# SUPREME COURT

**OF THE**

# STATE OF CONNECTICUT

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**SC 19336**

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**STATE OF CONNECTICUT**

**v.**

**LATASHA R. OBRYAN**

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BRIEF OF THE DEFENDANT-APPELLANT
WITH ATTACHED APPENDIX

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## NOTE REGARDING TRANSCRIPT REFERENCES

The transcript cited to in abbreviated form in this brief relates to proceedings in November, 2011 and April, 2012. Reference to the transcript indicates the date of the volume, except the year, and then the page. For example, page 100 of the transcript of November 1, 2011 is referred to as 11/7T 100. All *italicized* or <u>underlined</u> emphases appearing in quoted portions of the transcript were added by undersigned counsel.

## NATURE OF PROCEEDINGS AND STATEMENT OF FACTS

A New Haven JD jury, Moore, J., found the defendant, Latasha Obryan, guilty of one count of attempted 1st degree assault, Gen. Stat. §§ 53a-49, 53a-59(a)(1);[1] and one of 2nd degree assault, § 53a-60(a)(2).[2] She was later sentenced to five years imprisonment. Record at _. The State alleged that she and another adult, Lawanda McCrea, agreed in advance to physically fight but when it came time, she pulled out a knife and stabbed McCrea in the chest. The defendant, on the other hand, maintained McCrea had unexpectedly pulled out a box cutter and she reacted in self defense, Gen. Stat. § 53a-19.

*The World Turned Upside Down* is the tune some historians say Lord Cornwallis ordered his band to play as the British surrendered at Yorktown, Virginia in 1781.[3] The name describes this case succinctly.

It is not so often a case is presented where *the trial judge*, months after the verdict, addresses a defendant who had testified at trial and states that *"I found everything that you said to be credible. I think the jury did too."* 4/26T 34. Likewise, the judge stated that "I don't necessarily agree with the State that the jury rejected your story of self defense" and that "I'm not indicating that you knew...what the law requires" or even that "you should've known that," and that "the self defense...analysis is a very tough one to succeed" under Connecticut law. 4/26T 33. As the judge stated, "you don't see, myself,... *as a judge*, my life *in the criminal justice system for the past thirty years*, you don't see your kind of person in this system very often. It is the *very unusual* case to find you in this situation." 4/26T 31. The judge noted "it clearly struck me that Ms. Obryan, that you have been a person who,

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[1] A person violates Gen. Stat. § 53a-59(a)(1) when "[w]ith intent to cause serious physical injury to another person, [s]he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument...."

[2] A person violates Gen. Stat. § 53a-60(a)(2) when "with intent to cause physical injury to another person, [s]he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by...the discharge of a firearm...."

[3] See, e.g., Isaac Kramnick, introduction to *Thomas Paine, Common Sense* 7, 24 (Isaac Kramnick ed., Penguin Books 1982) (1776); Mark McNeilly, *Sun Tzu and the Art of Modern Warfare* 61 (Oxford Univ. Press 2001).

in today's society, was a person whom led *an exemplary life.*" Id.[4] The judge, who listened to the testimony and attended to the evidence, also forthrightly stated *"my hands are totally tied"* by the five year mandatory minimum non-suspendable sentence seen as required for 1st degree assault, whether committed or attempted, and *"I think this would have been a case where, as I said, a much lesser sentence would've been mandated by your history and by your exemplary life up until this point."* 4/26T 35-36.

Meanwhile, the jury heard Lawanda McCrea, 33 years old at time of trial, acknowledge she was imprisoned at York Correctional Institution and that on:

> **(1)** February 23, 2011 she pled guilty or was convicted of larceny third; **(2)** same as to an unnamed "felony" out of Middletown on November 30, 2011; **(3)** convicted of *assault on public safety personnel* on that date; **(4)** a forgery, "August 21st, '08, East Hartford; **(5)** "December 5th, '07, arising out of Vernon...a forgery and an identity theft?" **(6)** "September 19th, '07, out of Westport,...a larceny three?" **(7)** "August 2nd out of Orange, up in Derby,...identity theft, forgery two, larceny three?" **(8)** "August 2nd again out of Orange,...an identity theft and a forgery two?" **(9)** "August 2nd, '07, out of Meriden,...a larceny three?" **(10)** "July 26th, '07, out of Milford,...a larceny three?" **(11)** "April 4th, '07, out of Wethersfield,...a forgery second and a larceny third?" **(12)** "August 2nd, '07, arising out of Wethersfield,...a larceny third?" **(13)** "July 26th, '07, out of Wethersfield,...another [unnamed] felony?" **(14)** "May 26th, '04, out of New Haven,...a larceny two?" **(15)** "May 27th, '04, out of Groton,...a larceny three?" **(16)** "May 19th, '04, arising out of Stamford,...a forgery?" ("Forgery one.") **(17)** "May 26th, '04, out of New Haven,..Two larceny threes?" **(18)** "March 1st, '04, out of Bridgeport,...identity theft first and a larceny three?" **(19)** "May 27, '04, out of New London,...a larceny three?" **(20)** "March 25th, '04, out of Norwich,...identity theft?" **(21)** "March 1st, '04, out of Trumbull,...a larceny three and another [unnamed] felony?" **(22)** "March 30th, '04, out of Wallingford,...a larceny three and a bad check charge?" **(23)** "August 26th, '03, out of New Haven,...a larceny three?" **(24)** "August 26th, '03, out of New Haven,...a larceny three?" **(25)** November 25th, '02, out of Milford,...a forgery one?" and "All of them [were] felonies...."

With this litany, that the State then said *"Tell us a little bit about yourself"* was ludicrous. See 11/1T 44-49. McCrea later even acknowledged for the jury the list could have been longer; it was only "Nine times out of ten" that she had been caught. See 11/1T 120.

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[4] Even *the prosecutor* observed that "it's significant, she has no record, she has never been in problems with the law before. She has held a job, she's been gainfully employed to her credit. She appears to be *a woman who takes care of, not only her own children, but, others, to her credit.* She has done good things in her life, and there is certainly no way we can't acknowledge this. In some respects, this action appears to be *an aberration* from the relatively normal life that she has held." 4/26T 15.

## ARGUMENT

**I. CONSONANT WITH THE TRIAL COURT'S OWN ASSESSMENT THAT THE DEFENDANT HAD RAISED A CREDIBLE CLAIM OF SELF DEFENSE BUT HAD RUN AFOUL OF SOME INTRICACY OF CONNECTICUT LAW (SEE 4/26T 33-34), THE INSTRUCTIONS ON MUTUAL COMBAT THAT ARE "APPROVED BY THE JUDICIAL BRANCH" AND WERE GIVEN BY THE TRIAL COURT ARE IN PART SERIOUSLY WRONG ON THE LAW AND CAUSED REVERSIBLE ERROR HERE**

**Specific facts:** The court instructed that one "circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when the physical force is the product of an illegal combat by agreement."

> [I]t is not necessary that there be a formal agreement. Such agreement may be inferred from the conduct of the parties. To infer such an agreement, you must look at all the circumstances leading up to and preceding the event in question as well as all of the circumstances surrounding this event itself based on the entire evidence presented in your own credibility assessments.

11/7T 82-83. The defendant makes no claim as to this, from Judicial Branch, *Approved Criminal Jury Instructions* § 2-8-2C. However, the court then charged "This exception would not apply despite an agreement for mutual combat if you find that the terms were violated by Lawanda McCrea and that her conduct towards the defendant was in violation of their agreement. And further, that the defendant knew of such a violation. Violation means that Lawanda McCrea['s] use of force exceeded the terms of the agreement with the defendant and that it escalated beyond what they had then agreed to as either – as to either the extent or form of conduct – combat," 11/7T 83; A34. This, too, was verbatim or nearly so in every important aspect from *Approved Criminal Jury Instructions* § 2-8-2C; A9.

**Nature of claims:** Her claim involves the part stating a bar to a self defense claim "would not apply despite an agreement for mutual combat if you find that the terms *were violated* by Lawanda McCrea[,]" 11/7T 83; *Approved Criminal Jury Instructions* § 2-8-2C; "and that her conduct towards the defendant *was in violation* of their agreement. And further, that *the defendant knew* of such a violation." Id. She claims that thanks to the *Approved* Instruction, the trial court misstated Connecticut law on what it took to have a right to use deadly force in self defense in that mutual combat situation, thus lightening the State's burden of disproving her claim of self defense, violating her right to due process

under Conn. Const., art. I § 8; U.S. Const., amend XIV; and the guarantee of Conn. Const., art. I, § 9 that no person shall be punished except in cases "clearly warranted" by law; and that the error was harmful, let alone the State cannot not show it was harmless.

**Reviewabilty: (a) If the Judicial Branch is going to "approve" instructions to the jury that are wrong on the law in certain places, it would be hypocritical of Judicial Branch entities to refuse to review such "wrong on the law" claims because of being first raised on direct appeal**

The jury was charged on mutual combat from the instructions on self defense that were already "approved by the judicial branch[,]" State v. Bryan, 307 Conn. 823, 833-34, 60 A.3d 246 (2013) (emp. added) (citing Connecticut Judicial Branch, *Criminal Jury Instructions* (4th ed. 2010) § 2.8-1; see id., § 2.8-2C; and which are the work of "the experienced trial judges who comprise the...criminal jury instruction committee...." State v. Medrano, 308 Conn. 604, 649, 65 A.3d 503 (2013) (Norcott, J., concurring).

While the *Instructions* state their use "is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency[,]" see id.: A1; even the present Court has presumed they correctly state Connecticut law. State v. Channy Nee Khuth, 111 Conn. App. 184, 193, 958 A.2d 218 ("we also conclude that the instruction was correct in law, following, almost verbatim, the instructions set forth in the Connecticut Criminal Jury Instructions for a charge of assault in the first degree with the aid of two or more persons.") (emp. added), cert. denied, 289 Conn. 957, 961 A.2d 423 (2008); State v. Helmedach, 125 Conn. App. 125, 136, 8 A.3d 514 (2010) ("We also note that the court's original and additional instructions [on 'duress'] were correct in law, as it appears as though they were modeled on the instructions set forth in the Connecticut Criminal Jury Instructions.") (emp. added), aff'd on other grounds, 306 Conn. 61, 48 A.3d 664 (2012).

'The huge demands which criminal litigation imposes on both the bench and bar has led to growing acceptance of, and reliance on, standard pattern instructions as a way of saving time and effort. In fact, pattern instructions often preempt the adversarial process with regard to jury instructions. 'The proliferation of pattern instructions has lulled

many judges and lawyers into a sense of complacency,'" Thomas Lundy, *Jury Instruction Corner*, 29 Champion 39, 39 (May 2001) (quoting BNA *Criminal Practice Manual* § 131.101 (1999)); and "[i]t would be a hypocritical scheme indeed" for the Judicial Branch as initial decision maker to hold itself "unaccountable" for its approval by denying review. Cf. Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 39 (N.D. Tex. 1981); see also People v. Gonzalez, 326 Ill. App. 3d 629, 634-35, 761 N.E.2d 198 (2001) (reviewing under plain error doctrine claim that "the Illinois Pattern Jury Instruction (IPI) submitted to the jury misstated the law with respect to evaluating eyewitness identification testimony."), app. denied, 198 Ill. 2d 623, 770 N.E.2d 222 (2002); State v. Coleman, 481 S.W.2d 235, 236 (Mo. 1972) (reviewing under "the plain error rule...[s]ince this instruction was one recently recommended by the Missouri Bar Committee on Criminal Pattern Instructions").

**(b) A claim that a certain "approved" Judicial Branch instruction always misstates the law, at least when the claim is one of first impression, is logically and legally distinct for reviewability purposes from situational claims such as that the evidence did not warrant the instruction being given or that the trial court should have but did not give the instruction**

It makes sense that a claim of error involves "an issue of first impression" means no plain error review since the error cannot be said to be "a clear and obvious" one when the claim is procedural, see State v. Fagan, 280 Conn. 69, 88-89, 905 A.2d 1101 (2006) ("We therefore conclude that the trial court did not commit plain error by enhancing the defendant's sentence despite his lack of written notice as required under [Gen. Stat.] § 54-64e."), cert. denied, 549 U.S. 1269 (2007); but whether a case of first impression or not, that some errors were not plain at time of trial will not always preclude plain error review on direct appeal; "it is enough that an error be 'plain' at the time of appellate consideration." Johnson v. United States, 520 U.S. 461, 468 (1997) ("it is now settled that materiality is an issue for the jury."). In other words, so long as *someone else*, in a different case not involving the defendant but in that same jurisdiction objected and the plainness of the error was consequently established, later defendants in unrelated cases, like the present defendant, can claim plain error on direct appeal in that jurisdiction. See id.

However, if an appellate court absolutely refuses review of first impression claims on direct appeal under plain error, any defense attorney except, perhaps, Pollyanna with a law degree,[5] perceiving the time, effort and racking up of allotted brief pages to be a fore-doomed exercise in futility, albeit highly beneficial to *other* defendants and their lawyers, and trial and appellate court jurists (and even prosecutors trying to insulate favorable verdicts from reversal), will quite sensibly decide to skip it, likely ensuring one or more future preventable but reversible errors in that jurisdiction will occur.

That is why the New Jersey Supreme Court, in a case already reviewed and reversed under "plain error" even though dealing with a case of first impression (about an aspect of expert testimony in child sexual abuse cases) stated "[b]ecause this is the first time that our Court has addressed those issues, we affirm the judgment of the Appellate Division [reversing the conviction]. In future cases, we shall assume that the failure of informed defense counsel to object to such expert testimony may reflect a tactical decision by the defense to let the jury hear all available information pertaining to the case." State v. J.Q., 130 N.J. 554, 584, 617 A.2d 1196 (1993); see id., 556 (error "was clearly capable of producing an unjust result"); see also Bullock v. State, 775 A.2d 1043, 1057 & nn. 59-60 (Del. 2001) ("when the legal issue presented for the first time on appeal is one of first impression[,]... [o]ur plain error review has been sensitive to the desirability of addressing such issues in order to provide guidance to [the trial courts and to] future litigants and to the related consideration of relieving the appellant from forfeiture arising in part from lack of clarity in the law, assuming that all elements of the plain error standard are satisfied.").

Also, appellate courts will make an exception and review under plain error even in "first impression" cases if the error is one "which infringes upon a 'well-established constitutional principle.'" U.S. v. Turrietta, 696 F.3d 972, 981 (10th Cir. 2012); U.S. v. Laureys,

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[5] There *is Pollyanna Grows Up* (1915), by Eleanor H. Porter, see In re Page Co., 47 App. D.C. 195, 195 (D.C. Cir. 1917); Alice Mills, *Pollyanna and the Glad Game*, 27 Children's Literature 87, 87 (1999); but even then, she has still not lost her optimism, her faith in "her Glad Game" and its powers of positive transformation. See id.

653 F.3d 27, 33 (D.C. Cir. 2011) ("'issues of first impression present plain error only when they tread upon a well-established constitutional or legal principle.'"), cert. denied, 132 S.Ct. 1053 (2012); and as explained in the reviewability analysis infra as to State v. Golding, 213 Conn. 213 Conn. 233, 239-40, 567 A.2d 823 (1989), the defendant states a claim of constitutional magnitude and points to a record adequate to review it. Id.

Moreover, a first time claim that a pattern jury instruction incorrectly states the law is distinct from a situational claim such as that a pattern jury instruction was erroneously omitted. In the "wrong on the law" claim, no court to date has found the instruction to be legally incorrect, so defense counsel can hardly be said to have been already "informed" about the existence of the error, cf. State v. J.Q., supra, 130 N.J. at 584, 617 A.2d 1196; see also Smith v. McKee, 598 F.3d 374, 383-84 (7th Cir. 2010) (not "objectively unreasonable" for defense counsel in 1995 to have failed to object to the giving of a pattern instruction that only in 2001 was disavowed as causing plain error); while in a situational claim, one example being where the defendant claims the court did not give an instruction it should have, the defendant after trial maintains an error was committed that should have been obvious at time of trial to counsel. State v. Lemoine, 256 Conn. 193, 201, 770 A.2d 491 (2001) ("that the trial court properly omitted a duty to retreat instruction...disposes of the defendant's plain error claim."); cf. State v. Ortiz, 79 Conn. App. 667, 679, 830 A.2d 802 (Golding review; "We note that the defendant does not claim that the instruction was incorrect as a matter of law"), cert. denied, 266 Conn. 933, 837 A.2d 806 (2003).

The U.S. Supreme Court recently answered "yes" when asking "can an error be 'plain' if it is not plain until the time the error is reviewed?" Henderson v. United States, 133 S. Ct. 1121, 1125-26 (2013). Pursuant to Johnson, supra, 520 U.S. 461, "at least in one circumstance, an (un-objected to) error by a trial judge will also fall within [the] word 'plain' *even if the judge was not plainly incorrect* at the time it was made. That is the circumstance where an error is 'plain' even if the trial judge's decision was plainly *correct* at the time when it was made but subsequently becomes incorrect based on a change in law.

[Johnson], supra, 520 U. S., at 468...And, since by definition the trial judge did not commit *plain error* at the time of the ruling, Johnson explicitly rejects applying the words 'plain error' as of the time when the trial judge acted. Instead, Johnson deems it 'enough that an error be "plain" at the time of appellate consideration' for that error to fall within [the] category of 'plain error.' *Ibid.*" Henderson, 133 S. Ct., 1127 (emp. in original).

> But if the...words 'plain error' cover both (1) trial court decisions that were plainly correct at the time when the judge made the decision and (2) trial court decisions that were plainly *in*correct at the time when the judge made the decision, then why should they not also cover (3) cases in the middle--*i.e.*, where the law at the time of the trial judge's decision was neither clearly correct nor incorrect, but unsettled?...To hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals.

Id. (emp. in original). As the court explained, "counsel normally has...good reasons for calling a trial court's attention to potential error--for example, it is normally to the advantage of counsel and his client to get the error speedily corrected. And, even where that is not so, counsel cannot rely upon the 'plain error' rule to make up for a failure to object at trial. After all, that rule will help only if (1) the law changes in the defendant's favor, (2) the change comes after trial but before the appeal is decided, (3) the error affected the defendant's 'substantial rights,' and (4) the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'....If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' *later*, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom." Id., 1128-29 (underlining added); see also State v. Kitchens, 299 Conn. 447, 548, 10 A.3d 942 (2011) (Palmer, J., dis.) (counsel knows that while awaiting possible appellate or habeas relief, the "defendant[] [will be] serving a sentence of incarceration.").

Practice Book § 60-5 states "[t]he [C]ourt shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial" and that [t[he [C]ourt may in the interests of justice notice plain error not brought to the attention of the trial court." Even in cases of first impression, good reason exists to apply the plain error rule sometimes, see State v. J.Q., supra, 130 N.J. at 584, 617 A.2d 1196; Bullock, 775

A.2d, 1057 & nn. 59-60; especially if the claim is that an instruction already "approved by the [J]udicial [B]ranch" itself, State v. Bryan, supra, 307 Conn., 833-34 (emp. added), incorrectly states the law, and the claim is that the instruction "tread[s] upon a 'well-established constitutional...principle.'" U.S. v. Laureys, supra, 653 F.3d, 33.

