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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LUIS JIMENEZ,

Appellant.

NO. 88

20 Eagle Street
Albany, New York
October 18, 2022

Before:

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

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 88, People v. Luis Jimenez.

3 MR. BERKO: Good afternoon Your Honors. May it
4 please the court, my name is Steven Berko, and I represent
5 appellant Luis Jimenez on behalf of the Legal Aid Society.

6 JUDGE RIVERA: Counsel, just to be clear, what
7 are the two evils that the defendant was choosing between?

8 MR. BERKO: I'd like to answer the Court's
9 question, but I would also like to reserve two minutes for
10 rebuttal time.

11 JUDGE RIVERA: Oh. I'm sorry.

12 JUDGE TROUTMAN: Good job, Mr. Berko.

13 MR. BERKO: Thank you.

14 ACTING CHIEF JUDGE CANNATARO: You have two
15 minutes for rebuttal.

16 MR. BERKO: Well, according to Judge Zoll in his
17 June 18th order, the two evils was - - - were my client was
18 being restrained by Jonathan's uncle who was trying to take
19 a metal - - - a broom stick away from my client. And at
20 that moment, the dog approached my client, and according to
21 my client's testimony in front of the grand jury, he was
22 trying to bite my client's leg.

23 JUDGE RIVERA: Okay. I'm sorry. So again, what
24 are the two evils?

25 MR. BERKO: The two evils. According - - -



1 JUDGE RIVERA: He himself versus - - -

2 MR. BERKO: It - - - there were - - - according
3 to Judge Zoll, the way Judge Zoll saw it in his June 18th
4 order, there was a - - - there was a fight between my
5 client and Jonathan's uncle.

6 JUDGE RIVERA: Um-hum.

7 MR. BERKO: Jonathan's uncle was restraining my
8 client and trying to grab my client's broomstick which he
9 had picked up to defend himself against Jonathan who had
10 threatened to kill him over a - - - over the nonpayment of
11 a twenty-dollar debt. So that was one evil.

12 At that moment, the dog approached my client and
13 was trying to bite him on the ankle.

14 JUDGE TROUTMAN: So did he mistakenly or
15 intentionally hit the dog?

16 MR. BERKO: Well, Your Honor - - -

17 JUDGE TROUTMAN: Or does it matter if it - - -

18 MR. BERKO: His - - -

19 JUDGE TROUTMAN: - - - was intentional or a
20 mistake?

21 MR. BERKO: In effect, the answer to that
22 question doesn't really matter, because it's an objective
23 standard under Section 35.05(2). The - - - my client's
24 state of mind in whether he was actually trying to hit the
25 dog, or whether it was a mistake, simply doesn't bear on



1 the question before the bar.

2 JUDGE SINGAS: Yeah, but when your client is
3 saying different things at different times throughout his
4 grand jury testimony, doesn't that bear on the
5 reasonableness of what he's saying, and aren't the People
6 required in their sort of gatekeeping function to determine
7 what's reasonable and determine whether or not the
8 testimony would lead to a justification charge? Aren't
9 they - - - aren't they required to, under the statute, do
10 that?

11 MR. BERKO: No, they're not. Under the statute,
12 the statute obligates them to decide was there an
13 altercation, did a dog approach my client, and did the dog
14 try and bite my client. Those are the only threshold
15 questions that are - - -

16 JUDGE SINGAS: Isn't there a reasonable view of
17 the evidence that supports a justification charge?

18 MR. BERKO: That's exactly right.

19 JUDGE SINGAS: Just - - -

20 MR. BERKO: Beyond those questions, they are
21 getting into the province of the grand jury.

22 JUDGE SINGAS: Right. So I'm just saying when -
23 - - when the defendant - - - even hypothetically speaking -
24 - - gives you different versions of it, right, and the
25 testimony sort of evolves, isn't it the People's function



1 to then make a determination if the evidence has risen to
2 this level of giving a justification charge?

3 MR. BERKO: Not according to the law of
4 justification that's come down from this court. This court
5 has said in Butts 72 NY 2d at 750 that "inconsistency in
6 claim defenses, or even between the defendant's testimony
7 and the defense should not deprive a defendant of a charge
8 if the charge would otherwise be warranted by the
9 evidence".

