

No. 26-

IN THE
Supreme Court of the United States

ALAN WALTER COLIE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

PETITION FOR A WRIT OF CERTIORARI

DANIEL GOLDMAN
LAW OFFICE OF
DANIEL GOLDMAN
421 King Street,
Suite 505
Alexandria, VA 22314

MEGHAN SHAPIRO
Counsel of Record
LAW OFFICE OF
MEGHAN SHAPIRO
421 King Street, Suite 505
Alexandria, VA 22314
(703) 915-9594
shapiro.meghan@gmail.com

*Counsel for Petitioner
Alan Walter Colie*

QUESTIONS PRESENTED

1. Restriction of a criminal legal defense violates due process if it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Kahler v. Kansas*, 589 U.S. 271, 279 (2020) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)). Does the right to self-defense meet that test, by virtue of Justice Scalia’s extensively-catalogued recognition of self-defense as an “inherent,” “ancient” and “common law” right in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and subsequent cases?

If so, did the Virginia courts violate due process by effectively stopping Mr. Colie’s jury from considering self-defense, when deliberating on the only remaining allegation against him: unlawful discharge of a firearm? (After acquitting Mr. Colie of *all* other criminal charges on the basis of *bona fide* self-defense?)

2. *United States v. Powell*, 469 U.S. 57 (1984), holds that a conviction shall not be disturbed merely because it is inconsistent with an acquittal on a related count, because the inconsistency may result from mistake, compromise, or lenity from the jury. However, Footnote 8 of that opinion reserved whether the same tolerance applies where two verdicts are not merely inconsistent but logically exclusive. *Id.* at 69 n.8.

Here, the jury acquitted Mr. Colie of every criminal allegation arising from his single act of firing his firearm, but for one: unlawful discharge of the

firearm. But the jury's numerous acquittals here are clearly explained by *self-defense* rather than mistake, compromise, or lenity.

Does due process require vacatur of the sole conviction, consistent with *Powell's* Footnote 8 exception, where the jury's verdicts as a whole rationally convey that they found the act legally justified by self-defense, foreclosing lawful conviction?

PARTIES TO THE PROCEEDING

Petitioner Alan Walter Colie was the defendant/
appellant below.

Respondent Commonwealth of Virginia. was the state/
appellee below.

No party is a corporation.

RELATED PROCEEDINGS

- *Alan Walter Colie v. Commonwealth of Virginia*,
Record No. 251001 (Va. June 8, 2026)
- *Alan Walter Colie v. Commonwealth of Virginia*,
No. 0874-24-4 (Va. App. Sept. 30, 2025)

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
RELATED PROCEEDINGS	iv
TABLE OF CONTENTS.....	v
TABLE OF APPENDICES	viii
TABLE OF CITED AUTHORITIES	x
OPINIONS BELOW.....	1
JURISDICTION.....	1
PERTINENT PROVISIONS OF FEDERAL LAW...	1
STATEMENT OF THE CASE	2
I. Procedural History.....	2
II. Statement of Facts	3
III. The Jury's Questions and the Trial Court's Answers	7
IV. Mr. Colie's jury found he acted in self-defense. The record and context make this clear.....	9
V. State Appellate Court Findings	11

Table of Contents

	<i>Page</i>
REASONS FOR GRANTING THE PETITION. . . .	12
I. The right to assert self-defense is entitled to full due process protection under this Court’s precedents. Mr. Colie asserts a significant right that this Court should recognize and define.	12
A. The Virginia courts precluded Mr. Colie’s jury from applying self-defense to the sole remaining allegation against him, after acquitting him of all others on the basis of <i>bona fide</i> self-defense	12
B. Self-defense qualifies for federal constitutional protection under this Court’s clear precedents.	12
C. The verdict in this case violates due process under <i>Martin v. Ohio</i> , 480 U.S. 228 (1987), as well	15
D. This case is a good vehicle for this due process claim	16
II. This Court reserved, and should now decide, whether a conviction may stand as a mere “inconsistent verdict” where the jury’s own verdicts foreclose any explanation but that it convicted despite finding a complete defense.	17

Table of Contents

	<i>Page</i>
A. This is an important, unsettled question of constitutional law	17
B. Mr. Colie's verdict was logically excluded by the jury's clear self-defense finding.....	18
C. State courts of last resort are in conflict.....	24
D. This case presents a good vehicle to explain the <i>Powell</i> exception	25
CONCLUSION	27

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — ORDER OF THE SUPREME COURT OF VIRGINIA, FILED JUNE 8, 2026.....	1a
APPENDIX B — MEMORANDUM OPINION OF THE COURT OF APPEALS OF VIRGINIA, FILED SEPTEMBER 30, 2025.....	2a
APPENDIX C — SENTENCING ORDER OF THE VIRGINIA CIRCUIT COURT OF LOUDOUN COUNTY, FILED MARCH 15, 2024	25a
APPENDIX D — TRIAL ORDER OF THE COMMONWEALTH OF VIRGINIA IN THE CIRCUIT COURT OF LOUDOUN COUNTY, DATED OCTOBER 4, 2023.....	29a
APPENDIX E — EXCERPTS OF COLIE OPENING BRIEF OF THE VIRGINIA COURT OF APPEALS	42a
APPENDIX F — EXCERPTS OF PETITION FOR APPEAL OF THE SUPREME COURT OF VIRGINIA	46a
APPENDIX G — EXCERPTS OF BRIEF IN SUPPORT OF FOURTH MOTION TO SET ASIDE THE VERDICT OF THE VIRGINIA CIRCUIT COURT FOR LOUDOUN COUNTY; AND ORDER OF THE CIRCUIT COURT FOR LOUDOUN COUNTY OF MAY 9, 2024.....	51a

Table of Appendices

	<i>Page</i>
APPENDIX H — COURT EXHIBIT 4	56a
APPENDIX I — JURY INSTRUCTIONS	
10, 11 AND 29	57a
APPENDIX J — VERDICT FORMS OF	
JURY A, B AND C	62a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Bravo-Fernandez v. United States</i> , 580 U.S. 5 (2016)	18, 22, 23
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	13, 14, 15
<i>Dunn v. United States</i> , 284 U.S. 390 (1932)	17, 20
<i>In re Winship</i> , 397 U.S. 358 (1970)	25
<i>Kahler v. Kansas</i> , 589 U.S. 271 (2020)	12, 13, 15
<i>Leland v. Oregon</i> , 343 U.S. 790 (1952)	13, 15, 16
<i>Martin v. Ohio</i> , 480 U.S. 228 (1987)	15, 16
<i>Masoner v. Thurman</i> , 996 F.2d 1003 (9th Cir. 1993)	22, 24
<i>McQuinn v. Commonwealth</i> , 298 Va. 456 (2020)	17
<i>New York State Rifle & Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022)	14, 15

Cited Authorities

	<i>Page</i>
<i>Price v. State</i> , 405 Md. 10 (2008)	25
<i>State v. Beeler</i> , 12 S.W.3d 294 (Mo. 2000).	19, 23, 25
<i>State v. Cleveland</i> , No. 13-1262, 2015 W. Va. LEXIS 7 (W. Va. Jan. 12, 2015).	23
<i>State v. Goins</i> , 151 Wn.2d 728 (2004).	24
<i>State v. Halstead</i> , 791 N.W.2d 805 (Iowa 2010).	25
<i>State v. Hwynh</i> , No. 23580, 2002 Haw. LEXIS 24 (Haw. Jan. 16, 2002).	23
<i>State v. Springer</i> , 297 Ga. 376 (2015).	24
<i>State v. Stewart</i> , 464 Md. 296 (2019)	22, 25
<i>United States v. Daigle</i> , 149 F. Supp. 409, 413-14 (D.D.C.), <i>aff'd per curiam</i> , 248 F.2d 608 (D.C. Cir. 1957) . . .	20

Cited Authorities

	<i>Page</i>
<i>United States v. Forrester</i> , No. 24-5095, 2026 U.S. App. LEXIS 26266 (6th Cir. Aug. 27, 2026)	24
<i>United States v. Maury</i> , 695 F.3d 227 (3d Cir. 2012)	24
<i>United States v. Powell</i> , 469 U.S. 57 (1984)	17, 18, 19, 20, 21, 23, 24, 25, 26
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024)	15
<i>United States v. Ruiz</i> , 386 F. App’x 530 (6th Cir. 2010)	24
<i>Williams v. State</i> , 478 Md. 99 (2022)	25

Statutes and Other Authorities

U.S. Const., amend. II	2, 12, 13, 14
U.S. Const., amend. VI	1
U.S. Const., amend. XIV, sec. 1	2
28 U.S.C. § 1257(a)	1
Va. Code § 18.2-279	18

Cited Authorities

	<i>Page</i>
Sup. Ct. Rule 10	12, 18
<u>A Treatise on the Unconstitutionality of American Slavery</u> (1849)	14
L. Spooner, <u>The Unconstitutionality of Slavery</u> (1845)	14

OPINIONS BELOW

The final ruling of the Supreme Court of Virginia, *Alan Walter Colie v. Commonwealth of Virginia*, Record No. 251001 (Va. June 8, 2026) (unpub.) (Order refusing Petition for Appeal), is reproduced at App.1a. The Memorandum Opinion from the Court of Appeals of Virginia, *Alan Walter Colie v. Commonwealth of Virginia*, No. 0874-24-4 (Va. App. Sept. 30, 2025), is reproduced at App.2a-24a. The pertinent Orders of the Circuit Court for Loudoun County, Virginia, *Commonwealth v. Alan W. Colie*, CR00038492-02 (Loudoun Cir.) are reproduced at App.25a-41a and 54a-55a.

JURISDICTION

The Supreme Court of Virginia entered its judgment refusing Mr. Colie's petition for discretionary review on June 8, 2026. This Court has jurisdiction under 28 U.S.C. sec. 1257(a).

PERTINENT PROVISIONS OF FEDERAL LAW

U.S. Const., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., Amend. XIV, sec. 1:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const., Amend. II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

STATEMENT OF THE CASE

I. Procedural History

This case arose when Mr. Colie discharged his legal firearm a single time, in response to the unexpected, uninvited, assaultive actions of a stranger, Tanner Cook. A Loudoun County petit jury ultimately found Mr. Colie NOT GUILTY of:

- aggravated malicious wounding of Tanner Cook;
- malicious wounding of Tanner Cook;
- unlawful wounding of Tanner Cook;
- assault and battery of Tanner Cook;
- use of firearm in commission of aggravated malicious wounding;

- use of a firearm in commission of malicious wounding;
- malicious discharge of firearm in occupied building.

App.38a-39a. The jury returned a GUILTY verdict as to a single offense:

- unlawful discharge of a firearm in an occupied building.

Id. The Court of Appeals of Virginia upheld Mr. Colie’s single conviction. App.2a *et al.* The Supreme Court of Virginia refused a petition for appeal. App.1a.

II. Statement of Facts

Tanner Cook unscrupulously makes money by provoking and scaring unsuspecting, non-consenting bystanders on film; and posting videos online. R.2302-04, 2306, 2316-18.¹ Authorities have told him to stop repeatedly, including the day before this incident. R.2319-20, 2513 (active “BOLO” out for Cook). The Commonwealth referred to Cook as a “prankster.” R.2255, R.2256. The defense accurately characterized him less-benignly. R.2264.

Alan Colie is a DoorDash delivery driver and lawful gun owner with a conceal-carry permit. R.2863-64, 2866-67, 2498. On April 2, 2023, he was picking up a

1. “R.__” citations refer to the state appellate court’s electronic record..

delivery from a mall food court, when Cook targeted him. Cook, who is much taller than Mr. Colie, R.2313, 2326, approached him from behind with an accomplice, R.2322; R.2869-701 R.3662, held a cellphone close to Mr. Colie's head, played a recording in another language, R.2328, and then a confrontational, inappropriate recording in English. R.2311. Cook was stone-faced, while the accomplice silently pointed at Cook's cellphone. R.2322, 2327. To Mr. Colie, this was "an accusation or a threat[.]" R.2873.



R.3648. Mr. Colie backed away but Cook pursued him. R.2290-91, 2875-76 ("They kept advancing towards me, as I backed away. . . . I continued backing away from them. They continued advancing[.]").



R.3660. Mr. Colie said, “What?” “What’s going on?” “No,” “Stop,” and tried to push Cook’s hand away:



R.3652; R.2878. Neither Cook nor his accomplice acknowledged Colie’s requests; they only pursued, with unsettling expressions. R.2329-2332, 2335; R.2871, 2873-74 (“They looked really cold or angry. . . . I was feeling

nervous, anxious. . .”). Mr. Colie said “stop” twice more, R.2332-33, 2335, and threatened to call the police. R.2879. Cook kept pursuing. R.2880. Mr. Colie tried to walk faster toward an exit, and Cook kept pursuing:



R.3668, 3544. Cook then “seemed like he was being more aggressive I felt like he sped up the pace to a point where I felt like he was lunging towards me.” R.2881-82. Mr. Colie turned and shouted “STOP” once more. R.2881. He was “very fearful that my life was in danger.” R.2884. He felt Cook:

was a threat to me. He was going to try to harm me and didn’t give me a reason to think he wouldn’t. And I saw his left hand down beside his left pocket as well. I didn’t know if he could be concealing a weapon or getting ready to strike me or kick me, considering how close he was.

