

**JUSTIFICATION:
USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON IN
KIDNAPPING, RAPE, CRIMINAL SEXUAL ACT, OR ROBBERY
PENAL LAW 35.15 (2) (b)
Revised January, 2018¹**

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.”²

[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/she 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.³

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 unlawful physical force by such individual, and when he/she reasonably believes that the other individual is committing or attempting to commit a [kidnapping, forcible rape, forcible criminal sexual act or robbery.]⁴

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," "reasonably believes," "attempt to commit a crime" and ["kidnapping," "forcible rape," "forcible criminal sexual act" or "robbery"].

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.⁵

[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.⁶]

The determination of whether a person REASONABLY BELIEVES a certain circumstance to be true requires the application of a two-part test.⁷ 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 unlawful physical force against him/her [*or someone else*]; that the defendant's own use of deadly physical force was necessary to defend himself/herself [*or someone else*] from it; and that (*specify*) was committing or attempting to commit a [kidnapping, forcible rape, forcible criminal sexual act or robbery].

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/her own mind that he/she was faced with defending himself/herself [*or someone else*] against the use or imminent use of unlawful physical force from an individual committing or attempting to commit a [kidnapping, forcible rape, forcible criminal sexual act or robbery]. 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 unlawful physical force by (specify), that (specify) was committing or attempting to commit a [kidnapping, forcible rape, forcible criminal sexual act or robbery], and that 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 these circumstances to be true, 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.

I will now define for you: [specify the definition of the attempt to commit a crime and relevant offense(s) using the appropriate CJI2d charge or Penal Law language.]

The People are required to prove beyond a reasonable doubt that the defendant was not justified.

NOTE: At this point, the trial court must select the appropriate alternative set forth below to fulfill the mandate of appellate decisions. See endnote (8). Those decisions require that in a case with multiple counts, in which some or all of the counts include the same definition of justification as an element, the trial court's instructions (as well as its verdict sheet) need to convey to the jury that once the jury has determined that the People have failed to prove that the defendant was not justified as to a count, the jury must not reconsider that same justification defense as to any other count and they must find the defendant not guilty of each and every count for which that same definition of justification is an element. (For a sample verdict sheet, see CJI2d Model Verdict Sheet for Justification.)

Select appropriate alternative:

(1) If justification applies to only one count, add the following:

It is thus an element of count [specify number and name of offense] 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 that count.

(2) If justification applies to more than one count submitted to the jury on the verdict sheet, add the following:

It is thus an element of counts [specify numbers and names of the offenses on verdict sheet] that the defendant was not justified. As a result, if you find, as to the first of those counts that you consider pursuant to my instructions, 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 that count and of the remaining count(s) to which that same definition of justification applies.

(3) If there are additional counts for which justification is not an element, add the following:

If you find the defendant not guilty of counts (specify numbers and names of the offenses for which lack of justification was an element), you still must consider the count(s) (specify name of count) for which the People are not required to prove that the defendant was not justified.

1. The January, 2018 revision provided more detailed instructions at the end of the charge on how to instruct the jury to consider counts with the lack of justification as an element. See text associate with endnote 8.

2. See *People v McManus*, 67 NY2d 541, 549 (1986); *People v Higgins*, 188 AD2d 839, 840 (3d Dept 1992).

3. See *People v McTiernan*, 119 AD3d 465 (1st Dept 2014).

4. The circumstances in which the use of physical force generally would not be justified – when it resulted from provocation by the actor, when the actor was the initial aggressor, or when it resulted from a combat by agreement –

are omitted here, as they are unlikely to apply in a case involving the use of deadly physical force by the actor to defend against an individual committing a violent crime (see Penal Law § 35.15 [1] [a]-[c]).

5. Penal Law § 10.00 (11)

6. See Penal Law § 10.00 (9), (10).

7. *People v Goetz*, 68 NY2d 96 (1986)

8. See (1) *Appellate Division, First Department: People v. Blackwood*, 147 A.D.3d 462 (2017) (“the court’s charge did not convey to the jury that an acquittal on the top count. . . based on a finding of justification would preclude consideration of the other charges” for which the lack of justification was an element); *People v Roberts*, 280 AD2d 415, 416 (2001) (“Although the court instructed the jurors that justification was a defense to all of the counts, it did not instruct them that if they were to find defendant not guilty by reason of justification on a count, they were not to consider any lesser crimes”).

(2) *Appellate Division, Second Department: People v Feuer*, 11 AD3d 633, 634 (2004) (“[T]he error committed by the trial court in failing to instruct the jurors that if they found the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts, is of such nature and degree so as to constitute reversible error”); ; *People v Bracetty*, 216 AD2d 479, 480 (1995) (“The court failed to instruct the jury...that the jurors were only to consider the lesser offense if they found the defendant not guilty of the greater offense for a reason other than justification”).

(3) *Appellate Division, Third Department: People v Higgins*, 188 AD2d 839, 840-841 (1992) (The trial court properly informed the jury that “only if defendant was found not guilty of the greater offense for a reason other than justification, was the jury to consider the lesser offense”).