that the People  
2 oppose the justification defense. They didn't put forth  
3 why they weren't - - - specifically why justification  
4 wasn't appropriate. And the court said that, having  
5 reviewed the testimony of the - - - the witnesses, the  
6 photographs that came into evidence - - -

7 CHIEF JUDGE WILSON: Well, but don't you think  
8 it's fair that if you wanted the court to decide whether,  
9 given the circumstances, the layout, the pictures, and so  
10 on, that it was feasible to retreat, you needed to say  
11 that?

12 MS. CARLSON: No, because it's all part and  
13 parcel of the same argument of whether justification is  
14 appropriate. There are three - - - three reasons that  
15 justification has to - - - or three prongs to the test that  
16 justification has to be met, and the prosecutor was saying,  
17 we don't believe it was met at all. And so to go in and  
18 specifically say, well, it wasn't met because at the moment  
19 that he fired the weapon, he - - - as - - - the moment he  
20 fired the weapon, he wasn't facing deadly physical force as  
21 he is required to be facing. This court in Jones had  
22 noted, like, there's no reasonable belief - - -

23 JUDGE RIVERA: But - - - but this is all  
24 happening in a blink of an eye. This is not minutes. This  
25 is - - - yes, you can break it down now. We, of course,

1 can all break it down now, but it's happening in - - - in a  
2 blink of an eye. You step back and you shoot. Should - -  
3 - that strikes me as the kind of thing that goes to the  
4 jury, assessing the credibility of the witnesses, looking  
5 at the evidence, listening to the arguments, and deciding  
6 for itself, yes, this man did or did not have a basis to  
7 fear for his life and was justified in that moment in  
8 pulling the trigger.

9 MS. CARLSON: But New York State does not require  
10 that it has to be over minutes. We are not a stand-your-  
11 ground jurisdiction. Inherent in the historical tradition  
12 of justification is that there's a mindfulness - - -

13 JUDGE RIVERA: It doesn't require it's got to be  
14 - - - it doesn't have - - - it doesn't require it has to be  
15 two inches either. I mean, you're not saying anything with  
16 that. The point - - -

17 MS. CARLSON: No. But we're saying - - -

18 JUDGE RIVERA: - - - you do recognize that this  
19 is not like perhaps some other case where, yes, there's a  
20 pause, there's some time to reflect, or he has the  
21 opportunity safely to look and see if he can get away.

22 MS. CARLSON: But he has to be mindful at the  
23 time that he's facing the - - - the deadly physical force.  
24 He has to be reasonable in his subjective belief - - -

25 JUDGE RIVERA: Right.

1 MS. CARLSON: - - - that there is going to be  
2 deadly physical force used against him.

3 JUDGE RIVERA: A blade to the cheek. I'm going  
4 to cut your ear to ear. You step back and pull the  
5 trigger.

6 MS. CARLSON: He steps back - - -

7 JUDGE RIVERA: It - - - it takes less time than  
8 what it took me to say that, by the way.

9 MS. CARLSON: I'm - - - I'm sorry. Did you - - -

10 JUDGE RIVERA: Just it takes less time than what  
11 it took me to say that for that to happen.

12 MS. CARLSON: To step back.

13 JUDGE RIVERA: Yeah, sure.

14 MS. CARLSON: Well - - - well, certainly. But  
15 the defendant is still under - - -

16 JUDGE RIVERA: And shoot.

17 MS. CARLSON: - - - an obligation to have a  
18 reasonable belief that he is facing deadly physical force,  
19 and he wasn't facing deadly physical force. It's a one-  
20 and-five-eighths inch loose razor blade that has to be in a  
21 - - -

22 JUDGE RIVERA: What would have made it - - - what  
23 would have made it - - -

24 MS. CARLSON: A gun.

25 JUDGE RIVERA: - - - reasonable? What would have

1 made it?