R.2882-83.² Finally, Mr. Colie drew his weapon and fired at Cook, who fled. Mr. Colie sat on the floor, waited for law

2. The defense also presented an expert in threat assessment, stress impact, and avoiding violence, R.2836-37, who identified myriad threatening behaviors that matched Cook’s actions, R.2840-43, and natural responses from a person under threat, which described Mr. Colie’s actions and responses to a tee. R.2849-51.

enforcement, and followed all their instructions. R.2357, 2360-61, 2372-73, 2381; Comm. Exh. 55 (video). Cook was shot in the abdomen but fully recovered.

Mr. Colie was charged with aggravated malicious wounding, use of a firearm in the commission thereof, and malicious discharge of a firearm. The jury got “waterfall” instructions on the charges and numerous lesser-included offenses, *e.g.* App.59a, and self-defense instructions. App.57a-58a. After an *Allen* charge, pointed questions from the jury about application of self-defense to a single lesser-included offense (unlawful discharge of a firearm), and a new instruction, App.56a, 61a, the jury found Mr. Colie NOT GUILTY of every charge and every lesser-included offense but GUILTY of unlawful discharge. App.62a-65a.

III. The Jury’s Questions and the Trial Court’s Answers

After receiving an *Allen* charge, the jury submitted a question to the trial court that indicated two things: it was deliberating on the lowest lesser-included offense available (unlawful discharge); and it needed to know: “Regarding instruction #24, does self-defense come into play when determining if the act was done unlawfully? Does self-defense nullify the act being considered unlawful?” App.56a. Instruction 24 was the malicious discharge “waterfall” instruction, and the “unlawful” reference was to the lesser-included act listed there: unlawful discharge. The rest of Instruction 24’s language is key to understanding the jury’s confusion: Instruction 24 described malicious discharge as the offense Mr. Colie was “charged with,” and as “the crime as charged,” and then went on in a separate paragraph:

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two (2) elements of the crime as charged, but that the act was done unlawfully and not maliciously, then you shall find the defendant guilty of Unlawfully Discharging a Firearm Within an Occupied Building.

App.60a. This was the only instruction on unlawful discharge; and it never referred to the lesser-included as a “charge.” Consistently, the jury used the phrase “the act” to describe unlawful discharge; not “charge.” App.56a.

In response, the trial court gave brand new Instruction 29:

You have been instructed on the law on the issue of self-defense (Instructions #10 and #11). Those instructions of law **are not limited to any particular charge currently before you**. Therefore, the Court refers you to the instructions of law already given.

App.61a (emphasis added). “Instructions #10 and #11” were self-defense instructions. App.57a-58a. In new Instruction 29, the trial court added a limitation to their applicability: they apply to “any . . . charge currently before you.” App.61a. After receiving Instruction 29, the jury returned its verdict: guilty of unlawful discharge.

IV. Mr. Colie's jury found he acted in self-defense. The record and context make this clear.

It is clear that Mr. Colie's jury found he acted in self-defense as to each *charge* to which they understood the defense to apply. First, the jury's self-defense finding is self-evident from the questions they sent to the court. They explicitly, unambiguously asked whether self-defense applied to the lesser-included. Had they not already found self-defense, they would not have had such questions at all. Their questions – followed by their verdict – confirm that the jury had made all necessary findings for unlawful discharge, *but for* their question whether self-defense applied to it.

The evidentiary record amply supports self-defense. For one, we know the jury found Mr. Colie's testimony credible, because they unanimously acquitted on all aggravated and bodily-harm offenses. Mr. Colie persuasively testified to all self-defense requirements; and the audio/visual evidence fully corroborated him. The still shots in the Statement of Facts, *supra*, were defense exhibits; but the full video (with audio) was also before the jury. The jury clearly found Mr. Colie's testimony consistent with the objective, contemporaneous record. And uncontroverted expert testimony further supported both subjective and objective elements of self-defense.

Evaluating the verdicts as a whole provides more confirmation the jury found self-defense. It is particularly helpful to consider the jury's acquittal of the lowest lesser-included option to aggravated malicious wounding:

assault-and-battery.³ This option asked the jury to find that Mr. Colie “willfully touched Tanner Cook without legal excuse or justification,” and that the touching was “angry, rude, insulting, or vengeful[.]” R.412. The jury found Mr. Colie *not guilty* of this allegation, which means they either found self-defense (the only “legal excuse or justification” offered here), *or* they rejected that Mr. Colie touched Cook in a rude or insulting way. And it is irrational to conclude that a jury found a *bullet to the abdomen* anything less than “rude” or “insulting.” Cook testified to a close-range gunshot wound that required surgery. The jury must have found, instead, that Mr. Colie had a “legal excuse or justification,” *i.e.* he acted in self-defense. And thus, the jury acquitted Mr. Colie of assault and battery *because* they found he acted in self-defense.

In contrast to assault and battery, the lesser-included of unlawful discharge did not have a “without legal excuse or justification” element. Instead, it asked only whether the action taken by Mr. Colie was “unlawful.” App.59a-60a (Instruction 24). And thus, while the jury understood that self-defense applied to all other allegations – even the third-lesser-included of assault and battery – they were unsure whether or how it applied to unlawful discharge. Looking for help, the jury sent their questions: “Regarding instruction #24, does self-defense come into play when determining if the act was done unlawfully? Does self-defense nullify the act being considered unlawful?” App.56a. As the jury was clearly parsing the language of the instructions carefully, it would have done the same

3. There were two greater lesser-included options for aggravated malicious wounding: malicious wounding and unlawful wounding.

with new Instruction 29’s direction to apply self-defense to *charges*, and to *charges* alone. App.61a.

In context, it is clear the jury found self-defense, and understood how to apply it to all the allegations *but for unlawful discharge*. Erroneously believing, based on Instruction 29, that self-defense applied to all allegations *but for unlawful discharge*, they then acquitted Mr. Colie of every allegation *but for unlawful discharge*.

V. State Appellate Court Findings

The Court of Appeals found that Instruction 29 did not misinstruct the jury, because under Virginia law a lesser-included offense is considered a “charge,” App.12a, though it did acknowledge that “unlawful discharge was not explicitly ‘charge[d].’” App.13a (bracket in original). It rejected Mr. Colie’s position that the word “charge” in Instruction 29 misled the jury, App.12a, looking to the general self-defense instructions, App.13a (“Instructions 10 and 11 were unequivocal in the applicability of self-defense if found”), and failing to appreciate that Instruction 29 added a new, clarifying limit to Instructions 10 and 11. Because it found that the jury was not misled, it denied Mr. Colie’s Due Process Clause claim. App.31a, n.2. The Supreme Court of Virginia refused Mr. Colie’s Petition for Appeal (a discretionary appellate stage), leaving the Court of Appeals ruling in force. App.1a.

REASONS FOR GRANTING THE PETITION

- I. **The right to assert self-defense is entitled to full due process protection under this Court’s precedents. Mr. Colie asserts a significant right that this Court should recognize and define.**
 - A. **The Virginia courts precluded Mr. Colie’s jury from applying self-defense to the sole remaining allegation against him, after acquitting him of all others on the basis of *bona fide* self-defense.**

After Mr. Colie’s jury acquitted him of all charged conduct on the clear basis of self-defense, it asked the trial judge whether self-defense also applied to the single remaining *lesser-included* offense of unlawful discharge of a firearm. The trial court should have told them “yes,” but instead it effectively answered “no.” It limited the general self-defense instructions to Mr. Colie’s “charges,” while the main instructions listing the “charges” conspicuously did *not* include the lesser-included act of unlawful discharge. The state courts failed to recognize a significant constitutional deficiency in Mr. Colie’s trial, which this Court should settle. Supreme Court Rule 10I.

- B. **Self-defense qualifies for federal constitutional protection under this Court’s clear precedents.**

The right to assert self-defense is protected by the Sixth, Fourteenth, and Second Amendments. This Court has not yet held that the federal Constitution restricts a state’s ability to bar self-defense in a criminal trial; but it should. *Kahler v. Kansas*, 589 U.S. 271, 279 (2020)

(state rule abridging legal offense violates due process if it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”); *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (“[T]he inherent right of self-defense has been central to the Second Amendment right.”). Because Mr. Colie was not able to use self-defense against a criminal allegation, the federal constitutional was violated.

To assess whether a state rule abridging a defense “‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’” *Kahler*, 589 U.S. at 279 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)), “we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions.” 589 U.S. at 279. “The question is whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another.” *Id.*

The right to assert self-defense easily meets the *Kahler* standard. In *Heller*, Justice Scalia inextricably linked the right to keep and bear arms to the common law right to self-defense, referring to these rights as “ancient” and “the first law of nature.” 554 U.S. at 599 (right to keep and bear arms is an “ancient right,” which “most undoubtedly thought . . . important for self-defense[.]”); *id.* (“individual self-defense is . . . the *central component* of the right [to keep and bear arms] itself.”) (emphasis in original); *id.* at 602 (recognizing “an individual right to bear arms for defensive purposes”); *id.* at 603 (“19th-century courts and commentators interpreted [pre-

Second-Amendment] state constitutional provisions to protect an individual right to use arms for self-defense”); *id.* at 606 (“St. George Tucker’s version of Blackstone’s Commentaries . . . conceived of the Blackstonian arms right as necessary for self-defense. . . . Tucker elaborated on the Second Amendment: ‘This may be considered as the true palladium of liberty The right to self-defence is the first law of nature[.]’”); *id.* at 609 (“Joel Tiffany, for example, citing Blackstone’s description of the right, wrote that ‘the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.’”) (quoting A Treatise on the Unconstitutionality of American Slavery 117–118 (1849), and citing L. Spooner, The Unconstitutionality of Slavery 116 (1845) (right enables “personal defence”)); *id.* at 630 (unconstitutional for restriction on firearms to “make[] it impossible for citizens to use them for the core lawful purpose of self-defense[.]”).

This Court solidified the foundational status of the self-defense right in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*: the “right to carry a handgun for self-defense” extends outside a person’s home. 597 U.S. 1, 10 (2022); *id.* at 32–33 (“confining the right to ‘bear’ arms to the home would make little sense given that self-defense is ‘the *central component* of the [Second Amendment] right itself.’”) (quoting *Heller*, 554 U.S. at 599) (brackets and emphasis in original); *id.* (“the Second Amendment guarantees an ‘individual right to possess and carry weapons in case of confrontation’”) (quoting *Heller*, 554 U.S. at 592); *id.* at 33 (“Although we remarked in *Heller* that the need for armed self-defense is perhaps ‘most acute’ in the home, we did not suggest that the need was

insignificant elsewhere. Many Americans hazard greater danger outside the home than in it.”). And it continued to recognize this fundamentality in *United States v. Rahimi*, 602 U.S. 680, 690 (2024), referring to the right to keep and bear arms as a “fundamental right[] necessary to our system of ordered liberty Derived from English practice . . . the right secures for Americans a means of self-defense.”

Heller, *Bruen*, and *Rahimi* establish that the right to self-defense meets the *Kahler/Leland* standard. Mr. Colie should have been acquitted of unlawful discharge, just as he was of all other charges, because self-defense applied equally under the constitution. The misinstruction of his jury substantively limited his access to this fundamental defense; and violated the Due Process Clause.

C. The verdict in this case violates due process under *Martin v. Ohio*, 480 U.S. 228 (1987), as well.

Mr. Colie’s trial judge did not only abridge legal consideration of self-defense to unlawful discharge; it further abridged the jury’s consideration of the self-defense *evidence* when determining the elements of unlawful discharge (chiefly, the element of “unlawfulness,” which was not defined). In *Martin*, 480 U.S. at 233-34, this Court considered whether a state violated due process by burdening the accused to prove self-defense. In finding the burden constitutional, this Court also made clear that no state could limit the jury’s consideration of self-defense *evidence* when holding the prosecution to its burden of

proving other elements.⁴ The jury in this case asked “does self-defense come into play when determining if the act was done unlawfully? Does self-defense nullify the act being considered unlawful?” App.56a. By failing to tell them “yes,” and referring back to the instructions of law on self-defense, the jury may have erroneously understood that “self-defense [*evidence* did not] come into play when determining if the act was done unlawfully[.]” *Id.* (emphasis added).

D. This case is a good vehicle for this due process claim.

This case is on direct appeal, and thus the Due Process Clause claim is unimpeded by collateral review standards such as those of federal habeas review of state-court judgments, ineffective assistance of counsel, or postconviction evidentiary-record restrictions. Mr. Colie’s claim was also squarely rejected by the state court, App.31a, n.2. And the trial evidence of his *bona fide* self-defense is robust, reflected further by the jury’s acquittal on every single other allegation.

4. *Martin* concerned only the burden-allocation when an accused asserts self-defense; it did not raise any claim about *barring* self-defense, as Mr. Colie does *supra*. Limited only to considering burden-allocation, this Court found no due process violation under *Leland*. *Martin* does not comment on the different scenario of a jury instructed not to consider self-defense at all, as Mr. Colie argued *supra*.

II. This Court reserved, and should now decide, whether a conviction may stand as a mere “inconsistent verdict” where the jury’s own verdicts foreclose any explanation but that it convicted despite finding a complete defense.

A. This is an important, unsettled question of constitutional law.

In *Dunn v. United States*, 284 U.S. 390 (1932), and *United States v. Powell*, 469 U.S. 57 (1984), this Court held that inconsistent jury verdicts are generally tolerated, because an apparent inconsistency may reflect lenity toward the defendant on the count resolved in his favor—a possibility courts cannot rule out without probing jury deliberations. But *Powell* expressly reserved one situation from that general rule: “Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other.” *Id.* at 69 n.8.

