No. 26-

IN THE

Supreme Court of the United States

DARRYL BROWN,

Petitioner,

v.

LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK, ANTHONY J. ANNUCCI, IN HIS OFFICIAL CAPACITY AS THE ACTING COMMISSIONER FOR THE NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, MICHAEL KIRKPATRICK, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE CLINTON CORRECTIONAL FACILITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Americans have an "individual right to possess and carry weapons in case of confrontation." *D.C. v. Heller*, 554 U.S. 570, 592 (2008). Consistent with this right, may a State hold, as a matter of law, that the defensive display of a lawfully-possessed firearm — held at the defender's side, and not pointed at or used to threaten his assailant — is itself the threatened use of deadly force that makes him the "initial aggressor" as a matter of law and forfeits a justification defense otherwise available under state law?

2. Where state law makes justification a defense that the prosecution must disprove beyond a reasonable doubt, does it violate due process to withhold that defense from a jury's consideration as a matter of law solely because the defendant exercised his Second Amendment right to display a firearm as a deterrent in self-defense?

LIST OF PARTIES

Petitioner is Darryl Brown. Respondents are Letitia James, Anthony J. Annucci, and Michael Kirkpatrick. No corporate parties are involved in this case. The caption of the case contains the names of all parties.

RELATED PROCEEDINGS

Darryl Brown v. Letitia James, Second Circuit Court of Appeals, No. 23-7864. Order denying request for panel rehearing and rehearing *en banc*, entered on August 14, 2026.

Darryl Brown v. Letitia James, Second Circuit Court of Appeals, No. 23-7864. Opinion denying appeal of denial of petition for habeas corpus, entered on May 7, 2026.

Darryl Brown v. Letitia James, Second Circuit Court of Appeals, No. 23-7864. Order granting certificate of appealability, entered on May 10, 2024.

Darryl Brown v. Letitia James, District Court for the Southern District of New York, No. 20-CV-10491. Opinion and order adopting magistrate's recommendation in part and dismissing petition for habeas corpus, entered on July 5, 2023.

Darryl Brown v. Letitia James, District Court for the Southern District of New York, No. 20-CV-10491. Magistrate's report recommending denial of petition for habeas corpus, entered on August 31, 2021.

People v. Darryl Brown, N.Y. Court of Appeals. Decision denying leave to appeal, entered on November 12, 2019.

People v. Darryl Brown, N.Y. Court of Appeals. Decision denying motion for reargument, entered on September 12, 2019.

People v. Darryl Brown, New York Supreme Court, Appellate Division, First Department. Opinion on remand affirming conviction, entered on June 11, 2019.

People v. Darryl Brown, N.Y. Court of Appeals. Opinion reversing and remanding to Appellate Division, entered on May 7, 2019.

People v. Darryl Brown, New York Supreme Court, Appellate Division, First Department. Opinion reversing conviction, entered February 20, 2018.

People v. Darryl Brown, New York Supreme Court, Criminal Division, County of Bronx, No. 0971-14. Verdict entered on September 30, 2016.

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OPINIONS AND ORDERS BELOW

The order of the Court of Appeals for the Second Circuit denying the request for panel rehearing and rehearing *en banc* is unpublished and appears in Petitioner's Appendix as Appendix I. The opinion of the Court of Appeals for the Second Circuit denying the appeal of the denial of petition for habeas corpus appears in Petitioner's Appendix as Appendix A and is published at *Brown v. James*, 175 F.4th 361 (2d Cir. 2026). The order of the Court of Appeals for the Second Circuit granting a certificate of appealability is unpublished and appears in Petitioner's Appendix as Appendix H.

The opinion and order of the District Court for the Southern District of New York adopting the Magistrate's recommendation in part and dismissing the petition for habeas corpus appears in Petitioner's Appendix as Appendix G and is available at *Brown v. James*, 2023 WL 4351194 (S.D.N.Y. Jul 5, 2023). The Magistrate's report recommending denial of the petition for habeas corpus appears in Petitioner's Appendix as Appendix F and is available at *Brown v. James*, 2021 WL 11593759 (S.D.N.Y. Aug 31, 2021).

The opinion of the New York Supreme Court Appellate Division, First Department, reversing the conviction appears in Petitioner's Appendix as Appendix C and is published at *People v. Brown*, 160 A.D.3d 39 (2018). The opinion of the New York Court of Appeals reversing and remanding appears in Petitioner's Appendix as Appendix B and is published at *People v. Brown*, 33 N.Y.3d 316 (2019). The opinion of the Appellate Division on remand appears in Petitioner's Appendix as Appendix D and is published at *People v. Brown*, 173 A.D.3d 471 (2019). The order of the New

York Court of Appeals denying the motion for reargument appears in Petitioner's Appendix as Appendix E and is available at *People v. Brown*, 33 N.Y.3d 1136 (2019). The order of the New York Court of Appeals denying leave to appeal from the Appellate Division on remand is available at *People v. Brown*, 34 N.Y.3d 1015 (2019).

JURISDICTION

The District Court had jurisdiction over this habeas petition under 28 U.S.C. § 1331 and 28 U.S.C. § 2254, and denied the petition on July 5, 2023. 113a.[1] The Second Circuit had jurisdiction under 28 U.S.C. § 1291, and issued a certificate of appealability under 28 U.S.C. § 2253(c) on May 10, 2024. 121a. The Second Circuit denied Petitioner's appeal on May 7, 2026, and denied his request for panel rehearing and rehearing *en banc* on August 14, 2026. 1a, 123a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment provides: "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." U.S. Const. amend. II.

The Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . " U.S. Const. amend. V.

[1] References to __a are to Petitioner's Appendix.

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. Const. amend. VI.

The Fourteenth Amendment provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254.

N.Y. Penal Law § 35.00 provides: "In any prosecution for an offense, justification, as defined in sections 35.05 through 35.30, is a defense."

N.Y. Penal Law § 35.15 provides, in relevant part, that a person "may . . . use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force

by such other person," unless "[t]he actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force." § 35.15(1), (1)(b).

It further provides that "[a] person may not use deadly physical force upon another person under circumstances specified in subdivision one unless . . . [t]he actor reasonably believes that such other person is using or about to use deadly physical force," and that, even then, the actor "may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating," subject to exceptions not applicable here. § 35.15(2)(a).

N.Y. Penal Law § 10.00(11) defines "deadly physical force" as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."

STATEMENT OF THE CASE

A. The shooting

In March 2014, Darryl Brown, an off-duty corrections officer, returned home to his apartment in the Bronx that he shared with his adult daughter. 40a, 44a-45a. He encountered her twenty-one year-old boyfriend, Vonde Cabbagestalk, and another man in the lobby just outside his door. *Id*. An altercation ensued, culminating in Brown fatally shooting Cabbagestalk with his lawfully-possessed service firearm. *Id*.

The key witness to the shooting was Raymond Wolf, a postal worker delivering mail in the lobby. 32a, 142a-144a. Wolf observed Brown and Cabbagestalk become involved in an argument; he heard Brown telling the younger man "stay away from my daughter, don't come around here," and Cabbagestalk responding, "you can't tell me where to be." 150a, 159a. Wolf saw Cabbagestalk, who was taller than Brown, "getting in [Brown's] face a little bit," as if "trying to back him down," while the third man was "trying to break it up" and telling Cabbagestalk to "chill, relax." 151a. Cabbagestalk then "started swinging" at Brown, trying to hit his face with a closed fist, at least three times. 152a-153a, 159a. Brown never punched back, but "after the tussling" and after the first swing, Wolf saw a gun in Brown's hand. 154a, 177a. Wolf did not see the gun before that point. 156a-158a. Brown was holding the gun "at an angle" at his waist, "by his body." 155a-156a. Wolf did not see the gun "pointed in the direction of [Cabbagestalk] and threatening him." 180a.

Wolf heard Cabbagestalk say, "you going to pull a gun out, you better use it." 154a. As he said this, Cabbagestalk "swiped" at the gun in Brown's hand. 152a, 163a. The third man, who up to this point had been holding Cabbagestalk back, stepped away from the conflict. 160a. Wolf at this point also began to retreat up the stairs from the lobby of the building to a landing. 160a-161a, 164a. Wolf observed Brown moving or leaning back from the swings directed at him by Cabbagestalk as the shot went off. 164a-165a. Cabbagestalk got to within two feet of Brown. 182a. Wolf heard the gunshot, but did not see it. 164a. No weapon was found on Cabbagestalk's body,

but Wolf saw the third man "hovering" over Cabbagestalk's body on the ground after he was shot. 185a-186a.

B. Trial

In September and October 2016, Brown was tried before a jury on charges of second-degree murder and first-degree manslaughter. 99a-100a. Wolf and two neighbors from the building testified.[2] 28a-29a. The third man, who restrained Cabbagestalk, was not identified at the time of trial and was not a witness. 29a.

At the close of the government's case, after argument by both sides, the judge made a preliminary ruling that he would not instruct the jury on justification, on the basis that "there is no reasonable person who will say the defendant was justified based on the record as it stands." 189a. Brown then called an expert to testify about the training that members of law enforcement receive regarding the use of firearms. 10a. After this witness, the judge reiterated that he would not charge the jury on justification. 194a. Notably, neither the prosecution nor the defense argued that the initial aggressor doctrine applied, and the trial court's decision was not based on the initial aggressor doctrine. 56a n. 9.

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[2] Two neighbors also observed parts of the conflict, but did not see the gun or the shooting from their vantage point, and their testimony was irrelevant to the threshold question before this Court of whether Brown's act of drawing his firearm made him the initial aggressor. 9a. One was inside her apartment and saw Brown and Cabbagestalk arguing in the hallway through her peephole before they passed out of view and toward the lobby. *Id*. The second stood outside glass doors at the front of the building, holding groceries and looking for her keys. *Id*. She also saw Brown and Cabbagestalk arguing, but they passed out of her view through the door before the shot. *Id*.

Brown proffered through counsel that he would testify that he was "in fear for his life," but did not wish to testify if no justification instruction would be given. 198a. The judge then warned Brown's lawyer that he was not to refer to justification or self-preservation in his closing argument, and that if he did so, the jury would be explicitly instructed not to consider whether Brown acted "in self defense or with justification." 209a. Brown's lawyer accordingly only argued lack of intent. 219a-220a. The prosecutor then told the jury in his closing that they would not be instructed about "justification, self defense, self preservation or anything else like that." 223a. He emphasized that justification was "not part of this case" and "not something for you to consider." *Id*.

The jury acquitted Brown of murder, but convicted him of manslaughter. 100a. Brown was later sentenced to eighteen years in prison. *Id*.

C. State appellate court proceedings

Brown appealed to the First Department of the Appellate Division, and in 2018 a three-justice majority overturned the conviction, with two justices dissenting. *People v. Brown*, 160 A.D.3d 39 (2018). 38a. The majority noted that in New York it is reversible error to fail to give a justification instruction "where the evidence, viewed in the light most favorable to the defendant, reasonably supports the defense." 45a-46a (citing *People v. Padgett,* 60 N.Y.2d 142, 144–145 (1983)).

The majority described the sequence of events as follows:

> After Cabbagestalk swung "a couple [of] times," Wolf noticed the older man holding a gun "at an angle" by his waist. The gun was not "pointed in [Cabbagestalk's] direction" or "threatening him," but was "[k]ind of by [the older man's] body. The third man stepped away, still trying to calm Cabbagestalk down, asking him to stop advancing toward the older

> man. Cabbagestalk, however, continued to swing at the older man's face three to four times, using both hands. At the same time, Cabbagestalk was "grabbing" for the gun, saying, "[Y]ou going to pull a gun out, you better use it." Wolf testified that the older man, who was not at all "hyper," "continued to backup" "[a]nd backup," "[a]nd backup" as Cabbagestalk "continued to approach him," "continued to swing at him," and "continue[d] to swipe at the weapon." Wolf described Cabbagestalk as being "about two feet [from] the older [man]," who was "leaning back," "moving from the swings."

42a. *See also* 51a ("defendant discharged his weapon only after a continued assault upon him where Cabbagestalk, who was younger and taller than defendant, advanced upon him, backed him down, threw multiple punches, grabbed at his gun and made what could reasonably be viewed as an overt threat to use the weapon against defendant.").

The majority noted the "escalating series of aggressive actions and verbal threats made by Cabbagestalk" and concluded that "a fair view of the evidence, considered in the light most favorable to defendant, shows that Cabbagestalk advanced to within arm's reach of defendant, took multiple swings at his face and tried to take his gun." 47a, 53a. "A jury," the majority wrote, "could reasonably find that defendant did not have to wait until Cabbagestalk actually grabbed the gun before defendant had the right to defend himself." 53a-54a.

The First Department majority noted that "the trial evidence shows that when defendant drew his weapon in the midst of Cabbagestalk's attack, he held it by his side, did not point it at Cabbagestalk, and did not threaten him. Based on this evidence, a jury could have reasonably concluded that by drawing his firearm, defendant did not use or threaten the imminent use of deadly physical force." 56a.

The majority strongly rejected the view, advanced by two dissenting justices, that Brown was not entitled to a justification charge because, by holding the gun he became the initial aggressor – both because it was not preserved and on the merits. 55a-57a. Under New York law, a person may use physical force reasonably believed to be necessary for defense against unlawful physical force, but not if "[t]he actor was the initial aggressor." N.Y. Penal Law § 35.15.

"Taken to its logical conclusion," the majority wrote, "the dissent's argument is that anytime someone draws a weapon during an encounter with an unarmed individual, he or she is not entitled, as a matter of law, to a justification charge, regardless of what subsequent threatening actions that individual takes. No case in our justification jurisprudence stands for such a sweeping proposition, especially where, as here, the weapon was lawfully possessed." 57a.

The State appealed to the Court of Appeals, New York's highest court (the "N.Y. Court of Appeals"), which reversed the First Department and remanded. *People v. Brown*, 33 N.Y.3d 316 (2019). 27a. The court noted that the "the imminent threat to use a gun against another is, necessarily, a threat of deadly physical force," such that the "first person to make such an imminent threat" becomes the initial aggressor. 33a-34a. Brown's "display of the gun," the court said, was a "deterrent precisely because it threatened the imminent use of deadly physical force." 34a. The court also claimed that "Mr. Cabbagestalk sought to swipe the gun only after Mr. Brown had first threatened the imminent use of deadly physical force by displaying his gun,

leaving Mr. Brown as the initial deadly force aggressor." 35a-36a. Because Brown was the initial aggressor, he had no right to a justification instruction. 37a.

On remand, the First Department affirmed Brown's conviction and sentence. *People v. Brown*, 173 A.D.3d 471 (2019). 92a. Brown filed a motion for reargument before the N.Y. Court of Appeals, which was denied. 95a. Challenging the court's interpretation of both the facts and the law, Brown's counsel wrote, "[t]he import of this Court's decision would be that anytime a person takes out a weapon in an effort to defend or protect his or her life, they would be deemed the 'initial aggressor,' and thereby lose the right to properly defend themselves." 127a. Leave to appeal again to the N.Y. Court of Appeals was also denied. *See* 34 N.Y.3d 1015.

D. Federal habeas proceedings

On December 11, 2020, Brown filed a petition for habeas corpus under 28 U.S.C. § 2254(d) in the United States District Court for the Southern District of New York, arguing that he was denied due process. 100a. Brown specifically protested that the N.Y. Court of Appeals had created "a new standard: that anyone who pulls out a gun waives his or her right to defend themselves thereafter—even if they fear being disarmed and killed. That cannot be the law." 131a. A magistrate judge recommended denying the petition, concluding that Brown was the initial deadly force aggressor and thus not entitled to a justification instruction under New York law, such that there could be no due process violation. 111a-112a.[3] The magistrate noted that,

[3] The magistrate judge concluded that Brown had fairly presented his federal habeas claim to the court, as required by AEDPA, and noted that the state did not contest exhaustion. 101a-102a.

"Petitioner introduced the use of deadly force in the case at bar by displaying a loaded gun," and, "[t]he fact that Petitioner did not aim his weapon at Cabbagestalk does not alter the analysis." 106a. The district court adopted the magistrate judge's recommendation. 113a.

The Second Circuit granted a certificate of appealability. 121a. In his Second Circuit appeal, Brown argued that, drawing all inferences in Brown's favor as New York law required, a justification instruction was required under New York law, and the N.Y. Court of Appeals decision violated his due process rights under *Cupp v. Naughten*, 414 U.S. 141 (1973). 14a-16a. He further argued that, to the extent that the N.Y. Court of Appeals decisions could be interpreted as a construction of New York law, the sweeping holding that displaying a firearm is automatically a threatened use of deadly physical force, making one the initial aggressor as a matter of law, "could not be squared with Supreme Court decisions holding that an individual has a Second Amendment right to carry a firearm for self-defense." 133a.

The Second Circuit affirmed the District Court's denial of the habeas petition. *Brown v. James*, 175 F.4th 361 (2d Cir. 2026). 1a. The Second Circuit considered itself "without power to second-guess" the principle established by the N.Y. Court of Appeals that "the imminent threat to use deadly force makes one an initial aggressor" as a matter of New York law. 17a-18a. It therefore focused its review to the conclusion by the N.Y. Court of Appeals "that Brown's action of drawing a gun, and holding it in a way that allowed it to be readily aimed and imminently fired, constituted. . . an imminent threat to use deadly force." 18a. The Second Circuit saw no error in the

N.Y. Court of Appeals' reading of "the key facts at issue . . . namely that Brown pulled out a gun and held it by his side," or in their "conclusion that in the context of this case—where the parties were in a heated argument that was starting to get physical—Brown's display of the gun, and then holding it at his waist ready to aim and fire in an instant, constituted a threat to imminently use deadly force." *Id.* The Second Circuit failed to address Wolf's trial testimony that Brown was not pointing the gun at Cabbagestalk nor threatening Cabbagestalk with the gun. 180a.

In response to Brown's protest that the N.Y. Court of Appeals had not considered the evidence in the light most favorable to him, as required by New York law, the Second Circuit distinguished two of its prior precedents in which it *had* "granted habeas relief on the grounds that New York state courts erroneously drew inferences against the defendant when denying a justification instruction." 19a (citing *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001) and *Jackson v. Edwards*, 404 F.3d 612, 622 (2d Cir. 2005)). The difference, the Second Circuit explained, was that Brown's case involved the "initial aggressor" doctrine, not merely (like *Davis* and *Jackson*) "the subjective and objective criteria" required for the defense of justification under New York law. 22a. "[T]he initial aggressor doctrine," the court wrote, "turns not on what the defendant *feared*, but rather on the objective circumstances of what he *did* and whether his actions would reasonably be perceived as a threat to imminently use deadly force." *Id.* The Second Circuit then noted that "even accepting Brown's contention that he intended his display of the firearm to be 'defensive' and to deter Cabbagestalk from hitting him, such a deterrent effect would

have been produced only by impressing upon Cabbagestalk that Brown would shoot him. And threatening to shoot someone comfortably qualifies as the threatened use of deadly physical force." *Id*.

After this conclusion about the application of New York law, the Second Circuit also held that Brown failed to satisfy any of the prongs in 28 U.S.C. § 2254(d), which limits federal habeas review to state court decisions that were "contrary to, or involved an unreasonable application of, clearly established Federal law" or were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 23a-25a. Taking the relevant inquiry as whether the denial of the jury instruction "so infected the entire trial that the resulting conviction violates due process," 24a (quoting *Cupp*, 414 U.S. at 147), the court contrasted Brown's case unfavorably with *Davis*, where the *Cupp* standard *was* held to be "unreasonably applied" in a case "where the defendant had a 'clear right' to a case-determinative jury charge on self-defense" and "where denial of that instruction was 'catastrophic,'" *id*. (quoting *Davis*, 270 F.3d at 132–33).

In finding that the ruling of the N.Y. Court of Appeals was not contrary to or an unreasonable application of this Court's precedents, the Second Circuit did not address or even acknowledge Brown's argument that the state court's sweeping rule violated the Second Amendment as interpreted by this Court. Ignoring the broad implications for the right to self-defense raised by Brown, the Second Circuit denied that the N.Y. Court of Appeals had offered a "novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed

to be within its scope." 25a (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)). Brown sought panel rehearing and rehearing *en banc*, again urging the Second Circuit to address the implications of the N.Y. Court of Appeals decision on the constitutional right to bear arms, but the petition was denied without discussion. 123a, 137a.

REASONS FOR GRANTING THE WRIT

A. The N.Y. Court of Appeals decision was a novel expansion of New York law, which infringed upon Brown's constitutional right to display a lawfully possessed firearm for the core lawful purpose of self-defense

The N.Y. Court of Appeals decision, to which the Second Circuit deferred, had the effect of making the mere display of a lawfully-possessed firearm (even when used as a deterrent in self-defense and even where there was evidence that the firearm was not pointed at an aggressor in a threatening manner) the threatened use of deadly physical force as a matter of law, which disqualified Brown from even presenting a theory of self-defense to the jury. A writ should be granted because the N.Y. Court of Appeals decision, as affirmed by the Second Circuit, deprived Brown of the right to assert self-defense solely on the basis that he was engaged in conduct that is constitutionally protected by "clearly established" decisions of this Court. *See* U.S. Const. amend. II; 28 U.S.C. § 2254(d)(1). The result was a violation of Brown's fundamental and clearly established federal due process rights to a fair trial.

The facts of Brown's case are striking. The incident occurred in the lobby of an apartment building, right outside the door to Brown's home. 40a. Cabbagestalk, who was younger and taller than Brown, initiated the use of physical force by "swinging" at Brown as a third man tried to calm him down. 151a-152a. The evidence suggested

that Brown, a trained corrections officer who lawfully possessed the gun, took out the gun only after Cabbagestalk began swinging at him. 44a, 154a. Brown kept the gun by his waist; he did not point it at or use it to threaten Cabbagestalk, who then "swiped" at it in an apparent attempt to take control of the weapon. 152a, 180a. Only after that point—as Cabbagestalk continued to press on him and was leaning back moving away from the swings—did Brown shoot. 164a-165a. Despite these facts, which clearly suggested a legitimate display and later use of a weapon in self-defense, Brown was *not even allowed to argue* justification to the jury. 209a. The N.Y. Court of Appeals saw no error, and the Second Circuit then did not even attempt to analyze whether the state's new rule comported with the Second Amendment. It does not, and the effect of the N.Y. Court of Appeals decision was to deprive Brown of his clearly established federal rights.

1. Depriving Brown of his right to assert self-defense violated his clearly established right to bear arms for the purpose of self-defense in case of confrontation

The "right of the people to keep and bear arms" is enshrined in the Second Amendment to the United States Constitution, which is applicable to the states, and it was clearly established by decisions of this Court well before the N.Y. Court of Appeals issued its decision in *Brown* on May 7, 2019. In *Heller,* 554 U.S. at 592 (2008), this Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010) this Court affirmed that "the Second Amendment right is fully applicable to the States." *See also id.* at 791 ("the Due

Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.")

"Self-defense is a basic right, recognized by many legal systems from ancient times to the present day." *See id.* at 767. "[I]ndividual self-defense is 'the *central component*' of the Second Amendment right." *Id*. (quoting holding of *Heller*, 554 U.S. at 599 (emphasis in original)). As this Court confirmed in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 10 (2022), which post-dated the N.Y. Court of Appeals decision in *Brown*, but which this Court recognized was "consistent with *Heller* and *McDonald*," and reflected long-established rights, "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *See Andrew v. White*, 604 U.S. 86, 94 (2025) ("General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court.").

As noted in *Heller*, William Blackstone described "the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen," and tied it to the "the natural right of resistance and self-preservation" and to "the right of having and using arms for self-preservation and defence." *Heller*, 554 U.S. at 594 (quoting 1 Commentaries on the Laws of England 136, 139–140 (1765)). The N.Y. Court of Appeals decision, which essentially holds that one who draws a lawfully-possessed firearm as a deterrent in self-defense thereafter loses the right to use it in self-defense, therefore stands in fundamental conflict with this clearly-established right. Nonetheless, the Second Circuit failed to address the issue.

In *Heller*, this Court held that a District of Columbia law requiring that firearms in the home "be rendered and kept inoperable at all times," "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 554 U.S. at 630. The precedent established by the N.Y. Court of Appeals in *Brown*, to which the Second Circuit deferred, does the same: it makes it impossible for an individual to display a firearm for the core lawful purpose of self-defense during a confrontation without losing the ability to assert self-defense. The N.Y. Court of Appeals decision in Brown was "hence unconstitutional," and the Second Circuit erred in affirming it. This Court must intercede to correct the Second Circuit's error and to ensure that a defendant cannot be stripped of a right to assert self-defense solely for exercising a right guaranteed to him by the Second and Fourteenth Amendments to the United States Constitution.

2. Depriving Brown of his right to assert self-defense based on his exercise of a constitutionally protected right violated Brown's clearly established due process rights

The N.Y. Court of Appeals decision, which found that Brown was the initial aggressor as a matter of law because he held his lawfully-possessed firearm at his side as a deterrent, also violated Brown's fundamental and well-established federal due process rights on multiple fronts.

i. The right to have the prosecution prove all the elements of the crime charged beyond a reasonable doubt

The N.Y. Court of Appeals decision, to which the Second Circuit deferred, violated Brown's clearly established federal due process rights because, on the basis that Brown engaged in the constitutionally protected activity of displaying a lawfully

possessed firearm as a deterrent, the jury at Brown's trial was prevented from deciding the issue of whether Brown acted in self-defense, and the prosecution was relieved of its burden of proving each and every element of the offense with which Brown was charged beyond a reasonable doubt.

Under New York law, justification is a defense, not an affirmative defense, such that when the defense is raised on a proper evidentiary record, the prosecution bears the burden of disproving it beyond a reasonable doubt. *See* N.Y. Penal Law §§ 25.00(1), 35.00; *Matter of Y.K.*, 87 N.Y.2d 430, 433 (1996); *People v. McManus,* 67 N.Y.2d 541, 546–47 (1986). The trial court's refusal to allow Brown to present a justification defense to the jury, when the evidence, viewed in the light most favorable to Brown as New York law requires supported it, relieved the prosecution of its burden to prove each element of the offense with which Brown was charged beyond a reasonable doubt.

This Court's decision in *In re Winship* established that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. This Court emphasized that the reasonable doubt standard "dates at least from our early years as a Nation," it "plays a vital role in the American scheme of criminal procedure," and, "[i]t is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 361 (1970). *See also Middleton v. McNeil*, 541 U.S. 433, 437 (2004) ("In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement."); *Neder v. United States*, 527 U.S. 1, 12 (1999) (omission

of instruction on element of offense violates Sixth Amendment's jury trial guarantee by preventing jury from rendering "complete verdict" on every element of offense).

Where, as here, a state court law has the effect of alleviating the prosecution's burden of proving each and every element of a criminal offense beyond a reasonable doubt, it violates due process. For instance, in *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), this Court explicitly deferred to Maine's construction of its own law on felonious homicide and manslaughter. This Court nonetheless found that the state's construction of Maine law, which shifted the burden to the defendant to prove that he acted in the heat of passion on sudden provocation in order to receive the lesser penalty prescribed for manslaughter instead of requiring the prosecution to disprove that he acted in the heat of passion beyond a reasonable doubt, violated federal due process under *Winship*. *Id.* at 704.

In *Martin v. Ohio*, 480 U.S. 228, 233 (1987), this Court rejected a due process challenge brought by a woman convicted of murder to a state law that put the burden on a defendant to prove justification, reasoning that the defendant in the case "had the opportunity under state law and the instructions given to justify the killing and show herself to be blameless by proving that she acted in self-defense." This Court then added, however, that the situation "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," as such an instruction would "relieve the State of its burden" to prove every element beyond a reasonable doubt and thus violate due process. *Id.* at 233-34. This latter scenario was exactly what

occurred in Brown's case. The N.Y. Court of Appeals decision, which deprived Brown of the right to assert self-defense solely for displaying a lawfully-possessed service firearm as a deterrent, thus had the effect of depriving Brown of his well-established federal due process right to have each and every element of the crime with which he was charged considered by a jury and proven beyond a reasonable doubt.

ii. The right to present a complete defense

The Constitution also guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). *See also California v. Trombetta*, 467 U.S. 479, 485 (1984) ("meaningful opportunity to present a complete defense" part of "fundamental fairness" under Due Process Clause of Fourteenth Amendment).

Under New York law, a justification instruction is required "where the evidence, viewed in the light most favorable to the defendant, reasonably supports the defense." *See Padgett,* 60 N.Y.2d at 144-145. The majority of the First Department initially held that a reasonable jury could have found that Brown's actions were justified, and he was not the initial aggressor. As the majority explained, "the trial evidence shows that when defendant drew his weapon in the midst of Cabbagestalk's attack, he held it by his side, did not point it at Cabbagestalk, and did not threaten him. Based on this evidence, a jury could have reasonably concluded that by drawing his firearm, defendant did not use or threaten the imminent use of deadly physical force." 57a. The N.Y. Court of Appeals nonetheless drew the opposite inference,

unfavorable to Brown, that the "drawing of a gun here could only be understood as an imminent threat of deadly physical force," and found that Brown was therefore the initial aggressor as a matter of law, and affirmed the trial court's decision not to issue a justification instruction. 34a.

The trial court's denial of justification instruction based on inferences drawn against Brown in contravention of New York law prevented Brown from arguing self-defense, his only viable defense, to the jury. It was uncontested that Brown shot Cabbagestalk, leaving self-defense as Brown's only path to acquittal. Nonetheless, not only was the jury not instructed on a theory of justification, Brown's lawyer was not permitted to even mention justification or self-preservation in his closing. This was highly prejudicial. *See Herring v. New York,* 422 U.S. 853, 858 (1975) (closing argument for defense "a basic element of the adversary fact finding process in a criminal trial"). The unfairness was compounded by the fact that the prosecutor repeatedly emphasized to the jurors that justification was "not part of this case" and "not something for you to consider." 223a. The denial of the justification instruction therefore "infected the entire trial," and amounted to a due process violation. *Cupp*, 414 U.S. at 147.

iii. The right to fair notice

In *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964), this Court noted that the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court." The *Bouie* Court also held that, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and

retroactive judicial expansion of narrow and precise statutory language." *Id. at* 352. *See also id.* at 354-355 ("When [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.").

The evidence at Brown's trial, viewed in the light most favorable to him, showed that Brown, who was a corrections officer trained in the use of firearms for deescalation, drew his lawfully-possessed firearm as a deterrent. It was this and only this conduct that the N.Y. Court of Appeals thereafter determined disqualified him from asserting self-defense as a matter of law. But New York law does not define the defensive display of a firearm to automatically equate to the use of deadly physical force, such that drawing the firearm makes one the initial aggressor as a matter of law. To the contrary, the definition of what constitutes deadly physical force is a fact intensive inquiry. New York law defines "deadly physical force" as "physical force which, *under the circumstances in which it is used*, is readily capable of causing death or other serious physical injury." New York Penal Law § 10.00(11) (emphasis added). Brown was not in a position to argue at trial that his defensive display of a firearm did not make him the initial aggressor to use deadly physical force as a matter of law, because neither the defense nor the prosecution argued that the initial aggressor doctrine applied, and the trial court did not rely on the initial aggressor doctrine to deprive Brown of the instruction. *See* 56a n. 9 (First Department majority noting that

record did not show the People relying on the initial aggressor doctrine to oppose the charge, or the trial court deciding the initial aggressor issue.)

Further, prior to its decision in Brown's case, the N.Y. Court of Appeals had recognized that, although a defendant "drawing [a] pistol, cocking it, holding it with two hands and arms extended, and aiming it" amounted to the use of deadly physical force, "[t]he mere display or brandishing of a pistol may, perhaps, create an insufficiently imminent threat to life to be considered the 'use' of deadly physical force." *People v. Magliato*, 68 N.Y.2d 24, 30 (1986). Nonetheless, in *Brown*, the N.Y. Court of Appeals broadened New York law, after Brown's conduct, trial and conviction, to mean that Brown's "display of the gun," as a matter of law, could only be viewed as the threatened imminent use of deadly physical force. 34a. Particularly since the bearing of lawfully-possessed firearms for the purposes of self-defense is a constitutionally protected right, this sweeping and unprecedented conclusion was novel and unforeseeable. Because the N.Y. Court of Appeals decision represented an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," its application to Brown in this case after his trial and conviction to affirm a trial court's decision depriving him of his right to assert self-defense, which was not even based on the initial aggressor doctrine, violated due process.

B. This case presents the ideal vehicle to ensure that defendants are not deprived of their clearly-established Second and Fourteenth Amendment rights

For the reasons set forth below, Brown's case presents the right vehicle for this Court to address the intersection of multiple clearly established federal constitutional rights: the right to bear arms for the core lawful purpose of self-defense, and the due

process rights to have a jury decide each and every element of a criminal offense, in a fair trial, where the defendant is accorded the right to present a complete defense.

1. New York law is an outlier

The N.Y. Court of Appeals decision, and the Second Circuit decision affirming it, make New York's justification law an outlier in its intrusion upon the Second Amendment right to display a firearm for the core lawful purpose of self-defense. While these decisions hold, at bottom, that the mere defensive display of a lawfully-possessed firearm amounts to the threatened use of deadly physical force, sufficient to deprive a defendant of the right to assert self-defense as a matter of law, the view of the Model Penal Code, which has been adopted by multiple states,[4] is the opposite: "[a] threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force." ALI, Model Penal Code § 3.11(2) (Proposed Official Draft 1962).

Arizona, Idaho, and Oklahoma have also enacted laws codifying and protecting the right to display a firearm in self-defense, even in the absence of deadly force on the other side. A.R.S. § 13-421; I.C. § 19-202(2); 21 O.S. § 1289.25(K). For instance, Arizona's justification statute expressly provides that "[t]he defensive display of a firearm by a person against another is justified when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself

[4] *See, e.g.*, N.J.S.A. 2C:3-11(b); *accord* Tex. Penal Code § 9.04; Neb. Rev. Stat. § 28-1406(3); N.D.C.C. § 12.1-05-12(1).

against the use or attempted use of unlawful physical force or deadly physical force." A.R.S. § 13-421(A). *See* A.R.S. § 13-421(D)(2) (defining the "defensive display of a firearm" to include "[e]xposing or displaying a firearm in a manner that a reasonable person would understand was meant to protect the person against another's use or attempted use of unlawful physical force or deadly physical force"). Iowa Code § 704.2(2) similarly expressly excludes from the definition of deadly force "the production, display, or brandishing of a deadly weapon, as long as the actions of the person are limited to creating an expectation that the person may use deadly force to defend oneself or another."

Still other states make the question of whether the display of a firearm constitutes deadly force a question for the jury. *See*, *e.g.*, *Commonwealth v. Cataldo*, 423 Mass. 318, 322 (1996) (instruction that "required the jury to find that the defendant's actions constituted the use of deadly force if they found the defendant drew his gun" was error; when gun is "brandished but not fired, the jury must determine whether the defendant intended to use the weapon in a deadly manner"). Indeed, prior to the N.Y. Court of Appeals decision in *Brown*, even New York recognized that, "[t]he mere display or brandishing of a pistol may, perhaps, create an insufficiently imminent threat to life to be considered the 'use' of deadly physical force." *Magliato*, 68 N.Y.2d at 30. Nonetheless, in the wake of the N.Y. Court of Appeals and Second Circuit decisions in *Brown*, the mere defensive display of a lawfully-possessed firearm in New York now amounts to the use of deadly physical force as a matter of law.

