

## **2.8 JUSTIFICATION DEFENSES**

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## 2.8 Introduction to Justification Defenses

Revised to May 23, 2013

Justification is a general defense to a crime involving the use of physical force. The use of physical force upon another person that results in actual injury, while usually a criminal assault, is not criminal if it is permitted or justified by a provision of law or statute. General Statutes § 53a-16. Therefore, when one who is accused of committing an assault claims that he or she acted under a legal justification, the jury must examine the circumstances and discover whether the act was truly justified. The court's function in instructing the jury is to tell the jury the circumstances in which the use of physical force against another person is legally justified.

### ***Codification***

Justification is defined in General Statutes §§ 53a-17 -- 53a-23. "The statutes which enumerate the situations where the use of force is justified attempt to restate the common law. They should be read in the light of their common-law background, and the fact that an individual section does not fully state the relevant common-law rule, with all its possible applications, exceptions or implications, should not prevent a court from reading it as incorporating the full body of common-law rules relevant thereto." *State v. Shaw*, 185 Conn. 372, 379 (1981). Reliance on the common law is inappropriate when the statute directly addresses the question; i.e., when the statute is on point, the statutory language controls. *State v. Corchado*, 188 Conn. 653, 662-63 (1982).

### ***Burden of proof***

The burden is on the state to prove beyond a reasonable doubt that the defendant was not justified in using physical force. General Statutes § 53a-12 (a). "[A] defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. . . . This burden is light, however, and may be satisfied if there is any foundation in the evidence for the defendant's claim, no matter how weak or incredible." *State v. Clark*, 264 Conn. 723, 730-31 (2003). Once this burden is satisfied, the defendant is entitled to the instruction as a matter of law "even where the defendant has not submitted a request to charge on a particular aspect of his defense and has not objected to its omission from the charge after the charge has been given." *State v. Cruz*, 75 Conn. App. 500, 510 (2003); *State v. Bailey*, 209 Conn. 322, 340 (1988).

### ***General validity of laws and court orders allowing physical force -- § 53a-17***

Section 53a-17 justifies the use of physical force "when such conduct is required or authorized by a provision of law or by a judicial decree, including but not limited to (1) laws defining duties and functions of public servants, (2) laws defining duties of private citizens to assist public servants in the performance of certain of their functions, (3) laws governing the execution of legal process, (4) laws governing the military services and the conduct of war, and (5) judgments and orders of courts." See, e.g., Use of Physical Force by Peace Officer in Making Arrest or Preventing Escape, Instruction 2.8-6.

### ***Justification in certain circumstances -- § 53a-18***

General Statutes § 53a-18 includes six circumstances in which physical force is justified. Whenever the evidence raises justification under any of these circumstances, the jury must be charged with the permissible scope of the justifiable use of physical force.

*Justification of Force by Persons Entrusted to Care for Minors or Incompetent Persons -- § 53a-18 (1)*

A parent, guardian, or other person entrusted with the care and supervision of a minor child or an incompetent person, except a person entrusted with the care and supervision of a minor for school purposes as described in General Statutes § 53a-18 (6) (see below), is legally entitled to use physical force upon such minor child or incompetent person. To be justified, however, the person exercising this force must reasonably believe that it was necessary in order to maintain discipline or to promote the welfare of the minor or incompetent person. This force must be reasonable, and deadly force is not permitted. See *State v. Brocuglio*, 56 Conn. App. 514, 517-18, cert. denied, 252 Conn. 950 (2000) (whether the parent's physical force on a child is reasonable is for the jury to decide).

The statute recognizes the common-law right of parents to punish children for their own welfare. See *State v. Leavitt*, 8 Conn. App. 517, 522, cert. denied, 201 Conn. 810 (1986). Both the common law and the statute require that the use of physical force be reasonable. *Id.* See also General Statutes § 17a-101 (parents' right to discipline limited by child abuse statute).

The parental justification defense may be raised to a charge of risk of injury to a minor involving blatant physical abuse under the act prong of § 53-21 (a) (1). *State v. Nathan J.*, 294 Conn. 243, 260 (2009). See Risk of Injury to a Minor (Act Prong), Instruction 6.11-2.

*Justification of Force by a Correctional Official -- § 53a-18 (2)*

An authorized official of a correctional institution or facility is permitted to use physical force in order to maintain order and discipline, but only if that force is reasonable, and is authorized by the rules and regulations of the state department of correction. Such force may only be used for the purpose of maintaining order and discipline, and not for retaliation or punishment.