Lower courts have had no choice but to answer that reserved question themselves, though in irreconcilable ways. See Part C *infra*. Virginia’s own courts illustrate the difficulty. In *McQuinn v. Commonwealth*, 298 Va. 456 (2020), the Supreme Court of Virginia identified three categories of inconsistent-verdict claims: (1) inconsistent guilty verdicts, where a jury convicts a defendant of two crimes that cannot logically coexist; (2) legally-insufficient evidence of a predicate offense paired with conviction of a compound offense, requiring reversal; and (3) legally-sufficient evidence of a predicate despite acquittal thereof, with conviction of a compound offense tolerated on the theory that the jury exercised “grace and leniency.” *Id.*

Mr. Colie’s case proves the problem with these categorical distinctions, because his single guilty verdict cannot fall within the first category, yet it makes no sense to conclude his jury was exercising “grace and leniency” when convicting him of unlawful discharge despite also finding his complete defense. Virginia has never decided whether a case of acquittal/conviction could ever receive the treatment reserved for the first category when, as here, the record establishes without speculation what the jury’s acquittal rested on. This Court should settle this question. Supreme Court Rule 10I.

This Court has had few occasions to return to the question *Powell* reserved. In *Bravo-Fernandez v. United States*, 580 U.S. 5 (2016), a unanimous Court confronted verdicts it called “irreconcilably inconsistent”—a conviction and acquittals turning on the identical contested issue, arising from the same trial—and resolved the case entirely under *Powell*’s general tolerance rule, in the different context of issue-preclusion under Double Jeopardy. *Id.* at 5. *Powell*’s Footnote 8 does not appear anywhere in that opinion. This case presents the question directly.

B. Mr. Colie’s verdict was logically excluded by the jury’s clear self-defense finding.

Mr. Colie’s jury acquitted him of every charge but one. It acquitted him of aggravated malicious wounding and its lesser-includeds (malicious wounding, unlawful wounding, and assault and battery), and it acquitted him of malicious discharge. It convicted him only of unlawful discharge, which differs from malicious discharge only in the absence of malice. *See* Va. Code § 18.2-279; App.59a.

The conclusion that the jury found self-defense is not conjecture. *See* Statement of Facts § IV *supra*. Self-defense is a complete defense to the single act underlying every one of Mr. Colie’s charges. A person who acts in self-defense has not acted unlawfully at all; the justification cannot merely excuse a greater offense while leaving the identical conduct “unlawful” for purposes of a lesser charge.

The Missouri Supreme Court applied this principle to bar conviction on similar facts. In *State v. Beeler*, 12 S.W.3d 294, 300–01 (Mo. 2000) (en banc), a jury was instructed on self-defense to a murder charge but not a lesser-included manslaughter charge arising from the same shooting. Because the record established that the jury’s acquittal on murder rested on self-defense, that finding also “foreclose[d] any further trial on the question of whether defendant acted reasonably” as to the lesser-included. *Id.* Once a jury has found lawful self-defense, there is no remaining factual predicate for a finding that the same act was committed unlawfully.

To convict Mr. Colie of unlawful discharge, Instruction 24 required the jury to find that his discharge of the firearm was done “unlawfully.” App.59a. But the jury had already found that his conduct was justified. A finding of justification and a finding of unlawfulness as to the identical act, at the identical moment, cannot both stand. The guilty verdict on unlawful discharge is logically excluded by the jury’s own finding of self-defense—the precise situation *Powell* footnote 8 reserved.

Powell did not leave this question open in the abstract; it pointed to one example, which confirms rather than

undercuts Mr. Colie’s claim here. *United States v. Daigle* involved two guilty verdicts on legally incompatible theories of the same taking—embezzlement and larceny of identical funds—which the trial court itself corrected by directing a verdict of not guilty on one count once the jury’s incompatible verdicts became apparent. 149 F. Supp. 409, 413-14 (D.D.C.), *aff’d per curiam*, 248 F.2d 608 (D.C. Cir. 1957) (“where a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand”).

Mr. Colie’s case differs from *Daigle* in form: it involves a single conviction alongside acquittals, subject to correction on appellate review rather than by the trial court. But the principle *Powell*’s Footnote 8 recognized does not depend on that formal distinction. The law declines to give effect to two jury determinations that cannot logically coexist because doing so requires treating one of them as though it never happened; that concern applies with equal force to two guilty verdicts as to one guilt and one acquittal, if the basis is established by the record rather than assumed. There is no principled reason to treat this case differently from *Daigle* merely because the incompatible determination is an acquittal rather than conviction.

The general rule of *Dunn* and *Powell* tolerates a conviction returned alongside an acquittal because a reviewing court cannot know whether the inconsistency reflects “*mistake, compromise, or lenity*” on the acquittal versus error in the conviction, and thus “it is unclear whose ox has been gored.” *Powell*, 469 U.S. at 65. Each of those explanations depends on an assumption this record does not permit.

Lenity would require that the jury found every element of (at minimum) assault and battery—including that Mr. Colie touched Cook “without legal excuse or justification,” R.412—and nonetheless chose lenity through the extreme jury action of nullification. But the same jury, in the same verdict, convicted Mr. Colie of unlawful discharge for the identical act. Lenity for one charge, paired with conviction on another arising from a single act, is simply incoherent, and *Powell* does not ask courts to assume incoherence where a coherent explanation is available.

Mistake fares no better. A mistaken acquittal implies confusion or error untethered to any considered view of the evidence. But the jury did not stumble once; it acquitted Mr. Colie of aggravated malicious wounding and every other offense on the lesser-included ladder, *and* separately acquitted him of malicious discharge: five acquittals, each consistent with a single theory, self-defense. *See supra*, Statement of Facts §§ II, IV. A pattern of “mistakes” that happens to track one coherent legal theory across five separate verdicts, and that aligns precisely with the jury’s specific question about how that theory applied to the sole remaining charge, App.56a, is not a plausible account of confusion. It is the signature of a decision.

Nor is this a *compromise* verdict. A compromise surfaces as an intermediate conviction: jurors divided between conviction and acquittal settle on a middle ground. Mr. Colie’s jury did the opposite: it acquitted him outright of every offense on the aggravated-malicious-wounding ladder, and convicted him of one, lone, unrelated, minor discharge offense after explicitly asking whether self-defense applied to it. That is not the shape a compromise takes; it is the shape a self-defense finding takes when a jury applies it to every charge but one.

With mistake, compromise, and lenity all foreclosed, one explanation remains: the jury found that Mr. Colie acted with legal justification. That is not an inference from silence; it is the only reading these verdicts, taken together, permit.⁵

Furthermore, as noted *supra*, this case is unlike *Bravo-Fernandez*, 580 U.S. 5. That opinion determined whether an acquittal carried issue-preclusive effect against the Government in a *later* proceeding under the Double Jeopardy Clause, a question on which the defendant bore the burden of proving his jury “actually

5. The Commonwealth may respond that a reviewing court could hypothesize *some* set of facts on which the jury could have convicted and acquitted consistently: here, an endangerment theory to bystanders, somehow permissible despite *bona fide* self-defense. No one asked Mr. Colie’s jury to even consider that theory, however; in fact, the prosecution argued exclusively that the malicious discharge offense victimized Cook. In closing, it defined culpability by “the use of that deadly weapon against an individual”—Cook—“without any legal excuse or justification,” and argued endangerment through the shooting of Cook himself: “in firing the gun, he shot somebody. That proves that it endangered someone.” R.3162-64.

Moreover, that response implicates a significant division among the lower courts, *see infra* Part C. Some courts ask only whether “any rational fact finder could have found a consistent set of facts supporting both convictions,” *Masoner v. Thurman*, 996 F.2d 1003, 1005 (9th Cir. 1993), a standard satisfied by any reconciling theory a court can imagine; while others ask what *this* jury necessarily decided given its specific instructions and the arguments of trial counsel, *see, e.g., State v. Stewart*, 464 Md. 296, 305–07 (2019) (McDonald, J.), whereby a reconciling theory must have actually been presented to the jury in order to rescue a logically-inconsistent verdict.

decided” an issue in his favor. *Id.* at 9. In that case, lenity remained a coherent explanation for Bravo-Fernandez’s acquittals: the jury could have found a substantive violation but acquitted on conspiracy out of mercy. *Bravo-Fernandez* did not address—because it did not need to—*Powell*’s Footnote 8; and *Bravo-Fernandez* did not concern a record of a complete legal justification for the allegations-of-conviction.

Unlike in *Bravo-Fernandez*, this record supplies a complete, rational explanation for why Mr. Colie’s jury would have convicted him of unlawful discharge despite self-defense: the trial court’s Instruction 29, briefed in Section I *supra*, told them to. But Mr. Colie’s entitlement to relief under *Powell* Footnote 8 does not depend on locating the precise reason the jury’s reasoning went astray. It depends only on what the jury actually found and the legal consequence of its finding. *Bona fide* self-defense precludes conviction, and a guilty verdict is irreconcilable with acquittals that rest on that finding.⁶

6. Courts that have confronted materially identical circumstances—a lesser-included conviction returned alongside acquittals resting on self-defense—confirm both the soundness of this reasoning and its unsettled treatment. As the Missouri Supreme Court held in *Beeler*, 12 S.W.3d at 300–01, a lesser-included manslaughter charge could not be alleged where the record left little doubt that the jury’s acquittal on murder rested on self-defense. Though where the record leaves genuine doubt about whether an acquittal rested on self-defense, courts have declined to find inconsistency, reasoning that the defendant’s argument rests on an “unsupported premise.” *State v. Cleveland*, No. 13-1262, 2015 W. Va. LEXIS 7, at *3 (W. Va. Jan. 12, 2015) (mem.); accord *State v. Huynh*, No. 23580, 2002 Haw. LEXIS 24, at *2–*3 (Haw. Jan. 16, 2002). The Sixth Circuit has gone further, holding that Footnote 8’s exception does not reach any case in which one

C. State courts of last resort are in conflict.

National treatment of claims like Mr. Colie’s reflects divergent applications of *Powell*. At one extreme, some courts recognize no exception to *Powell*’s tolerance rule at all, even where the verdicts cannot be reconciled on their own terms. The Washington Supreme Court has upheld a conviction its own opinion described as “irreconcilably inconsistent,” holding that “the very nature of inconsistent verdicts is that they are irrationally inconsistent; this alone does not render inconsistent verdicts void.” *State v. Goins*, 151 Wn.2d 728, 733 (2004). Meanwhile, no federal court of appeals to address the question has applied *Powell*’s Footnote 8 exception to any case where one of two verdicts was an acquittal.⁷ And some state supreme courts decline to find “mutually exclusive verdicts” even when a jury returns two *guilty* verdicts for both greater and lesser-included offenses with differing *mens rea*. See, e.g., *State v. Springer*, 297 Ga. 376 (2015).

But other state supreme courts have extended relief to defendants convicted alongside an acquittal, finding the verdicts intolerably inconsistent. Iowa has rejected the

of two verdicts is an acquittal. *United States v. Forrester*, No. 24-5095, 2026 U.S. App. LEXIS 26266, at *32 (6th Cir. Aug. 27, 2026). But the Sixth Circuit’s doctrine, as first set out, was narrower: Footnote 8 did not apply to an acquittal that “could reflect jury lenity, or even a mistaken acquittal.” *United States v. Ruiz*, 386 F. App’x 530, 533 (6th Cir. 2010).

7. See *United States v. Forrester*, No. 24-5095, 2026 U.S. App. LEXIS 26266, at *32 (6th Cir. Aug. 27, 2026) (citing *United States v. Ruiz*, 386 F. App’x 530, 533 (6th Cir. 2010)); *United States v. Maury*, 695 F.3d 227, 266 (3d Cir. 2012); *Masoner v. Thurman*, 996 F.2d 1003, 1005 (9th Cir. 1993).

tolerance rule outright for some cases, reasoning that “a jury verdict involving compound inconsistency insults the basic due process requirement that guilt must be proved beyond a reasonable doubt.” *State v. Halstead*, 791 N.W.2d 805, 815 (Iowa 2010) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). And as noted *supra*, the *en banc* Missouri Supreme Court reversed a conviction on facts nearly identical to this case, holding that a jury’s acquittal on a greater charge in a self-defense case “forecloses any further trial” on a lesser-included. *Beeler*, 12 S.W.3d at 300–01. Maryland is also reticent to affirm inconsistent jury verdicts: it first held that “legally inconsistent” verdicts cannot stand while “factually inconsistent” verdicts may, reversing a conviction for possessing a firearm during a drug trafficking crime because the jury had acquitted the defendant of the legal predicates. *Price v. State*, 405 Md. 10 (2008). But it then struggled to agree on how to apply this rule, starkly splitting in a plurality ruling thereon, *State v. Stewart*, 464 Md. 296 (2019), before eventually reaffirmed the original test. *Williams v. State*, 478 Md. 99, 127–28 (2022).

Powell reserved the question of Footnote 8 more than 40 years ago, and the lower courts clearly need guidance on its parameters and application.

D. This case presents a good vehicle to explain the *Powell* exception.

Inconsistent guilt/acquittal verdicts will usually fail because the trial record leaves room to doubt that the acquittal *legally* precluded the conviction; but where the record does not leave doubt, the result should be settled. Accused persons with *bona fide* self-defense claims are

entitled to full acquittal, not just partial relief. This case gives the Court a direct vehicle to decide whether *Powell's* Footnote 8 exception can apply to any acquittal at all, in the context of a robust record of self-defense. Mr. Colie's record overcomes any doubt about the jury's basis for acquittal based on the jury's unusual questions to the trial court, the court's flawed Instruction 29, the overall context of the myriad acquittals here, the strength and consistency of the self-defense evidence, and the elimination of every alternative explanation for the specific combination of verdicts. The lower courts clearly need guidance on this question, and Mr. Colie's presents a good opportunity to provide it.