**(c) A claim that a certain "approved" Judicial Branch instruction always misstates the law, at least when the claim is one of first impression, and the instruction at issue involves an applicable facet of Connecticut law of self defense, is independently reviewable under the criteria set out in State v. Golding, 213 Conn. 233 (1989)**

Pursuant to State v. Golding, supra, 213 Conn., 239-40, an unpreserved claim of error is still reviewable if it involves an issue of constitutional magnitude and if the record is adequate to review that claim. Id. "The record in the present case is adequate for [the Court's] review [of this claim] because" except for the individual voir dire of prospective jurors, which is not relevant to the defendant's claim of instructional error, "it contains the full transcript of the trial proceedings, and therefore satisfies the [adequate record] prong of Golding." See State v. Brewer, 283 Conn. 352, 358, 927 A.2d 825 (2007). The issue is of constitutional magnitude since "the fair opportunity to establish a defense 'is a fundamental element of due process of law[.]'" State v. Carter, 228 Conn. 412, 427, 636 A.2d 821 (1994), quoting Washington v. Texas, 388 U.S. 14, 19 (1967). Gen. Stat. § 53a-12(a) provides that "[w]hen a defense other than an affirmative defense, is raised at a trial, the state shall have the burden of disproving such defense beyond a reasonable doubt."

The defense of self-defense is codified in § 53a-19(a), which provides in relevant part that "a person is justified in using reasonable physical force upon another person to defend himself...from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." See id; see also State

v. Bryan, supra, 307 Conn., 832. Self-defense is not an affirmative defense under our statutes, id., 834; so the due process right to establish a defense "includes proper jury instructions on the elements of self defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified." State v. Miller, 186 Conn. 654, 660-61, 443 A.2d 906 (1982).

**(d) An implied waiver forestalling Golding or even plain error review pursuant to State v. Kitchens, 299 Conn. 447 (2011) cannot credibly be found if the claim is one of first impression asserting an "approved by the Judicial Branch" instruction always misstates Connecticut law**

In Kitchens, our state Supreme Court held that even if a claim of instructional error was of constitutional magnitude, if the record showed defense counsel had an adequate opportunity to consider the proposes instructions but failed to object or otherwise alert the trial court, then counsel would be seen as implicitly waiving the claim and so Golding review would be inappropriate. See Kitchens, 299 Conn., 482-83.

There is some "question" as to whether a claim of constitutional magnitude instructional error deemed waived pursuant to Kitchens still is "subject to plain error review." State v. Webster, 308 Conn. 43, 63-84, 60 A.3d 259 (2013) (Rogers, C.J., conc.); State v. Sanchez, 308 Conn. 64, 75, 60 A.3d 271 (2013) (noting "the question raised in recent cases regarding the application of the implied waiver doctrine to claims of plain error.")

The Kitchens bar cannot *credibly* be invoked if the issue is one of first impression as to a pattern instruction "approved by the judicial branch" itself, Bryan, supra, 307 Conn., 833-34. First, Kitchens depends on an implied waiver theory where counsel is presumed to have recognized the error now claimed. See id., 483. However, if the Judicial Branch itself did not recognize the error but instead approved and published it for ready use by trial courts and attorneys, it is difficult to see how trial counsel, "on the firing line in the courtroom," amidst "the hurly-burly circumstances of a trial[,]" Irving Younger, *Hearsay: A Practical Guide Through the Thicket* 7 (1988); would have any reason to look into whether the instruction always misstated the law. Just about the last thing a court of appeals

should expect out of a trial attorney is to go over very carefully an almost verbatim rendition of an approved Judicial Branch instruction.[6]

Also, applying Kitchens' implied waiver theory to such situations gets even further from credibility when reviewing courts themselves, such as the present Court, make statements like "we also conclude that the instruction was correct in law, following, almost verbatim, the instructions set forth in the Connecticut Criminal Jury Instructions [,]" State v. Channy Nee Khuth, supra, 111 Conn. App., 193 (emp. added), and like "We also note that the court's original and additional instructions...were correct in law, as it appears as though they were modeled on the instructions set forth in the Connecticut Criminal Jury Instructions." State v. Helmedach, supra, 125 Conn. App., 136 (emp. added).

Also, no defense lawyer in her right mind who identified a wrong in the law instruction coming from an approved Judicial Branch instruction and that appeared to be an issue of first impression would choose to still say nothing to the trial court about it but keep it in reserve to be sprung later at the appellate level, relying instead on getting review under a rather oxymoronic sounding "case of first impression but plain error" theory.

As far as Golding review in particular, apart from the specific argument in the paragraph above about first impression but plain error, the other arguments apply as to why no implied waiver can credibly be found in cases of first impression relating to wrong in the law claims as to approved Judicial branch instructions. A further argument about why the Kitchens implied waiver theory is invalid as to instructional error Golding claims now stems from the very existence of the Kitchens opinion itself. The Kitchens opinion was officially released albeit "as a slip opinion," on January 5, 2011. See id., 299 Conn., 447. This "is the operative date for all substantive and procedural purposes." Ibid.

So, at least by a few months after Kitchens was officially released in January 2011,

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[6] See Kitchens, supra, 299 Conn., 521 (Katz, J., dis.) ("we do not expect any attorney, especially trial attorneys working under the pressure and intensity of an ongoing trial, to perform flawlessly. We must also recognize that appellate attorneys, with the benefit of time and hindsight, are often able to identify errors inadvertently missed by trial counsel").

criminal defense practitioners are reasonably seen as becoming aware of what would happen if they knowingly sit on a constitutional magnitude instructional error claim in hopes of later Golding review where the record showed an adequate opportunity to review in advance the proposed instructions: no Golding review. The evidentiary part of the defendant's trial began almost eleven months after Kitchens.[7] See Record at __.

*Logically,* Kitchens *now undermines its own driving rationale.* Counsel will be "deemed" to recognize if she thinks a claim of error can prevent her client's conviction, holding back can easily result in lengthy imprisonment when instead her client might be back home, with the criminal charges behind her. See Kitchens, 299 Conn., 548 (Palmer, J., dis.); cf. Com. ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971) (Bell, C.J., dis.) ("common knowledge that many prisons are greatly overcrowded and provide deplorable living conditions, and many prisoners live in fear of dangerous inmates.").

On top of a criminal defense practitioner's presumed knowledge of the Kitchens opinion and what it would mean to her client if that attorney held back claiming at trial a constitutional instructional error, Kitchens itself firmly states that in determining if the Kitchens bar to Golding review applies, "[s]uch a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." Kitchens, supra, 299 Conn. 482-83 (emp. added)..

Accordingly, our state Supreme Court has noted "that in every post-Kitchens case in which defense counsel was given the opportunity to review the proposed jury instructions overnight, we have concluded that defense counsel had received a meaningful opportunity to review the proposed instructions under the Kitchens test." State v. Webster,

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[7] While "in the 'real word'" it may not be "that every busy practicing attorney keeps abreast of every single one of this Court's [or our state Supreme Court's or U.S. Supreme Court's] decisions," see Green v. Bock Laundry Machine Co., 490 U.S. 504, 534 (1989) (Blackmun, J., dis.); "practitioners have an obligation to keep abreast of current changes in the law" at least as to the area of law they practice within. State v. Traeger, 130 N.M. 618, 626, 29 P.3d 518 (2001) (internal quotation marks omitted); Rules of Prof'l Conduct 1.1(2013) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge...reasonably necessary for the representation.").

supra, 308 Conn., 63 (citations omitted). So, barring extenuating circumstances, the temporal component of a meaningful opportunity to review proposed instructions under Kitchens is satisfied by an "overnight" opportunity. Webster, supra, 308 Conn., 63.

Kitchens itself states that "[t]he significance of a meaningful opportunity for review and comment cannot be underestimated." Id., 299 Conn., 495 n. 28. "Holding an on-the-record charge conference, and even providing counsel with an advance copy of the instructions, will not necessarily be sufficient in all cases to constitute waiver of Golding review if defense counsel has not been afforded adequate time, under the circumstances, to examine the instructions and to identify any potential flaws." Ibid. (emphasis added).

So, for example, where "the record indicates that the charging conference lasted only approximately eight minutes [and] [t]here is also no indication on the record that the trial court provided the defendant with an advance copy of the charge[,]" defense counsel could not be said to have had a meaningful opportunity to review the proposed instructions, especially when the record did not indicate whether the proposed instructions relating to the claimed impropriety were discussed or not. State v. Baptiste, 302 Conn. 46, 55, 23 A.3d 1233 (2011); see also State v. Collins, 299 Conn. 567, 597-98, 10 A.3d 1005 (2011) ("there is no indication on the record that the trial court provided the defendant with an advance copy of the proposed jury charge. Thus, although the trial court's summary of the conference indicates that one of the topics discussed...related to the topic of the instructions now challenged on appeal, we cannot say with certainty whether the defendant had a meaningful opportunity to review the written instruction itself and to challenge any objectionable language therein. Thus, we decline to find this claim implicitly waived under *Kitchens*, and will review its merits pursuant to Golding."), cert. denied, U.S. , 132 S. Ct. 314 (2011); State v. Brown, 299 Conn. 640, 659, 11 A.3d 663 (2011) ("we have no record of the charging conference or copy of the court's intended charge").

A record satisfying the temporal prong of "meaningful opportunity" to identify flaws in proposed jury instructions is crucial to allowing the Court to "reasonably conclude that

counsel was aware in advance of the instructional deficiency...." Baptiste, supra, 302 Conn., 57 (quoting Brown, supra). If what is at issue is an omission in the proposed instructions from what the approved *Instructions* state, overnight review with a written copy would under Kitchens easily meet the temporal prong. Webster, supra, 308 Conn., 63. Cf. *Big First Grade Workbook* 4 (School Zone Pub. Co. 2013) ("Rocking Robots...Compare Pictures A and B. Circle 9 things that are different in Picture B.").

Likewise, if what is at issue is an omission or inclusion in the proposed instructions of one from the approved *Instructions*, overnight review with a copy of the proposed instructions in hand would under Kitchens meet, albeit perhaps not as easily, the temporal prong of the "meaningful opportunity" standard. Cf. *Big First Grade Workbook*, supra.

When the claim of error is an issue no Connecticut court has yet announced it was presented with, a written copy of the proposed instructions and overnight to consider them by a lawyer in the midst of a trial is on a different footing; this is no matching or notice-the-difference exercise, and nothing within Connecticut jurisprudence suggests counsel go further. A reviewing court cannot *reasonably* conclude that nonetheless, counsel should somehow perceive an error that up to then no one else "said 'boo' about[.]" Cf. Zambrano v. Reinert, 291 F.3d 964, 971 (7th Cir. 2002) (Easterbrook, J., conc.).

A case of first impression means that *the entire Connecticut criminal defense bar,* having at least *years* for at least some member to consider it, has up to now not said a peep about the issue.[8] A case of first impression involving a wrong on the law claim as to an approved Judicial Branch instruction means that the entire Connecticut criminal

[8] Even if a member of the Connecticut criminal defense bar had in fact raised the claim at issue but the reviewing court had left it an open question, expecting trial counsel, given an overnight to look over and consider all of the other proposed instructions, in light of counsel's knowing the jury will be, as usual, "doused with a kettleful of law during the charge that would make a third-year law-student blanch[,]"Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 64 (2d Cir.) (Frank, J.) (quoting Curtis Bok, *I, Too, Nicodemus* (1946)), cert. denied, 335 U.S. 816 (1948); and not only recall the question, its being open, and look into whether he or she should raise it and on what authority, is unrealistic; Kitchens waiver when there has been "overnight" consideration implies a reasonable conclusion that trial counsel identified a potential error based on *existing* law.

defense bar *and* "the experienced trial judges who comprise the judicial branch criminal jury instruction committee[,]" State v. Medrano, supra, 308 Conn.,649 (Norcott, J., concurring) have never said a word about the instruction misstating the law, even over the course of several or more years. It does not make any difference, then, if the trial attorney was given a copy of the proposed instructions and if she was given overnight to consider them; Kitchens involves trial attorneys in the middle of a trial; first impression cases mean no one from the Connecticut criminal defense bar, including appellate practitioners, had ever said anything about the issue now being raised; and first impression cases involving an approved Judicial Branch instruction means a whole committee of experienced trial judges judge which okayed the instruction in the first place saw nothing wrong.

So, on a temporal basis alone, even if trial counsel did have a copy of the proposed instructions, or its functional equivalent, and also had even longer than overnight to consider the instruction the defendant now complains about, the Court could still not reasonably conclude that the temporal prong of the "meaningful opportunity" standard emphasized in Kitchens was met. Cf. Stephanie B. Goldberg, *The Ethics of Billing: A Roundtable*, 77 A.B.A. J. 56, 59 (1991) ("'We're assuming you spent a lot of time initially because it was a case of first impression or you were unfamiliar with the problem.'").

**(e) Even if the defendant was not making a first impression claim and it did not involve an instruction already approved by the Judicial Branch, the record still would not show the "meaningful opportunity" for counsel's review of the proposed instructions that Kitchens waiver requires**

Evidence was presented November 1, 2, 3 and 4, 2010, and closing arguments and jury instructions were on November 7. On the next to the last day of evidence, November 3, after that day's last witness testified and the jury sent home, the court asking them to "hope that I have power when I get home[,]"[9] the court then stated "[n]ow, counsel, remember any suggested instructions are tomorrow." 11/3T 183. The next day, the last day of evidence, with the jury excused while a motion for acquittal was raised again, which was

[9] See Elizabeth Harris, *Thousands Still Without Power in Connecticut*, N.Y. Times, Nov. 5, 2011 at _ (millions in state and region left powerless by recent "bizarre" fall snowstorm).

again denied, the court stated "we might as well call the jury back out, excuse them for the day, and then counsel can meet me in chambers in about ten minutes or so." 11/4T 170. Then, after the jury was excused for the day, and court adjourned "til Monday[,] November 7, the court reminded the attorneys "[a]nd, counsel, ten minutes." 11/4T 171.

On Monday, November 7, before the jury was brought in for closing arguments, the State asked if it could "just make a record with respect to one thing on the instructions before we go forward....Just what we have discussed in chambers with respect to the instruction that had been requested by the State." The trial court then responded "All right. Well, why don't you wait until we -- we're in the instruction period 'cause I don't plan on seeing the instructions done before lunch. So we'll do it right...before[.]" 11/7T 2-3. The court was not referring to charging the jury before lunch; it later stated "That concludes the argument and we still have the instruction. I'm going to release you for lunch early today. I'm going to have you come back at quarter of two and we'll begin the instruction at 1:45." Soon after, "the jury panel [then] exit[ed] the courtroom." 11/7T 49-50; A22-A23. So, even then, the instructions the trial court planned on giving were still not as yet "done...." Id.

On top of that, after the jury exited the courtroom, the court then stated "1:45" and the prosecutor said "Thank you" and the court cautioned "Make sure you all are present timely." The transcript then notes that the court then "took its luncheon recess" and after the luncheon recess, proceedings resumed with a brief discussion about a 911 tape, the jury reentered the courtroom and the court began its charge. 11/7T 50-51; A23-A24.

So the record does not show that between when closing arguments concluded and the luncheon break concluded, there was any discussion in chambers or in the courtroom about the instructions that the court proposed to give. In fact, it shows that *no such discussion took place* during that time even though this was the time period in which the court was making a final determination of its instructions to the jury. See 11/7T 3, 49-51.

The record does reflect that in the chambers conference on November 4, a possible instruction on the law of self defense in mutual combat situations, as "requested

by the State[,]" might or might not be given; that, however worded or adverted to in "the instruction that had been requested by the State[,]", the trial court might decide to omit a mutual combat instruction entirely. On the morning of November 7, right after the court noted that it did not expect to have the instructions which it intended to give "done" in the sense of figured out and/or composed, until after closing arguments but before the luncheon break was over, 11/7T 3, 49-51; the State asked if the trial court had as yet decided whether to give a combat by agreement instruction, since it wanted to tailor its closing argument in light of the law which the court would instruct the jury upon. While there was a discussion at least at that time, right before closing arguments, on the law of self defense in mutual combat situations, see 11/7T 3-6, it was clear that from the time that combat by agreement had been discussed in chambers on November 4 to the time that combat by agreement was discussed in the courtroom on November 7, *neither defense counsel nor the State was in a position* "to know ahead of time...if the [c]ourt [was] inclined to provide an instruction on combat by agreement" *at all*, let alone "what conclusions [the jury could] draw if they, in fact, find that occurred," See 11/7T 3.

Moreover, *a criminal defense attorney ordinarily does not want an instruction on a limitation to the law of self defense* which, if the State can prove beyond a reasonable doubt, makes it easier for the State to dispose of her client's self defense claim. "*A defendant has no burden to disprove the limitations and, consequently, no burden [nor incentive] to submit instructions on them.*" State v. Freeman, 109 Ore. App. 472, 476, 820 P.2d 37 (1991) (emphasis added). To expect defense counsel to pore over the law of combat by agreement when an instruction on combat by agreement might not be given at all, when the absence of such instruction would make it harder for the State to prove guilt, not easier, see id.; and when the instruction which if given would likely then mirror the instruction on combat by agreement already "approved by the Judicial Branch[,]" State v. Bryan, supra, 307 Conn., 833; which the record in fact indicates was either the instruction the State had requested verbatim or one which mirrored it, see 11/7T 3-4, (and leaving

aside the case of first impression factor); when, instead of perhaps wasting all that time and effort, defense counsel could, among many other things which needed to be done, use that time and effort for example on going over the evidence and what she might reasonably expect or know *would* be given as to the instructions to the jury on any other matters, so as to hone her closing argument, "the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt[,]" Herring v. New York, 422 U.S. 853, 862 (1975); is simply unrealistic. See Kitchens, supra, 299 Conn., 483 (implied waiver of a claim otherwise reviewable under Golding "must be based on a close examination of the record and the particular facts and circumstances of each case.").

Beyond that, the temporal prong of the "meaningful opportunity" for review was not satisfied, because that clock starts ticking only once the trial court decides and states what instructions it thinks it should give. See Kitchens, supra, 299 Conn., 482-83.

> [W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal.

Id. In the present case, the record shows the court right up until sometime after closing arguments began had not decided if it would give *any* instruction on combat by agreement, indicating it would not be deciding this until sometime during the luncheon break, let alone stating its decision during that break, the record showing that the next time the court expected to see the attorneys was "1:45" at the end of the luncheon break, the exact time that the jury was expected to be ready to be summoned into the courtroom in order to hear the instructions which the court had decided to give. 11/7T 3-6, 49-51. This left the temporal prong of the Kitchens meaningful opportunity for review standard wholly unmet.

Another reason the "meaningful opportunity" standard is not met under the circumstances of the present case, see Kitchens, supra, 483, is because the temporal component problem is further aggravated by the fact the record does not show defense coun-

sel ever had a written copy of the instructions that the court intended to give. There is no reference to counsel having been provided with any such document. See 11/4T 171; 11/7T 3-6, 49-51. The only reference to something being in writing is apparent reference to a print-out or photocopy of that part of the approved *Criminal Jury Instructions* dealing with combat by agreement the prosecutor brought with her in trying to resolve before closing argument whether the court would so instruct. § 2.8-2. See 11/7T 4-6. Even with a "well established" principle of law, without a record showing that the defendant had an advance copy of the instructions the trial court intended to give, in the very language the trial court framed them, the Court "cannot reasonably conclude that counsel was aware in advance of the instructional deficiency...." State v. Brown, supra, 299 Conn., 659.

**Standard of review:** "[T]he correctness of a statement of law in a jury instruction is a matter of law and reviewed *de novo*...." Freudeman v. Landing of Canton, 702 F.3d 318, 325 (6th Cir. 2012); see also U.S. v. Olofson, 563 F.2d. 652, 656 (7th Cir. 2009).