10 JUDGE SINGAS: Correct. That's the second part
11 of it is what I'm concerned with.

12 MR. BERKO: Well - - - well, those questions,
13 then, become questions for the grand jury. Those are fact-
14 finding questions. Maybe they would not have credited the
15 defense, but that's a different question than the question
16 of whether he was entitled to the charge on the defense.

17 JUDGE RIVERA: But it - - - this is --I'm losing
18 you. But it seems his testimony many times over is, it was
19 reflective, it was not intended, I didn't want to hurt the
20 dog. I'm just afraid, there's a lot of people coming at
21 me, and I swung.

22 MR. BERKO: Well - - -

23 JUDGE RIVERA: Isn't that the reading of the
24 testimony?

25 MR. BERKO: The - - - that is one reading of the



1 testimony, but the fact that is not - - -

2 JUDGE RIVERA: What's the other reading? I'm
3 having difficulty.

4 MR. BERKO: The - - - he did say the dog was
5 trying to bite him.

6 JUDGE RIVERA: Yes. I get that.

7 MR. BERKO: He didn't - - -

8 JUDGE RIVERA: But he actually says in several
9 places he was biting him. But he does make that clear, I
10 think, over and over that he was not intending to hit the
11 dog with a stick, that it's pulling back.

12 MR. BERKO: But again the - - -

13 JUDGE RIVERA: The reaction - - - he says several
14 times it's a reaction.

15 MR. BERKO: It's an objective standard. And the
16 fact that he states he's not afraid - - -

17 JUDGE WILSON: Counsel, I mean, you know much
18 more about this than I do, but I thought that justification
19 had both the subjective and an objective component to it.

20 MR. BERKO: That is true. Justification does
21 have those components under a different subsection of 35.
22 This court said in Craig, talking about the section that's
23 at issue here, "There's no reference in Section 35.05(2) to
24 what the actor intends or believes to be necessary. In
25 this respect, the section is unlike - - - unlike Penal Law

1 Section 35.15 which bases justification for the use of
2 physical force on the actor's reasonable belief that such
3 force is necessary to defend himself or a third person, and
4 for the use of deadly force" - - - again - - - "on the
5 actor's reasonable belief that the other person is using or
6 about to use deadly force". So this court has already
7 parsed out an actor's state of mind in - - - in invoking
8 that defense.

9 And I would just like to state - - -

10 JUDGE RIVERA: Because I know - - - I'm sorry. I
11 just can't - - - I'm not satisfied with these answers. I'm
12 going to be straight with you. I don't understand what the
13 argument is as to the evil that's being avoided and the
14 evil that's being chosen to be done, because it seems to me
15 his testimony is this is an accident. I didn't mean to
16 hurt this dog.

17 MR. BERKO: Right. But that - - - I mean again,
18 getting - - -

19 JUDGE RIVERA: The whole choice of evil. You're
20 making a choice.

21 MR. BERKO: - - - getting back to Judge Zoll's
22 June 18th order, Judge Zoll saw the two evils as one: the
23 ongoing fight between the uncle and my client where the
24 uncle was trying to take a weapon from my client.

25 JUDGE RIVERA: So what's the evil in that? That



1 I might get hurt?

2 MR. BERKO: The evil in that is yes, the uncle
3 might have been saying to my client - - - I mean, the video
4 surveillance has no video - - - I'm going to take this
5 broomstick away from you and wrap it around your head. I
6 mean, that's an evil.

7 JUDGE RIVERA: Okay.

8 MR. BERKO: Sustaining an injury from the uncle
9 is an evil.

10 JUDGE RIVERA: Okay.

11 MR. BERKO: And another evil is - - -

12 JUDGE TROUTMAN: Does it state in the grand jury
13 that he feared the uncle was going to harm him?

14 MR. BERKO: Yes, he did. In our - - - I believe
15 it's in - - - on page 56 of his supplemental appendix.

16 JUDGE TROUTMAN: So when he's talking about
17 tussling, so you're saying it wasn't tussling, it was
18 fighting, the uncle was fighting?

19 MR. BERKO: Well, he was saying in my client's
20 words, tussling, I think, is commonly understood as
21 fighting. The uncle was trying to deprive my client of a
22 weapon that he had taken to defend himself against a man
23 who threatened to kill him.

