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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 33

CARLOS VALENTIN,

Respondent.

20 Eagle Street
Albany, New York
February 15, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF DIFIORE: The next matter on the
2 afternoon's calendar is appeal number 33, the People of the
3 State of New York v. Carlos Valentin.

4 Good afternoon, counsel.

5 MS. MARCIANO: Good afternoon. May it please the
6 court. Virginia Marciano on behalf of Anthony A. Scarpino
7 Jr., appointed special district attorney in this Bronx
8 matter.

9 The Appellate Division usurped the jury's - - -

10 CHIEF DIFIORE: Ms. Marciano, may I interrupt for
11 a second? Would you like some rebuttal time?

12 MS. MARCIANO: Three minutes, please.

13 CHIEF DIFIORE: Of course.

14 MS. MARCIANO: Thank you, Judge.

15 The Appellate Division usurped the jury's role in
16 concluding, as a matter of law, that the - - - that the
17 initial aggressor instruction should not have been given.

18 First, the Appellate Division used the wrong
19 standard when it analyzed the evidence at trial. Rather
20 than using a reasonable view of the evidence, a neutral
21 light, the Appellate Division analyzed the evidence using a
22 light most favorable to defendant.

23 In doing so, the - - -

24 JUDGE RIVERA: Well, in the neutral light, isn't
25 the testimony that - - - that they act simultaneously?

1 MS. MARCIANO: There is - - - Edward Hogan's
2 testimony is inconsistent. There are portions of his
3 testimony that speak to a simultaneous drawing of the
4 weapon and swinging of the mop handle, but there are
5 portions of his testimony that the defendant withdrew his
6 weapon before the swinging of the mop handle. And the
7 Appellate Division used the wrong standard because it
8 completely disregarded those portions of Edward Hogan - - -
9 Hogan's testimony.

10 I direct you to the record at 866. Hogan is
11 asked the events of Hogan being shot and the swinging of
12 the mop handle happened at the same time. He says,
13 simultaneously, yes. Again, and 867, this is on
14 cross-examination, "Just so we're clear, you got shot while
15 Justin was swinging that stick at Carlos; is that correct?
16 Correct." He also reiterates it on redirect.

17 There are inconsistent versions of his testimony.
18 However, where there are differing inferences that can be
19 taken, it's for the jury to determine the credibility of
20 Hogan and to figure out which portions of his testimony to
21 credit.

22 JUDGE RIVERA: Sorry. You're - - - you're
23 looking at that as there's only one swing - - -

24 MS. MARCIANO: Yes.

25 JUDGE RIVERA: - - - as opposed to there are

1 several swings?

2 MS. MARCIANO: The testimony at trial is that
3 there is a single swing. And - - - and - - -

4 JUDGE GARCIA: Counsel, if - - - if let's say
5 it's even before, and you swing a mop handle at somebody,
6 and you hit them, can you still then and never get an
7 initial aggressor charge?

8 I mean, is it true that you would always then
9 have the mop handle swing - - - the initial aggressor? If
10 somebody shoots you, if they shoot him, like it seems - - -
11 do you - - - to be the initial aggressor in a shooting,
12 wouldn't there have to be a level of force used? I mean,
13 could swinging a mop handle at a guy with a - - - a person
14 with a gun ever disqualify you from getting an initial
15 aggressor charge?

16 MS. MARCIANO: I think it - - - I think it
17 depends. I - - - I'm - - - it's not our contention that
18 the mop handle could never be deadly physical force, but
19 certainly the swinging of a hollow plastic mop handle, the
20 way in which it was used in this case - - -

21 JUDGE GARCIA: Yeah. Better - - -

22 MS. MARCIANO: - - - is not.

23 JUDGE GARCIA: - - - way to phrase it, this mop
24 handle.

25 JUDGE STEIN: But is there any evidence that

1 defendant had any idea what that mop handle was all about,
2 or even knew what was hitting him?

3 MS. MARCIANO: First, we don't have the testimony
4 of the defendant. He's claiming a justification defense,
5 and for the - - - the jury doesn't have any more
6 information about what he believed in that instant.
7 However, if you look to the moments before the fatal
8 encounter, the defendant sees Justin McWillis walking
9 across the street toward the bodega.

