

**JUSTIFICATION:
USE OF DEADLY PHYSICAL FORCE
IN DEFENSE OF A PERSON**

**PENAL LAW 35.15
(Effective Sept. 1, 1980)**

NOTE: This charge should precede the reading of the elements of the charged crime, and then, the final element of the crime charged should read as follows:

“and, #. That the defendant was not justified.”¹

[With respect to count(s) (*specify*),] [T]he defendant has raised the defense of justification, also known as self defense. The defendant, however, is not required to prove that he was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.

I will now explain our law's definition of the defense of justification as it applies to this case.

Under our law, a person may use deadly physical force upon another individual when, and to the extent that, he/she reasonably believes it to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of [unlawful²] deadly physical force by such individual.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "deadly physical force" and "reasonably believes."

DEADLY PHYSICAL FORCE means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.³

[Serious physical injury means impairment of a person's physical condition which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁴]

The determination of whether a person REASONABLY BELIEVES deadly physical force to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of deadly physical force by another individual requires the application of a two-part test.⁵ That test applies to this case in the following way:

First, the defendant must have actually believed that (*specify*) was using or was about to use deadly physical force against him/her [*or someone else*], and that the defendant's own use of deadly physical force was necessary to defend himself/herself from it; and

Second, a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have had those same beliefs.

Thus, under our law of justification, it is not sufficient that the defendant honestly believed in his own mind that he was faced with defending himself/herself [or someone else] against the use or imminent use of deadly physical force. An honest belief, no matter how genuine or sincere, may yet be unreasonable.

To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself [or someone else] from what he/she honestly believed to be the use or imminent use of such force by (*specify*), and a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have believed that too.

On the question of whether the defendant did reasonably believe that deadly physical force was necessary to defend

himself/herself [or someone else] from what he/she reasonably believed to be the use or imminent use of such force by (*specify*), it does not matter that the defendant was or may have been mistaken in his/her belief; provided that such belief was both honestly held and reasonable.

[Add if there was evidence of a party's reputation for violence:

Now, you have heard testimony that (*specify*) had a reputation for violence and engaged in violent acts. Normally, the law does not permit such testimony. The reason is that every person, regardless of that person's relative worth to the community, has the right to live undisturbed by an unlawful assault. The character of (*specify*) is thus not in issue.

What is in issue, however, is whether the defendant did "reasonably believe" that the deadly physical force he/she used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" to be the use or imminent use of such force by (*specify*).

In assessing that issue, you may consider whether the defendant knew that (*specify*) had a reputation for violence or had engaged in violent acts. If so, you may then consider to what extent, if any, that knowledge contributed to a "reasonable belief" that the deadly physical force the defendant used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" was the use or imminent use of such force by (*specify*).⁶

Further, provided the defendant believed (*specify*) had such reputation or engaged in such acts, it does not matter whether that belief was correct.]

Add as applicable:

Notwithstanding the rules I have just explained, the defendant would not be justified in using deadly physical force under the following circumstances:

Select appropriate alternative(s):

(1) The defendant would not be justified if he/she was the initial aggressor;

[Add if applicable:

except, that the defendant's use of deadly physical force would nevertheless be justified if he/she had withdrawn from the encounter and effectively communicated such withdrawal to (*specify*) but (*specify*) persisted in continuing the incident by the use or threatened imminent use of (unlawful⁷) deadly physical force.]

"Initial aggressor" means the person who first attacks or threatens to attack; that is, the first person who uses or threatens the imminent use of offensive physical force. The actual striking of the first blow or inflicting of the first wound, however, does not necessarily determine who was the initial aggressor.

A person who reasonably believes that another is about to use deadly physical force upon him/her need not wait until he/she is struck or wounded. He/she may, in such circumstances, be the first to use deadly physical force, so long as he/she reasonably believed it was about to be used against him/her. He/she is then not considered to be the "initial aggressor," even though he/she strikes the first blow or inflicts the first wound. Arguing, using abusive language, calling a person names, or the like, unaccompanied by physical threats or acts, does not make a person an initial aggressor and does not justify physical force.

[A person cannot be considered the initial aggressor simply because he/she has a reputation for violence or has previously engaged in violent acts.⁸]

(2) The defendant would not be justified if he/she knew that he/she could with complete safety to himself/herself and others avoid the necessity of using deadly physical force by retreating.

[The defendant, however, would not be required to retreat if

the defendant was in his/her dwelling and was not the initial aggressor.⁹

The term, “dwelling,” encompasses a house, an apartment or a part of a structure where the defendant lives and where others are ordinarily excluded. (The determination of whether a particular location is part of a defendant's dwelling depends on the extent to which the defendant [and persons actually sharing living quarters with the defendant] exercise(s) exclusive possession and control over the area in question.)^{10]}

(3) The defendant would not be justified if (specify's) conduct was provoked by the defendant himself/herself with intent to cause physical injury to (specify).

(4) The defendant would not be justified if the deadly physical force involved was the product of a combat by agreement not specifically authorized by law.

The People are required to prove beyond a reasonable doubt that the defendant was not justified. It is thus an element of [each] count [specify] that the defendant was not justified. As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of [all] count(s) [specify].¹¹

1. See *People v. McManus*, 67 N.Y.2d 541, 549 (1986); *People v. Higgins*, 188 A.D.2d 839, 840 (3d Dept. 1992).

2. If the lawfulness of this deadly physical force is in issue, then include the word "unlawful," which appears in the statute [Penal Law § 35.15(1)], and explain how it applies to the case.

3. Penal Law § 10.00(11).

4. See Penal Law § 10.00(9)&(10).

5. *People v. Goetz*, 68 N.Y.2d 96 (1986)

6. *People v. Miller*, 39 N.Y.2d 543, 550-51 (1976).

7. If the lawfulness of this deadly physical force is in issue, then include the word "unlawful," which appears in the statute [Penal Law § 35.15(1)(b)], and explain how it applies to the case.

8. While evidence of the defendant's knowledge of the victim's reputation for violence or specific acts of violence is admissible to show that the defendant's fears were reasonable, the evidence is not admissible "to show that the deceased was the aggressor, for if competent for that purpose, similar evidence could be given as to the reputation of the defendant as bearing on the probability that he was the aggressor." *People v. Rodawald*, 177 N.Y. 408, 423 (1904). See Prince, *Richardson On Evidence*, § 4-409, p172 (11th ed. Farrell).

9. Penal Law § 35.15(2)(a). That statute also provides an exception to the duty to retreat for a police officer or peace officer, or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to Penal Law § 35.30.

10. *People v. Hernandez*, 98 N.Y.2d 175 (2002).

11. *People v. Roberts*, 280 A.D.2d 415 (1st Dept. 2001); *People v. Higgins*, 188 A.D.2d 839, 840-841 (3d Dept. 1992); *People v. Castro*, 131 A.D.2d 771, 773 (2d Dept. 1987).