2 MS. CARLSON: A gun.

3 JUDGE RIVERA: Well - - -

4 MS. CARLSON: If the victim had a gun on him.

5 JUDGE RIVERA: So if he had a gun?

6 MS. CARLSON: Yes.

7 JUDGE RIVERA: Ah, so it's not the distance  
8 between them.

9 MS. CARLSON: It's - - -

10 JUDGE RIVERA: It's not the - - - whatever he  
11 threatened them with, it's the fact that it's a razor  
12 blade.

13 MS. CARLSON: It's a combination of factors. One  
14 particular factor could be that the victim had a gun. If  
15 the victim has a gun, then the defendant would have been  
16 justified.

17 JUDGE TROUTMAN: So do you disagree that if  
18 someone slices you at a particular place, let's say it  
19 slides from your face to your throat, that they could, in  
20 fact, cause you to bleed to death?

21 MS. CARLSON: No. It - - - it certainly could be  
22 deadly physical force. At the time that that razor blade  
23 was held to the defendant's face, that could be deadly - -  
24 - that is deadly physical force. But the defendant stepped  
25 back and he did not get cut. The facts of this case

1 matter. Justification is a fact of the - - -

2 JUDGE SINGAS: So is there any evidence that when  
3 he stepped back that the decedent kept approaching?

4 MS. CARLSON: No, there is absolutely no  
5 evidence. Denny Garcia testified that the defendant  
6 stepped back and was asked, and then what happened? And  
7 she said that the defendant fired the gun. The defendant  
8 never testified - - -

9 JUDGE RIVERA: What if because it's  
10 instantaneous, or it's in a blink of an eye, there's no  
11 such time.

12 MS. CARLSON: I - - -

13 JUDGE RIVERA: There's no such time. You pull  
14 back and you shoot.

15 MS. CARLSON: But no one testified that there's  
16 no such time for him - - -

17 JUDGE RIVERA: And again, isn't that for the jury  
18 to parse out?

19 MS. CARLSON: No, because there has to be a basis  
20 in the evidence to reasonably believe that the defendant  
21 faced deadly physical force for the court to then give the  
22 charge. The court isn't - - -

23 JUDGE RIVERA: Do you - - - do you - - - do you  
24 agree that the amount of time that it takes for these  
25 events to unfold is a factor to be considered in a judge



1 reaching their conclusion about whether or not it's  
2 reasonable?

3 MS. CARLSON: It - - -

4 JUDGE RIVERA: You agree?

5 MS. CARLSON: - - - certainly it could be a  
6 factor. It could be a factor. But here - - -

7 JUDGE RIVERA: When is it not?

8 MS. CARLSON: It - - - it depends on - - - in  
9 this case, it's not a factor because the victim at the time  
10 that he is facing the defendant, this deadly physical force  
11 - - -

12 JUDGE RIVERA: Uh-huh.

13 MS. CARLSON: - - - would have to be something  
14 more than a one-and-five-eighths-inch razor blade. It is  
15 less than two inches - - - smaller than a paperclip.

16 JUDGE RIVERA: Are you saying he needs a gun?

17 MS. CARLSON: He would need a gun.

18 JUDGE RIVERA: If he had a hammer.

19 MS. CARLSON: He - - - no.

20 JUDGE RIVERA: If he had a - - - a bigger knife?

21 MS. CARLSON: Potentially with a bigger knife,  
22 depending on the size of the knife.

23 JUDGE RIVERA: Because?

24 MS. CARLSON: I'm sorry?

25 JUDGE RIVERA: Because? Why does that matter?

1 MS. CARLSON: Because it's about - - - this  
2 court, in *Dodt*, said that what creates deadly physical  
3 force, what defines deadly - - - deadly physical force, is  
4 the capacity to cause death. A small razor blade from a  
5 distance greater than a few feet cannot cause death. When  
6 it's against his face, against his jugular, sure. But  
7 we're talking about the ability to use deadly physical  
8 force is at the time that you're actually facing deadly  
9 physical force. He was not facing it then - - -

10 JUDGE GARCIA: Counsel, I'm sorry to interrupt,  
11 but could you address, if we were to disagree with you on  
12 the justification charge, what would the effect be on the  
13 possession count?