10 And the defendant, with his loaded gun, follows
11 him into the bodega where an argument ensues. During that
12 argument, Justin McWillis, who is otherwise, you know,
13 unarmed, grabs a plastic mop handle from a display there.
14 So I - - - I mean - - - we don't know what's inside the
15 defendant's head, but I think he's watching the victim grab
16 the plastic handle from a display, I think he would have
17 good reason to know, and I believe it occurred at
18 approximately 4 o'clock in the afternoon, so between seeing
19 where he got the mop handle and then watching him carry it
20 outside, I think he knows what it is.

21 JUDGE STEIN: But you're - - - you're not arguing
22 that a mop handle, any kind of mop handle, could never be a
23 - - - a dangerous instrument.

24 MS. MARCIANO: Certainly not. But the way in
25 which it's used in this case, Judge Saxe's dissent is

1 correct. In - - - the way in which it was used in this
2 case, it's not - - -

3 JUDGE RIVERA: If he's going to shoot him, isn't
4 he going to do it when he puts the mop handle down outside?
5 Or are you going to wait for him to pick it up if he's not
6 concerned about the mop handle, and that's what he's
7 responding to.

8 MS. MARCIANO: I mean, we don't know, because
9 that's not the situation that we encountered. We only have
10 Hogan's testimony - - -

11 JUDGE RIVERA: But you would - - -

12 MS. MARCIANO: - - - that - - -

13 JUDGE RIVERA: No. That is the situation, right?
14 Isn't the testimony that the victim puts the mop handle
15 down outside, and then picks it up again?

16 MS. MARCIANO: Correct. And I mean, our view of
17 the evidence is that McWillis grabs the mop handle
18 defensively in the bodega, and when - - -

19 JUDGE RIVERA: And the mop handle has a metal
20 part to it; does it not?

21 MS. MARCIANO: It does. It has a metal T-clamp -
22 - -

23 JUDGE RIVERA: Yeah.

24 MS. MARCIANO: - - - at the bottom.

25 But when the three leave the bodega, now, Hogan

1 is walking away, defendant is walking away, McWillis puts
2 down the mop handle, I think that's consistent with our
3 view that his use of the mop handle was a defensive one.

4 The portions of Hogan's testimony that follow are
5 just that he sees McWillis pick the mop handle back up and
6 approach defendant. But the two are squared off and facing
7 one another, and then comes the issue of the sequence of
8 events.

9 However, the - - - the - - - the Appellate
10 Division, not only used the wrong standard when it
11 discounted that evidence of Hogan's testimony, which had
12 the defendant withdrawing the gun first, it also ignored
13 the context in which these - - - these events happened.

14 The fact that there was an altercation the night
15 before, the threats the defendant made. We have the
16 testimony of Officer Colon who says, the defendant is
17 unhappy with the response of the police to an issue the
18 night before with a group of kids that involved the victim,
19 McWillis. And he said, I know my second amendment right to
20 bear arms. If I put a bullet in one of these kids' heads,
21 the cops aren't going to do anything. I'm paraphrasing
22 slightly, and he said, you know, I don't need the cops
23 anymore. He has that mindset.

24 And then when you look at his actions he takes
25 the next day, he leaves his house with a concealed .22

1 underneath his open coat, it's mid-January, it's freezing,
2 and when he first sees McWillis on the street, Hogan tries
3 to talk to him first, he says to Hogan, do you want to get
4 shot, Hogan says, may I speak with you, he says, do you
5 want to get shot.

6 When he sees McWillis, McWillis and he make eye
7 contact, McWillis is walking directly into the bodega, it's
8 defendant who follows him with that loaded gun, and then
9 that's when the interaction between them starts. That's
10 when the argument starts.

11 JUDGE RIVERA: Outside, it's defendant who is
12 walking away from him, correct?

13 MS. MARCIANO: The - - - correct. The defendant
14 is initially walking away - - -

15 JUDGE RIVERA: Yes.

16 MS. MARCIANO: - - - and he's - - -

17 JUDGE RIVERA: Turns around and walks away,
18 correct?

19 MS. MARCIANO: He turns around and walks away,
20 and he's walking in the direction of his home.

21 JUDGE RIVERA: Um-hum.

22 MS. MARCIANO: Both Hogan and McWillis are behind
23 him, closer to the bodega. And as I said - - -

24 JUDGE RIVERA: And it's after that that the
25 victim picks up the mop - - -

1 MS. MARCIANO: Correct.

2 JUDGE RIVERA: - - - with a metal top?

3 MS. MARCIANO: He picks up the mop handle and
4 approaches defendant, and they are squared off, and then
5 there is a withdrawing and the weapon and a swinging of the
6 mop handle. The - - - we think - - -

