JUSTIFICATION - SELF DEFENSE
In Self Protection
(N.J.S.A. 2C:3-4)

The indictment charges that the defendant has committed the crime of _____ (i.e., aggravated assault or homicide).

The defendant contends that if the State proves he/she used or threatened to use force upon the other person(s), that such force was justifiably used for his/her self protection.

The statute reads:

"The use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

In other words, self defense is the right of a person to defend against any unlawful force. Self defense is also the right of a person to defend against seriously threatened unlawful force that is actually pending or reasonably anticipated. When a person is in imminent danger of bodily harm, the person has the right to use force or even deadly force when that force is necessary to prevent the use against him/her of unlawful force. The force used by the defendant must not be significantly greater than, and must be proportionate to, the unlawful force threatened or used against the defendant.

Unlawful force is defined as force used against a person without the person's consent in such a way that the action would be a civil wrong or a criminal offense.

If the force used by the defendant was not immediately necessary for the defendant's protection or if the force used by the defendant was disproportionate in its intensity, then the use of such force by the defendant was not justified and the self defense claim fails.[1]

There are different levels of force that a person may use in his/her own defense to prevent

[1] In State v. Bowens, 108 N.J. 622, 626 (1987), the Court held that the Code of Criminal Justice "does not provide an independent category of justification, excuse or mitigation under the concept of imperfect self-defense." Therefore courts are not required, as was the case prior to the adoption of the Code, to instruct that "imperfect self-defense would serve to reduce murder to an unspecified degree of manslaughter." Id. at 637. However, Bowens also held that "evidence that will sustain the defense at common law is frequently relevant to the presence or absence of the essential elements of Code offenses." Id. at 626. In almost all cases, if such evidence is adduced at trial, the trial court should charge purposeful murder and the lesser-included offense of aggravated manslaughter, reckless manslaughter, and passion/provocation manslaughter. State v. Coyle, 119 N.J. 194, 228 (1990). If there is a rational basis for the jury to find that defendant acted in the honest but unreasonable belief in the necessity to resort to force in self-defense, it could conclude that he/she acted recklessly rather than purposely or knowingly. State v. Pridgen, 245 N.J. Super. 239, 244 (App. Div. 1991). In murder prosecutions, such evidence should cause the court to instruct the jury on the lesser included offenses of aggravated and/or reckless manslaughter. Similarly, if there is a rational basis for a jury to find that defendant reasonably believed in the necessity to use force, and honestly but unreasonably believed that he/she needed to resort to deadly force to repel the danger that he/she faced, it could conclude that he/she acted in the heat of passion resulting from a reasonable provocation, which would justify submission of passion/provocation manslaughter as a lesser included offense of murder. State v. Powell, 84 N.J. 305, 312 nn.7 & 313 (1980); Pridgen, 245 N.J. Super. at 244.

unlawful harm.

The defendant can only use that amount or degree of force that he/she reasonably believes is necessary to protect himself/herself against harm. If the defendant is attempting to protect himself/herself against exposure to death or the substantial danger of serious bodily harm, he/she may resort to the use of deadly force. Otherwise, he/she may only resort to non-deadly force.

Deadly Force

The use of deadly force may be justified only to defend against force or the threat of force of nearly equal severity and is not justifiable unless the defendant reasonably believes that such force is necessary to protect himself/herself against death or serious bodily harm. Deadly force is defined as force that the defendant uses with the purpose of causing or which he/she knows to create a substantial risk of causing death or serious bodily harm. By serious bodily harm we mean an injury that creates a substantial risk of death or which causes serious permanent disfigurement or which causes a protracted loss or impairment of the function of any bodily member or organ.[2] For example, if one were to purposely fire a firearm in the direction of another person, that would be an example of deadly force. A mere threat with a firearm, intended only to make the victim of the threat believe that the defendant will use the firearm if necessary, however, is not an example of deadly force.

One cannot respond with deadly force to a threat of, or even an actual, minor attack. For example, a slap or an imminent threat of being pushed in a crowd would not ordinarily justify the use of deadly force to defend against such unlawful conduct. Therefore, you must first determine whether the defendant used deadly force. If you find that the defendant did so, then you must determine if the defendant reasonably believes he/she had to use deadly force to defend against the unlawful conduct of another.