This section is applicable not only to a charge of assault brought against a correctional officer, but to offenses related to an assault upon a correctional officer when the defendant attempts to raise self-defense. See *Interfering with an Officer*, Instruction 4.3-1, and *Assault of Public Safety or Emergency Medical Personnel*, Instruction 4.3-3.

*Justification of Force by Employee of Common Carrier -- § 53a-18 (3)*

Force may legally be used by a person responsible for the maintenance of order in a common carrier, such as a railroad, bus, airplane, taxi, etc. Such person, or someone acting under his or her direction, may use reasonable force if he or she reasonably believes that it is necessary to maintain order. The right of a person responsible for maintaining order in a common carrier to use reasonable force to maintain such order, is a restatement of the common-law rule. See, e.g., *Downs v. New York & New Haven R. Co.*, 36 Conn. 287, 291 (1869); *Crocker v. New London, Willimantic, and Palmer, R.R. Co.*, 24 Conn. 249, 263-64 (1855) (railroad employees have the right to use reasonable force to eject passengers who fail to tender the proper fare). See also *Pease v. Delaware, L. & W. R. Co.*, 101 N.Y. 367, 371, 5 N.E. 37 (1886) (disorderly passengers may be ejected for causing danger, discomfort or annoyance to passengers).

Even deadly force may be used, but only in cases where it is reasonably believed to be necessary to prevent death or serious physical injury. It should be noted that although § 53a-18

uses the term "physical injury," § 53a-19 limits the use of deadly force to the threat of deadly force or "great bodily harm," which is broader than serious physical injury.

*Justification of Force to Prevent Suicide -- § 53a-18 (4)*

A person is permitted to use force if he or she reasonably believes that another person is about to commit suicide, or to inflict serious bodily harm upon himself or herself. Only reasonable force may be used, and the person must reasonably believe that such force is necessary to prevent the apparent suicide or serious injury.

*Justification of Force by a Physician -- § 53a-18 (5)*

Force may be used by a licensed physician or psychologist, or someone acting under his or her direction. This force must be reasonable and for the purpose of providing a recognized form of treatment that the doctor reasonably believes is necessary to promote the physical or mental health of a patient. Such force is only allowed in two situations: (1) when the patient has consented to such treatment, or if the patient is a minor or incompetent person, when the consent of the person entrusted with his care and supervision has been obtained; or (2) when the physician or psychologist has determined that a medical emergency exists. In the second situation, the doctor is permitted to use force if he or she reasonably believes that no consent can be obtained from a competent person, and that a reasonable person would provide consent in order to safeguard the welfare of the patient.

*Justification of Force in Schools -- § 53a-18 (6)*

A teacher or other person entrusted with the care of a minor for school purposes may use reasonable force upon such minor in certain situations. The teacher must reasonably believe that force is necessary to: 1) protect himself or herself or others from immediate physical injury; 2) obtain possession of a dangerous instrument or controlled substance; 3) protect property from physical damage; or 4) restrain such minor or remove such minor to another area to maintain order.

Section 53a-18 restates the common-law rule allowing the use of force by teachers or other school authorities who are placed in loco parentis. For cases discussing the common-law rule, see *Andreozzi v. Rubano*, 145 Conn. 280 (1958); *Calway v. Williamson*, 130 Conn. 575 (1944); *O'Rourke v. Walker*, 102 Conn. 130 (1925) (power of school authority to use physical discipline may extend beyond school grounds and hours); *Sheehan v. Sturges*, 53 Conn. 481 (1885); *Peck v. Smith*, 41 Conn. 442 (1874). See also *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

***Subjective-objective standard***

Justification defenses are similar in that they focus on the defendant's reasonable beliefs as to circumstances defined in the statutes and the necessity of using force. The use in these statutes of the phrase "reasonably believes" has been interpreted by the Supreme Court as embodying a subjective-objective standard. See *State v. Saunders*, 267 Conn. 363, 373 (2004); *State v. Wright*, 77 Conn. App. 80, 88 (2003).

"The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." *State v. DeJesus*, 194 Conn. 376, 389 n.13 (1984). "The self-defense statute, i.e., General Statutes § 53a-19 . . . focuses on the person . . . claiming self-defense. It focuses on what *he*

reasonably believes under the circumstances and presents a question of fact . . . . This statutory emphasis upon the defendant further demonstrates the function of the jury in their evaluation of the self-defense claim." (Emphasis in original.) *State v. Corchado*, 188 Conn. 653, 663 (1982). "The jury's initial determination, therefore, requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief . . . at the time of the confrontation is in fact credible. This probe into the defendant's actual state of mind clearly demonstrates the function of the jury in [its] evaluation of the self-defense claim." *State v. Prioleau*, 235 Conn. 274, 286-87 (1995). "[T]he jury must make a further determination as to whether that belief was reasonable, from the perspective of a reasonable person in the defendant's circumstances." *Id.*, 287.