7 JUDGE ABDUS-SALAAM: Counsel, I don't know how
8 relevant this is, but there are versions of the events that
9 are happening on the street before the shooting takes place
10 where it appears that the defendant was walking to the
11 bodega. McWillis, who is across the street, sees defendant
12 going toward the bodega and then goes over as if he may be
13 looking for some fight.

14 MS. MARCIANO: Well, the - - - I don't know about
15 looking for a fight. I don't believe that that is - - -
16 that the evidence bears that. The - - -

17 JUDGE ABDUS-SALAAM: Or a confrontation with the
18 defendant.

19 MS. MARCIANO: There's no - - - there is no - - -
20 there are no words that are exchanged between the two of
21 them. I mean, the defendant lives in the neighborhood, a
22 few doors down from the bodega. He's out on the street
23 walking in the direction, and that's when the - - - Hogan,
24 you know, begins to speak with him. But there's - - -
25 there's no evidence that McWillis was pursuing him, there's

1 no - - - there's no evidence that he made any statements,
2 just that the two looked eyes.

3 But even at that point, the defendant is - - -
4 has armed himself that day, and goes, and pursues him into
5 the bodega, which is when the - - - the fight started.

6 I - - - I - - - we also believe that the court
7 erroneously determined that the mop handle was deadly
8 physical force as a matter of law. Both that and using the
9 wrong legal standard were both legal errors.

10 We are respectfully asking this court to reverse
11 the Appellate Division decision, reinstate the judgment of
12 conviction and sentence.

13 CHIEF DIFIORE: Thank you, counsel.

14 Counsel.

15 MR. DEAN: Robert Dean for Mr. Valentin.

16 I want to be absolutely clear on this. There's
17 no evidence at all in the record, as the Appellate Division
18 majority correctly held that the defendant displayed or
19 pulled out his gun before he saw the mop handle coming
20 towards his head.

21 JUDGE STEIN: Well, didn't - - - didn't Hogan
22 testify that - - - that he got shot about the same time - -
23 -

24 MR. DEAN: Hogan.

25 JUDGE STEIN: Hogan. But wouldn't - - - yes,

1 exactly. Hogan. And wouldn't that, at least, allow an
2 inference that defendant had already pulled out his gun,
3 and it was getting ready to shoot? You know, it happened
4 so fast.

5 MR. DEAN: There was no testimony to that effect,
6 and there was no inference - - - as the Appellate Division
7 held, there was not even any inference that can be drawn
8 that the defendant pulled out before McWillis started
9 swinging.

10 JUDGE FAHEY: Is it - - -

11 MR. DEAN: I want to make that absolutely clear.

12 JUDGE FAHEY: Is there any legal basis to draw a
13 distinction between the application of the initial
14 aggressor, exception now between someone who uses force and
15 someone who uses deadly physical force, McWilliams's case
16 is what I'm thinking of.

17 MR. DEAN: In the McWilliams case, what happened
18 was McWilliams used ordinary physical force, and then the
19 soon to be victim used deadly physical force, and then
20 McWilliams used deadly physical force.

21 JUDGE FAHEY: Right. You're right about the
22 sequence.

23 MR. DEAN: In McWilliams, the court said, in that
24 particular scenario - - -

25 JUDGE FAHEY: Um-hum.

1 MR. DEAN: - - - you can - - - you're not the
2 initial aggressor if you were responding to deadly physical
3 force.

4 JUDGE FAHEY: So I view - - -

5 MR. DEAN: So for that particular scenario - - -

6 JUDGE FAHEY: - - - Williams as - - -

7 MR. DEAN: - - - but that's it. The ordinary
8 scenario is the person is the initial aggressor who first
9 uses offensive physical force.