24 JUDGE TROUTMAN: But only to engage in fighting?

25 MR. BERKO: Excuse me?



1 JUDGE TROUTMAN: He was preventing - - - he was
2 preventing one combatant from engaging with another.

3 MR. BERKO: Well, that is a construction that the
4 People would submit to this court, but I would say that
5 that construction violates the basic principal that in
6 evaluating whether my client was entitled to the charge,
7 you have construct the evidence in the light most favorable
8 to him. So in that light, the uncle wasn't trying to stop
9 the fight, but the uncle was enraged and he didn't pay
10 twenty bucks to his nephew and was trying to take the stick
11 away from - - -

12 JUDGE RIVERA: So what's the other evil though?
13 I still can't understand.

14 JUDGE GARCIA: Counsel, let's just go back to
15 Judge Rivera's question. The choice of evil. So if this
16 person is attack - - - the person is attacking your client,
17 the choice of evil is I can hit that person or I'm going to
18 get harmed. If the dog is attacking your client, the
19 choice is either is I can strike the dog or I'm going to
20 get bit - - - bitten on.

21 MR. BERKO: Right.

22 JUDGE GARCIA: Which is it here? It seems to me
23 this is a combination of the argument is the uncle is
24 coming at me, I swing because I don't want to get hurt or
25 he's trying to take the stick away from me, and I



1 accidentally hit the dog. Isn't that an intent argument;
2 not a justification argument?

3 MR. BERKO: No, not under Section 35.05(2). The
4 - - - his state of mind is simply not relevant. It really
5 - - - the relevant question really is was the dog trying to
6 bite him? He doesn't necessarily have to fear the dog's
7 bite in order not to want to endure it.

8 JUDGE GARCIA: Then it's the dog. It's the - - -
9 the choice of evil is the dog is going to harm me and I hit
10 the dog. That's the support you need in the record.

11 MR. BERKO: You could look at it that way, yes.

12 ACTING CHIEF JUDGE CANNATARO: And that's the
13 problem Counsel, because I don't understand your
14 hypothetical about - - - or your alternate version of what
15 you can see in the video and what was said at the grand
16 jury is that the uncle said I'm going to wrap this stick
17 around your head, which would justify, or potentially
18 warrant a justification defense as to some act against the
19 uncle. But how is - - - how does that provide a
20 justification defense for the dog?

21 MR. BERKO: Well, Your Honor, you could look at
22 it together the way Judge Zoll did it, or - - - did, or you
23 could look at it the way Judge Garcia poses it that the dog
24 was trying to bite my client at that moment, and he swung
25 the stick.



1 My client doesn't need to be afraid of the dog,
2 not to want to endure a bite from the dog.

3 ACTING CHIEF JUDGE CANNATARO: That's not what he
4 said about the dog. What he said about the dog was simply
5 I didn't mean to do it.

6 MR. BERKO: Right. But what - - - but his intent
7 is not a factor in - - -

8 ACTING CHIEF JUDGE CANNATARO: I get that his
9 intent is not a factor, but we're sifting through the
10 record for some reasonable view of it that would warrant
11 giving this defense.

12 MR. BERKO: He could have intended to swing the
13 stick just to move the dog away to scare the dog and have
14 accidentally hit it. That would be consistent - - -

15 JUDGE SINGAS: But that's not what the statute
16 requires, right. He has to be in imminent fear of a grave
17 injury.

18 MR. BERKO: It's not a question of imminent fear.
19 He doesn't actually have to stand there and be afraid of
20 the injury, he just has to have cognizance that he may get
21 bitten, which he did.

22 JUDGE RIVERA: But this is the problem. The
23 statute said the conduct is necessary - - -

24 JUDGE SINGAS: He did.

25 JUDGE RIVERA: - - - as an emergency measure. So



1 if it's only about the dog, it's very hard for me to see
2 that as - - - given - - - given the size of this dog, given
3 actually what you do as an emergency measure - - -
4 necessary as an emergency measure.

5 MR. BERKO: Well, that's - - -

6 JUDGE RIVERA: However, you're correct. The
7 Supreme Court did view this as this melee, right, that it's
8 the uncle. He actually - - - the defendant does talk about
9 other people there, he's afraid of other people, he's
10 alone, all of that. That strikes me as different. That's
11 why the question about what are the two evils. It sounds
12 to me like you've taken the position, I just want to be
13 clear, that the evil is to hit the dog.

14 MR. BERKO: Well - - -

15 JUDGE RIVERA: As oppose to I'm just throwing my
16 arm around with this stick to protect myself or to retain
17 the stick - - - the broomstick - - - that Jonathan is
18 trying to - - - excuse me; not Jonathan - - - the uncle is
19 trying to take from me and I wanted to protect myself, and
20 oh, my goodness, the dog is hit in that process. I just -
21 - - I understand your thinking intent of that, I just want
22 to know what - - - what the challenge is.