14 MS. CARLSON: The possession count should still  
15 stay. The reason being, as this court noted in *Pons*, that  
16 justification is about the use of the weapon, but the - - -  
17 the criminal possession of the weapon charge is about the  
18 intent to use.

19 JUDGE GARCIA: Clearly, *Pons* - - - and *Almodovar*,  
20 I think, is the other case says you don't get a  
21 justification charge to a possession count. And we've said  
22 that at least twice. The issue, I think, is the jury could  
23 have considered what is - - - the jury now could have found  
24 to be a lawful shooting as proof of the intent to use  
25 unlawfully. And in fact, I think on the instructions that

1 were actually given in this case, they had to find that.

2 MS. CARLSON: In order for the weapon charge to -  
3 - - or for the - - - the justification charge, for every  
4 shot to have been justified, that would then mean that the  
5 shots to the back where the victim has completely turned  
6 around - - -

7 JUDGE GARCIA: That's a justification issue. But  
8 let's say they get the justification charge, you had asked  
9 for every shot needs to be justified if it was given. They  
10 get those charges, and the jury still finds justified.  
11 Four to five seconds, okay. All were justified. Now, they  
12 could still find, without a proper instruction, that the  
13 intent to use the weapon unlawfully is based on that  
14 shooting, which, with a properly instructed jury, would  
15 have been lawful.

16 MS. CARLSON: But it's also about the continuum  
17 of the defendant's activity with that gun. So it's not  
18 just the moment that he brandishes it in the - - - the  
19 salon, it's the moment leading up to it. We have the  
20 evidence that there are phone calls between the co-  
21 defendant and the defendant, and he's - - -

22 JUDGE GARCIA: And it may well be a jury could  
23 find that. But I think there's some problems because one,  
24 the way the jury was specifically charged in this case.  
25 But even without that, they could find that, but you



1 wouldn't know if they based it on that or without the  
2 proper instruction. And there is one for when you get a -  
3 - - there is an instruction for when you get a  
4 justification charge other than what is the lawful  
5 discharge.

6 MS. CARLSON: There - - - there is an expanded  
7 intent charge on a weapon. But the facts of this case  
8 don't suggest, don't establish that that - - -

9 JUDGE GARCIA: There's a charge that says if you  
10 find the shooting justified, that's a lawful act, and you  
11 can't use a lawful act to prove intent to use the weapon  
12 unlawfully.

13 MS. CARLSON: Right. But what Pons and Almo - -  
14 - Pons and its progeny talk about is it's not just that one  
15 minute. It's - - - it's the continuum of events.

16 JUDGE GARCIA: How do we know that's not what  
17 they used here, if they should have been instructed on  
18 justification - - -

19 MS. CARLSON: Because it's so abundantly clear  
20 that the shots - - - the fatal shots - - - or not even the  
21 fatal shots - - - the one shot to the back that goes  
22 straight up his neck through his ear, it is so abundantly  
23 clear from that medical examiner's testimony, there is no  
24 way that the defendant at that - - - the victim at that  
25 time was a threat - - - posed deadly physical force to the

1 - - - the defendant for the defendant to then be justified.

2 I would also note, even if this court finds that  
3 the instruction should have been given, it's subject to  
4 harmless-error analysis, and the medical - - - the  
5 uncontroverted testimony between Denny Garcia and the  
6 medical testimony, there is no way that these - - - these  
7 shots were justified.