**Argument: (A) The adversary in a combat by agreement does not actually have to have escalated the combat from mere use of physical force to actual use or imminent use of deadly force and the defendant does not have to actually know this is occurring but only actually and reasonably believe it**

Under the common law, if a defendant and her adversary have agreed to engage in combat involving just physical force, like a fistfight, but when they reach the place of combat, the adversary "manifest[s] [an] intention" to use a deadly weapon, the defendant, if there is adequate time, must decline the offer to escalate, and, if possible, "seek[] to withdraw...." But "[i]f the [adversary] should insist upon having a deadly fight, the other party in good faith declines to enter into it, seeks to withdraw from it, [s]he may then stand upon [her] defense and justifiably use whatever force may be necessary to protect [her]self." Anthony v. State, 62 Tex. Crim. 138, 172, 136 S.W. 1097 (Tex. Crim. App. 1911) (quoting Barton v. State, 96 Ga. 435, 436-37, 23 S.E. 827 (1895)). This, of course, implies that the defendant at least actually had the time to decline to enter into deadly force combat and had the time to seek to withdraw before using deadly force. See id.

"If the actors are engaged in mutual combat *both* are employing aggressive, rather than defensive force, and *neither* actor's conduct is necessary to his defense and is, for that reason, unjustified." 2 Paul H. Robinson, *Criminal Law Defenses* § 132 at 99 & n. 6 (1984) (emphasis added). "Such an agreement, in effect, presupposes that the participants are mutual aggressors." People v. Beasley, 778 P.2d 304, 307 (Colo. App. 1989).

The combat by agreement situation is thus distinguishable from where one actor is the initial aggressor and the other never agreed to use of physical force but uses physical force in self defense. See Robinson, *Criminal Law Defenses*, § 123(a) at 33-34. But "[t]he first person to use physical force is not necessarily the initial aggressor[.]" State v. Singleton, 292 Conn. 734, 763, 974 A.2d 679 (2009) (internal quotation marks omitted).

"[T]he initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person[.]" Id. If it turns out the defendant was the initial aggressor, using or imminently threatening use of physical force, but then the other party uses or imminently threatens use of *deadly* physical force, Singleton's interpretation of Gen. Stat. § 53a-19 is that the defendant as initial aggressor does not gain a right to deadly force self defense even then unless he "withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of [deadly] physical force...." See id., 765 (bracketed text added) (quoting § 53a-19(c). "The language of the statute is plain and unambiguous, and provides that the initial aggressor is justified in using physical force *only* if he withdraws from the encounter and certain other conditions are satisfied. It does not provide, or suggest, that an initial aggressor who uses nondeadly force is justified in using deadly force to repel the victim's unlawful escalation of force to the deadly level." Ibid. (emp. in original).

It is not, however, that the person who responds to an initial aggressor's use or imminent use of physical force by escalating the encounter with her own use of imminent use of deadly physical force is doing something legal under Connecticut law, such as acting in

deadly force self defense. Far from it. "Of course, a [person] who acts as an initial aggressor or as a person who responds with excessive force is not entitled to the protection of the defense of justification." Daniel v. Commissioner of Correction, 57 Conn. App. 651, 676, 751 A.2d 398 (2000) (emp. added). So, if *A* as an initial aggressor takes a punch at *B*, what A is doing is criminal (usually or often at most *a class A misdemeanor*)[10] and B has a self defense right to punch back. If *A* as an initial aggressor takes a punch at *B*, *B* has no self defense right to try slicing *A* with a box cutter; *what B is now doing makes B a criminal, too,* and usually a much worse one, like a *class B felon,*[11] but *A,* the misdemeanant, as initial physical force aggressor but not the initial deadly force aggressor, who is *B, the felon*, must still withdraw, among other things, before she can use deadly force in self defense. See Singleton, supra, 292 Conn., 765; Daniel, supra, 57 Conn. App., 676. This makes sense only if, to start with, *A* can withdraw and knows it

'Connecticut is among a minority of jurisdictions...that has followed the position advanced by the Model Penal Code that, before using deadly force in self-defense, an individual must retreat. Retreat is required, however, only if it can be achieved with complete safety. The underlying policy of the duty to retreat is that *the protection of human life has a higher place in the scheme of social values than the value that inheres in standing up to an aggression*. 2 P. Robinson, *Criminal Law Defenses* [, supra,] § 131 (d), pp. 84-85." State v. Anderson, 227 Conn. 518, 530, 631 A.2d 1149 (1993) (emp. added).

Connecticut's "underlying policy of...the protection of human life" would be wholly disserved if a misdemeanant initial aggressor could not defend herself against a felonious and quite possibly murderous counter-attack when she could not in fact withdraw from that felonious and quite possibly murderous counterattack. See id. Both "reason and logic" support the proposition that even though *A* as initial misdemeanant aggressor still has a

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[10] Third degree assault includes intending to cause physical injury to another person and causing such injury or to a third person. Gen. Stat. § 53a-61(a)(1); see § 53a-61(b).

[11] Gen. Stat. §§ 53a-59(a)(1): intending to cause serious physical injury to another and causing it "by means of a deadly weapon or a dangerous instrument[.]" See § 53a-59(b).

duty to withdraw from *B's* felonious and quite possibly murderous counter-attack before *A* is justified in using deadly force in her own defense, "[i]f the original assailant [i.e., *A*, the misdemeanant initial aggressor] is unable to retreat to a place of safety or there is no place of safety available, then [s]he may use whatever force necessary to repel the counterattack" by *B,* who has now introduced felonious deadly force into the encounter. Tipton v. State, 1 Md. App. 556, 562, 232 A.2d 289 (1967).

This presupposes that *A*, the misdemeanant initial aggressor, actually *knows* she can retreat to a place of safety. See id. If *A*, the misdemeanant initial aggressor, does not in fact know that she can retreat to a place of safety, and *at least if her lack of knowledge is a reasonable one*, she is in at least a closely approximate position to a misdemeanant initial aggressor faced with a deadly counterattack but with nowhere to go safely. If there is a duty to retreat when the defendant knows that he can so with complete safety, even though the reasonable person standard incorrectly states the law, his lack of knowledge would obviously be excused if a reasonable person would not know that he could retreat with complete safety, either. Cf. State v. Ash, 231 Conn. 484, 495, 651 A.2d 247 (1994).

Scenarios occur where a misdemeanant initial aggressor, with the withdrawal to safety requirement aside (she withdraws or is unable to do so or a reasonable person would not know she could withdraw, either), is faced with what someone in the misdemeanant initial aggressor's situation would *reasonably believe* was a deadly physical force counterattack. Under the common law, the misdemeanant initial aggressor did not have to actually know that he was being counter-attacked with deadly force; it was enough that the other party, "in his turn, in a manner disproportioned to the character of the assault, put in jeopardy, or on reasonable grounds appeared to do so, the life of the [misdemeanant] assailant," so as not to deprive the misdemeanant initial aggressor of his right to use deadly physical force in self defense. Irvine v. State, 104 Tenn. 132, 149, 56 S.W. 845 (Tenn. 1899) (emp. added). So whatever else was required of a misdemeanant initial aggressor under the common law, he did not have to actually be correct that he was facing a

deadly force counter-attack, that is, he did not have to *know* he was being counter-attacked with deadly force; it was enough that he had "reasonable grounds" to believe this was happening. Irvine, supra, 104 Tenn. at 149, 56 S.W. 845.[12] Cf. Bracewell v. State, 243 Ga. App. 792, 796, 534 S.E.2d 494 (2000) (noting that 1968 revision to the criminal code, which includes a withdrawal provision in "mutual combat" situations to raise self defense, "which traces at least as far back as...1833[,]" now rejects stating an "absolute necessity" standard for deadly force self defense in mutual combat situations and emphasizes the "reasonable belief" standard as to use of deadly force).

That being the case, *the* initial misdemeanant aggressor not being held to an actual knowledge standard as to the other party, innocent up to then, using or about to use deadly force in response, but rather to a reasonable belief standard, see id., there would be less reason to impose a knowledge rather than reasonable belief standard on a misdemeanant initial aggressor as to the other party's non-innocent use or imminent use of force, as to its being deadly or not, when the other party had agreed to also be a misdemeanant initial aggressor, i.e., the combat by agreement situation.

The authority cited by the *Criminal Jury Instructions* for the mutual combat instruction stating "if you further find that its terms *were violated* by [the complainant or decedent] and that (his/her) conduct toward the defendant *was* in violation of their agreement, and further that the defendant *knew* of such violation[,]" § 2.8-2C (emp. added) comes from a footnote citation to State v. Abraham, 84 Conn. App. 551, 558, 854 A.2d 89, cert. denied, 271 Conn. 938, 861 A.2d 514 (2004). A look at Abraham, however, reveals the defendant there was not raising any even similar claim to that raised here, and the Court in Abraham was merely repeating what the trial court in that case thought was

[12] "On the other hand,...where the assailant, by the violence or fierceness of the attack, put the assailed party in danger of felony to life or limb, or gave him reasonable ground to suppose that he was in such danger, then the latter had a right to [use deadly force]..., and the former could not [use deadly force] in his own defense, unless he had first withdrawn from the combat, and by word or deed given the assailed notice of such withdrawal." Id., 149-50.

an appropriate statement of law, and contains no authority for the correctness of these assertions. See State v. Abraham, supra, 84 Conn. App., 557-58.[13]

One of the leading authorities on criminal law defenses, if not *the* leading authority, observes that "[w]ith respect to the provision of justification rules, a low-scoring [penal] code may err in either direction. Some codes fail entirely to provide any justification rules. Others provide rules that are so complex as to make their practical application impossible, hence - in terms of notice and behavior modification - nearly as bad as providing no rule at all. In the latter category fall such states as...Connecticut." *See* Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes,* 95 Nw. U. L. Rev. 1, 32 (2000) (emphasis added). Citing Gen. Stat. § 53a-19, our self-defense statute, Prof. Robinson observes that "[i]t seems unrealistic to think that such provisions could give real guidance to a person caught in a self-defense situation." Id., 33 & n. 85. The trial court itself observed similarly, stating "the self defense...analysis is a very tough way to succeed. The law in the State of Connecticut, it's not what people think out on the street corner....There's a multitude of steps that the law requires that needs to be done before the defense of self defense can be satisfied." 4/26T 33.

It would be challenging enough under these circumstances to formulate instructions to layperson jurors which accurately and understandably communicated Connecticut law of self defense. But if the Judicial Branch is going to approve and promulgate instructions for the guidance and assistance of its trial courts, it needs to own up when it recommends a heretofore unchallenged instruction which in fact misstates the law.

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[13] Abraham claimed the charge implied that if his friend or acquaintance, Bailey and the victim had agreed to a fist fight, anyone who intervened to prevent one of the combatants from being injured or killed would not be able to claim defense of a third party. He further claimed that because there was no evidence he was a participant in the combat between the victim and Bailey, the charge misled and confused the jury on the interaction between the doctrines of combat by agreement and defense of a third party. Id., 559. He also claimed the instruction violated his state constitutional right to carry a firearm for his defense "pursuant to article first, § 15, of the constitution of Connecticut." Ibid., 560. He finally argued "that 'under the common law, the fact that a defendant arms himself after an altercation with an aggressor is consistent with self-defense.'" Ibid., 561.

### (B) The State cannot show that the error was harmless

There was evidence to infer a combat by agreement. See, e.g., 11/1T 129 (McCrea); 11/4T 92 (defendant). Under the instructions as given, the State could obtain the defendant's conviction if it could convince the jurors either Lawanda McCrea had not in fact been violating the terms of the agreement to engage in combat with the defendant, or that the defendant did not really know that McCrea was doing so. See 11/7T 82.

This was a far, far easier burden for the State than if it had to disprove beyond a reasonable doubt that a reasonable person in the defendant's circumstances would have believed that McCrea was violating the terms of the mutual combat agreement and that the defendant had actually believed this. Cf. State v. Ash, supra, 231 Conn., 496 ("the trial court,...at worst, suggested to the jury that it could reject the defendant's claim of self-defense if it found he could have perceived, but did not actually know, that he could have avoided using deadly physical force in complete safety by retreating.").

Since the State at the time of having to give its closing argument did not know whether the court would be instructing on the law of mutual combat, see 11/7T 3-7, it is not surprising that specific mention of the evidence in terms of the exception to the limitation on self defense in combat by agreement situations was not present in the State's closing argument. However, the State argued to the jury that it took "some stretch of the imagination" for the jury to "think that Lawanda McCrea may have had a weapon," 11/7T 18; and "that this defendant was never at any time justified in using deadly physical force in this consensual fight with Lawanda Murdock." Id. After defense counsel argued that "Latasha saw a green box cutter, a lime green box cutter, with a black piece on the handle at her – coming at her face[,]" 11/7T 23, the State in rebuttal argued that Jessica Pugh did not really like McCrea, but even so, Pugh had testified that she did not see McCrea with a weapon. 11/7T 38. The State argued that "considering all the evidence from the State's witnesses, the State would submit that what occurred here is essentially a consensual

fight of two women beefing over things that are not perhaps in your view significant of a fist fight and [only] one of those women coming to the fight with a blade." 11/7T 39.

The State spent considerable time in arguing the defendant did not really see a weapon in Lawanda McCrea's hand. See, e.g., 11/7T 43 ("she puts a weapon in Lawanda Murdock's hand, didn't understand [the law of] self-defense then, does now. She has Lawanda Murdock charging at her so that there is clearly no time to retreat and she indicates now she's faced with deadly force and, coincidently, she's ready for it."); id., 48 ('there never really was a knife"). The cross-examination of the defendant was along similar lines, See, e.g., 11/4T 147-48 ("and at this point in time, you realize there's *definitely* a blade in her hand?"). This would obviously feed into the later instruction by the court to the effect that if McCrea was not as a matter of fact escalating their agreement to have a fistfight by McCrea's actually using or being about to use deadly force, or if the defendant did not really know this, her self defense claim must fail. See 11/7T 83; A34.

Also, the evidence is not even strong that the defendant had not at least thought that she had seen a box cutter or a sharp or shiny object in McCrea's hand. The evidence was that McCrea had been stabbed one time, although the wound was a relatively deep one, with the wound extending just past the chest wall. 11/2T 64-79 (trauma surgeon Gary Kaml, M.D.). The defendant testified and acknowledged that she had, indeed, stabbed McCrea, with the small steak knife that she, the defendant kept as a matter of course in a pocket of the uniform scrubs she wore to work at a nursing and rehabilitation center, where she used it to open boxes of diapers and that she kept in that uniform pocket when going to and from work in case she needed it to protect herself when going to and from the parking lot, often in the dark, in back of the nursing center and to and from wherever she could find a parking spot for her vehicle on the street and her home, 11/4T 83, 112-14, 137-39; in what New Haven Police Officer Dwayne Biros testified was a "[c]rime ridden

area" with "[a] lot of activity. Very busy. A lot of calls for service." 11/2T 5. The evidence was that because of the acrimony and number of family and friends of McCrea at the building where both the defendant and McCrea lived, the defendant had first departed the scone on arriving home from work, but then returned, since, among other things, her children were upstairs with her "goddaughter" as babysitter. See, e.g., 11/4T 11; 134-37

The defendant testified she saw State's witness Jessica Pugh hand McCrea "something lime green,...like a lime green fluorescent color." 11/4T 108-09. The defendant's cousin, Tiny Lester, testified that she herself had seen "Lawanda and her cousin [i.e., Pugh] kind of doing, like, a hand-to-hand sort of action when they were standing on the porch." 11/4T 2-11. James Turner testified that as soon as the defendant got to the gate in front of the building, "Lawanda rushes off the porch, runs down the stairs, charged full force, and runs up to Tasha. All I could see is *Tasha backing up and almost falling up against the car*" behind her at the curb, 11/3T 144-45; that "when Lawanda ran off the porch and charged her and *she [the defendant] almost fell, it was the vehicle that braced her.* There was -- it was a vehicle behind her." 11/7T 149. Tiny Lester testified that the defendant "kind of *backed up to get away*" but was not able to do so. 11/4T 16. although the defendant had managed to get from "directly in front of their house" over to "the next door neighbor's yard or walkway." 11/7T 45. Lester testified the defendant was initially beside one of the wheels of the car behind her at the curb and backed up to the sidewalk facing the edge of the porch of the house next door. 11/7T 49. The defendant testified that "[t]he way [McCrea] charged me,...pretty much tripped me back" against the car "behind us" and "I fell back into [i.e., against] the car" and her pocketbook fell to the ground and "I couldn't get away" so "that's when I retrieved back to protect myself." 11/4T 124.

The stabbing and run up to it occurred Memorial Day weekend, at night, about 1:30 a.m. James Turner, a resident of the building, testified he was on the porch when the defendant came home late on May 30 or very early May 31"exhausted" from working all day. He also testified that in their neighborhood, it was a topic of discussion every time McCrea

"came out of jail" again and McCrea had a reputation in the community of being "[a] manipulator, fraud....She will fight" and that sometime before the incident he had discussed with the defendant "that Lawanda McCrea was violent[.]" 11/3T 123-32. Tiny Lester, the defendant's cousin, who had also just worked a double shift, testified she saw McCrea yell at the defendant she was a fat bitch ("a fat B") and come "running out of the gate screaming and swinging at the defendant in a what looked to her as a "slashing" motion and "it looked like something sharp in her hands," 11/4T 3-16; and the whole episode, including the run up, was rampantly chaotic. For example, State's witness Jessica Pugh testified *"I was scared the whole night."* 11/1T 113. Merwin Wade, the director of a "sober house" occupying part of the building, testified he saw McCrea charge off the porch and confront the defendant and after exchanging insults, "both hands of each party started heading toward each other." 11/3T 17. David Kennedy, a resident of the building, testified he had fetched Wade, the landlord or acting one, to "come take care of this mess that's out here" and that "there was a lot of people out there and,...it was a lot going on." 11/2T 116-29. Police Officer Dwayne Biros called it "[a] *real chaotic* situation[,]" 11/2T 4; and Turner testified it was already so chaotic *before the stabbing* "[t]here's a daycare next door and the people that run [it] even came outside" even though it was past 1:00 a.m. 11/3T 134.

Lester testified to seeing "something sharp" in McCrea's hands, 11/4T 16; did the defendant 11/4T 114 ("I seen the sharpness come at me"); and the evidence showed McCrea went back on the porch amidst relatives after being stabbed. See, e.g., 11/!T 101-06 (McCrea). With this as just a sample of the evidence in the case, and even without factoring in that the trial judge, with experience "in the criminal justice system for the past thirty years" stated to the defendant for the record that "I found *everything* that you said to be credible, I think the jury did too[,]" 4/26T 34, a mistake like the jury being instructed that the defendant's self defense claim must fail if the State could either disprove McCrea had *actually* used or imminently threatened deadly force or if the State could disprove that the defendant had *known* McCrea was doing this, could not have been harmless.