The Kentucky Supreme Court recently analyzed, as a matter of first impression, the intersection of its state justification law and the right to bear arms under the federal and Kentucky constitutions. *Dunkleberger v. Commonwealth*, 719 S.W.3d 17, 29-30 (Ky. 2025). The court held that the act of displaying a holstered and lawfully possessed firearm is entirely lawful, constitutionally protected activity, and therefore the display of a holstered firearm is "legally inadequate to predicate an initial aggressor instruction," which would allow a jury to find, or not find, that defendant was the initial aggressor and therefore he was not entitled to assert self-defense. *Id.* at 30. The court noted that "[i]t is precisely because our constitutions protect the right to openly carry and display firearms that an act doing so, even if initially from a concealed position in a confrontation, is a lawful act of physical force," reasoning that "display is not an act provoking violence but an attempt to quell it or head it off before it arises." *Id.* at 29.

The Kentucky Supreme Court did distinguish cases in which defendants drew their firearm and displayed it from those where the firearm was holstered and displayed, finding that it has "consistently held an initial aggressor instruction is warranted when the defendant brandishes, i.e., draws and displays, the weapon openly prior to the shooting." *Id.* at 24. But in such cases where an initial aggressor instruction is given, Kentucky law still leaves for the jury the decision of whether the defendant was in fact the initial aggressor. *Id.* at 23.

In sharp contrast, the Second Circuit expressly rejected Brown's argument that the defensive display of a lawfully-possessed firearm as a deterrent was not an

act of offensive aggression sufficient to trigger the initial aggressor doctrine. *See* 22a ("[E]ven accepting Brown's contention that he intended his display of the firearm to be 'defensive' and to deter Cabbagestalk from hitting him, such a deterrent effect would have been produced only by impressing upon Cabbagestalk that Brown would shoot him. And threatening to shoot someone comfortably qualifies as the threatened use of deadly physical force."). Further, rather than let a jury decide whether the defensive display or brandishing of the firearm made Brown the initial aggressor, the Second Circuit blessed the N.Y. Court of Appeals decision, which held that Brown could not even present the issue of whether he was acting in self-defense to a jury because his display of a lawfully-possessed a firearm made him the initial aggressor as a matter of law, and wholly failed to engage with Brown's argument that the N.Y. Court of Appeals' decision was in intolerable tension with the "individual right to possess and carry weapons in case of confrontation." *See Heller*, 554 U.S. at 592.

Because the states have adopted varying approaches to the question of whether the defensive display of a lawfully-possessed firearm amounts to a threat of physical or deadly physical force sufficient to deprive a defendant of a justification defense; because the rule in New York established in *Brown* reflects the most extreme intrusion among the justification laws established by the states into the federal constitutional right to keep and bear arms; and because the Second Circuit failed to even address the important federal constitutional interest at stake, this Court must intervene to ensure that state justification statutes do not infringe on clearly-established Fourteenth Amendment rights to bear arms and to due process.

2. The issue was preserved

Because Brown repeatedly raised the sweeping implications of the N.Y. Court of Appeals' novel and expansive decision on the right to defensively display a firearm in self-defense, the issue has been preserved and is squarely presented for this Court's review.

In this case, the trial court did not rely upon the initial aggressor doctrine in denying Brown the right to a defense instruction, and the People did not raise the issue. 188a-192a. It was only the N.Y. Court of Appeals that invoked and relied upon the initial aggressor doctrine, in order to affirm the trial court's denial of a justification instruction after the fact, articulating its expansive view of the initial aggressor doctrine for the first time in its decision. In New York's intermediate appellate court, the majority of the First Department found that the State had failed to even preserve the issue of whether the initial aggressor doctrine applied. 55a-56a. Nonetheless, in response to the dissent's suggestion "that anytime someone draws a weapon during an encounter with an unarmed individual, he or she is not entitled, as a matter of law, to a justification charge, regardless of what subsequent threatening actions that individual takes," the majority immediately recognized the unprecedented nature and sweeping implication of such an interpretation of the initial aggressor doctrine. 57a. The First Department emphasized: "No case in our justification jurisprudence stands for such a sweeping proposition, especially where, as here, the weapon was lawfully possessed." *Id*.

When the N.Y. Court of Appeals thereafter overturned the First Department decision, invoking the initial aggressor as a matter of law for the first time in Brown's

case, Brown's counsel sought reargument, emphasizing the unprecedented nature and sweeping implications for the N.Y. Court of Appeals decision on the right to display a lawfully-possessed firearm in self-defense. *See* 127a ("It is neither now nor has it ever been the law in this jurisdiction that a person becomes the 'initial aggressor' merely by displaying a weapon in order to deter an attack, preserve their own life, or prevent themselves from being physically harmed, including facing the prospect of death. The import of this Court's decision would be that anytime a person takes out a weapon in an effort to defend or protect his or her life, they would be deemed the 'initial aggressor,' and thereby lose the right to properly defend themselves."). *See also* 128a ("The Court further suggests that 'one who wields a gun during a nondeadly altercation' should not be entitled to the justification defense. This has never been the law in this jurisdiction or throughout the country.").

In his habeas petition before the Southern District of New York, Brown continued to emphasize the implications of the N.Y. Court of Appeals' expansive interpretation of the initial aggressor doctrine on the right to display a firearm as a deterrent in self-defense, and its lack of precedent in the law. *See* 131a ("In essence, the Court of Appeals posits that if an individual introduces a gun into an argument by holding it by their side for protection, they better never use it— even when facing serious physical injury or death. This could not be the law.").

In his Second Circuit briefing, Brown then expressly addressed and argued that the N.Y. Court of Appeals' novel interpretation of the initial aggressor doctrine was both an improper expansion of New York law, and it could not be reconciled with

the right to bear arms for the core lawful purpose of self-defense established by this Court's Second and Fourteenth Amendment jurisprudence. 133a.

After the Second Circuit wholly failed to address Brown's contention that the N.Y. Court of Appeals novel interpretation of the initial aggressor doctrine violated this Court's Second Amendment precedents, Brown again raised the issue in his petition for panel rehearing and rehearing *en banc*. 137a. Thus Brown pressed the issue at every turn after the N.Y. Court of Appeals reached its decision. The issue was therefore squarely preserved and ripe for review by this Court.

3. AEDPA and *Estelle v. McGuire* are not barriers to granting the writ

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Estelle v. McGuire* serve as no barrier to granting relief to Brown. Under AEDPA, a federal habeas court may grant relief to a person in custody pursuant to a judgment of a state court if the state court proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254. Here Brown is entitled to habeas relief because the state court deprived Brown of a justification defense to which he otherwise would have been entitled under New York law, on the grounds that he displayed a lawfully-possessed firearm as a deterrent in self-defense, which *Heller* and *McDonald* establish is constitutionally protected activity. This resulted in a conviction contrary to Brown's clearly established federal due process rights, including the right to have the prosecution prove all the elements of the crime

with which he was charged beyond a reasonable doubt, *Winship*, 397 U.S. at 361, the right to present a complete defense, *Crane*, 476 U.S. at 690, the right to fair notice, *Bouie,* 378 U.S. at 352, and the right to a fair trial, *Cupp*, 414 U.S. at 147. These are all clearly-established decisions of this Court bearing on fundamental constitutional rights for purposes of AEDPA.

The N.Y. Court of Appeals decision depriving Brown of his right to assert self-defense also amounted to an unreasonable application of these legal principles. When holding that Brown was the initial aggressor as a matter of law, the N.Y. Court of Appeals plainly did not draw inferences in favor of Brown, as required by New York law. Most fundamentally, the N.Y. Court of Appeals found that Brown's display of a firearm amounted to an imminent threat to use deadly force, even though the sole eyewitness to the altercation testified that he did not see the gun "pointed in the direction of [Cabbagestalk] and threatening him." 180a. Under these facts, no "fairminded jurist" could conclude that the most favorable inference that could be drawn in Brown's favor was that he was threatening the imminent use of deadly physical force. *Cf.* 24a. The state court's conclusion that Brown was the initial aggressor thus amounted to an unreasonable application of the law.

This case also does not hinge solely on state law, but rather implicates important federal interests. While the Second Circuit correctly recognized that federal habeas courts do not "reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 68 (1991), this Court has never viewed this principle to require federal courts to abdicate their right and obligation to ensure

that state laws are not interpreted and implemented in a manner that violates the federal constitution. Instead, this Court has been clear that although states have latitude in defining elements of crimes and defenses to them, "there are obviously constitutional limits beyond which the States may not go in this regard." *See Patterson v. New York*, 432 U.S. 197, 210 (1977). In *Kahler v. Kansas*, while not finding a due process violation, this Court recognized that a state's laws defining elements of criminal offenses may violate due process if they "offend[] 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)) (noting that "primary guide" to applying the standard is "historical practice" based on "eminent common-law authorities"). *See also United States v. Lovasco*, 431 U.S. 783, 790 (1977) (due process protects against violations of "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency") (citations and quotations omitted)). The Second Circuit was therefore wrong to abdicate its duty to address whether the N.Y. Court of Appeals decision comported with the fundamental right to bear arms for the core lawful purpose of self-defense. This case presents the opportunity for this Court to do so.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, this petition should be granted.

Dated: November 12, 2026

Respectfully submitted,

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In the
United States Court of Appeals
for the Second Circuit

August Term, 2025
No. 23-7864

DARRYL BROWN,
Petitioner-Appellant,

v.

LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK, ANTHONY J. ANNUCCI, IN HIS OFFICIAL CAPACITY AS THE ACTING COMMISSIONER FOR THE NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, MICHAEL KIRKPATRICK, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE CLINTON CORRECTIONAL FACILITY,
Respondents-Appellees.

On Appeal from the United States District Court
for the Southern District of New York.

ARGUED: FEBRUARY 6, 2026
DECIDED: MAY 7, 2026

Before: CABRANES, NARDINI, and KAHN, *Circuit Judges*.

Petitioner Darryl Brown was convicted in New York Supreme Court, Bronx County of first-degree manslaughter after he shot and killed a person during an argument. Over Brown's objection, the trial court declined to instruct the jury on the state-law defense of justification. A divided panel of the First Department vacated Brown's conviction on the ground that the instruction should have been given, but the New York Court of Appeals unanimously reinstated the conviction. The New York Court of Appeals held that Brown was the first person in the confrontation to pull out a gun and thereby threaten the use of deadly force, which made him the initial aggressor under New York law, and that he was accordingly not entitled to a justification instruction. Brown sought habeas relief under 28 U.S.C. § 2254, arguing that the state courts violated his federal due process rights by denying him an instruction on a defense to which he was clearly entitled under state law, thereby rendering his trial fundamentally unfair. The United States District Court for the Southern District of New York (Vernon S. Broderick, *District Judge*) denied habeas relief. The district court agreed with the New York Court of Appeals that the trial court properly declined to charge the jury on justification under state law, and that Brown therefore had not made a predicate showing that would be required to establish a federal due process violation. We agree, and thus we AFFIRM the denial of Brown's petition.

KRISTEN SANTILLO, Gelber & Santillo PPC, New York, NY, *for Petitioner-Appellant*.

TAE-HOON CHARLES WON (David M. Cohn, *on the brief*), Assistant District Attorney,

Bronx County District Attorney's Office, Bronx, NY, *for Respondent-Appellee.*

WILLIAM J. NARDINI, *Circuit Judge*:

Petitioner-Appellant Darryl Brown was convicted of first-degree manslaughter in New York Supreme Court, after he shot his daughter's boyfriend during an altercation in the lobby of his apartment building. The New York Court of Appeals ultimately affirmed the conviction. Brown sought federal habeas relief under 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York (Vernon S. Broderick, *District Judge*), claiming that the trial court violated his federal due process rights by declining to charge the jury on a justification defense.

The district court denied Brown's habeas petition, agreeing with the New York Court of Appeals that the trial evidence did not warrant a justification charge under state law. Specifically, the district court agreed that when Brown pulled out a gun during the argument, he was the first to threaten to use "deadly force." That made him the "initial aggressor" under N.Y. Penal Law § 35.15, which took away his right to argue self-defense. And because the trial court did not deprive Brown of a defense to which he was entitled under state law, there could be no due process violation.

We agree with the district court. As an initial matter, we have no remit on habeas review to second-guess the New York Court of Appeals' authoritative construction of N.Y. Penal Law § 35.15, which

defines the contours of the justification defense. In light of that settled state law, we discern no error (and hence no possible constitutional violation) in the New York Court of Appeals' application of law to the facts of this case. And even if we had doubts on that score (which we do not), we could not conclude on this record that the Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court, or that it made unreasonable determinations of fact. Accordingly, we AFFIRM the denial of Brown's petition.

I. Background

On March 20, 2014, Brown, an off-duty corrections officer, got into an argument in the lobby of his apartment building with Vonde Cabbagestalk, his daughter's boyfriend and the father of her child. The argument culminated in Brown shooting and killing Cabbagestalk. The State of New York charged Brown with murder in the second degree, N.Y. Penal Law § 125.25(1); manslaughter in the first degree, N.Y. Penal Law § 125.20(1); and criminal use of a firearm in the first degree, N.Y. Penal Law § 265.09. The case proceeded to trial in September 2016 in New York Supreme Court, Bronx County. Based on the evidence presented to the jury, the trial court decided that Brown was not entitled to a justification instruction under New York Penal Law § 35.15, and the jury convicted Brown of first-degree manslaughter. This appeal turns on whether Brown was deprived of a jury charge to which he was entitled under state law, and if so whether such a deprivation violated his federal due process rights by rendering his trial fundamentally unfair.

A. New York's Defense of Justification

The New York legislature has statutorily created a justification defense, which establishes that a person will not be held criminally responsible for the use of force under certain circumstances. As relevant here, N.Y. Penal Law § 35.15 provides:

> 1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:
>
> (a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or
>
> (b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force . . .
>
> 2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

> (a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating . . . .

A few things emerge about the justification defense from § 35.15 and New York case law. For one thing, "[j]ustification in New York is a defense, not an affirmative defense; therefore, when the defense is raised on a proper evidentiary record, the People bear the burden of disproving it beyond a reasonable doubt." *See Jackson v. Edwards*, 404 F.3d 612, 622 (2d Cir. 2005) (internal quotation marks and citation omitted).

Second, a justification charge is not given automatically in every case. The trial evidence must warrant it, though the record must be viewed in the light most favorable to the defendant. *See id.* at 622–23. A defendant is entitled to the instruction "'if on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified'" under § 35.15. *Id*. (quoting *People v. Padgett*, 60 N.Y.2d 142, 145 (1983)). "In order to be entitled to a justification instruction," a defendant who has used deadly force "must show both that he subjectively believed that deadly force was necessary under the circumstances and that a reasonable person in his situation would have held this belief." *Blazic v. Henderson*, 900 F.2d 534, 540 (2d Cir. 1990) (citing *People v. Goetz*, 68 N.Y.2d 96, 115 (1986)). The term "deadly physical force" is defined as "physical force which,

under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." N.Y. Penal Law § 10.00(11).

Third, even if a defendant makes both the subjective and objective showings, there are certain circumstances that will nonetheless make him ineligible for a justification instruction. Among other things, a defendant cannot be justified in the use of force if he was the initial aggressor. N.Y. Penal Law § 35.15(1)(b). An initial aggressor is "the first person who uses, or threatens the imminent use of, physical force." CJI2d[NY] Justification: Use of Physical Force in Defense of a Person, Penal Law § 35.15(1); *People v. Brown*, 33 N.Y.3d 316, 321 (2019), *reargument denied*, 33 N.Y.3d 1136 (2019).

The New York Court of Appeals has interpreted § 35.15(1)(b) in a few ways relevant here. The Court of Appeals has approved a jury instruction stating that "[t]he actual striking of the first blow or inflicting of the first wound . . . does not necessarily determine who was the initial aggressor." *People v. Valentin*, 29 N.Y.3d 57, 60 (2017). Instead, where "mere physical force is employed against a defendant, and the defendant responds by employing deadly physical force, 'the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force.'" *Brown*, 33 N.Y.3d at 321 (quoting *People v. McWilliams*, 852 N.Y.S.2d 523, 524 (4th Dep't 2008)); *id*. at 321 n.4 (collecting cases). A person who first *threatens* the imminent use of deadly physical force, like a person who first threatens the use of nondeadly physical force, is likewise deemed to be an initial aggressor under New York law. *See Brown*, 33 N.Y.3d at

322; *Valentin*, 29 N.Y.3d at 60, 62; *see also* CJI2d[NY] Justification: Use of Deadly Physical Force in Defense of a Person, Penal Law § 35.15(2) (defining initial aggressor as "the first person who uses, or threatens the imminent use of, deadly physical force"). Where a person is an initial aggressor, his use of force is justifiable only if he withdrew from the encounter and effectively communicated his withdrawal to the other person, but the other person "persists in continuing the incident by the use or threatened imminent use of unlawful physical force." N.Y. Penal Law § 35.15(1)(b).

B. Proceedings at Trial

At Brown's trial, the jury heard testimony from three witnesses about the events surrounding the shooting.

Raymond Wolf, a postal worker who was delivering mail at the time, saw the entire interaction. Wolf testified that shortly before the shooting, he entered the apartment building and saw three people talking in the lobby: Brown, Cabbagestalk, and a third person whom the police were unable to locate for trial, *People v. Brown*, 71 N.Y.S.3d 422, 425 n.1 (1st Dep't 2018). Wolf heard Brown tell Cabbagestalk to stay away from his daughter, and Cabbagestalk answered that Brown could not tell him where to be. Cabbagestalk began getting in Brown's face, and the third person tried to break up the argument, telling Cabbagestalk to relax. Cabbagestalk proceeded to swing at Brown's face, and Brown stepped back. Wolf subsequently saw Brown holding a gun "at an angle[] [a]t his waist," Joint App'x at 474–75, and heard Cabbagestalk say "you going to pull a gun out, you

better use it" while swiping at Brown's gun, *id*. at 473, 482–83. Wolf heard the gun go off, and Cabbagestalk fell to the ground. When the shot was fired, according to Wolf, Cabbagestalk was two feet away from Brown, and Brown was leaning back.

Yvette Flores, who lived on the first floor of the building, saw the beginning of the argument through the peephole of her apartment door and, after her sightline was lost when the parties walked away, continued to hear the altercation. Flores testified that she saw Brown, his daughter and her baby, and Cabbagestalk standing in front of Brown's apartment. Brown and Cabbagestalk walked away and Flores could not see the rest of the interaction, but she heard Cabbagestalk and Brown continue to argue. Flores then heard Brown's daughter yell "no daddy no," followed by a loud boom. *Id.* at 339.

Another neighbor, Sheila Thomas, witnessed part of the argument between Brown and Cabbagestalk from outside while looking through the windows of the lobby door as she prepared to enter the building with her groceries. Thomas testified that she saw Brown and Cabbagestalk walking at a slow pace, with Cabbagestalk following Brown. She could tell they were having a disagreement, but could not hear what was being said. Thomas testified that when she saw the men, they were between six and seven feet apart. They passed out of her view, and then she heard a gunshot.

At the close of these witnesses' testimony, the trial court decided that it would not submit the criminal use of a weapon count

to the jury, and it preliminarily ruled that it would not grant Brown's request to instruct the jury on the defense of justification.

After the trial court indicated that it would not give a justification charge, Brown declined to testify. Defense counsel told the trial court that Brown would have testified only that he feared for his life—which would be relevant only if the jury were instructed on the defense of justification. The defense did, however, call an expert to testify as to how corrections officers like Brown are trained to use firearms and deadly force. The expert testified that officers are trained to draw a weapon if they perceive a threat, even if the person threatening them is not displaying a weapon. He further testified that if officers feel that their lives are in jeopardy and their firearm could be taken and used against them, "that escalates the situation to enough where we can use deadly lethal force." *Id.* at 653.

Following the close of the defense's case, the trial court reaffirmed its ruling on justification. The jury deliberated for nine hours and returned a verdict acquitting Brown of second-degree murder but finding him guilty of first-degree manslaughter. The court sentenced Brown to eighteen years in prison.

C. The Direct Appeal

Brown appealed his manslaughter conviction, arguing that the trial court committed reversible error by failing to charge the jury on justification. *Brown*, 71 N.Y.S.3d at 426. A majority of the First Department agreed, reasoning that the evidence—when viewed in the light most favorable to Brown as required under New York law—

supported "a conclusion that [Brown] feared for his life, and reasonably believed that deadly physical force was necessary to defend himself against Cabbagestalk's imminent use of deadly physical force." *Id*. at 427. In its view, Wolf's testimony "described an escalating series of aggressive actions and verbal threats made by Cabbagestalk immediately before defendant fired his weapon." *Id*. Based on that testimony, a jury could have concluded that Brown "reasonably believed that Cabbagestalk, who was younger and taller than [Brown], and just two feet away, would gain control of [Brown's] gun," and that Cabbagestalk's statement to Brown ("you going to pull a gun out, you better use it") constituted a threat to take Brown's gun and use it against him, particularly because Cabbagestalk was "grabbing for the gun at the same time he made the threat." *Id*. at 427–28. The majority further reasoned that the initial aggressor doctrine, which disallows a justification instruction if the defendant was the first person to use or threaten to use deadly force, did not apply here because Brown "held [the gun] by his side" and "did not point it at Cabbagestalk" or threaten him. *Id*. at 431.

Two justices dissented. In their view, "[Brown's] drawing of his gun in the course of his confrontation with Cabbagestalk constituted the threatened use of deadly physical force." *Brown*, 71 N.Y.S.3d at 438. Brown could not have satisfied the subjective prong of the two-step justification inquiry, the dissenters said, because there was no evidence that he "actually believed" Cabbagestalk would use deadly physical force at the time Brown drew his gun. *Id*.

The New York Court of Appeals unanimously reversed and reinstated Brown's conviction. It held that "Brown was the initial aggressor as a matter of law" and therefore his use of force was not justifiable under N.Y. Penal Law § 35.15(1)(b). *Brown*, 33 N.Y.3d at 320–21. As the court explained, "[i]f mere physical force is employed against a defendant, and the defendant responds by employing deadly physical force, 'the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force.'" *Id*. at 321 (quoting *McWilliams*, 852 N.Y.S.2d at 524). Relying on its precedent, the Court of Appeals explained that "the imminent threat to use a gun against another is, necessarily, a threat of deadly physical force." *Id*. at 322 (citing *People v. Dodt*, 61 N.Y.2d 408, 414–15 (1984)). The Court of Appeals determined that Brown's conduct constituted an imminent threat because he "placed his gun in a position where he was readily able to aim and fire it imminently, and did so before Mr. Cabbagestalk's efforts to 'swipe' at the gun," a conclusion that was bolstered by the "circumstances surrounding that act." *Id*.

Having determined that Brown's act of drawing the gun made him the initial aggressor, the Court of Appeals considered whether a reasonable jury could have concluded that Brown withdrew from the encounter after threatening the use of deadly force, which would still allow him to claim justification. *Id*. at 323; *see* N.Y. Penal Law § 35.15(1)(b). Because there was no evidence that Brown withdrew after pulling out his gun, the court held that Brown was indeed not entitled to a justification instruction.

The Court of Appeals also considered whether there was a reasonable view of the evidence under which Cabbagestalk and not Brown was the initial aggressor. *Brown*, 33 N.Y.3d at 323. It concluded that "[n]o reasonable view of the evidence supports the proposition that Mr. Brown was ever threatened by Mr. Cabbagestalk with the imminent use of deadly force prior to the point at which Mr. Brown drew his gun." *Id*. at 323.

D. The District Court Decision

Brown then sought habeas relief in federal court, contending that his federal due process rights were violated when he was denied a justification charge. Magistrate Judge Katharine H. Parker filed a Report and Recommendation recommending that the district court deny Brown's habeas petition. *Brown v. James*, No. 1:20-cv-10491, 2021 WL 11593759 (S.D.N.Y. Aug. 31, 2021). The district court agreed and denied the petition, concurring with the New York Court of Appeals that when Brown pulled out his gun he became the initial aggressor as a matter of law, and that he was accordingly not entitled to a justification charge under New York law. In rejecting Brown's argument that Cabbagestalk was the initial aggressor, the district court emphasized that (1) Wolf did not testify that any of Cabbagestalk's swings made contact with Brown and (2) Wolf did not describe Brown's gun as "holstered" when Cabbagestalk swiped at it. *Brown v. James*, No. 1:20-cv-10491, 2023 WL 4351194, at *3 (S.D.N.Y. July 5, 2023). Thus, the district court held that none of Cabbagestalk's actions "can reasonably be interpreted as deadly force," and instead that "'the evidence at trial establishes that [Brown] immediately

responded to the victim's use of ordinary force with deadly force' by shooting the victim." *Id*. (quoting *People v Irizarry*, 157 N.YS.3d 287, 288 (1st Dep't 2021)) (alterations adopted). Having concluded that Brown was the initial aggressor, the district court dismissed the petition because Brown failed to establish that he was erroneously deprived of a jury instruction to which he was entitled under New York law. And without such a predicate showing, Brown could not establish that his trial had been fundamentally unfair, in violation of his federal due process rights.

We granted a certificate of appealability, and this appeal followed.

II. Standard of Review

We review the denial of a habeas petition *de novo*. *Carew v. Morton*, 150 F.4th 150, 159 (2d Cir. 2025). We have jurisdiction pursuant to 28 U.S.C. § 2253(a).

III. Discussion

A. Federal Habeas Review of State-Law Jury Instructions

To obtain relief, a state habeas petitioner like Brown must first establish that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Here, he contends that the purported instructional error violated his federal constitutional rights. The claim advanced by Brown has two components: (1) that the trial court erroneously declined to give a jury charge to which he was entitled under New York law, and (2) that this

state-law error "violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'" *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)). Even if Brown establishes that there has been a federal due process violation, he can obtain habeas relief only if he satisfies the further requirements of § 2254(d) that (3) the error led to a conviction that was either (i) contrary to (or an unreasonable application of) clearly established federal law as determined by the Supreme Court, or (ii) based on an unreasonable determination of facts. *See Jackson*, 404 F.3d at 621. If we determine at the first step that the justification instruction was correctly denied under New York law, then we need not reach the second or third steps of this inquiry.

Our first task is therefore to determine whether the state court deprived the defendant of a jury charge on a defense to which he was entitled under state law. We begin with this question because "[w]hat due process requires will often depend on what state law is." *Davis*, 270 F.3d at 123. "States are free to define the elements of, and defenses to, crimes," *id*., subject to certain outer constitutional limits. *See, e.g.*, *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Martin v. Ohio*, 480 U.S. 228, 232 (1987); *see also Kahler v. Kansas*, 589 U.S. 271, 279 (2020). In determining whether the defendant was entitled to the jury charge in question, we do not "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Davis*, 270 F.3d at 123 n.4 (stating that we must "defer to state-court interpretations of the state's laws, so long as those interpretations are themselves constitutional"). "In other words, our role here is not to

interpret New York's law of justification, but to determine whether the evidence was sufficient to warrant a justification charge under that law." *Davis*, 270 F.3d at 124 n.4.

If this first inquiry yields the conclusion that there was instructional error under state law, we turn to the second question: "whether the trial court's refusal to give the justification instruction 'so infected the entire trial that the resulting conviction violates due process.'" *Jackson*, 404 F.3d at 624 (quoting *Cupp*, 414 U.S. at 147). In the past, we have held that habeas relief is warranted for a state court's wholesale failure to charge the jury on justification "where the erroneous failure to give such a charge was sufficiently harmful to make the conviction unfair." *Davis*, 270 F.3d at 123–24; *see also Jackson*, 404 F.3d at 625. We have found such unfairness where the defendant had a "compelling" and "highly credible" justification defense, the omission of which was "catastrophic" for the defendant. *Davis*, 270 F.3d at 131–32; *see also Jackson*, 404 F.3d at 625–26 (granting habeas relief in a case that, we concluded, was not materially different from *Davis*; concluding that "the probabilities are substantial that, if given a justification charge, Jackson's jury might well have acquitted"). By contrast, we have denied habeas relief, even in the face of similar instructional error, where giving a justification charge "would not have altered the result of the trial." *Blazic*, 900 F.2d at 542.

Third, even if we conclude that there was instructional error, and that the error violated due process, we may grant habeas relief only if Brown's conviction "was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "These standards require federal courts to give the 'benefit of the doubt' to merits decisions issued by the courts of the sovereign States." *Klein v. Martin*, 607 U.S. ____, 146 S. Ct. 589, 596 (2026) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). In order to obtain relief, a petitioner convicted on state charges must "establish that the state court 'blundered' so badly that every fairminded jurist would disagree' with the decision." *Klein*, 607 U.S. ____, 146 S. Ct. at 596 (quoting *Mays v. Hines*, 592 U.S. 385, 392 (2021)) (alteration adopted). This is because federal habeas review of state convictions "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. The Failure to Give a Justification Instruction Did Not Violate Due Process

The New York Court of Appeals held that Brown was the initial aggressor and therefore ineligible for a justification instruction because his act of drawing his gun "in a position where he was readily able to aim and fire it imminently" was "an imminent threat of deadly physical force." *Brown*, 33 N.Y.3d at 322. This ruling can essentially be divided into two parts, one legal and one factual. As a legal matter, the Court of Appeals held that the imminent threat to use deadly force makes one an initial aggressor under N.Y. Penal Law § 35.15(b). *Id*. We are without power to second-guess the Court of Appeals'

articulation of that legal standard. *Estelle*, 502 U.S. at 67–68; *Davis*, 270 F.3d at 123 n.4. Accordingly, we limit our review to how that court applied the standard in this case. As relevant here, the Court of Appeals concluded that Brown's action of drawing a gun, and holding it in a way that allowed it to be readily aimed and imminently fired, constituted just such an imminent threat to use deadly force.

As an initial matter, we discern no error in the New York Court of Appeals' assessment of the evidentiary record before the state trial court as to the key facts at issue here, namely that Brown pulled out a gun and held it by his side. These conclusions were supported by ample and unrebutted witness testimony: namely, Wolf's testimony that he saw Brown holding the gun at his waist and that he heard Cabbagestalk state that Brown "pull[ed] a gun out," and all three witnesses' testimony that they heard a gunshot go off in short order. There was no evidence in the state court record that could have allowed the jury to reach a contrary conclusion.

Armed with these undisputed facts, we likewise see no error in the New York Court of Appeals' application of state law to those facts: that Brown threatened Cabbagestalk with a gun and was therefore the initial aggressor. It is self-evident that the use of a firearm constitutes the use of deadly force. And, like the district court, we agree with the New York Court of Appeals' conclusion that in the context of this case—where the parties were in a heated argument that was starting to get physical—Brown's display of the gun, and then holding it at his waist ready to aim and fire in an instant, constituted a threat to imminently use deadly force.

Brown argues that a reasonable inference could be drawn that his act of drawing a firearm was not, in fact, a threatened imminent use of deadly physical force. He contends that "the jury could have found that Brown's act of drawing his lawfully-possessed service firearm, and holding it at his side, pointed away from Cabbagestalk, was a defensive display or brandishing of his weapon" that "did *not* threaten the imminent use of deadly physical force." Appellant's Br. at 34. Under Brown's interpretation of events, he drew his weapon to deter Cabbagestalk's attempts to hit him, and fired it only after Cabbagestalk tried to take the gun from him. Thus, according to Brown, the Court of Appeals' rejection of his gloss on the facts was the result of inferences drawn against him instead of in his favor, as required when assessing the availability of a justification defense. In support of his argument, Brown points to our decisions in *Davis* and *Jackson*, where we granted habeas relief on the grounds that New York state courts erroneously drew inferences against the defendant when denying a justification instruction. Neither ruling aids Brown's arguments here.

Davis involved an extraordinarily unusual set of facts supporting a justification offense, and we concluded that the New York courts had both unreasonably applied settled law and made unreasonable determinations of fact. There, the New York Appellate Division affirmed the denial of a justification instruction in a case where the defendant, Davis, fatally shot a person who had previously robbed him at gunpoint, raped him, and threatened his life. 270 F.3d at 121. When Davis next passed this person on the sidewalk, the

person started to turn around and reach to his waistband, and Davis shot him in the back. In the Appellate Division's view, (1) Davis lacked a reasonable belief that the victim was about to shoot him because Davis had not seen a gun on the victim's person, and (2) Davis failed to offer a "convincing reason why he did not retreat from the scene at the time of the actual shooting." *Id*. at 129, 130 (citation omitted). We granted habeas relief. In our view, the former conclusion ignored that Davis knew that the victim "had robbed, raped, and beaten other people at gun point," and had indeed "robbed Davis at gun point three times, forced him to strip naked twice, raped him once, once urged his co-assailant to shoot Davis, and at their last meeting, after raping him, promised to kill Davis when he next saw him." *Id*. at 129. That is, we believed the Appellate Division inappropriately discounted evidence of Davis's subjective fear, and the reasonableness of that fear. We also held that the Appellate Division had "no basis" to conclude that Davis might have retreated safely because "[i]f Davis's reasonable belief that [the victim] had a gun had been correct, he had one or two seconds left to live" as they stood there on the sidewalk and the victim pulled out a gun, and Davis thus could not have retreated with "complete safety," as required by N.Y. Penal Law § 35.15(2)(a). *Id.* at 130. Put simply, we found grievous fault with the New York court's application of the subjective and objective inquiries required by § 35.15—namely, that it did so in a way that failed to draw obvious inferences in Davis's favor, in contravention of state law. And we concluded that the New York court's decision was based on an unreasonable determination of the

facts, in light of the evidence presented in the state proceeding, in contravention of 28 U.S.C. § 2254(d)(2). *Id.* at 133.

In *Jackson*, the defendant fatally shot a severely inebriated man who had attempted to take a set of keys from the defendant by force, including by punching the defendant. 404 F.3d at 624. The state trial court, as affirmed by the Appellate Division, stated that Jackson would have been entitled to a justification instruction only if "there was a burglary being committed or an arson," but held that "none of that is applicable in this case." *Id*. at 617; *see* N.Y. Penal Law § 35.15(2)(b), (c) (providing, as relevant here, that a person may be justified in the use of deadly force if "[h]e or she reasonably believes that such other person is committing or attempting to commit" a burglary or a robbery and satisfies the conditions in § 35.15(1)). The federal district court granted Jackson's habeas petition because, as relevant here, it agreed with Jackson that the trial court improperly denied Jackson a justification instruction. *Id*. at 617–18. We affirmed, agreeing with the district court that "[v]iewing the evidence in the light most favorable to Jackson," a jury could have concluded that Jackson thought the victim was about to burglarize or rob him, thereby justifying his use of force pursuant to N.Y. Penal Law § 35.15(2)(b) or (c), and that Jackson reasonably "believed that simply striking back or announcing that he had a gun would not have prevented the robbery and that he was required to use his weapon," *id.* at 624. Thus, as in *Davis*, we sharply disagreed with the state courts' assessment of the subjective and objective prongs of the justification instruction inquiry and held that the state courts

erroneously failed to draw inferences in the defendant's favor, as required by New York law.