CONCLUSION

Mr. Colie respectfully asks that this Court grant his Petition and order full briefing of the claims presented. Ultimately, Mr. Colie moves for vacatur of his conviction for unlawful discharge, and any other relief this Court deems appropriate.

Respectfully submitted,

DANIEL GOLDMAN
LAW OFFICE OF
DANIEL GOLDMAN
421 King Street,
Suite 505
Alexandria, VA 22314

MEGHAN SHAPIRO
Counsel of Record
LAW OFFICE OF
MEGHAN SHAPIRO
421 King Street, Suite 505
Alexandria, VA 22314
(703) 915-9594
shapiro.meghan@gmail.com

Counsel for Petitioner
Alan Walter Colie

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — ORDER OF THE SUPREME COURT OF VIRGINIA, FILED JUNE 8, 2026.....	1a
APPENDIX B — MEMORANDUM OPINION OF THE COURT OF APPEALS OF VIRGINIA, FILED SEPTEMBER 30, 2025.....	2a
APPENDIX C — SENTENCING ORDER OF THE VIRGINIA CIRCUIT COURT OF LOUDOUN COUNTY, FILED MARCH 15, 2024	25a
APPENDIX D — TRIAL ORDER OF THE COMMONWEALTH OF VIRGINIA IN THE CIRCUIT COURT OF LOUDOUN COUNTY, DATED OCTOBER 4, 2023.....	29a
APPENDIX E — EXCERPTS OF COLIE OPENING BRIEF OF THE VIRGINIA COURT OF APPEALS.....	42a
APPENDIX F — EXCERPTS OF PETITION FOR APPEAL OF THE SUPREME COURT OF VIRGINIA	46a
APPENDIX G — EXCERPTS OF BRIEF IN SUPPORT OF FOURTH MOTION TO SET ASIDE THE VERDICT OF THE VIRGINIA CIRCUIT COURT FOR LOUDOUN COUNTY; AND ORDER OF THE CIRCUIT COURT FOR LOUDOUN COUNTY OF MAY 9, 2024.....	51a

Table of Appendices

	<i>Page</i>
APPENDIX H — COURT EXHIBIT 4	56a
APPENDIX I — JURY INSTRUCTIONS	
10, 11 AND 29	57a
APPENDIX J — VERDICT FORMS OF	
JURY A, B AND C	62a

1a

**APPENDIX A — ORDER OF THE SUPREME
COURT OF VIRGINIA, FILED JUNE 8, 2026**

SUPREME COURT OF VIRGINIA

Record No. 251001
Court of Appeals No. 0874-24-4

ALAN WALTER COLIE,

Appellant,

against

COMMONWEALTH OF VIRGINIA,

Appellee.

ORDER

Filed June 8, 2026

FROM THE COURT OF APPEALS OF VIRGINIA

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste: Muriel-Theresa Pitney, Clerk

By: /s/ Ervina Pajalic, Deputy Clerk

2a

**APPENDIX B — MEMORANDUM OPINION
OF THE COURT OF APPEALS OF VIRGINIA,
FILED SEPTEMBER 30, 2025**

COURT OF APPEALS OF VIRGINIA

Record No. 0874-24-4

ALAN W. COLIE, SOMETIMES KNOWN AS
ALAN WALTER COLIE

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF
LOUDOUN COUNTY
Matthew P. Snow, Judge

MEMORANDUM OPINION* BY
JUDGE DANIEL E. ORTIZ
SEPTEMBER 30, 2025

Present: Judges O'Brien, Ortiz and Friedman
Argued at Fredericksburg, Virginia

This matter began when an internet prank went horribly wrong and Alan Walter Colie shot Tanner Cook, a YouTube prankster. Subsequently, after a bevy of charges were lodged against Colie, a jury convicted him of only unlawful discharge of a firearm in an occupied building, in violation of Code § 18.2-279. Colie claimed that the shooting was in self-defense, testifying that he

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

Appendix B

was “fearful that [his] life was in danger.” On appeal, Colie argues that the evidence was insufficient to convict him of unlawful discharge. He also assigns error to the circuit court’s rulings on four jury instructions. Because the evidence was sufficient and the jury instructions were proper, we find no reversible error and affirm.

BACKGROUND¹**I. The Shooting**

Tanner Cook was a YouTube creator whose videos focused on pranking the public. On the morning of April 2, 2023, Cook went to the Dulles Town Center Mall with another content creator, Francesco Lonigro, and two cameramen to film new content for their YouTube channels. The prank for that day was to walk up to mallgoers and play a recording from Cook’s phone that said, “Hey dipshit, quit thinking about my twinkle.” Cook had already attempted the prank on at least one other person when he saw Colie in the mall’s food court and decided to prank him.

1. “On appeal, we recite the facts ‘in the “light most favorable” to the Commonwealth, the prevailing party in the trial court.’” *Camann v. Commonwealth*, 79 Va. App. 427, 431, 896 S.E.2d 370 (2024) (en banc) (quoting *Hammer v. Commonwealth*, 74 Va. App. 225, 231, 867 S.E.2d 505 (2022)). “Doing so requires that we ‘discard’ the defendant’s evidence when it conflicts with the Commonwealth’s evidence, ‘regard as true all the credible evidence favorable to the Commonwealth,’ and read ‘all fair inferences’ in the Commonwealth’s favor.” *Id.* (quoting *Commonwealth v. Cady*, 300 Va. 325, 329, 863 S.E.2d 858 (2021)).

Appendix B

Cook and Lonigro walked up to Colie; Cook held his phone up to him, playing the recording while the cameramen filmed the interaction from approximately 15 feet away. Colie said something to Cook before beginning to walk away. Cook walked toward Colie and continued to play the recording. During this interaction, Colie told Cook to “stop,” backed up, pushed Cook’s phone away with his hand, and walked towards the food court exit. Cook continued walking toward Colie and played the recording a fourth or fifth time. Colie then drew his weapon and shot Cook. The bullet pierced Cook’s upper left abdomen, requiring treatment at the hospital for injuries to his bowel and liver. At trial, video recordings of the shooting were entered into evidence and showed that the interaction between Colie and Cook lasted approximately 20 seconds.

Cook testified that, while he did not inform Colie ahead of time that it was a prank and that he was unarmed, he had no intention of hurting Colie and confirmed that neither he nor his companions were armed during the interaction. Cook also said he only had his phone in his hand during the prank and had nothing in his other hand. Cook testified that he did not stop the prank because Colie did not “seem to show emotion” and that he “couldn’t tell if [Colie] was scared or angry.” Cook further testified that, while he was initially two feet away from Colie and held the phone about six inches from Colie’s face when the prank began, they were “[a] lot further” apart when Colie shot him. The video recordings corroborated the initial distances described by Cook but, because of an obstruction, do not show the distance between Cook and Colie at the time of the shooting.

Appendix B

Wael Thabet was at the mall at the time of the shooting with his family. Thabet testified that he heard “a loud noise” and that he went to check on a friend who worked in the food court about five minutes later. When he arrived at the food court, he saw a gun on the floor and Colie standing nearby. Thabet told Colie to sit down; Colie complied. Deputy First Class Brian Leppert with the Loudoun County Sheriff’s Office arrived at the food court shortly thereafter and saw Colie on the ground “next to” the pistol.

Colie testified in his defense at trial. He told the jury that, on the day of the shooting, he was at the Dulles Town Center Mall picking up a DoorDash delivery. Colie was carrying a concealed gun holstered in his pocket. He testified that he felt it was necessary to carry a gun for his protection because of stories that he had heard about DoorDash drivers being “robbed and assaulted.” Colie testified that he had taken “a basic pistol course” that taught him the “[b]asics of firearm safety.” He further testified that he took a class to get his concealed carry permit.

Colie stated that, when Cook began to prank him, Cook held the phone approximately six inches from his face and that the recorded phrase “sounded like an accusation or a threat” to him. Colie testified that he asked, “[W]hat’s that,” but neither Cook nor the other man answered. He also stated that Cook appeared “angry, cold and empty.” Colie further testified that he felt “nervous” and “anxious” and backed away. He said, “[N]o,” and told them to “stop,” but Cook continued playing the recording as he walked

Appendix B

towards him. Colie pushed the phone away with his hand. Colie testified that he told Cook to stop again and “turned and tried to walk in a straight line away from him, towards the exit to the food court.” But Cook “seemed like he was being more aggressive” because, “instead of keeping his distance, like he initially had when [Colie] pushed the phone away, [Colie] felt like [Cook] sped up the pace to a point where [Colie] felt like [Cook] was lunging towards [him].” He then turned around and told Cook to stop again. Colie testified, “[A]t that point, he was right up next to me again. After I felt like he lunged towards me to get that close again. And he wasn’t moving.” He determined that Cook “was a threat” and that Cook “was going to try to harm [him] and didn’t give [him] a reason to think he wouldn’t.” Colie “didn’t know if [Cook] could be concealing a weapon or getting ready to strike . . . or kick [him], considering how close he was.” He was unaware that the interaction was a prank and claimed that he “was very fearful that [his] life was in danger.” Colie determined, “for the sake of [his] own safety and protection,” that he needed to “fire one shot towards [Cook’s] stomach.” Colie estimated that he walked “just feet, . . . about 30 feet” in total from the time Cook approached him to the time he shot Cook.

Asked why he chose not to run away, Colie testified that he did not believe he would be able to outrun Cook. He did not engage Cook physically after pushing his arm away because he “was really surprised by the whole situation,” did not know if Cook was armed, and did not believe he could win a physical altercation against Cook, who was 6’5” and 240 pounds, and the other man, who was

Appendix B

roughly 5'8". Colie also testified that he feared, if he drew his weapon and did not shoot, that Cook would "attempt to get it away from [him]" and that his gun safety and training classes had taught him never to draw a weapon unless you intended to use it.

During cross-examination, Colie conceded that Cook never presented a weapon, never verbally threatened him, and never physically touched him. Colie also conceded that Cook's phone was not six inches from his face for the entire duration of the interaction. Colie denied that he ever saw either of the men smiling and, when presented with screenshot of Lonigro smiling in the video, stated that he did not see that because he was looking at Cook.

II. Jury Instructions

The circuit court, with the agreement of both parties, gave Instruction 10 on self-defense. It read:

If you believe that the defendant, Alan Colie, was without fault in provoking or bringing on the fight, and you further believe that: 1. he reasonably feared, under the circumstances as they appeared to him, that he was in imminent danger of bodily harm; and 2. he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm, then he acted in self-defense, and you shall find the defendant not guilty.

Appendix B

The defense proposed three additional instructions about self-defense, Defense Instructions 3, 4, and 5. Defense Instruction 4 (given as Instruction 11) was granted; it stated, “The defendant, Alan Colie, asserts he was acting in self-defense when he shot Tanner Cook. If, after hearing all of the evidence, you have a reasonable doubt as to whether or not Mr. Colie acted in self-defense, then you shall find the defendant not guilty.”

Defense Instructions 3 and 5, however, were rejected. Defense Instruction 3 stated:

It is not essential to the right of self-defense that the danger should in fact exist. If it reasonably appeared at the time to the Defendant, Alan Colie, that the danger existed, he has the right to defend against it to the same extent, and under the same rules, as would obtain in case the danger is real. The defendant may always act upon reasonable appearance of danger, and whether the danger is reasonably apparent is always to be determined from the viewpoint of the defendant at the time he acted.

The circuit court rejected the instruction as duplicative of the law given in Instruction 10. Defense Instruction 5 stated:

In passing upon the danger, if any, to which the Defendant, Alan Colie, was exposed, you will consider the circumstances as they reasonably appeared to him and draw such

Appendix B

conclusions from these circumstances as he could reasonably have drawn, situated as he was at the time. In other words, Alan Colie is entitled to be tried and judged by the facts and circumstances as they reasonably appeared to him and not by any intention that may or may not have existed in the mind of Tanner Cook.

The circuit court rejected Defense Instruction 5 because it was “confusing” and duplicative of Instruction 10.

Additionally, the Commonwealth proposed an instruction on character evidence, which stated, “You may consider the character of the defendant, Alan Colie, when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence.” The Commonwealth argued that the defense had introduced character evidence through Colie’s testimony that he had a practice of not using his firearm unless necessary. The defense objected, arguing that this testimony was not character evidence. The circuit court granted the instruction, given as Instruction 7, because the “door [for the character instruction] was cracked open[.]”

III. Jury Question and Verdict

During its deliberations, the jury asked, “Regarding Instruction Number 24, does self-defense come into play when determining if the act was done unlawfully? Does self-defense nullify the act being considered unlawful?” Instruction 24 instructed the jury on malicious discharge

Appendix B

of a firearm within an occupied building and the lesser-included offense of unlawful discharge of a firearm within an occupied building. The defense argued that the answer to the question was “yes,” and the court should answer that self-defense “is an absolute defense to all the charges they have.” The Commonwealth argued that the jury’s question required legal analysis and that the court should refer them to the instructions already given. The circuit court answered the question as Instruction 29, telling the jury, “You have been instructed on the law on the issue of self-defense (Instructions #10 and #11). Those instructions of law are not limited to any particular charge currently before you. Therefore, the Court refers you to the instructions of law already given.”

The jury subsequently acquitted Colie of aggravated malicious wounding, its lesser-included offenses (malicious wounding, unlawful wounding, and assault and battery), and the use of a firearm in the commission of a felony. The jury also acquitted him of malicious discharge of a firearm. But the jury convicted Colie of unlawful discharge of a firearm.