**II. INSTRUCTING, AS THE PATTERN INSTRUCTIONS STATE, THAT "YOU MUST ASK...SIMPLY AS A MATTER OF FACT WHETHER THE DEFENDANT ACTUALLY, THAT IS HONESTLY AND SINCERELY, ENTERTAINED THE BELIEF IN QUESTION WHEN SHE ACTED AS SHE DID" AS TO ANY OF THE SELF-DEFENSE FACTORS REQUIRING HER ACTUAL BELIEF (11/7T 77), SUCH AS HAD "SHE ACTUALLY, THAT IS HONESTLY AND SINCERELY, BELIEVED THAT THE OTHER PERSON WAS USING OR ABOUT TO USE PHYSICAL FORCE AGAINST HER[?]" (11/7T 79); HAD "SHE ACTUALLY, THAT IS HONESTLY AND SINCERELY, BELIEVED THAT THE DEGREE OF FORCE SHE USED WAS NECESSARY" TO DEFEND HERSELF[?]" (11/7T 80-81); THAT "YOU MUST FIND THAT THE DEFENDANT DID NOT ACT IN SELF-DEFENSE IF YOU FIND" THAT HER ACTUAL BELIEF THAT THE DEGREE OF FORCE SHE USED WAS NECESSARY TO DEFEND HERSELF WAS NOT "AN HONEST AND SINCERE BELIEF" (SEE 11/7T 84-85), WAS REVERSIBLE ERROR**

**Specific facts:** These are direct quotes, except the last part stated in pertinent part: "You must find that the defendant did not act in self-defense if you find any of the following:...that the State has proved beyond a reasonable doubt that the defendant used physical force to defend herself against Lawanda McCrea and she did not actually believe that the degree of force she used was necessary for that purpose. Here, again as with the first requirement, the actual belief is an honest and sincere belief." 11/7T 84-85; A35-A36.

The court repeatedly emphasized what it was talking about on the requirement that any actual belief must be an "honest and sincere belief" was *not* just another way of saying it had to be "reasonable" one. Instead, the court repeatedly, after describing *the law's* "actual belief" as requiring an "honest and sincere belief" then went on to state as another requirement of the law that any such "honest and sincere" actual belief *also* be a reasonable one. See 11/7T 77; A28 (prefacing self defense instructions by noting law comprised of a "subjective" actual belief standard and an "objective" reasonable belief standard; id. (instructing that "[a] defendant cannot justifiably act on her actual belief however honestly or sincerely she held it if that belief would not have been shared by a reasonable person in [her] circumstances"); see also 117T 79-81; A30-A32; 11/7T 84-85; A35-A36.

This language about an "actual" belief of the defendant having to be an "honest and sincere" belief *did not come* from Gen. Stat. § 53a-19, which merely incorporates the actual belief requirement and the reasonable belief requirement into the term "what he reasonably believes". See id. Instead, and echoing the first claim of error, this "actual

belief" means an "honest and sincere" belief language comes from the already "approved by the Judicial Branch" pattern instructions on self defense. See, generally, Bryan, supra, 307 Conn., 833-34; *Criminal Jury Instructions*, supra, § 2.8-1; A3-A5.[14]

**Nature of claims:** All this repeated verbiage about an "actual belief" on the defendant's part having to an "honest and sincere belief" inserted a requirement that is nowhere found in the self defense statute, Gen. Stat. § 53a-19, but which thus gave the State one more way to disprove the defendant's claim of self defense on *any* of the several elements involved in this case, such as that while the defendant may actually have believed that Lawanda McCrea was using or imminently about to use deadly force, the defendant's actual belief was not an honest and sincere one; or that while the defendant may actually have believed that she needed to use deadly physical force in defending herself, the defendant's belief was not an honest and sincere belief.

The defendant claims the instruction was thus wrong on the law on at least two of the crucial elements of self defense, let alone any carryover effect it may have had as well as to any other element, limitation or exception to a limitation, such as the attempt to withdraw requirement in combat by agreement situations. She further claims that by giving the State another but legally unauthorized way to disprove her claim of self defense, the error was in derogation of her right to present a defense, as guaranteed by the federal and state constitutions, U.S. Const., amend XIV; Conn. Const., art. I, §§ 8, 9.

**Reviewability:** The defendant asserts that review is appropriate under both the

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[14] "The first question you must ask is, simply, as a matter of fact, whether the defendant actually – that is, honestly and sincerely – entertained the belief in question..."); id. ("The first element is that when the defendant used defensive force against <insert name of other person>, (he/she) actually –that is, honestly and sincerely – believed...."); ibid. ("The third element is that when the defendant used physical force upon <insert name...>for the purpose of defending (himself/herself....), (he/she) actually – that is, honestly and sincerely – believed...."); ibid., ("You must find that the defendant did not act in (self-defense...), if you find any of the following:...4. The state has proved beyond a reasonable doubt that, if the defendant did believe that the degree of force (he/she) used to defend (himself/herself...) against <insert name...>, (he/she) did not actually believe that the degree of force (he/she) used was necessary for that purpose. Here again, as with the first requirement, an actual belief is an honest, sincere belief.") (emp. added) (italics omitted).

plain error rule, Practice Book § 60-5, and under the criteria set out in State v. Golding, supra, 213 Conn., 239-40; and not foreclosed by State v. Kitchens, supra, 299 Conn., 482-83, for the same reasons given in the reviewability analysis set out at length with her first claim of error. See pages 4-19, supra. The instructions are verbatim or nearly so what the Judicial Branch has approved and provided; the claim is one of first impression; and the record does not show defense counsel knew in advance the trial court intended to charge in the complained-of language even if included in the pattern instructions.

**Standard of review:** Whether these instructions were a correct statement of law is reviewed de novo. See, e.g., Freudeman v. Landing of Canton, supra, 702 F.3d, 325.

**Argument: (A) In U.S. v. Hardin, 443 F.2d 735 (1970) the D.C. Circuit held that use of the term "honest belief" *instead of* the term "actual belief" throughout the charge on self defense, although cause for "concern[,]...did not did not impose some higher standard of belief in this case" but unlike Hardin, the jury in the present case was instructed throughout that in order for the defendant to have an "actual" belief, it had to be an "honest and sincere" one**

In U.S. v.Hardin 443 F.2d 735 (D.C. Cir. 1970) the court noted that "[t]he only variance from the recommended charge [on self defense] contained in the Junior Bar Manual that is of any concern to us was the use of the words *honest* belief instead of *actual* belief. We find that, although the word *actual* would be preferred to the use of the word *honest*, the exchange did not impose some higher standard of belief in this case, but only required a finding that the appellant *really believed* that he was in immediate danger. This is a fair statement of the law of self-defense." Id., 739. (underlining added); cf. Williams v. U.S., 858 A.2d 984, 999-1000 (D.C. App. 2004) (rejecting claim charge suggested defendant "had the *burden of proof* on the issue of self-defense" when jury charged to ask if he 'honestly and reasonably believed'" instead of "'actually believes...and 'has reasonable grounds for that belief.'") (emp. added), cert. denied, 545 U.S. 1122 (2005).

**(B) The California Supreme Court has noted "the confusing suggestion inherent in the phrase 'honest belief'"**

The California Supreme Court noted the potential for confusion in using the term "honest belief." It stated that although prior opinions on the concept of "imperfect self-de-

fense...referred to an 'honest belief' we shall use the more precise term '*actual belief*" because it avoids the confusing suggestion inherent in the phrase 'honest belief' that a person could have a 'dishonest belief,' i.e., that a person could believe something he does not believe.") In re Christian S., 7 Cal. 4th 768, 773, 872 P.2d 574 (1994) (emp. added).

**(C) Other courts have found that a phrase like "honest belief" or "sincere belief" equates with a belief formed on a "good faith" basis unlike an "actual belief" that a person has talked herself into or where she has kidded herself into believing it**

What an "honest belief" or "sincere belief" often suggests is not just limited to a seemingly self-contradictory "dishonest belief" or "insincere belief" that means a person could believe something she does not believe, Christian S., supra, 7 Cal. 4th at 773, 872 P.2d 574; but also can imply a belief formed on a "good faith" basis as opposed to *a belief that the defendant talked herself into.* See Magness v. State, 67 Ark. 594, 604, 50 S.W. 554 (1899) (self defense; "the belief must also have been actually and in good faith entertained by him. If he acted from real and honest convictions"); Bailey v. Kalamazoo Publishing. Co., 40 Mich. 251, 254 (1879) ("good faith" belief differentiated from "mere belief").

Introducing the concept of an "honest belief" *or* a "sincere belief" in the context of an instruction on an "actual belief" in a self defense case, let alone drumming into the jurors' heads to the effect that to be an "actual belief" that belief had to be *both* "an honest and sincere belief[,]" 11/7T 85; see id., 77 ("whether the defendant actually, that is honestly and sincerely, entertained the belief in question when she acted as she did"); ibid., 79 (had "she actually, that is honestly and sincerely, believed that the other person was using or about to use physical force against her[?]" ); ibid., 81 (had "she actually, that is honestly and sincerely, believed that the degree of force she used was necessary" to defend herself?); is *like the proverbial "hog on ice"* in that we do not know, and have no control over, where it will go or stop.[15] See The Diner, Inc. v. The Honest Bread Co., Inc.,

[15] In re Martens-Neal, 314 B.R. 198, 199 (N.D. Iowa 2004) ("Debtor testified that without four-wheel drive, the Tracker operates 'like a hog on ice', making driving in the winter dangerous."); William H. Rehnquist, *Chief Justices I Never Knew*, 3 Hastings Const. L.Q. 637, 637 (1976) (Supreme Court Justices are "as independent as hogs on ice.").

37 U.S.P.Q.2d 1029 (S.D.N.Y. 1995), § 5 ("The parties' own uses of the word 'Honest' have, to them, differing, even if similar, connotations."); Melancon v. Mizell, 216 La. 711, 726, 44 So. 2d 826 (1950) ("the word 'honest' ordinarily is used as meaning free of fraud or deception" but "is not always so restricted. Sometimes it is employed as meaning just, equitable, trustworthy, truthful, upright, sincere, all of which are listed in the definition given for 'honest'" in Webster's New International Dictionary, Second Edition."); Glazer v. First American Nat'l Bank, 930 S.W.2d 546, 549 (Tenn. 1996) ("the word 'honesty,' which is not defined in the code, is susceptible to more than one definition.").

> ....FANB is correct that [Tenn. Code §] 47-1-201(19) does make a party's "good faith" dependent upon its "honesty," and that this Court, in [a prior opinion] did equate "bad faith" with "dishonesty." This does not end the inquiry, however, for the word "honesty," which is not defined in the code, is susceptible to more than one definition. For example, *Webster's* defines "honesty" as "freedom from subterfuge or duplicity," a definition that supports the bank's argument. *Webster's Third International Dictionary* 1086 (G. [&] C. Merriam Co.:1976). However, *Webster's* also defines the term as "fairness and straightforwardness of conduct," *id.,* which tends to support Dr. Glazer's argument. Moreover, several courts have concluded that the term "bad faith" encompasses a wider range of actions than outright deception or untruthfulness.

Glazer, supra. "Taking into consideration the various meanings of the word 'honesty,'" id., 550; to give one example, *compare* Commercial Nat'l Bank v. Batchelor, 980 S.W.2d 750, 753 (Tex. App. 1998) ("the law imposes on a party to an agreement an obligation to enforce the agreement in good faith. In that connection, *good faith means honesty in fact* in the conduct or transaction concerned. *Honesty in fact is determined by the actual belief of the party in question, not the reasonableness of that belief.*") (emp. added); *with* Banditt v R., [2005] H.C.A. 80, 223 A.L.R. 633, ¶ 92 (Austl. 2005) ("Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held").

A common understanding of the word "honest"' is "*free from...deception.*" *Webster's Third New International Dictionary* 1086 (1986) (emp. added); U.S. v. Ehrlich, 902 F.2d 327, 330 (5th Cir. 1990) ("'Honesty' connotes a freedom from deception in both word and deed"), cert. denied, 498 U.S. 1069 (1991); and the concept of a person deceiving herself

is no novel one. See, e.g., Dadirrian v. Yacubian, 98 F. 872, 880 (1st Cir. 1900) ("prevent[ing] the purchaser from deceiving himself."); Nowling v. State, 955 N.E.2d 854, 856 (Ind. App. 2011) (probation officer "believed...that Nowling was 'not being honest with himself about what's going on...with his use or his amount of control he has] to abstain' from using drugs") (brackets omitted) (emphasis added); In re A.B., 815 N.W.2d 764, 775 (Iowa 2012); (positive test showed "that Silverio had been deceiving himself and others, and that he had failed to confront his history of illegal drug use.").

Another, and different, understanding is "the definition of the word 'honesty' in Webster's New International Dictionary, Second Edition...'*Fairness and straightforwardness of conduct....*'" United States v. Webster, 23 C.M.R. 492, 497 (A.C.M.R. 1957) (emp. added); Manasco v. Walley, 216 Miss. 614, 627, 63 So.2d 91 (1953).

Inviting the jury to question whether the defendant had arrived at an "actual belief" by "straightforward" means is thus just yet another way to mischief. See U.S. v. Cagle, 849 F.2d 924, 925 (5th Cir. 1988) (trial court "'conclude[d] that what really happened is that [the Border Patrol Agent] smelled the scent of baby powder, knew from his training that baby powder is sometimes used to mask the scent of marihuana, and talked himself into believing that he had actually detected the scent of marihuana....'") (emp. added); Sugar Creek Packing, Inc. v. Amalgamated Food & Allied Workers Disrict. Union, 526 F. Supp. 809, 812 (S.D. Ohio 1981) (arbitrator noted "[s]ome of the grievants went to their physicians from work....One or more of them were not at home to get the call from the plant manager that she was fired for engaging in a wildcat strike; she was at the doctor's office. Many of the grievants may have talked themselves into an illness....").

Instructing the jury to ask if the defendant had a "sincere" belief is no better. This invites the jury to ask whether the defendant had been *deceiving herself or was being hypocritical,* the latter which could get jurors to plumb the depth of her belief. See *Webster's New Universal Unabridged Dictionary* 1693 (2d ed. 1983) ("without deceit, pretense, or hypocrisy"); Myers v. State, 468 S.W.2d 847, 848-49 (Tex. Crim. App. 1971) (prosecu-

tor argued to jury ""Now, I would be a charlatan or a hypocrite to ask you to do something that I didn't feel deep in my heart was justified.....") (emphasis added). In the alternative, or in addition, it risks conflating the actual belief and reasonable belief inquires. See In re Thomas, 962 N.E.2d 454, 478, 356 Ill. Dec. 769 (Ill. 2012) ("The fact that [the attorney] may have convinced himself that his suspension was stayed does not alter the underlying dishonesty because his belief, even if sincere, was entirely unreasonable."). It also risked that a juror could question whether even if the defendant could be said to have had an "honest" belief, it was not a "sincere" one, on the one hand, or whether even if she had a "sincere" belief, it was not an "honest" one, on the other hand. See, e.g., id.

**(D) Instructing repeatedly that to be an "actual" belief, a self defense case defendant's belief had to have been both an "honest" one and a "sincere" one is bad enough in an ordinary case; even worse when bad blood existed between the parties involved or in a combat by agreement case; at least doubly worse than that when both factors are present; and categorically poisonous when, as here, the defendant has acknowledged that she had stabbed her opponent believing that what she was doing was illegal but that she did it to protect herself anyways**

The instructions made it clear that even if a reasonable person in the defendant's situation would have stabbed Lawanda McCrea, too, if the defendant had not actually believed in the need to do so, her self defense claim must fail. 11/7T 77-85. U.S. v. Hardin, supra, realized the potential for imposing a "higher standard" on defendants, making it easier for the prosecution to disprove being met, even when "honest" or "sincere" was not used as a modifier for "actual." The Hardin court noted "the use of the words *honest belief* instead of *actual belief*." See id., 443 F.2d, 779 (underlining added). The trial court had "exchange[d]" the word "actual" with the word "honest....instead[.]" Ibid. (emp. added).

In the present case, by repeatedly attaching both the modifiers "honest" and "sincere" to an "actual" belief, the concepts of an "honest" belief and a "sincere" belief were made added requirements to the existence of an "actual" belief. See Hardin, supra.

The potential for prejudice should be obvious when the jury is told or invited to make "honestly" held and "sincerely" held belief inquiries about a defendant's claim of self de-

fense in cases where the evidence shows *a history of bad blood* between the defendant and the person she stabbed. See, e.g., 11/1T 166-67 (McCrea's Uncle Billy: "they seem like they was beefing with each other. They didn't like each other."); 11/2T 15 (Officer Piro: defendant "indicated it was an ongoing feud [with]...Lawanda McCrea."); 11/3T 11 (landlord Merwin Wade: the defendant "was giving me complaints about Lawanda harassing her on multiple occasions"); 11/7T 10 (prosecutor reminds jury "they were no longer talking and their relationship had deteriorated. They were beefing, as it might be said."); (prosecutor argues even if they were "beefing...[McCrea's] actions, it is submitted, did not justify her being stabbed down to her chest wall."). By comparison, in U.S. v. Hardin, supra, what transpired "involved two old friends who had spent the evening drinking together...." Id., 433 F.2d, 740 (Bazelon, C.J., dissenting on other grounds) (emphasis added).

Also, a close look at Hardin is further useful because in that case the issue of "mutual combat" had come up, but only in the context of "mitigating" what otherwise would be a murder to a manslaughter: the deceased "and the appellant had a fight in which the appellant had smashed a Diet-Rite Cola bottle over the head of the deceased, and after the two men had fought for a spell in a closet of the apartment where the killing occurred, the deceased retired from the fight to the center of the living room. The appellant then went to the kitchen-dinette area of that apartment, took a gun from his pocket and, from 15 to 18 feet away, shot the deceased. After he shot the deceased in the neck with the gun he told his wife 'I meant to shoot him in the head.'" Id., 737-38 & n. 6.

In Hardin, the choices for the jury were either "he shot the deceased in the heat of passion while engaged in mutual combat or he shot the decedent in self-defense or he maliciously killed the decedent." Id., 739 (emp. added). It appears the self defense claim was raised in the context of the defendant denying that he was engaged in combat by agreement, see ibid., 738 n. 6; meaning what was not involved was the befouling or not of

the jury's understanding of the "actual" belief standard in the context of a self defense claim raised under an acknowledgement of a combat by agreement.

Moreover, in the present case, the defendant testified that she had not told the police about having an actual belief that Lawanda McCrea was about to cut her with a box cutter and had instead denied stabbing McCrea because she "was scared. I didn't know the law. I didn't know the state of Connecticut had a law of self-defense because I have heard that, you know, if someone break in your house and you hurt them you're going to go to jail so, you know, so that means you can't defend yourself if someone breaks in your house you cannot defend yourself. So I always thought that the state of Connecticut didn't have a self-defense law and I didn't want to go to jail." 11/4T 124-25.

The prosecutor made sure to remind the jury of this: "she puts a weapon in Lawanda Murdock's [i.e, McCrea's] hand, *didn't understand self-defense then, does now.* She has Lawanda Murdock charging at her so that there is clearly no time to retreat and *she indicates now she's faced with deadly force* and, coincidently, she's ready for it." 11/7T 43.

A big problem with instructing that even if the defendant had an "actual" belief McCrea was using or about to use deadly force against her, the jury still had to ask whether that belief was both an "honest" one and a "sincere" one, see 11/7T 77-85, is that the jury being so charged would recall "the well worn dictum that 'ignorance of the law is no excuse[,]'" see, e.g., United States v. Holck, 398 F. Supp. 2d 338, 355 (E.D. Pa. 2005), aff'd, 500 F.3d 257(3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008), or at least think she had needed to know what she was doing was legal, even if after all it could turn out that way, and mistakenly believe that because the defendant thought that what she was doing was *illegal*, one or more of her "actual" beliefs were thus either not "honest" or "sincere" or both.