Critically, neither *Davis* nor *Jackson* involved the "initial aggressor" doctrine set forth in N.Y. Penal Law § 35.15(b). In both of those cases, our decisions turned on the subjective and objective criteria of the defense of justification. And in both cases, the trial evidence permitted inferences favorable to the defendant about what he actually feared, or objectively could have feared, from the person he ultimately shot. By contrast, the initial aggressor doctrine turns not on what the defendant *feared*, but rather on the objective circumstances of what he *did* and whether his actions would reasonably be perceived as a threat to imminently use deadly force. Applying that legal standard here, even accepting Brown's contention that he intended his display of the firearm to be "defensive" and to deter Cabbagestalk from hitting him, such a deterrent effect would have been produced only by impressing upon Cabbagestalk that Brown would shoot him. And threatening to shoot someone comfortably qualifies as the threatened use of deadly physical force. Brown points to no plausible inference, based on the trial evidence, that his pulling of the gun was not such a threat. *Davis* and *Jackson* are therefore of little help to Brown.

We likewise agree with the district court, and the New York Court of Appeals, that no reasonable view of the evidence permits the conclusion that Brown withdrew from his confrontation with Cabbagestalk after drawing his gun, which is the only way he could still have been eligible for the defense upon the determination that he

was the initial aggressor. *See Brown*, 33 N.Y.3d at 323. As the district court explained, review of the trial transcripts does not reveal any testimony that Brown withdrew from the confrontation with Cabbagestalk. *Brown*, 2023 WL 4351194, at *3. We also agree that no reasonable view of the evidence reveals that Cabbagestalk was actually the initial aggressor. That is, there is no evidence that Cabbagestalk threatened Brown with deadly physical force before Brown got out his gun—the only remaining theory that might have permitted a justification instruction here. *Brown*, 33 N.Y.3d at 323–24.

Even if we entertained some residual doubt about whether the state courts had properly denied a justification defense, we would still conclude—under the third prong of our habeas inquiry—that Brown failed to satisfy § 2254(d), which calls for especially deferential federal review of state convictions. Brown has not shown, as he must, that the New York Court of Appeals acted contrary to clearly established federal law as set forth in Supreme Court precedent. Even in *Davis* and *Jackson*, where we granted habeas relief, we did not conclude that the New York courts had acted "contrary to" federal law as provided in § 2254(d)(1). As in *Davis*, "there is no indication that the [state courts] construed the due process clause in a manner 'opposite to' the Supreme Court's rulings." 270 F.3d at 133.

Nor has Brown satisfied the alternative prong of § 2254(d)(1)—namely, that the New York Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court. It bears repeating that, "[i]n order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's instructions to

the jury on matters of state law, the petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by federal law." *Casillas v. Scully*, 769 F.2d 60, 63 (2d Cir. 1985). Our Court has read *Cupp v. Naughten*, 414 U.S. 141 (1973), to establish a due process violation where a state court's instructional error "so infected the entire trial that the resulting conviction violates due process." *Jackson*, 404 F.3d at 624 (quoting *Cupp*, 414 U.S. at 147). In *Davis*, we held that the state court unreasonably applied that standard where the defendant had a "clear right" to a case-determinative jury charge on self-defense, where denial of that instruction was "catastrophic," and where the trial was therefore "egregiously at odds with the standards of due process" clearly established by *Cupp*. *Davis*, 270 F.3d at 132–33; *see also Jackson*, 404 F.3d at 627–28 (reaching the same conclusion in a similar case).

Here, by contrast, it cannot be said that the New York Court of Appeals unreasonably applied *Cupp* when it concluded that Brown was not entitled to a justification defense. Even if we disagreed with that conclusion, we could hardly say that *every* fairminded jurist would similarly disagree. *See Klein*, 146 S. Ct. at 596. That is indeed a high bar to surmount. As the Supreme Court has repeatedly admonished, a state court cannot be faulted as having unreasonably applied federal law unless its decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Having reviewed the New York Court of Appeals' decision, we detect nothing that could be remotely

described as the sort of "extreme malfunction[]" for which federal habeas relief is reserved. *Klein*, 146 S. Ct. at 596 (internal quotation marks omitted). Even insofar as Brown contends that the Court of Appeals applied its own precedents inconsistently, he does not argue and cannot show that the decision was a "novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997); *see also Metrish v. Lancaster*, 569 U.S. 351, 359 (2013); *Rogers v. Tennessee*, 532 U.S. 451, 461–62 (2001); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Finally, we reach the same conclusion with respect to the final question posed by § 2254(d)(2)—whether the state court decision was based on an unreasonable determination of fact based on the evidence in the state proceeding. As explained earlier, the New York Court of Appeals relied on facts that were clearly supported by the witness testimony presented at trial, and those facts were essentially undisputed. Brown was the first (and only) antagonist to pull out a gun during his argument with Cabbagestalk; Brown held the gun at his waist, where it could be readily aimed and fired; and he indeed did so shortly after the gun was drawn, killing Cabbagestalk. The New York Court of Appeals therefore cannot be said to have based its decision on unreasonable findings of fact.

IV. Conclusion

In sum, we hold that the New York Court of Appeals did not erroneously deprive Brown of a justification instruction to which he

was entitled under state law when it concluded that his conduct rendered him an initial aggressor under N.Y. Penal Law § 35.15(b). And because there was no state-law instructional error, there cannot have been a federal due process violation. The decision of the district court dismissing the petition is AFFIRMED.

State of New York
Court of Appeals

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 32
The People &c.,
Appellant,
v.
Darryl Brown,
Respondent.

Clara H. Salzberg, for appellant.
Joey Jackson, for respondent.

WILSON, J.:

Defendant Darryl Brown shot and killed Vonde Cabbagestalk in the lobby of Mr. Brown's apartment building after an argument. At trial, Mr. Brown sought a jury instruction on justification, which the court declined to give. We agree with the trial court

that no reasonable view of the evidence warranted a justification charge, and, accordingly reverse.

I

Mr. Brown and his pregnant daughter lived in an apartment building in the Bronx; Mr. Cabbagestalk was Mr. Brown's daughter's boyfriend and the father of her child. Three witnesses who saw at least a part of the events surrounding Mr. Cabbagestalk's death testified at trial.

The first witness, Yvette Flores, lived across the hall from Mr. Brown. Ms. Flores heard arguing in the hallway. Looking through the peephole in her front door, she saw Mr. Brown and Mr. Cabbagestalk arguing in front of the open door to Mr. Brown's apartment, with Mr. Brown's daughter standing there as well. The argument between Mr. Brown and Mr. Cabbagestalk continued after both men passed out of Ms. Flores' view; shortly afterwards, she heard Mr. Brown's daughter yell, "No, daddy, no!" followed by a loud boom. Ms. Flores left her apartment, saw Mr. Cabbagestalk lying on the lobby floor, and saw Mr. Brown and his daughter re-enter their apartment. She called 911.

A second witness, Sheila Thomas, observed the argument as she was entering the building. Looking through the interior glass door, she saw two men in the lobby, one older than the other. She saw the older man (Mr. Brown) walk away and the younger man (Mr. Cabbagestalk) follow. Ms. Thomas said the older man was walking and the younger man was following him with his hands out and elbows bent so that his palms were up, facing the older man, as if he was "trying to reason" with him. The argument continued after Ms.

Thomas could no longer see them, when suddenly a shot rang out. She saw the younger man fall and heard a woman scream. She then fled outside.

The third witness, Raymond Wolf, a postal carrier, was delivering mail to the building at the time of the incident. When he arrived at the building, Mr. Cabbagestalk and Cordarell Marshall, an acquaintance of Mr. Cabbagestalk's, opened the building's locked door to admit Mr. Wolf.[1] While Mr. Wolf was in the lobby, distributing mail into the residents' individual mailboxes, an older man (Mr. Brown) entered the lobby where the two younger men had been talking, and started arguing with the taller of the two younger men (Mr. Cabbagestalk). Mr. Wolf said he heard the older man say, "Stay away from my daughter, don't come around here." Mr. Cabbagestalk responded, "you can't tell me where to be." According to Mr. Wolf, Mr. Cabbagestalk was "getting in the older guy's face a little bit," "trying to back him down," and Mr. Marshall was trying to calm Mr. Cabbagestalk down.

Mr. Wolf testified at trial that he observed Mr. Cabbagestalk throwing a few punches at Mr. Brown but that he believed those punches did not reach Mr. Brown. Mr. Wolf also testified that Mr. Brown was holding a gun slightly "above waist high" and "pointed away from him." Mr. Cabbagestalk then "swiped" at Mr. Brown's gun, though Mr. Wolf's testimony about the exact number of swings and sequence of events was

[1] The identity of Mr. Cabbagestalk's companion was not definitively resolved at trial, but for purposes of the present appeal we will follow the Appellate Division's finding that this individual's name is Cordarell Marshall (160 AD3d 39, 42 n 1).

inconsistent, at times testifying to three swings followed by one swipe, at other times interspersing one swipe amid swings. In any event, Mr. Wolf averred that he could not recall if any of the swings or swipes was with an open or closed hand. According to Mr. Wolf, at some point before Mr. Cabbagestalk's last swing or swipe, Mr. Cabbagestalk said, "if you going to pull a gun out, you got to use it." Mr. Brown did just that, shooting Mr. Cabbagestalk in the chest. When Mr. Wolf first saw the gun, he started up the stairs to the second floor. From his vantage point on the stairs, he did not see "the flash [of the gun firing] or anything," but heard the shot and saw Mr. Cabbagestalk fall.

When the police arrived, they found Mr. Cabbagestalk lying face down in the lobby, dead at the scene with a shell casing next to him. During their canvass of the building, the police spoke to Ms. Flores, who directed them to the Browns' apartment. Mr. Brown admitted the police, where they recovered a semiautomatic Glock pistol in a kitchen drawer. Testing later revealed it was the gun that fired the shell casing found next to Mr. Cabbagestalk's body.

Mr. Brown was indicted for murder in the second degree, manslaughter in the first degree, and criminal use of a firearm in the first degree. Defense counsel asked the court for a justification instruction; the People objected. The court denied the request because the evidence, taken in the light most favorable to Mr. Brown, did not warrant a justification charge.[2] The jury acquitted Mr. Brown of murder in the second degree but found him guilty

[2] Contrary to the position of Mr. Brown and the conclusion of the Appellate Division majority below (160 AD3d at 49 n 9), the question of whether the trial court correctly

of manslaughter in the first degree. The Appellate Division, over a two-Justice dissent, reversed, holding Mr. Brown was entitled to a jury instruction on justification (People v Brown, 160 AD3d 39 [1st Dept 2018]). A Justice of the Appellate Division granted the People leave to appeal to this Court, and we now reverse.

II

Mr. Brown's shooting of Mr. Cabbagestalk self-evidently constituted the use of deadly physical force. As relevant here, a defendant is justified in using "deadly physical force" upon another only if that defendant "reasonably believes that such other person is using or about to use deadly physical force" (Penal Law § 35.15 [2] [a]): in other words, both that "he believed deadly force was necessary to avert the imminent use of deadly force [and that] in light of all the circumstances . . . a reasonable person could have had these beliefs" (People v Goetz, 68 NY2d 96, 115 [1986]). However, the Penal Law provides that a defendant is never justified in using deadly physical force if that defendant is the "initial aggressor:" the first person in an altercation who uses or threatens the imminent use of deadly physical force (Penal Law § 35.15 [1] [b]; People v Petty, 7 NY3d 277, 285 [2006]).[3]

denied Mr. Brown's request for a justification instruction, including on initial aggressor grounds, is preserved (CPL 470.05 [2]; cf. People v Miranda, 27 NY3d 931, 932 [2016]).

[3] We have no need to consider the People's argument that Mr. Brown was not entitled to a justification instruction because he does not satisfy the subjective and objective criteria of the defense set out in People v Goetz (68 NY2d at 114-15) and its progeny.

"Justification is a defense, not an affirmative defense, and therefore the People bear the burden of disproving it beyond a reasonable doubt" (Matter of Y.K., 87 NY2d 430, 433 [1996]). "[I]n considering whether the trial court's charge to the jury was adequate, the record must be considered most favorably to defendant . . . [and] if[,] on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified, the failure to charge the [justification] defense constitutes reversible error" (People v Padgett, 60 NY2d 142, 145 [1983]). However, "when no reasonable view of the evidence would support a finding of the tendered defense, the court is under no obligation to submit the question to the jury" (People v Watts, 57 NY2d 299, 301 [1982]).

Mr. Brown's argument that he was entitled to a justification charge rests entirely on Mr. Wolf's testimony; the testimony of the other witnesses does not provide any basis for a justification charge. Even fully crediting Mr. Wolf's testimony, it is uncontested both that Mr. Cabbagestalk was unarmed and that Mr. Cabbagestalk swiped at the gun only after Mr. Brown wielded it. On the facts of this case, taken in the light most favorable to Mr. Brown, we hold that the trial court's refusal to charge justification was not error, because Mr. Brown was the initial aggressor as a matter of law.

The "initial aggressor" is the first person who uses or threatens the imminent use of physical force in a given encounter. However, even if someone is the initial aggressor with respect to mere physical force, another person may be the initial aggressor with respect to *deadly* physical force. If mere physical force is employed against a defendant, and the defendant responds by employing deadly physical force, "the term initial aggressor is

properly defined as the first person in the encounter to use deadly physical force" (People v McWilliams, 48 AD3d 1266, 1267 [4th Dept 2008]).[4]

To determine who the "initial aggressor" is, then, both the sequence of the attacks (or imminently threatened attacks) and the nature of those attacks matter: which attacks were "physical force" and which attacks were "deadly physical force?" "Deadly physical force means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[11]). Deadly physical force, we have held, encompasses not merely the striking of the first blow or infliction of the first wound. It also encompasses acts by a person that cause the defendant reasonably to believe that the defendant is facing the "imminent threat" of deadly force (see People v Valentin, 29 NY3d 57, 60 [2017]). As for what constitutes such a threat, we held in People v Dodt (61 NY2d 408 [1984]) that the imminent threat to use a gun constituted the threat of deadly physical force even if the gun is never fired. "The threat presented by a gun does not depend to any significant extent on the manner in which it is used. So long as a gun is operable, it constitutes deadly physical force, and a threat to use a gun, such as was made here, can only be understood as a threat that the weapon is operable" (id. at 415). Thus, the imminent threat to use a gun against another is, necessarily,

[4] See also People v Valentin, 29 NY3d 57, 61 (2017); People v Kerley, 154 AD3d 1074, 1076 (3d Dept 2017); People v Daniel, 35 AD3d 877, 878 (2d Dept 2006); People v Walker, 285 AD2d 364, 365 (1st Dept 2001); People v Mickens, 219 AD2d 543, 544 (1st Dept 1995); CJI2d[NY] Justification: Use of Deadly Physical Force in Defense of a Person, Penal Law § 35.15 (2).

a threat of deadly physical force. The first person to make such an imminent threat is, therefore, the initial aggressor with respect to deadly physical force.

Those principles control this case. Here, Mr. Brown placed his gun in a position where he was readily able to aim and fire it imminently, and did so before Mr. Cabbagestalk's efforts to "swipe" at the gun. The circumstances surrounding that act—where a verbal altercation between Mr. Brown and the victim preceded it, where the victim was unarmed, where an armed Mr. Brown pursued the victim into the building's lobby, and where both Mr. Brown's daughter ("No, daddy, no!") and the victim himself ("you going to pull a gun out, you better use it") expressed their subjective belief that Mr. Brown had threatened the imminent use of deadly force—provide further support for the trial court's conclusion that Mr. Brown's drawing of a gun here could only be understood as an imminent threat of deadly physical force.

Even the Appellate Division majority, holding that Mr. Brown was not an initial aggressor, nonetheless characterized Mr. Cabbagestalk's errant punches as "undeterred by [Brown's] weapon" (160 AD3d at 45). Mr. Brown's display of the gun as a "deterrent" was, on this record, a deterrent precisely because it threatened the imminent use of deadly physical force. We reached the same conclusion in People v Magliato (68 NY2d 24 [1986]), in which we held that the defendant was the initial aggressor when he drew his firearm to "scare off" the victim, because the gun was "readily capable of causing death or physical injury" (id. at 30) as those terms are defined in Penal Law § 10.00(11). We explained "the risk of serious injury or death and the capacity presently to inflict the same

are central to the definition [of deadly physical force], not the consequence of defendant's conduct or what he intended" (Magliato, 68 NY2d at 29).

Because Mr. Brown's drawing of his gun under these circumstances constituted the imminent threat of deadly physical force, the "initial aggressor" rule bars Mr. Brown from claiming justification unless a reasonable jury could conclude either: (1) that Mr. Brown withdrew from the encounter after drawing his gun, communicated that withdrawal to Mr. Cabbagestalk, and Mr. Cabbagestalk thereafter used or threatened imminent use of deadly physical force (Penal Law § 35.15[1][b]), or (2) that Mr. Cabbagestalk himself was the initial "deadly force" aggressor. No reasonable jury could reach either conclusion based on the evidence in this case, even viewing the evidence in the light most favorable to Mr. Brown (as we must).

First, there is no evidence that Mr. Brown withdrew after drawing his gun. Instead, after drawing his gun, Mr. Brown shot Mr. Cabbagestalk dead. All testimony as to Mr. Brown carrying a firearm indicates that Mr. Brown had his firearm out during all or part of the argument in the lobby—there was no withdrawal between the imminent threat to use the gun (the first threat of deadly physical force) and the grim realization of that threat.

Second, Mr. Cabbagestalk was not the initial deadly force aggressor because of his "swipe" at Mr. Brown's gun. No reasonable view of the evidence supports the proposition that Mr. Brown was ever threatened by Mr. Cabbagestalk with the imminent use of deadly force prior to the point at which Mr. Brown drew his gun. Mr. Cabbagestalk sought to swipe the gun only after Mr. Brown had first threatened the imminent use of deadly

physical force by displaying his gun, leaving Mr. Brown as the initial deadly force aggressor. There is no evidence that Mr. Cabbagestalk was ever armed; indeed, both Mr. Wolf and Ms. Thomas testified that Mr. Cabbagestalk had nothing in his hands. As for Mr. Cabbagestalk's argument with Mr. Brown, as we said in Valentin, "calling a person names or the like unaccompanied by physical threats or acts does not make a person an initial aggressor and does not justify physical force" (29 NY3d at 61), let alone deadly physical force.[5] As the dissenting Justices below explained, "when defendant became the first and only participant in the altercation to threaten the use of deadly physical force . . . he did so without any basis for fearing that Cabbagestalk was about to use such force on him" (160 AD3d 39, 60 [Kahn, J. dissenting]).[6] To hold that one who wields a gun during a nondeadly altercation may claim justification because the unarmed victim subsequently attempted to swipe, grab or dislodge the gun would be to disregard the requirements of Penal Law § 35.15.

[5] There is no evidence in this case remotely akin to that presented in People v Petty (7 NY3d 277 [2006]), in which we held a reasonable jury could infer an imminent threat of deadly physical force from the victim's unambiguous, credible death threats uttered repeatedly to the defendant over an 11-day period. The uncontroverted evidence in this case is that Mr. Cabbagestalk did no more than argue with Mr. Brown before Mr. Brown drew his gun.

[6] Mr. Brown further argues that the reasonableness of his alleged belief that Mr. Cabbagestalk threatened the imminent use of deadly physical force is demonstrated by the jury's decision to acquit him of murder, because the acquittal shows that Mr. Brown did not intend to cause the death of Mr. Cabbagestalk. But whether proof beyond a reasonable doubt existed that Mr. Brown intended to kill Mr. Cabbagestalk is a different question than whether Mr. Brown reasonably believed he himself was threatened with deadly physical force.

III

In holding that Mr. Brown is not entitled to a justification charge on this record, we do not disturb in the slightest "the well-settled principle that, in considering whether the trial court's charge to the jury was adequate, the record must be considered most favorably to defendant [and i]f, taking that view of the record, the evidence supports the defense of justification, the trial court should instruct the jury as to the defense and must when so requested" (Padgett, 60 NY2d at 144-45). However, where, as here, there is no reasonable view of the evidence that Mr. Brown was anything other than the initial aggressor in his use of deadly physical force, he is not entitled to a jury instruction on justification.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to the Appellate Division for a determination of the facts and issues raised but not determined on appeal to that Court.

* * * * * * * * * * * * * * * * *

Order reversed and case remitted to the Appellate Division, First Department, for determination of the facts and issues raised but not determined on appeal to that court. Opinion by Judge Wilson. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Feinman concur.

Decided May 7, 2019

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4634 The People of the State of New York, Respondent,

-against-

Darryl Brown, Defendant-Appellant.

Ind. 971/14

Kohler & Isaacs, LLP, New York (Joey Jackson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered November 2, 2016, reversed, on the law, and the matter remanded for a new trial.

Opinion by Richter, J.P. All concur except Gische and Kahn, JJ. who dissent in an Opinion by Kahn, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Judith J. Gische
Barbara R. Kapnick
Marcy L. Kahn
Cynthia S. Kern, JJ.

4634
Ind. 971/14

_____x

The People of the State of New York,
Respondent,

-against-

Darryl Brown,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Robert A. Neary, J.), rendered November 2, 2016, convicting him, after a jury trial, of manslaughter in the first degree, and imposing sentence.

Kohler & Isaacs, LLP, New York (Joey Jackson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg and Justin Braun of counsel), for respondent.

RICHTER, J.P.

In this homicide prosecution, we are asked to determine whether the trial court erred in denying defendant's request to instruct the jury on the defense of justification. We find that, viewing the evidence at trial in the light most favorable to defendant, a jury could conclude that defendant feared for his life, and reasonably believed deadly physical force was necessary to defend himself against the deceased's imminent use of deadly physical force. Under the circumstances here, the court's failure to give the justification charge constitutes reversible error, and the case must be remanded for a new trial.

Defendant Darryl Brown was charged with murder in the second degree, manslaughter in the first degree, and criminal use of a firearm in the first degree, based on allegations that he fatally shot Vonde Cabbagestalk on March 20, 2014. The evidence at trial established the following. On the day of the incident, defendant lived with his daughter in apartment 1B at 739 East 242nd Street in the Bronx. On the afternoon of that day, Yvette Flores, who lived directly across the hall in apartment 1A, heard a loud voice arguing. Flores looked through the peephole in her door and saw defendant and his daughter, who was holding a child, standing in front of their apartment with a younger man. Flores heard defendant and the younger man arguing, but was unable to

hear what they were saying. Flores then saw the two men walk off together toward the direction of the building's lobby and out of her line of sight. Defendant's daughter remained at the apartment door with the child.

Although Flores could no longer see the men after they walked off, she heard them arguing and cursing, but did not hear any specific threats. She heard defendant's daughter yell, "[N]o daddy no," followed immediately by a loud boom. Flores initially moved away from her door, but returned to look through the peephole, where she saw defendant, his daughter and the child go into their apartment. Flores went into the hallway and saw a man lying by the front door of the lobby, motionless, and called 911. Flores testified that she did not see the actual shooting incident and never saw a gun or any other weapon during the encounter.

Raymond Wolf, a postal carrier, was delivering mail to the building that afternoon. Two young men who were standing in the lobby let Wolf in. Wolf, who was listening to music on his headphones, went off to the side of the lobby to place the mail into the mailboxes. At some point, Wolf noticed a shorter, older man enter the lobby area. The older man and the two young men were talking at first, and then the conversation became louder. The older man said, "[W]hy you here," "stay away from my

daughter, don't come around here." One of the young men, later identified as the deceased, Vonde Cabbagestalk, responded, "[Y]ou can't tell me where to be." Cabbagestalk was "getting in the older guy's face a little bit," "trying to back him down." The older man stepped back, and the third man restrained Cabbagestalk, telling him to "chill out, relax."

Cabbagestalk started swinging at the older man, trying to hit him in the face. After Cabbagestalk swung "a couple [of] times," Wolf noticed the older man holding a gun "at an angle" by his waist. The gun was not "pointed in [Cabbagestalk's] direction" or "threatening him," but was "[k]ind of by [the older man's] body. The third man stepped away, still trying to calm Cabbagestalk down, asking him to stop advancing toward the older man. Cabbagestalk, however, continued to swing at the older man's face three to four times, using both hands. At the same time, Cabbagestalk was "grabbing" for the gun, saying, "[Y]ou going to pull a gun out, you better use it." Wolf testified that the older man, who was not at all "hyper," "continued to backup" "[a]nd backup," "[a]nd backup" as Cabbagestalk "continued to approach him," "continued to swing at him," and "continue[d] to swipe at the weapon." Wolf described Cabbagestalk as being "about two feet [from] the older [man]," who was "leaning back," "moving from the swings." Although Wolf did not actually see the

flash from the gun, he heard a shot ring out and saw Cabbagestalk fall to the floor. Wolf retreated upstairs and called his supervisor.[1]

Sheila Thomas, who lived in the building, was returning home from grocery shopping that day. As she approached the interior door to the building, she was holding her groceries and searching for her keys. Thomas heard voices arguing inside, and although she did not hear what they were saying, she could tell it was a disagreement. Looking through the windows of the foyer door into the building, Thomas saw two men in the lobby. One of the men was older than the other and had "a little weight" on him; the younger man was taller, "probably slender." Thomas observed the older man walking across the lobby away from the younger man, and the younger man following him. Both were walking in the same direction "at a slow pace," about six to seven feet from each other. As the younger man followed the older man, the older man gestured with his hands, but never turned around to face the younger man. Thomas saw nothing in the older man's hands.

Thomas described how the younger man had his hands extended

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[1] In the course of their investigation, the police came to believe that the third man in the lobby was Cordarell Marshall. Marshall was questioned by police on the day of the shooting, and told them that he did not see or hear anything. Although the police took pedigree information from him, they subsequently were unable to locate him.

outward from his body, elbows bent at 90 degrees, with his palms facing upward. Based on those gestures, it appeared to Thomas that the younger man was "trying to reason" with the older man. The two men walked across the hallway and out of Thomas's field of vision, continuing to argue. She heard a gunshot from the direction where the men had just walked, saw the younger man fall backwards in front of the door, and heard a woman scream. Thomas fled outside, ran down the block and called 911. Before she heard the gunshot, Thomas did not observe any physical altercation between the men, saw no punches being thrown, and saw no weapons.

When the police arrived, they observed a man lying face down in the lobby with a single shell casing next to him; he was pronounced dead at the scene. During their canvass of the building, the police spoke to Flores, who directed them to defendant's apartment. Defendant let the police inside, where they recovered a semiautomatic Glock pistol in a kitchen drawer. The police later learned that defendant was a New York City corrections officer who legally possessed the gun. Testing revealed that the shell casing found in the lobby had been fired from defendant's gun. The deceased was subsequently identified as Vonde Cabbagestalk, a 21-year-old man who had been dating

defendant's daughter.[2]

Prior to summations, defendant asked the court to instruct the jury on the defense of justification. The court denied the request, believing that there was no reasonable view of the evidence to support a justification charge. The jury rendered a verdict finding defendant not guilty of murder in the second degree and guilty of manslaughter in the first degree.[3] The court sentenced defendant to 18 years in prison. Defendant now appeals, arguing that the court erred in failing to charge the jury on justification.[4]

A trial court must instruct the jury on the defense of justification where the evidence, viewed in the light most favorable to the defendant, reasonably supports the defense

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[2] Robert Baumert, a security consultant and former firearms instructor for the New York City Police Department, testified as an expert witness for the defense about the tactical use of force by law enforcement officers. Defendant did not testify.

[3] The court did not submit the criminal use of a firearm count to the jury.

[4] The People do not argue on appeal that this issue is unpreserved. Although, as the dissent notes, defendant did not object after the court instructed the jury, the issue was fully preserved by defendant's earlier request for the justification charge. Defendant was not required to renew his request after the jury was instructed (CPL 470.05[2]; *People v Le Mieux*, 51 NY2d 981, 982 [1980]; *see People v Mezon*, 80 NY2d 155, 161 [1992] ["The law does not require litigants to make repeated pointless protests after the court has made its position clear"]).

(*People v Padgett*, 60 NY2d 142, 144-145 [1983]; *People v Gant*, 282 AD2d 298, 299 [1st Dept 2001]). "[I]f on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified, the failure to charge the defense constitutes reversible error" (*Padgett*, 60 NY2d at 145). "Ordinarily, the possibility of the defense would not appear until injected by the defendant. However, the prosecution's case, in and of itself, may raise an issue of fact as to whether the defendant was justified in using force such that his or her conduct was entirely lawful" (*People v Singh*, 139 AD3d 761, 763 [2d Dept 2016] [internal quotation marks and citation omitted], *lv denied* 28 NY3d 936 [2016]).

The use of "deadly physical force" upon another person is justified where the defendant "reasonably believes that such other person is using or about to use deadly physical force" (Penal Law § 35.15[2][a]). However, a defendant may not use deadly physical force "if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating" (*id.*). Nor may a defendant who is the "initial aggressor" use deadly force, with limited exception (Penal Law § 35.15[1][b]). "Penal Law § 35.15 requires a jury to consider both subjective and objective factors in determining whether a defendant's conduct was reasonable" (*People*

v Wesley, 76 NY2d 555, 559 [1990]). Thus, for a defendant to be entitled to a justification charge with respect to the use of deadly physical force, there must be a reasonable view of the evidence: (1) that the defendant actually believed that the use of deadly physical force was necessary to defend himself or herself against the use, or imminent use, of deadly physical force; and (2) that the defendant's belief was reasonable (*see Matter of Y.K.*, 87 NY2d 430, 433-434 [1996]; *People v Wesley*, 76 NY2d at 559; *People v Goetz*, 68 NY2d 96, 115 [1986]).

Applying these principles, we conclude that the trial court should have instructed the jury on the defense of justification. The trial evidence, when viewed in the light most favorable to defendant, supports a conclusion that defendant feared for his life, and reasonably believed that deadly physical force was necessary to defend himself against Cabbagestalk's imminent use of deadly physical force. Wolf, the postal carrier, who was the only eyewitness to the actual shooting,[5] described an escalating series of aggressive actions and verbal threats made by Cabbagestalk immediately before defendant fired his weapon. Wolf explained that Cabbagestalk was "getting in [defendant's] face"

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[5] The testimony of Flores and Thomas sheds no light on the critical event. Flores conceded that she did not see the actual shooting, and Thomas testified that the two men were out of her view when the shot went off.

and was "trying to back him down." Cabbagestalk's behavior was aggressive enough for his friend to, albeit unsuccessfully, attempt to restrain him, entreating him to "chill out, relax."

Instead of taking his friend's advice, Cabbagestalk escalated the encounter and began throwing punches at defendant, using both hands, trying to hit defendant in the face. At that point, defendant took his gun out, but held it by his body, not pointed at Cabbagestalk. Undeterred by the weapon, Cabbagestalk continued to swing at defendant multiple times, and at the same time, grabbed for the gun, threatening, "[Y]ou going to pull a gun out, you better use it." Wolf described how defendant continued to "backup" "[a]nd backup," "[a]nd backup," trying to move away from the swings. But Cabbagestalk continued his attack, advancing toward defendant, taking multiple swings at his face, and grabbing for his gun while simultaneously making a statement that could be interpreted as a threat. Cabbagestalk got within two feet of defendant, and defendant fired the weapon.

Based on Wolf's testimony, a jury could conclude that defendant reasonably believed that Cabbagestalk, who was younger and taller than defendant, and just two feet away, would gain control of defendant's gun (*see People v Wesley*, 76 NY2d at 559 [determination of reasonableness of the defendant's conduct must be based on the circumstances facing the defendant, including the

physical attributes of all those involved in the incident]; *Matter of Ismael S.*, 213 AD2d 169, 172 [1st Dept 1995] [noting the physical and age disparities between the respondent and victim in finding that the presentment agency failed to disprove justification defense]). A jury could also reasonably conclude that Cabbagestalk's statement to defendant - "[Y]ou going to pull a gun out, you better use it" — constituted a threat that if defendant did not use the gun, Cabbagestalk would take the gun and use it to shoot defendant. This is particularly true in light of the evidence that Cabbagestalk was advancing toward defendant, throwing punches at his face, and grabbing for the gun at the same time he made the threat.

Our decision in *People v Schwartz* (168 AD2d 251 [1st Dept 1990]) is on point. In that case, the defendant testified that while he was holding a gun in an apartment, a man lunged at him and grabbed for the weapon. The defendant discharged the gun so that the man would not shoot him, and another man in the apartment was hit by a bullet and killed. This Court reversed the defendant's manslaughter conviction, finding that the trial court erred in not giving a justification charge. The Court found that a reasonable view of the evidence showed that the defendant fired the weapon to protect himself from the imminent use of deadly force by the man who grabbed for his gun (*see also*

People v Smith, 234 AD2d 484, 485 [2d Dept 1996] [justification should have been charged where the victim "'lunged' at" and "attempt[ed] to grab" the defendant, who was armed with a gun]).

In arguing that no justification charge was warranted, the People place undue emphasis on Thomas's testimony that defendant was angrier and more aggressive than Cabbagestalk, and that defendant and Cabbagestalk were six to seven feet away from each other. The jury, however, could have disregarded that testimony in favor of Wolf's testimony describing Cabbagestalk as the aggressor, and placing the men only two feet apart when the gun was discharged (*see People v Zona*, 14 NY3d 488, 493 [2010] ["it is fundamental that a jury may accept portions of the defense and prosecution evidence or either of them"] [internal quotation marks omitted]).[6] Moreover, it is undisputed that Thomas, who was looking for her keys during the incident, did not witness the actual shooting, and expressly conceded that she did not know how far away the men were from each other when the shot was fired.

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[6] The dissent's contention that Wolf did not have the participants in view when the shot was fired is not supported by the record. Contrary to the dissent's suggestion, Wolf did not testify that he did not witness the shooting. Although Wolf did not actually see the flash from the gun, he observed defendant retreating from Cabbagestalk's swings at the precise moment the shot went off, and saw Cabbagestalk fall to the ground immediately thereafter. The only fair reading of this testimony is that Wolf witnessed the actual shooting.

In denying defendant's request for the justification charge, the trial court relied on three cases, all of which are distinguishable. In *People v Jones* (3 NY3d 491 [2004]), the defendant, who had a considerable height and weight advantage over his girlfriend, choked her to death after "she merely picked up [a] knife" and tried to slap him (*id.* at 497). In *People v Torres* (140 AD3d 478 [1st Dept 2016], *lv denied* 28 NY3d 974 [2016]), the defendant stabbed two unarmed men in the back, had no reason to believe that the victims or their companions were armed or about to use deadly force, and had the ability to retreat. In *People v Taylor* (134 AD3d 508 [1st Dept 2015], *lv denied* 28 NY3d 1075 [2016]), the defendant stabbed two bouncers at a club, and subsequently chased one of them with a knife, even though the defendant had no reason to believe that the victims, or their fellow employees, were using anything more than ordinary physical force. Here, in contrast, defendant discharged his weapon only after a continued assault upon him where Cabbagestalk, who was younger and taller than defendant, advanced upon him, backed him down, threw multiple punches, grabbed at his gun and made what could reasonably be viewed as an overt threat to use the weapon against defendant.