23 MR. BERKO: The - - - the - - - I think - - - I'm
24 going to try and respond to that - - -

25 JUDGE RIVERA: All right.



1 MR. BERKO: - - - and, you know, just say that
2 Judge - - - Judge Zoll contextualized the swing,
3 contextualized the act of swinging the stick within the
4 larger context of an ongoing fight where my client was
5 approached and threatened with death for nonpayment of the
6 twenty-dollar debt. He was - - - he was being restrained
7 by the uncle. He couldn't move away.

8 In his conception of it in his testimony to the
9 grand jury, the uncle was trying to take the stick away
10 from him. At that moment, the dog approached him.

11 So Judge Zoll saw it - - - saw these two things
12 as evils, the - - - but the essential question before the
13 court is here - - - I mean, the nub of the issue is who
14 gets to find the facts? Is it the prosecutor presenting
15 the case to the grand jury, or is it the grand jurors
16 themselves?

17 I would point out to the court that the grand
18 jurors when they were hearing this case, they asked
19 questions to the prosecutor such as was the dog on the
20 leash, did appellant hit the dog before or during the
21 fight? Was appellant trying to break free? Well, they
22 weren't using appellant. But was appellant actually trying
23 to hit the dog and whether the dog was menacing my client.
24 Those questions go to show that the grand jurors were
25 evaluating the testimony as they should have if they'd been



1 properly charged from the prospective of the defendant.

2 JUDGE RIVERA: But as to his testimony, they're
3 also asking, given his statements that he felt afraid and
4 he was alone in this moment, and he keeps telling the
5 prosecutor show the video, show the video, and they're
6 doing it not quite frame-by-frame, but they slowed it all
7 down. They're also asking did the People come and attack
8 you afterwards? What happened once this dog got hit? You
9 walked away. No one followed you. Right.

10 MR. BERKO: Right.

11 JUDGE RIVERA: There's certainly these other sets
12 of questions that perhaps undermine the argument about the
13 grand jury potentially having concerns that suggest that
14 the instruction might have led them to a different outcome.

15 MR. BERKO: Well, there, I would respectfully
16 disagree with Your Honor. The fact that he got away after
17 the incident doesn't mean that he didn't fear the family at
18 that point, and he had no knowledge, had no foresight of
19 what the family would do after the dog got hit. So I don't
20 think that really bears it out.

21 And the standard to determine whether the charge
22 was proper or not is to construct the evidence in the light
23 most favorable to the defense. That standard wasn't
24 adhered to. And in fact, the entire argument presented by
25 the People here constructs the evidence in the light most



1 favorable to themselves.

2 So they're invoking an improper standard, and
3 under this court's justification law, as long as there's
4 any reasonable line of inferences that would support the
5 defense, it must be given.

6 That wasn't true here. The grand jurors had no
7 legal framework upon which to issue a note to a bill. They
8 had no instruction about the law of justification.

9 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
10 Berko.

11 MR. BERKO: Thank you, Your Honors.

12 MR. POLLAK: One moment. Okay. Good afternoon.
13 May it please the court, Assistant District Attorney
14 Charlie Pollak for the People on behalf of Queens District
15 Attorney Melinda Katz.

16 JUDGE RIVERA: So just as I was dogging with him;
17 I'm dogging with you here, if you don't mind the pun.

18 What are the two evils that the defendant is
19 choosing between?

20 MR. POLLAK: Well, that's just it, Your Honor. I
21 think that, as Your Honor pointed out, nowhere in the
22 record does the defendant actually say or anyone else
23 support that he struck the dog because he was concerned
24 about a bite from the dog, or to stop a bite from the dog.

25 So in their briefs, defendant is suggesting that



1 it was necessary to strike the dog to stop a bite, but
2 that's not reflected it in the evidence before the grand
3 jury.

4 To the extent that he claims that there's an evil
5 threatened by the family against him, Craig, the case we
6 were discussing earlier specifically says that the evil
7 you're choosing has to be reasonably calculated to prevent
8 the harm that's being threatened. And in this case, as
9 Your Honor pointed out, striking the dog would not prevent,
10 in any reasonable way, whatever harm he fears from the
11 family.