This would and very likely did sink her self defense claim like a stone, obviating an assertion by the State that the error was harmless.

**III ORDERING THE JURY "YOU MUST...FIND THAT THE DEFENDANT DID NOT ACT IN SELF-DEFENSE IF YOU FIND THAT THE STATE HAS PROVED BEYOND A REASONABLE DOUBT...THAT THE PHYSICAL ENCOUNTER BETWEEN THE DEFENDANT AND LAWANDA MCCREA WAS A COMBAT BY AGREEMENT (11/7T 85) WITHOUT ANY REMINDER OF WHEN THAT "EXCEPTION" DID NOT APPLY, WHICH WAS NOTED ONLY ONCE EARLIER AMID THE BODY OF THE SELF DEFENSE INSTRUCTIONS (11/7T 83); AND WITH THE FACTS AUTHORIZING THE NON-APPLICATION OF THE COMBAT BY AGREEMENT EXCEPTION HAVING BEEN STATED AS SOMETHING NEEDED TO BE "FOUND" WHILE THE STATE'S BURDEN WAS PUT ONLY IN TERMS OF PROOF OF THE COMBAT BY AGREEMENT ITSELF, (11/7T 82-83), WAS REVERSIBLE ERROR**

**Specific facts:** The instructions to the jury are over 37 full pages long. See 11/7T 51-88. Near the end, the court charged that "another circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when the physical force is the product of an illegal combat by agreement." 11/7T 82.

> Under this provision, it is not necessary that there be a formal agreement. Such agreement may be inferred from the conduct of the parties. To infer such an agreement, you must look at all the circumstances leading up to and preceding the event in question as well as all of the circumstances surrounding this event itself based on the entire evidence presented in your own credibility assessments. *This exception would not apply despite an agreement for mutual combat if you find that the terms were violated by Lawanda McCrea and that her conduct towards the defendant was in violation of their agreement. And further, that the defendant knew of such a violation. Violation means that Lawanda McCrea['s] use of force exceeded the terms of the agreement with the defendant and that it escalated beyond what they had then agreed to as either -- as to either the extent or form of conduct -- combat.*

Id., 82-83; A33-34. So about half of the instruction on combat on agreement was on how the jury could "infer" there had been a combat by agreement and half was about "how [t]his exception would not apply" if the jury *found* certain facts existed. The jury was not told that if the defendant had pointed to evidence that supported the non-application of the "exception" that the State had the burden of disproving the non-application beyond a reasonable doubt. Instead, what immediately followed was an instruction directed solely to the State's burden of proof as to the existence or not of a combat by agreement:

> It is important to remember that the defendant has no burden of proof to prove that her use of physical force was not the product of a combat by agreement. To the contrary, you may only reject her defense on the basis of the statutory disqualification if you find that the State has proved that the -- has proved beyond a reasonable doubt that the defendant and -- that the defendant and Lawanda McCrea had engaged in conduct -- in combat by agreement.

11/7T 82. This was then followed by a reminder "that the defendant has no burden

whatsoever in respect to self defense." After reminding the jury that the stated needed to prove beyond a reasonable doubt that the defendant did not act in self defense, it also reminded the jury that the State "not need disprove all four of the elements of self defense." It then gave what was in effect *a checklist* of all the different ways the State could disprove self defense, prefaced by the order that "[y]ou must find that the defendant did not act in self defense if you find any of the following" and went down the examples. The last example was "[y]ou must also find that the defendant did not act in self-defense if you find that the State has proved beyond a reasonable doubt...that the physical encounter between the defendant and Lawanda McCrea was a combat by agreement." 11/7T 84-85; A35-A36. The jury was not reminded about when that did not apply. See id.

**Nature of claims:** Even if, *arguendo*, the instructions were correct on the law *on what facts were needed* for non-application of the combat by agreement disqualification, the defendant claims that the instructions **(1)** had the effect of shifting the burden of proof from the State (the instructions were that "[t]his exception *would not apply despite an agreement for mutual combat if you find*" the facts needed and the State's burden was specifically then only directed to establishing combat by agreement); **(2)** had the effect of directing a verdict by eliminating her defense ("you must find that the defendant did not act in self defense" if the State could prove combat by agreement, when her defense involved non-application of that disqualifier; and **(3)** at minimum left the jury to figure out for itself that the non-application of the combat by agreement disqualifier was something the State had to disprove, not merely the fact of the combat by agreement itself.

**Reviewability:** Kitchens does not apply; the record not show counsel had a written copy of the proposed instructions and up to closing arguments, mutual combat might not be charged. 11/7T 3-7. "If justice is to be done ...it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime" and any defense the State must disprove. See U.S. v. Clark, 475 F.2d 240, 248 (2d Cir. 1973). In the circumstances of this

case, the claim is reviewable as plain error, Practice Book § 60-5 and under Golding.

**Standard of review:** Such claims are reviewed de novo. See U.S. v. Clark, supra.

**Argument:** Starting with **(2)** and **(3)** because they are the most obvious, instructing in checklist form poses the "danger" that if something is left off the list, it will not then be considered, especially if the list comes from an expert or person in authority. See, e.g., Allan Ashworth, et al, *Willis's Practice and Procedure for the Quantity Surveyor,* 184 (13th ed. 2013); Thomas Peltier, *Information Security Policies and Procedures: A Practitioner's Reference Guide*, 40 (2d ed. 2004) ("misleading" because user thinks this "must be all there is to do."). A good example is listing situations where the jury was ordered ("*you must*") to reject the defendant's self defense claim, ending with "a combat by agreement" but not mentioning taking a look at if that exception did not apply. See 11/7T 84-85.

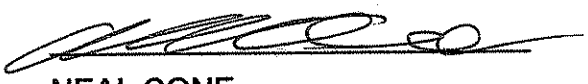
**(1)** is pretty obvious, too. Instructing about certain facts the jury needed to "*find*" before it could say the combat by agreement "disqualification" did not apply, while only instructing specifically that the State had to prove the fact of "a combat by agreement" but not also instructing that the State had to disprove the non-application, which is tricky enough to grasp in written form, and then followed by a list of situations, any one of which, if proven by the State, required the jury to then reject self defense, and listing "a combat by agreement" as one without a peep about non-application, would cement the justifiable impression by jurors that if the State had proven "a combat by agreement" which meant they were then required to reject self defense, then even if they then gave the possibility of non-application a thought, it was something not part of the State's burden. 11/7T 82-85.

**Reversibility:** The State relied heavily on the testimony of habitual liar and thief Lawanda McCrea, also assailant of a police officer, and that of some of her relatives, of whom McCrea's own cousin, Jessica Pugh, stated "I don't mess with that family." 11/2T 41, 73. The trial court found the defendant credible and thought the jury did, too. 4/26T 34.

## CONCLUSION

The Court should find that error occurred and order the appropriate relief.

Respectfully submitted,
LATASHA OBRYAN
The Defendant-Appellant

By: 

NEAL CONE
Senior Assistant Public Defender

# SUPREME COURT

**OF THE**

# STATE OF CONNECTICUT

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**SC 19336**

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**STATE OF CONNECTICUT**

**v.**

**LATASHA R. OBRYAN**

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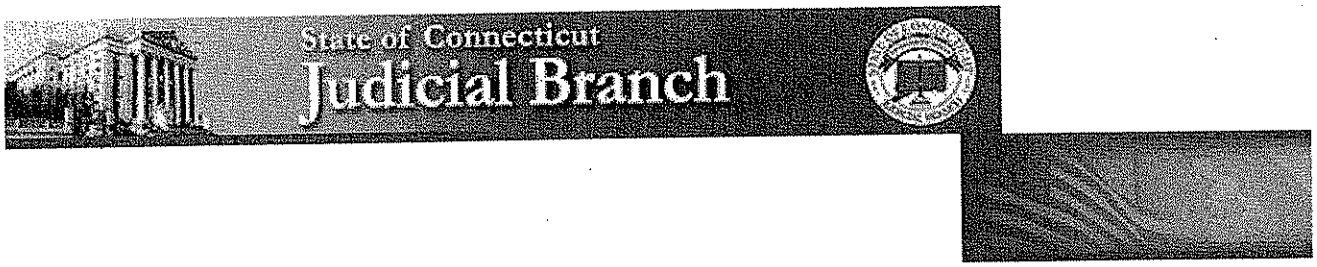


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# Criminal Jury Instructions Home

This collection of Criminal Jury Instructions is intended as a guide for judges and attorneys in constructing charges and requests to charge and as a general reference to criminal offenses and their elements. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency.

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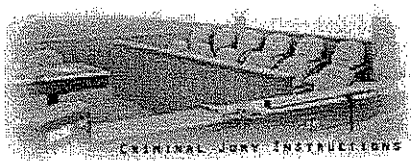


The committee would like to honor the late Ronald J. Fracasse, who was a member of the original Criminal Jury Instructions Committee and chaired the committee from 1993 until 2006. The committee drew heavily on the earlier editions of *Connecticut Selected Jury Instructions Criminal* and owes a debt of gratitude to Judge Fracasse's leadership in that effort.

In producing this 4th edition of Criminal Jury Instructions, the committee undertook a complete rewriting of the 3rd edition and added over 100 new instructions. See About this Edition for a complete description of the committee's approach to revising the instructions.

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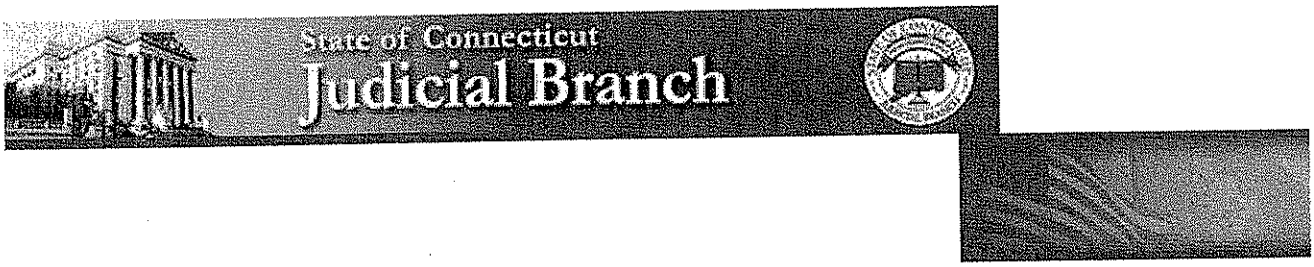


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## 2.8-1 Self-Defense and Defense of Others -- § 53a-19

Revised to June 12, 2009 (modified April 23, 2010)

The evidence in this case raises the issue of (self-defense / the defense of others). (Self-defense / The defense of others) applies to the charge[s] of *<insert applicable crimes>* [and the lesser included offense[s] of *<insert lesser included offenses>*.]

After you have considered all of the evidence in this case, if you find that the state has proved beyond a reasonable doubt each element of a crime to which (self-defense/defense of others) applies, you must go on to consider whether or not the defendant acted in (self-defense / the defense of others). In this case you must consider this defense in connection with count[s] __ of the information.

A person is justified in the use of force against another person that would otherwise be illegal if (he/she) is acting in the defense of (self / others). It is a complete defense to certain crimes, including *<insert applicable crimes>*. When, as in this case, evidence of (self-defense / the defense of others) is introduced at trial, the state must not only prove beyond a reasonable doubt all the elements of the crime charged to obtain a conviction, but must also disprove beyond a reasonable doubt that the defendant acted in (self-defense / the defense of others). If the state fails to disprove beyond a reasonable doubt that the defendant acted in (self-defense / the defense of others), you must find the defendant not guilty despite the fact that you have found the elements of the crime proved beyond a reasonable doubt. The defendant has no burden of proof whatsoever with respect to this defense.

There is a statute that defines (self-defense / the defense of others) and you are to apply that definition in reviewing the evidence in this case and not apply any common or colloquial meaning that you may have heard before. The statute defining (self-defense / the defense of others) reads in pertinent part as follows:

> a person is justified in using reasonable physical force upon another person to defend (himself/herself/a third person) from what (he/she) reasonably believes to be the use or imminent use of physical force, and (he/she) may use such degree of force which (he/she) reasonably believes to be necessary for such purpose.

The statute requires that, before a defendant uses physical force upon another person to defend (himself/herself/a third person), (he/she) must have two "reasonable beliefs." The first is a reasonable belief that physical force is then being used or about to be used upon (him/her/a third person). The second is a reasonable belief that the degree of force (he/she) is using to defend (himself/herself/a third person) from what (he/she) believes to be an ongoing or imminent use of force is necessary for that purpose.

***Deadly and non-deadly physical force***[1]

The law distinguishes non-deadly physical force from deadly physical force. "Physical force" means actual physical force or violence or superior physical strength. The term "deadly physical force" is defined by statute as physical force which can reasonably be expected to cause death or serious physical injury. Under this definition, the physical force used by the defendant need not actually have caused a death or a serious physical injury in order to be considered deadly physical force, nor need it have been expected or intended by the defendant to result in such serious consequences. Instead, what determines whether the

defendant used deadly physical force is whether the force actually used by the defendant could reasonably have been expected to cause death or serious physical injury. "Physical injury" is defined by statute as impairment of physical condition or pain, and "serious physical injury" is defined as physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ.

It is up to you to determine whether the defendant used deadly physical force or non-deadly physical force against *<insert name of the other person>*. You are to make that determination after considering all the evidence. If the state claims that the defendant used deadly physical force, the state must prove that beyond a reasonable doubt. The first question you must resolve, then, is whether the level of force used by the defendant rises to the level of deadly physical force, or is some lower degree of physical force.

***Reasonable beliefs***

Once you have determined whether the defendant has used deadly or non-deadly force, you must then go on to consider whether the defendant justifiably acted in (self-defense / defense of others).

[*<Optional language:>*[2] The test you are to apply is a subjective-objective test, meaning that it has some subjective aspects and some objective aspects. You must first consider the situation from the perspective of the defendant; that is, what did the defendant actually believe, as best as can be inferred from the evidence. This is the subjective aspect of the test. The statute requires, however, that the defendant's belief be reasonable, and not irrational or unreasonable under the circumstances; that is, would a reasonable person in the defendant's circumstances have reached that belief. This is the objective aspect of the test.]

Each of the reasonable belief requirements of the statute requires you to ask two questions. The first question you must ask is, simply, as a matter of fact, whether the defendant actually -- that is, honestly and sincerely -- entertained the belief in question when (he/she) acted as (he/she) did. The second question you must ask is whether the defendant's actual belief was reasonable, in the sense that a reasonable person in the defendant's circumstances at the time of (his/her) actions, viewing those circumstances from the defendant's point of view, would have shared that belief. A defendant cannot justifiably act on (his/her) actual belief, however honestly or sincerely (he/she) held it, if that belief would not have been shared by a reasonable person in (his/her) circumstances, viewing those circumstances from the defendant's point of view. Therefore, the defense of (self-defense / defense of others) has four elements:[3]

1. The defendant actually believed that someone else was using or about to use physical force against (him/her/a third person). If you have found that the force used by the defendant was deadly physical force, then this element requires that the defendant actually believed that the other person 1) was using or about to use deadly physical force against (him/her/a third person), or 2) was inflicting or about to inflict great bodily harm upon (him/her/a third person).

2. That belief was reasonable because a reasonable person in the defendant's circumstances, viewing those circumstances from the defendant's perspective, would have shared that belief.

3. The defendant actually believed that the degree of force (he/she) used was necessary to repel the attack. Again, if you have found that the force used by the defendant was deadly physical force, then this element requires that the defendant actually believed that deadly physical force was necessary to repel the attack.

4. That belief was reasonable because a reasonable person in the defendant's circumstances, viewing those circumstances from the defendant's perspective, would have shared that belief.

The defendant has no burden of proof regarding any of these elements. Instead, the state bears the sole and exclusive burden of proving beyond a reasonable doubt that the defendant did not act in (self-defense / the defense of others), a burden it can meet by disproving at least one of these elements beyond a reasonable doubt. I will go over each of these elements

again in detail.

***Element 1 - Actual belief regarding use of physical force by other person***
The first element is that when the defendant used defensive force against <insert name of other person>, (he/she) actually -- that is, honestly and sincerely -- believed that the other person was using or about to use physical force against (him/her/<insert name of third person>). The word "using" has its ordinary meaning, that is, the other person has already begun to use force. The word "imminent" means that the person is about to use physical force at that time. It does not encompass the possibility that an act of physical force may take place at some unspecified future time.

If you have found that the force used by the defendant was deadly physical force, then you must find that the defendant actually believed that *<insert name of other person>* was not only using or about to use physical force upon (him/her/*<insert name of third person>*), but that the other person was either using or about to use deadly physical force against (him/her/*<insert name of third person>*), or inflicting or about to inflict great bodily harm upon (him/her/*<insert name of third person>*). "Great bodily harm" is not limited by the definition of serious physical injury and may encompass other acts such as sexual assault or the threat of sexual assault.[4] The term "great" has its ordinary meaning and indicates a bodily harm that is substantially more than minor or inconsequential harm.

The act of *<insert name of other person>* leading to the defendant's use of defensive physical force need not be an actual threat or assault. The test is not what the other person actually intended, but what the other person's act caused the defendant to believe was the intention of the other. In other words, the danger to which the defendant was reacting need not have been actual or real. In judging the danger to (himself/herself/*<insert name of third person>*) the defendant is not required to act with infallible judgment. A person acting in (self-defense / the defense of others) is sometimes required to act instantly and without time to deliberate and investigate. Under such circumstances it is possible to perceive an actual threat when none in fact existed.

***Element 2 - Reasonableness of that belief***
The second element is that the defendant's actual belief about the force being used or about to be used against (him/her/*<insert name of third person>*) was a reasonable belief. This means that under the circumstances of the case, viewing those circumstances from the defendant's point of view, the defendant's actual belief that *<insert name of other person>* was using or about to use physical force or deadly physical force against (him/her/<insert name of third person>) was reasonable because a reasonable person in the defendant's situation at the time of (his/her) actions, viewing the circumstances from the defendant's point of view, would have shared that belief.

***Element 3 - Actual belief regarding degree of force necessary***
The third element is that when the defendant used physical force upon *<insert name of other person>* for the purpose of defending (himself/herself/*<insert name of third person>*), (he/she) actually -- that is, honestly and sincerely -- believed that the degree of force (he/she) used was necessary for that purpose. This applies whether you have found that the defendant used deadly physical force or not. The question is whether the defendant believed that it was necessary to use the degree of force that (he/she) used to defend (himself/herself/*<insert name of third person>*) from the attack.

***Element 4 - Reasonableness of that belief***
The fourth element is that the defendant's actual belief about the degree of force necessary to defend (himself/herself)/*<insert name of third person>* was a reasonable belief. This means that under the circumstances of the case, viewing those circumstances from the defendant's point of view, the defendant's actual belief that the degree of force used was necessary to defend (himself/ herself/ *<insert name of third person>*) was reasonable because a reasonable person in the defendant's circumstances at the time of (his/her) actions, viewing those circumstances from the defendant's point of view, would have shared that belief.