People v Watts (57 NY2d 299 [1982]), relied upon by the dissent, is distinguishable. There, the Court found that a

justification charge was not warranted where the "sole probative evidence" was the defendant's statement to a police officer at the time of arrest that "the complainant 'came after [defendant] in his room with a kitchen knife'" (*id.* at 302). Notably, there is no description in *Watts* of the circumstances surrounding the incident, including the defendant's proximity to the victim, or their relative ages and sizes. The proof in *Watts* stands in stark contrast to the evidence of Cabbagestalk's aggressive behavior here.

The dissent's reliance on *People v Hosein* (221 AD2d 563 [2d Dept 1995]) is similarly misplaced. In that case, no justification charge was warranted because the defendant had no reason to believe that the victim was about to use deadly physical force against him. Unlike here, the victim in *Hosein* did not take multiple swings at the defendant, did not try to grab his gun, and made no threatening remarks. Moreover, the victim in *Hosein* was six to seven feet away from the defendant at the time the defendant fired his gun. Here, in contrast, defendant and Cabbagestalk were only two feet apart when Cabbagestalk grabbed for the weapon, which increased the likelihood that Cabbagestalk could have gotten control of it.

We do not agree with the dissent's view that, as a matter of law, Cabbagestalk employed only "ordinary physical force, not

deadly physical force," at the time defendant discharged his weapon. Nor do we agree with the dissent's characterization that Cabbagestalk "made [no] serious effort to grab defendant's firearm." According to Wolf, the only witness who actually saw the shooting, Cabbagestalk was advancing upon defendant and backing him down, while simultaneously swinging multiple times at his face, swiping for the gun and making a threatening statement. A jury could conclude that faced with Cabbagestalk's rapidly escalating violent behavior, defendant reasonably believed that Cabbagestalk was about to use deadly physical force, by gaining control of defendant's gun and using it to shoot defendant.

The natural extension of the dissent's argument is that because Cabbagestalk did not actually take possession of defendant's gun, defendant could not, as a matter of law, reasonably have feared that Cabbagestalk would imminently use deadly physical force. We believe that is a question for the trier of fact. Although, as the dissent points out, there was no physical contact between Cabbagestalk and defendant, a fair view of the evidence, considered in the light most favorable to defendant, shows that Cabbagestalk advanced to within arm's reach of defendant, took multiple swings at his face and tried to take his gun. A jury could reasonably find that defendant did not have to wait until Cabbagestalk actually grabbed the gun before

defendant had the right to defend himself.[7]

Pointing to select excerpts from the testimony of defendant's expert witness, the dissent opines that, as a matter of law, a reasonable law enforcement officer in defendant's situation would not have drawn and discharged his weapon. Although the expert did testify that law enforcement officers are trained to defuse confrontations, he also emphasized that officers "do[] not have to see a weapon in order to draw [their own] weapon," and acknowledged that the closer an assailant is, the more of a threat they pose. According to the expert, law enforcement officers are trained that if they draw their weapon, and subsequently fear that the weapon could be wrestled away from them, they can discharge the weapon to defend themselves. Although the dissent posits that the expert's testimony "dispels any notion" that defendant had a reasonable belief that his life was in jeopardy, the testimony, viewed in its entirety, presents

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[7] The dissent's belief that Cabbagestalk himself would have been entitled to a justification charge if he had grabbed defendant's gun and shot him is irrelevant because that hypothetical scenario is not before us. Similarly, the dissent's observation that defendant's possession of the weapon could constitute criminal conduct if he were not a correction officer has no relevance to whether his actions were justified in this homicide prosecution.

a question for the jury.[8]

The dissent also concludes that defendant was not entitled to a justification charge because he was the first participant in the encounter to threaten the use of deadly physical force. Although not describing it as such, the dissent is essentially arguing that defendant was the initial aggressor as a matter of law (*see* CJI2d[NY] Justification: Use of Deadly Physical Force in Defense of a Person [defining "initial aggressor" as "the first person who uses, or threatens the imminent use of, deadly physical force"]; *People v McWilliams*, 48 AD3d 1266, 1267 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008]). This issue is not properly before us. In their appellate brief before this Court, the People do not contend that the justification charge was not warranted because defendant was the first one to use deadly physical force. Nor do they otherwise rely on the initial aggressor doctrine. Therefore, we should not consider it (*see Misicki v Caradonna*, 12 NY3d 511, 519 [2009] [courts should

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[8] It is difficult to understand how the issue of de-escalation, which is in the dissent's discussion about the expert testimony, has any bearing on the issues on appeal. Although this might have some relevance to whether defendant was the initial aggressor or had a duty to retreat, those issues are not before us.

decide appeals only on rationales advanced by the parties]).[9]

Even if we were to address this argument, we would reject it. The dissent takes the view that, as a matter of law, defendant was the first one to use deadly physical force in the encounter (i.e., defendant was the initial aggressor) because he drew his firearm before Cabbagestalk swiped at the gun. The law, however, does not support the dissent's apparent belief that the mere act of drawing a firearm always constitutes a threat of the imminent use of deadly physical force. "Deadly physical force" is defined as "physical force which, *under the circumstances in which it is used*, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[11] [emphasis added]). Whether or not an act is considered deadly physical force "hinges on the nature of the risk created, its imminence or

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[9] The initial aggressor issue is also unpreserved. The record on appeal does not show that the People below relied on this doctrine in opposing the justification charge *(see People v More*, 97 NY2d 209, 214 [2002] [arguments raised by the People for the first time on appeal are unpreserved]). Nor did the trial court "expressly decide[]" this issue in refusing to instruct the jury on justification (CPL 470.05[2]; *see People v Miranda*, 27 NY3d 931, 932 [2016] [arguments not preserved where the court "did not expressly decide, in response to protest, the issues now raised on appeal"]). Indeed, in denying the justification charge, the court stated, "We have none of that in this case, the issue of who the initial aggressor [was]." Contrary to the dissent's view, the only reasonable interpretation of the court's statement is that it did not rely on the initial aggressor doctrine in declining to give the justification charge.

immediacy, as well as its gravity" (*People v Samuels*, 198 AD2d 384, 384 [2d Dept 1993], *lv denied* 82 NY2d 930 [1994]).

Thus, in *People v Montanez* (17 Misc3d 126[A], 2007 NY Slip Op 51806[U] [App Term, 2d Dept 2007]), where the defendant exhibited a gun but never pointed it directly at the individuals he believed posed a threat, or cocked the gun, the court found that the defendant "displayed the weapon but never used physical force." Similarly here, the trial evidence shows that when defendant drew his weapon in the midst of Cabbagestalk's attack, he held it by his side, did not point it at Cabbagestalk, and did not threaten him. Based on this evidence, a jury could have reasonably concluded that by drawing his firearm, defendant did not use or threaten the imminent use of deadly physical force.

In arguing that no justification charge was warranted, the dissent places undue emphasis on defendant's displaying his weapon. Taken to its logical conclusion, the dissent's argument is that anytime someone draws a weapon during an encounter with an unarmed individual, he or she is not entitled, as a matter of law, to a justification charge, regardless of what subsequent threatening actions that individual takes. No case in our justification jurisprudence stands for such a sweeping proposition, especially where, as here, the weapon was lawfully possessed.

The dissent's focus on what others in the lobby allegedly thought when defendant had his weapon by his side is misplaced. To begin, no witness ever testified as to what their perceptions were when defendant removed his gun. Although Wolf testified that he started to back up after defendant drew the weapon, he never said that he viewed defendant's conduct as a threat to use to use deadly force. As for defendant's daughter and Cabbagestalk's friend, neither one testified at trial, and thus it would be entirely speculative to try to glean what their perceptions may have been. In any event, the question is not how any of these individuals may have perceived the incident, but whether a jury could have concluded that, at the time defendant fired the weapon, he reasonably believed his actions were necessary to defend himself against Cabbagestalk's imminent use of deadly physical force.

The cases relied upon by the dissent are easily distinguishable. In *People v Magliato* (68 NY2d 24, 30 [1986]), the Court concluded that "[the] defendant's conduct in drawing [a] pistol, cocking it, holding it with two hands and arms extended, and aiming it at [the approaching victim]" amounted to the use of deadly physical force. Here, defendant engaged in no such threatening behavior and merely held the weapon by his side. Indeed, the Court in *Magliato* expressly recognized that "[t]he

mere display or brandishing of a pistol" could "create an insufficiently imminent threat to life to be considered the 'use' of deadly physical force" (*id.*).

People v Berk (217 AD2d 941 [4th Dept 1995], *affd* 88 NY2d 257 [1996], *cert denied* 519 US 859 [1996]), *People v Dodt* (61 NY2d 408 [1984]) and *People v Madeo* (103 AD2d 901 [3d Dept 1984]) were appeals from convictions after trial or a guilty plea, and have no applicability here. In *Berk*, where the evidence showed that the defendant confronted the victim with a loaded gun, the Court found that there was a question of fact as to whether the defendant was the initial aggressor. In *Dodt*, which did not even involve the justification defense, the Court simply found that the defendant's threat to use a gun was legally sufficient to establish that he threatened to use deadly physical force.

In *Madeo*, which also did not involve justification, the Court merely concluded that the defendant's actions were legally sufficient under the circumstances to constitute a threat of the immediate use of a dangerous instrument. None of these cases provides any support for the dissent's view that drawing a weapon always constitutes deadly physical force as a matter of law. Moreover, the question of whether evidence supporting a conviction is legally sufficient is entirely distinct from the issue here of whether the proof at trial, viewed in the light

most favorable to defendant, would have warranted a justification charge.[10]

Because a reasonable view of the evidence supports a conclusion that defendant's actions were justified, the court's failure to charge the justification defense constitutes reversible error (*see Padgett*, 60 NY2d at 145). We reject the People's position that any such error was harmless. The evidence at trial undeniably established that defendant fatally shot Cabbagestalk, and justification was defendant's sole viable defense. The People's reliance on *People v Petty* (7 NY3d 277 [2006]) is misplaced. In that case, the victim did not say anything to, or make any threatening gestures towards, the defendant, but instead tried to run away. The Court found harmless error because there was no persuasive evidence that the victim used or was about to use deadly physical force. Here, in

[10] We do not agree with the dissent's belief that, as a matter of law, defendant could have safely retreated into his apartment. As the dissent recognizes, the People do not argue that defendant failed to satisfy his duty to retreat. Because the record on appeal does not show that the People relied on this doctrine below, and the court did not expressly address it, it is unpreserved. In any event, a jury could have reasonably concluded that defendant did not know that he could with complete safety to himself and others have avoided the necessity of using deadly physical force by retreating (*see* Penal Law § 35.15[2][a]). In view of the proximity of the two men, with Cabbagestalk within arm's reach of defendant's weapon, we cannot say, as a matter of law, on the record before us, that defendant knew that he could have safely retreated.

contrast, there was no such "overwhelming evidence disproving the justification defense" (*id.* at 286).

In light of our reversal of the conviction, we need not address defendant's complaints about the prosecutor's summation and the sentencing proceeding.

Accordingly, the judgment of the Supreme Court, Bronx County (Robert A. Neary, J.), rendered November 2, 2016, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 18 years, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Gische and Kahn, JJ. who dissent in an Opinion by Kahn, J.

KAHN, J. (dissenting)

Because I believe that the trial evidence, viewed in the light most favorable to defendant, supported the trial court's denial of defendant's request for a justification charge, I respectfully dissent.

I. *Factual and Procedural Background*

A. Evidence at Trial

The People's evidence at trial indicated that the shooting in question took place in the common lobby of a double-sided residential building located in the Bronx. Each side of the building has its own street address, 735 East 242nd Street on the west side and 739 East 242nd Street on the east side, along with its own set of mailboxes located in the lobby adjacent to the first floor hallway of each side of the building.

On the day of the shooting, defendant Darryl Brown, a New York City correction officer with a license to carry a gun, lived in apartment 1B on the east side of the building with his adult daughter, Myesha Brown, and her baby. Yvette Flores, who lived across the hallway in apartment 1A, testified that on March 20, 2014, around 12:30 p.m., she was at home when she heard a loud voice arguing in the hallway, looked through the peephole in her door, and saw defendant's daughter, Myesha, who was holding a baby, standing in the open doorway of apartment 1B next to a

younger man whom she had never seen before. Flores also saw defendant standing just outside the doorway, facing Myesha and the younger man. Flores heard defendant and the younger man arguing, but could not hear what they were saying. Defendant and the younger man walked out of her line of sight toward the lobby, arguing and cursing, while Myesha remained at the apartment door with the baby, looking upset.

Raymond Wolf, a postal worker, testified that when he entered the building that day and stood at the vestibule door leading into the lobby, two men who were standing in the lobby let him in to deliver the mail. Wolf, who was listening to music with his headphones, had seen one of the two men in the neighborhood before, although he did not know his name or where he lived, and did not recognize the other, younger man. The two men were relaxed and talking. One of the two men was the victim, Vonde Cabbagestalk, and the police later came to believe that the other man, the one whom Wolf recognized, was Cornell or Cardarell Marshall, a friend of Flores's son.

Sheila Thomas, who lived on the fifth floor of the building, was just returning to the building after having gone food shopping. Thomas was standing just outside the vestibule door, facing into the lobby, holding groceries and searching for her keys when she heard voices arguing inside the building. Through

the vestibule door windows, she saw an older man, defendant, walk across the lobby from the west side of the building to the east side, followed at a distance of approximately six to seven feet by a taller, younger man, Cabbagestalk. Defendant appeared to Thomas to be very upset, angrier and more aggressive than Cabbagestalk, who "wasn't too upset." Thomas saw Cabbagestalk, who was wearing a coat, holding out both of his hands toward defendant with his palms facing outward, "trying to reason with" defendant. Thomas then saw defendant, followed by Cabbagestalk, continue to walk easterly across the lobby and out of her field of vision. Thomas did not notice a gun in defendant's hand.

At the same time, Wolf was delivering mail at the mailboxes located on the west side of the lobby. He then noticed a shorter, older man, defendant, in the lobby. While the three men were positioned to the east of the building entrance, Wolf saw defendant approach Cabbagestalk and Marshall and heard defendant say, "[S]tay away from my daughter, don't come around here." Defendant and Cabbagestalk began talking, then arguing. Defendant yelled, "[W]hy you here," and Cabbagestalk responded, "[Y]ou can't tell me where to be." Defendant and Cabbagestalk were "getting in each other['s] face[s]" and Cabbagestalk started "trying to back [defendant] down." Marshall then attempted to separate them, telling Cabbagestalk to "break it up" and "chill

out, relax." Cabbagestalk took three swings of his fist toward defendant but did not strike him. Wolf noticed that defendant was holding a gun, which looked "like a police gun." Wolf described defendant as holding the gun in his right hand "at an angle . . . by his body" with his hand just above the height of his waist and his fingers outstretched. Wolf then began to back further away from the men, towards a stairway on the west side of the building. Marshall then stepped toward the back of the building lobby, still trying to tell Cabbagestalk to "relax and chill." Clearly noticing defendant's introduction of the firearm into their dispute, Cabbagestalk, who was at that point standing approximately two feet from defendant, attempted to take one swipe at the gun with his hand, saying, "[Y]ou going to pull a gun out, you better use it." Wolf did not see Cabbagestalk make any physical contact with defendant or his firearm, however. Rather, Wolf saw defendant lean back from Cabbagestalk. Wolf then ascended the stairs on the west side of the building to the first landing, after which he heard a gunshot but could not see the gun being fired. Wolf then called his supervisor.

Meanwhile, Flores had returned to her vantage point at the peephole of her apartment door and observed that defendant's daughter, Myesha, was still standing at the doorway of apartment 1B. She heard Myesha, who was "very upset," yell, "[N]o, daddy,

no!" from the doorway, and immediately thereafter heard "a loud boom."

Thomas, who was still standing outside in front of and facing the vestibule door, heard a gunshot, which she thought came from the east side of the lobby. She then saw Cabbagestalk fall backwards and heard a woman scream. Thomas dropped her groceries on the stairs leading to the vestibule door, ran out of the building and called 911.

After hearing the "loud boom," Flores moved away from her door, but then returned "[i]mmediately after," again looked through the peephole and saw defendant, along with Myesha and the baby, enter apartment 1B. Flores called 911. She then opened her door and saw Cabbagestalk lying motionless in front of the lobby door leading to the vestibule.

Wolf returned to the lobby and saw that Cabbagestalk had fallen in the lobby in front of the entrance. Wolf recalled "a lot of people" coming out of their apartments into their hallways. He testified that a woman was screaming while positioned close to where Cabbagestalk was lying on the floor, trying to help him and saying, "[C]all the police." When the police arrived at the crime scene, they recovered a single shell casing from the lobby floor, between the lobby entrance where Cabbagestalk had fallen and defendant's apartment.

The People also introduced into evidence a schematic diagram of the first floor of the building.

Defendant did not testify at trial. Rather, the defense called Robert Baumert, a former officer of the New York City Police Department who later became a security consultant, to testify as an expert witness in the field of tactical uses of force. Much of Baumert's testimony concerned the training of law enforcement officers, including correction officers. In that regard, Baumert testified on cross-examination that law enforcement officers are not trained to shoot people unless "they present a deadly physical force." After Baumert made that statement, the prosecutor inquired, "So, if they don't present a deadly physical force, then you are trained not to shoot them?" and Baumert replied, "Yes." Additionally, Baumert testified that law enforcement officers are trained to "try to de-escalate a situation," by "talk[ing] a person down" and attempting "to stop that person from going any further and escalating the situation where it might turn into a shooting" as a reasonable alternative to use of force. Baumert added that law enforcement officers are trained to know that "a weapon doesn't have to be displayed" by a perpetrator in order for an officer to perceive a threat of use of deadly physical force against them, and that under those circumstances officers may "draw [their] weapon[s] and tell . . .

[such perpetrators] not to move, stay where they are and show their hands."

B. Trial Court's Instructions

The trial court denied defendant's request for a justification charge, explaining that there were no issues in this case as to whether defendant had a duty to retreat or was the initial aggressor and that, based on the record, no reasonable person would conclude that defendant was justified in shooting Cabbagestalk. The trial court also denied the People's request to preclude defense counsel from arguing in summation that defendant acted in self-defense, but added that if defense counsel strayed into asking the jury to consider a justification defense, the court would instruct the jury not to consider it because such a defense was not before it. After hearing defense counsel's summation, the court announced that it would not so charge the jury.

During her summation, the Assistant District Attorney told the jury that the court would not instruct the jury on the justification defense because such a defense was not a part of the case before the jury and was not for the jury to consider. The court then gave its instructions to the jury, without including a justification defense charge. Neither of the parties voiced any exception to the court's instructions.

II. *Legal Standards*

The law of justification sets forth specific and differing rules for the lawful use of force. Insofar as is pertinent to this case, the statute delineates the circumstances under which a defendant may use ordinary physical force or deadly physical force to avert the use of physical force by another actor.

Penal Law § 35.15(1)(b) authorizes the use of ordinary physical force to the extent a person reasonably believes it is necessary for defense against the use or imminent use of unlawful physical force upon oneself or a third person, subject to the provisions of section 35.15(2), unless the actor was the initial aggressor. Penal Law § 35.15(2), which authorizes the use of deadly physical force against another under certain circumstances, provides, in pertinent part:

> "A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
>
> "(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:
>
> "(i) in his or her dwelling and not the initial aggressor . . . ."

"Deadly physical force" is statutorily defined as "physical

force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.10[11]).

The seminal case of the Court of Appeals on the circumstances under which the threatened use of a firearm constitutes a threatened use of deadly physical force is *People v Dodt* (61 NY2d 408 [1984]). In *Dodt*, the defendant and the victim were in a parking lot when the defendant grabbed the victim from behind, put his hand over the victim's mouth and used his body to push her across the parking lot toward his car while repeatedly warning, "Don't scream lady, I've got a gun in my pocket" (*id.* at 412). The defendant never displayed a gun, however (*id.* at 414). The victim managed to bite one of the defendant's fingers and then screamed, and the defendant fled in his car (*id.*). The defendant was arrested, tried and convicted of kidnapping in the second degree (*id.* at 412-413). On appeal, the defendant argued that the proof of abduction by the threatened use of deadly force was insufficient because there was no evidence that he actually possessed a gun during his encounter with the victim (*id.* at 414). The Court of Appeals rejected the defendant's argument, finding the threatened use of a gun to be sufficient evidence of threatening to use deadly physical force. As the Court of Appeals explained:

> "*[T]he threat presented by a gun does not depend to any significant extent on the manner in which it is used.* So long as a gun is operable, it constitutes deadly physical force, and a threat to use a gun, such as was made here, can only be understood as a threat that the weapon is operable. In short, on the facts of this case, the evidence was sufficient to establish that defendant restrained [the victim] by threatening to use deadly physical force" (*Dodt*, 61 NY2d at 414-415 [emphasis added] [internal quotation marks omitted]).

Similarly, in *People v Berk* (217 AD2d 941 [4th Dept 1995], *affd* 88 NY2d 257 [1996], *cert denied* 519 US 859 [1996]), the Appellate Division, Fourth Department, found that the jury properly rejected the defendant's justification claim. There, the Fourth Department explained that the defendant's entry into a room while displaying a loaded gun in plain view of the victims was a sufficient basis for the jury to conclude that the defendant was the initial aggressor, that is, the first to *threaten* the use of deadly physical force (*id.* at 942-943, citing *People v Magliato*, 68 NY2d 24, 28-29 [1986] [drawing cocked and loaded pistol and pointing it at victim constitutes actual "*use* of deadly physical force within the meaning of Penal Law § 35.15] [emphasis added])[internal quotation marks omitted].

If on any reasonable view of the evidence the jury might have decided that a defendant's conduct was justified, the failure to so charge constitutes reversible error (*People v Padgett*, 60 NY2d 142, 145 [1983]). In considering "whether a

particular theory of the defense should have been charged to the jury, the evidence must be viewed in the light most favorable to the defendant" (*People v Farnsworth*, 65 NY2d 734, 735, [1985]). While the issue of justification is most often introduced by the defendant, "the prosecution's case, in and of itself, may raise an issue of fact as to whether the defendant was justified in using force such that his or her conduct was entirely lawful" *People v Singh*, 139 AD3d 761, 763 [2d Dept 2016], *lv denied* 28 NY3d 936 [2016]). Where evidence supporting the defense of justification has been presented, the People must disprove that defense beyond a reasonable doubt (*People v McManus*, 67 NY2d 541, 543 [1986]).

In determining whether a defendant is entitled to a charge of justification in the use of physical force in defense of a person under Penal Law § 35.15, the Court must initially determine the type of force that the defendant used. The result of this inquiry will govern whether the provisions of Penal Law § 35.15(1) (ordinary physical force) or of Penal Law § 35.15(2) (deadly physical force) are applicable.

Once the type of force used has been determined, the Court should next utilize a two-step inquiry set forth by the Court of Appeals to determine whether a defendant's conduct was justified. First, it must be ascertained whether the defendant actually

believed that deadly physical force was necessary to avert an imminent use of deadly physical force by another actor (the subjective aspect of the justification defense). If the People fail to prove beyond a reasonable doubt that the defendant did not actually believe that the use of deadly physical force was necessary to avoid the use of such force by the other actor, then it must be determined whether, in light of all of the circumstances facing the defendant, a reasonable person in the defendant's circumstances would have used deadly physical force (the objective aspect) (*People v Wesley*, 76 NY2d 555, 559 [1990]; *People v Goetz*, 68 NY2d 96, 115 [1986]). In making a determination whether defendant's actions were objectively reasonable, among the circumstances to be considered are the physical attributes of those involved in the incident and any prior experiences that the defendant may have had which could provide a reasonable basis for a belief that another person's intentions were such that the use of deadly force was necessary (*Wesley*, 76 NY2d at 559; *Goetz*, 68 NY2d at 114).

Even where an individual reasonably believes that deadly physical force is necessary to avert the imminent use of deadly physical force by someone else, however, the statute provides, to the extent relevant here, that a defendant may not use deadly physical force if he or she knows that with complete safety to

oneself and others, he or she may avoid the necessity of doing so by retreating (*Matter of Y.K.*, 87 NY2d 430, 433 [1996]), unless the defendant is not the initial aggressor and is in his or her dwelling (Penal Law § 35.15[2][a][i]).

III. *Discussion*

A. Refusal to Instruct on Justification Defense

Defendant's drawing of his gun in the course of his confrontation with Cabbagestalk constituted the threatened use of deadly physical force (*see People v Dodt*, 61 NY2d at 415; *People v Berk*, 217 AD2d at 942). Accordingly, the statutory provisions pertaining to the use of such force are those that are properly applicable here (*see* Penal Law § 35.15[2]).

Employing the two-step inquiry rubric set forth in *Wesley* and *Goetz*, it must first be ascertained whether the record provides any evidentiary support for the subjective aspect of the justification defense. I find that the record is devoid of any evidence supporting the view that at the time defendant introduced deadly physical force into the altercation, by drawing his firearm, he actually believed he was in danger of being subjected to deadly physical force by Cabbagestalk, and that his use of deadly physical force was necessary to avert Cabbagestalk's imminent use of such force (*see People v Sparks*, 29 NY3d 932, 934 [2017]).

Instructive is the Court of Appeals analysis in *People v Watts* (57 NY2d 299 [1982]). There the defense proffered the defendant's own statement, made at the time of his arrest, that the woman he shot had "[come] after [him] in his room with a kitchen knife" (*id.* at 302). The Court of Appeals found that that evidence, which is similar to defendant's suggestion here that Cabbagestalk was endeavoring to grab his gun, did not warrant a jury charge on the defense of justification because "[i]t provides no basis for determining whether defendant reasonably believed that he was in imminent danger of being subjected to deadly physical force" (*id.*). The Court of Appeals pointed out the "sharp contrast" between the evidence before it in *Watts* and that presented in *People v Torre* (42 NY2d 1036 [1977]), where there was testimony of both the defendant and an eyewitness detailing that the victim was the first to introduce the use of deadly force into the controversy (*Watts*, 42 NY2d at 302 n, citing *Torre*, 42 NY2d at 1036-1037).

This case is far closer to *Watts* than to *Torre*, and presents an even stronger rationale for finding no evidentiary support for the subjective aspect of the justification charge. According to Flores's trial testimony, Cabbagestalk and defendant argued at defendant's apartment doorway and then walked together towards the lobby. Wolf saw both men in the lobby as they continued

their dispute. Wolf observed Cabbagestalk backing defendant across the lobby, swinging with his fists at defendant's face so aggressively that Marshall held Cabbagestalk back and attempted to calm him down. After Wolf observed Cabbagestalk swinging his fists, he then saw that defendant was holding a gun in his right hand.

Notwithstanding the testimony regarding Cabbagestalk's aggressive conduct toward defendant, there is no record evidence whatsoever demonstrating that at any time from the beginning of the altercation at the doorway of defendant's apartment to the moment that, following Cabbagestalk's swinging of his fists, defendant decided to draw his gun, Cabbagestalk had any access to, threatened the use of, or was about to use, deadly physical force against defendant. There is no evidence that Cabbagestalk was ever armed with a deadly weapon. Indeed, neither Thomas nor Wolf saw Cabbagestalk holding anything in his hands. In fact, Thomas testified that when she saw Cabbagestalk following defendant from a distance of approximately six to seven feet, Cabbagestalk was holding out both of his hands toward defendant with his palms facing outward, "trying to reason with" defendant. And although Thomas testified that Cabbagestalk was wearing a coat at the time of the incident, neither she nor Wolf claimed to have seen the outline of a gun, knife or other deadly weapon on

the coat, or claimed that Cabbagestalk appeared to be clutching any object concealed in his coat. When defendant became the first and only participant in the altercation to threaten the use of deadly physical force (*see People v Dodt*, 61 NY2d at 415; *People v Berk*, 217 AD2d at 942), he did so without any basis for fearing that Cabbagestalk was about to use such force on him.

Additionally, defendant's own expert testified that law enforcement officers are trained to first try to defuse any situation that might turn into a shooting by talking the person down and attempting to stop the person from going any further and to keep the situation from escalating into the use of force. This testimony dispels any notion that defendant could have harbored any actual subjective belief, whether before or after he displayed his gun, that he needed to shoot Cabbagestalk in order to avert Cabbagestalk's grabbing his service firearm away from him, pointing it at defendant and shooting him (*see People v Goetz*, 68 NY2d at 114-115).

In any case, even if there were a reasonable doubt as to defendant's subjective belief that the use of deadly physical force was necessary to avert Cabbagestalk's use of such force, there was no reasonable view of the evidence that a reasonable, objective person in defendant's circumstances would have believed that use of deadly physical force was necessary to avert the

imminent use of deadly physical force by Cabbagestalk against him.

Although Wolf testified that Cabbagestalk made three swings of his fist toward defendant and a single swipe at the gun once defendant drew it, neither he nor Thomas saw Cabbagestalk make any physical contact with defendant or the gun. More plausibly, Cabbagestalk's swipe at defendant's gun, given defendant's positioning it at his waist level, along with Cabbagestalk's statement, "[Y]ou going to pull a gun out, you better use it," could only reasonably and objectively be viewed as Cabbagestalk's only available defensive response to defendant's introducing the threat of deadly physical force into the altercation. Cabbagestalk neither produced his own weapon, nor made any serious effort to grab defendant's firearm away from him, as his one-time swipe at the gun was at a distance of two feet and he never made physical contact with defendant or his weapon. There is absolutely no record evidence of any indication of Cabbagestalk's imminent use of deadly physical force that would require defendant's use of his gun in self-defense (*see People v Hosein*, 221 AD2d 563, 564 [2d Dept 1995] [no justification charge warranted as to defendant who shot an unarmed victim where the defendant has no reason to believe the victim had a weapon or was about to use deadly physical force and could have retreated in

safety]). Indeed, had Cabbagestalk managed to grab defendant's gun and discharge it, and face prosecution for injuring defendant, Cabbagestalk credibly could have argued that he did so in self-defense, and would have been entitled to a justification charge. Therefore, defendant's argument that he reasonably believed that his use of his gun to shoot Cabbagestalk was necessary to defend himself from Cabbagestalk's imminent use of deadly physical force is supported by "nothing but speculation" (*People v Garcia*, 59 AD3d 211, 212 [1st Dept 2009], *lv denied* 12 NY3d 853 [2009] [in assault case where the defendant's stepson's single striking of the defendant with his hand was followed by the defendant's striking his stepson's head and shoulder with a claw hammer, trial court properly denied the defendant's request for a justification charge where the defendant's argument that his use of deadly physical force against his stepson was based on his belief that his stepson was armed and that his wife was about to join the attack was grounded on nothing other than speculation as to both the objective and subjective aspects of that defense]).

Viewing the evidence regarding Cabbagestalk's conduct in the light most favorable to defendant, Cabbagestalk's repeated swinging at defendant and his swipe at defendant's gun on one occasion could be seen, at most, as an effort to intentionally

place defendant in fear of imminent harmful or offensive contact, but by the use of ordinary physical force, not deadly physical force. Accordingly, I find that, viewed in the light most favorable to defendant, an objectively reasonable person in defendant's circumstances would harbor no belief that the use of deadly force was necessary to avert the imminent use of deadly physical force by Cabbagestalk.

Neither would it be objectively reasonable for a trained law enforcement officer in defendant's situation even to draw a firearm, much less use it, when faced with a man such as Cabbagestalk, who was unarmed and taking swings toward defendant without making physical contact. With respect to the determination of the reasonableness of a defendant's belief in the necessity for use of deadly physical force, the Court of Appeals has explained:

> "The critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendant's background and experiences would conclude" (*People v Wesley*, 76 NY2d at 559, citing 1 CJI[NY] PL 35.00, Introductory Comment, at 848-849).

The Court of Appeals has further instructed that the experiences of a defendant to be considered include "any prior experiences that the defendant may have had 'which could provide a reasonable basis for a belief that another person's intentions were to

injure or rob him or that the use of deadly force was necessary'" (*Wesley*, 76 NY2d at 559, quoting *People v Goetz*, 68 NY2d at 114).[1]

Here, as defendant's own expert witness, Baumert, testified, law enforcement officers such as defendant are trained that they should always attempt to de-escalate a confrontational situation such as this one without resorting to drawing a gun. Thus, a reasonable law enforcement officer confronted with defendant's situation would not have drawn a firearm or used deadly physical force against Cabbagestalk.

The majority extracts from Baumert's testimony his statement that an officer "does not have to see a weapon in order to draw his weapon." This statement was made in the context of Baumert's overall testimony as to what a law enforcement officer is trained to do when confronting a person who is either carrying a deadly

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[1] In applying the *Wesley* standard of inquiry as to whether a reasonable person in defendant's circumstances would have used deadly physical force, it is therefore appropriate to consider defendant's status as a correction officer. This is so not only because defendant himself found that circumstance germane in offering Baumert's testimony, but also because, realistically, it would be impossible to separate defendant from his own knowledge, training and experience as a correction officer. Moreover, were defendant not an active correction officer licensed to carry a concealed pistol or revolver (*see* Penal Law §§ 265.20[3], 400.00[2][e]), his carrying of a loaded firearm into the lobby would have constituted, at minimum, a class C violent felony (*see* Penal Law § 265.03[3]).

weapon in plain sight or taking actions suggesting that person's possession of a concealed weapon, however. Specifically, Baumert's testimony referred to what an officer is trained to do when confronting a person who is either "armed and that arm is visible in that person's hand" or who is perceived by the officer to be threatening the use of deadly physical force by "making some kind of gesture" such as "putting [one's] hand inside [one's] pocket," thereby suggesting that the person is carrying a concealed weapon.

Baumert testified that in situations where an officer is confronting a person displaying a weapon in plain sight, the officer is trained to command that person to "put the weapon down[,]" to "[p]lace the weapon at your feet" and to "[s]tep away from it." Baumert further stated that lack of time may impact on the ability to issue such commands in situations where a person is "approaching." Baumert further testified that in situations where officers perceive threats without actually seeing a weapon and draw their own weapons, officers are trained to tell such threatening individuals "not to move, stay where they are and show their hands."

Neither of the scenarios described by Baumert was presented in this case, however. Here, Cabbagestalk advanced toward defendant with both his hands out of his pockets and

outstretched, and then swung his fists toward defendant. There is no evidence that at any time during their confrontation Cabbagestalk was seen holding a weapon in plain sight or that he made any gesture, such a putting a hand in his pocket, suggesting that he was carrying a concealed weapon. Moreover, there is no evidence that defendant ever tried to de-escalate the situation in accordance with his training, or took any of the measures an officer is trained to take, and an objectively reasonable correction officer would have taken, before drawing his weapon and shooting Cabbagestalk.

Indeed, the record reveals that defendant acted in a manner entirely contrary to that dictated by his own training and experience. Specifically, after his initial confrontation with Cabbagestalk at the doorway of his apartment, rather than returning to the safety of his apartment, defendant walked away from it, toward the building's lobby, armed with a loaded gun. Upon entering the lobby, he continued to argue with Cabbagestalk, and then escalated the intensity of their encounter by being the first, and only, participant to introduce a firearm and deadly physical force into the confrontation. Even as Cabbagestalk began swinging his fists at defendant, defendant was not authorized by law to respond to Cabbagestalk's use of ordinary physical force by introducing the threat of deadly physical force

into the situation (*see* Penal Law § 35.15[2]).

