

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS  
STATE OF NEW YORK

-----

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 32

DARRYL BROWN,

Respondent.

-----

20 Eagle Street  
Albany, New York  
March 27, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

CLARA H. SALZBERG, ADA  
BRONX COUNTY DISTRICT ATTORNEY`S OFFICE  
Attorney for Appellant  
198 East 161st Street  
Bronx, NY 10451

JOEY JACKSON, ESQ.  
WATFORD JACKSON, PLLC  
Attorney for Respondent  
101 Avenue of the Americas  
9th Floor  
New York, NY 10013

Sharona Shapiro  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 32, the People of  
2 the State of New York v. Darryl Brown.

3 MS. SALZBERG: I would like to reserve four  
4 minutes of my time for rebuttal, with the Chief Justice's  
5 permission.

6 CHIEF JUDGE DIFIORE: You may. Four minutes.

7 MS. SALZBERG: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel, if an initial  
9 aggressor who introduces deadly physical force into an  
10 encounter can shoot and kill the person who's trying to  
11 grab at the gun, what does that do to the limitations set  
12 out in Article 35?

13 MS. SALZBERG: Well, Your Honor, initially the  
14 word "grab" was defense counsel's word. The - - - the eye  
15 witness, the mailman who was - - -

16 CHIEF JUDGE DIFIORE: Oh, I'm talking generally.  
17 I'm not talking yet - - -

18 MS. SALZBERG: Oh, generally.

19 CHIEF JUDGE DIFIORE: - - - specifically about  
20 this case.

21 MS. SALZBERG: Right. Well, Your Honor, ultimate  
22 - - - I mean, it's obviously a very fact-specific  
23 determination. There may be instances in which it's - - -  
24 it's warranted versus not warranted. But under the  
25 circumstances of - - - of this case, where we have no



1 evidence, no reasonable view of the evidence indicating  
2 that there was ever any use of physical force, deadly  
3 physical force, on the part of the victim, Mr.  
4 Cabbagestalk, there - - - there was no reasonable view of  
5 the evidence that warranted the justification charge. And  
6 the Appellate Division was incorrect in finding otherwise.

7 JUDGE RIVERA: But if there's a witness who's  
8 testifying that the - - - the victim is grabbing, punching,  
9 swinging - - - excuse me - - - getting in the face of the  
10 defendant, why isn't that enough to give you that  
11 reasonable view of the evidence that permits a  
12 justification defense?

13 MS. SALZBERG: Well, Your Honor, first of all,  
14 again, the word "grab" was defense counsel's word. The  
15 word that this particular witness, Mr. Wolfe, used was  
16 "swipe". And what Mr. - - -

17 JUDGE RIVERA: Well, let's use that word.

18 MS. SALZBERG: Sure.

19 JUDGE RIVERA: It's obviously an attempt to get  
20 at a weapon.

21 MS. SALZBERG: I would disagree with that  
22 characterization, but even if - - - even if Your Honor  
23 would disagree with my disagreement - - -

24 JUDGE RIVERA: But isn't there a reasonable view  
25 that that might be the way the jury sees it?



1 MS. SALZBERG: I - - -

2 JUDGE GARCIA: But assume that's the view.

3 MS. SALZBERG: Let's assume that's the view,  
4 yeah.

5 JUDGE GARCIA: So what would the answer to Judge  
6 Rivera's question - - -

7 MS. SALZBERG: So the answer, Judge Rivera, is  
8 that if the encounter were to end there then I would be  
9 more inclined to agree with Your Honor. However, that is  
10 not what actually happened under the circumstances of this  
11 case. Under the circumstances, we have a forty-five-second  
12 window during which the witness in question, Mr. Wolfe, the  
13 mailman, is, according to his own testimony, up a flight of  
14 stairs, out of eyesight of the defendant and the  
15 complaining witness.

16 The only person who actually sees what happens  
17 next is Ms. Thomas who testifies that in fact Mr. - - - Mr.  
18 - - - the - - - the defendant, Mr. Brown, walks away from  
19 Mr. Cabbagestalk and that Mr. Cabbagestalk follows him from  
20 several feet behind with his arms outstretched, trying to  
21 reason with him. At that point they walk past her field of  
22 view, and then she hears the shot.

23 JUDGE RIVERA: But they've been in that  
24 encounter, the victim is following the defendant quite  
25 closely, and obviously they're continuing to engage in some



1 form or another. Why is that still not - - - remember,  
2 it's - - - it's not a de minimis threshold, but it's not a  
3 high bar, right? It's a reasonable view of the evidence.

4 MS. SALZBERG: Well, Your Honor, keep in mind  
5 that the testimony was that the defendant was angrier than  
6 Mr. Cabbagestalk. Mr. Cabbagestalk had his hands up, his  
7 palms facing outward - - - upward, trying to reason with  
8 him, and that they were at a distance of six to seven feet.

9 JUDGE RIVERA: That's again, part of that is sort  
10 of the witness saying that's what she thought all of that  
11 reflected because, as I recall, she doesn't really hear  
12 them, right? She doesn't say she could hear them, correct?