The circuit court sentenced Colie to time served and six months of post-release supervision. Colie appeals.

ANALYSIS

On appeal, Colie challenges the circuit court’s giving Instructions 29 and 7 and refusing Defense Instructions 3 and 5. Colie also argues that the evidence was insufficient to convict him of unlawful discharge where he acted in self-defense. For the reasons articulated below, we affirm the judgment of the circuit court.

*Appendix B***I. The circuit court did not err by giving
Instruction 29.**

Colie first asserts that the circuit court’s answer to the jury’s question, Instruction 29, failed to accurately state the law because the court should not have used the word “charge” to describe the lesser-included offense of unlawful discharge. The word “charge,” he argues, confused the jury because the other instructions never directly stated that he was “charge[d]” with unlawful discharge—“charge” was only used to describe malicious discharge of a firearm. Because the jury’s question used the word “act,” Colie argues that the circuit court’s answer “effectively told [the jury]: no; self-defense only applies to charges,” i.e., malicious discharge. We disagree.

“A judicial response to a jury question is considered a legal instruction.” *Ludwig v. Commonwealth*, 52 Va. App. 1, 11, 660 S.E.2d 679 (2008). We review a circuit court’s decision giving or refusing a jury instruction for an abuse of discretion. *Fahringer v. Commonwealth*, 70 Va. App. 208, 211, 827 S.E.2d 1 (2019). “Whether a proffered jury instruction accurately states the law, however, is reviewed de novo.” *Holmes v. Commonwealth*, 76 Va. App. 34, 53, 880 S.E.2d 37 (2022). This Court’s role “is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.” *Swisher v. Swisher*, 223 Va. 499, 503, 290 S.E.2d 856 (1982). “[W]hen reviewing jury instructions on appeal, we read the instructions together and consider them as a whole[.]” *Griffin v. Commonwealth*, 78 Va. App. 116, 145, 890 S.E.2d 619 (2023) (quoting *Supervalu, Inc. v. Johnson*, 276 Va. 356, 366, 666 S.E.2d 335 (2008)). “When granted

Appendix B

instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle.” *Hilton v. Commonwealth*, 293 Va. 293, 302, 797 S.E.2d 781 (2017) (quoting *Daniels v. Commonwealth*, 275 Va. 460, 466, 657 S.E.2d 84 (2008)).

Colie argues that Instruction 29 did not accurately reflect the distinction between malicious discharge, with which he was specifically “charge[d],” and its lesser-included offense, unlawful discharge. But Colie misunderstands the relationship between lesser-included and greater offenses. “A lesser included offense must be ‘composed entirely of elements that are also elements of the greater offense.’” *Crump v. Commonwealth*, 13 Va. App. 286, 290, 411 S.E.2d 238, 8 Va. Law Rep. 1460 (1991) (quoting *Kauffmann v. Commonwealth*, 8 Va. App. 400, 409, 382 S.E.2d 279, 6 Va. Law Rep. 42 (1989)). “The lesser offense is therefore always ‘charged by implication’ as a part of the ‘greater offense’ and ‘necessarily proven by the proof of the greater offense.’” *Id.* (emphasis added) (quoting *Taylor v. Commonwealth*, 11 Va. App. 649, 652, 400 S.E.2d 794, 7 Va. Law Rep. 1515 (1991)). Thus, contrary to Colie’s assertion, the circuit court’s description of unlawful discharge as a “charge” that was before the jury was an accurate statement of the law.

Colie nonetheless argues that Instruction 29’s use of the word “charge” to describe the lesser-included offenses at issue misled the jury about whether self-defense applied to unlawful discharge. But when Instruction 29 is “read . . . together” with the other self-defense instructions, this argument is fruitless. *Griffin*, 78 Va. App. at 145.

Appendix B

The circuit court began its answer by properly referring the jury back to Instructions 10 and 11. *See Couture v. Commonwealth*, 51 Va. App. 239, 246, 656 S.E.2d 425 (2008) (“It is entirely proper for the court to refer the jury back to the court’s original charge[.]” (quoting *United States v. Barsanti*, 943 F.2d 428, 438 (4th Cir. 1991))). Instruction 10 required the jury, if they found self-defense, to “find the defendant not guilty.” Instruction 11 instructed the jury that, if they had a reasonable doubt as to whether the shooting was in self-defense, they must find Colie not guilty. These instructions were unequivocal that self-defense, if found or if there was reasonable doubt that it existed, required the jury to find the defendant not guilty—the instructions did not limit self-defense to only “charge[d]” conduct. Further, defense counsel agreed to both Instruction 10 and Instruction 11, and together those instructions clearly and correctly stated the law of self-defense. *Cf. Gaines v. Commonwealth*, 39 Va. App. 562, 567, 574 S.E.2d 775 (2003) (en banc) (“A trial judge does not abuse his discretion by failing to modify a correct statement of the law on the mere chance that a jury may not follow clearly written instructions.”). Thus, although unlawful discharge was not explicitly “charge[d],” because Instructions 10 and 11 were unequivocal in the applicability of self-defense if found, the circuit court did not abuse its discretion by requiring the jury to refer back to those instructions in its answer.²

2. Colie also argues that Instruction 29 violated his rights under the Due Process Clause of the United States Constitution because, insofar as the jury was improperly instructed, it denied him the right to assert an affirmative defense. Because we have found that the court properly instructed the jury on self-defense, we also find that Colie’s due process rights were not violated.

*Appendix B***II. The evidence was sufficient to convict Colie of unlawful discharge.**

“The judgment of the trial court is presumed correct and will not be disturbed unless it is ‘plainly wrong or without evidence to support it.’” *Pijor v. Commonwealth*, 294 Va. 502, 512, 808 S.E.2d 408 (2017) (quoting Code § 8.01-680). In reviewing the sufficiency of the evidence, “[t]he only ‘relevant question is, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Commonwealth v. Barney*, 302 Va. 84, 97, 884 S.E.2d 81 (2023) (quoting *Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61 (2010)). “Whether an accused proves circumstances sufficient to create a reasonable doubt that he acted in self-defense is a question of fact.” *Smith v. Commonwealth*, 17 Va. App. 68, 71, 435 S.E.2d 414, 10 Va. Law Rep. 211 (1993).

For Colie to be convicted of unlawful discharge, the Commonwealth was required to prove that: (1) he discharged a firearm within an occupied building, (2) he did so in a manner as to endanger the life or lives of such person or persons, and (3) he did so unlawfully. Code § 18.2-279. “Unlawfully” means conduct that is at least criminally negligent. *See Bryant v. Commonwealth*, 295 Va. 302, 310, 811 S.E.2d 250 (2018). Criminally negligent conduct requires “a reckless or indifferent disregard for the safety of others.” *Coomer v. Commonwealth*, 67 Va. App. 537, 550, 797 S.E.2d 787 (2017) (quoting *Rich v. Commonwealth*, 292 Va. 791, 798, 793 S.E.2d 798 (2016));

Appendix B

see also Tubman v. Commonwealth, 3 Va. App. 267, 271, 348 S.E.2d 871, 3 Va. Law Rep. 838 (1986) (“[Criminal] negligence is acting consciously in disregard of another person’s right or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge or existing circumstances and conditions, that his conduct probably would cause injury to another.” (quoting *Griffin v. Shively*, 227 Va. 317, 321, 315 S.E.2d 210 (1984))).

“Self-defense is an affirmative defense which the accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt.” *Meade v. Commonwealth*, 74 Va. App. 796, 806, 872 S.E.2d 240 (2022) (quoting *Hughes v. Commonwealth*, 39 Va. App. 448, 464, 573 S.E.2d 324 (2002)). “To establish a claim of self-defense, a defendant must show that he reasonably feared death or serious bodily harm at the hands of his victim.” *Hines v. Commonwealth*, 292 Va. 674, 679, 791 S.E.2d 563 (2016). “Whether the danger is reasonably apparent is judged from the viewpoint of the defendant at the time of the incident.” *Id.* “The defendant must also show that he was in imminent danger of harm, that is, a showing of an overt act or other circumstance that affords an immediate threat to safety.” *Id.*

As an initial matter, there is no real dispute that the Commonwealth satisfied the first two elements of unlawful discharge; the evidence viewed in the light most favorable to the Commonwealth showed that Colie discharged his firearm, there were other people in the food court, and the gunshot hit Cook, which damaged his bowel and liver.

Appendix B

Instead, Colie argues that the evidence was insufficient to prove the unlawfulness element because the “verdict does not reflect the jury’s own finding of self-defense”; in other words, he argues that the jury must have found self-defense to acquit him of the other charges and that the guilty verdict on unlawful discharge was therefore inconsistent with that finding. The Commonwealth counters that Colie cannot assume the jury found self-defense based on the record, and, regardless, the jury was permitted to reach inconsistent verdicts. We agree with the Commonwealth.

“The fact that verdicts may, on their face, arguably appear inconsistent does not provide a basis to reverse either conviction on appeal, provided the evidence is sufficient to support [the] verdict.” *Pugliese v. Commonwealth*, 16 Va. App. 82, 96, 428 S.E.2d 16, 9 Va. Law Rep. 1057 (1993). Inconsistent verdicts “‘cannot be upset by speculation or inquiry’ into whether they ‘may have been the result of compromise, or of a mistake on the part of the jury,’” *Reed v. Commonwealth*, 239 Va. 594, 597, 391 S.E.2d 75, 6 Va. Law Rep. 2164 (1990) (quoting *Dunn v. United States*, 284 U.S. 390, 394, 52 S. Ct. 189, 76 L. Ed. 356 (1932)), or into whether the jury decided to use its power of lenity, *United States v. Powell*, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Here, the evidence, viewed in the light most favorable to the Commonwealth, was sufficient for a rational jury to find that Colie acted unlawfully in discharging his firearm and did not act in self-defense.

The court correctly instructed the jury that, to find self-defense, Colie was required to show that “he reasonably

Appendix B

feared, under the circumstances as they appeared to him, that he was in imminent danger of bodily harm[.]” and that “he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm[.]” The evidence showed that Cook walked up to Colie holding a phone around six inches away from Colie. But Cook testified that, by the time Colie shot him, he was “[a] lot further” away. The jury could have disbelieved Colie’s self-serving testimony that Cook lunged at him and that he was unaware if Cook could have concealed a weapon, and instead credited Cook’s testimony that he was not close to Colie when Colie shot him. See *Sanford v. Commonwealth*, 54 Va. App. 357, 364, 678 S.E.2d 842 (2009) (“[T]he fact finder is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt.” (alteration in original) (quoting *Marable v. Commonwealth*, 27 Va. App. 505, 509-10, 500 S.E.2d 233 (1998))). Further, the evidence showed that the interaction was only about 20 seconds long, Cook followed Colie only a short distance through the food court, and there were others from whom Colie could have sought help. Colie also admitted that Cook never threatened or touched him. From this, the jury could have rationally concluded that Colie “had [no] reasonable ground to believe . . . that he was in . . . danger” to justify shooting Cook, *Watkins v. Commonwealth*, 83 Va. App. 456, 483, 911 S.E.2d 181 (2025) (quoting *Humphrey v. Commonwealth*, 37 Va. App. 36, 49-50, 553 S.E.2d 546 (2001)), and that he acted with “a reckless or indifferent disregard for the safety of others,” *Coomer*, 67 Va. App. at 550. Accordingly, the circuit court was not plainly wrong to find that the evidence was sufficient to support Colie’s conviction.

*Appendix B***III. The court did not err in refusing Defense Instructions 3 and 5.**

We review a circuit court's refusal to give a jury instruction for an abuse of discretion. *Fahringer*, 70 Va. App. at 211. To reiterate, "[o]ur sole responsibility in reviewing [jury instructions] is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Swisher*, 223 Va. at 503. "When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle." *Hilton*, 293 Va. at 302 (quoting *Daniels*, 275 Va. at 466).

Proposed Defense Instruction 3 stated:

It is not essential to the right of self-defense that the danger should in fact exist. If it reasonably appeared at the time to the Defendant, Alan Colie, that the danger existed, he has the right to defend against it to the same extent, and under the same rules, as would obtain in case the danger is real. The defendant may always act upon reasonable appearance of danger, and whether the danger is reasonably apparent is always to be determined from the viewpoint of the defendant at the time he acted.

The circuit court refused this instruction, reasoning that the relevant law was sufficiently addressed in Instruction 10, discussed at length above. Colie argues that Instruction

Appendix B

10 did not address whether the danger had to be real, so his proposed instruction was not duplicative. We disagree.

To be sure, Defense Instruction 3 was a correct statement of the law. *See McGhee v. Commonwealth*, 219 Va. 560, 562, 248 S.E.2d 808 (1978) (“It is not essential to the right of self-defense that the danger should in fact exist.”). But the relevant substance of Defense Instruction 3 was adequately covered by Instruction 10. Instruction 10 provided that, to find that he acted in self-defense, Colie must have “reasonably feared, *under the circumstances as they appeared to him*, that he was in imminent danger of bodily harm.” (Emphasis added). In other words, Instruction 10 clearly articulated that the objective reasonableness inquiry is from the perspective of the defendant. And that inquiry necessarily encompasses the impact of any perceived danger, “real” or not. *See Stoneman v. Commonwealth*, 66 Va. (25 Gratt.) 887, 900 (1874) (“[If there is] reasonable ground for believing there is a design . . . to do some serious bodily harm, and imminent danger of carrying such design into immediate execution[.]. . . the killing will be justifiable, although it should afterwards turn out that appearances were deceptive . . .”). Thus, the circuit court correctly determined that Defense Instruction 3 was duplicative, and it did not abuse its discretion by refusing to give it. *See Hilton*, 293 Va. at 302.