12 Now, on the other side, the evil that he's
13 committing is - - - is very serious. He struck a dog, a
14 tiny 8.4-pound dog in the face, fracturing his cheekbone,
15 blinding it in one eye.

16 JUDGE RIVERA: Let me ask you this. It really
17 does seem to turn from what you're saying on the
18 characteristics of the dog. Because let's say this was a
19 much larger dog, a hundred pound-dog, was quite aggressive,
20 the jawline is at the thigh, not merely able - - - at the
21 ankles potentially able to lunge, if that was a dog in this
22 melee, you would perhaps have seen his view of this, no?

23 MR. POLLAK: I think so, Your Honor. It's a very
24 fact-and-circumstance dependent analysis. In fact, that's
25 basically - - -



1 JUDGE RIVERA: So in that way you could see
2 potentially. It might not - - - the grand jury might not
3 agree. It's not about whether or not they agree or not.

4 MR. POLLAK: Yes.

5 JUDGE RIVERA: It's whether or not to give the
6 instruction. There they - - - there, you might say well,
7 in that case certainly the record might support an argument
8 that it was necessary to strike at that kind of an animal
9 to prevent this, not only an attack from the animal, that's
10 - - - that's kind of very obvious in this example - - - but
11 in this melee to help him, right. Because the dog is a
12 distraction. One could view this is as even this little
13 dog is a distraction. It's pulling at his leg; it's trying
14 to bite his leg. And so he's fearful that that will
15 somehow put him in a worse position to defend himself
16 against the uncle.

17 MR. POLLAK: The fact that the dog is a
18 distraction does not appear anywhere in the record. But
19 certainly I can imagine a situation where, to take the
20 example, a much larger dog or a much more frail defendant.
21 You know, if we're talking about a ninety pound, a
22 Rottweiler and a toddler - - -

23 JUDGE RIVERA: Um-hum.

24 MR. POLLAK: - - - swing away, right. We're not
25 going to be standing here anymore, because that's not a



1 case that people are going to prosecute. But because the
2 size of the dog was so small, and because as we know from
3 our amicus brief that smaller dogs have smaller bite force,
4 and female dogs have smaller bite - - - smaller bite force
5 than male dogs --

6 JUDGE RIVERA: Walk cautiously on that one. But
7 go ahead.

8 MR. POLLAK: I'm strictly limiting my comments to
9 dog bite force.

10 JUDGE RIVERA: I understand.

11 MR. POLLAK: I think that there really is no
12 reasonable view of this evidence objectively or
13 subjectively that he was justified in - - -

14 JUDGE RIVERA: If he said I was afraid of the
15 dog, would that be enough? No.

16 MR. POLLAK: No. Because - - -

17 JUDGE RIVERA: Because of the dog itself.

18 MR. POLLAK: There's an objective and a
19 subjective component to this arguably.

20 Now, I know defendant says that there is no
21 subjective component to 35.05(2). Craig actually has a
22 footnote specifically carving out this situation saying it
23 is not reaching the question where the defendant
24 subjectively does not intend to commit this harm to prevent
25 it.

1 JUDGE RIVERA: Um-hum.

2 MR. POLLAK: But objectively, someone could dream
3 up a way where it was reasonable. That hasn't been
4 decided.

5 So Craig was saying that it is an objective
6 standard as opposed to a purely subjective standard, but I
7 think it's open for this court to determine whether or not
8 there should also be a subjective component.

9 ACTING CHIEF JUDGE CANNATARO: Go back to the
10 reasonableness and the larger dog. You know, that would
11 seem to speak to providing a basis for the justification,
12 because a larger dog is more threatening, it has greater
13 bite force. And, you know, one could reasonably understand
14 why hitting the dog is a potentially valid choice under
15 those circumstances. But what we heard from your adversary
16 on argument is that this situation was more broadly
17 contextualized by the court, that this was an effort - - -
18 a melee was going on and he was just sort of trying to
19 protect himself from any harm that might be coming his way,
20 which provides, at least I heard it to be one basis for the
21 argument for why the charge was justified here. Is that
22 permitted under the statute? Can you have this broadly
23 contextualized situation where you're just swinging because
24 you don't want to get hurt? It doesn't really matter what
25 you're swinging at.



1 MR. POLLAK: No. I think - - - I mean, I think -
2 - - again, very fact-and-circumstance specific, but I think
3 that on some level if you're just wildly swinging around
4 and you accidentally hit a dog, we know that mistakes are
5 not choices of evil. A mistake is not a choice of evil.
6 That's what Rodriguez says.