***Exceptions***
*<Insert any applicable statutory disqualifications. See Exceptions to Justification: Provocation, Initial Aggressor, Combat by Agreement, Instruction 2.8-2 and Exceptions to use of Deadly*

*Physical Force: Duty to Retreat, Surrender Property, Comply with Demand, Instruction 2.8-3.>*

***The state's burden***[5]

You must remember that the defendant has no burden of proof whatsoever with respect to the defense of (self-defense / the defense of others). Instead, it is the state that must prove beyond a reasonable doubt that the defendant did not act in (self-defense / the defense of others) if it is to prevail on its charge[s] of *<insert applicable crimes>*[, or of any of the lesser-included offenses on which you have been instructed]. To meet this burden, the state need not disprove all four of the elements of (self-defense / the defense of others). Instead, it can defeat the defense of (self-defense / the defense of others) by disproving any one of the four elements of self-defense beyond a reasonable doubt to your unanimous satisfaction. You must find that the defendant did not act in (self-defense / defense of others), if you find any of the following:

1. The state has proved beyond a reasonable doubt that, when the defendant used physical force, (he/she) did not actually believe that *<insert name of other person>* was using or about to use physical force against (him/her/*<insert name of third person>*). If you have found that the force used by the defendant was deadly physical force, then the state must prove that the defendant did not actually believe that the other person 1) was using or about to use deadly physical force against (him/her/a third person), or 2) was inflicting or about to inflict great bodily harm upon (him/her/a third person).

**OR**

2. The state has proved beyond a reasonable doubt that the defendant's actual belief concerning the degree of force being, or about to be, used against (him/her) was unreasonable, in the sense that a reasonable person, viewing all the circumstances from the defendant's point of view, would not have shared that belief.

**OR**

3. The state has proved beyond a reasonable doubt that, when the defendant used physical force to defend (himself/herself/*<insert name of third person>*) against *<insert name of other person>*, (he/she) did not actually believe that the degree of force (he/she) used was necessary for that purpose. Here again, as with the first requirement, an actual belief is an honest, sincere belief.

**OR**

4. The state has proved beyond a reasonable doubt that, if the defendant did actually believe that the degree of force (he/she) used to defend (himself/herself/*<insert name of third person>*) against *<insert name of other person>* was necessary for that purpose, that belief was unreasonable, in the sense that a reasonable person, viewing all the circumstances from the defendant's point of view, would not have shared that belief.

[*<If any statutory disqualifications have been included:>*

You must also find that the defendant did not act in (self-defense / defense of others), if you find that the state has proved beyond a reasonable doubt that *<insert the statutory disqualifications upon which the jury has been instructed:>*

- **Provocation**: the defendant provoked *<insert name of decedent/complainant>* into using physical force against (him/her).
- **Initial aggressor**: the defendant was the initial aggressor in the encounter.
- **Combat by agreement**: the physical encounter between the defendant and *<insert name of other person>* was a combat by agreement.
- **Duty to retreat**: the defendant had a duty to retreat from the physical encounter because (he/she) knew (he/she) could do so with complete safety.
- **Surrender property**: the defendant knew that (he/she) would not need to use physical force against *<insert name of other person>* if (he/she) surrendered property to *<insert*

*name of other person>.*

- **Comply with demand**: the defendant knew that (he/she) would not need to use physical force against *<insert name of other person>* if (he/she) complied with the demand to *<insert name of demand>*.]

***Conclusion***

If you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements of a crime to which (self-defense/defense of others) applies, you shall then find the defendant not guilty and not consider the defense.

If you unanimously find that all the elements of a crime to which (self-defense/defense of others) applies have been proved beyond a reasonable doubt, you shall then consider the defense of (self-defense / defense of others). If you unanimously find that the state has disproved beyond a reasonable doubt at least one of the elements of the defense [or has proved one of the statutory disqualifications], you must reject that defense and find the defendant guilty.

If, on the other hand, you unanimously find that the state has not disproved beyond a reasonable doubt at least one of the elements of the defense, [or has not proven one of the statutory disqualifications], then on the strength of that defense alone you must find the defendant not guilty despite the fact that you have found the elements of the crime proved beyond a reasonable doubt.[6]

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[1] If there is an issue as to whether the degree of force used was non-deadly physical force or deadly physical force, it should be submitted to the jury. If the parties stipulate to it on the record you may instruct the jury that "the parties agree that in this case the force used was deadly." See *State v. Dorans*, 261 Conn. 730, 746 n.9 (2002) (sufficient evidence that force used was deadly to submit question to jury); *State v. Whitford*, 260 Conn. 610, 631 (2002) (court properly gave supplemental instruction that jury should determine the level of force, when victim suffered stab wounds that could have been fatal but were not); *State v. Wayne*, 60 Conn. App. 761, 765 (2000) (court improperly instructed the jury that the defendant, as a matter of law, had used deadly physical force by pointing a gun at victim).

[2] It is well established that § 53a-19 imposes a "subjective-objective" inquiry on a claim of self-defense or defense of others. This means that a defendant's "reasonable beliefs" must be evaluated from the defendant's subjective point of view, i.e., what he or she actually believed, and from an objective point of view, i.e., what a reasonable person in the defendant's situation would have believed. See the discussion in the Introduction to this section. The basic approach to self-defense thus requires the jury to ask, and answer, four questions: 1) Did the defendant believe that he/she was being subjected to imminent physical harm? 2) Would a reasonable person in the defendant's situation have believed that to be so? 3) Did the defendant believe that the degree of force he/she used was necessary to ward off the attack? 4) Would a reasonable person in the defendant's situation have believed that such a degree of force was necessary? An instruction that clearly guides the jury in addressing these four questions has properly instructed it on applying the subjective-objective standard. Optional language is included at the beginning of this section of the instruction to provide the jury with an analytical description of the standard.

[3] The model instruction takes the approach of calling each of the inquiries the jury must make "elements," analytically similar to the elements of an offense. They may also be labeled "parts" or "components," or simply "circumstances under which a person is not justified in using physical force in self-defense."

[4] See *State v. Havican*, 213 Conn. 593, 600-601 (1990) (concluding that "the threat of great bodily harm and the threat of serious physical injury are two separate grounds that each justify the use of deadly force in self-defense").

[5] The appellate courts have not addressed the issue of whether the state's burden of proof on a claim of self-defense is best expressed in the positive ("the state must prove that the

defendant did not believe....") or the negative ("the state must disprove that the defendant believed...."). Although they have recited portions of trial courts' charges that have stated the burden of proof in both ways; see, e.g., *State v. Singleton*, 97 Conn. App. 679, 693 (2006), rev'd on other grounds, 292 Conn. 734 (2009); *State v. Peters*, 40 Conn. App. 805, 817 (1996); such recitation carries no "precedential imprimatur" with regard to the propriety or impropriety of either approach. See *State v. Romero*, 269 Conn. 481, 490 (2004).

[6] See *State v. Terwilliger*, 294 Conn. 399, 417-18 (2009) (advisable to instruct the jury on the consequences of the state's failure to meet its burden as it may enhance the jury's understanding of the defense).

## *Commentary*

If the evidence, if believed, is sufficient to raise "a reasonable doubt in the mind of a rational juror" as to whether the defendant acted in self-defense, then the defendant is entitled to a jury instruction on the defense. *State v. Edwards*, 234 Conn. 381, 390 (1995).

A defendant does not have to "admit that he intended to kill the victim to assert the justification of self-defense." *State v. Miller*, 55 Conn. App. 298, 300 (1999), cert. denied, 252 Conn. 923 (2000). Furthermore, a defendant is permitted to present inconsistent defenses. Id., 301. Accordingly, a defendant is entitled to an instruction on the defense of self-defense if the evidence warrants it, even if the evidence would also support a claim of innocence because of an unintended or accidental shooting. Id.

"Self-defense is a valid defense to crimes based on reckless conduct as well as intentional conduct." *State v. Jones*, 39 Conn. App. 563, 567 n.4 (1995); see also *State v. Hall*, 213 Conn. 579, 586 (1990); *State v. King*, 24 Conn. App. 586, 590-91, cert. denied, 219 Conn. 912 (1991).

As a matter of law, self-defense is not available as a defense to a charge of felony murder. *State v. Amado*, 254 Conn. 184, 197-202 (2000); *State v. Burke*, 254 Conn. 202, 205 (2000). This holding is "consistent with the purpose underlying felony murder, which is to punish those whose conduct brought about an unintended death in the commission or attempted commission of a felony. . . . The felony murder rule includes accidental, unintended deaths. Indeed, we have noted that crimes against the person like robbery, rape and common-law arson and burglary are, in common experience, likely to involve danger to life in the event of resistance by the victim. . . . Accordingly, when one kills in the commission of a felony, that person cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony murder [statute]." (Citations omitted; internal quotation marks omitted.) *State v. Amado*, supra, 254 Conn. 201.

Self-defense is not applicable to "status offenses," such as carrying a dangerous weapon; *State v. Holloway*, 11 Conn. App. 665, 771 (1987); or carrying a pistol without a permit. *State v. Bailey*, 209 Conn. 322, 238 (1988). But see *State v. Ramos*, 271 Conn. 785, 803 (2004) ("when the item that the defendant is charged with having in the vehicle is an otherwise legal item and did not become a dangerous instrument within the meaning of § 29-38 until it was used in self-defense, the defendant may raise § 53a-19 as a defense").

When a defendant is charged with multiple offenses, only some of which self-defense may apply to, the instruction must clearly state that self-defense does not apply to all of the offenses. *State v. Davis*, 261 Conn. 553, 573 (2002) (self-defense did not apply to charge of interference with an officer, but would apply to assault charges arising out of the same conduct); *State v. Wright*, 77 Conn. App. 80, 86-87, cert. denied, 266 Conn. 913 (2003) (self-defense did not apply to count charging defendant as accessory).

A person cannot claim defense of a third party, if the third party had a duty to retreat. *State v. Rodriguez*, 47 Conn. App. 91, 96, cert. denied, 243 Conn. 960 (1997).

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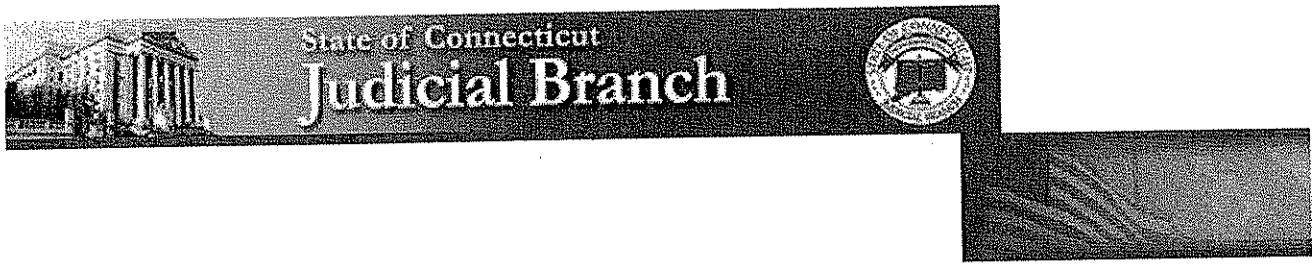


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## 2.8-2 Exceptions to Justification: Provocation, Initial Aggressor, Combat by Agreement -- § 53a-19 (c)

Revised to December 1, 2007

In addition, the state can defeat the defendant's claim of self-defense by proving one of the statutory disqualifications to self-defense. The statute defining self-defense describes certain circumstances in which a person is not justified in using any degree of physical force in self-defense against another.

*<Include as appropriate:>*

A. Provocation

B. Initial Aggressor

C. Combat by Agreement

### A. Provocation – § 53a-19 (c) (1)

(One such / Another) circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when (he/she) provokes the other person to use physical force against (him/her).

In order to provoke the use of physical force by another, it is not enough that the defendant by (his/her) conduct elicited the use of physical force by another; rather the defendant must have embarked upon such conduct with the specific intent to provoke the other into using physical force and intending to cause the other physical injury or death.

The defendant must have specifically intended to provoke another into using physical force, and then used force to defend (himself/herself) from the ensuing use of force by the person provoked.

It is important to remember that the defendant has no burden whatsoever to prove that (he/she) did not provoke *<insert name of decedent/complainant>* into using physical force against (him/her). To the contrary, you may only reject (his/her) defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that the defendant provoked the use of physical force by *<insert name of decedent/complainant>* against (him/her).

### B. Initial aggressor – § 53a-19 (c) (2)

(One such / Another) circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when (he/she) is the initial aggressor in the encounter with the other person, and does not both withdraw from the encounter and effectively communicate (his/her) intent to do so before using the physical force at issue in the case.

Under this provision, the state can prove that the defendant was not justified in using physical force in self-defense by proving beyond a reasonable doubt that (he/she) was the initial aggressor in (his/her) encounter with *<insert name of other person>* and that (he/she) neither

withdrew from that encounter nor effectively communicated (his/her) intent to do so before using physical force against <*insert name of other person*>.

To prove that the defendant was the initial aggressor in (his/her) encounter with <*insert name of other person*>, the state need not prove that the defendant was the first person to use physical force in that encounter. The initial aggressor can be the first person who threatened to use physical force, or even the first person who appeared to threaten the imminent use of physical force under circumstances.

To prove that the defendant did not withdraw and communicate (his/her) intent to do so, the state must prove that (he/she) did not abandon the conflict in such a way that the fact of (his/her) withdrawal was perceived by <*insert name of other person*> so that <*insert name of other person*> was aware that there was no longer any danger from the original aggression.

It is important to remember that the defendant has no burden whatsoever to prove that (he/she) was not the initial aggressor or that (he/she) withdrew from the encounter and communicated (his/her) intent to do so before (he/she) used physical force against <*insert name of other person*>. To the contrary, you may only reject (his/her) defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that (he/she) was the initial aggressor, did not withdraw from the encounter, and did not communicate (his/her) intent to withdraw before using physical force.

**C. Combat by agreement – § 53a-19 (c) (3)**

(One such / Another) circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when the physical force is the product of an illegal combat by agreement.

Under this provision, it is not necessary that there be a formal agreement – such an agreement may be inferred from the conduct of the parties. To infer such an agreement you must look at all the circumstances leading up to and preceding the event in question as well as all of the circumstances surrounding this event itself based on the entire evidence presented and your own credibility assessments.

[<*Include if the facts warrant:*> This exception would not apply despite an agreement for mutual combat if you further find that its terms were violated by <*insert name of complainant/decedent*> and that (his/her) conduct toward the defendant was in violation of their agreement, and further that the defendant knew of such violation. Violation means that <*insert name of complainant/decedent*>'s use of force exceeded the terms of the agreement with the defendant, and that it escalated beyond what had been agreed to as to either the extent or form of combat.][1]

It is important to remember that the defendant has no burden whatsoever to prove that (his/her) use of physical force was not the product of a combat by agreement. To the contrary, you may only reject (his/her) defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that the defendant and <*insert name of other alleged combatant(s)*> had engaged in combat by agreement.

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[1] See *State v. Abraham*, 84 Conn. App. 551, 558, cert. denied, 271 Conn. 938 (2004).

## *Commentary*

The exceptions to justification in § 53a-19 (c) serve to negate justification because they involve factual circumstances that disprove that the defendant was acting defensively, and apply to all claims of defense or defense of others, regardless of the degree of force used. See *State v. Silveira*, 198 Conn. 454, 470 (1986).

***Provocation***

In order to provoke the use of physical force by another, it is not enough that the defendant by his or her conduct elicited the use of physical force by another; rather the defendant must have embarked upon such conduct with the specific intent to provoke the other into using

physical force and intending to cause the other physical injury or death. See *State v. Hawkins*, 19 Conn. App. 609, 616, cert. denied, 212 Conn. 820 (1989). Section 53a-19 (c) (1) also applies to the situation in which the defendant, intending to harm the victim by retaliation, intentionally provokes the victim into using physical force against the defendant by attacking a third party. Id., 617.

***Initial Aggressor***

There is no legal definition of "initial aggressor," so it is proper to instruct the jury to apply the ordinary meaning of the words. *State v. Ramos*, 261 Conn. 156, 164-69 (2002); *State v. Whitford*, 260 Conn. 610, 620-24 (2002).

It is improper to define "initial aggressor" simply as the first person to use force. *State v. Jimenez*, 228 Conn. 335, 341 (1994) (such an instruction forecloses the jury from considering the claim of self-defense at all). In *State v. Corchado*, 188 Conn. 653, 666-68 (1982), the court included "directed verdict" language in defining the "initial aggressor" as one who makes "any direct personal assault . . . in anger" or one who "deliberately places himself in a position where he has reason to believe his presence would provoke trouble" or as one who "leaves a quarrel to go to his home to arm himself, and then returns to the scene of the quarrel and kills the other person."

***Withdrawal***

An initial aggressor is justified in using physical force if "he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force." General Statutes § 53a-19 (c) (2). "An instruction as to the effect of an aggressor withdrawing from an encounter and communicating the intent to withdraw is only necessary where the particular factual situation supports such an instruction." *State v. Diggs*, 219 Conn. 295, 299 (1991). Further, the aggressor's intent to withdraw must clearly be made known to his or her victim in order to invoke the doctrine of communicated withdrawal. Id. In other words, the initial aggressor must withdraw or abandon the conflict in such a way that the fact of withdrawal is perceived by his or her opponent, so that the opponent is aware that he or she is no longer in any danger from the original aggressor. *State v. Cartagena*, 47 Conn. App. 317, 321 (1997), cert. denied, 244 Conn. 904 (1998).

***Combat by agreement***

The agreement need not be formal or express, as long as there is any evidence to support a reasonable inference that the participants agreed, either expressly or impliedly, to engage in combat. *State v. Silveira*, 198 Conn. 454, 471 (1986); *State v. Johnson*, 53 Conn. App. 476, 480-82, cert. denied, 249 Conn. 929 (1999).

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## 2.8-3 Exceptions to Use of Deadly Physical Force: Duty to Retreat, Surrender Property, Comply with Demand -- § 53a-19 (b)

Revised to December 1, 2007

In addition, the state can defeat the defendant's claim of self-defense by proving one of the statutory disqualifications to the use of deadly physical force. The statute defining self-defense describes certain circumstances in which a person is not justified in using deadly physical force in self-defense against another. These exceptions apply only to the use of deadly force, so if you have found that the defendant used deadly physical force, you must consider these exceptions.

*<Include as appropriate:>*

A. Duty to retreat

B. Surrender property

C. Comply with demand

### A. Duty to retreat § 53a-19 (b) (1)

(One such / Another) circumstance is that a person is not justified in using deadly physical force upon another person if (he/she) knows that (he/she) can avoid the necessity of using such force with complete safety by retreating. This disqualification requires a defendant to retreat instead of using deadly physical force whenever two conditions are met: 1) a completely safe retreat is in fact available to (him/her); and 2) (he/she) knows that (he/she) can avoid the necessity of using deadly physical force by making that completely safe retreat. The law stresses that self-defense cannot be retaliatory. It must be defensive and not punitive.

The term "complete safety," as used in this statute, means without any injury to the defendant whatsoever. A person acts "knowingly" with respect to a circumstance described in a statute when (he/she) is aware that such circumstance exists. *<See Knowledge, Instruction 2.3-3.>*

It is important to remember that the defendant has no burden whatsoever to prove that (he/she) could not have retreated with complete safety or that (he/she) didn't know that a safe retreat was possible before (he/she) used physical force against *<insert name of other person>*. To the contrary, you may only reject (his/her) defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that (he/she) did know that (he/she) could retreat with complete safety.

#### Exception for dwelling[1]

As a general rule, a defendant is not required to retreat in (his/her) own dwelling before (he/she) may use force. A dwelling is defined in our law as a place which is usually occupied by a person lodging therein at night. "Usually occupied" means customary or routine nightly occupancy. Thus, occupation for some period of time is required. In considering whether a house is the defendant's dwelling, consider evidence such as where the defendant's clothes

and personal effects were kept.[2]

[*<If the case involves a question of co-dwellers:>* To this general rule there is an exception which you may or may not apply here, which is for you to determine as a question of fact. That exception is that one claiming self-defense in (his/her) own dwelling has the duty to retreat from a co-dweller before (he/she) may employ force against that co-dweller. A co-dweller is a person who also is usually lodged in those premises at night.