For the same reason, the circuit court also did not err in refusing Defense Instruction 5. Proposed Defense Instruction 5 stated:

Appendix B

In passing upon the danger, if any, to which the Defendant, Alan Colie, was exposed, you will consider the circumstances as they reasonably appeared to him and draw such conclusions from these circumstances as he could reasonably have drawn, situated as he was at the time. In other words, Alan Colie is entitled to be tried and judged by the facts and circumstances as they reasonably appeared to him and not by any intention that may or may not have existed in the mind of Tanner Cook.

The circuit court refused the instruction because it was “confusing and repetitive” and “self-defense law [was] sufficiently stated in other instructions.” Colie argues that the given instructions on self-defense did not sufficiently instruct the jury on assessing the reasonableness of Colie’s fear from his point of view. But, as we have already noted, Instruction 10 expressly required the jury to determine whether Colie “reasonably feared, *under the circumstances as they appeared to him*, that he was in imminent danger of bodily harm.” (Emphasis added). Defense Instruction 5 was therefore a verbose restatement of the principle outlined in Instruction 10, and the court did not abuse its discretion by refusing it.³

3. We further note that, if the defense believed that the principles repeated in Defense Instructions 3 and 5 required additional emphasis, they were free to do so in closing argument. See *Payne v. Commonwealth*, 65 Va. App. 194, 211, 776 S.E.2d 442 (2015) (“When a trial court rejects a jury instruction, however, it merely limits the manner by which a party may transmit information to the jury. There are many ways to educate a jury, including those,

*Appendix B***IV. Any error in giving Instruction 7 was harmless.**

Colie's last assignment of error is that the circuit court erred by giving Instruction 7 because there was no evidence to support it. Instruction 7 said, "You may consider the character of the defendant, Alan Colie, when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence."

Even if a jury instruction "correctly states the law, if it is not applicable to the facts and circumstances of the case, it should not be given." *Hatcher v. Commonwealth*, 218 Va. 811, 813-14, 241 S.E.2d 756 (1978). "[J]ury instructions are proper only if supported by the evidence, and more than a scintilla of evidence is required." *Payne v. Commonwealth*, 292 Va. 855, 869, 794 S.E.2d 577 (2016) (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 228-29, 738 S.E.2d 847 (2013)). "[W]hen considering whether a jury instruction is supported by the evidence we review the facts in the light most favorable to the proponent of the instruction." *Barney v. Commonwealth*, 69 Va. App. 604, 606 n.3, 822 S.E.2d 368 (2019).

An instruction inviting the jury to consider the character of the defendant in determining guilt should only be given if the defendant offers character evidence. *See Robinson v. Commonwealth*, 118 Va. 785, 790, 87 S.E. 553 (1916) ("The weight of authority is to the effect

like closing argument, where commenting upon the evidence is the entire point."), *aff'd*, 292 Va. 855, 794 S.E.2d 577 (2016).

Appendix B

that character is not in issue unless put there by the defendant.”). As relevant here, on direct examination, Colie testified that he had taken “a basic pistol course” that taught him the “[b]asics of firearm safety.” He further testified that he took a class to get his concealed carry permit. Lastly, he testified that his training taught him to never pull his firearm unless he intended to fire it. The Commonwealth argues that this testimony presented evidence of character traits that would tend to prove Colie was a responsible gun owner who would not unlawfully shoot someone, traits that were relevant to the case.

We need not determine whether the circuit court erred by giving Instruction 7 because, even assuming that it did, the error was harmless.

When determining whether a court’s error in instructing the jury is harmless, we apply the non-constitutional harmless error test. *Graves v. Commonwealth*, 65 Va. App. 702, 711, 780 S.E.2d 904 (2016). “A non-constitutional error is harmless ‘[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached.’” *Id.* at 712 (alteration in original) (quoting *Turman v. Commonwealth*, 276 Va. 558, 567, 667 S.E.2d 767 (2008)). “This Court may uphold a decision on the ground that any error involved is harmless only if it can conclude, without usurping the jury’s fact-finding function, ‘that the error did not influence the jury[] or had but slight effect.’” *Id.* (alteration in original) (quoting *Clay v. Commonwealth*, 262 Va. 253, 260, 546 S.E.2d 728 (2001)). “To reach this

Appendix B

conclusion, the evidence of guilt must be so overwhelming that it renders the error insignificant by comparison such that the error could not have affected the verdict.” *Commonwealth v. Kilpatrick*, 301 Va. 214, 217, 876 S.E.2d 177 (2022).

In this case, first, the purported character evidence was introduced by the defense and was properly before the jury, irrespective of whether the character evidence instruction was error. *Cf. Gravelly v. Commonwealth*, 13 Va. App. 560, 564, 414 S.E.2d 190, 8 Va. Law Rep. 1978 (1992) (holding that the Commonwealth’s improper examination of defendant’s witness was not harmless error because the jury would not have heard the evidence but for the cross-examination). Since there was no other evidence presented that could be viewed as character evidence, the instruction did not harm Colie.

Second, for the same reasons the evidence was more than sufficient to support Colie’s conviction, *see supra*, any error in giving Instruction 7 had, at most, “but slight effect” on the jury. *Graves*, 65 Va. App. at 712. To reiterate, the elements of unlawful discharge are that the defendant discharged a firearm within an occupied building, he did so in a manner as to endanger the live or lives of such person or persons, and he did so unlawfully. Code § 18.2-279. Here, Colie testified that Cook never said that he would hurt him and that Cook did not threaten him verbally. He also testified that Cook never touched him and that he “initiated physical contact with [Cook] first.” Colie did not try to get mall security or the police to help him. The video of the interaction showed that Colie shot Cook only

Appendix B

around 20 seconds after the interaction began and that there were other people to whom Colie could have sought help. Further, the evidence showed Colie's gunshot hit Cook in the upper left abdomen and damaged his bowel and liver. The weight of this evidence makes any error by the circuit court in giving Instruction 7 "insignificant by comparison." *Kilpatrick*, 301 Va. at 217. Accordingly, even assuming that the court erred, any error was harmless.

CONCLUSION

For the foregoing reasons, the circuit court's judgment is affirmed.

Affirmed.

25a

**APPENDIX C — SENTENCING ORDER OF THE
VIRGINIA CIRCUIT COURT OF LOUDOUN
COUNTY, FILED MARCH 15, 2024**

**VIRGINIA: IN THE CIRCUIT COURT OF
LOUDOUN COUNTY**

**FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 107**

CRIMINAL NO.: 38492-02

Hearing Date: DECEMBER 21, 2023

Judge: MATTHEW P. SNOW

COMMONWEALTH OF VIRGINIA

v.

ALAN WALTER COLIE

SENTENCING ORDER

This case came before the Court for sentencing of the Defendant, who was present in the custody of the Sheriff and also came his attorneys, **Adam Pouilliard** and **Tabatha Blake**. The Commonwealth was represented by **Eden Holmes**, Assistant Commonwealth's Attorney.

This matter came on this day for sentencing by Order of this Court entered November 1, 2023.

Appendix C

On September 28, 2023, the Defendant was found guilty by a jury of the following offense:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
38000-02	Unlawful Discharge of a Firearm in an Occupied Dwelling (F)	April 22, 2023	§18.2-279

The Presentence investigation Report, was received by this Court in the manner prescribed by law together with additional evidence in mitigation and extenuation, and the Court heard argument by counsel for the Defendant and by the attorney for the Commonwealth.

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary Sentencing Guidelines and the guidelines worksheets, as amended. The Sentencing Guidelines worksheets, as amended, and the written explanation of any departure from the guidelines are ordered filed as a part of the record in these cases.

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

Appendix C

In considering all of the above, the Court **SENTENCES** the Defendant to **TIME SERVED** for the felony conviction of **Unlawful Discharge of a Firearm in an Occupied Dwelling**, as contained in Count Three (3) of the Indictment.

Postrelease Supervision. Pursuant to Virginia Code § 19.2-295.2 (A), the Court imposes a term of **six (6) months** incarceration. The Court suspends the aforesaid **six (6) months** and places the Defendant **six (6) months** postrelease supervision to commence upon release from incarceration. The period of postrelease supervision shall be under the supervision and review of the Virginia Parole Board. The Defendant shall comply with all the rules and requirements set by the Virginia Parole Board.

It is hereby **ORDERED** that the Defendant shall not posse any firearms or ammunition. The Defendant shall surrender his Concealed Handgun Permit, forthwith, and his Concealed Handgun Permit shall be revoked. It is further

ORDERED that the Defendant is to pay the costs in these proceedings to the Clerk of the Court on or before December 21, 2024.

Pursuant to Virginia Code Section §19.2-310.2 and §19.2-310.3 the Defendant is **ORDERED** to cooperate fully and promptly in providing information and permitting fingerprinting and/or sampling of blood, tissue, or saliva as required. Thereupon the Court and the Defendant endorsed the Order for fingerprinting and/or DNA analysis to be taken.

28a

Appendix C

The Court advised the Defendant of his right to appeal from this case.

The Defendant is remanded to the custody of the Sheriff.

The Clerk is directed to forward a copy of this Order, forthwith, to the Office of the Commonwealth's Attorney, to counsel for the Defendant, to the Loudoun County Adult Detention Center and to the Virginia Parole Board.

ENTERED THIS 15th DAY OF MARCH, 2024

/s/ Matthew P. Snow
MATTHEW P. SNOW, JUDGE

IDENTIFICATION:

Alias: **unknown**

SSN: XXX-XX-2143 DOB: XX/XX/XXXX **Sex: M**

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: time served

TOTAL SENTENCE SUSPENDED: none

TOTAL SENTENCE TO SERVE: time served

29a

**APPENDIX D — TRIAL ORDER OF THE
COMMONWEALTH OF VIRGINIA IN THE
CIRCUIT COURT OF LOUDOUN COUNTY,
DATED OCTOBER 4, 2023**

IN THE COMMONWEALTH OF VIRGINIA
OF THE CIRCUIT COURT OF LOUDOUN COUNTY

JUDGE: MATTHEW P. SNOW

CRIMINAL NO.: 38492-00 THRU -02

COMMONWEALTH OF VIRGINIA

v.

ALAN WALTER COLIE

Social Security Number: XXX-XX-2143

Date of Birth: XX/XX/XXXX

Hearing Dates: September 25-28, 2023

Hearing Type: Jury Trial

Original Charge Descriptions:

Case No. 38492-00 **Aggravated Malicious
Wounding (F)**

Case No. 38492-01 **Use of Firearm in Commission
of a Felony (F)**

30a

Appendix D

Case No. 38492-02 **Maliciously Discharge
Firearm, Missile in/at
Occupied Dwelling (F)**

Statute/Ordinance Violations Charged:

Case No. 38492-00 **Virginia Code Section §18.2-51.2**

Case No. 38492-01 **Virginia Code Section §18.2-53.1**

Case No. 38492-02 **Virginia Code Section §18.2-279**

Alleged Offense Date: On or about April 2, 2023, in all
counts

Conviction Offense Description:

Case No. 38492-02 **Unlawful Discharge of a
Firearm in an Occupied
Dwelling (F)**

Statute/Ordinance Violation Conviction:

Case No. 38492-02 **Virginia Code Section §18.2-279**

Commencing Status of Defendant: In Custody

Concluding Status of Defendant: In Custody

*Appendix D***ORDER**

On the above date came **Pamela Jones**, Deputy Commonwealth's Attorney **Eden Holmes** Assistant Commonwealth Attorney; also came **Adam Pouilliard, Esq.** co-counsel for the Defendant and **Tabatha Blake, Esq.**, co-counsel for the Defendant. The Defendant, **ALAN WALTER COLIE**, who stands charged in an Indictment of the felonies described above, appeared before the bar of this Court in the custody of the Sheriff.

This case came on this day for a jury trial, at the request of the Defendant by previous Order of this Court entered on May 9 2023.

The Defendant was arraigned outside of the presence of a jury, as charged in the Indictment in this case and entered pleas of not guilty to the charge of: **Aggravated Malicious Wounding**, a felony as contained in Count One (1) of the Indictment (Case Number 38492-00); **Use of a Firearm in Commission of a Felony** a felony, as contained in Count Two (2) of the Inditment (Case Number 38492-01)· and **Maliciously Discharge a Firearm in/at Occupied Dwelling**, a felony as contained in Count Three (3) of the Indictment (Case Number 38492-02).

The Court ordered without objection that two (2) alternate jurors would be impaneled as part of the jury to hear the case, and therefore twenty-four (24) qualified jurors free from exception would need to be impaneled prior to each side exercising five (5) peremptory strikes.

Appendix D

Beginning at approximately 9:50 A.M., Voir Dire was conducted of venireman in two (2) groups. Following strikes for cause and strikes by random lot, the Court then impaneled twenty-four (24) jurors free from exception for the trial of the Defendant. Whereupon the attorneys for the Commonwealth and the attorneys for the Defendant each alternately exercised their rights to strike the names of five (5) veniremen each, as provided by law. The remaining fourteen (14) jurors, two (2) being alternates constituting the jury for the trial of the Defendant were sworn. Thereafter, the identity and order of the two (2) alternate jurors were established by lot in the presence of both parties at sidebar, without objection.

The Court admonished each member of the jury not to discuss this case with anyone, not to seek or receive any information about this case from the news media or any other sources during recesses from this case and instructed the jurors on note taking and that upon every recess the notes would remain in the courtroom.