7 ACTING CHIEF JUDGE CANNATARO: Well, he may - - -
8 he may have intended to hit the dog; he may not have
9 intended to hit the dog, but he was just trying to protect
10 himself in the course of - - - I think I heard the word
11 melee said up here at one point.

12 MR. POLLAK: Yeah. I'm - - -

13 ACTING CHIEF JUDGE CANNATARO: I'm just swinging.

14 MR. POLLAK: Your Honors have seen the video. I
15 think a melee is a very strong word for what's occurring.

16 JUDGE GARCIA: In a hypothetical, let's say the
17 video showed - - - not this case - - - but big guy coming
18 at the defendant here, he swings the stick to defend
19 himself, choice of evils, but he hits the dog.

20 MR. POLLAK: He swings the stick to defend
21 himself against the person and accidentally hits the dog.

22 JUDGE GARCIA: Yes.

23 MR. POLLAK: You're talking about transferred
24 intent - - -

25 JUDGE GARCIA: Right.



1 MR. POLLAK: - - - in a justification defense
2 under a different section of 35. We specifically don't
3 have there here as well either, by the way. He doesn't say
4 he was trying to hit the uncle and accidentally hit the
5 dog. He says he was trying to pull the stick away from the
6 uncle, he was trying to get it from him, and accidentally
7 hit the dog.

8 But in that case, I think then you're actually
9 analyzing it under 35.15, because that's - - - that's an
10 attempted justifica - - - justified self-defense act
11 against the person as opposed to a dog. Then you do have a
12 subjective and an objective component. You also have a
13 proportionality requirement.

14 JUDGE RIVERA: So even though the dog is what
15 gets injured in that - - - in this hypothetical, and you're
16 saying it still fits under because it's an attempt to
17 defend against another even though that's not how you
18 actually handle injuries.

19 MR. POLLAK: I think so. I mean, actually, I
20 haven't - - - I haven't done the research that far out into
21 35.15. I'm just off the top of my head here - - -

22 JUDGE RIVERA: You may hear differently when you
23 get back to your office.

24 MR. POLLAK: I mean, it's just - - - I might. It
25 just strikes me that in that particular case, it would be



1 someone attempting to attack a person who's attempting to
2 attack them, and if they accidentally hurt a dog as well, I
3 think there's an argument it's under 35.15, yes.

4 JUDGE RIVERA: Well, then, why isn't that the
5 choice of evils? I'm actually trying to protect myself
6 against them, that's the conduct. But the consequences are
7 against an animal, not an individual. Why isn't that like
8 - - - what is Meyer-- Meyer, where you're driving away,
9 you think someone has a gun, right, and you think - - - or
10 a weapon and you're going to be injured, you drive
11 recklessly. So the conduct is the reckless conduct. You
12 never intend to hit somebody, but unfortunately that's what
13 happened, right. They killed - - - they killed somebody.
14 Why isn't it closer to that?

15 MR. POLLAK: Because there's no evidence in the
16 record that he was attempting to strike the uncle. So in
17 this case, there's literally nothing in the record that
18 says he's attempting to hurt another person, or, you know,
19 in this case - - -

20 JUDGE RIVERA: But no. Protecting himself from
21 being injured by another person.

22 MR. POLLAK: He's - - -

23 JUDGE RIVERA: He's not trying to keep the weapon
24 that he's chosen by breaking off this broomstick in half,
25 right, to protect himself against the family. He talked

1 the handle of the family.

2 MR. POLLAK: I think we're outside the realm of
3 justification on that point, Your Honor.

4 JUDGE RIVERA: Okay.

5 MR. POLLAK: It's an argument about intent which
6 was squarely before the grand jury, and wildly rejected by
7 them.

8 JUDGE RIVERA: Um-hum.

9 MR. POLLAK: So under a subjective analysis, he
10 testifies repeatedly that he hit the dog by mistake. He
11 never says he did it on purpose to stop it from biting him.

12 Under an objective analysis, the weight of the
13 harm that he did to this dog is an evil that does not - - -
14 was not clearly outweighed by the small amount of harm - -
15 - the de minimis harm, really, that he could have expected
16 from the dog. And as such, there is - - - there is really
17 no reasonable jury, even viewing the facts in the light
18 most favorable to the defendant, could ever have found the
19 choice of evil's justification appropriate here. And for
20 that reason, this court should affirm the Appellate
21 Division.