10 JUDGE FAHEY: Well, I kind of view - - - view
11 Williams as clarifying. I don't think the law was entirely
12 clear before the - - -

13 MR. DEAN: It depends - - -

14 JUDGE FAHEY: Yeah.

15 MR. DEAN: It always depends upon the
16 circumstances. But - - -

17 JUDGE FAHEY: But it's in - - -

18 MR. DEAN: - - - in this circumstance - - -

19 JUDGE FAHEY: You go ahead.

20 MR. DEAN: - - - there was - - - the defendant
21 used no offensive force whatsoever before McWillis started
22 swinging. The first person to put forward the idea that
23 that happened was not the prosecutor, it wasn't Hogan, it
24 wasn't during the prosecutor summation, it wasn't in the
25 People's Appellate Division brief. The first - - - first

1 person who indicated that was Justice Saxe in his dissent.

2 I want to make it absolutely clear.

3 In modern parlance, that's what's called an
4 alternative fact. There's no such testimony.

5 I don't know if that's really fair to Judge Saxe,
6 but okay.

7 MR. DEAN: Okay. Well, I'm - - - I'm thinking
8 about the four judges in the majority who have fact finding
9 jurisdiction - - -

10 JUDGE FAHEY: Um-hum.

11 MR. DEAN: - - - who combed the record, who could
12 see, there was no such evidence. And they were absolutely
13 correct. That fact is not in the record. Inferences from
14 which you could draw that, it's not in the record. The
15 only evidence is that it was either simultaneous, or that
16 the defendant pulled out after McWillis started swinging,
17 and the defendant saw this object coming towards his head.

18 JUDGE FAHEY: So I'm clear then. So your
19 position is - - - is that deadly physical force in a
20 response to physical force only applies - - - wasn't the
21 law at the time this case was tried.

22 MR. DEAN: No. What I'm saying is that the law
23 is, you can be the first one to use deadly physical force
24 if you reasonably believe that deadly physical force is
25 being used against you. That was the real and is the real

1 issue in the case.

2 JUDGE FAHEY: Okay.

3 JUDGE ABDUS-SALAAM: So what is - - -

4 MR. DEAN: You can be the first one to use - - -

5 JUDGE FAHEY: No, I - - - I get it. I get your
6 argument.

7 MR. DEAN: - - - deadly physical force - - -

8 JUDGE FAHEY: No, I understand it.

9 MR. DEAN: - - - if you reasonably perceive.

10 That is - - - it has nothing to do with the initial
11 aggressor.

12 JUDGE RIVERA: Well, then it's a jury question
13 whether or not the mop - - - the use of the mop handle is
14 deadly physical force.

15 MR. DEAN: No, the jury - - -

16 JUDGE RIVERA: Is that what you're saying?

17 MR. DEAN: - - - question is to whether the
18 defendant reasonably believed that when he saw that mop
19 handle coming in his head - - -

20 JUDGE RIVERA: That it was - - -

21 MR. DEAN: - - - that deadly physical force was -
22 - -

23 JUDGE RIVERA: I see.

24 MR. DEAN: - - - about to be used against him.
25 You can be the first one to use deadly physical force.

1 In hindsight, in retrospect, it turns out that
2 deadly physical force wasn't going to be used. The
3 perpetrator was just reaching in their pocket, didn't turn
4 out that a weapon was there. You can - - - you can still
5 use deadly physical force. That was the true issue in this
6 case, which was obscured by the judge's charge.

7 And not just the judge's charge, but if you look
8 at the prosecutor's summation about what the theory was
9 that the defendant was the initial aggressor, it had
10 nothing to do with the defendant pulling out first. That
11 was not in the case. Even the DA did not argue that on
12 summation. He argued there were nine separate factors.

13 If you found any one of them, the defendant was
14 the initial aggressor, including the fact that the
15 defendant went outside armed with a gun. That he had the
16 gun and he went outside, that's number two. Number three,
17 that when he went outside, the jacket was in the unzipped
18 position. Number four, that he verbally sparred with
19 Hogan. Number five, that he locked eyes with McWillis.

20 According to the prosecutor on summation, these -
21 - - each and every one of these individually were evidences
22 of initial aggressor.

23 JUDGE WILSON: Does the jury - - -

24 MR. DEAN: That was the prosecutor's theory at
25 trial.

1 JUDGE WILSON: The jury had the mop handle,
2 right, in evidence.

3 MR. DEAN: Yeah - - -

4 JUDGE WILSON: And they could inspect it.

5 MR. DEAN: - - - they did.

6 JUDGE WILSON: Is it within providence to have
7 determined that it couldn't reasonably constitute deadly
8 force, no matter how it was wielded?