13 MS. SALZBERG: That's correct, Your Honor.

14 JUDGE RIVERA: So again, the jury can discount,  
15 accept, all or any part of any testimony. Why isn't - - -

16 MS. SALZBERG: Well - - -

17 JUDGE RIVERA: Given the range of what occurred,  
18 why doesn't - - - I'm still not understanding why it  
19 doesn't give you a reasonable view. I mean, I understand  
20 the dissent's position which is once he's - - - once he's -  
21 - - the defendant appears to be going for his gun or has  
22 his hand on the gun that now he's an initial aggressor, you  
23 have a whole different situation, he's not entitled to the  
24 justification defense. But - - - but you're arguing that  
25 that scenario of facts, based on this testimony, doesn't



1 even meet this very low bar. And I'm not understanding  
2 that.

3 MS. SALZBERG: Well, Your Honor, the jury  
4 certainly can accept or reject testimony, but they cannot,  
5 however, imagine testimony that doesn't exist, as this - -  
6 - as this court stated - - -

7 JUDGE RIVERA: But they can draw reasonable  
8 inferences.

9 MS. SALZBERG: That's true, but there's no  
10 testimony whatsoever in the record that - - - that  
11 contradicts Ms. Thomas' testimony. She was the only person  
12 who could see the defendant and Mr. Cabbagestalk in the  
13 second leading up to the shot.

14 JUDGE FAHEY: I thought there was testimony by  
15 Wolfe that the defendant was - - - kept backing up. He  
16 says it three times: he backed up, he backed up, he backed  
17 up.

18 MS. SALZBERG: He indicated that the defendant  
19 was leaning back. This was earlier in the encounter when  
20 there was still the third man.

21 JUDGE FAHEY: So he doesn't say he continued to  
22 back up, back up, back up?

23 MS. SALZBERG: He indicated the defendant was  
24 leaning back but that he wasn't retreating.

25 JUDGE FAHEY: No, but that wasn't my question.



1 Did he say that? Did Wolfe say that? Was there testimony  
2 in the record that he continued to back up?

3 MS. SALZBERG: Okay, yes, yes. And he's leaning  
4 back. This is earlier when there's the third man, before  
5 the third man leaves, before the gun is prominently  
6 displayed and Mr. Wolfe sees the gun, and in his - - - in  
7 his words, goes upstairs, right, which is why, when the  
8 shot goes off he has to come back downstairs - - -

9 JUDGE RIVERA: So - - -

10 MS. SALZBERG: - - - in order to see what  
11 occurred.

12 JUDGE RIVERA: - - - counsel, if we disagree with  
13 the way you've characterized this testimony and - - - and  
14 the interactions, does that end the inquiry? Does that  
15 mean that the Appellate Division's correct that  
16 justification should have been charged here, if we disagree  
17 with the way you've characterized this - - - this testimony  
18 about what the interactions were, let me put it that way,  
19 between the victim and the defendant?

20 MS. SALZBERG: It's certainly a harder case for  
21 us, Your Honor, but I would still say that at the point  
22 where you have here - - - unlike in the previous case  
23 before Your Honors, you have here somebody who was  
24 undisputedly the initial aggressor, who chose, as a  
25 corrections officer, to bring a gun and confront an unarmed



1 man in the hallway of his apartment building.

2 JUDGE FEINMAN: On that point of bringing the  
3 gun, is the record - - - the trial record, as opposed to  
4 anything that may have happened before trial, is that clear  
5 about where - - - that he had the gun on him already as  
6 opposed to going to retrieve it from someplace else or  
7 anything like that?

8 MS. SALZBERG: Well, the testimony, Your Honor,  
9 was that the defendant came home from work, he goes into  
10 his apartment, and then at some point thereafter he exits  
11 the apartment to confront his daughter's boyfriend, Mr.  
12 Cabbagestalk. So he did have an opportunity to obviously  
13 leave the gun in the apartment, but he instead chose, not  
14 only to have it on him, but to have it at his side, to be  
15 holding it when he's having what, by all accounts, was an  
16 aggressive conversation - - -

17 JUDGE FEINMAN: To what extent - - -

18 JUDGE FAHEY: Do you know if there was - - -

19 JUDGE FEINMAN: - - - does it matter - - - I'm  
20 sorry.

21 JUDGE FAHEY: No, you go ahead, Judge.

22 JUDGE FEINMAN: To what extent does it matter  
23 whether it's at an angle, whether he's actually put his  
24 hand on it, whether he's drawn it? Is the mere fact that  
25 he goes into this fist fight with a gun, is that enough to



1 make him the initial aggressor, as a matter of law?

2 MS. SALZBERG: I think that - - -

3 JUDGE FEINMAN: Is that what you're saying?

4 MS. SALZBERG: - - - when you - - - I understand  
5 your question. I would say yes, but even if Your Honor  
6 disagreed with me, the reality is that what he was saying,  
7 stay away from my daughter, don't come around here, he's -  
8 - - he's angrier, he's - - - he's the one who's - - - he's  
9 the one who's having the heated discussion, those  
10 indicators, which are throughout the record, would increase  
11 that level to which he is the initial - - -

12 JUDGE STEIN: Do we know if it was at least in  
13 his holster when the altercation began rather than taken  
14 out of the holster and at his side? Do we - - - do we know  
15 that?

16 MS. SALZBERG: I would have to double check the  
17 record, Your Honor. I believe that he took it out of his  
18 holster while the conversation was ongoing.