The majority is certainly correct in stating that the display of a firearm does not always constitute a threat of deadly physical force. For example, a person's display of a licensed firearm for the purpose of informing another person what type of firearm she is carrying or to explain its physical features or workings would not necessarily constitute a threat of use of deadly physical force. This case does not present an instance of a display of a firearm for informational purposes, however.

Rather, this case involves defendant's display of a firearm as a means to convey to Cabbagestalk defendant's threat to use deadly physical force against him. In an analogous circumstance, with regard to what constitutes a "display" of a firearm in the context of a first degree robbery case (*see* Penal Law § 160.15[4] [robbery involving display of what appears to be a firearm]), the Court of Appeals has provided guidance by explaining that "the display requirement has been construed broadly to cover a wide range of actions which might reasonably create the impression in the mind of the victim that the robber is armed with a firearm" (*People v Lopez*, 73 NY2d 214, 220-221 [1989]). In such cases, even the partial display of a firearm by a defendant has been held to be not only sufficient to meet the "display" requirement

for first degree robbery, but also to constitute a threat of the use of deadly physical force. In *People v Madeo* (103 AD2d 901, 902 [3d Dept 1984]), the Appellate Division, Third Department, affirmed the defendant's first degree robbery conviction, holding that the "defendant's statement that he had a gun and his partial display thereof are sufficient under the circumstances to constitute a threat" of use of deadly physical force. In doing so, the Third Department rejected the defendant's argument that his actions did not constitute a threat because he neither used any express words of threat nor brandished his gun. Rather, the Third Department analogized the case before it to *People v Dodt*, in which the Court of Appeals upheld a first degree kidnapping conviction, reasoning that the defendant's statement in that case that he had a gun was sufficient to convey an implied threat that the defendant would use an operable weapon and to establish the "threatening to use deadly physical force" requirement of the first degree kidnapping statute (Penal Law § 135.25), even though no gun was even partially displayed in that case (*see Dodt*, 61 NY2d at 415; *Madeo*, 103 AD3d at 902; *Berk*, 217 AD2d at 942).

In this case, defendant displayed a loaded, operable firearm by unholstering it and holding it at his side at waist height. In displaying his service firearm in this manner at relatively close range to the unarmed Cabbagestalk, defendant unquestionably

intended to convey to Cabbagestalk the implied threat that defendant would use deadly physical force against him (*see Dodt*, 61 NY2d at 415; *Madeo*, 103 AD3d at 902; *Berk*, 217 AD2d at 942). Indeed, each of the four people who witnessed him doing so perceived him as threatening the use of deadly physical force against Cabbagestalk. Cabbagestalk, upon seeing defendant holding the gun, stated, "[Y]ou going to pull a gun out, you better use it," and attempted to swipe it away. Wolf, upon seeing defendant with a firearm in his hand, immediately backed up the stairway on the west side of the building to its first landing, abandoning his mail delivery duties in search of a safe refuge. Myesha Brown, according to Flores's testimony, stood at the doorway of the apartment looking very upset and yelled, "[N]o, daddy, no!" immediately before the shot was fired. Even Marshall stepped toward the back of the lobby, away from the two men. Clearly, the defensive actions of every witness to defendant's drawing his gun make clear that each of them perceived defendant's holding his gun as a threat to use deadly physical force, and not as an informational display of the weapon.

Furthermore, in determining whether defendant's display of his service firearm constituted a threat of deadly physical force, it is of no moment that the gun was not aimed at

Cabbagestalk at the moment he displayed it. The evidence clearly indicates defendant fired his loaded weapon at Cabbagestalk shortly after displaying it, making clear his prior intent (*see People v Joyce*, 150 AD3d 1632, 1634 [4th Dept 2017]).

In support of its contrary view, the majority cites *People v Montanez* (17 Misc 3d 126[A], 2007 NY Slip Op 51806[4] [App Term, 2d Dept 2007]), a decision in which the Appellate Term upheld the trial court's denial of a justification charge pursuant to Penal Law § 35.15, as occurred in this case. In *Montanez*, therefore, no basis was found for a charge of justification in self-defense. Rather, in *Montanez*, the Appellate Term held that the only ground for granting a justification charge was Penal Law § 35.05(2), the emergency doctrine. Under that doctrine, the use of physical force which would otherwise constitute a criminal offense is justifiable as the lesser of two evils, that is, when necessary as an emergency measure to avoid an imminent public or private injury of even greater magnitude. Here, in contrast to *Montanez*, there is not a scintilla of evidence that defendant's deployment of his gun was perceived as the lesser of two evils, necessary as an emergency measure to avoid an imminent and more serious public or private injury. In any event, in this case defendant never requested a justification charge based upon the emergency doctrine.

The majority's argument that a jury could conclude that defendant had a reasonable fear that Cabbagestalk would gain control of the gun because he was younger and taller than defendant misses the mark. A comparison of the ages and sizes of Cabbagestalk and defendant is merely one consideration in determining whether defendant had a reasonable fear of Cabbagestalk's imminent use of deadly physical force (*see People v Wesley*, 76 NY2d at 559). *Wesley* also requires consideration of "any prior experiences that the defendant may have had 'which could provide a reasonable basis for a belief that . . . the use of deadly force was necessary'" (*id.*, quoting *People v Goetz*, 68 NY2d at 114).

Here, as previously discussed, as defendant's own expert witness testified at trial, law enforcement officers such as defendant are trained, even when faced with a threat of deadly force, to attempt to de-escalate the situation. Thus, based on his own experience as a correction officer, defendant knew from his training how to de-escalate the tension of the situation and avoid exacerbating it. The "critical focus" required by *Wesley* (76 NY2d at 559) must here be placed on what a trained correction officer would reasonably have done in the circumstances, notwithstanding the respective physical attributes of defendant and Cabbagestalk.

The majority argues that the jury could have found that defendant reasonably feared that Cabbagestalk would use deadly physical force against him because defendant and Cabbagestalk were within two feet of each other at the time of the shooting. None of the witnesses had the participants in view at the time that defendant discharged his weapon, however. And although a jury is entitled to accept some portions of defense and prosecution evidence while rejecting others (*see People v Zona*, 14 NY3d 488, 493 [2010]), it may not arbitrarily dissect the integrated testimony of a single witness, such as Wolf or Thomas (*see People v Scarborough*, 49 NY2d 364, 373-374 [1980]).

The majority also contends that defendant did not have to wait until Cabbagestalk actually grabbed the gun before using deadly physical force. This argument inverts the statutory requisites for the use of deadly physical force in self-defense. As previously established, no reasonable view of the evidence supported the view that Cabbagestalk was the first to threaten the use of deadly physical force.

In sum, viewed in the light most favorable to defendant, there is no reasonable view of the evidence to support either the subjective or objective aspects of the justification defense (*see People v Goetz*, 68 NY2d at 114-115), as there is no reasonable view of the evidence that defendant believed, or had reason to

believe, that Cabbagestalk was using or was about to use anything more than ordinary physical force against him at the time he brought out his gun. As there was no reasonable view of the evidence that defendant's use of deadly physical force was justified, the trial court's ruling denying defendant's request for a charge of justification for his use of deadly physical force was correct.[2]

B. Prosecutorial Misconduct

Defendant, who failed to object during the summation, and who also declined any remedy after making a belated postsummation

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[2] On this appeal, the People have not raised issues as to who was the initial aggressor and whether defendant had a duty to retreat, although the trial judge's ruling denying a justification charge employed language which could be interpreted as addressing both concerns ("We have none of that in this case, the issue of who the initial aggressor [was] and duty to retreat. All of that factors into my thinking there is no reasonable person who will say the defendant was justified based on the record as it stands now." The issue of which party first threatened the use of deadly physical force has been addressed in the *Goetz-Wesley* analysis already discussed. Additionally, the trial record is uncontroverted, based on the testimony, the police diagram of the location of the parties during the incident and the location of the shell casing, that at the time of the shooting, nothing prevented defendant's retreat with safety to his own apartment, a few feet away (*cf. Matter of Ismael S.*, 213 AD2d 169, 172 [1st Dept 1995] [the defendant was surrounded by group of men larger than himself and had "no means to extricate himself"]; *People v Schwartz*, 168 AD2d 251 [1st Dept 1990] [on emerging from bathroom, the defendant was jumped by man grabbing for his gun]).

objection, failed to preserve his claim that the prosecutor committed misconduct by arguing to the jury that justification was not "a part of this case," after the court had declined to give the jury an instruction to that effect. I would, therefore, decline to review it in the interest of justice. Alternatively, I would find that the challenged remarks did not deprive defendant of a fair trial (*see People v Rodriguez*, 52 AD3d 399 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008], *see also People v. D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992] *lv denied* 81 NY2d 884 [1993]).

C. Excessive Sentence

Because defendant's contention that the court sentenced him on the basis of misinformation is not supported by the record, I would conclude that there is no basis for reducing the sentence.

Accordingly, I would affirm the judgment of the Supreme Court.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 20, 2018



CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT
----------X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NOTICE OF ENTRY
Ind. No. 971/14

Darryl Brown,

Defendant-Appellant.
----------X

SIR:

PLEASE TAKE NOTICE, that the attached Order is a true copy of the one entered on June 11, 2019 in the Appellate Division, First Department.

Dated: June 11, 2019
Bronx, New York

Yours, etc.

DARCEL D. CLARK
District Attorney
Bronx County
198 East 161st Street
Bronx, New York 10451

Joey Jackson, Esq.
Koehler & Isaacs LLP
61 Broadway, 25th Floor
New York, New York 10006

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4634 The People of the State of New York, Respondent,

-against-

Darryl Brown, Defendant-Appellant.

Ind. 971/14

Koehler & Isaacs, LLP, New York (Joey Jackson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

Upon remittitur from the Court of Appeals for determination of undecided issues (__NY3d__, 2019 NY Slip Op 03529 [2019]), judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered November 2, 2016, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 18 years, unanimously affirmed.

Defendant, who failed to object during the summation and who also declined any remedy after making a belated postsummation objection, failed to preserve his claim that the prosecutor committed misconduct by arguing to the jury that justification was not "a part of this case," after the court had declined to give the jury an instruction to that effect, and we decline to review it in the interest of justice. As an alternative holding, we find that the challenged remarks did not deprive defendant of

a fair trial (*see People v Rodriguez*, 52 AD3d 399 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's contention that the court sentenced him on the basis of misinformation is not supported by the record, and we perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 11, 2019

CLERK

State of New York
Court of Appeals

Decided and Entered on the twelfth day of September, 2019

Present, Hon. Janet DiFiore, *Chief Judge, **presiding**.*

Mo. No. 2019-759
The People &c.,
Appellant,
v.
Darryl Brown,
Respondent.

Respondent having moved for reargument in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

John P. Asiello
Clerk of the Court

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/31/2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DARRYL BROWN,

Petitioner,

-against-

LETITIA JAMES, *in her official capacity as Attorney General of New York*, ANTHONY J. ANNUCI, *in his official capacity as the acting Commissioner for the New York Department of Corrections and Community Supervision*, MICHAEL KIRKPATRICK, *in his official capacity as Superintendent of the Clinton Correctional Facility*,

Respondents.
----------X

REPORT AND RECOMMENDATION

1:20-cv-10491 (VSB) (KHP)

TO: THE HONORABLE VERNON S. BRODERICK, United States District Judge
FROM: KATHARINE H. PARKER, United States Magistrate Judge

On October 3, 2016, Darryl Brown ("Petitioner") was convicted of manslaughter in the first degree and sentenced to 18 years in prison. (ECF No. 2-1 at 29.) On appeal, the Appellate Division, First Department, vacated the conviction finding that the jury instructions at trial should have included a self-defense justification. *People v. Brown*, 160 A.D.3d 39, 40 (1st Dep't 2018). The Court of Appeals later reversed the First Department's decision based on its finding that Petitioner was the initial aggressor and that, pursuant to New York Penal Law § 35.15, he was not entitled to a self-defense justification. *People v. Brown*, 33 N.Y.3d 316, 325 (2019) *reargument denied*, 33 N.Y.3d 1136 (2019). On December 11, 2020, Petitioner filed the instant petition for a writ of habeas corpus (the "Petition") pursuant to 28 U.S.C. § 2254(d)(1) &

(2). (ECF No. 1.) For the reasons set forth below, I respectfully recommend that the Petition be DENIED.

Factual Background

At around noon on March 20, 2014, Petitioner, a Rikers Island corrections officer, returned home to his apartment building in the Bronx where he shared an apartment with his pregnant daughter, Myesha, and infant grandson. An argument ensued in the apartment building between Petitioner and his daughter's boyfriend and father of her child, Mr. Vonde Cabbagestalk. The argument escalated, culminating in Petitioner shooting Cabbagestalk with his service weapon. Cabbagestalk was killed by the gunshot. There were three witnesses to the incident that testified at Petitioner's trial.

The first witness, Ms. Flores, a social worker who lived in the building, heard arguing in the hallway. (ECF No. 2-3 at 99.) Looking through her apartment door's peephole, she observed Petitioner and Cabbagestalk arguing in front of the open door to Petitioner's apartment. (*Id.* at 99-100.) Myesha and her infant child were standing there as well. (*Id.*) Flores saw the two men walk off towards the lobby leaving Myesha and the baby standing in the doorway. (*Id.* at 103.) The two men continued to argue and curse at one another and eventually passed out of Flores' view. Flores then heard Meysha yell, "No, daddy, no!" followed by loud voices arguing and then a "loud boom." (*Id.* at 106-07.) Flores testified that, immediately afterwards, Petitioner entered his apartment together with his daughter and closed the door. (*Id.* at 108.) Flores then left her apartment, saw Cabbagestalk lying on the lobby floor, and promptly called the police. (*Id.* at 109-10.)

The second witness, Ms. Sheila Thomas, a resident of the building, was returning home from grocery shopping. *Brown*, 160 A.D.3d at 42. Looking through the interior glass door at the building's entrance, she saw the two men (Petitioner and Cabbagestalk) arguing. *Id.* She observed Cabbagestalk follow Petitioner as he walked away. *Id.* She testified that they were both walking at a slow pace and were about six feet apart. *Id.* Thomas testified that Cabbagestalk had his hands extended outwards from his body, elbows bent at 90 degrees, with his palms facing upwards as if trying to reason with Petitioner. *Id.* Thomas did not see anything in Petitioner's hands. *Id.* The two men walked across the hallway and out of Thomas' view. Thomas then heard a gunshot from the direction the men had just walked, saw Cabbagestalk fall backwards, and heard a woman scream. She did not observe any physical altercation between the two men or any weapons. *Id.*

The third witness, the only witness to observe the actual shooting, was Mr. Raymond Wolf, a 25-year-old postal carrier delivering the building's mail. (ECF No. 2-2 at 228-30.) Cabbagestalk was in the building's lobby with an acquaintance (who was never located and did not testify at trial) and opened the building's locked doors to let Wolf in. (*Id*. at 230-31.) While Wolf was distributing mail to the residents' individual mailboxes, Petitioner entered the lobby and started arguing with Cabbagestalk. (*Id*. at 233.) Wolf testified that he heard Petitioner say, "stay away from my daughter." (*Id*. at 245.) Cabbagestalk responded, "you can't tell me where to be." (*Id*. at 236.) According to Wolf, Cabbagestalk then started "getting in the older guy's face a little bit," while Cabbagestalk's acquaintance attempted to restrain Cabbagestalk. (*Id*. at 237.)

Wolf further testified that Cabbaggestalk threw a few punches at Petitioner but did not believe the punches made contact. (*Id*. at 239.) After Cabbagestalk swung a couple of times, Wolf noticed Petitioner holding a gun slightly above his waist and pointed away from Petitioner. (*Id*. at 241-42.) He further observed Cabbagestalk "swiping" at the gun but could not recall whether Cabbagestalk swiped at the gun with an open or closed hand. (*Id*. at 239-40). At some point before Cabbagestalk's last swing or swipe, Cabbagestalk said, "if you going to pull a gun out, you better use it." (*Id*.) Petitioner did just that, shooting Cabbagestalk in the chest. Wolf did not see the gun's flash but heard the shot ring and saw Cabbagestalk wounded on the floor. (*Id*. at 250-51.)

The police arrived to find Cabbagestalk lying face up in the lobby, already dead, with a single shell casing next to him. (ECF 1-7 at 279.) Flores directed the police to Petitioner's apartment where they recovered his service weapon, a semiautomatic Glock pistol, from the kitchen drawer. (ECF No. 12 at 140-142.) Forensic testing revealed that the shell casing found in the lobby was fired from Petitioner's gun.

Petitioner was indicted for murder in the second degree, manslaughter in the first degree, and criminal use of a firearm in the first degree.

Procedural history

i. Trial and Sentencing

Petitioner's trial commenced on September 19, 2016 and concluded on September 29, 2016. Prior to summations, Petitioner asked the court to instruct the jury on a justification defense pursuant to New York Penal Law § 35.15. The trial court denied the request, reasoning that the evidence, even when viewed in a light most favorable to the defendant, did not

warrant a self-defense jury instruction. (*See* ECF No. 2-4 at 1.) On October 3, 2016, the jury rendered a verdict finding Petitioner not guilty of murder in the second degree but guilty of manslaughter in the first degree. He was sentenced to 18 years in prison. (ECF No. 2-1 at 27-29.)

ii. Appellate Division

On appeal, the Appellate Division, First Department, over a two-justice dissent, reversed. The First Department held that Petitioner was entitled to a self-defense jury instruction because "the trial evidence, when viewed in the light most favorable to defendant, supports a conclusion that defendant feared for his life." *Brown*, 160 A.D.3d at 44. The court further reasoned that the initial aggressor doctrine, which bars a self-defense justification when the defendant was the first to introduce deadly force, would not bar a self-defense justification in this case because a reasonable jury could have found Petitioner was not the initial aggressor because he held the gun to his side and did not point it at his victim. *Id*. at 49-50.[1]

It bears noting that the two dissenting Justices found that the "defendant became the first and only participant in the altercation to threaten the use of deadly physical force," and "did so without any basis for fearing that Cabbagestalk was about to use such force on him," and that a "reasonable person in defendant's circumstances would harbor no belief that the use of deadly force was necessary to avert the imminent use of deadly physical force by

[1] The Appellate Division also held that the People could not prevail on the "initial aggressor" doctrine because the People failed to preserve that argument in their briefing and arguments before the trial court. *Brown*, 160 A.D.3d at 49. The Court of Appeals disagreed, holding that "the question of whether the trial court correctly denied Mr. Brown's request for a justification instruction, including on initial aggressor grounds, is preserved." *Brown*, 33 N.Y.3d at 320 n.2; *see also* C.P.L. § 470.05(2).

Cabbagestalk." *Brown*, 160 A.D.3d at 60, 62 (Kahn, J., dissenting). One Justice of the Appellate Division granted the People leave to appeal to the Court of Appeals. The People appealed.

iii. Court of Appeals

On May 7, 2019, the New York Court of Appeals unanimously reversed the Appellate Division's decision. The court reasoned that "it is uncontested both that Mr. Cabbagestalk was unarmed and that Mr. Cabbagestalk swiped at the gun only after Mr. Brown wielded it. On the facts of this case, taken in the light most favorable to Mr. Brown, we hold that the trial court's refusal to charge justification was not error, because Mr. Brown was the initial aggressor as a matter of law." *Brown*, 33 N.Y.3d at 321. In short, the Court of Appeals found that Petitioner was the initial aggressor and that he was not entitled to a justification jury instruction pursuant to New York Penal Law § 35.15(2)(a).

iv. The Instant Petition

On December 11, 2020, Petitioner filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(d)(1) & (2). Specifically, Petitioner argues that the Court of Appeals ruling denying a justification instruction violated his due process rights.

Exhaustion

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal habeas relief from a state court conviction is generally unavailable unless the petitioner "has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To exhaust state remedies, a petitioner must fairly present his or her federal constitutional claims to the highest state court. *See Daye v. Attorney Gen. of New York,* 696 F.2d 186, 191 (2d Cir. 1982) (*en banc*). In *Picard v. Connor*, the court ruled that as long as the substantial equivalent

of a federal habeas corpus claim was first presented to the state courts the issue was fairly presented even if the petitioner did not cite "book and verse on the federal constitution" in his or her state claim. 404 U.S. 270, 277–78 (1971). Furthermore, in *Jackson v. Edwards*, the Second Circuit ruled that because the petitioner's challenge of a state court's denial of a self-defense jury instruction and his subsequent habeas petition were "virtually identical," the petitioner's constitutional claim was "fairly presented" to the state courts. 404 F.3d 612, 621 (2d Cir. 2005). Similarly, here, the justification issue was fairly presented to the state courts. Indeed, Respondents do not contest the fact that Petitioner properly exhausted the remedies available to him in state court. Accordingly, I now turn to the merits of the Petition.

Habeas Review of Jury Instructions

Under 28 U.S.C. § 2254(d)**:**

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 68 (1991). Generally, a federal court may not grant habeas relief for a "mere error of state law." *Blazic v. Henderson*, 900 F.2d 534, 541 (2d Cir. 1990). However, while "federal habeas corpus relief does not lie for errors of state law," *Lewis v. Jeffers,* 497 U.S. 764, 780 (1990), errors under state law *can* result in cognizable constitutional due process violations. What due

process requires will often depend on what is required under state law. *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001). Indeed, once states have promulgated laws defining criminal conduct, "federal due process protects a defendant from conviction unless he is shown in a fair proceeding to have violated those laws." *Id.*

When alleging a due process violation for a trial court's failure to provide a particular jury instruction, "a finding that the petitioner was erroneously deprived of a jury instruction to which he was entitled under state law is the first step in [determining] whether that error violated the petitioner's federal due process rights." *Id.* Accordingly, courts only grant habeas relief for a failure to charge the jury with a self-defense instruction where the evidence supported such a charge under applicable state law and where the failure to give such a charge was sufficiently harmful to violate a constitutional right. *See Cupp v. Naughten,* 414 U.S. 141, 146 (1973).

More specifically, habeas relief in this context cannot be granted without asking three questions. First, was the petitioner entitled to a justification charge? Second, if so, did the failure to give one result in a denial of due process? Third, if so, did the state court's contrary conclusion constitute an unreasonable application of clear Supreme Court law? *Jackson*, 404 F.3d at 621; *see also DeLeon v. Lempke*, 401 F. App'x 610, 611-12 (2d Cir. 2010) (summary order).

Furthermore, a state court's factual findings are entitled to deference on federal habeas review unless the petitioner presents clear and convincing evidence, supported by the record, to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Black v. Griffin*, No. 15-cv-8112 (ALC), 2019 WL 2551685, at *15 (S.D.N.Y. Jan. 11, 2019) ("under Section § 2254(e)(1), a state court's factual

findings are 'presumed to be correct,' and that presumption can only be overcome by 'clear and convincing evidence'") (citations omitted), report and recommendation adopted, No. 15-cv-8112 (ALC), 2019 WL 2548132 (S.D.N.Y. June 20, 2019).

Discussion

i. Petitioner was not Entitled to a Justification Charge.

Consistent with the legal standards set forth above, the Court must first determine whether Petitioner was entitled to a justification charge under New York law. *Jackson*, 404 F.3d at 621.

a. Applicable Law

New York Penal Law § 35.15(1) provides that a person may:

> use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person.

§ 35.15(2) further provides:

> A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
> (a) The actor reasonably believes that such other person is using or about to use deadly physical force.

In evaluating the viability of a self-defense jury instruction, New York case law establishes both "a subjective and an objective component: The fact-finder must determine that the defendant believed deadly physical force was necessary and that a reasonable person would have believed the use of deadly physical force was necessary under the same circumstances." *Edwards*, 404 F.3d at 623; *see also People v. Goetz*, 68 N.Y.2d 96, 115 (1986) (confirming that a jury must first determine whether a defendant "believed deadly force was

necessary to avert the imminent use of deadly force . . . [and] in light of all the circumstances . . . if a reasonable person could have had these beliefs"). Accordingly, a self-defense jury instruction is warranted if "on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified." *People v. Padgett*, 60 N.Y.2d 142, 145 (1983); *see also Davis,* 270 F.3d at 124. New York courts have further clarified that "the jury must be instructed on all claimed defenses which are supported by a *reasonable view* of the evidence—not by any view of the evidence, however artificial or irrational." *People v. Butts,* 72 N.Y.2d 746, 750 (1988) (emphasis in original); *see also DeLeon*, 401 F. App'x at 612.

Under New York law a self-defense justification is not warranted where the defendant was the "initial aggressor." New York Penal Law § 35.15(1)(b). New York courts have expanded the "initial aggressor" doctrine to include "the first person in the encounter to use *deadly* physical force," even if not the first person to use physical force. *People v. McWilliams*, 48 A.D.3d 1266, 1267 (4th Dep't 2008) (emphasis in original). New York courts have also found that the first person to *threaten* deadly physical force can be deemed the initial aggressor. *See People v. Petty*, 7 N.Y.3d 277, 285 (2006).

The term "deadly physical force" is defined as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." N.Y. Penal Law § 10.00(11). To be sure, the threat presented by wielding a gun constitutes a threat of deadly force. *People v. Dodt*, 61 N.Y.2d 408, 414-415 (1984). In *People v. Magliato*, the New York Court of Appeals held a defendant's "use of the pistol to 'scare off' [the assailant] unquestionably placed [the assailant] in the imminent risk of grave danger and, therefore, constituted the 'use of deadly physical force.'" 68 N.Y.2d 24, 29 (1986). "Thus, the

imminent threat to use a gun against another is, necessarily, a threat of deadly physical force." *Brown*, 33 N.Y.3d at 322.

Finally, in determining whether the evidence warrants a justification charge, the reviewing court must view the record in the light most favorable to the defendant. *See People v. McManus,* 67 N.Y.2d 541, 549 (1986).

b. Analysis

In determining whether Petitioner was entitled to a self-defense jury instruction, I must first assess whether Petitioner was the initial aggressor.

I. Petitioner Used Deadly Physical Force.

Petitioner used deadly force when he pulled out his gun while arguing with Cabbagestalk. Indeed, it is well-held that "the threat presented by a gun . . . constitutes deadly physical force." *Dodt*, 61 N.Y.2d at 414-415. In *Dodt*, despite the fact that the defendant did not even display a gun when he threatened to shoot his victim, the defendant was found to have abducted his victim by the "threatened use of deadly force." *Id.* at 414. *A fortiori*, Petitioner introduced the use of deadly force in the case at bar by displaying a loaded gun. Furthermore, even if Petitioner introduced the gun merely to scare, and not threaten, Cabbagestalk, "[c]onduct intended merely to scare off an assailant or to keep him at bay . . . constitutes the 'use of deadly physical force.'" *Magliato*, 68 N.Y.2d at 26; *see also People v. Berk*, 217 A.D.2d 941, 942-43 (4th Dep't 1995), *aff'd,* 88 N.Y.2d 257 (1996) (ruling defendant's entry into a room while displaying a loaded gun in plain view of the victim could be construed as a threat of deadly force).

The fact that Petitioner did not aim his weapon at Cabbagestalk does not alter the analysis. As Petitioner correctly points out, a New York court has stated, in dicta, that "[t]he mere display or brandishing of a pistol may, perhaps, create an insufficiently imminent threat to life to be considered 'use' of deadly physical force." *Magliato*, 68 N.Y.2d at 30. However, that *Magliato* decision was issued in 1986. Since then, the trend of New York case law suggests that merely displaying a loaded gun in plain view constitutes deadly physical force. *See People v. Vega*, 33 N.Y.3d 1002, 1006-07 (2019) ("even where a defendant merely . . . 'threaten[s]' to use a dangerous instrument, a jury would presumably find that the defendant employed deadly physical force by virtue of the instrument's *capacity* to imminently cause death or other serious physical injury") (emphasis in original); *People v. Joyce*, 150 A.D.3d 1632, 1634 (4th Dep't 2017) ("[a]lthough defendant may have aimed the gun at victim's raised arm, such action constituted deadly physical force *regardless of where defendant aimed the weapon* inasmuch as defendant fired a loaded weapon at the victim from a close range") (emphasis added); *cf. Berk*, 217 A.D.2d at 943 ("the testimony of defendant that he entered the room armed with a loaded gun in plain view provided a sufficient basis for the jury to conclude that defendant was the initial aggressor"). Thus, it is clear that Petitioner used deadly physical force on the night of the incident.

II. Petitioner's Use of Deadly Force was not in Response to Deadly Force.

Petitioner was unjustified in using deadly physical force because, as the Court of Appeals found, "the uncontroverted evidence in this case is that Mr. Cabbagestalk did no more

than argue with Mr. Brown before Mr. Brown drew his gun." *Brown*, 33 N.Y.3d at 324 n.5.[2] Given those factual findings and Petitioner's failure to refute them with clear and convincing evidence no reasonable person in Petitioner's shoes could have believed deadly force was necessary. As such, Petitioner was the first to introduce deadly physical force in the altercation by drawing his gun.

The record supports the Court of Appeal's finding on this issue for a number of reasons. First, all three witnesses testified to hearing the two men argue without any evidence of a physical altercation or physical contact. Even the mail carrier, Raymond Wolf, who observed all the events leading up to the shooting, testified that Cabbagestalk was swinging at Petitioner while Cabbagestalk's acquaintance was holding him back, but he did not think that Cabbagestalk made contact with Petitioner. (ECF 2-2 at 239.) Under New York law, the threat of an imminent punch is not a threat of deadly force and does not justify responding with deadly force. *See People v. Goley*, 113 A.D.3d 1083, 1083–84 (4th Dep't 2014) (holding that "[a]lthough defendant told the police that the victim was about to strike her with a 'hammer fist' when she stabbed him," that did not justify the use of deadly force).

Second, even if Cabbagestalk did make contact with Brown, a "single, albeit crushing punch" is "ordinary, not *deadly*, physical force." *People v. Bradley*, 297 A.D.2d 640, 641 (2d Dep't 2002) (emphasis in original); *see also People v. Owusu*, 93 N.Y.2d 398, 403 (1999) (confirming that "fists are not dangerous instruments"). As such, even if Cabbagestalk was the first to introduce physical force in the altercation, Petitioner was the first to introduce *deadly*

[2] As noted above, a state court's factual findings are entitled to deference on federal habeas review unless the petitioner presents clear and convincing record evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1).

force by wielding a gun. By responding to mere physical force with deadly physical force, Petitioner was the initial aggressor. *See McWilliams*, 48 A.D.3d at 1267 (stating that the term initial aggressor properly includes the first person in the encounter to use deadly physical force even if not the first person to use physical force). Petitioner fails to cite any authority in support of the proposition that a punch constitutes an introduction of deadly physical force. Nor is the Court aware of any such authority.

Third, even if Cabbagestalk attempted to gain control of Petitioner's gun, Cabbagestalk swiped at the gun only after Petitioner brandished it—*i.e.*, after Petitioner had already established himself as the initial aggressor.

Petitioner argues, in his moving brief, that Cabbagestalk swiped at Petitioner's firearm while it was still holstered. However, Petitioner fails to cite any evidence whatsoever that could reasonably support such a factual interpretation of the record. Indeed, Petitioner concedes this point in his reply brief. (ECF No. 13 at 8 ("it is uncontested both that Cabbagestalk was unarmed and that Cabbagestalk swiped at the gun after Mr. Brown wielded it").)

Petitioner has not advanced a single colorable argument to suggest that it was Cabbagestalk that introduced deadly physical force on the night of the incident.

Petitioner also relies on inapposite case law in arguing to the contrary. In *People v. Schwartz*, the Appellate Division, Second Department found error in the trial Court's failure to instruct the jury on a justification defense with respect to the charge of manslaughter in the second degree. 168 A.D.2d 251, 253 (1st Dep't 1990). In *Schwartz*, the defendant introduced the gun – not as a weapon – but in an attempt to sell the gun to someone. The defendant further testified that after he failed to make a sale he went into a bathroom to wipe the

fingerprints off of the gun and that, when he emerged from the bathroom, another individual lunged at him and grabbed for the gun. *Id.* at 252. Thus, in *Schwartz* the firearm was not introduced as a weapon, but as an item to be sold. It was not until another individual lunged for the gun to try and steal it that deadly physical force was introduced into the situation. Therefore, it would have been reasonable for a jury to have concluded, in that specific scenario, that the defendant was not the initial aggressor.

People v. Smith, also relied on by Petitioner, is similarly inapposite. In *Smith*, the two deceased victims had held defendant at gunpoint and attempted to force defendant to perform sexual acts. *People v. Smith*, 234 A.D.2d 484, 485 (2d Dep't 1996). The defendant managed to swipe the gun away from one of the eventual victims and fired numerous shots at that individual when he lunged after the gun to take it back. On these facts, the Appellate Division, Second Department found that the trial court should have charged the jury on justification as to that shooting.

In this case, however, Petitioner was the first person to introduce a firearm and he did so in connection with a domestic dispute. Thus, the above-referenced cases do not aid Petitioner's argument in any way.

Petitioner also argues that he withdrew from the encounter after drawing his gun. Because the evidence shows that Petitioner attempted to walk away from Cabbagestalk, Petitioner argues that the trial court should have provided a justification instruction to the jury. Petitioner's argument on this point misapprehends the applicable law. Penal Law § 35.15(1) justifies the use of force from an initial aggressor in cases where the initial aggressor withdraws from the encounter and effectively communicates such withdrawal to the eventual victim. This

section only applies to the use of *non-deadly*, ordinary physical force. *See* New York Penal Law § 35.15(1)-(2). The use of *deadly* physical force is governed by Penal Law § 35.15(2), which merely provides, in pertinent part, that a person may not use deadly physical force unless that individual reasonably believes that another person is "using or about to use deadly physical force." It does not, as Petitioner apparently contends, permit an individual to introduce a threat of deadly force, walk a few feet away from an altercation, and then use deadly physical force in response to another's physical attacks.

Furthermore, even assuming the law operated as Petitioner proposes, Petitioner merely claims that Petitioner "walked away from Cabbagestalk." (ECF No. 13 at 6.) Petitioner fails to cite any case law to show that merely taking a few steps away from Cabbagestalk constituted a successful withdrawal under New York law.

In sum, because Petitioner was the first, and only, person to introduce deadly physical force, "[n]o reasonable view of the evidence here would support a justification defense." *People v. Kerley*, 154 A.D.3d 1074, 1075 (2017).

III. The Petition Must be Denied.

Having determined Petitioner was the initial aggressor and was not entitled to a self-defense justification, there can be no finding that Petitioner was erroneously deprived of a jury instruction to which he was entitled under New York law. Accordingly, the Petition fails to satisfy the first prerequisite for habeas relief. *Jackson,* 404 F.3d at 621.

Once such a determination has been made, the Court "need not reach the second and third steps of the analysis." *Taylor v. Capra*, 412 F. Supp. 3d 126, 136 (E.D.N.Y. 2019).

Conclusion

For the reasons set forth above, I respectfully recommend that the Petition be denied and dismissed in its entirety.

Respectfully submitted,

Dated: August 31, 2021
New York, New York

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge

Notice

The parties shall have fourteen days from the service of this Report and Recommendation to file written objections to the Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)).