22 JUDGE RIVERA: So let me just ask you this.

23 MR. POLLAK: Okay.

24 JUDGE RIVERA: The - - - we could more narrowly -
25 - - is that what you're suggesting - - - decide it in



1 saying it's just the injury - - - to stay with the dog bite
2 for a moment - - - is not grave enough to justify this
3 knock on the dog?

4 MR. POLLAK: The risk - - -

5 JUDGE RIVERA: Just - - - just deciding it on
6 that ground. Would that be possible?

7 MR. POLLAK: Yeah, I think you could - - -

8 JUDGE RIVERA: Put aside every other element of
9 this justification; just that one?

10 MR. POLLAK: In the event that Your Honors found
11 that looking at the record there was enough you could slice
12 and dice - - -

13 JUDGE RIVERA: Yeah.

14 MR. POLLAK: - - - and put together to find that
15 he potentially hit the dog to stop the dog from biting him.

16 JUDGE RIVERA: Okay.

17 MR. POLLAK: Even then, it was a disproportional
18 response by miles. And in that case, the evil he was
19 trying to prevent, the very de minimis threat of a bite
20 through blue jeans from this - - - this very small dog did
21 not clearly outweigh the harm that he caused, the evil that
22 he chose, which was to strike this dog so hard that he
23 blinded it and broke its face.

24 ACTING CHIEF JUDGE CANNATARO: Thank you.

25 MR. BERKO: I just have several quick points,



1 Your Honor, but I'll start with my adversary's last - - -
2 your last question, Judge, and my adversary's last
3 response.

4 The - - - the People here are asking this court
5 to find the facts that should have been found by the grand
6 jury. These - - - these questions, these factual
7 questions, basically, the answers to them depend upon value
8 judgments based upon the moral standards of the community
9 as Judge Hinds-Radix said in her Appellate Division
10 dissent.

11 JUDGE RIVERA: But let's say we agree with you
12 that it was error, not to instruct, is this error with
13 respect to the grand jury subject to harmless error
14 analysis?

15 MR. BERKO: Well, no, it isn't. What - - - if
16 you agree with me - - -

17 JUDGE RIVERA: Okay.

18 MR. BERKO: - - - then you would reverse the
19 Appellate Division's decision, and Judge Zoll's June 18th
20 order would be reinstated, and that order allowed the
21 People to re-present to another grand jury. So it's not
22 like they're out of business. They're - - - they just have
23 to present the same case with a properly charged grand
24 jury.

25 I would also like to speak for a moment about the



1 question of small dog or large dog.

2 A small dog does have canine teeth that are
3 designed to puncture and tear flesh. They've evolved the
4 same way as a large dog. The question as to whether a
5 small - - - a man should subject himself to the bite of
6 even a small dog, that's precisely the value judgment that
7 goes to the grand jury.

8 As to the question of the - - -

9 JUDGE RIVERA: But this particular justification
10 provision is intended to be used in rare circumstance,
11 right?

12 MR. BERKO: Well, I mean, I would say that, you
13 know, I've been practicing law with the Legal Aid Society
14 for thirty-two years. I've never come across a case like
15 this - - -

16 JUDGE RIVERA: Yes.

17 MR. BERKO: - - - where a man was being held and
18 threatened - - - had just been threatened by another man
19 with death, and one of the other man's family members is
20 holding him while the dog is approaching him and trying to
21 bite him. I mean, that's a pretty unique circumstance.

22 I also don't think you could dismiss out of hand
23 the threat of a zoonotic infection.

24 Yes, it's true it's a small risk. However,
25 someone wins the lottery every week, and it would be cold



1 comfort to my client lying on his deathbed if someone had
2 told him well, you know, the chances of you dying of this
3 disease that the dog gave you is infinitesimally small, but
4 your estate does have a cause of action for wrongful death.

5 JUDGE RIVERA: But he did testify his own dog had
6 bitten him and he had two - - -

7 MR. BERKO: Excuse me?

8 JUDGE RIVERA: He did testify his own dog had
9 bitten him, one or two - - - much larger dog and one that
10 was a Yorkie and the Yorkie's not the one that bit him. So
11 he certainly is - - - he has experience with dog bites in
12 the past. But what about this question of maybe - - -
13 maybe this is really the wrong section of the justification
14 defense provision?