19 JUDGE FAHEY: So you're saying - - -

20 JUDGE STEIN: Does that make a difference?

21 MS. SALZBERG: I - - - I think it does because I  
22 think, when you take all of those things together, you can  
23 understand why Mr. Cabbagestalk and his - - - and his  
24 friend, who was there and then left when - - - you know,  
25 when it became clear that this was going to be a violent

1 confrontation, it's clear why they displayed such - - -  
2 such concern.

3 JUDGE FAHEY: So just let me ask, did the victim  
4 swipe at the gun before it was taken out of its holster?

5 MS. SALZBERG: No. No, Your Honor. The - - -  
6 the defendant was holding the gun at his side and that was  
7 when the victim - - -

8 JUDGE FAHEY: He was holding - - - so it already  
9 had been taken out - - -

10 MS. SALZBERG: Yes.

11 JUDGE FAHEY: - - - when he began to swipe at the  
12 gun?

13 MS. SALZBERG: Yes, and to be honest, I don't  
14 recall whether there was testimony of whether it was ever  
15 in the holster or whether he emerged from the apartment  
16 with it at his side.

17 JUDGE FAHEY: I see.

18 MS. SALZBERG: I don't recall that.

19 JUDGE WILSON: And Wolfe's testimony was  
20 inconsistent about in which hand Mr. Brown had the gun,  
21 right? It started one way, and then he switched it to the  
22 other way and he wasn't sure?

23 MS. SALZBERG: That's possible. But - - - but  
24 his testimony was that the gun was at the defendant's side.  
25 And I'm sorry, I know my time is expired, but very briefly.



1 It's at - - - it's at the defend - - - at his side, and  
2 that - - - and that that is when Mr. Cabbagestalk says - -  
3 -

4 JUDGE WILSON: In one hand or the other?

5 MS. SALZBERG: Right. And Mr. Cabbagestalk  
6 indicates, you're going to pull a gun out, you better use  
7 it, and he's swiping. But again, all of that occurred well  
8 before the - - - the actual - - - the actual murder.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. SALZBERG: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. JACKSON: Yes. May it please the Court. My  
13 name is Joey Jackson. I've had the pleasure of  
14 representing Mr. Brown at the trial level, sitting through  
15 read-back in the case, listening to the testimony, writing  
16 the brief, arguing it before the First Department - - -

17 CHIEF JUDGE DIFIORE: So that's great. So what  
18 exactly is the evidence - - -

19 MR. JACKSON: So the evidence - - -

20 CHIEF JUDGE DIFIORE: - - - of the threat - - -

21 MR. JACKSON: And Judge, let me just say - - -

22 CHIEF JUDGE DIFIORE: - - - of deadly physical  
23 force - - -

24 MR. JACKSON: Yes.

25 CHIEF JUDGE DIFIORE: - - - by the victim?



1 MR. JACKSON: So let me explain why I say that.  
2 I say that because, on the issues of facts, I think there  
3 were misrepresentations, not intentional, but I say that to  
4 let you know that I believe I'm conversant with the facts,  
5 and what was represented did not occur.

6 Who saw the case was Mr. Wolfe. Mr. Wolfe, in  
7 seeing the case, posited a significant amount of testimony  
8 which would establish that Mr. Brown was in immediate fear  
9 for his life. What is that specific testimony? He posited  
10 testimony that would suggest that at the time of the  
11 critical moment when the shot was fired Mr. Brown was  
12 moving back, to your point, moving back again, moving back  
13 again, not attempting at all. At this point the gun was  
14 out, Your Honors, it was out, indeed, by his side. It  
15 wasn't pointed at anyone. And when Mr. Brown was moving  
16 back - - -

17 JUDGE STEIN: Well, here's my question.

18 MR. JACKSON: Yes.

19 JUDGE STEIN: If I have a legal license to carry  
20 a firearm, and somebody who is - - - well, there's no  
21 evidence at least here that - - - that - - - that the - - -  
22 the victim here was - - - was armed. So let's say somebody  
23 who was unarmed comes at me, and you know, and - - - and  
24 we're going back and forth, and maybe he's approaching me.  
25 Do I have the right to take out my gun and impliedly



1 threaten - - - again, I'm making some assumptions - - -  
2 that person, do I have the right to introduce a dangerous  
3 instrument into our confrontation?

4 MR. JACKSON: Judge, most respectfully, I don't  
5 believe that that's relevant to the inquiry, and if I could  
6 - - - if Your Honor would permit me to say why. Now, in  
7 terms of introducing a gun into the equation, you could  
8 argue that potentially that's bad judgment, potentially it  
9 should not have been introduced. I think the inquiry  
10 begins when the gun is introduced into the equation, what  
11 then happens.

12 JUDGE STEIN: But my question is is does that  
13 make - - - it matters to me because the question to me is  
14 did that make him the - - -

15 JUDGE FEINMAN: Initial aggressor.

16 JUDGE STEIN: - - - initial aggressor.

17 MR. JACKSON: Okay. In terms of the initial  
18 agresh - - - aggre - - - aggressor let me be clear. That  
19 issue was never brought up at all. That issue was not  
20 preserved before the Court. That issue was - - -

21 JUDGE STEIN: Well, let's just say - - -

22 MR. JACKSON: Okay.

23 JUDGE STEIN: - - - we disagree with you. I - -

24 -

25 MR. JACKSON: Okay.



1 JUDGE STEIN: You know, I think that there - - -  
2 there may be an argument that it was. I can't see how - -  
3 - I'm not sure how the trial - - - why the trial court  
4 would have ruled the way it did unless that was what it was  
5 basing it on. But - - - but anyway, let's assume that to  
6 be true.