A reasonable belief is one which would be held by a person of ordinary prudence and intelligence situated as this defendant was situated. Self defense exonerates a person who uses force in the reasonable belief that such action was necessary to prevent his or her death or serious injury, even though his/her belief was later proven mistaken. Accordingly, the law requires only

[2] If appropriate, charge the following: "Serious bodily injury may also mean bodily harm that results from aggravated sexual assault or sexual assault."

a reasonable, not necessarily a correct, judgment.[3]

Accordingly, if you find that the defendant used deadly force, then you must determine whether the force was justified.

A person may use deadly force to protect himself/herself if the following conditions exist:

1. The person reasonably believes he/she must use deadly force; and
2. The person reasonably believes that the use of deadly force was immediately necessary; and
3. The person reasonably believes he/she is using deadly force to defend himself/herself against death or serious bodily harm; and
4. The person reasonably believes that the level of the intensity of the force he/she uses is proportionate to the unlawful force he/she is attempting to defend against.

Even if you find that the use of deadly force was reasonable, there are limitations on the use of deadly force. If you find that the defendant, with the purpose of causing death or serious bodily harm to another person, provoked or incited the use of force against himself/herself in the same encounter, then the defense is not available to him/her.

If you find that the defendant knew that he/she could avoid the necessity of using deadly force by retreating, provided that the defendant knew he/she could do so with complete safety, then the defense is not available to him/her. [**CHARGE WHERE APPLICABLE**: An exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including the porch, unless he/she was the initial aggressor.[4] A dwelling includes a porch or other similar structure.[5]]

In your inquiry as to whether a defendant who resorted to deadly force knew that an opportunity to retreat with complete safety was available, the total circumstances, including the attendant excitement accompanying the situation, must be considered.

---

[3] In State v. Rodriguez, 195 N.J. 165, 171-72 (2008), the Supreme Court held that a valid claim of self-defense "would entitle [a defendant] to an exoneration of criminal liability" on all charges relating to his or her alleged aggressor, including aggravated or reckless manslaughter or assault, because a "person who kills in the honest and reasonable belief that the protection of his own life requires the use of deadly force does not kill recklessly." However, "it is another question if the use of force to protect one's self recklessly endangers innocent third parties…." Id.; N.J.S.A. 2C:3-9c. The Court did not expand upon the latter concept because the third party scenario was not implicated in Rodriguez.

[4] N.J.S.A. 2C:3-4b(2)(b)(i).

[5] State v. Martinez, 229 N.J. Super. 593, 604 (App. Div. 1989).

Non-Deadly Force

A person may also use non-deadly force in his/her own defense. If you find that this defendant did use non-deadly force, then you must determine whether that force was justified.

A person may use non-deadly force to protect himself/herself if the following conditions exist:

1. The person reasonably believes he/she must use force; and
2. The person reasonably believes that the use of force was immediately necessary; and
3. The person reasonably believes he/she is using force to defend himself/herself against unlawful force; and
4. The person reasonably believes that the level of the intensity of the force he/she uses is proportionate to the unlawful force he/she is attempting to defend against.

A reasonable belief is one which would be held by a person of ordinary prudence and intelligence situated as this defendant was. Self defense exonerates a person who uses force in the reasonable belief that such action was necessary to prevent his or her injury from another's use of unlawful force against them, even though his/her belief was later proven mistaken. Accordingly, the law requires only a reasonable, not necessarily a correct, judgment.[6]

Remember, only if you conclude that in using force or deadly force the defendant reasonably believed he/she was defending against unlawful force is the defense available to him/her.

Burden of Proof

The State has the burden to prove to you beyond a reasonable doubt that the defense of self defense is untrue. This defense only applies if all the conditions or elements previously described exist. The defense must be rejected if the State disproves any of the conditions beyond a reasonable doubt.

The same theory applies to the issue of retreat. Remember that the obligation of the

[6] See Rodriguez, supra note 3.

defendant to retreat only arises if you find that the defendant resorts to the use of deadly force. If the defendant does not resort to the use of deadly force, one who is unlawfully attacked may hold his/her position and not retreat whether the attack upon him/her is by deadly force or some lesser force.

The burden of proof is upon the State to prove beyond a reasonable doubt that the defendant knew he/she could have retreated with complete safety. If the State carries its burden then you must disallow the defense. If the State does not satisfy this burden and you do have a reasonable doubt, then it must be resolved in favor of the defendant, and you must allow the claim of self defense and acquit the defendant.