9 MR. DEAN: That wasn't really the issue in the
10 case. The issue - - -

11 JUDGE WILSON: No, a different - - - that's not
12 what I asked.

13 MR. DEAN: Could they have determined that? But
14 it would not really have been the relevant question.
15 Because the relevant question was, as the defendant saw
16 this mop handle heading towards his head at 200 miles an
17 hour, could he have reasonably perceived that this was
18 deadly physical force. It doesn't matter whether really
19 the mop handle could have been deadly physical force.

20 JUDGE WILSON: So - - - so let's take your
21 example at 200 miles an hour. Could - - - was it within
22 the jury's providence to determine that even at 200 miles
23 an hour, the - - - Mr. Valentin could not have perceived
24 this as deadly physical force?

25 MR. DEAN: Yes. That was - - - of course, that

1 was the jury question. But it wasn't anything about
2 initial aggressor. That was the legitimate jury question.

3 And my adversary is saying, well, you know, it
4 couldn't have been justifica - - - you know, justification
5 was charged, that's not the issue in the case, but they're
6 saying it was a - - - and this was really the basis of
7 Justice Saxe's dissent, it's, come on, it was a mop handle.

8 So what I have to say to that is, the jury took
9 one-and-a-half days to deliberate. They had a recharge on
10 justification, they asked to rehear Hogan's testimony
11 twice. There was a deadlock note. And then they reached a
12 compromised verdict, because the defendant shot him at
13 close range through the heart. It would seem like murder,
14 but they came to manslaughter in the first degree. It
15 seems like a compromised verdict.

16 And then when you look at that and the - - - so
17 it wasn't this overwhelming case. The jury didn't think
18 so.

19 And then when you look at the prosecutor's
20 summation, nine different factors, each one of which would
21 mean initial aggressor, which was not in fact true. None
22 of these things would have made him the initial aggressor.

23 That was the theme of the prosecutor's summation.
24 And none of it was all about how the defendant pulled out
25 before McWillis swung; that was not in the trial.

1 The first one to mention that was Justice Saxe.
2 My adversary is latched onto it. It's not in the case;
3 it's not in the record. It's not there.

4 Appellate Division - - - four judges on the
5 Appellate Division looked at the record, they combed the
6 record, it wasn't there.

7 Thank you.

8 CHIEF DIFIORE: Thank you, counsel.

9 Counsel.

10 MS. MARCIANO: First, I want to address the
11 prosecutor's summation. It's not evidence at trial, and in
12 fact, the judge instructed the jury on how to consider the
13 law, and we presume that the jury followed the court's
14 instructions.

15 JUDGE STEIN: But where - - - where is there
16 testimony or evidence regarding the defendant pulling out
17 before he was threatened with a mop handle?

18 MS. MARCIANO: Pulling out the gun?

19 JUDGE STEIN: Um-hum.

20 MS. MARCIANO: Well, when you talk about
21 threatening with the mop handle, McWillis is holding the
22 mop handle, but there's - - - there's no evidence that he
23 is wielding it, he's swinging it, or he's using it in a
24 threatening manner; he's holding onto it. But these
25 portions that he was shot, Hogan was shot and Justin was

1 swinging - - -

2 JUDGE STEIN: Well, he - - - he was hit with the
3 mop handle at some point in that fracas - - -

4 MS. MARCIANO: Correct.

5 JUDGE STEIN: - - - right. Okay.

6 MS. MARCIANO: After he got a shot off to Hogan.

7 JUDGE STEIN: Well, that's - - - that's - - -
8 after he got a shot off to Hogan. But where - - - where is
9 - - - where in the record is there evidence that he shot
10 first?

11 MS. MARCIANO: Page 907, at line 18, he's asked,
12 "At the time you were being shot by defendant and your arm
13 was up" - - - this question is posed to Hogan - - - "was
14 Justin doing something with the mop, or had he already done
15 something with the mop?"

16 And Hogan goes to answer starting on line 25, the
17 most prominent part is page 908, line 4. He said, "I
18 guess, well, you could say" - - - you could say, he,
19 meaning McWillis, "hit him, the defendant, after I got
20 shot. But when McWillis hit him, the gun was already
21 pulled out."