7 MR. JACKSON: Well, Judge, yeah, I don't know why  
8 the trial court did what it did, most respectfully, but in  
9 any event - - -

10 JUDGE STEIN: I understand you don't know.

11 MR. JACKSON: - - - moving on - - -

12 JUDGE STEIN: Um-hum.

13 MR. JACKSON: - - - I do not believe that that,  
14 in and of itself, would make him the initial aggressor. I  
15 think the fact inquiry regarding the initial aggressor is  
16 what then occurs. The gun is now out, not pointed at him.  
17 You would think, under normal circumstances - - -

18 JUDGE STEIN: Well, why else would he take it  
19 out?

20 MR. JACKSON: He would take out the gun, it would  
21 seem to me - - - again, a reasonable view of the evidence  
22 might be to end it, to say, look, there's a weapon; leave  
23 it alone. That's not what happened here.

24 JUDGE STEIN: Well, isn't that a threat?

25 MR. JACKSON: Well, the - - -



1 JUDGE STEIN: If you keep doing this then I'm  
2 going to end this?

3 MR. JACKSON: But that's not what happened. What  
4 happ - - - again - - -

5 JUDGE STEIN: I know, but the question is is - -  
6 - we're talk - - - we're talking about what is a reasonable  
7 view of the evidence, right?

8 MR. JACKSON: Right. And so my view is that I  
9 would believe that Mr. Cabbagestalk was the aggressor  
10 inasmuch as once the gun is out, he then says, Mr.  
11 Cabbagestalk, if you have a gun, you had better use it.

12 JUDGE RIVERA: Can you just clarify a little bit  
13 of the order here?

14 MR. JACKSON: Yes.

15 JUDGE RIVERA: Okay. So the gun is holstered - -  
16 -

17 MR. JACKSON: Yes.

18 JUDGE RIVERA: - - - when the defendant and  
19 victim first interact, and at what point is - - - does he  
20 pull out this gun?

21 MR. JACKSON: What happens is is that initially  
22 there's a confrontation between Mr. Brown and Mr.  
23 Cabbagestalk. Following that confrontation, Mr. Brown then  
24 walks away. While he's walking away, with his hands up in  
25 the air, Mr. Cabbagestalk is following him.



1 JUDGE RIVERA: Yeah.

2 MR. JACKSON: He's following him. That's what  
3 Sheila Shakes sees.

4 JUDGE WILSON: Where is the evidence in the  
5 record that the gun was ever holstered?

6 MR. JACKSON: There's inferences - - -

7 JUDGE WILSON: No, no, no, is there the word  
8 "holster" in the record anywhere? You're intimately  
9 familiar with it; where is it?

10 MR. JACKSON: There's not the word "holster"  
11 itself in the record.

12 JUDGE WILSON: Okay.

13 MR. JACKSON: But we can infer it, Judge Wilson,  
14 and let me explain why we can infer.

15 JUDGE WILSON: Well, then I'm not sure it's  
16 really fair to answer - - -

17 MR. JACKSON: Okay.

18 JUDGE WILSON: - - - Judge Rivera's question  
19 about whether the gun was holstered by saying, well, we  
20 don't actually know.

21 MR. JACKSON: Okay. So - - -

22 JUDGE WILSON: Right?

23 MR. JACKSON: Right. So we don't know - - -

24 JUDGE WILSON: So you know the record. You've  
25 accused your - - -



1 MR. JACKSON: Yes.

2 JUDGE WILSON: - - - your adversary of  
3 misrepresenting it. Please represent it accurately.

4 MR. JACKSON: Okay. So what happens is is that  
5 when my client is walking away, when Mr. Brown - - -

6 JUDGE WILSON: And where is the evidence that  
7 your client is walking away with his hands up?

8 MR. JACKSON: The evidence is by Sheila Shakes,  
9 a/k/a Sheila Thomas which suggests - - -

10 JUDGE WILSON: That his hands are up.

11 MR. JACKSON: - - - that she comes from grocery  
12 shopping, she looks in - - - when she looks into the  
13 vestibule she sees, at that point, Mr. Brown, no gun at  
14 all, walking with his hands in the air, no gun. No gun in  
15 his hands at all.

16 JUDGE WILSON: Isn't her testimony that Mr.  
17 Cabbagestalk is walking with his hands up with no gun at  
18 all?

19 MR. JACKSON: No, that's not her testimony.

20 JUDGE WILSON: All right.

21 MR. JACKSON: Her testimony is that Mr. Brown is  
22 walking, gesticulating with his hands, and that's why she  
23 could observe that he doesn't have the gun. So to your  
24 point about the holster, again, the inference could be made  
25 that after Mr. Cabbagestalk approaches him, and then now we



1 have the postman, which is Raymond Wolfe, enter into the  
2 equation to see the critical moments that it occurs. So  
3 now, after the initial confrontation, when Mr. Brown walks  
4 away, that's when you have Mr. Cabbagestalk following him.  
5 That's where you have the confrontation where he ultimately  
6 follows him, Judge Wilson, and in following him, now  
7 there's the confrontation where the gun - - - we could pre  
8 - - - we could presume at some point it gets unholstered  
9 because we know he didn't have the gun when Sheila Shakes  
10 sees them. And then we know Raymond Wolfe is delivering  
11 the mail. Now the gun is out. And when the gun is out, he  
12 now, that is, Mr. Brown, becomes under attack. He's under  
13 attack inasmuch as he has the gun out, Mr. Cabbagestalk  
14 says if you have the gun out, you had better use it.