If any party files written objections to this Report and Recommendation, the opposing party may respond to the objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Vernon S. Broderick at the United States Courthouse, 40 Foley Square, New York, New York 10007, and to any opposing parties. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Broderick. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DARRYL BROWN, Petitioner,	:	
-against-	:	20-CV-10491 (VSB)
LETITIA JAMES, et al., Respondents.	:	**OPINION AND ORDER**

Appearances:

Joey Jackson
Joey Jackson Law
New York, NY
Counsel for Petitioner

Tae-Hoon Charles Won
Bronx County District Attorney's Office
Bronx, NY
Counsel for Respondents

VERNON S. BRODERICK, United States District Judge:

Darryl Brown ("Brown" or "Petitioner") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on December 11, 2020. ("Petition," Doc. 1.) Before me is the Report and Recommendation of United States Magistrate Judge Katharine H. Parker, (the "R&R" or "Report," Doc. 14), recommending that I deny the Petition. Petitioner filed objections to the Report on October 14, 2021. (Doc. 17.) Because Petitioner has failed to show that he was entitled to a justification defense instruction, I ADOPT the Report subject to the exception detailed below and DISMISS the Petition.

I. Background[1]

On December 11, 2020, Brown filed a petition for a writ of habeas corpus and supporting memorandum of law. (Docs. 1–2.) On June 9, 2021, the Bronx County District Attorney's Office ("DA's Office") filed an opposition to the Petition. (Doc. 11.) On July 8, 2021, Petitioner filed his reply brief in support of his Petition. (Doc. 13.) On December 15, 2020, I referred the case to Magistrate Judge Parker for a report and recommendation. (Doc. 5.)

Magistrate Judge Parker issued her Report on August 31, 2021, and notified that parties that they had "fourteen days from the service of [the] Report and Recommendation to file written objections." (Report 17.) On September 7, 2021—seven days before objections were due—Petitioner moved for an extension of time to file his objections. (Doc. 15.) The following day, I granted Petitioner an additional 30 days to file his objections. (Doc. 16.) On October 14, 2021, Petitioner filed objections to the Report. (Doc. 17.) The DA's Office did not file any objections or responses to Petitioner's objections to the Report, nor did it seek additional time to do so.

II. Legal Standards

A. *Review of a Magistrate Judge's Report*

In reviewing a magistrate judge's report and recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). "If a party timely objects to any portion of a magistrate judge's report and recommendation, the district court must make a de novo determination of those portions of the report or specified proposed findings or recommendations

[1] For purposes of this Opinion & Order, I assume familiarity with the underlying facts and analysis as set forth in Magistrate Judge Parker's Report. (Doc. 14.) I limit my description of the factual and procedural history to only those matters that are relevant to the motion currently under consideration.

to which objection is made." *Bush v. Colvin*, No. 15CIV2062LGSDF, 2017 WL 1493689, at *4 (S.D.N.Y. Apr. 26, 2017) (quoting *United States v. Romano*, 794 F.3d 317, 340 (2d Cir. 2015)).

Pursuant to the standard often articulated by the district courts of this Circuit, "[i]f a party . . . simply relitigates his original arguments, the Court reviews the Report and Recommendation only for clear error." *Antrobus v. New York City Dep't of Sanitation*, No. 11CV5434CBALB 2016 WL 5390120, at * 1 (E.D.N.Y. Sept. 26, 2016) (internal quotation marks omitted); *see also Wu v. Good Samaritan Hosp. Med. Ctr.*, 815 F. App'x 575, 579 (2d Cir. 2020) ("Merely referring the court to previously filed papers or arguments does not constitute an adequate objection under . . . Fed. R. Civ. P. 72(b)." (quoting *Mario v. P & C Food Markets., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002))); *Pena v. Rivera*, No. 05 CIV3109(LTS)(FM), 2006 WL 2529771, at *1 (S.D.N.Y. Aug. 31, 2006). General and conclusory objections are also only reviewed for clear error. Fed. R. Civ. P. 72(b)(2) ("[A] party may serve and file specific written objections to the [magistrate judge's] proposed findings and recommendations.*")*; *Benitez v. Parmer*, 654 F. App'x 502, 504 (2d Cir. 2016) (holding that "general objection[s] [are] insufficient to obtain de novo review by [a] district court"). Under a clear error standard of review, "[s]o long as there is a basis in the evidence for a challenged inference, [the court] do[es] not question whether a different inference was available or more likely." *United States v. Freeman*, 443 F. App'x 664, 666 (2d Cir. 2011) (quoting *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007)).

B. *Habeas Relief*

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas petitions under 28 U.S.C. § 2254 may not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). Under the first test, "a writ of habeas corpus will issue only if 'a state court's application of federal law . . . is so erroneous that there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.'" *Duhs v. Capra*, 639 F. App'x 691, 694 (2d Cir. 2016) (quoting *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (per curiam)) (alteration in original). "Thus, even a showing of 'clear error' will not suffice." *Id.* (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). A state court's factual findings are presumed correct unless the petitioner comes forward with clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1).

Furthermore, to qualify as "clearly established Federal law" within the meaning of AEDPA, the law in question must be "'embodied in a Supreme Court holding, framed at the appropriate level of generality.'" *Garlick v. Lee*, 1 F.4th 122, 128–29 (2d Cir. 2021) (quoting *Washington v. Griffin*, 876 F.3d 395, 403 (2d Cir. 2017). "'A state court decision is contrary to such clearly established law when the state court either has arrived at a conclusion that is the opposite of the conclusion reached by the Supreme Court on a question of law or has decided a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Id.*

III. Discussion

I have reviewed the Report in its entirety, and I do not find any clear error. Petitioner almost exclusively repeats the same arguments already rejected by Magistrate Judge Parker. Despite this, I have reviewed Petitioner's objections under a *de novo* standard and find that all objections fail. In several instances, Petitioner refers to and cites to Magistrate Judge Parker's Report as if it were written by Respondent. (*See, e.g.,* Doc. 17 at 8 "Respondent argues . . . " and

"Respondent fails to include . . . ".) In these instances, I interpret Petitioner's criticisms as objections to Magistrate Judge Parker's analysis.

As Magistrate Judge Parker correctly noted, there are three steps to determining whether Petitioner is entitled to Habeas relief: "First, was the petitioner entitled to a justification charge? Second, if so, did the failure to give one result in a denial of due process? Third, if so, did the state court's contrary conclusion constitute an unreasonable application of clear Supreme Court law?" (Report 8.) Because I do not find that Defendant was entitled to a justification charge, I need not reach steps two and three. *Taylor v. Capra*, 412 F. Supp. 3d 126, 136 (E.D.N.Y. 2019). Under New York Law, "[a] defendant is entitled to a justification charge only where a reasonable view of the evidence, viewed in the light most favorable to the defendant, would support a finding of that defense." *People v. Irizarry*, 157 N.Y.S.3d 287, 288 (1st Dep't 2021). New York's justification statute provides that a person may not "use physical force upon another person . . . to defend himself . . . from what he . . . reasonably believes to be the use or imminent use of unlawful physical force" if they are the "initial aggressor." N.Y. Penal Law § 35.15(1)(b). The statute also provides that even if a person is entitled to use defensive force against another, that force may not be deadly unless the person "reasonably believes that such other person is using or about to use deadly physical force." N.Y. Penal Law § 35.15(2)(a). The initial aggressor is the first person to use or threaten to use deadly physical force. *Williams v. Chappius,* No. 16CV08329PAESN, 2018 WL 7133267, at *8 (S.D.N.Y. Nov. 16, 2018), *report and recommendation adopted,* No. 16CIV8329PAESN, 2019 WL 330630 (S.D.N.Y. Jan. 25, 2019); *People v. Daniel*, 828 N.Y.S.2d 125, 126 (2d Dep't 2006); *People v. Walker*, 726 N.Y.S.2d 857 (1st Dep't 2001).

Petitioner disputes Magistrate Judge Parker's findings that Petitioner was the initial aggressor. Petitioner, as evidence that he was not the initial aggressor, highlights that the victim was "getting in the Petitioner's face," that the victim's friend was telling the victim to "chill out" and "relax," and that the victim "kept pursuing [the Petitioner] and swinging his fists at him." (Doc. 17 at 6.) These circumstances were all described to and considered by Magistrate Judge Parker in her analysis. (*See* Report 3–4.) The victim was swinging "over his friend" trying to hit the Petitioner. (Doc. 2-2 at 239:2-14.) The only witness who observed the shooting ("Wolf") testified that he didn't think that any of the swings made contact with Petitioner. (*Id.* at 239:17–18.) With respect to the gun, Wolf testified that he observed the victim "swiping the man's gun" which was in Petitioner's hand when Wolf saw it. (*Id.* at 239:19-240:23.) Contrary to Petitioner's assertion, (Doc. 2 at 13), Wolf does not testify that the gun was holstered when the victim swiped at it. None of the victim's actions can reasonably be interpreted as deadly force, since "a punch from an ordinary person does not generally constitute deadly physical force," *People v. Kerley*, 63 N.Y.S. 3d 538 (3d Dep't. 2017). Instead, "[t]he evidence at trial establishes that defendant immediately responded to the [victim's] use of ordinary force with deadly force" by shooting the victim. *Irizarry*, 157 N.Y.S.3d at 288. Petitioner compares this case to *People v. Schwartz*, where a man accidentally killed a third party during a struggle for a gun. 562 N.Y.S.2d 619, 620 (1st Dep't 1990). Petitioner made the same comparison before Magistrate Judge Parker, who found this case was inapposite. (Report 14.) I agree. Unlike in *Schwartz*, where the defendant was ambushed after offering to sell a gun, Petitioner introduced the gun to the situation as a threat of force.

Petitioner also objects to the Report on the grounds that it "fails to include the principle that an initial aggressor may regain his rights to self-defense." (Doc. 17 at 8.) This is incorrect.

Magistrate Judge Parker analyzed Petitioner's argument that he withdrew from the encounter and she concluded that in making this argument Petitioner "misapprehends the applicable law." (Report at 15.) Although I disagree with Magistrate Judge Parker's analysis of New York's justification statute, I ultimately reach the same conclusion that there is no evidence that Petitioner withdrew from the altercation.

Magistrate Judge Parker explains that N.Y. Penal Law § 35.15(1) "only applies to the use of non-deadly, ordinary physical force" because "[t]he use of deadly physical force is governed by Penal Law § 35.15(2)." (Report 15–16.) I agree with Magistrate Judge Parker that Penal Law 35.15(1) applies to "physical force," however I interpret this term as being a broad term that is inclusive of "deadly physical force," rather than a narrow term meaning only "non-deadly physical force." Although the statute does not define the term "physical force," it does define "deadly physical force" as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious injury." N.Y. Penal Law § 10.00(11). This definition supports a finding that the term physical force is intended to be inclusive of deadly physical force. Additionally, New York state case law supports that New York allows withdrawal in cases of any physical force, deadly or not. *See Irizarry*, 157 N.Y.S.3d at 288 ("[a]n initial aggressor with respect to deadly force is only entitled to the defense of justification where he withdrew from the encounter, effectively communicated such withdrawal, and the other person continued the incident with deadly force."); *see also People v. Mickens,* 631 N.Y.S.2d 687, 688 (1st Dep't 1995) ("[n]othing in the record indicates that defendant withdrew after deadly force was used.").

Although I find that the justification statute allows for an initial aggressor to withdraw after using deadly force, ultimately, it is not dispositive whether it is statutorily possible for one

to withdraw after initiating deadly force. I agree with Magistrate Judge Parker that Petitioner does not demonstrate that he withdrew from the encounter, (Report 16), because Petitioner does not point to any evidence that he withdrew. Petitioner asserts that "[a]ccording to Wolf's testimony, Mr. Brown attempted to walk away, after the gun was in view of the decedent." (Doc. 17 at 8.) A review of Wolf's trial transcript, (Doc. 2-2), does not reveal any testimony that supports that Petitioner tried to withdraw after brandishing his gun.

IV. Conclusion

Having reviewed the Report, as well as other materials in the record, I hereby ADOPT the Report and Recommendation, except with respect to the portion interpreting N.Y. Penal Law § 35.15 as only permitting withdrawal in cases of non-deadly physical force, as explained above. I hereby DISMISS the Petition. The Clerk of Court is respectfully directed to close the case.

SO ORDERED.

Dated: July 5, 2023
New York, New York

Vernon S. Broderick
United States District Judge

S.D.N.Y. – N.Y.C.
20-cv-10491
Broderick, J.
Parker, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of May, two thousand twenty-four.

Present:

José A. Cabranes,
Maria Araújo Kahn,
Circuit Judges,
Katherine Polk Failla,*
District Judge.

Darryl Brown,

Petitioner-Appellant,

v. 23-7864

Letitia James, In her official capacity as
Attorney General of New York, et al.,

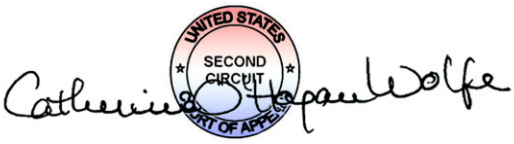
Respondents-Appellees.

Appellant, pro se, moves for a certificate of appealability ("COA"), appointment of counsel, summary reversal, and for vacatur of the conviction. Upon due consideration, it is hereby ORDERED that the appointment of counsel motion is GRANTED and that the COA motion is granted on the following issues: whether Appellant was entitled to a justification defense instruction pursuant to N.Y. Penal Law § 35.15; whether the failure to give one resulted in a denial of due process; and whether the New York State Court of Appeals' conclusion "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

* Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

Supreme Court." 28 U.S.C. § 2254(d)(1); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Jackson v. Edwards*, 404 F.3d 612, 621 (2d Cir. 2005). The Clerk's Office shall appoint counsel pursuant to the Criminal Justice Act, and the parties are directed to brief the issues above. It is further ORDERED that the motion for summary reversal is DENIED and the motion for vacatur of the conviction is DENIED without prejudice to briefing before the merits panel.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of August, two thousand twenty-six.

Darryl Brown,

Petitioner - Appellant,

v.

Letitia James, In her official capacity as Attorney General of New York, Anthony J. Annucci, In his official capacity as the acting Commissioner for the New York Department of Corrections and Community Supervision, Michael Kirkpatrick, In his official capacity as Superintendent of the Clinton Correctional Facility,

Respondents - Appellees.

ORDER

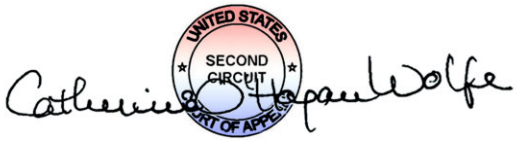
Docket No: 23-7864

Appellant, Darryl Brown, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

ORDER TO SHOW CAUSE

APL –2018-00070

-against-

DARRYL BROWN,

Defendant.

Upon the Affirmation of Joey Jackson, Attorney for the Defendant, in relation to the Order to Show Cause, the accompanying Notice of Motion, Motion for Reargument, and the Exhibits annexed thereto,

LET the Defendant in this matter show cause before this Court on the _____ day of _____, 2019 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should be granted permitting this Court to accept Defendant's Motion for Reargument with respect to this Court's Decision dated May 7, 2019, wherein said Court reversed the Decision of the N.Y.S. Supreme Court, Appellate Division, First Department dated February 20, 2018, and thereby reinstating Defendant's conviction.

In its May 7, 2019 Decision, this Court remitted the case to the "Appellate Division for a determination of the facts and issues raised but not determined on appeal to that Court." In doing so, the Appellate Division, First Department, issued its final decision on June 11, 2019, at which time said Court found that the Defendant's remaining appellate issues did not have merit.

Permission is hereby sought as Court rules provide for the filing of all Motions for Reargument of Appeals to be filed "not later than thirty (30) days after the appeal. . . sought to be reargued has been decided, unless otherwise permitted by the Court." See, 500.24(b);

The instant Order to Show Cause seeks said permission from this Honorable Court, and includes the Motion for Reargument in the event this Court grants the Defendant's Application.

Sufficient reason appearing therefore, it is

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ORDERED that the Defendant's Motion for Reargument, which is appended to the instant Order to Show Cause, be accepted for filing and consideration by this Court, pending the determination and resolution of the Defendant's Motion, and it is further Ordered that,

SUFFICIENT CAUSE THEREFORE APPEARING, LET service of a copy of this Order to Show Cause, along with the Attorney Affirmation, Notice of Motion, Motion for Reargument, and the Exhibits annexed thereto, be served upon the People of The State of New York, to wit, Ms. Clara H. Salzberg, Esq., Assistant District Attorney, Office of the District Attorney, 198 East 161st Street, 6th Floor, Bronx, New York 10451, by Certified Mail, Return Receipt, on or before the _____ day of _____, 2019, which shall be deemed good and sufficient service thereof, and it is further

ORDERED that the Motion brought on by this Order to Show Cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of this Court.

Dated: July 23, 2019
New York, New York

_____
Honorable
Associate Justice
New York State Court of Appeals

at trial, that the third party known as "Black" was standing over Mr. Brown for a period of time after the shooting occurred. While the police did not recover a gun from Mr. Cabbagestalk, it is indeed contested as to whether or not he was armed during his vicious onslaught against Mr. Brown. The witness, Yvette Flores, testified that she let "Black" into her apartment, who was in the hallway at the time of the incident, and who witnessed what occurred. Tr. 110:18 (R. A113). See., Exhibit F (Transcript of Yvette Flores). The police arrived thereafter, and came into her apartment about 15 to 20 minutes later. Id., Tr. 112:13 (R. A115). It is estimated that "Black" remained in the hallway for some ten minutes before coming into her apartment. Id., Tr. 136:2 (R. A139). Other than being sure that he was in the hallway, she doesn't know exactly what he was doing or whether he was hovering over the decedent's body. Id., Tr. 136:9 (R. A139). In fact, Mr. Wolf indicated that after Cabbagestalk was shot, that "Black" was "hovering over him". Transcript., 271-22. Although police took a statement from "Black", there is no indication that he was ever searched for a weapon. Id., Tr. 136:23 (R. A139).

This is not at all speculation or innuendo, but rather reasonable views of the evidence that can be inferred from the facts that were before the jury.

To the extent that this Court's decision does not recognize critical facts, it has misinterpreted the event at issue, which proceeded the deadly encounter. As such, I would ask that this Court reconsider its decision and reexamine the record.

IV. THE INITIAL AGGRESSOR DOCTRINE

This Court asserts that Mr. Brown is the "initial aggressor" merely because he drew his weapon, which was pointed away from Mr. Cabbagestalk and held by his side. There are no facts in the record, which would suggest that Mr. Brown ever menaced Mr. Cabbagestalk with the weapon, pointed the weapon at him, threatened to use the weapon, or otherwise pursued Mr.

Cabbagestalk while his weapon was drawn. It was only after Mr. Brown was subject to a relentless attack by Mr. Cabbagestalk, and only after Mr. Black could not thwart Mr. Cabbagestalk's repeated onslaught, that Mr. Brown was compelled to discharge his firearm. It is neither now nor has it ever been the law in this jurisdiction that a person becomes the "initial aggressor" merely by displaying a weapon in order to deter an attack, preserve their own life, or prevent themselves from being physically harmed, including facing the prospect of death.

The import of this Court's decision would be that anytime a person takes out a weapon in an effort to defend or protect his or her life, they would be deemed the "initial aggressor," and thereby lose the right to properly defend themselves. As such, a person who draws a weapon because they reasonably believe themselves to be facing a serious attack would lose the ability to protect themselves under the rationale of this Court.

This Court cites People v. Dodt to stand for the proposition that the imminent threat to use a gun constitutes deadly physical force even if the gun is never fired. It should be noted that Dodt, which is relied upon heavily by this Court in its analysis, is a case about kidnapping. As such, the victim, who was in fear for her life, never challenged or resisted the defendant, but simply complied with his demands. She did so out of fear of being killed. That is not this case.

Here, Mr. Brown merely drew his weapon to deter the violence and relentless attack of Mr. Cabbagestalk. Mr. Cabbagestalk, however, was undeterred and persisted in throwing punches at Mr. Brown's head and both swiping and grabbing for his gun. The proposition of Dodt is limited to the facts of that case inasmuch as the helpless victim in Dodt felt threatened and terrorized by a weapon that was in the defendant's pocket. Accordingly, the victim believed that her life was in serious jeopardy because of the defendant's threats of violence. As a result, she complied with the defendant's demands. This is wholly different than what happened here.

4. Brazilian Man KILLED By One Punch! https://www.youtube.com/watch?v=5VHQU975xpA (Frontal punch kills man as the back-of-head strikes hard floor)
5. Man charged with one-punch murder remains in custody [https://www.youtube.com/watch?v=lLGFJpIxnR8
6. Man Who Killed Victim With Single Punch Jailed CCTV https://www.youtube.com/watch?v=xqBqXHvLE28 A man has been jailed after his single punch led to the death of a stranger after an argument about cycling on the pavement. Lewis Gill, 20, was given a four-year sentence at Salisbury Crown Court after his attack gave 40-year-old Andrew Young a fatal head injury when he fell. CCTV cameras recorded the attack outside the Tesco Metro store in Charminster Road, Bournemouth, on November 6, 2013.

This Court, notes that "[t]here is no evidence that Mr. Cabbagestalk was ever armed." Indeed, both Mr. Wolf and Ms. Thomas testified that Mr. Cabbagestalk had nothing in his hands." In the instant factual analysis, the Court misstates the record. Based upon evidence elicited at trial, it was inconclusive as to whether or not Mr. Cabbagestalk actually had a weapon. The mere fact that he did not have a weapon in his hand at the time of his vicious onslaught toward Mr. Brown does not mean that a jury could infer that he did not have a weapon at all. Accordingly, the inferences that this Court draws in substituting its judgement for that of a jury is improper. The Court further suggests that "one who wields a gun during a nondeadly altercation" should not be entitled to the justification defense. This has never been the law in this jurisdiction or throughout the country. First, to characterize Mr. Brown as wielding a weapon is a factual misstatement. Mr. Brown had the weapon at his side, pointed away from Mr. Cabbagestalk and at no point used it to threaten or menace him. Mr. Brown fired his weapon only as a last resort in order to thwart Mr. Cabbagestalk's attack. Second, as noted above, a well-placed punch could be deadly indeed.

Moreover, this Court ignores the objective difference between a "mere display" of a weapon and the "use" of a weapon as would be indicative of a person pointing, discharging, or threatening to do same. Mr. Brown did none of the following until it became apparent that Mr.

Cabbagestalk was intent upon gaining control of the weapon, ignoring "Black's" entreaties to stop, and continued to advance upon him in a deliberate fashion. Additionally, this Court collapses the statutory concept of the "initial aggressor" with the question of whether the force initially employed by Mr. Brown was lawful. If the defensive display of a weapon is justified (as non-deadly force), then that mere lawful "display" of a weapon cannot make the defender, Mr. Brown, the "initial aggressor" as a matter of law. The Court completely ignores the fact that Mr. Brown, as a law enforcement officer, is lawfully possessed of his weapon, and maintains it to thwart the violent action of those whom he may encounter.

By way of analogy, consider the cases in which a woman may display or point a knife or a gun at an aggressive male attacker to "prevent" or terminate a physical attack. Would she not be legally justified in doing so? As such, this case should not turn on the gender of the party being attacked. Under the instant set of facts, if a woman took out a weapon to protect herself from a male attacker, would the Court equally conclude that she was the "initial aggressor" simply because a weapon was held by her side to thwart an attack? If this Court's decision is applied to that scenario, then the woman defender who merely "displays" a deadly weapon defensively, can next be subject to a deadly attack by the original aggressor while losing the ability to defend herself.

In the instant case, the initial attack by Mr. Cabbagestalk was continuing unabated until he was shot. Under such a circumstance, no reasonable person reading New York State Penal Law §35.15 and directly observing the altercation progress could conclude that Brown was the "initial aggressor" as a matter of law. Mr. Brown continued to duck Mr. Cabbagestalk's punches while backing and moving away from his attacker. In doing so, Mr. Brown exercised considerable restraint in not discharging his weapon. Even after Mr. Cabbagestalk swiped and

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DARRYL BROWN,

Petitioner

v.

LETITIA JAMES, in her official capacity as Attorney General of New York, ANTHONY J. ANNUCI, in his official capacity as the acting Commissioner for the New York Department of Corrections and Community Supervision, MICHAEL KIRKPATRICK, in his official capacity as Superintendent of the Clinton Correctional Facility,

Respondents.

No. 20-10491

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

Joey Jackson, Esq. Principal
JOEY JACKSON LAW, PLLC.
5 Penn Plaza, 23rd Floor
New York, New York 10001
833.Joey Jackson (563.9522)
jjackson@joeyjacksonlaw.com

of the Trial Court's failure to instruct the Jury on Legal Justification— finding that Mr. Brown was entitled to such an instruction as a matter of law. *Id.* The People of the State of New York, Bronx County ("Respondents" or "Prosecutor") thereafter sought leave to appeal from the First Department, which was granted.

Following the submission of additional briefs and oral argument, the New York State Court of Appeals ("Court of Appeals"), reinstated Mr. Brown's unlawful conviction. See, Ex. G. They did so by applying the Initial Aggressor Doctrine— which was never urged upon the Trial Court by the Prosecutor nor otherwise argued or referenced in the Appellate Division.

This doctrine continues to have no place in this case. According to the Court of Appeals, Mr. Brown was ineligible for such an instruction as he was the Initial Aggressor. Said Court apparently ignored or otherwise overlooked facts demonstrating that Cabbagestalk's actions, if left unchecked, could themselves have been lethal to Mr. Brown if he did not defend himself. In essence, the Court of Appeals posits that if an individual introduces a gun into an argument by holding it by their side for protection, they better never use it— even when facing serious physical injury or death. This could not be the law.

The Court of Appeals then remanded Mr. Brown's case to the First Department for proceedings on the issues not reviewed. See, Ex. G. Subsequently, the First Appellate affirmed, and the Court of Appeals denied a Motion for Re-argument on September 13, 2019. Mr. Brown's ability to directly appeal to the Supreme Court of the United States ended on December 12, 2019. Mr. Brown's ability to file this Writ of Habeas Corpus expires on December 11, 2020.

Respondents' custody of Mr. Brown is violative of due process for two reasons. First, Mr. Brown had a legal right to a Self Defense Charge under New York Law. Second, Respondents'

23-7864-pr

United States Court of Appeals

for the

Second Circuit

DARRYL BROWN,

Petitioner-Appellant,

– v. –

LETITIA JAMES, In her official capacity as Attorney General of New York, ANTHONY J. ANNUCCI, In his official capacity as the acting Commissioner for the New York Department of Corrections and Community Supervision, MICHAEL KIRKPATRICK, In his official capacity as Superintendent of the Clinton Correctional Facility,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PETITIONER-APPELLANT

KRISTEN SANTILLO
GELBER & SANTILLO PLLC
Attorneys for Petitioner-Appellant
52 Duane Street, 7th Floor
New York, New York 10007
(212) 227-4743

CP COUNSEL PRESS (800) 4-APPEAL • (381129)

evidence is more believable than others. Rather, it is for the jury, with the proper self defense instruction, to decide whether the amount of force was justifiable or unjustifiable.")

The Court of Appeals decision thus evidences a failure of the state to follow its own rules on justification. *Davis*, 270 F.3d at 123 ("Once states have promulgated laws to define criminal conduct…federal due process protects a defendant from conviction unless he is shown in a fair proceeding to have violated those laws.") The decision cannot be viewed as merely a state court's interpretation of its own law, as nowhere in New York's statutes does it state that displaying a firearm is automatically a threatened use of deadly physical force, which makes one the initial aggressor as a matter of law. As the First Department recognized in reversing Brown's conviction, "No case in [New York's] justification jurisprudence stands for [the] sweeping proposition," that "anytime someone draws a weapon during an encounter with an unarmed individual, he or she is not entitled, as a matter of law, to a justification charge, regardless of what subsequent threatening actions that individual takes," "especially where…the weapon was lawfully possessed." A-57.

Indeed, such a sweeping proposition could not be squared with Supreme Court decisions holding that an individual has a Second Amendment right to carry a firearm for self-defense. As the Supreme Court held in *D.C. v. Heller*, 554 U.S. 570, 592 (2008), the Second Amendment "guarantee[s] the individual right to possess

and carry weapons in case of confrontation." *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 749–50, 767-768 (2010) ("the Second Amendment protects the right to keep and bear arms for the purpose of self-defense"; "individual self-defense is 'the central component' of the Second Amendment right,"; "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'"); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 10 (2022) ("the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home").

As the Supreme Court confirmed in *Bruen*, "the right to 'bear arms' refers to the right to 'wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Bruen*, 597 U.S. at 32 (*quoting Heller*, 554 U.S. at 584). This right to carry a firearm "in case of confrontation" would be meaningless if the mere act of unholstering one's firearm when facing a threat disqualified one from establishing that he was acting in self-defense.

Thus, while the Court of Appeals decision represented a clear misapplication of New York law to the facts of Brown's case, to any extent the Court of Appeals decision could be viewed as an interpretation of New York law, no deference would be warranted to the state court as such an interpretation would be patently unconstitutional under clearly established Supreme Court law. *See Davis*, 270 F.3d

at 124 ("federal courts must of course defer to state-court interpretations of the state's laws, so long as those interpretations are themselves constitutional.")

VIII. CONCLUSION

For the foregoing reasons, Brown respectfully urges the Court to reverse the District Court's denial of his 2254 Motion, and to remand the case to the District Court with instructions to issue a writ of habeas corpus.

Dated: July 1, 2025

Respectfully submitted,

GELBER & SANTILLO PLLC

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23-7864-pr

United States Court of Appeals

for the

Second Circuit

DARRYL BROWN,

Petitioner-Appellant,

– v. –

LETITIA JAMES, In her official capacity as Attorney General of New York, ANTHONY J. ANNUCCI, In his official capacity as the acting Commissioner for the New York Department of Corrections and Community Supervision, MICHAEL KIRKPATRICK, In his official capacity as Superintendent of the Clinton Correctional Facility,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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and an expert testified that Brown was trained to use firearms to deescalate, the panel concluded that Brown was holding the gun "ready to aim and fire in an instant." *Id*.

The Opinion distinguished *Davis* and *Jackson*, noting that neither "involved the 'initial aggressor' doctrine," which the panel described, without citing any authority, as turning on the objective circumstances of a defendant's actions, not subjective criteria. Opinion at 22. Without addressing Thomas's testimony that Brown tried to walk away from Cabbagestalk after he initially drew his firearm, the panel also found that "no reasonable view of the evidence permits the conclusion that Brown withdrew" from the confrontation. *Id*.

The panel did not address Brown's argument that the Court of Appeals' expansive decision violated the constitutionally protected right of individuals to carry firearms for use in self-defense.

III. ARGUMENT

A. The Opinion Conflicts with the Supreme Court's Second Amendment Jurisprudence

The Opinion failed to address Brown's argument that a finding that simply holding a gun as a deterrent disqualifies a defendant from asserting self-defense conflicts with the Supreme Court's decisions holding that an individual has a Second Amendment right to carry a firearm for use in self-defense in case of a confrontation. In *Heller*, 554 U.S. at 592, the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of

confrontation." *See also McDonald*, 561 U.S. at 749–50, 767-768 (2010) ("the Second Amendment protects the right to keep and bear arms for the purpose of self-defense"; "individual self-defense is 'the central component' of the Second Amendment right,"; "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'"); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 10 (2022) ("the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home"). The Supreme Court reaffirmed in *Bruen* that "the right to 'bear arms' refers to the right to 'wear, bear, or carry ... upon the person … for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Bruen*, 597 U.S. at 32 (*quoting Heller*, 554 U.S. at 584).

This right to carry a firearm "in case of confrontation" would be meaningless if the mere act of holding a firearm by one's side as a deterrent when facing a threat automatically abdicated one's right to lawfully use self-defense. For instance, in *Heller*, the Supreme Court found a law requiring homeowners to store firearms disassembled unconstitutional because it made it "impossible for citizens to use them for the core lawful purpose of self-defense...." *Heller*, 554 U.S. at 630. Similarly, the published Opinion and the state court decision it blesses effectively hold that a firearm can never be displayed as a deterrent in self-defense, or the bearer will thereafter abandon his right to use it in self-defense.

While "federal courts must of course defer to state-court interpretations of the state's laws," "those interpretations" must "themselves [be] constitutional." *Davis*, 270 F.3d at 123 n.4. The panel's conclusion that any time someone draws a firearm, even an off-duty officer who draws a lawfully-possessed firearm as a deterrent, he becomes the initial aggressor as a matter of law and cannot thereafter assert self-defense, finds no support in New York statutes or decisions prior to *Brown*. *See, e.g.*, A-57 (First Department majority in *Brown* noting that "No case in [New York's] justification jurisprudence stands for [the] sweeping proposition," that "anytime someone draws a weapon during an encounter with an unarmed individual, he or she is not entitled, as a matter of law, to a justification charge, regardless of what subsequent threatening actions that individual takes," "especially where…the weapon was lawfully possessed.")

Panel rehearing is warranted, and if it is not granted, it is exceptionally important that the whole Court sitting *en banc* act to address the implications for such a sweeping decision on the constitutional right of citizens to bear arms for the core-lawful purpose of self-defense.

B. The Panel Misapprehended Key Aspects of the Initial Aggressor Doctrine

The panel distinguished this Court's precedents in *Davis* and *Jackson*, reasoning that in those cases, "the Court sharply disagreed with the state courts' assessment of the subjective and objective prongs of the justification instruction

Trial Transcript, dated September 26, 2016
[pp. A219 - A438]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : CRIMINAL TERM : PART 70
INDICTMENT NUMBER: 0971-14
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DARRYL BROWN,
Defendant(s).
----------x
265 East 161st Street
Bronx, NY 10451
September 26, 2016

B E F O R E:

THE HONORABLE ROBERT A. NEARY,
Justice of the Supreme Court & jury

(Appearances as previously noted.)

Lorraine L. Ramsey
Senior Court Reporter

THE COURT CLERK: This is the case on trial, People State of New York verses Darryl Brown.

THE COURT: Appearance as previously noted. Apparently, we are missing two jurors. I jumped the gun a little bit. Is there anything we have to deal with?

MR. MENDYS: Yes, Judge. My first witness this morning is Raymond Wolf. It came to my attention Friday afternoon, after we were done in court, that Mr. Jackson spoke to Mr. Wolf on September 14th of this year which is fine, obviously. However, there is a couple of issues surrounding that. One, is that Mr. Jackson apparently asked Mr. Wolf whether he believed that Mr. Brown was acting in

THE WITNESS: Good morning.
THE COURT: Keep your voice up. It helps, so you don't have to repeat yourself then, okay?
THE WITNESS: Okay.
THE COURT: People may inquire.
MR. MENDYS: Thank you, Judge.

DIRECT EXAMINATION

BY MR MENDYS:

Q Good morning, Mr. Wolf.
A Good morning.
Q Mr. Wolf, how old are you?
A I'm 25.
Q And how far did you go in school?
A I finished high school.
Q Are you from the Bronx, originally?
A Yes.
Q Married?
A No.
Q Have any kids?
A Yes.
Q How many?
A I have one son.
Q And do you work?
A Yes.
Q What do you do for a living?