22 So this is a - - -

23 JUDGE RIVERA: But isn't that different, taking a
24 swing and you don't connect and actually hitting? Isn't
25 that different so that you can harmonize all of this,

1 there's not the inconsistencies you're talking about?

2 MS. MARCIANO: Well, there's no evidence that - -
3 - that McWillis was took an initial swing where he missed
4 defendant. There's testimony only about a single swing
5 where he did make contact with defendant, but he made
6 contact with defendant after defendant had already shot
7 Hogan.

8 And just - - - you know, to go back - - -

9 JUDGE RIVERA: If that - - - if that's true, why
10 - - - why is that not an argument that you made below?

11 MS. MARCIANO: Pardon?

12 JUDGE RIVERA: You're saying, you didn't argue.
13 Is opposing counsel incorrect? He says that this was never
14 raised before the Appellate Division, that this comes from
15 Justice Saxe's reading of the record, that the People never
16 took this position. Is that incorrect?

17 MS. MARCIANO: You're talking about the sequence?

18 JUDGE RIVERA: Yes. Yes.

19 MS. MARCIANO: No, the - - - the arguments about
20 the sequence of events really only come out of the
21 Appellate Division's decision. That - - - that - - -

22 JUDGE RIVERA: So the People never took this
23 position.

24 MS. MARCIANO: No. There really wasn't a lot of
25 discussion about the sequence of events in the - - - in the

1 briefing below or in the Appellate Division decision.

2 I - - -

3 JUDGE ABDUS-SALAAM: What about the force with
4 which the mop handle was swung, and the distance that
5 McWillis was from the defendant when that mop handle was
6 swung?

7 MS. MARCIANO: You're asking what the distance
8 was?

9 JUDGE ABDUS-SALAAM: Yeah. Was there any
10 evidence regarding that?

11 MS. MARCIANO: Yes. The testimony was that they
12 were approximately three to four feet from one another.
13 The mop handle is approximately four feet long. But at the
14 time of the shot, the testimony is that defend - - - is
15 that McWillis was shot at approximately six inches, so they
16 were much closer to each other at the time of the shooting.

17 I just wanted to - - -

18 JUDGE RIVERA: Is there testimony regarding the -
19 - - the metal T, was that what was being swung at - - -

20 MS. MARCIANO: We don't have - - -

21 JUDGE RIVERA: - - - defendant? Is there any
22 testimony about sort of what - - - what end of the mop is
23 aimed at defendant?

24 MS. MARCIANO: We don't have any testimony about
25 that. But the mop handle, which was in evidence as

1 People's 18, and it was requested by the jury during their
2 deliberations, they were able to see that a portion of the
3 mop handle, and it's the top portion, it's about the top
4 quarter of it or so, is what bent, and part of the plastic
5 is actually broken open.

6 JUDGE RIVERA: That's - - - that's the top
7 without the metal, right?

8 MS. MARCIANO: Correct. The opposite end of
9 where the - - - the metal clamp would be.

10 I just wanted to address Judge Fahey's comment on
11 McWilliams. You know, respondent wants to limit McWilliams
12 to a scenario where only the defendant is initiating
13 nondeadly physical force that has met with deadly physical
14 force.

15 That's - - - that's - - - you have to look to the
16 current revision of the CJI to see that it hasn't been
17 limited that way. In fact, the most recent 2013 revision
18 of the CJI specifically discusses when nondeadly force is
19 met with deadly force, stating that the initial aggressor
20 is the first person to use - - -

21 JUDGE RIVERA: Well, we're not bound by them.
22 Right. So if the CJI is an incorrect articulation of the
23 law, we are not bound by it. Right. We are the ones who
24 are going to articulate the law, correct?

25 MS. MARCIANO: Correct. But it is a statement -

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- - it's a reflection of - - - of the law and the case law as it is now, and it reflects the scenario, I submit, that is - - - that is the situation.

There's no doubt that defendant's use of force was deadly. McWillis' swinging of the mop handle in this circumstance was not, but it was for the jury to determine whether that swinging mop handle was deadly physical force, and to determine who the initial aggressor was in that scenario.

And that is where the Appellate Division overstepped its bounds.

Thank you.

CHIEF DIFIORE: Thank you, counsel.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Carlos Valentin, No. 33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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Date: February 20, 2017