15 JUDGE WILSON: So is a punch - - - is there a  
16 swing before the gun is out?

17 MR. JACKSON: There is not - - - there's - - -  
18 from my understanding, there's not a punch before the gun  
19 is out.

20 JUDGE WILSON: So the gun is out first, then  
21 first swing?

22 MR. JACKSON: The gun is out, first swing. Gun  
23 is out, second swing. Gun is out - - -

24 CHIEF JUDGE DIFIORE: So does he have to bring  
25 the gun out only when he's defending against deadly



1 physical force?

2 MR. JACKSON: Well, I don't think the issue  
3 really is - - - there are two cases that I would just like  
4 to - - - to think that this court should look at. One is  
5 the Schwartz case, and it's a First Department case in  
6 1990, and it stands for the proposition that when you lunge  
7 at someone who has a gun out, irrespective of when the gun  
8 came out, and they discharged that weapon because they  
9 believe that you could either take the gun from them or  
10 otherwise empower - - - otherwise overpower them or  
11 otherwise gain access to the gun, a justification charge  
12 would be warranted.

13 That case does not speak to the issue of it's  
14 relevant who - - - when the gun comes out, how it comes  
15 out. It's relevant, when the gun is out, says Schwartz,  
16 and there's a lunging for that weapon, that person who's  
17 getting lunged at has a - - - who might have an immediate  
18 belief that they're about to be attacked, or otherwise have  
19 serious physical force used against them, can shoot.

20 The second case I would direct the Court to would  
21 be the case of People v. Smith, standing for a very similar  
22 proposition, not in regards to when the gun comes out or  
23 should he have it out first, second, or third, but if a gun  
24 is out, and whenever that gun is out and the person becomes  
25 under attack, then it certainly would be a view of the



1 evidence that that person who introduced the gun, even,  
2 feels that they could be overpowered and the gun could be  
3 taken away.

4 JUDGE RIVERA: Well, why aren't the People  
5 correct that you've got this altercation but then the  
6 defendant is - - - is moving away, the victim follows him,  
7 Ms. Thomas sees the victim with the hands in the air - - -  
8 that's the hands in the air; I understand you're saying  
9 Brown has his hands at the air - - -

10 MR. JACKSON: Yes.

11 JUDGE RIVERA: - - - earlier, and she says she  
12 sees that without a gun. Why - - - why isn't - - - why  
13 aren't the People correct that at that point forty-five  
14 seconds have passed, there's now moving on, and he's not in  
15 that moment where he's - - - he's fearful.

16 MR. JACKSON: Because that's not what happened.  
17 What happened was is that the shooting came after the fact.  
18 What I'm suggesting to you - - -

19 JUDGE RIVERA: Well, no one saw the actual  
20 shooting; is that correct?

21 MR. JACKSON: Yes, they did. Raymond Wolfe saw  
22 the shooting. He didn't see the muzzle flash. He saw  
23 everything leading up to the shooting except the muzzle  
24 flash. And that's what I want to be clear on. Facts here  
25 matter, and they matter very much because there was no

1           dissipation of time. There was no forty-five seconds  
2           elapsing. This happened simultaneous. Mr. Brown acted  
3           simultaneous to when he needed to act. When he did finally  
4           discharge that firearm, he was swung at once, and he  
5           stepped back, says Wolfe. He was swung at again, he  
6           stepped back, says Wolfe.

7                   JUDGE RIVERA: So the basis for the reasonable  
8           view of the evidence that he's entitled to justification  
9           all turns on Wolfe's testimony?

10                   MR. JACKSON: It turn - - -

11                   JUDGE RIVERA: If we just read that, is that your  
12           position?

13                   MR. JACKSON: My position is that Wolfe's  
14           testimony lends further credence to the fact that he would  
15           be entitled to that charge. Here's why: because Wolfe  
16           suggests, again, that he's swiping and grabbing for the gun  
17           - - - it's in the record - - - in addition to Sheila  
18           Shakes, who says she doesn't see anything, but she sees him  
19           leaving the confrontation. Mr. Brown had left the  
20           confrontation. It was Mr. Cabbagestalk who then follows  
21           behind him and reinforces and goes after him and approaches  
22           him and otherwise ascends upon him thereby needing - - -  
23           Mr. Brown needing to defend himself.