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A I work for the Post Office. I'm a mail carrier.
Q And how long -- excuse me. How long have you worked for the Postal Service?
A About four years now.
Q And what is your -- generally speaking where is your route?
A On White Plains Road, in the Bronx.
Q And has that always been your route?
A Yes, pretty much.
Q Now, what are your responsibilities with the Postal Service?
A I deliver the mail. I just make sure it gets into the destination.
Q And do you work the same hours everyday?
A Yeah.
Q What hours do you, generally, work?
A From like 7:30 till like maybe five.
Q Okay, and that whole time you are doing your route?
A Yeah. Uhm, not the whole time. I'm in the office like in the morning, then I'll go out and I do deliver the mail.
Q So, I want -- you're here to talk about events from March 20, 2014. Do you remember that day?
A Yeah.
Q And are you familiar with the particular location of 739 East 242nd Street?

A Yes.
Q Now, back in March of 2014, was that location on your route?
A Yes.
Q And can you describe that building for the jury, please?
A It's a double building. It has two sides, two mailboxes.
Q What kind? Is it a residential building?
A Yeah, it's a residential building.
Q And you said it has two sides? That all the same address or is there --
A No, one side is 735, and the other side is 739.
Q Okay, showing you People's one on the monitor behind you. Do you recognize that, yes?
A Yes.
Q What is that location?
A That's 735, and 739.
Q Which side is the 739 side?
A 739 is the right side.
Q Right side, as we're looking at this photograph?
A Yes.
Q Generally speaking, back in March -- well, strike that. Uhm, do you still deliver mail to that building right now?
A Yes.

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Q And have you, since March of 2014, have you ever had any breaks from delivering mail from that building?

A About a couple months. Maybe three months.

Q And when was that, roughly?

A Around after the event that happened. After that day, I didn't -- they didn't send me back to that, that block.

Q Was your route totally changed?

A No, I was still -- I was still in the area. I still did the route, but I didn't do that block.

Q Okay, but since those two, two to three months, you've been back there?

A Yeah.

Q Going back to that building?

A Yeah.

Q Okay. So, let's talk about March 20th of 2014, 12:00 in the afternoon, at that location 739 East 242nd Street, here in the Bronx. What was -- well, at about that time is that when you arrived at the building?

A Yeah.

Q And is that, generally, speaking, is that the time you normally arrive there?

A Yeah, around 12, 12:30.

Q Okay, and back on March 20th of 2014, how did you gain entry into the building?

A Two guys let me in. They was in the lobby already.

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Q Okay, did you recognize either of those two men?
A I knew one of them. I seen him around couple times. The other one I didn't know.
Q Okay, can you describe what they look like?
A Two young -- kind of young gentlemen, black, and that's about it.
Q Now, which one did you say you recognized? Can you distinguish in any way?
A He was kind of taller than the other guy. I seen them. I don't really know him. I just seen him once or twice.
Q Okay, and you said before that they opened the door for you?
A Yeah.
Q Did you acknowledge them in any way?
A Yes, I said what's up to them. Greeted them.
Q And where did you go?
A I went to the 735 side, and started doing the mail.
Q That would be the left side?
A The left side, yeah.
Q When you went into building, where were they exactly standing when you walked into the building?
A They was like directly like in front of door. It's like two doors. They was in the building directly in front of the first door.
Q Okay, already inside the building?

A Already inside the building, yeah.
Q Now, could you tell what they were doing there?
A They was just talking.
Q Were they calm? Or how would you describe -- strike that. How would you describe their demeanor?
A They was relaxed. They was just, uhm, talking.
Q Okay, was there anyone else in the lobby at that point in time?
A Nah, just them two.
Q Now, this is People's 4, in evidence. Mr. Wolf, do you recognize this photograph?
A Yes.
Q What's this a photograph of?
A That's 735, 242nd.
Q Okay, and what do we see here on the left side of the photograph?
A That's the mailbox.
Q So, that's where you would go to deliver the mail?
A Yeah.
Q Now, what about packages? What do you do with those?
A If they don't fit in the box, I take them upstairs, knock on the person's door.
Q Okay. So, now when you deliver the mail, do you do anything for you to kind of keep your mind occupied?
A Yeah, I usually listen to my music and my headphones

are on.

Q Okay, and on this day did you have your headphones on?

A Yes.

Q Uhm, now, do you -- how would you describe the level of volume that your music is played at? Does it prevent you from hearing anything else?

A I could hear, if they are talking to me. But you got to like get my attention, kind of.

Q Okay. So, okay. So, can you tell the jury what happens while you're delivering the mail at -- on the 735 side?

A Uhm, as I'm delivering the mail, uhm, I -- somebody comes in. I see, I see three people. They are, uhm, they are like talking, and then like they start arguing a little bit, and like the one guy starts separating the two, and I start like getting my stuff together because I didn't want to be there. So, then a couple swings got thrown. Then I seen a gun, and I started like to go away. I was like, right -- I moved back like towards the steps, and then a shot went off, then I went upstairs.

Q Okay. So, let me just follow-up, based on what you just said.

A Um hum.

Q There was a point when somebody else --

A Say that again?

Q Somebody else came in the building? Yes?

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A Yeah.
Q Did you, did you see where that person came from?
A I think he came inside the door from outside.
Q But you're not sure?
A I'm not really sure.
Q Okay, if you don't know the answer, it's okay to say you don't know the answer.
A Okay.
Q It's okay. Can you describe that third person?
A Short black guy. Older than the other two.
Q Okay, and you did not see where he came from?
A No, no.
Q And what did he do when he, when he approached these two men?
A They was just talking at first. I didn't really hear what they was talking about.
Q You didn't hear what they were talking about?
A No.
Q Okay, and what, what's -- so, at this point you're still doing the mail?
A Yeah.
Q At your -- at these mail boxes that we see here?
A Yeah.
Q And where are these men in relation to you?
A They are further to my, uhm, to my left.

Q This is People's 3. Can you see in this photograph where they would be?
A They was kind of in the middle. Like in the middle, like right in front of the door, but a little bit back.
Q In this area right here?
A Yeah, right there.
MR. MENDYS: Indicating the space directly next to the front door, that's on the left of the photograph.
MR. JACKSON: Judge, Your Honor, I'm sorry let the witness do it.
THE COURT: Sure. Mr. Wolf, can you use this high tech device that we have here.
Q Can you just point to where --
THE COURT: You can standup, get up closer, if you'd like.
Q Where those three men were?
A Right here, right here.
Q Okay, so set back from the door?
A Yeah.
Q All right, and where were you?
A I was right here.
Q By the mailboxes?
A Yeah, by the mailboxes.
Q They were a little bit behind you?
A Yeah.

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Q Now, it sounds like you were aware that they were there?
A Yeah.
Q Did your attention kind of go to them a little bit more during the course --
A Yeah.
Q During the course --
A It did.
Q Of you delivering the mail?
A It got a little bit louder, the conversation.
Q What was it that that kind of drew your attention to them?
A Uhm, I heard, uhm, heard them yelling like why you here? Then the other guy was saying, you can't tell me where to be. Stuff like that. I didn't really -- like I started like, like not -- trying, trying to get out of there really at that point, but.
Q Trying to mind your own business?
A Yeah, trying to mind my business.
Q Which, which one of the men was it that said, you know, why are you here?
A The older guy.
Q Okay, who was it that was responding?
A The guy that got shot. The younger one of the two guys that was in the hallway. The younger guy.

Q What did he say?
A Like you can't tell me like where to be.
Q Okay, now at this point was the -- was there anything physical going on?
A Not at that point. It was like a couple movements. They was getting in each other face. The younger guy was getting in the older guy's face a little bit. Like trying to back him down.
Q And the -- what about the third male, what was he doing?
A He was trying to break it up. Tell his friend to chill, relax.
Q Okay, telling the other younger guy?
A Other, yeah.
Q Of those two guys, the guy who was -- who was talking to his friend telling him to chill out, relax?
A Yeah.
Q The guy who ultimately ended up getting shot, you indicated you saw one of those two guys previously?
A Yeah, the one that was breaking it up.
Q The one that was breaking it up?
A Um hum.
Q Do you know where he's from?
A No.
Q Do you know where he lives?

A No.
Q Do you know his name?
A No, I just see him. I just see him, as I'm doing the mail.
Q Uhm, so what's the next thing that happened?
A Uhm.
Q You can have a seat.
A Okay. I was, I started, I had a package to do. So, I, uhm, I started to go upstairs. I was like backing up, and the younger guy was like started swinging at him a little bit, swinging, trying to swipe at him. Trying to swipe at the gun, and that's when the shot went off. Like after like the third, fourth time.
Q At what point, all right. Where exactly were you? This is with the pointer on People's 4. Where were you delivering the mail, when all this was going on?
A I was right here.
Q So, kind of in the middle of the --
A Yeah.
Q Or towards the right --
A Yeah.
Q Of the section of the mailbox here?
A Yeah. Yeah.
MR. JACKSON: Right side of the photo, Judge?
THE COURT: Fair enough.

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MR. MENDYS: Correct.

Q And you indicated that the younger guy was swinging at the older guy?

A Yeah.

Q Can you describe that a little bit more?

A Uhm, it was like kind of over hook, trying to like hit him in his face.

Q Okay, with a closed fist?

A Yeah, with a closed fist.

Q Let the record reflect the witness with his right arm swung.

A Like, pretty much swinging over his friend kind of.

Q Over his?

A Yeah.

Q Okay. Swung high with his arm extended parallel to the ground, across his body as throwing a punch.

Did he make contact with the older man?

A I don't think so.

Q You indicated also that you saw swiping?

A Yeah, he was swiping the man's gun.

Q He was swiping?

A Yeah, he was like at an angle. He wasn't really -- he had it like leaning back, and swinging at him.

Q The younger man?

A The younger man swinging at the open --

Q Swiping? He had an open hand?
A Yeah. I mean, yeah.
MR. JACKSON: Objection to maybe. Just what he knows.
A Yeah. I'm not sure.
THE COURT: If you can't.
A Okay, I'm not sure if it was closed.
Q You're not sure if it's an open or closed hand?
A No, I'm not sure.
Q And you, all right, at what point do you see the gun?
A After, like after the first -- after I seen him swing, then I noticed, I seen a gun, and that's when I started backing up. Like after, after the tussling, and all that, and I seen him swing one time, then I seen his gun, then I heard the guy said you going to pull a gun out, you better use it.
Q Who said that?
A The younger guy.
Q The younger guy who was throwing the punches?
A Yeah.
Q And where exactly was the gun, when you saw it?
A It was in his hands.
Q In the older man's hands?
A Left hand.
Q Left hand? Right hand?
A Uhm, I think it was his left hand. Maybe left hand.

Q Are you certain about that?
A Not sure.
Q Okay.
A I'm not sure what hand it was in.
Q Previously you made gestures with your right hand. Would that be inaccurate?
A That was inaccurate, yeah.
Q Okay. How is the gun -- what kind of gun was it?
A Maybe automatic gun.
MR. JACKSON: Judge, objection, as to the maybe, Your Honor.
THE COURT: Are you familiar with guns?
THE WITNESS: No, I'm not familiar with guns.
THE COURT: It's a handgun, as oppose to rifle?
THE WITNESS: It was a handgun, yeah.
Q Are you familiar with differences between revolvers verses the type of gun that the police carry?
A Yeah.
Q How would you describe it?
A It was like a police gun.
Q Okay, what color was it?
A I'm not sure.
Q How would you describe how he was holding it? Was it down to the ground?
A It was at his -- at an angle. At his waist. Kind of

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by his body.

THE COURT: Can you standup and show the jury?

A Like this.

MR. MENDYS: Okay, let the record reflect the witness stood up and had his right hand --

THE COURT: Waist high.

MR. MENDYS: A little above waist high I would say with his four fingers and middle finger out stretched. The gun was kind of pointed away from him.

A Yeah.

Q And it was at that time that the younger man was swiping at it?

A Yeah.

Q Okay. So, now when you testified earlier the first time you saw the gun was after the younger guy had swung a couple times at him?

A Yeah.

Q Is that right?

A Yes.

Q Do you remember testifying in the grand jury?

A Yeah.

Q On March 25th of 2014?

A Um hum.

Q And you were under oath there like you are now?

A Um hum.

Q Right? And I was asking you questions?
A Yeah.
Q And you remember testifying there that -- one moment. That when you saw the older man approach, that is when you saw the gun?
A Yeah, I think I messed it up then, but I didn't mean it that way. I mean I seen it after the swungs, after everything already escalated in the hallway already.
Q So, you were asked these questions and giving these answers. How did he approach?
MR. JACKSON: Sorry, Judge. Can I have a page and line number, please?
THE COURT: Sure.
MR. MENDYS: Of course. JV-10, line 21.
"Question: How did he approach them?
And your answer: He walked just -- he walked up to them.
Question: Okay, did he have anything in his hand?
Answer: I think he had a gun in his hand.
Question: Could you tell which hand?
Answer: (On JV 11, line one) The right hand.
Q You remember giving those answers to those questions?
A Yeah.
Q And now you're saying?
A I was confused when I said approached them. He didn't

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approach them with -- I didn't see when he approached them with a gun in his hands.

Q Okay, and you first made the District Attorney's aware of that difference this past Friday?

A Yes.

Q And this was after you had spoken to Mr. Jackson back on September 14th?

A Um hum.

Q Prior to that, we had met a number of times, correct?

A Yeah, yeah.

Q Did you hear any conversation between Mr. -- between the older man and the younger man, as the older man approached? Did you hear any of that conversation?

A No.

Q You remember testifying in the grand jury about that?

A About, about the younger guy and older guy talking?

Q Do you remember testifying that you heard bits and pieces of the conversation?

A Oh, yes, yes.

Q Between -- as the older man approached --

A Yeah.

Q And you remember giving the following answer to this question on JV-11, line 23:

"Question: So did you hear the conversation while -- did he say anything as he approached these two

individuals?

Your answer on line 1 JV-2: I don't remember really hearing the whole conversation. I heard bits and pieces of it. It was a sort of stay away from my daughter, don't come around here. That was pretty much what I heard.

Q You remember testifying to that?

A Yes.

Q Did you hear that?

A Yeah.

Q You heard that conversation?

A Yeah, I heard that.

Q So, you see the older man with the gun in his right hand or in his hand?

A Um hum.

Q And you see the younger man swinging at his face?

A Yeah.

Q Correct? About how many swings to his face did you see?

A Probably three.

Q And about how many swipes to the gun did you see?

A One.

Q Okay, when do you know the order in which those things happen?

A Uh, I don't. Maybe I seen a swing, and like a swipe and then a swing again.

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Q Okay, did you see the younger man with any weapon?
A No.
Q Did you see him with his hands in his pockets?
A No.
Q Did you see his left hand at all?
A No.
Q Now, what was the third guy, for lack of a better description, what was he doing while -- at the point when you saw the gun?
A Uhm, he stepped back at that point.
Q He stepped back?
A Yeah, he stepped back.
Q When you say he stepped back, what do you mean?
A He just stepped to the side. He was trying to tell his friend to relax and chill. Then he just like he stepped back. He kept swinging at him.
Q Now, prior to, prior to that he had been involved in somewhat --
A He was like breaking it up.
Q How so?
A He was holding his friend back.
Q Holding his friend back?
A Yeah.
Q And then as soon as you see the gun, that's when he steps away?

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A Yeah.
Q Now, during this point where are you?
A Uhm, when he stepped back?
Q Correct?
A I was by the steps. I went by the steps already. I was like backing up at that point.
Q And can you -- which of these three men was closest to you?
A The guy that got shot.
Q All right, and where was the third guy at that point?
A He was like further to -- like on the side of them, but he was like further -- he was like -- it was them two, and he was further to the side. Further back.
Q Let's do it this way. You have the pointer in your hand still. This is People's 3? Where, where were you? Let's start with you?
A I was like right here.
Q Indicating the landing top of the stairs?
A Yeah.
Q And were you facing the direction of all this activity?
A Yeah.
Q And where was the one who -- the man who got shot, where was he?
A He was like I'd say right here.
Q So, pretty much the middle of the lobby?

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A Uh huh.
Q Was he, was he pretty much in the center of the lobby or was he close to one side?
A He was closer to 739 side. They was a little bit at an angle. Like right here, and the other guy was standing further back like he stood back.
Q So, essentially half off out of view from this camera angle?
A Yeah.
Q So, he would be towards -- the third guy would be towards the rear of the building?
A Yeah.
Q What about the older guy, where was he?
A He was like right here.
Q So, pretty much directly in front of the younger man?
A Yeah.
Q Okay, so from you -- from where you were standing, you were looking at the person who got shot? You were looking at his back?
A Yeah.
Q And then could you see the -- and you were looking at the front of the older man?
A Yeah, the side. The side I was looking at because he was at an angle. I was looking, yeah, I was looking at him. I was looking straight at him. He was facing me kind of, but it

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was his side.

Q Okay. Now, what was it that made you backup, away from the mailboxes?

A The gun.

Q Seeing the gun?

A Seeing the gun, yeah.

Q Is this -- and prior to that you were just --

A Yeah, I was just there. I thought they were going to fight or something. I don't know.

Q Okay. So, now does -- is there any conversation between the two of them while at the point when you see the gun?

A Not really. Not that I know of.

Q Did you hear the younger guy say anything?

A I didn't hear anything.

Q Didn't you say earlier he said something like if you going to --

A Oh, yeah. If he was going to use it, if you going to pull a gun out, you got to use it.

Q Okay.

A That's what he said to him.

Q And when was that in relation to when he was swinging? Was that before or after, during?

How would you describe it?

A That was like at the swipe of the gun like he said that.

Q As he swiped at the gun?
A Yeah. Yeah, yeah.
Q He said that?
A Yeah.
Q All right, and what's the next thing that happened?
A Uhm, a shot went off.
Q A shot went off?
A Yeah.
Q Did you see the gunshot?
A I didn't see the gunshot.
Q What did you see?
A I just heard it. I just seen him backup. After the shot he kind of backed up, and kind of going towards the door, but I had went upstairs after that.
Q Where were you when the shot went off?
A When the shot went off, I was upstairs.
Q Still at the top of the landing?
A Yeah.
Q And you were looking in the direction of this activity?
A Yeah.
Q And the older man, could you tell how he was positioned when you heard the shot go off?
A He was at, like uh, he was like moving from the swings. He was at a like moving back.
Q He was leaning back?

A Leaning back. He was leaning back.
Q Okay. So, he was leaning back from the swings from the young guy?
A Yeah.
Q And at that point is when you hear the shot?
A Um hum.
Q You did not see the gun go off?
A I didn't see the flash or anything. I just heard it.
Q Okay, where was the third guy, when the shot went off?
A He was -- where he was at? I don't know where he went after. But he was, he was there where I see like towards the back. I didn't see where he went, when the shot went off.
Q He was still directly towards the back of the building?
A Yeah, yeah.
Q Okay. And after the shot went off could you tell if anyone was hurt?
A Uhm, I think the guy. I know he got shot. I could tell he was like holding his self, and going like towards the door.
Q Did he fall to the ground?
A Yeah, he fell to the ground.
Q Was he able to move anywhere?
A After I came down I, I came back down. I seen that he was -- he was like -- he couldn't -- he couldn't breathe kind of. That's all I really seen. He was in front of the door. I

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was trying to --

Q Where did you go when you heard the gunshot?

A I went to like the second, third floor. I was -- I went to the third floor and somebody came out.

Q What were you doing up there?

A I was just -- I called my manager to see what to do or let her know.

Q Did you ever call the police?

A No.

Q And when you came back downstairs, where was the person who got shot?

A He was laid out. He was laid in front of the door.

Q In front of the front door?

A I can't I -- in front of the front door.

Q Based on where he was, were you able to get out of the building?

A No.

Q This is People's 7. Do you recognize this?

A Yes.

Q What's this a photo of?

A That's the guy that got shot in front of the door.

Q And is that about where he was --

A Yeah.

Q When you came back down?

A Yeah.

Q And the third man, when you came back downstairs, where was he?
A I'm not sure.
Q Okay, what about the older man?
A Uhm, the -- I don't know. I'm not sure where he went neither. It was a lot of people in the hallway.
Q Okay. Did you hear anyone screaming?
A Yeah, it was a, uhm, lot of people. It was a lady. She was, she was screaming. She was saying call the police. Uhm, a whole bunch of people in the hallway. Everybody came out their apartment.
Q Where was she?
A I don't know. She was on the floor with him saying call the police.
Q With, with?
A With the decease, yeah.
Q She was on the floor saying call the police?
A Trying to help him.
Q Okay, and did you hear any screams before the shot?
A Nah. No.
Q Did you see, aside from those three, the three men, did you see anybody else in the lobby when or even on that first floor anywhere on that first floor when the shot went off?
A No, no.
Q Now, when the shot -- this is People's 3.

Again, when the shot went off, you said you were at the top of the landing, these stairs?

A Yeah.

Q Could you see like down in this direction across from apartment 1A from where you were standing?

A Yeah, I think so.

Q Okay. You're not sure?

A I'm not sure.

Q And the older man, did you see him?

I don't remember if I asked you that question. Did you see him, when you came back downstairs?

A No, I don't remember seeing him.

Q At any point did you, did you ever see a woman try to intervene between the young man and the older man?

A No.

Q Once you were downstairs was there a point when the police came?

A Yes.

Q Did you speak to the police?

A Yes.

Q Did you go to the precinct with them?

A Yeah.

Q And did you make a written statement to them?

A Yes.

Q And you signed that statement?

A Yes.
Q And did you -- and you testified before the grand jury as you mentioned before?
A Um hum, yes.
Q One moment.
MR. MENDYS: No further questions.
THE COURT: Okay.
Cross examination.
MR. JACKSON: Yes, Judge. May I see People's Exhibits 1, 4, 3 and 7, please.

CROSS EXAMINATION

BY MR. JACKSON:

Q Mr. Wolf, good afternoon to you.
A Good afternoon.
Q Good morning to you. Mr. Mendys referred you to a conversation that you and I had. Do you recall him asking you questions about that?
A Yeah.
Q And that he said something like you didn't see Mr. -- well, you didn't see the older gentleman approach with a gun. You heard him tell you that, right?
A Um hum.
Q And he said that you met with him several times previous to that, right?
A I can't I.

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Q And then he said I think he said that after the conversation with Mr. Jackson, now you didn't see him approach with a gun?

Do you remember that line of questioning?

A Yeah.

Q Okay, let's go back to that conversation because I wanted to show you a few things, okay.

The first thing I want to ask you is did there come a time that my office patched you into me on or about September 14th?

A Yeah.

Q And in them patching you in to me, do you recall you and I having a conversation about what occurred?

A Yes, yes.

THE COURT: Counsel, get to the point. You may be making yourself a witness.

MR. JACKSON: I just want to -- okay, Judge. I just wanted to clarify, just to be very clear. I'll tell you what, I will do it this way.

Q Mr. Mendys asked you about when he, Mr. Mendys, take you to the precinct?

A Yes.

Q Did they did take you to precinct?

Yes?

A Yes.

Q And they asked you to write a written statement?
Did you not --
A Um hum.
Q Did you write a statement?
A Um hum.
Q In that written statement you prepared you indicated what you knew happened, is that right?
A Yeah.
Q And in the written statement, sir, is there -- it would be fair to say that you never said in the written statement that the older person approached anyone with a gun?
You didn't say that in the written statement, right? Right?
A No, I don't think so. No.
Q I'm sorry?
A No.
Q You didn't say it?
A I don't remember what I wrote. That was like two years.
Q Would you like to --
MR. JACKSON: Judge, I'm just showing for recollection purposes we can -- what we can mark as Defense A, for identification, which is the written statement by Mr. Wolf. I ask that he be shown that.
Q Take your time reviewing it. Look up at me when you're

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done.
A Okay.
Q You read that?
A I read it, yeah.
Q Mr. Mendys said after you spoke to me that you stated there was no approach with a gun, remember that?
A Um hum.
Q In the statement, sir, you remember giving that statement?
A Yeah.
Q You were completely cooperative with the police; is that correct?
A Um hum.
Q Yes?
A Yes.
Q You as you're doing today expressed exactly what you knew, correct?
A Yeah.
Q To the best of your ability?
A Yes.
Q It's fair to say that nowhere in that statement, sir, did you mention that Mr. Brown approached anybody with a gun; is that fair?
A Yes.
Q Okay, and I'll take that back. And that statement was

given on the same day, correct?
A Um hum. Yeah, yes.
Q Okay, when you indicated today that Mr. Brown didn't approach anybody with a gun, that's based on what you recollect from that day, correct?
A Yes.
Q And it's based upon -- and if in the event that that would of happened, right, you had an opportunity to put it in a statement, correct?
A Yes.
Q And that's not what you did?
A No.
Q Is that right?
A Yes, yes.
Q And the police, in fact, they interviewed you exhaustively about what happened in the case?
MR. MENDYS: Objection.
THE COURT: Exhaustively? He was interviewed more than once?
Q The police interviewed you on that day, correct?
A Correct.
Q As Mr. Mendys pointed out, you went to the precinct on that day, fair?
A Correct, yes.
Q And it was your intent at the precinct to tell the

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police what you knew occurred, right?

A Yes.

Q And you did tell the police what occurred, right?

A Yes.

Q To the best of your recollection?

A Yes.

Q And it's fair to say you didn't tell the police either that Mr. Brown or an older guy approached anyone with a gun, correct?

A Correct.

THE COURT: You have to clarify that by saying was he asked specifically about approaching, and things like that.

MR. JACKSON: Glad to do that.

THE COURT: As oppose to writing out a narrative.

MR. JACKSON: I'm gad to do that, Judge.

Q The police asked you what you saw fair?

A Fair. Um hum.

Q You told them what you saw, correct?

A Right.

Q The police asked you what the older person was doing; is that right?

A Yes.

Q If the older person had anything in his hands? Is that correct?

A Yes.
Q The police asked you what the younger person was doing, right?
A Yeah.
Q What the younger person was doing relative to being aggressive towards the older person, is that right?
A Yes.
MR. MENDYS: Objection to that question.
THE COURT: As to the aggressiveness?
MR. MENDYS: Yeah.
THE COURT: That's categorizing. It's sustained.
Q Did the police ask you to describe the demeanor of both parties?
A Yes.
Q Did you do that for the police?
A Yes.
Q Did you describe to the police what, if anything, the older person had in his hand?
A Um hum. Yes.
Q Yes, and you did that to the best of your ability; is that right?
A Yes.
Q And you never, never told the police on the date at issue, when you went to the precinct and you were talking to them, anything about the older person approaching with a gun in

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his hand, right?
A Yeah, I --
Q It wasn't after a conversation with me?
It was, in fact, from day one, that was your recollection that the older person didn't have anything in the hand; is that right?
A Yeah.
Q Thank you. Now, with respect to what you did see, let's get into that.
The fact is, sir, that you saw two people and they were in the lobby; is that accurate?
A Yes.
Q Okay. Now, there came a point in time that you saw, you saw an older person approach them; is that right?
A Yeah.
Q At any time did the older person approach them, did you hear the older person say you're a dead man?
A No.
Q No?
A No.
Q Did you hear the older person say I'm going to shoot you now?
A No.
Q Did you hear the older person saying --
MR. MENDYS: Objection.

THE COURT: Bases.

MR. MENDYS: Hearsay.

THE COURT: Okay, sustained.

MR. JACKSON: Excited utterance, Judge.

THE COURT: Not really.

MR. JACKSON: Okay.

Q So, the fact is -- let's go to what you saw. Did you see the older person, when he approached? Did you see him swinging at anybody?

A No.

Q Did you see the older person use his left -- let's take it step by step. Did you see the older person use his left hand and swing at the younger person?

A No.

Q Did you see the older person take his right hand and swing at the younger person?

A No.

Q You didn't see the older person make any contact at all with the younger person, is that right?

A No.

Q There was a conversation, correct?

A Yeah.

Q And that conversation ultimately got heated; is that true?

A Yes.

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Q And when the conversation got heated, in fact, it was the younger person who approached the older person; is that correct?
A Yes.
Q And when the younger person was approaching that older person, the older person was stepping back. Is that fair?
A Yes.
Q And the younger person swung at the older person with his left, correct?
A Yes.
Q That was the younger person?
A Yeah.
Q Who ended up shot, correct?
A Yes.
Q And after he swung at him, the first time, did you hear a gun go off?
A No.
Q And, in fact, the younger person swung again with his right arm, is that right?
A Yes.
Q At that point did you hear any shot fired?
A No.
Q In addition, when this was happening, there was another person there, right?
A Yeah.

Q And that person who was there you had seen previously, fair?
A Yeah.
Q And that person who you had seen previously he wasn't trying to hold back the older person was he?
A Yeah.
Q He wasn't pushing back the older person at all, correct?
A Correct.
Q Wasn't telling the older person to stop?
A Nah.
Q Wasn't telling the older person to chill?
A No.
Q He was doing that as it relates to the younger guy; is that right?
A Yes. Yes.
THE COURT: That's important.
THE WITNESS: Sorry.
Q He was, in fact, asking the younger person to stop, right?
A Yeah.
Q He was trying to get the younger person from to stop, to stop him from advancing towards the older person, right?
A Yes.
Q And then after the -- again, the first swing no shot,

correct?
A No, sir. Nothing.
Q Second swing no shot, correct?
A Correct.
Q Third swing no shot, correct?
A Correct.
Q And then there also came a time that in addition to the younger person swinging, and being held back by this third person, who you had seen before that was the taller guy?
A Yeah.
Q Now, there came a time that the younger person started grabbing for a gun; is that right?
A Yeah.
Q He started grabbing at this point? You did see a gun come out right?
A Yeah.
Q Did -- there did come a time that you observed a gun come out, right?
A Yes.
Q Until when you saw that gun, you didn't see it discharge, is that right?
A No.
Q You didn't see it pointed in the direction of the younger person and threatening him; is that right?
A No.

Q Didn't see him say you're going to get hit up now, right?
A No.
Q I'm going to kill you?
THE COURT: Sustained. Those are objectionable.
MR. JACKSON: Withdrawn, Judge. I'm sorry, yes.
Q So at this point there's still no weapon that's discharged?
A Um hum.
Q Yes?
A Yes.
Q Okay, and the younger person is continuing at this point to swipe and grab at the gun, correct?
A Yes.
Q And still there's no discharge of a firearm; is that right?
A Yeah.
Q And in addition to that, while he's swiping for the gun, the third person who is there is still holding the younger person back, right?
A Um hum.
Q And, in fact, with regard to my client, would it be fair to say that you said that he wasn't hyper at all; is that right?
A No, the older guy wasn't.

Q Sorry?
A The older guy wasn't hyper at all.
Q He was, in fact, he continued to backup, right?
A Yes.
Q And backup, is that right?
A Yes.
Q And backup, right?
A Yes, yes.
Q And the younger person continued to approach him, is that right?
A Yes.
Q And continued to swing at him, is that right?
A Yes.
Q And continue to swipe at the weapon, is that right?
A Yes.
Q And, in fact, in terms of proximity, the younger person got to about two feet or so, he got about two feet to the older person. Is that right?
A Yes.
Q Okay, and then even then you didn't hear the gun go off, did you?
A No.
Q You then at that point decided to continue with the mail? People's 3. And are those the steps that you went up?
A Yeah.

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Q And you were walking up those series of steps, right?
A Yeah.
Q Which direction were you walking?
A Uhm, I was, I was backing up. I was like backing up, up the steps.
Q You were backing up?
A Yeah.
Q Okay, and there are a series of steps here, right? A series of steps? And as you were going, as you were backing up the stairs, you, you were going away from what was occurring?
A Yeah, I --
Q And as you got to the first step, no shot, right?
A No.
Q Second step you backed on to, no shot, right?
A No, no.
Q Third step, no shot?
A No.
Q Fourth step still no shot, right?
A No.
Q But you still see the younger person attacking the oler person, is that right?
A Yeah.
MR. MENDYS: Objection.
THE COURT: Advancing, as oppose to he's attacking, whatever. Attacking is a little bit of a

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conclusive word.

Q Let me suggest by your own words when he was approaching him, was he approaching him -- being the younger person -- as he approached, was he approaching that as the younger person with the older person with his hand to his side?

A No.

Q Was he approaching the older person with his hand up?

A Yeah, with his hands up.

Q Okay, and could you tell, based on where you were, where the younger person's left hand was?

A Uhm, where his left hand was? I was -- I'm not sure.

Q You don't know where his left hand was, right?

A I can't I.

Q Where was his right hand? That is the young person?

A He was swinging at him.

Q Okay, with the right hand?

A Yeah.

Q You don't know where his left hand was while he was swinging?

A No.

Q You do know he continued to go in the direction of the older person, correct?

A Yeah.

Q And there came a point in time after you heard the shot, after all of this is when the shot was fired, correct?

A Yeah.
Q At no time did you see the older person walk up to the younger person and start shooting, right?
A No.
Q Walk-up to the younger person and start threatening him, right?
A No.
Q Walk-up to the younger person and discharge his firearm?
A No.
Q It was only after what you told the police on that particular day and after what you put in that statement on that particular day, that's what you saw, right?
A Yes.
Q To the best of your recollection?
A Yes.
Q And in addition to that, Mr. Wolf, if I can ask you, the third person that -- there came a point in time after the shot rang out that that third person went to where the younger person backed up; is that right?
A Yeah.
Q And he stood and you saw him hovering over him. That is just to be clear, the older, tall guy who you had seen previously we're talking about him, okay?
A Yeah.

Q The person who was attempting to calm down the younger guy? We're talking about him, okay?
A Right.
Q That person you saw hovering over the person who got shot; is that right?
A Hovering, yes.
Q You don't know what he was doing?
A No.
Q You just know he was hovering over him?
A Yeah.
Q Okay.
THE COURT: Any redirect?
MR. MENDYS: Yes.
REDIRECT EXAMINATION
BY MR. MENDYS:
Q Mr. Wolf, you saw one swipe; is that correct?
A Yeah.
Q And in the statement that you wrote to the police, do you have it up there?
A No, I don't have it.
MR. MENDYS: Do you have it?
MR. JACKSON: I do.
MR. MENDYS: Can this be shown to the witness.
THE COURT OFFICER: Judge, you want me to show the witness?

THE COURT: Please do.

REDIRECT EXAMINATION

BY MR. MENDYS:

Q Mr. Wolf that statement is 13 lines long; is that right?

A Yeah.

Q And this is something you wrote of your own words?

A Yes.

Q And there's no mention of a gun at all in this statement?

A No.

Q Okay. Have you ever seen somebody throwing punches with one hand, while the other hand is in the pocket?

MR. JACKSON: Objection.

THE COURT: Sustained.

MR. MENDYS: No further questions.

THE COURT: Recross?

MR. MENDYS: No.

THE COURT: Mr. Wolf, thanks for coming in.

THE WITNESS: All right.

THE COURT: Okay, we'll take five minutes, folks. Keep all the admonitions in mind. Don't discuss the case, okay. I will have you back in here very quickly.