At approximately 4:26 P.M., the jury was excused for the evening. Prior thereto, the Court admonished each member of the jury not to discuss this case with anyone, not to receive any information about this case from the news media or any other sources and directed each member of the jury to return, promptly at 9:00 A.M. on September 26, 2023.

And the Defendant was remanded to the custody of the Sheriff.

Appendix D

On the **26th day of September, 2023, at 9:02 A.M.**, came all counsel and the Defendant who came to the bar in the custody of the Sheriff.

At approximately 9:05 A.M., it came to the Court's attention that one (1) juror had not appeared as a result of a health issue and was not able to continue serving. The juror was excused from the jury, for cause without objection, and the first alternate juror replaced the excused juror.

Thereafter the remaining thirteen (13) members of the jury, one (1) being an alternate, were brought into the courtroom. The Court inquired of the jurors if any of them had discussed the case with anyone or received any outside information relative to this case. The jurors advised the Court on the record, that they had not discussed the case with anyone nor received any such information.

At approximately 9:15 A.M., opening statements began. After opening statements, the Commonwealth presented evidence for its case-in-chief.

At approximately 3:33 P.M., the Commonwealth rested its case-in-chief.

At approximately 3:48 P.M. the attorney for the Defendant moved the Court to strike the Commonwealth's evidence with respect to the charges alleged in the Indictment. The Court, based upon argument by counsel and for the reason stated on the record, ***denied*** the Defendant's motion(s) to strike the Commonwealth's evidence. The Court noted the Defendant's exception(s).

Appendix D

At approximately 4:32 P.M., the jury was exeused for the evening. Prior thereto, the Court admonished each member of the jury not to discuss this case with anyone, not to receive any infomation about this case from the news media or any other source and directed each member of the jury to return promptly at 10:00 A.M. on September 27, 2023.

And the Defendant was remanded to the custody of the Sheriff.

On the **27th day of September, 2023 at 9:00 A.M.**, came all counsel and the Defendant, who came to the bar in the custody of the Sheriff, outside the presence of the jury, to address various motions *in limine* that had previously been deferred.

Counsel for the Defendant renewed the Motion to Admit Prior Act of Violence previously filed on July 27 2023. This motion was originally heard on August 10, 2023 and deferred to the trial Judge pursuant to the Order of this Court entered on September 1, 2023. Following proffers of testimony and argument from the parties, the Court **grants in part and denies in part** the Defendant's Motion to Admit Prior Acts of Violence in regard to any testimony provided by witnesses Keith Bannister and/or Brandi Bannister. For the reasons stated on the record it is hereby

ORDERED, pursuant to Rule 2:404(a)(2), as well as Rule 2:607(a)(vii), that the defense witnesses, Keith Bannister and/or Brandi Bannister are **permitted** to offer

Appendix D

limited testimony of prior acts of “violence, aggression or turbulence,” of the victim relative to alleged actions of the victim that were “invading of personal space.” Such witnesses and the defense are **prohibited** from mentioning, arguing or presenting evidence that one or both such witnesses were “scared feared or felt threatened for their safety.” The Court noted the exception of the parties to the rulings.

Thereafter, the Commonwealth renewed her Motion in limine to Prohibit Defendant’s Proposed Expert Opinion Testimony previously filed herin on August 1, 2023 and September 7, 2023, respectively. The first such motion was originally heard on August 31, 2023 and any rulings deferred to the trial Judge pursuant to the Order of this Court entered on September 5, 2023; the same ruling was made with respect to the second such motion on September 21, 2023. The Defendant called their proffered expert witness and offered proposed testimony outside the presence of the jury. Following consideration of such testimony and the argument of the parties, the Court **grants in part and denies in part** the Commonwealth’s Motion in limine to Prohibit Defendant’s Proposed Expert Opinion Testimony. For the reasons stated on the record it is hereby

ORDERED that the defense witness Brian O’Donnell, is recognized as an expert in the areas of 1) Threat assesment; 2) Stress Impact on Executive Cognitive Functioning; and 3) Training for Limiting or Avoiding Violent Interactions, over the objection of the Commonwealth. The defense expert witness is **permitted**

Appendix D

to offer expert opinion within those limited areas, if elicited. The defense expert witness is **prohibited** from mentioning or presenting opinion evidence regarding the victim Tanner Cook and any alleged threats or nonverbal communication which could be perceived as a threat and/or other opinion evidence regarding the events of April 2, 2023. The exception of the parties to the Court's rulings is noted.

At approximately 1:05 P.M. came all thirteen (13) members of the jury one (1) being an alternate. The Court inquired of the jurors if any of them had discussed the case with anyone or received any outside information relative to this case. The jurors advised the Court, on the record, that they had not discussed the case with anyone nor received any such information.

Thereafter, the Defendant by counsel, presented evidence for the defense case-in-chief.

At approximately 3:17 P.M. the Defendant rested his case-in-chief, and the Commonwealth presented no rebuttal evidence.

At approximately 3:25 P.M., the jury was excused for the evening. Prior thereto, the court admonished each member of the jury not to discuss this case with anyone, not to receive any information about this case from the news media or any other sources and directed each member of the jury to return, promptly at 9:00 A.M. on September 28, 2023.

Appendix D

At approximately 3:59 P.M., counsel for the Defendant renewed his motion to strike the Commonwealth's evidence. The Court, based upon argument by counsel and for the reason stated on the record ***denied*** the Defendant's motion to strike the Commonwealth's evidence. The Court noted the Defendant's exceptions.

And the Defendant was remanded to the custody of the Sheriff.

On the **28th day of September 2023, at 9:02 A.M.** came all counsel and the Defendant who came to the bar in the custody of the Sheriff. The Court shared its rulings related to the jury instructions previously proposed by the parties and noted the exceptions to the Court's rulings.

At approximately 9:32 A.M. came all thirteen (13) members of the jury, one (1) being an alternate. The Court inquired of the jurors if any of them had discussed the case with anyone or received an outside information relative to this case. The jurors advised the Court, on the record, that they had not discussed the case with anyone nor received an such information.

At approximately 9:36 A.M. the Court gave the jurors the applicable instructions of law for the case by means of the approved jury instructions. Ther after, each party presented their closing arguments to the jury.

At approximately 11:21 A.M. after hearing the evidence the instruction of the Court and argument of counsel, the Court excused the one (1) alternate juror with the thanks or the Court.

Appendix D

The remaining twelve (12) jurors retired to the jury room with the instructions of the Court to consider their verdicts.

At approximately 4:58 P.M. the Jury returned their verdicts in open Court in the following words:

Count One (1), Case Number 38492-00 (Aggravated Malicious Wounding): **“We the jury find the defendant not guilty. Andrew Ralston, Foreperson”**

Count Three (3), Case Number 38492-02 (Maliciously Discharge a Firearm in Occupied Building): **“We the jury find the defendant guilty of Unlawful Discharge of a Firearm in an Occupied Building, a lesser included offense, as charged. Andrew Ralston, Foreperson”**

Count Two (2), Case Number 38492-01 (Use of a Firearm in the Commission of Aggravated Malicious Wounding): **“We the jury find the defendant not guilty. Andrew Ralston, Foreperson”**

The Court asked if either party requested that the jury be polled as to the verdict, and the right to poll the jury was requested by the Commonwealth. Thereupon the jury was polled. Each juror affirmed his or her verdicts in open court.

The Court excused the jury, with the thanks of the Court.

The Court enters judgment in accordance with the

Appendix D

verdict of the jury and finds the Defendant, **ALAN WALTER COLIE**:

Not guilty of Aggravated Malicious Wounding, a felony, as contained in Count One (1) of the Indictment (Case Number 38492-00); and

Not guilty of Use of a Firearm in Commission of a Felony, a felony, as contained in Count Two (2) of the Indictment (Case Number 38492-01).

It is **ORDERED** that the charges of **Aggravated Malicious Wounding**, a felony, as contained in Count One (1) of the Indictment (Case Number 38492-00), and **Use of a Firearm in Commission of a Felony**, a felony, as contained in Count Two (2) of the Indictment (Case Number 38492-01) are hereby **dismissed**.

Furthermore, the Court enters judgment in accordance with the verdict of the jury and finds the Defendant, **ALAN WALTER COLIE**:

Guilty of Unlawful Discharge of a Firearm in an Occupied Building, a felony as contained in Count Three (3) of the Indictment (Case Number 38492-02).

Whereupon counsel for the Defendant rally moved the Court to set aside the Jury verdict with respect to the guilty verdict tendered in Count Three (3) of the Indictment (Case Number 38492-02) on the charge of **Unlawful Discharge a Firearm in an Occupied Building**. Said oral motion was objected to by the Commonwealth.

Appendix D

The Court hereby **ORDERED** that this case be continued to **October 19, 2023 at 1:00 P.M.** for hearing on the Defendant's Motion to Set Aside Jury Verdict Counsel are directed to file any written motion(s) and briefs on or before October 10, 2023.

A sentencing hearing is scheduled for **December 21, 2023 at 10:00 a.m.** for one (1) hour. Should either party have a conflict with such scheduling, they may file an appropriate motion.

It is **ORDERED** that the Defendant cooperate fully with the requests for information made by the probation officer, who is directed to conduct a thorough investigation and to file a **Pre-Sentence Report** and **Virginia Sentencing Guidelines** with the Court, **five (5) days prior to sentencing** as required by law. Thereupon the Defendant endorsed, and the Court entered an Order directing the preparation of a Pre-Sentence Report and Virginia Sentencing Guidelines, and the Clerk provided a copy of this Order to the Adult Probation and Parole Office.

Whereupon the proceedings were adjourned and the Defendant was remanded to the custody of the Sheriff.

The Clerk is directed to forward a copy of this Order forthwith, to the Office of the Commonwealth Attorney, to counsel for the Defendant, to the Office of Adult Probation and Parole and to the Loudoun County Adult Detention Center.

41a

Appendix D

ENTERED THIS 4th DAY OF OCTOBER, 2023

/s/ Mathew P. Snow

MATHEW P. SNOW, JUDGE

**APPENDIX E — EXCERPTS OF COLIE OPENING
BRIEF OF THE VIRGINIA COURT OF APPEALS**

IN THE COURT OF APPEALS OF VIRGINIA

Record No. 0874-24-4

ALAN WALTER COLIE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF ALAN COLIE (APPELLANT)

Daniel H. Goldman, VSB # 82144
The Law Office of Daniel Goldman
421 King Street, Suite 505
Alexandria, Virginia 22314
(202) 677-5709 – Phone
(833) 523-2310 – Facsimile
dan@dangoldmanlaw.com
Counsel for Mr. Colie

* * *

must correct it and give it to the jury. *Fishback v. Commonwealth*, 260 Va. 104, 117 (2000); *Commonwealth v. Jerman*, 263 Va. 88, 93 (2002).

*Appendix E***b. Argument**

Mr. Colie's jury was misinstructed by Instruction 29, and Mr. Colie was thereby denied his rights to present a defense (self-defense), to due process of law, and to put the Commonwealth to its burden to prove the "unlawfulness" element beyond a reasonable doubt. U.S. Const. Amends. VI & XIV; Va. Const. Art. I, § 8; *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987).

The jury asked: "Regarding instruction #24, does self-defense come into play when determining if the act was done unlawfully? Does self-defense nullify the act being considered unlawful?" R.431. The defense asked the court to tell the jury: yes. The court instead responded: "You have been instructed on the law on the issue of self-defense (Instructions #10 and #11). Those instructions of law are not limited to any particular charge currently before you. Therefore, the Court refers you to the instructions of law already given." R.431.

"It is proper for a trial court to fully and completely respond to a jury's inquiry concerning its duties." *Marlowe v. Commonwealth*, 2 Va. App. 619, 625 (1986). It is error not to instruct when the jury may make findings based upon a mistaken belief of the law. *See Martin v. Commonwealth*, 218 Va. 4, 7 (1977) (*per curiam*). In this situation, a trial court must "give a direct and correct

* * *

Appendix E

presented in Instruction 25 the layout of the unlawful discharge option was textually identically to the option to find Mr. Colie not guilty; and very distinct from the formatting layout of the Malicious Discharge option. R.425.

The jury's question did not use the term "charge," it used the broader term "act." They asked whether self-defense legally applied to the non-charged "act" of unlawful discharge in Instruction 24. The judge effectively told them: no; self-defense applies only to **charges**. That was incorrect.

Significant instructional error in a criminal case violates the Constitution under general due process requirements. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (due process is violated where an "ailing instruction . . . so infected the entire trial that the resulting conviction violates due process") (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). In this case, the instructional error also deprived Mr. Colie of his constitutional right to present a defense, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (fundamental due process right to present a defense); *Massey v. Commonwealth*, 230 Va. 436, 442 (1985) (same); *Oliva v. Commonwealth*, 19 Va. App. 523, 526 (1995) (an accused has a "right 'to call for evidence in [the accused's] favor'" (quoting Va. Const. Art. I, § 8); and to self defense itself. *See District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.").

* * *

Appendix E

respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

480 U.S. at 233-34. The Petitioner in *Martin* made the same claim raised here, that the jury's instructions diluted the state's burden with regard to an "unlawfulness" element. However, in *Martin*, "unlawfulness" was not actually an element of the crime (murder) under Ohio state law. 480 U.S. at 233-34.

Here, in contrast to *Martin*, "unlawfulness" is clearly an element of the crime (unlawful discharge). Thus, the Commonwealth's burden of proof beyond a reasonable doubt was diluted by the trial court's failure to tell the jury "yes," self-defense does "come into play when determining if the act was done unlawfully." R.431.