24                   JUDGE GARCIA: Counsel, what - - -

25                   CHIEF JUDGE DIFIORE: Was Brown's back to him



1 when he was - - -

2 MR. JACKSON: Mr. Brown's back was - - - and this  
3 is Sheila Shakes' testimony - - - Mr. Brown's back was away  
4 from Mr. Cabbagestalk who was behind - - -

5 CHIEF JUDGE DIFIORE: And it's your position he  
6 spun around and shot him?

7 MR. JACKSON: At some point - - - no, not spun  
8 around and shot him, Your Honor. He spun around when he  
9 continued to follow him. And after he continued to follow  
10 him and he - - - at some point, which is unclear, the gun  
11 comes out. But it's not unclear in terms of the  
12 persistence of Mr. Cabbagestalk in swinging at him multiple  
13 times and grabbing for that gun and otherwise, in Mr.  
14 Brown's view, attempting to overpower him to get that  
15 weapon, and Mr. Brown attempting to do each and every thing  
16 before the gun was ultimately discharged.

17 JUDGE STEIN: When Mr. Brown had his back to him,  
18 could he have kept walking to his apartment?

19 MR. JACKSON: Mr. Brown, in terms of keeping  
20 walking to the apartment, my understanding is is that at  
21 some point there was a confrontation such that Mr. Brown  
22 had to turn around; otherwise he felt that he was in  
23 danger. In other words, he couldn't just walk - - - this  
24 person's behind him using all kind of language, et cetera,  
25 et cetera. He turned - - -

1 JUDGE RIVERA: Was he walking towards the door of  
2 his apartment?

3 MR. JACKSON: He - - - he - - - the record is  
4 unclear about precisely was it the door of his apartment.  
5 He was walking in the direction. I can't say he was - - -

6 JUDGE RIVERA: He was walking towards his  
7 daughter and the grandchild.

8 MR. JACKSON: In the direction - - -

9 JUDGE RIVERA: They're in front of the door; is  
10 that correct?

11 MR. JACKSON: Right, in the direction, not - - -  
12 not - - - I can't say he was walking into the apartment. I  
13 could say he was walking in the direction - - -

14 JUDGE RIVERA: No evidence how far he is from  
15 that door?

16 MR. JACKSON: There's no evidence in the record  
17 in terms of that. It just - - - he - - - he spins around,  
18 and at that particular time, the confrontation occurs. And  
19 again, this was - - - this was a situation where he was  
20 compelled to discharge the firearm based upon the  
21 surrounding set of circumstances and him feeling he was in  
22 immediate fear for his life.

23 JUDGE GARCIA: Counsel, we've talked a lot about  
24 the facts and the perspective here, but let's assume - - -  
25 and I know these aren't the facts of this case, but let's



1           assume there is this type of confrontation and the victim  
2           is, you know, getting loud but not in any way physically  
3           threatening, and the defendant pulls out a weapon, same  
4           angle, pulls out a weapon. I think we can all say at that  
5           point you're introducing a dangerous weapon into this  
6           confrontation without any reason, right? The - - - the  
7           person's twenty feet away and just getting kind of  
8           belligerent. There's no other evidence in the record that  
9           he knew they were armed or he had reason to suspect they  
10          were violent. So they pull out a gun. Now that victim  
11          comes and starts to swipe at the gun. Would you say - - -  
12          and same testimony, swiping for it, would you say you would  
13          be entitled to a justification charge?

14                       MR. JACKSON: I think it depends upon the facts.  
15          Was there - - - as here, was the person being berated and  
16          being belligerent to the other person, number one. Number  
17          two, was the person wearing a long black coat at the time?  
18          Number three, did my client fear that - - -

19                       JUDGE GARCIA: The problem is assume that there  
20          is no reason to pull that gun out. We could all agree  
21          there's no reason, but now it's out. It's out. And now  
22          that victim is swiping at the gun.

23                       MR. JACKSON: Yes.

24                       JUDGE GARCIA: So do you get a justification  
25          charge?



1 MR. JACKSON: I believe at that particular point  
2 if the gun - - - if the gun is out, I think, and the person  
3 is coming towards you and grabbing for the gun, and now you  
4 really feel that you're in immediate fear for your life, I  
5 think you do get a justification charge.

6 JUDGE GARCIA: Isn't that a problematic rule? I  
7 mean, because you've introduced a deadly weapon into a  
8 confrontation where it has no business being, under any  
9 stretch of the facts - - - and again, I'm not saying this  
10 is this case - - - and now all of a sudden you can say,  
11 well, they're reaching for the gun I shouldn't have had  
12 out, so I can - - - I can get a justification.

13 MR. JACKSON: Well, I'd answer that this way. I  
14 think the first thing is is that those are not these facts.  
15 I think there's an argument to be made that the gun should  
16 have been out, number one - - -

17 JUDGE GARCIA: Understood.

18 MR. JACKSON: - - - based upon the manner in  
19 which he was being approached after Mr. Brown decided to  
20 leave the situation alone, and based upon a person being in  
21 close proximity to him and otherwise saying things to him  
22 that were pretty colorful, that I will not, you know,  
23 repeat in this courtroom, and based upon the person really  
24 believing that he could be under attack and he could  
25 literally be in a threatening situation.



1 JUDGE GARCIA: So then your rule would be  
2 bringing the gun out would have to be justified initially?

3 MR. JACKSON: I don't think - - - no, I'm not  
4 saying bring - - -

5 JUDGE GARCIA: Well, that's why you're explaining  
6 all these facts to me, right? You're trying to justify him  
7 bringing the gun out.