THE COURT OFFICER: All rise, jury exiting.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : CRIMINAL TERM : PART 70
INDICTMENT NO. 0971-14
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DARRYL BROWN,
Defendant(s).
----------x
265 East 161st Street
Bronx, NY 10451

B E F O R E:

THE HONORABLE ROERT A. NEARY, Justice, & jury

(Appearances as previously noted.)

Lorraine L. Ramsey
Senior Court Reporter

THE COURT: Good morning, everyone. Step up if you will.

THE COURT CLERK: I recollect case on trial, People of the State of New York against Darryl Brown. Appearance as previously noted.

THE COURT: Thank you. Any business we have to deal with before we bring the jury in?

MR. MENDYS: No, Judge. We got three witnesses this morning. After those witnesses I will be resting.

THE COURT: Okay, anything this afternoon if you have --

MR. JACKSON: Yes, Judge. I have my witnesses

Okay. We will proceed with the defense case now.

MR. JACKSON: Yes, Judge. Your Honor, would you like to address the other issue of the justification charge now or wait until my case is --

THE COURT: We had some lengthy conversations, well not lengthy conversations. We had some conversations in chambers, in the robing room, off the record. Having reviewed over the lunch break several cases, I do not believe at this juncture the defense is entitled to a charge of justification based on any reasonable view of the evidence as far as I see it. So, that's my preliminary ruling. I'll wait to see if anything develops from this point on.

MR. JACKSON: Judge, just in terms of the pushback to that, I guess factually I'm not understanding -- I guess I don't understand your Honor's ruling. If we're looking at reasonable views of the evidence, we have a person who the People's own witnesses have said is under attack. And the People's own witness has said not only was he under attack, but he's swiping at a gun, and the person who is attacking him is saying if you have a gun, you'd better use it, which seems to me to be the equivalent of it's either you or me. So, if the standard for justification is not only what the defendant believes, and the defendant's belief, Judge, they can be inferred by the evidence, just as any circumstantial

evidence a jury can evaluate a state of mind based upon the circumstances.

And so, if you have Sheila Thomas having the defendant under attack, inasmuch as he's walking away from the person who is shot, if you have the person, Judge, who actually -- you had evidence that there was a person breaking up the fight and telling Mr. Cabbagestalk to leave it alone, holding him back, telling him to go about his business, telling him to stop, and you have my client backing up numerous times while being swung upon, you have the gun being swiped at and evidence suggesting that the person is saying, you know, it's you or me, basically, and the threshold for justification is what a reasonable juror would do under those circumstances, I'm not sure how I could be denied a justification charge just based on that.

Furthermore, your Honor, if I am denied a justification charge, that goes against -- that essentially is saying that the law is that a defendant must testify in any case concerning justification. That's not the law as I understand it.

THE COURT: I don't understand the law to be that either. I'm aware that in the Baljit Singh case that was discussed, it's a Queens case where the court ruled that -- I believe it was the Appellate Division Second Department, ruled that a case for justification can be made out in rare

instances from the People's case alone without defense having to offer any evidence. I just don't see that having to be the instance here. I see no reasonable view of the evidence that permits legal force being justified at this juncture.

MR. JACKSON: But again, Judge, at this juncture determines how I'm going to proceed with the defense case. Because, again, I'm saying if a reasonable juror could conclude that if they were in Mr. Brown's position that they, too, would have to discharge their weapon such that they would have to ward off the attack. And if the legal standard is, and Judge I am not so much arguing as in trying to suggest what I believe the law to be to the Court, if it's what a reasonable juror would do in the defendant's position, and Mr. Brown is under the attack of Mr. Cabbagestalk, and Mr. Cabbagestalk is aware from the evidence that he has a gun and is grabbing for the gun, I'm just not sure what else the defendant would have to say, other than I felt I was going to die, which any reasonable juror in Mr. Brown's position could make that conclusion. So, I'm not sure how we could say there is no reasonable view of the evidence when the standard is what would a reasonable person do in the defendant's position.

And so, essentially what we're doing is crafting the law such that in a justification defense, we're saying

the defendant has to testify, and we're essentially having a defendant waive his right to testify because we can't draw reasonable inferences that suggest that he was in fear for his life. The only thing I think the defendant can add to the case is just that. It's taking the stand and saying I thought I was going to die. And I think, as the evidence stands, the jury can make that conclusion. Maybe they don't. And if they don't, he's guilty, and he gets convicted, and then, you know, I'll have whatever appealable issues I do. But I think factually, Judge, factually, not legally, factually I think a jury could conclude on this fact pattern that lethal force was necessary and appropriate under these circumstances.

THE COURT: I disagree respectfully. In the Singh case, which I read, and the other case is far more dramatic evidence was produced in favor of defense for justification in the People's case. The people were moving -- in the Singh case, attacking each other with knives. In the other case people were being assaulted with keys, I forget the name of it, and things like that. We have none of that in this case, the issue of who the initial aggressor and duty to retreat. All of that factors into my thinking there is no reasonable person who will say the defendant was justified based on the record as it stands now. That's my ruling.

Do the People want to be heard on any of that?

MR. MENDYS: No, Judge.

THE COURT: We will proceed then.

Can you get the panel in.

MR. JACKSON: Judge, I want to clarify something. I don't want to run afoul of your ruling. I have my exception.

On the issue of my expert, Mr. Mendys is saying that this witness has no knowledge of my client's training, but he kind of does because he's reviewed all of the evidence, and he's reviewed the background, he's reviewed my client. So, I told you I didn't want him to testify for my client, but I'm kind of in a box, Judge, because he does know because of what he's reviewed.

THE COURT: Has he reviewed his personnel records, that he was present for training at a certain time?

MR. JACKSON: I wouldn't say his personnel records, but I could certainly find out. I think it's more his knowledge in speaking to my client about, in good faith -- they train one time a year, and he's current on his training. That is, Mr. Brown. And so, presuming they train one time a year, PD does it twice, the police department. That's the only distinction. And his license was valid for the gun at the time. So, ergo, he received the training to have a valid license. Do you get what I'm trying to say?

Trial Transcript, dated September 29, 2016
[pp. A439 - A544]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : CRIMINAL TERM : PART 70
INDICTMENT NO. 0971-14
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DARRYL BROWN,
Defendant(s).
----------x
265 East 161st Street
Bronx, NY 10451
September 29, 2016

B E F O R E:

THE HONORABLE ROBERT A. NEARY, Justice, & jury

(Appearances as previously noted.)

Lorraine L. Ramsey
Senior Court Reporter

THE COURT CLERK: This is the case on trial, People State of New York v. Darryl Brown. Appearances as previously noted.

THE COURT: Thank you. Good morning, everyone.

MR. JACKSON: Good morning, Judge.

MR. MENDYS: Good morning.

THE COURT: Before we start, I just want to cite a couple of cases in support of my decision in denying the justification charge.

People v. Alan Torres, 140 AD, 3rd, 478.

People v. Abdul, ABDUL, Taylor. 134, AD, 3rd, 508.

And People v. Mark Jones, NY 3rd, 491.

Also the Court has determined, and informed the attorneys late yesterday afternoon, that the Court will not give a missing witness charge against the defense for failing to call, if they do fail to call, Myesha Brown. The Court feels that threshold requirement of convincing the Court that she has information or evidence favorable to the defense has not been met, and I base that upon reading her grand jury minutes.

Okay, next issue, we have a juror that's called in sick.

THE COURT CLERK: Diana Vega, juror Number 11.

THE COURT: She informed our clerk, via a call that was received 8:30 this morning, that she's pretty sick. She's had migraine all night. She was up all night. She had diarrhea, and she doesn't feel she could come in today or in the next foreseeable future. Actually, my inclination is to put in alternate number one, Sharon Hines, but I will hear either party on that, if they care to make a comment.

People care to be heard?

MR. MENDYS: No, Judge.

THE COURT: All right, and defense is not oppose to that, correct?

MR. JACKSON: I am not.

THE COURT: We will substitute Miss Hines.

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Sergeant, I think we will move her into the 11th seat, also I think she's sitting in the front row right now.

THE SERGEANT: Okay.

THE COURT: Miss Hines goes into Miss Vega's seat. Anything else we have to deal with this morning before we start?

MR. MENDYS: I think my application depends on the future of Mr. Jackson's case.

THE COURT: Okay.

MR. MENDYS: So, I'm not sure what he plans to do.

MR. JACKSON: The future of my case is, Judge, there is no future. We intend to rest at this time. I'm prepared to sum.

THE COURT: Okay.

MR. JACKSON: That's the future of my case.

MR. MENDYS: Judge, I'm not prepared to sum. I think based on the conversation we had yesterday, I was anticipating the defendant or at least additional witnesses testifying. So, this is the first time I'm hearing about thi

THE COURT: Okay.

MR. MENDYS: So if --

THE COURT: We have the jury here. I'm incline to give you until two o'clock to prepare summation.

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MR. MENDYS: I think that's reasonable. I'm not asking for anything beyond that, so.

THE COURT: If you're asking for less, I would have listened to that, too. Two o'clock is fair.

MR. MENDYS: No, I think I can manage two o'clock.

THE COURT: I will get the jury in here, I'll tell them about the substitution of one their colleagues, we are going to have to put the case over to two o'clock, at which time we anticipate summations.

The defense is aware they are not going to get a justification charge?

MR. JACKSON: Judge, let me make the following record. Your Honor, I have discussed this matter with my client. My client feels as follows:

Number one, that on the evidence before the Court, that he would be entitled to a justification charge. I have not had the opportunity to review the cases cited by Your Honor. I will do so, but I believe there's certainly evidence before the Court, and a reasonable view of the evidence, which would suggest that legal force was necessary at the time that it was used in this case. My client is of the mind that having sat through trial that there is such evidence before the Court, such a charge would be appropriate, justification.

He understands the Court's position. He's in

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disagreement with the Court's position. He's advised that the only remedy that I would have to challenge the Court is an appeal, which would presume a conviction.

In having that discussion, my client believes, number two, that based upon the People's case or lack thereof, that the issue of intent to kill or intent to seriously injure has not been established, and in that regard, he's perfectly content without -- well, let me withdraw that. Is not perfectly content of anything, but believes that the People have failed in their burden to put forward a case establishing that he intentionally acted in any way.

He further believes that him testifying would only give him the opportunity to say he was in fear for his life. I think there's certainly enough evidence in the case for a jury to conclude that.

He also feels that he would be being compelled to testify against his wishes. He doesn't wish to testify, but he feels that he's being compelled to testify, in order to get justification. But my client being aware that the Court is not incline to charge justification, being aware of the element of murder being an intent to consciously cause the objective of death, being aware that Man. 1, requires the conscious objective intent to cause serious physical injury, he does not believe that the People at

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this point have put forward evidence suggesting that he intended to do anything other than to stop the attack. Based upon that, and based upon our discussions concerning him not testifying, he does not elect to testify at this time.

THE COURT: Mr. Brown is that all accurate?

THE DEFENDANT: All accurate.

THE COURT: As I told you earlier, your lawyer has the final say during jury selection. The defendant gets final say whether they wants to testify or not.

THE DEFENDANT: He spoke for me, Your Honor.

THE COURT: And you decided not to testify?

THE DEFENDANT: He speaks for me.

THE COURT: Yes, sir. Thank you.

The People want to be heard? I don't see any need to.

MR. MENDYS: Well, only in terms of how summation will play out in the instructions. Mr. Jackson, during his voir dire, in his opening statement, repeatedly referenced self preservation, as essentially, the rational behind what has happened in this case. There is no legal charge for self preservation. It is not a legal term. I would ask tha Mr. Jackson be precluded from arguing any type of self preservation or any type of synonym for justification, since the charge is not being given.

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THE COURT: I don't want to preclude counsel from summing up. He could sum up in any fashion. Just because he's not getting a justification charge, doesn't mean he can't argue some form of that to the jury.

MR. MENDYS: Well, I would ask, if the instruction is not being given, I would ask that the jury be instructed that justification is not something for them to consider.

THE COURT: We are going to have to talk about that. Maybe the next half hour. So, I will have the jury charge conference in the back. I will tell you what I'm going to charge on a bunch of different things. We can talk about it there.

MR. JACKSON: Very good, Judge.

THE COURT: Not right now.

MR. JACKSON: Just for the record --

THE COURT: Before you prepare your summation you'll no.

MR. JACKSON: Obviously, Judge, just for the record, I think in summation I can argue, and I'm entitled to argue, whatever the evidence, in a reasonable view of the evidence, shows. Certainly, there are facts -- the jury cannot speculate -- but they can draw reasonable inferences from those facts. I was very clear in my opening, and very clear in my voir dire -- as Mr. Mendys states it very well -- not to use self defense. I have

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never mentioned that word once in voir dire, or once during my opening statement knowing there may come a time down the road where the Court was not satisfied that justification, which is self defense, was appropriate. Therefore, exactly as Mr. Mendys said, I did not use the legal term of art. I think all of us know what self preservation means. Mr. Mendys voir dired, Miss Petersen, as well, on the issue of common sense. I trust the jury has common sense, and I trust that they know he wasn't intending to kill anybody. What he was intending was to stop the attack and to preserve himself, and I don't believe it would be appropriate to tell the jury what they shouldn't consider. Should we take out numerous charges that will be irrelevant and speculative, and tell the jury, well, you're not to consider assault; you're not to consider manslaughter, two; you're not to consider -- no. The Judge is instructing them on the law.

There are two charges you are charging them, that is Intent Murder; Murder 2; and Man 1. Period. The jury can, using their common sense, make any inferences they want, I think, on the facts of this case. And based on the People's failure to demonstrate any intent, I can argue self preservation. Not as an end around the charge, but to negate the issue of intent. There was no intent. Period. And I think to start instructing the jury -- we could

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continue this in your chambers, Judge -- but I think to start instructing the jury on what they shouldn't consider certainly it would be improper, and inappropriate. Particularly, in as much as Mr. Mendys concedes, I never said the words self defense not one time in this courtroom.

MR. MENDYS: Well, self defense isn't a legal term either. Justification is. And the Court not providing them any information about justification, whether it's being charged or not being charged --

THE COURT: If you have cases to that effect?

MR. MENDYS: I most certainly --

THE COURT: The case on point where justification is denied, and defense counsel was precluded from arguing self preservation, they may exist.

MR. MENDYS: I would just put on the record that this is essentially a jury nullification issue, because he's essentially arguing on justification without the charge, and without them having the information by saying self preservation. It's a synonym. It's the same thing, but without him having made out the case, and without the jury being provided with the information.

MR. JACKSON: Judge, just to be clear, I don't have the burden of making out any case. The charge even in justification itself says we don't have the burden to establish justification. The People have the burden to

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establish he wasn't justified. So, I'm not making out any case. What I intend to do is to take my case to the jury and to argue plainly as it relates to the negating of intent. That there was no intent to murder anybody. There was no intent to seriously injure anybody, and that Mr. Brown acted in accord with what the evidence shows. In the event that I say anything which calls for speculation, I think counsel can have his objection. But I believe, I do believe, right, that I understand the Court's rules. I understand the rules of the Court, and I don't want the jury speculating. I don't want them guessing, but I do want them consistent with what Mr. Mendys repeated instructions to them about common sense, and Miss Petersen's common sense to have them draw reasonable inferences from the evidence. And, I think the reasonable inferences from the evidence that could be drawn, based upon the People's lack of a case, is that my client lacked any intent whatsoever, and how I get there is up to me.

Summation is argument, the Judge will instruct the jury and on the issue of what constitutes evidence in this case. And as far as I'm aware, Judge, that means, as you have already said, that opening statements are not evidence, closing statements are not evidence. The only evidence that this jury could consider is what's before them, and I'm allowed to argue anything I want, as long as

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there is a reasonable view of the evidence that supports it, and that's the law, as I understand it, and that's what I intend to do.

MR. MENDYS: The final point I'll make, Judge, is I have no issue, and no objection, obviously, to Mr. Jackson arguing that there is no intent. He has been referencing the fact that one bullet was fired. He called a witness to talk about tactics and center mass. Things with that rubrics of the evidence is fine.

Self preservation, arguing the essential, the why there wasn't an intent is a different matter altogether. That is something that is going to create confusion with the jury, if they are not provided any sort of charge. It's going to create confusion as to whether anybody was justified or not. I would certainly put forth that Mr. Cabbagestalk was justified in swiping at the gun. So, if the Court --

MR. JACKSON: Well --

MR. MENDYS: If Mr. Jackson is going to argue he fired one time, he didn't intend to kill him, he didn't intend to hurt him, he was trying to stop him, as with what Mr. Baumert said, I have no issue with that. If he starts saying he was trying to preserve himself, there is no evidence of that whatsoever. There is no evidence.

THE COURT: If you have some case, I'm happy to

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look at it.

MR. MENDYS: I will. The final thing I want to add is in his opening statement he did say -- he said repeatedly that the defendant was acting consistent with the law.

MR. JACKSON: What does that mean?

MR. MENDYS: In accordance with the law is what he said.

MR. JACKSON: Well, that means that he is not guilty. That's the only thing it means. And, Judge, I will, most respectfully, I will never in practicing law have a prosecutor tell me what I can say in summation or attempt to limit what I say which is otherwise lawful. The fact is that if I say that he was acting consistent with the law, that means he didn't commit a crime. If you want to talk about analogies, justification means self preservation, justification mean self defense. Well, acting consistent with the law means he's not guilty, and that's what I intend to argue for the jury, based upon the People's lack of a case.

Intent wasn't established, and as long as, Judge, I make arguments consistent with every shred of evidence that was heard in this courtroom, and don't go over the preservation, asking them to make assumptions, asking them to make leaps, asking them to make guesses, I'm within my

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right to do that. And his own witnesses, Judge, established that my client acting in accord with preserving himself. His own witnesses.

MR. MENDYS: That's not a legal standard.

MR. JACKSON: I'm not arguing a legal standard.

THE COURT: He acted within the law, that's the Court's parameter. That phraseology is troublesome.

MR. JACKSON: Very well.

THE COURT: If you do, I will strike it on the law

MR. JACKSON: Of course.

MR. MENDYS: Judge, I'm happy to provide cases that are --

THE COURT: Okay, give me ten minutes. We will talk in the back just about the general -- other charge whe. the charge is a prepared case. A little different than what you're used to down here. I'm not sure. Five minutes.

Let's get the jury out first, let them know.

THE COURT OFFICER: All rise jury entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seat.)

THE COURT: Okay, good morning. Please have a seat everybody. Good morning.

THE JURORS: Good morning, Judge.

THE COURT: One of your number has taken ill. She's not here today. She's sick, but it's not anything terribly serious. It's just incapacitated her for the rest of the day and perhaps tomorrow. So, with the consent of the attorneys, and based on my ruling, we're going to move forward with the case and move in one of the alternates to take Miss Vegas spot, and that will be Miss Hines, okay.

The rest of the story is there is some other legal issues that have come up. We are not going to hear any more testimony just now. I believe the defense is prepared to rest, is that correct?

MR. JACKSON: Judge, the defense rest at this time.

THE COURT: Okay, that concludes the testimonial evidence portion of the case, but I have to allow the attorneys to sum up, and I have to charge you on the law, instruct you on the law. So, that takes sometime to prepare, and I have to discuss some issues with the lawyers. Rather than have you sit around while we do that, I'm going to discharge you, have you come back two o'clock. Two o'clock this afternoon we will have the summations, and I will charge you by the end of day. Hopefully you will be deliberating. That's the status right now. You've heard the evidence, haven't heard summations, haven't heard the charge, haven't talked to one another. Don't draw any

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conclusions, all right. Enjoy your little rest and I will see you back two o'clock sharp, okay?

THE COURT OFFICER: All rise, jury exiting.

(Whereupon, the sworn jurors exit the courtroom.)

THE COURT: All jurors have left. Attorneys just give me five minutes. We will conference in the backroom.

(Whereupon, the Court and counsel have retired to the Court's robing room. Proceeding held off the record.)

(Whereupon, the case was set aside, to be recalled later.)

THE COURT CLERK: In the case of the trial People State of New York v. Darryl Brown. Appearances as previously noted.

THE COURT: We have a minute to put on the record the fact that we had a charge conference in chambers. I advised the parties of the Standard CJI materials that are being charged to the jury. The People ask that the Court consider -- well, they asked for the expanded instruction on intent, which is going to be given. They also asked that the Court draft some type of instruction addressing defendant's potential argument that the defendant was justified or self-defense was justified in this case.

Counsel for the defendant indicated he didn't intend to make that particular argument. That he intended to stress the intent element of the crime, and that's

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certainly appropriate. But, I did draft a proposed instruction that I believe each party got a copy of. At least, it was placed on your desk, about what I believe I will charge in the event the defense's argument stray into the area of justification, and/or self defense, and it reads as follows:

"In rendering your verdict, you must decide whether defendant acted with the necessary criminal intent, as I have defined that term for you. This will come at the end of the charge as to the crimes.

The defendant contends that he did not have the required intent to commit the crimes charged in the indictment. If you find that the defendant lacked the intent to commit either or both of the charged crimes, you must render a verdict of not guilty. However, in rendering your verdict, you may not consider whether defendant acted in self defense or with justification, as those issues are not before you in this case."

Okay, anybody want to comment or try to adjust that charge or the proposed charge?

MR. MENDYS: No, Judge.

THE COURT: Satisfactory to the People?

MR. MENDYS: It is, yes.

THE COURT: Mr. Jackson?

MR. JACKSON: Judge, it is entirely unsatisfactory

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to the defense entirely.

THE COURT: Okay.

MR. JACKSON: As an initial matter, Your Honor, I would like to, and the Court was kind enough to provide me with a copy of the cases that were cited by the People in chambers, when we were having a conference.

The case I'm citing is People v. Medina, 20 NY 3rd, 1101. It's a 2013 case. This case is distinguishable from this particular issue that we're addressing in three ways.

I had asked this Court for an instruction based upon justification. It is our view, Judge, that justification has been made out in this case. There is a reasonable view of the evidence that justification has been plainly established by the People, in the absence of any testimony by the defendant or the defense. Your Honor disagrees. Your Honor's ruling controls. I have my exception. I get it.

However, in the case People v. Medina. Number one, there was evidence of justification put forth in that particular case.

Number two, the Court agreed to deliver a justification instruction; but number three, it was the defense that asked the Court to withdraw that instruction. The Court felt in People v. Medina, that the jury would be

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confused, and they would otherwise speculate, and it was on that ground that the Court affirmatively asked the jury not to consider justification. So, plainly, there's a distinction between -- in that case where the Court agreed to provide justification, the defense then said, well, we don't want it. But the Court provided an affirmative instruction so as not to confuse the jury. That's not at all the case here.

Second, Judge, I'm looking at the case People v. Rodriguez.

THE COURT: That was the case I felt was more persuasive, to be candid.

MR. JACKSON: Let me tell you why it's not in our view persuasive at all. People v. Rodriguez, 11 NY 3rd, 834. It's a 2008 case.

Okay, now in this particular case, Judge, the defense didn't even raise the issue of justification, and because the defense in their case did not raise the issue, ask[illegible] the issue or otherwise requested the Court to provide instruction. The Court felt that there might be some confusion on the jury's part, and felt that it was affirmatively necessary for the Court to do so.

So, in this case, which the Court thinks is more like our case, I suggest that it is not at all like our cas[illegible] because in that case it was not raised. That is, it

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being justification was not raised by the defense. Whereas, our position from day one has been that justification is central to this case. And, otherwise, not providing it, the defense is now in some regards hamstrung in arguing justification. However, Judge, we are left with arguing the evidence, and reasonable inferences that can be drawn therefrom.

Final point, and that is on the issue of the instruction the Court is providing itself, and I read:

However -- the last three lines, Judge, starting with however.

In rendering your verdict, you may not consider whether defendant acted in self defense or with justification, as those issues are not before you in this case.

Judge, I beg to disagree. The issues are very much before them in this case. The charge is not before them in this case. Issues of self defense and justification are plainly before the jury, based upon the witnesses proffered by the People. So, the issues clearly are before the jury, the charge is not before the jury. That's number one.

Number two, I believe that affirmatively providing a jury with what they should not consider is an invitation to convict Mr. Brown. I don't believe that the jury should be invited to convict anybody.

I believe, Judge, the jury should be invited to do their job, and that job, Your Honor, has been plainly stated on more than one occasion, several, throughout voir dire, throughout this process. Can you, ladies and gentlemen, follow my instructions? They have said yes.

In the backroom, we went through what the jury charges are. Those are the instructions. Those are the only instructions that they should be able to consider. Telling a jury now what they should not consider is not only pinpointing what the essence of our defense is, but it's essentially telling the jury, well, you heard them raise a defense, reject it because you can't consider it. I think that's plainly improper.

THE COURT: The Court has an obligation not to confuse the jurors. To try to eliminate the confusion, that's what I am trying to focus on.

MR. JACKSON: Judge, I get it. I don't know how the jury is confused, when I'm arguing what the evidence is. In the event, I went off the reservation (sic), Judge, which obviously the Court will constrain me from doing, and I have much more than ample respect for this Court, and attempting to do that would be another matter. If I'm off the reservation, the Court pulls me back on. That's another issue. I'm arguing with what the evidence shows in the case. That's my job. If I'm considering arguing a

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reasonable view of the evidence, the law allows me to do that. And if a reasonable view of the evidence, as I will when I'm permitted to give my summation get into, there's more than ample reasonable view of the evidence for them to follow your instruction, and allow me to talk about issues which negate intent. But to pigeonhole and tell the jury, essentially, to disregard my closing argument, when I talk about issues that negate intent, when Mr. Browns' plainly under attack, and being struck and the gun's being grabbed don't consider justification, don't consider self defense, the jury should consider what you told them to which is your instructions. Nothing more, nothing less.

The third issue, Judge, is essentially, again, that you're specifically not only denying the defense the justification charge, but in denying us the charge of justification, you not only don't give it to the jury, but you give it to them and tell them you can't use it.

Well, if you're going to deny me the charge, deny it. Don't give it to them. But then don't deny me the charge, but tell them in addition to that don't even consider it. That's like a double whammy. Not only now are my hands tied behind my back with regard to me being denied a charge, which in the event things turn out the way they could. I'll have my appeal, fine. But now I'm denied the charge of justification, number one; and then the jury

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is told, number two, don't even consider it. I'm just not sure how I can argue.

THE COURT: Justification and self defense are legal issues, and they are not factual issues.

MR. JACKSON: Judge, I'm not arguing any legal issue. I'm arguing facts, and I think if we're arguing facts and reasonable inferences, I'm entitled to do that. And I think the jury is entitled to otherwise follow the instructions you've given them, and the instruction is as it relates to murder, that he intended to murder anyone, that's it. It wasn't his conscious objective to see Vonde Cabbagestalk dead. That's it as it relates to Manslaughter One. Was it his conscious object to see Vonde Cabbagestalk seriously, physically injured? Period. I don't think we have to start getting into, well, you can consider intent, but you can only consider it for purposes of him not doing it. But as it relates to him getting into why he didn't do it, if he says self defense, don't consider that. I just think I'm being hamstrung in a variety of respects. I think this jury is smart enough, Judge, to follow your instructions without being told you're not getting a self defense instruction, and in addition to not getting one, you're not even going to consider it. That puts me in a position of what am I left here to argue? What am I left here to do? I'm here to do a job, and if I do my job

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consistent with the rules of the Court, if I do my job consistent with New York State Law, if I do my job consistent with the rules of practice, and I'm able to make reasonable inferences from the facts, then I'm permitted to ful[illegible] make my arguments and allow the jury to follow your instructions, in the event --

THE COURT: I get your point, and it's understood. We talked about it in the back. I can understand your reasons for arguing. I feel differently. Do you propose you want to make any propose changes to that?

MR. JACKSON: The propose change is that we take out any affirmative instruction that tells the jury what not to consider. In every other instruction that you provide to this jury, Judge, you tell them what they are permitted to consider. I believe in the system of justice. I believe that this jury can follow your instruction. I bel[illegible]e that we have a jury that's intelligent enough to discern fact from nonfact. I believe, Judge, that this jury will be able to do what you tell them to do, and if you tell them affirmatively to disregard anything Mr. Jackson says about self defense, which I'm not. Of course, I'm not going to do that because you told me not to, Judge. But, now --

THE COURT: Um hum.

MR. JACKSON: When I don't even talk about self

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defense or say Mr. Brown acted in self defense, when I just talk about and I start negating intent through my argument, now I make my argument, and then when I sit down and he makes his, then you say well, you know what, ladies and gentlemen, that's nice, but if you thought it might be self defense, you can't consider it.

THE COURT: I'll tell you this, I'm going to hear your summations, and then make a determination if this is necessary. This charge. I'll give you that. That's fair.

MR. JACKSON: Judge, that's fair, but I would say yet and still and again, we could revisit it after summation, and before your charge, but I just don't think it's appropriate. I told you why I think it's distinguishable from the cases they cited. And the case Your Honor believes is on point, and I just don't.

THE COURT: I'm not saying it's on point, but the rationale in Rodriguez I was impressed with. I thought it was applicable.

But do the People want to respond?

MR. MENDYS: Judge, I'll just note, I think we have about half dozen cases, First Department, all stand for the proposition that a charge like this is appropriate, especially in a situation where -- and there are cases I think Colon is one from 1997 First Department, where defense requested the charge, it was denied and then the

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jury was instructed that it's not an issue for them to consider, and that's exactly what we have here, and that's, I think, eminently reasonable. So, as to avoid confusion in the issues that --

THE COURT: What does Colon say, if you have it?

MR. MENDYS: Colon, the cite 235 AD 2d, 305. We have copies here.

THE COURT: We will wait till the end of summation before I make a final determination, okay.

Ready for the jury?

MR. JACKSON: Judge, we will argue this later, but I think the first line I read is the Court properly declined to charge, as it was not supported by any reasonable view of the evidence. I'll read it, we will argue about it, but I'm just asking to be able to do my job, and argue any reasonable view of the evidence.

THE COURT: Okay, I will talk to the jurors for about five minutes before you get up so, so just so you're aware.

Okay.

THE COURT OFFICER: All rise, jury entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seat.)

THE COURT: Everyone have a seat. Good afternoon, jurors. Everybody's good. Ready to go? Nothing to

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THE COURT OFFICER: All rise, jury exiting.

(Whereupon, the sworn jurors exit the courtroom.)

THE COURT: All the jurors left the courtroom. I'm incline to think Mr. Jackson skillfully skirted the issue of justification in his summation, so I'm incline to withdraw my offer to charge, as I indicated earlier. I'm sure the People want to be heard on that.

MR. MENDYS: You are correct. I don't think it matters whether he's skillfully skirted it or not, it's not evidence what he testified to. The evidence is what controls. And throughout his cross examinations of the witnesses, he elicited testimony in preparation for a self-defense charge that he requested and was denied.

In his summation, he mentioned the term aggressor. It's a legal term. Initial aggressor under justification. He mentioned the duty to retreat or who was retreating and he inferred certainly that, but because Vonde Cabbagestalk had clothes on, he may or may not have something. So, with those facts combined with the continued tenor of the trial, his theory all along his opening statement, his voir dire on self preservation. Judge, just because he limited his comments to intent, based on the Court's previous ruling, doesn't eliminate everything that has been done up to this poi So, you know I think the charge that has been drafted is specific, and it is totally on point, and all

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the case law stands for the proposition that to eliminate juror speculation that a charge -- it is perfectly within the Court's discretion to provide the charge to them, based on the facts of case, and based on the facts which Mr. Jackson in his previous argument essentially argued to the Court that justification are the issues, those facts are the issues before the jury, to argue that to the Court and then say we shouldn't instruct them one way or another.

THE COURT: What I'm saying is in his summation he didn't make that argument. He argued intent almost exclusively.

MR. MENDYS: He did, Judge. But we still have a problem of justification, factual issues relating to justification being elicited and now a jury that has no instruction on the matter, having two possible ideas about what that means and how that's relevant to then speculate and come to their own conclusions, when the Court has ruled that is not legally part of this case. It is not legally part of this case, it's not been made out. We're asking them to essentially speculate on the issue.

THE COURT: All right, I'm going to adhere to my -- what I just said. I'm not going to charge them that they must not consider justification because it hasn't been argued in summation, which is what I indicated earlier. As I said, I think he's skillfully skirted the issue, so be

it. Ten minutes.

MR. MENDYS: Sure.

(Whereupon, there is a pause in the proceedings, as the Court takes a brief recess.)

THE COURT OFFICER: All rise jury entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seat.)

THE COURT: Have a seat, everyone. Let the record reflected all the jurors are back in the courtroom.

Mr. Mendys, it's all for your summation.

MR. MENDYS: Thank you, Judge.

Darryl Brown is guilty of murder. He was not acting as a member of law enforcement. He was not responding to something that was presented upon himself, that he did nothing and had no part in starting. He was acting as a father who was concerned for his daughter, and who didn't like his daughter's boyfriend. The fact that he was a correction officer only explains why he had a gun, and a legal gun. It explains nothing else, except for what happens after the shooting, and we'll get to that.

Jurors, the People have provided believable, credible, reliable evidence that the defendant, shot and killed Vonde Cabbagestalk, and that he did so with the intent to kill. That is what has happened here over the past week or so. The hard part is over for you guys. You

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have sat, you have listened attentively. You've seen the evidence, you've seen the witnesses for yourself with your own eyes. You've seen the documents, you've seen the gun, and you've seen the defendant. Now the easy part begins. The easy part for you will be putting this all together. Because if you follow the evidence, and follow the facts and listen to the law that the Court provides you, there's only going to be one option for you, there's only going to be one conclusion that you are going to be able to reach. And while we know there is no dispute that Darrel Brown is the shooter, there is no dispute that he killed Vonde Cabbagestalk, the only issue for you to decide, the only question that you have to answer is what was his intent? And counsel I'm going to layout for you the multitude of evidence that shows that his intent was to kill, that his intent was to cause serious physical injury. I want you to listen to the instructions from the judge. Intent and premeditation are not the same thing.

Despite what Mr. Jackson would have you believe, Darrel Brown went to Vonde Cabbagestalk to talk to him. He didn't come out of that building. He didn't walk up to him arm out stretched gun in his hand and say I'm going to kill you now, and put a bullet in his head. Let me know when you see that case. His intent developed as the situation developed. So, you will hear that intent and premeditation

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are two separate things. All that matters is that when he pulled that trigger, he had in his mind that Vonde Cabbagestalk was a dead man. That's what matters.

Intent is the issue here, jurors. You'll also hear nothing from the Court in its instructions to you regarding justification, self defense, self preservation or anything else like that. Justification is a legal term. It is very specific, and it is not a part of this case. If you have a question about that when you deliberate, I suggest that you write a note and ask it, and the Court will provide an answer, but that there will be nothing about justification in the instructions to you. It's not something for you to consider.

So, what did we learn jurors? We learned that March 20, 2014, Vonde Cabbagestalk and another man Black possibly Corell Marshall were in the lobby of 739 East 242nd Street by themselves. They were talking, they were relaxed. This is People's two, they were relaxed, as Raymond Wolf said, the mailman, talking to one another. Conversation that Mr. Wolf couldn't hear and wasn't particularly paying attention to. And while they're there, the defendant approaches them. Mr. Wolf didn't see where he came from, and that's when all this starts. The defendant approaches Vonde Cabbagestalk. He's upset. The defendant approaches with his gun on his hip, in his hand,

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