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard is so fundamental that it "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *Winship*, 397 U.S. at 372 (Harlan, J.,

* * *

**APPENDIX F — EXCERPTS OF PETITION FOR
APPEAL OF THE SUPREME COURT OF VIRGINIA**

IN THE SUPREME COURT OF VIRGINIA

Court of Appeals Record No. 0874-24-4

Supreme Court of Virginia Record No. _____

ALAN WALTER COLIE

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR APPEAL

Meghan Shapiro	Daniel Goldman
Va. Bar No. 79046	Va. Bar No. 82144
Law Office of	Law Office of
Meghan Shapiro	Daniel Goldman
421 King Street, Suite 505	421 King Street,
Alexandria, VA 22314	Suite 505
703.915.9594	Alexandria, VA 22314
shapiro.meghan@gmail.com	(202) 677-5709
	dan@dangoldmanlaw.com

Counsel for Alan Colie

* * *

had an “affirmative duty to properly instruct [the] jury” thereon. Jiminez, 241 Va. at 250. That did not happen, and thus a new trial is necessary.

*Appendix F***II. The Circuit Court’s ruling on Instruction 29 also violated Mr. Colie’s constitutional right to present a defense, and diluted the Commonwealth’s burden of proof as to an element of the offense.**

Significant instructional error in a criminal case violates the Constitution under general due process requirements. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (due process is violated where an “ailing instruction . . . so infected the entire trial that the resulting conviction violates due process”) (*quoting Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). In this case, the instructional error also deprived Mr. Colie of his constitutional right to present a defense, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (fundamental due process right to present a defense); *Massey v. Commonwealth*, 230 Va. 436, 442 (1985) (same); *Oliva v. Commonwealth*, 19 Va. App. 523, 526 (1995) (an accused has a “right ‘to call for evidence in [the accused’s] favor’”) (*quoting* Va. Const. Art. I, § 8); and to self-defense itself. *See District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (“As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.”).

Instruction 29 created constitutional error for yet another reason: it relieved the Commonwealth of its burden to prove an element of unlawful discharge (unlawfulness). “Unlawful” is a necessary element of unlawful discharge. Here, the jury directly asked “does self-defense come into play when determining if the act was done unlawfully?” If any of the jurors were asking about Mr. Colie’s self-defense evidence, rather than the formal legal defense, the failure

Appendix F

to respond “yes” to that question effectively told the jury they did not need to consider Mr. Colie’s evidence in holding the prosecution to its burden to prove the “unlawfulness” element. That violates due process under *Martin v. Ohio*, 480 U.S. 228 (1987).

In *Martin*, the Supreme Court considered whether the state of Ohio violated the Due Process Clause by placing a burden on the accused to prove self-defense. In finding that the burden did not violate the constitution, the Court nonetheless made clear that Ohio could not instruct its juries not to consider the same self-defense evidence in holding the prosecution to its burden of proving the elements of their charge:

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State’s case, *i. e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*’s mandate. [] The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State’s proof of the elements of the crime.

480 U.S. at 233-34.

Appendix F

The Petitioner in *Martin* made the same claim raised here, that the jury's instructions diluted the state's burden with regard to an "unlawfulness" element. However, in *Martin*, "unlawfulness" was not actually an element of the crime (murder) under Ohio state law. 480 U.S. at 233-34. Here, in contrast to *Martin*, "unlawfulness" is clearly an element of the crime (unlawful discharge). Thus, the Commonwealth's burden of proof beyond a reasonable doubt was diluted by the trial court's failure to tell the jury "yes," self-defense does "come into play when determining if the act was done unlawfully." R.431.

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard is so fundamental that it "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (*quoting Winship*, 397 U.S. at 372 (Harlan, J., concurring)). Mr. Colie's jury received instructions that diluted this fundamental due process protection.

III. This Court should modify or explain *Reed v. Commonwealth*, 239 Va. 594 (1990), and recognize a necessary exception for guilty verdicts

* * *

as to guilt. *Smith v. Commonwealth*, 17 Va. App. 68, 71 (1993) ("Self-defense is an affirmative defense which the

Appendix F

accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt.”). It is not dissimilar from the duty to raise a reasonable hypothesis of innocence, which is also described as just another way of saying that the Commonwealth carries the burden of proof beyond a reasonable doubt. Self-defense is thus entitled to all of our highest protections in a criminal trial: those attendant the right to put the Commonwealth to its burden of proof; those attendant the right to present a defense; and those attendant the inherent right of self-defense specifically.

IV. Even without a new exception to *Reed*, this jury’s non-speculative finding of self-defense should place Mr. Colie’s claim within an existing exception under the U.S. Supreme Court’s jurisprudence about inconsistent verdicts.

This Court could, alternatively, find that this case falls within an existing exception to *Powell*, 469 U.S. at 69 n.8: “Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other.” In other words, a guilty verdict cannot stand when a jury’s verdict on another count per se excluded their legal ability to find guilt on this one.

This Court in *Reed* directly applied *Powell* to a case with predicate offenses, just like the facts of *Powell*. *Reed* could be read as limited to that

* * *

**APPENDIX G — EXCERPTS OF BRIEF IN
SUPPORT OF FOURTH MOTION TO SET A SIDE
THE VERDICT OF THE VIRGINIA CIRCUIT
COURT FOR LOUDOUN COUNTY; AND ORDER
OF THE CIRCUIT COURT FOR LOUDOUN
COUNTY OF MAY 9, 2024**

VIRGINIA:

IN THE CIRCUIT COURT FOR
LOUDOUN COUNTY

No. CR38492-02

COMMONWEALTH

v.

ALAN W. COLIE

Before the Hon. Judge M. Snow

**BRIEF IN SUPPORT OF FOURTH MOTION TO
SET ASIDE THE VERDICT**

Mr. Alan W. Colie, by counsel, respectfully moves this Court to set aside the jury’s verdict in the above-captioned matter and order a new trial. This Motion raises a federal constitutional claim that the jury was confused by Instruction 29, and that Mr. Colie was thereby denied his rights to present a defense, to due process of law, and to put the Commonwealth to its burden to prove the “unlawfulness” element beyond a reasonable doubt. U.S. Const., Amends. VI & XIV; Va. Const. Art. I, § 8; *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987).

Appendix G

Instruction 29 caused a constitutional error in Mr. Colie's trial. Because the jury was allowed to believe that Mr. Colie's self-defense evidence did not "nullify the act [unlawful discharge] being considered unlawful," and that his self-defense evidence did not "come into play when determining if the act [unlawful discharge] was done unlawfully," see *Instruction 29*, several of his constitutional rights were violated.

Significant instructional error in a criminal case violates the Constitution under general due process requirements. See *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (due process is violated where an "ailing instruction . . . so infected the entire trial that the resulting conviction violates due process") (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). In this case, the instructional error also deprived Mr. Colie of his constitutional right to present a defense, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (fundamental due process right to present a defense); *Massey v. Commonwealth*, 230 Va. 436, 442 (1985) (same); *Oliva v. Commonwealth*, 19 Va. App. 523, 526 (1995) (an accused has a "right 'to call for evidence in [the accused's] favor'" (quoting Va. Const. Art. I, § 8); and to self-defense itself. See *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.").

But Instruction 29 created a constitutional error for another, even more fundamental reason: it relieved the Commonwealth of its burden to prove an element of unlawful discharge – unlawfulness. In Virginia law,

Appendix G

“unlawful” is an express element of unlawful discharge. *See Instruction 24*. Here, the jury directly asked “Regarding Instruction #24, does self-defense come into play when determining if the act was done unlawfully?” and “Does self-defense nullify the act being considered unlawful?” The failure to respond “yes” to these questions was a due process violation because it diluted the Commonwealth’s burden of proof to prove “unlawful” beyond a reasonable doubt. *Martin v. Ohio*, 480 U.S. 228, 23334 (1987).

In *Martin*, the Supreme Court considered whether the state of Ohio violated the Due Process Clause by placing a burden on the accused to prove self-defense. In finding that the burden-placement did not violate the constitution the Court nonetheless made clear that Ohio could not instruct its juries not to consider the same self-defense evidence in holding the prosecution to its burden of proving the elements of their charge:

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State’s case, *i. e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and

* * *

54a

Appendix G

VIRGINIA:

IN THE CIRCUIT COURT FOR
LOUDOUN COUNTY

CR00038492-02

COMMONWEALTH OF VIRGINIA,

v.

ALAN W. COLIE,

Defendant.

Hearing Date: May 9, 2024

Hon. Matthew P. Snow

ORDER

On the above date came Eden Holmes, Assistant Commonwealth's Attorney, and Daniel Goldman, counsel for the Defendant. The Defendant, Alan W. Colie, waived his appearance in writing and appeared through counsel.

This case came on this day on Defendant's Third Motion to Set Aside the Verdict and Fourth Motion to Set Aside the Verdict.

The Court, after consideration of the written and oral arguments by counsel and for the reasons stated on the

55a

Appendix G

record, denies the Defendant's Third Motion to Set Aside the Verdict and Fourth Motion to Set Aside the Verdict.

The Clerk is directed to forward a copy of this Order, forthwith, to the Office of the Commonwealth's Attorney and to counsel for the Defendant.

ENTERED THIS 9TH DAY OF MAY, 2024.

/s/ Matthew P. Snow
MATTHEW P. SNOW, JUDGE

56a

APPENDIX H — COURT EXHIBIT 4

COURT EXHIBIT NO. 4
CASE NO. 3849200 Thru -02
DATE 9/28/23
JUDGE'S INITIALS MPS

Regarding instruction #24, does self-defense come into play when determining if the act was done unlawfully?

Does self-defense nullify the act being considered unlawful?

s/ Andrew Ralston
ANDREW RALSTON

57a

**APPENDIX I — JURY INSTRUCTIONS 10, 11
AND 29**

INSTRUCTION NO. 10

SELF-DEFENSE

If you believe that the defendant, Alan Colie, was without fault in provoking or bringing on the fight, and you further believe that:

1. he reasonably feared, under the circumstances as they appeared to him, that he was in imminent danger of bodily harm; and
2. he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm,

then he acted in self-defense, and you shall find the defendant not guilty.

58a

Appendix I

INSTRUCTION NO. 11

SELF-DEFENSE- STANDARD

The defendant, Alan Colie, asserts he was acting in self-defense when he shot Tanner Cook.

If, after hearing all of the evidence, you have a reasonable doubt as to whether or not Mr. Colie acted in self-defense, then you shall find the defendant not guilty.

Appendix I

INSTRUCTION NO. 24

MALICIOUS DISCHARGE OF A FIREARM

The defendant, Alan Colie, is charged with the crime of Maliciously Discharging a Firearm Within an Occupied Building.

The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant discharged a firearm within a building occupied by one or more persons; and
- (2) That the firearm was discharged in such a manner as to endanger the life or lives of such person or persons; and
- (3) That the act was done with malice.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of Maliciously Discharging a Firearm Within an Occupied Building.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two (2) elements of the crime as charged, but that the act was done unlawfully and not maliciously, then you shall find the defendant guilty of Unlawfully Discharging a Firearm Within an Occupied Building.

60a

Appendix I

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two (2) elements of the crime, then you shall find the defendant not guilty.

61a

Appendix I

INSTRUCTION NO. 29

COURT RESPONSE

The inquiry submitted to the Court was:

“Regarding instruction #24, does self-defense come into play when determining if the act was done unlawfully? Does self-defense nullify the act being considered unlawful?”

The Court’s response:

“You have been instructed on the law on the issue of self-defense (Instructions #10 and #11). Those instructions of law are not limited to any particular charge currently before you.

Therefore, the Court refers you to the instructions of law already given.”

**APPENDIX J — VERDICT
FORMS OF JURY A, B AND C**

INSTRUCTION NO. A

**FINDING (AGGRAVATED MALICIOUS
WOUNDING)**

We the jury find the defendant, Alan Colie, guilty of Aggravated Malicious Wounding of Tanner Cook as charged.

Foreperson

OR

We the jury find the defendant guilty of Malicious Wounding of Tanner Cook, a lesser included offense, as charged.

Foreperson

OR

We the jury find the defendant guilty of Unlawful Wounding of Tanner Cook, a lesser included offense, as charged.

Foreperson

OR

63a

Appendix J

We the jury find the defendant guilty of Assault and Battery of Tanner Cook, a lesser included offense, as charged.

Foreperson

OR

We the jury find the defendant not guilty.

s/ Andrew Ralson

Foreperson

64a

Appendix J

INSTRUCTION NO. B

FINDING (MALICIOUS DISCHARGE OF A
FIREARM)

We the jury find the defendant, Alan Colie, guilty of
Malicious Discharge of a Firearm in an Occupied Building,
as charged.

Foreperson

OR

We the jury find the defendant guilty of Unlawful
Discharge of a Firearm in an Occupied Building, a lesser
included offense, as charged.

s/ Andrew Ralson
Foreperson

OR

We the jury find the defendant not guilty.

Foreperson

65a

Appendix J

INSTRUCTION NO. C

FINDINGS (USE OF A FIREARM IN FELONY)

We the jury find the defendant, Alan Colie, guilty of Use of a Firearm in the Commission of Aggravated Malicious Wounding, as charged.

Foreperson

OR

We the jury find the defendant, Alan Colie, guilty of Use of a Firearm in the Commission of Malicious Wounding (a lesser included offense), as charged.

Foreperson

OR

We the jury find the defendant not guilty.

s/ Andrew Ralson

Foreperson