8 MR. JACKSON: No, I - - - yeah, I'm not trying to  
9 justify it; I'm suggesting to you that that was the reason  
10 here, under these facts.

11 JUDGE GARCIA: So how about, again, getting back  
12 to my hypothetical where these aren't the facts, it's out,  
13 now swiping, do you get a justification defense?

14 MR. JACKSON: I think it should turn on what  
15 happens in the critical moments leading up to the actual  
16 deadly encounter. Whether the gun's out, whether the gun's  
17 not out, the issue, to me, would turn on, if a gun is  
18 introduced, I don't think the law says if you introduce the  
19 gun you can never ever get a justification defense under  
20 any circumstance. That's just not the law.

21 The law would suggest that, whether it's  
22 introduced or it's not introduced, once it's introduced, if  
23 you feel that you're under attack and you feel that you  
24 really could die, based upon someone continuing to punch,  
25 to swipe, to grab at the gun, and to punch at you, even

1           though you continue to move back, back, back, back, and  
2           back, and you use it, that seems - - -

3                   JUDGE RIVERA: But the fear you're - - - I know  
4           your light is out. My last question. But the fear that  
5           you're referring to is the fear that the attacker, this - -  
6           - the victim is going to take the gun?

7                   MR. JACKSON: I think that's - - -

8                   JUDGE RIVERA: Is that the fear you're talking  
9           about - - -

10                  MR. JACKSON: I think that - - -

11                  JUDGE RIVERA: - - - as opposed to just punching  
12           you and hitting you?

13                  MR. JACKSON: Right. The fear is that they're  
14           going to take the gun. It's not the fear that they're - -  
15           - they're going to, you know, beat you or whatever. It's  
16           the fear that they're going to gain control of that weapon.  
17           And they told you if that's out you had better use it.

18                  JUDGE WILSON: Take the gun and shoot you, is  
19           what you're saying; not just take the gun?

20                  MR. JACKSON: Exactly. Take the gun and use it  
21           against you in a way that's overpowering such that they can  
22           kill you, of course.

23                  CHIEF JUDGE DIFIORE: Thank you, counsel.

24                           Counsel?

25                  MS. SALZBERG: Thank you, Your Honor. I - - - I



1 just want to clear up a couple of things about the record.  
2 The - - - the record is clear that Mr. Wolfe was upstairs  
3 at the time of the shot. Transcript pages 250 to 251,  
4 where he says: "When the shot went off, I was upstairs."  
5 Later on he says, "I didn't see the flash; I just heard  
6 it." It's very clear. And then after that, later on, on  
7 that same page, on page 251, he says after he heard the  
8 shot he came back down. That clearly indicates that he was  
9 not looking at the encounter at the time that the shot went  
10 off.

11 JUDGE FAHEY: Can I ask you, just so I'm clear on  
12 your position? You're not saying, are you, that the  
13 display of a firearm automatically constitutes a threat of  
14 deadly physical force as a matter of law?

15 MS. SALZBERG: No. But it is certainly something  
16 that should be weighed by - - -

17 JUDGE FAHEY: Of course, it should be - - -

18 MS. SALZBERG: - - - by the Court.

19 JUDGE FAHEY: - - - indicated, but it's not the -  
20 - - the display itself is not an indication of anything as  
21 a matter of law?

22 MS. SALZBERG: No.

23 JUDGE FAHEY: So if we say - - - if you took the  
24 display of the gun out of the equation here, would there be  
25 anything that would deny a justification charge other than



1 the display of the gun in this circumstance?

2 MS. SALZBERG: Well, I think the fact that right  
3 before the shot, Ms. Thomas, who is the one who's able to  
4 see the encounter - - - and this is on pages 154 to 155 of  
5 the transcript. I just want to make sure that I - - - I  
6 answer counsel's accusation that I'm misrepresenting. The  
7 - - - the complaining witness is walking with his hands up,  
8 palms outstretched, trying to reason with the defendant.  
9 Then you have, on transcript page 158, Ms. Thomas  
10 testifying that the defendant is walking away from his  
11 apartment door, not toward his apartment door but away from  
12 his apartment door. That's on T1 - - -

13 JUDGE FAHEY: Here's my logical problem.

14 MS. SALZBERG: Yes.

15 JUDGE FAHEY: My logical problem is if the  
16 display of a firearm, in and of itself, cannot constitute a  
17 threat of deadly physical force, then there must be  
18 something else here that constitutes that threat of deadly  
19 physical force as a matter of law. And if not, then it's a  
20 question of fact as to whether - - -

21 MS. SALZBERG: Well - - -

22 JUDGE FAHEY: Let me finish - - - as to whether  
23 or not it's that threat of deadly physical force, or that  
24 it can be justified, or that threat of any force can be  
25 justified here. So when you take the display out, what's



1 left?

2 MS. SALZBERG: Okay. Well, Your Honor, let me  
3 back up. Maybe I misunderstood Your Honor's question.

4 JUDGE FAHEY: It's okay. It's all right.

5 MS. SALZBERG: And I'm citing - - -

6 JUDGE FAHEY: Go ahead.

7 MS. SALZBERG: - - - here to People v. Dodt,  
8 which is a 1984 case from this court where you - - - where  
9 - - - where the Court says: "So long as a gun is operable,  
10 it constitutes deadly physical force." So certainly we had  
11 here a threat of deadly physical force - - -

12 JUDGE FAHEY: Yeah, I - - -

13 MS. SALZBERG: - - - at the time when - - -

14 JUDGE FAHEY: I understand that. My question to  
15 you was: if you take the display of the gun out, which  
16 everybody agrees, display of a gun, in and of itself, does  
17 not constitute deadly physical force as a matter of law.  
18 It may be a question of fact but not as a matter of law.  
19 Take the display out here. What other facts support the  
20 failure to give a justification charge?