Accordingly, you must first determine if the state has proved that *<insert name of other person>* was a co-dweller with the defendant at *<insert location>*. If the state has failed to prove that *<insert name of other person>* was a co-dweller, then you go no further on this issue as the defendant would have no duty to retreat. If, however, you find that the state has proved that *<insert name of other person>* was a co-dweller with the defendant, you would then consider whether the defendant had a duty to retreat in accordance with the previously stated rule that a person must retreat before using deadly physical force if (he/she) knows that (he/she) can retreat with complete safety.

If you find that the state has proved beyond a reasonable doubt that the defendant and *<insert name of other person>* were co-dwellers and that a retreat with complete safety was available to the defendant and that the defendant knew it, but did not retreat, you shall then find that the state has proved beyond a reasonable doubt that the defendant was not justified in using deadly force.]

**B. Surrender property § 53a-19 (b) (2)**

(One such / Another) circumstance under which a person is not justified in using deadly physical force in self-defense against another is when (he/she) knows that (he/she) can avoid the use of physical force with complete safety by surrendering an object of personal property to the assailant.

Under this provision, if the assailant's conduct appears motivated by (his/her) claim to property that the defendant possesses and the defendant knows that if (he/she) surrendered the property that the assailant would cease the assault upon the defendant, then the defendant may not use deadly physical force in defense and must surrender the property.

It is important to remember that the defendant has no burden whatsoever to prove that (he/she) knew that *<insert name of assailant>* would cease the assault upon the defendant if the defendant surrendered *<insert property in question>*. To the contrary, you may only reject (his/her) defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that the defendant knew that *<insert name of assailant>* would flee without harming (him/her) if (he/she) surrendered *<insert property in question>*.

**C. Comply with demand § 53a-19 (b) (3)**

(One such / Another) circumstance under which a person is not justified in using deadly physical force in self-defense against another is when (he/she) knows that (he/she) can avoid the necessity of using such force with complete safety by complying with a demand that (he/she) abstain from performing an act which (he/she) is not obliged to perform.

Under this provision, if *<insert name of assailant>*'s conduct appears motivated by (his/her) insistence that the defendant stop *<insert defendant's conduct in question>* and the defendant was not obliged to *<insert defendant's conduct in question>* and the defendant knew that *<insert name of assailant>* would cease (his/her) use of physical force against the defendant, then the defendant may not use deadly physical force in self-defense and must comply with the demand.

It is important to remember that the defendant has no burden whatsoever to prove that (he/she) knew (he/she) would no longer be in danger from *<insert name of assailant>* if the defendant stopped *<insert defendant's conduct in question>*. To the contrary, you may only reject the defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that the defendant knew that if (he/she) complied with the demands of *<insert name of assailant>* then (he/she) would have no need to defend (himself/herself).

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[1] See *State v. James*, 54 Conn. App. 26, 32-26 (1999).

[2] See *State v. Pranckus*, 75 Conn. App. 80, 92 (2003).

## *Commentary*

General Statutes § 53a-19 (b) applies only to the use of deadly physical force. A person is not limited by these requirements before using nondeadly physical force in self-defense. See *State v. Anderson*, 227 Conn. 518, 529 (1993) (one who can safely retreat is not required to do so before using nondeadly force).

***Knowledge of complete safety***
The statute requires that the person must know that he or she can avoid the necessity of using deadly physical force with complete safety. *State v. Quintana*, 209 Conn. 34, 46 (1988). It is reversible error to fail to include the word "complete" before "safety." *State v. Anderson*, 227 Conn. 525, 532 (1993); see also *State v. Byrd*, 34 Conn. App. 368, 374-77, aff'd, 239 Conn. 405 (1996).

"A charge on the duty to retreat is flawed if it fails to instruct the jury to consider the subjective component of the duty to retreat: the defendant's knowledge of his ability to retreat." (Internal quotation marks omitted.) *State v. Montanez*, 71 Conn. App. 246, 263 (2002). The correct measure of a person's knowledge of the ability to retreat in complete safety is "the subjective standard of the defendant's actual knowledge." *State v. Ash*, 231 Conn. 484, 495 (1994); *State v. Amado*, 254 Conn. 184,195-97 (2000).

***Duty to retreat***
"Connecticut is among a minority of jurisdictions . . . that has followed the position advanced by the Model Penal Code that, before using deadly force in self-defense, an individual must retreat." *State v. Anderson*, 227 Conn. 518, 530 (1993). The statutory provision requiring retreat in lieu of deadly force replaces common-law rules. See *State v. Byrd*, 233 Conn. 517 (1995). The trial court need not instruct the jury on the duty to retreat if the state does not claim that the defendant should have retreated. *State v. Lemoine*, 256 Conn. 193, 200 (2001).

The statute provides three exceptions to the duty to retreat.

*1. Dwelling*

A person is not required to retreat if in his or her own home or dwelling. "[T]he dwelling exception to the duty to retreat rule does not encompass the common areas of the defendant's apartment building such as stairways, hallways and foyers." *State v. Silva*, 43 Conn. App. 488, 493-94 (1996); *State v. Rodriquez*, 47 Conn. App. 91, 96 (1997).

Section 53a-19 incorporates the definition of dwelling in 53a-100, which is "a building which is usually occupied by a person lodging therein at night." This definition "contemplates a duration element by requiring usual inhabitation at night. Usual in this context obviously means customary or routine occupancy . . . in short, occupation for period of duration." *State v. Bailey*, 209 Conn. 322, 343 (1988); see also *State v. Adams*, 52 Conn. App. 643, 649 (1999) (trial court's instruction that in determining whether it was the victim's dwelling "at or about the time in question" did not materially alter the statutory definition of dwelling).

The co-dweller retreat rule was adopted from the Restatement (Second), Torts § 65 (1965) in *State v. Shaw*, 185 Conn. 372, 279 (1981), cert. denied, 454 U.S. 1155, 102 S.Ct. 1027, 71 L.Ed.2d 312 (1982). A person is required to retreat when in his or her own dwelling when threatened by another who dwells in the same place. The status of the other person as a co-dweller is a question for the jury. See *State v. James*, 54 Conn. App. 26, 37 (1999).

*2. Workplace*

A person is not required to retreat if he or she is in his or her place of work and was not the initial aggressor. The right to use deadly force in one's workplace was recognized at common law. See *State v. Feltovic*, 110 Conn. 303, 311-12 (1929).

*3. Peace officer*

A peace officer or a private person assisting such officer at his direction, acting pursuant to § 53a-22, is not required to retreat.

***Surrendering property***
The instruction must convey the person's knowledge that the assailant *would* flee if that person surrendered the property sought. *State v. Schiavo*, 93 Conn. App. 290, 296-99 (2006) (court improperly substituted "could" in one part of the charge).

"A person is not permitted to use deadly physical force in self-defense just because that person reasonably believed that the victim was attempting to rob that person." *State v. Harrison*, 32 Conn. App. 687, 694, cert. denied, 227 Conn. 932 (1993); see also *State v. Byrd*, 34 Conn. App. 368, aff'd, 239 Conn. 405 (1996) (deadly force is not allowed if person can retreat in complete safety or avoid harm by surrendering property).

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|---|---|---|
| NO: NNH-CR10-0106078-T | : | SUPERIOR COURT |
| STATE OF CONNECTICUT | : | JUDICIAL DISTRICT OF NEW HAVEN |
| v. | : | AT NEW HAVEN, CONNECTICUT |
| LATASHA O'BRYAN | : | NOVEMBER 7, 2011 |

BEFORE THE HONORABLE SHERIDAN MOORE, JUDGE

A P P E A R A N C E S :

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Recorded & Transcribed By:
Alison Case
Court Recording Monitor
235 Church Street
New Haven, CT 06510

1 ATTY. DELEO: Yeah. I wasn't aware of any time
2 limit or that I was -- I assumed an hour which is
3 fairly standard.
4 THE COURT: Right. But what I'm saying to you
5 is both of your arguments complies one hour not --
6 ATTY. DELEO: Right. I understand.
7 THE COURT: Okay. Not an hour on one and an
8 hour on another one.
9 ATTY. DELEO: I understand that, your Honor.
10 THE COURT: Or an hour plus.
11 ATTY. DELEO: Right.
12 THE COURT: Okay. All right. I mean, but, you
13 know, you can, you know, take less obviously.
14 ATTY. DELEO: Right.
15 THE COURT: And you're not limited to the actual
16 amount of time that Attorney Alosi does. If she
17 takes less than an hour, it doesn't mean that you
18 have that same amount of time; however, you do not
19 have to -- you do not have the ability to go over the
20 hour.
21 ATTY. DELEO: Right.
22 THE COURT: Okay.
23 ATTY. DELEO: Thank you.
24 THE COURT: All right. Then we're ready --
25 ATTY. DELEO: Your Honor --
26 THE COURT: I'm sorry.
27 ATTY. DELEO: -- may I just, I'm sorry. Can I

1 just make a record with respect to one thing on the
2 instructions before we go forward or do you want me
3 to do that later?
4 THE COURT: Well, a record in regards to --
5 ATTY. DELEO: Just what we have discussed in
6 chambers with respect to the instruction that had
7 been requested by the State.
8 THE COURT: All right. Well, why don't you wait
9 until we -- we're in the instruction period 'cause I
10 don't plan on seeing the instructions done before
11 lunch. So we'll do it right --
12 ATTY. DELEO: I just --
13 THE COURT: -- right before -- before --
14 ATTY. DELEO: Can I just inquire then, just as I
15 tailor though in terms of alluding to the jury as to
16 what I anticipate the Court is going to instruct, I
17 just -- it becomes important to the State to know
18 ahead of time because obviously I will -- if the
19 Court is inclined to provide an instruction on combat
20 by agreement and what they -- what conclusions they
21 can draw if they, in fact, find that occurred, I
22 would like to allude to that in that -- before I
23 construct my argument.
24 THE COURT: Well, all I can say to you at this
25 point is that the Court hasn't made -- has not made a
26 final decision as to that. I mean, I would say do
27 your argument as you feel you must do it in total;

1 and then if the Court does instruct on that, then
2 you'll have that benefit. You won't have the -- you
3 won't have the benefit if the Court then includes the
4 combat by agreement instruction if you have not
5 argued it. I mean, I don't know how your argument
6 runs, but you just may instead of -- I think you
7 probably would have alluded to testimony but, you --
8 you know, you could just change the word to say the
9 Court may instruct you. But at this point, I haven't
10 made a -- a final decision on whether or not that
11 instruction's going to be excluded or not.
12 ATTY. DELEO: I understand. The -- the State
13 obviously if it was included would anticipate
14 indicating that, of course, no physical -- no degree
15 of physical force can be used if it's a combat by
16 agreement situation, but I --
17 THE COURT: Well, that's not what the statute
18 says. It doesn't say that no physical force could be
19 used if it's combat by agreement. It says that once
20 the parties have seen or agreed that if, in fact, the
21 agreement changes its color and variation, physical
22 force might be used.
23 ATTY. DELEO: I was just -- I was just reading
24 from the first paragraph of the jury instructions on
25 the combat by agreement, your Honor. I just --
26 obviously, I just don't want to indicate something to
27 the jury that is going to come from the Court if it,

1 in fact, is not going to.
2 THE COURT: Well, I'm just saying. I mean, you
3 have the instruction there?
4 ATTY. DELEO: I understand, your Honor. I do.
5 THE COURT: Well, do you have it there?
6 ATTY. DELEO: I do have it actually.
7 THE COURT: Can -- can I just look at it?
8 ATTY. DELEO: Surely.
9 (Whereupon there was a pause in the
10 proceedings.)
11 THE COURT: I mean, looking at paragraph three
12 that said this exception would not apply despite an
13 agreement for mutual combat if you further find that
14 the terms were violated. So it does allow physical
15 -- if you find that particular issue.
16 ATTY. DELEO: Right.
17 THE COURT: But as I said earlier in our
18 conversation in chambers that -- so, I mean, I guess
19 what -- getting back to the point you made. So if
20 your -- if your statement in your closing argument is
21 that, in fact, no physical force is allowable, that's
22 not a proper statement under the instruction. No
23 physical force is allowable at any time, at any
24 point, in any -- I mean, our law says you're not to
25 use physical force against another person, period.
26 That's the law. Okay.
27 ATTY. DELEO: I understand.

1 THE COURT: The agreement by combat is a
2 justification or a lack of a justification for the
3 self-defense. So once you, in fact, have a contact,
4 physical contact, be it deadly or nondeadly, then
5 you're saying I did this by a reason of self-defense;
6 but if I had agreed to a illegal combat, if I had
7 agreement to illegal combat then I can't even claim
8 self-defense, but I could if there was some
9 violations in the agreement which is what this
10 particular thing does -- deals with. So the -- the
11 point is is your statement that simply because it was
12 an illegal combat by agreement, you know, doesn't
13 justify physical, that's not true. Physical contact
14 is always illegal whether it's by agreement or not.
15 ATTY. DELEO: I understand, your Honor, and --
16 and, you know, obviously at least what the -- the
17 State would argue with respect to the combat by
18 agreement is that self-defense is not a legal defense
19 when two individuals engage in mutual combat.
20 THE COURT: Right. Now, if -- if --
21 ATTY. DELEO: If an individual violates the
22 terms of that agreement, then the analysis obviously
23 changes. If the -- not the defendant but the other
24 party does and -- and a jury so finds, then their
25 analysis becomes a different one.
26 THE COURT: Right. I would agree with that.
27 ATTY. DELEO: But they can -- but they can also

1 find that two individuals engaged in conduct and are
2 equally situated with respect to the weapons they
3 have in which case under the law, at least the
4 State's position will be, if there is found to be an
5 implied agreement with respect to that combat, then
6 self-defense is not available as a defense when two
7 individuals similarly situated agree to engage in
8 combat. So at least that was the State's argument --
9 THE COURT: Right. I understand.
10 ATTY. DELEO: -- your Honor. That's how I would
11 -- I would articulate it and I will work my language
12 and make it as general as I can.
13 THE COURT: Okay.
14 ATTY. DELEO: Okay. Thank you.
15 THE COURT: That's fine. All right.
16 And I think we're ready for the jury.
17 (Whereupon the jury panel enters the courtroom.)
18 THE COURT: Good morning.
19 THE JURY: Good morning.
20 THE COURT: Counsel, stipulate to the presence
21 of the jury?
22 ATTY. ALOSI: Yes, your Honor.
23 ATTY. DELEO: So stipulated.
24 THE COURT: And, of course, the first answer is
25 yes. I got it Friday.
26 Okay. Now, we're going to hear the closing
27 arguments of the parties at this time. Now, the

1 the landlord, David, anyone about a weapon in the hands of
2 Lawanda. Mad and yelling, you can hear her yelling on the
3 911 tape, but never -- she had a knife. Jessica gave her a
4 knife. She was dirty to the fight. You don't hear anything
5 about that. She's yelling other things. She's not yelling
6 that. She never mentions it to anyone until now because it
7 didn't happen. She's not sad. She was angry and she struck
8 the blow that she intended to strike all night.
9 Ladies and gentlemen, Lawanda Murdock is a convicted
10 felon many times over, but the State submits to you that she
11 is a convicted felon who happens to have gotten stabbed,
12 months spent healing, that wound, as it heals from the
13 inside out, in a fight that was decidedly not fair, and by
14 Tasha O'Bryan acting not in self-defense but out of anger.
15 Ladies and gentlemen, when you take your good common
16 sense and you evaluate the witness testimony, the State
17 submits that you will find that the elements of this offense
18 have been proven beyond a reasonable doubt and there never
19 was any legitimate self-defense on this night. Thank you.
20 THE COURT: Okay, ladies and gentlemen. That
21 concludes the argument and we still have the
22 instruction. I'm going to release you for lunch
23 early today. I'm going to have you come back at
24 quarter of two and we'll begin the instruction at
25 1:45.
26 So do not talk with yourselves or anyone else
27 about the case because we're not done yet. You will

1 not be able to talk even among yourselves or with
2 anyone else until you've actually received the
3 instruction on the law and I have then let you --
4 excuse you back to the jury room after that time. So
5 make sure we keep it together a few more minutes and
6 we'll see you back upstairs at 1:45.
7 (Whereupon the jury panel exits the courtroom.)
8 THE COURT: 1:45.
9 ATTY. DELEO: Thank you.
10 THE COURT: Make sure you all are present
11 timely.
12 (Whereupon the Court took its luncheon recess
13 and resumed as follows.)
14 THE COURT: Good afternoon. You can bring the
15 jury out.
16 ATTY. DELEO: May I -- hold, your Honor.
17 THE COURT: Oh.
18 ATTY. DELEO: May I just -- one preliminary
19 thing. I just neglected to put this on the record
20 before. We had one 911 tape that contained an
21 unrelated call. And just for the record, it's
22 1:36:13. That's the one that contains the unrelated
23 call. I know -- anticipate that those CDs are going
24 to the jury room. I don't have a computer that
25 doesn't have --
26 THE COURT: Well, I'm going to tell the jury
27 that they're -- that they're not going to listen to

1 the CD in the jury room --
2 ATTY. DELEO: Right.
3 THE COURT: -- because -- because of the
4 computer issue.
5 ATTY. DELEO: Exactly.
6 THE COURT: Right.
7 ATTY. DELEO: Thank you.
8 THE COURT: Okay. Now, if they do want to hear
9 that, we will then set the computer up so they can
10 hear it --
11 ATTY. DELEO: Exactly.
12 THE COURT: -- out here. Okay.
13 ATTY. DELEO: Okay. Thank you.
14 THE COURT: If we're ready.
15 (Whereupon the jury panel reenters the
16 courtroom.)
17 THE COURT: Counsel, stipulate to the presence
18 of the jury?
19 ATTY. ALOSI: Yes, your Honor.
20 ATTY. DELEO: Yes, your Honor.
21 JURY CHARGE BY THE COURT:
22 Now, ladies and gentlemen, what I am about to do now
23 is to give you a detailed instruction as to the law in this
24 case that I referred to in my more general comments before
25 the case started.
26 In the performance of our duties, yours and mine, you
27 as the jury and I as the Court have separate functions. To

1 towards the commission of that crime, then you shall find
2 the defendant guilty. On the other hand, if you unanimously
3 find that the State has failed to prove beyond a reasonable
4 doubt either of these elements, then you shall find the
5 defendant not guilty.
6 Now, the evidence in this -- evidence in this case
7 raises the issue of self-defense. Now, self-defense applies
8 to the charges of assault in the second degree and criminal
9 attempt of assault in the first degree. After you have
10 considered all of the evidence in this case, if you find
11 that the State has proved beyond a reasonable doubt each of
12 the elements to which self-defense applies, you must go on
13 to consider whether or not the defendant acted in self-
14 defense. In this case, therefore, you must consider this
15 defense in connection with both count one and count two of
16 the Information. A person is justified in the use of force
17 against another person that would otherwise be illegal if
18 she is acting in the defense of self. It is a complete
19 defense to certain crimes including assault in the second
20 degree and criminal attempt of assault in the first degree.
21 When, as in this case, evidence of self-defense is
22 introduced at trial, the State must not only prove beyond a
23 reasonable doubt all of the elements of the crime charged in
24 order to obtain a conviction but must also disprove beyond a
25 reasonable doubt that the defendant acted in self-defense.
26 If the State fails to disprove beyond a reasonable doubt the
27 defendant acted in self-defense, you must find the defendant

1 not guilty despite the fact that you have found the elements
2 of the crime proved beyond a reasonable doubt. The
3 defendant has no burden of proof whatsoever in respect to
4 this defense.
5 Now, there is a statute that defines self-defense
6 and you are to apply that definition in reviewing the
7 evidence in this case and not to apply any common or
8 colloquial meaning that you may have heard before. Now, the
9 statute defining self-defense reads in part as follows: A
10 person is justified in using reasonable physical force upon
11 another person to defend herself from what she reasonably
12 believes to be the use or imminent use of physical force and
13 she may use such degree of force which she reasonably
14 believes to be necessary for such purpose. The statute
15 requires that before the defendant uses physical force on --
16 upon another person to defend herself, she must have two
17 reasonable beliefs. The first is a reasonable belief that
18 the physical force is then being used or about to be used
19 upon her. The second is a reasonable belief that the degree
20 of force that she is using to defend herself from what she
21 believes to be an ongoing or imminent use of force is
22 necessary for that purpose.
23 Now, the law distinguishes nondeadly physical
24 force from deadly physical force. Now, physical force means
25 actual physical force or violence or superior physical
26 strength. The term deadly physical force is defined by
27 statute as physical force which can be reasonably expected

1 to cause death or serious physical injury. Now, under this
2 definition, the physical force used by the defendant may not
3 actually have caused a death or a serious physical injury in
4 order to be considered deadly physical force, nor need it
5 had been expected or intended by the defendant to result in
6 such serious consequences. Instead, what the term is
7 whether the defendant used deadly physical force is whether
8 the force actually used by the defendant could reasonably
9 have been expected to cause death or serious physical
10 injury. Physical injury is defined as the impairment of
11 physical condition or pain. And serious physical injury is
12 defined as physical injury which creates a substantial risk
13 of death or which causes a serious disfigurement, serious
14 impairment of health, or serious loss or impairment of the
15 function of any bodily organ.
16 It is up to you to determine whether the defendant
17 used deadly physical force or nondeadly physical force
18 against Lawanda McCrea. You are to make that determination
19 after considering all of the evidence. If the State claims
20 that the defendant used deadly physical force, the State
21 must prove that beyond a reasonable doubt. First question
22 you must resolve then is whether the level of force used by
23 the defendant rises to the level of deadly physical force or
24 is it some lower degree of physical force. Now, once you
25 have determined whether the defendant has used deadly or
26 nondeadly force, you must then go on to consider whether the
27 defendant justifiably acted in self-defense.