15 MR. BERKO: Well, I think - - -

16 JUDGE RIVERA: This really doesn't fit here,
17 because he says time and time again I wasn't trying to hit
18 the dog. It's not my intention. That was a mistake. I
19 was doing something else.

20 MR. BERKO: I think the way Judge Zoll looked at
21 it, that was the ultimate act. I mean, he didn't hit - - -
22 you know, there would have been a completely different
23 argument here if as they were tussling for the stick my
24 client poked the uncle in the eye with it - - -

25 JUDGE RIVERA: Oh, sure.



1 MR. BERKO: - - - and that would have ended the
2 fight.

3 JUDGE RIVERA: Sure.

4 MR. BERKO: So you know, looking at it in that
5 context, is it better to hit the dog, although you would
6 cause incredible injury to the dog, or hit the man? So - -
7 -

8 JUDGE SINGAS: Mr. Berko, am I mistaken about
9 this? Didn't he testify that he was struggling with the
10 uncle so that he could go after Jonathan - - -

11 MR. BERKO: I don't recall that - - -

12 JUDGE SINGAS: - - - who was walking away?

13 MR. BERKO: Well, I mean, again, you know, as
14 this court found in its - - - in its cases discussing the
15 entitlement to the justification charge, inconsistency in
16 testimony doesn't deprive you of the charge. As long as
17 there is one rational line of inferences that support the
18 charge, then you're entitled to it, even if you say
19 something that contradicts the charge.

20 JUDGE WILSON: Maybe this is just too
21 linguistically simple, but I'm having a little trouble
22 applying a choice of evil's defense to a defendant who says
23 I didn't make that choice; this just happened accidentally.

24 MR. BERKO: Then again, I would go back to this
25 court's decision in Craig and - - - and, you know, remind



1 Your Honor that it is not what is in his mind as opposed to
2 it is the objective reality of what's going on.

3 Objectively speaking, the dog poses some threat
4 of a viral or bacterial infection. It's some threat more
5 than nothing.

6 ACTING CHIEF JUDGE CANNATARO: But Counsel, Craig
7 calls for an imminent threat and a reaction to that
8 imminent threat. A viral infection doesn't sound - - -

9 MR. BERKO: Well - - -

10 ACTING CHIEF JUDGE CANNATARO: - - - imminent.

11 MR. BERKO: Well, I mean, it would - - - if - - -
12 if it's something more than nothing, which is what the
13 People concede, then if it's bitten, there's also the
14 question of whether he has to endure a bite. I mean,
15 that's another value judgment that Judge Hinds-Radix was
16 deciding to - - -

17 ACTING CHIEF JUDGE CANNATARO: And he also has to
18 buy a new pair of jeans because the dog put a hole in them,
19 but the question is - - -

20 MR. BERKO: Right.

21 ACTING CHIEF JUDGE CANNATARO: - - - does it rise
22 to the level of justifying the force that was used.

23 MR. BERKO: I agree with Your Honor. That is the
24 question, and that question was for the grand jury and not
25 for the prosecutor.



1 The only way that the prosecutor could have
2 deprived the grand jury of the defense within the context
3 of the standards that we've discussed here is if the animal
4 at his ankle posed absolutely no chance of harm to him,
5 such as a pet butterfly if it were that he cruelly crushed.
6 But let's say the companion animal here wasn't a dog, but a
7 highly trained rat. Those are very intelligent creatures.
8 I mean, would the court say because it's small and has
9 small - - - and little biting power that he's not entitled
10 to swing a stick at a rat that's nibbling at his ankle? I
11 mean, to base the rule upon - - - to base an exception to
12 the rule upon the size of the dog, I think opens up - - -
13 put it this way, I think it infringes - - - it greatly
14 infringes upon the grand jury's fact-finding abilities.

15 JUDGE RIVERA: So if it was just a toddler, he
16 could hit the toddler with the stick?

17 MR. BERKO: No, that's not what I said. There
18 has to be a threat posed.

19 ACTING CHIEF JUDGE CANNATARO: They do carry some
20 diseases, toddlers.

21 MR. BERKO: Well, I had a couple of my own. I
22 know that's true.

23 ACTING CHIEF JUDGE CANNATARO: Thank you Counsel.

24 MR. BERKO: Thank you very much Your Honors.

25 (Court is adjourned)



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

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Luis Jimenez v. The People of the State of New York, No. APL 2021-29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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