21 MS. SALZBERG: The fact that we have the  
22 complaining witness seven feet away, palms outstretched,  
23 trying to reason with Mr. Brown. And at that point, the  
24 defendant is angrier, more aggressive. All of this is on  
25 the tran - - - in the transcript, pages 154 to 155.



1 JUDGE RIVERA: You mean, that's the  
2 characterizations by - - -

3 MS. SALZBERG: That's Ms. Thomas.

4 JUDGE RIVERA: - - - Thomas, right, because she  
5 doesn't hear anything, right?

6 MS. SALZBERG: That's true. She's looking  
7 through a glass door.

8 JUDGE RIVERA: And the jury could discount that.

9 JUDGE FEINMAN: What about their physical sizes?  
10 How does that factor in?

11 MS. SALZBERG: I'm sorry, the physical sizes?

12 JUDGE FEINMAN: Their physical sizes.

13 MS. SALZBERG: Well, okay, so - - - so in terms  
14 of their physical sizes, you have a corrections officer  
15 who, by the testimony of his own witness, is trained to  
16 handle a gun. He's 55 years old, 5 feet, 9 inches tall,  
17 200 pounds, in apparently good health. So not Mike Tyson,  
18 but certainly someone who can handle himself. And you  
19 have, on the other hand, Mr. Cabbagestalk, who's 21, 5  
20 feet, 11-and-a-half inches, so they have an inch difference  
21 in their heights, 187 pounds, maybe 20 pounds different in  
22 their heights (sic), and also in apparently good health.

23 So you have two men who are capable of handling  
24 themselves. You don't have circumstances that this court  
25 has discussed in the past where you have two clearly



1           unequal people in this altercation. The difference in this  
2           case happened to be that one of them had a gun, and knew  
3           how to use it, and the other one did not.

4                    JUDGE RIVERA: But if they're, as you're  
5           suggesting, sort of equally positioned in terms of, sort  
6           of, body, height, and so forth, then the defendant could be  
7           fearful that this other person is physically able to take  
8           the gun and use it on him.

9                    MS. SALZBERG: It's theoretically possible, but  
10          the circumstances don't indicate that. And - - - and here,  
11          Your Honor, it's true - - -

12                   JUDGE RIVERA: It's not about theoretically  
13          possible; it's whether or not you've got a reasonable view  
14          of the evidence - - -

15                   MS. SALZBERG: Right.

16                   JUDGE RIVERA: - - - that supports it.

17                   MS. SALZBERG: And - - - and so for that, Your  
18          Honor, it's certainly true that the - - - the jury can  
19          accept or reject parts of any witness' testimony. What the  
20          jury can't do, and what the Appellate Division shouldn't  
21          have done, was to create - - - imagine something that's not  
22          actually supported by the record.

23                   JUDGE RIVERA: So from your reading of the  
24          evidence, who, if anyone, saw the actual shooting?

25                   MS. SALZBERG: Nobody saw the actual shooting.



1           What happened was Mr. Wolfe saw the initial altercation.  
2           He goes upstairs. It's undisputable from his testimony  
3           when the shot went off.

4                    JUDGE RIVERA: So we're left with the jury then  
5           having to - - -

6                    MS. SALZBERG: We're left - - -

7                    JUDGE RIVERA: - - - deal with whatever this  
8           testimony is - - -

9                    MS. SALZBERG: Right.

10                   JUDGE RIVERA: - - - drawing reasonable  
11           inferences, right?

12                   MS. SALZBERG: Right. And we have Ms. Thomas  
13           watch the two men as they're walking across the hallway - -  
14           -

15                   JUDGE RIVERA: I understand your argument is  
16           about this forty-five-second break.

17                   MS. SALZBERG: That's correct.

18                   JUDGE RIVERA: I understand.

19                   MS. SALZBERG: And when you take that forty-five-  
20           second break into account, and what Ms. Thomas sees, she  
21           says it's seconds. That's what her - - - her testimony is,  
22           after they go out of her line of sight, when the shot goes  
23           off. But the last thing that anybody sees - - -

24                   JUDGE RIVERA: The fact is no one saw what  
25           happened in that moment.



1 MS. SALZBERG: Correct. Nobody saw what happened  
2 in that moment. And that, in itself, that absence of  
3 evidence, under the circumstances where you have one with a  
4 gun, there's no indication that there's anything other than  
5 an attempt to reason that's being - - - that's being  
6 answered with aggression, there's simply nothing in the  
7 record to support the reasonable inference that there was  
8 any sort of justification here.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. SALZBERG: Thank you.

11 (Court is adjourned)

12

13

14

15

16

17

18

19

20

21

22

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Darryl Brown, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

Signature: \_\_\_\_\_

Agency Name: eScribers  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001

Date: April 02, 2019