1 The task you are to apply is a subjective
2 objective test, meaning that it has some subjective aspects
3 and some objective aspects. You must consider the situation
4 from the perspective of the defendant; that is, what did the
5 defendant actually believe as best as can be inferred from
6 the evidence. This is the subjective aspect of the test.
7 The statute requires, however, that the defendant's belief
8 be reasonable and not irrational or unreasonable under the
9 circumstances; that is, would a reasonable person in the
10 defendant's circumstances have reached that belief. This is
11 the objective aspect of the test.
12 Each of the reasonable belief requirements of the
13 Statute ask that you -- requires that you ask two questions
14 of yourself. The first question you must ask is simply as a
15 matter of fact whether the defendant actually, that is
16 honestly and sincerely, entertained the belief in question
17 when she acted as she did. The second question you must ask
18 is whether the defendant's actual belief was reasonable in
19 the sense that a reasonable person in the defendant's
20 circumstances at the time of her actions viewing those
21 circumstances from the defendant's point of view would have
22 shared that belief. A defendant cannot justifiably act on
23 her actual belief however honestly or sincerely she held it
24 if that belief would not have been shared by a reasonable
25 person in our circumstances viewing those circumstances from
26 the defendant's point of view.
27 Therefore, the defense of self-defense has four

1 elements. One, that the defendant actually believed that
2 someone was using or was about to use physical force against
3 her. If you find that the force used by the defendant was
4 deadly physical force, then this element requires that the
5 defendant actually believed that the other person was, A,
6 using or about to use deadly physical force against her or,
7 B, was inflicting or about to inflict great bodily harm upon
8 her.
9 Second element, that that belief was reasonable
10 because a reasonable person in the defendant's circumstances
11 viewing those circumstances from the defendant's perspective
12 would have shared that belief.
13 Element three, that the defendant actually
14 believed that the degree of force she used was necessary to
15 repel the attack. Again, if you find that that force used
16 by the defendant was deadly physical force, then this
17 element requires that the defendant actually believed that
18 deadly physical force was necessary to repel the attack.
19 And element four, that the belief was reasonable
20 because a reasonable person in the defendant's circumstances
21 viewing those circumstances from the defendant's perspective
22 would have shared that belief.
23 Now, I remind you that the defendant has no burden
24 of proof regarding any of these elements. Instead, the
25 State bears the sole and exclusive burden of proving beyond
26 a reasonable doubt that the defendant did not act in self-
27 defense, a burden that it can disprove or it -- a burden

1 that it can meet by disproving at least one of these
2 elements beyond a reasonable doubt.
3 Now, I'll go over these elements again in detail
4 from that perspective. The first element is that when the
5 defendant used offensive force against Lawanda McCrea, she
6 actually, that is honestly and sincerely, believed that the
7 other person was using or about to use physical force
8 against her. The word using has its ordinary meaning; that
9 is, the other person had already begun to use force. The
10 word imminent means that the person is about to use the
11 force or physical force at that time. It does not encompass
12 the possibility that an act of physical force may take place
13 at some unspecified future time.
14 If you have found that the force used by the
15 defendant was deadly physical force, then you must find the
16 defendant actually believed that Lawanda McCrea was not only
17 using or about the use physical force upon her but that the
18 other person, namely Lawanda McCrea, was about -- was either
19 using or about to use deadly physical force against the
20 defendant or inflicting or about to inflict great bodily
21 harm upon her. Great bodily harm is not limited by the
22 definition of serious physical injury and may encompass
23 other acts. The term great has its ordinary meaning and
24 indicates a bodily harm that is substantially more than
25 minor or inconsequential harm.
26 The act of Lawanda McCrea leading to the
27 defendant's use of defensive physical force may not be

1 actual threat -- may not be an actual threat or an actual
2 assault. The test is not what the other person actually
3 intended but what the other person's act caused the
4 defendant to believe was the intention of the other. In
5 other words, the danger to which the defendant was reacting
6 may not have been an actual or real. In judging a danger to
7 herself, the defendant is not required to act with
8 infallible judgment. A person acting in self-defense is
9 sometimes required to act instantly and without time to
10 deliberate and investigate. Under some circumstances, it is
11 possible -- possible to perceive an actual threat when none,
12 in fact, existed.
13 The next element is that the defendant's actual
14 belief about force being used or about to be used against
15 her was a reasonable belief. And this means that on the --
16 that -- that -- that on the circumstances of the case,
17 viewing these circumstances from the defendant's point of
18 view, the defendant's actual belief that Lawanda McCrea was
19 using or about to use physical force or deadly physical
20 force against her was reasonable because a reasonable person
21 in the defendant's situation at the time of her actions
22 viewing the circumstances from the defendant's point of view
23 will have shared that belief.
24 The third element is that when the defendant used
25 physical force upon Lawanda McCrea for the purposes of
26 defending herself she actually, that is honestly and
27 sincerely, believed that the degree of force she used was

1 necessary for that purpose. And this applies whether you
2 have found that the defendant used deadly physical force or
3 not. The question is whether the defendant believed that it
4 was necessary to use the degree of force that she used to
5 defend herself from the attack.
6 And the forth element is that the defendant's
7 actual belief about the degree of force necessary to defend
8 herself was a reasonable belief. This means that under the
9 circumstances of the case, viewing those circumstances from
10 the defendant's point of view, the defendant's actual belief
11 that the degree of force used was necessary to defend
12 herself and it was reasonable because a reasonable person in
13 the defendant's circumstances at the time of her actions,
14 excuse me, viewing those circumstances from the defendant's
15 point of view would have shared that belief.
16 Now, in addition, the State can defeat the
17 defendant's claim of self-defense by proving one of the
18 statutory disqualifications to the use of deadly physical
19 force. Now, the statute defining self-defense describes
20 certain circumstances in which a person is not justified in
21 using deadly physical force in self-defense against another.
22 These exceptions apply only to the use of deadly physical
23 force. So if you find that the defendant used deadly
24 physical force, you must consider these exceptions. One
25 such exception is that a person is not justified in using
26 deadly physical force upon another person if she knows that
27 she can avoid the necessary -- the necessity of using such

1 force with complete safety by retreating. This -- this
2 disqualification requires a defendant to retreat instead of
3 using deadly physical force whenever two conditions are met.
4 One, a complete -- a completely safe retreat is available to
5 her and, two, she knows she can avoid the necessity of using
6 deadly physical force by making that completely safe
7 retreat. The law stresses that self-defense cannot be
8 retaliatory. It must be defensive and not punitive. The
9 term complete safety as used in the statute means without
10 any injury to the defendant whatsoever. A person acts
11 knowingly with the respect of the circumstances described in
12 the statute when she is aware that such circumstances exist.
13 And I refer you back to my instruction on knowingly.
14 Again, it's important to remember that the
15 defendant has no burden whatsoever to prove that she could
16 have retreated with complete safety or that she didn't know
17 that a safe retreat was possible before she used physical
18 force against Lawanda McCrea. To the contrary, you may only
19 reject her defense on the basis of this statutory
20 disqualification if you find that the State has proved
21 beyond a reasonable doubt that she did know that she could
22 retreat with complete safety.
23 Now, another circumstance under which a person is
24 not justified in using any degree of physical force in self-
25 defense against another is when the physical force is the
26 product of an illegal combat by agreement. Under this
27 provision, it is not necessary that there be a formal

1 agreement. Such agreement may be inferred from the conduct
2 of the parties. To infer such an agreement, you must look
3 at all the circumstances leading up to and preceding the
4 event in question as well as all of the circumstances
5 surrounding this event itself based on the entire evidence
6 presented in your own credibility assessments. This
7 exception would not apply despite an agreement for mutual
8 combat if you find that the terms were violated by Lawanda
9 McCrea and that her conduct towards the defendant was in
10 violation of their agreement. And further, that the
11 defendant knew of such a violation. Violation means that
12 Lawanda McCrea use of force exceeded the terms of the
13 agreement with the defendant and that it escalated beyond
14 what they had then agreed to as either -- as to either the
15 extent or form of conduct -- combat.
16 It is important to remember that the defendant has
17 no burden of proof to prove that her use of physical force
18 was not the product of a combat by agreement. To the
19 contrary, you may only reject her defense on the basis of
20 the statutory disqualification if you find that the State
21 has proved that the -- has proved beyond a reasonable doubt
22 that the defendant and -- that the defendant and Lawanda
23 McCrea had engaged in conduct -- in combat by agreement.
24 I said this several times but it bears repeat.
25 You must remember that the defendant has no burden of proof
26 whatsoever in respect to the defense of self-defense.
27 Instead, it is the State that must prove beyond a reasonable

1 doubt that the defendant did not act in self-defense if it
2 is to prevail on its charges of assault in the second degree
3 and criminal attempt of assault in the first degree. To
4 meet this burden, the State need not disprove all four of
5 the elements of self-defense. Instead, it can defeat the
6 defense of self-defense by disproving any one of the four
7 elements of self-defense beyond a reasonable doubt to your
8 unanimous satisfaction.
9 You must find that the defendant did not act in
10 self-defense if you find any of the following:
11 The State has proved beyond a reasonable doubt
12 when the defendant used physical force, she did not actually
13 believe that Lawanda McCrea was using or about to use
14 physical force against her. If you have found that the force
15 used by the defendant was deadly physical force, then the
16 State must prove that the defendant did actually -- did not
17 actually believe that the other person, A, was using or was
18 about to use deadly physical force against her or, B, was
19 inflicting or about to inflict great bodily harm on her.
20 Or the State has proved beyond a reasonable doubt
21 that the defendant's actual belief concerning the degree of
22 force being or about to be used against her was unreasonable
23 in the sense that a reasonable person viewing all the
24 circumstances from the defendant's point of view would have
25 not shared that belief.
26 Or you may find that the State has proved beyond a
27 reasonable doubt that the defendant used physical force to

1 defend herself against Lawanda McCrea and she did not
2 actually believe that the degree of force she used was
3 necessary for that purpose. Here, again as with the first
4 requirement, the actual belief is an honest and sincere
5 belief.
6 Or the State has proved beyond a reasonable doubt
7 that the defendant did actually believe that the degree of
8 force she used to defend herself against Lawanda McCrea was
9 necessary for that purpose; however, that belief was
10 unreasonable in the sense that a reasonable person viewing
11 all the circumstances from the defendant's point of view
12 would not have shared that belief.
13 You must also find that the defendant did not act
14 in sel-defense if you find that the State has proved beyond
15 a reasonable doubt that the defendant had a duty to retreat
16 from the physical encounter because she knew she could do so
17 with complete safety or that the physical encounter between
18 the defendant and Lawanda McCrea was a combat by agreement.
19 If you unanimously find that the State has failed
20 to prove beyond a reasonable doubt any of the elements in
21 the crime in this case, then you are to find the defendant
22 not guilty and not consider the defense. If you unanimously
23 find that all the elements of a crime to which self-defense
24 applies has been proved beyond a reasonable doubt, you shall
25 then consider the defense of self-defense. If you find that
26 the State has disproved beyond a reasonable doubt at least
27 one of the elements of the defense or has proved the

1 statutory -- one of the statutory disqualifications, you
2 must reject that defense and find the defendant guilty. If,
3 on the other hand, you unanimously find that the State has
4 not disproved beyond a reasonable doubt at least one of the
5 elements of the defense or has not proven the statutory
6 disqualifications, then on the strength of that defense
7 alone, you must find the defendant not guilty despite the
8 fact that you would of -- that you have found the elements
9 of the -- of the crime proved beyond a reasonable doubt.
10 Now, I'd like to emphasize to you the duty from
11 which -- which now rests upon you. Let me begin by
12 repeating to you the oath which was administered to you when
13 you took your seats in the jury box. It went something like
14 this. Do you solemnly swear that without respect of persons
15 or favor of any person you will decide between the State of
16 Connecticut and the defendant at bar according to the law
17 and the evidence before you so help you God and upon penalty
18 of perjury.
19 That was the oath you took and, as I've said, the
20 law has been given to you by me, the Court. It is your duty
21 to accept the law as given to you by the Court. It is your
22 duty to accept the facts. You will apply the facts
23 determined by you to the law given -- given to you by the
24 Court and render your verdict of guilty or not guilty. You
25 must coolly, considerately, and with minds unswerved from
26 your duty, by any kind of passion or sentiment, determine
27 your verdict from a careful considerations of the facts as

1 THE COURT: Oh, yeah. McClintock is his name.
2 I always mean to do that and then I forget.
3 (Whereupon Mr. McClintock reenters the
4 courtroom.)
5 THE COURT: Fun's over, but let me just say to
6 you this. We don't know what's going to happen as
7 far as the deliberation. So until you know for a
8 fact that a verdict has been reached, that warning
9 about talking to anybody about the case still
10 applies, because if for some reason we have to call
11 you back in and to make a part of the jury, we will
12 do so. They'll start their deliberations over again
13 with you present, but don't talk to anybody until you
14 know there actually have been a verdict.
15 MR. MCCLINTOCK: Am I excused for the day or?
16 THE COURT: You are excused. Okay.
17 MR. MCCLINTOCK: Thank you.
18 THE COURT: Thank you.
19 (Whereupon Mr. McClintock exits the courtroom.)
20 THE COURT: Any exceptions noted on the record
21 concerning the instruction?
22 ATTY. DELEO: Nothing from the State, Judge.
23 ATTY. ALOSI: No, your Honor.
24 THE COURT: Okay. We gotta get the exhibits and
25 the Information and I want to make sure 'cause I
26 don't want to have any problems.
27 Counsel have gone over the exhibits to make sure

## CONSTITUTIONAL PROVISIONS

## UNITED STATES CONSTITUTION

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

## CONNECTICUT CONSTITUTION

**Section 8 of the article first** of the constitution is amended to read as follows: In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

**Section 9** No person shall be arrested, detained or punished, except in cases clearly warranted by law.

## GENERAL STATUTES

**Sec. 53a-12. Defenses; burden of proof.** (a) When a defense other than an affirmative defense, is raised at a trial, the state shall have the burden of disproving such defense beyond a reasonable doubt.
(b) When a defense declared to be an affirmative defense is raised at a trial, the defendant shall have the burden of establishing such defense by a preponderance of the evidence.

**Sec. 53a-19. Use of physical force in defense of person.** (a) Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably

believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm.

(b) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he or she is in his or her dwelling, as defined in section 53a-100, or place of work and was not the initial aggressor, or if he or she is a peace officer, a special policeman appointed under section 29-18b, or a motor vehicle inspector designated under section 14-8 and certified pursuant to section 7-294d, or a private person assisting such peace officer, special policeman or motor vehicle inspector at his or her direction, and acting pursuant to section 53a-22, or (2) by surrendering possession of property to a person asserting a claim of right thereto, or (3) by complying with a demand that he or she abstain from performing an act which he or she is not obliged to perform.

(c) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force, or (3) the physical force involved was the product of a combat by agreement not specifically authorized by law.

**Sec. 53a-49. Criminal attempt: Sufficiency of conduct; renunciation as defense.** (a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which

can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(c) When the actor's conduct would otherwise constitute an attempt under subsection (a) of this section, it shall be a defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

**Sec. 53a-59. Assault in the first degree: Class B felony: Nonsuspendable sentences.** (a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person; or (4) with intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person or to a third person; or (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm.

(b) Assault in the first degree is a class B felony provided (1) any person found guilty under subdivision (1) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court and (2) any person found guilty under subsection (a) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim of the offense is a person under ten years of age or if the victim of the offense is a witness, as defined in section 53a-146, and the actor knew the victim was a witness.

**Sec. 53a-60. Assault in the second degree: Class D felony.** (a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm; or (3) he recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or (4) for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to such person, without his consent, a drug, substance or preparation capable of producing the same; or (5) he is a parolee from a correctional institution and with intent to cause physical injury to an employee or member of the Board of Pardons and Paroles, he causes physical injury to such employee or member.

(b) Assault in the second degree is a class D felony.

**Sec. 53a-61. Assault in the third degree: Class A misdemeanor.** (a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

(b) Assault in the third degree is a class A misdemeanor and any person found guilty under subdivision (3) of subsection (a) of this section shall be sentenced to a term of imprisonment of one year which may not be suspended or reduced.

## PRACTICE BOOK PROVISIONS

**Sec. 60-5. Review by the Court; Plain Error; Preservation of Claims**

The court may reverse or modify the decision of the trial court if it determines that the factual findings are clearly erroneous in view of the evidence and pleadings in the whole record, or that the decision is otherwise erroneous in law.

The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court.

In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, and counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or exception, and the ruling thereon as previously articulated, remain the same.

If the court deems it necessary to the proper disposition of the cause, it may remand the case for a further articulation of the basis of the trial court's factual findings or decision.
It is the responsibility of the appellant to provide an adequate record for review as provided in Section 61-10.