8 For that reason, the People would ask that the  
9 court affirm defendant's conviction.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. BOVA: Just as to the distance of the  
12 bathroom in the back, it's actually thirty-five feet.  
13 That's at A-1354. So the pros - - - so the argument here  
14 would have to be for the prosecution that they're making  
15 now for the first time - - - the unpreserved argument,  
16 which the court doesn't have to reach. But in any event,  
17 it fails on the merits because a reasonable jury could have  
18 absolutely found that he had no opportunity to retreat,  
19 because A, there's absolutely no evidence whatsoever that  
20 he knows about this bathroom with these locks; and B, in  
21 order to get to that bathroom, he would have to bank his  
22 life on the hope that he can outrun a deadly armed  
23 assailant who has already threatened him - - - to kill him  
24 with a razor blade. That's not the ability to retreat with  
25 complete safety. But like the other issues in this case,

1 at a bare minimum, that's an issue that goes to the jury.

2 JUDGE RIVERA: Can you address this argument that  
3 it's not - - - not - - - once he steps back, there's not  
4 really a threat from that kind of a razor blade.

5 MR. BOVA: Once he steps back, all we're talking  
6 about is a few feet. Even if we credit the medical  
7 examiner's testimony that because there's no stippling, it  
8 would have been more than a couple of feet. We're still  
9 talking about three, four feet at the most. That doesn't  
10 do anything to nullify the threat of imminent deadly  
11 physical force as a matter of law, which is what we're  
12 talking about here. We're not talking about whether or not  
13 Mr. Castillo gets dismissal. We're talking about whether a  
14 jury gets to decide this, and the jury - - -

15 JUDGE CANNATARO: I'm - - - I'm - - - I'm sorry  
16 for being obtuse, but is that because the - - - the victim  
17 can - - - can lunge at him with the razor blade? Is that  
18 what you're saying?

19 MR. BOVA: Absolutely. Yes.

20 JUDGE CANNATARO: A few feet is not enough to  
21 make him feel safe?

22 MR. BOVA: No, a few - - - no, because the person  
23 has just said, I'm going to - - - I'm going to end your  
24 life, effectively, by cutting you from ear to ear with the  
25 razor blade. Merely being able to take one step back like

1 this and creating - - - going from the knife on the cheek  
2 to perhaps this far away does not nullify that threat as a  
3 matter of law - - -

4 JUDGE GARCIA: Okay.

5 MR. BOVA: - - - because any sensible person in  
6 Mr. Castillo's shoes could have easily said to himself, I'm  
7 still in serious danger here because this person is  
8 committed, he's already put the knife to my cheek, and I'm  
9 going to die - - -

10 JUDGE CANNATARO: So Lebron is blocking the door,  
11 right. That - - - that's - - - that's his position when -  
12 - -

13 MR. BOVA: Yes.

14 JUDGE CANNATARO: - - - all this is going on?

15 MR. BOVA: Yes.

16 JUDGE CANNATARO: So it - - - I - - - I  
17 understand, and I'm not in any way trying to contradict  
18 your statement that he couldn't retreat. But in a thirty-  
19 five foot space, he took a step back. He could have taken  
20 a couple more steps back and completely obviated that  
21 legitimate concern about being assaulted with deadly  
22 physical force, couldn't he, or no?

23 MR. BOVA: No, not - - - I mean, not as a matter  
24 of law, that's not - - - that is - - - that's not correct  
25 because what - - - what that's requiring someone to do is

1 to hope and be optimistic. It's - - - it's requiring  
2 someone to say, this person's already - - -

3 JUDGE CANNATARO: All right. I get it.

4 MR. BOVA: Sorry, Your Honor.

5 JUDGE CANNATARO: No. No. No. I - - - I  
6 understand what you're saying. I understand.

7 MR. BOVA: Because this person has already lodged  
8 a deadly threat. He's already shown that he means business  
9 because he's put that knife to his cheek. And to say, oh,  
10 now I'm okay because I've managed to get four feet back.  
11 It doesn't nullify the threat, because any sensible person  
12 would say, this person is still going to charge at me. He  
13 clearly wants to kill me, and he's already acted on it.  
14 But - - -

15 JUDGE CANNATARO: At least that's one reasonable  
16 view of it.

17 MR. BOVA: It is - - - and - - - and the jury  
18 should have been able to determine those issues.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. BOVA: Thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jairo Castillo, No. 102 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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