In instructing the jury on the reasonableness of the defendant's belief, it was error to refer to "an average person of ordinary intelligence in like circumstances." *State v. Anderson*, 227 Conn. 518, 533 (1993). "[T]here is nothing in [the subjective-objective] test that refers to a 'person of ordinary intelligence.'" *Id.*; see also *State v. Cruz*, 75 Conn. App. 500, 512-13 n.10 (2003). "The defendant's conduct must be judged ultimately against that of a reasonably prudent person." (Internal quotation marks omitted.) *State v. Carter*, 48 Conn. App. 755, 772 (1998).

It is not required that the jury find that the victim was, in fact, using or about to use physical force against the defendant. *State v. Clark*, 264 Conn. 723, 732-33 (2003). An instruction that requires the jury to find that the victim was not using or about to use physical force is thus improper. *Id.*; *State v. Wortham*, 80 Conn. App. 635, 644-46 (2003).

### ***Imperfect self-defense***

Connecticut does not recognize the doctrine of "imperfect self-defense," under which an honest but unreasonably held belief is a mitigating factor that allows a defendant to be convicted of a lesser crime because although the defendant may have acted with the requisite intent, he or she is less culpable. Connecticut's Penal Code provides a similar treatment of extreme emotional distress as a mitigating factor. "Under an instruction for extreme emotional disturbance, as with imperfect self-defense as applied by other jurisdictions, the defendant must be found to have intentionally caused the death of the victim before the crime can be mitigated downward to a lesser offense." *State v. Abdalaziz*, 248 Conn. 430, 440 (1999)

When a defendant attempts to raise the defense that he or she had an honest but unreasonably held belief, the proper approach is a lesser included offense. "[I]f evidence is presented that the defendant had an honest but unreasonable belief in the need to use physical force, such evidence may be sufficient for the jury to find the defendant innocent of the greater crime for which specific intent is required, and guilty of the lesser included offense for which recklessness is required, and therefore, the jury should receive a . . . lesser included offenses instruction on that basis." *Id.*, 441.

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

Revised to June 12, 2009 (modified May 23, 2013)

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<sup>1</sup>**

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:>*<sup>2</sup> 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:<sup>3</sup>

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.<sup>4</sup> 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<sup>5</sup>**

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 proved 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.<sup>6</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> 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."

<sup>4</sup> 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").

<sup>5</sup> 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).

<sup>6</sup> 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*

"Although § 53a-19 provides for two separate, but related defenses -- self-defense and defense of others -- [the Supreme Court has] interpreted the provision consistently without regard to the specific type of claim asserted thereunder. . . . [B]ecause [the] court has had far fewer occasions to consider defense of others claims under § 53a-19, [the court] looks to [its] precedents concerning the application of this section to self-defense claims to [claims of defense of others]." *State v. Bryan*, 307 Conn. 823, 833-34 (2013).

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).

Whether a person claiming defense of a third party has a duty to retreat depends on whether the person being defended has a duty to retreat. *State v. Rodriguez*, 47 Conn. App. 91, 96, cert. denied, 243 Conn. 960 (1997).

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

(c)

Revised to December 1, 2007 (modified April 19, 2017)

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.]<sup>1</sup>

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.

### ***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***

"[C]ombat by agreement exists only when there is a mutual agreement to fight *on equal terms* for purposes other than protection," because such equality is inconsistent with the concept of self-defense. (Emphasis in original; internal quotation marks omitted.) *State v. O'Bryan*, 318 Conn. 621, 641 (2015). The existence of an agreement and its terms are questions of fact. *Id.*, 643 n.18. 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).

Notwithstanding an initial agreement for mutual combat, a defendant may still claim self-defense when the other person escalates the encounter beyond the agreed-upon terms. *State v. O'Bryan*, *supra*, 318 Conn. 642-43. The jury must find that the defendant, in fact, knew that the other person had violated the terms of the agreement, not simply that he or she reasonably believed so. *Id.*, 644.

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

Revised to April 19, 2017

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.<sup>1</sup>

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<sup>2</sup>

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.<sup>3</sup>

[<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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<sup>1</sup> In this context, the court should not give the full instruction on Knowledge, Instruction 2.3-3, which indicates that knowledge may be inferred when "a reasonable person of honest intention, in the situation of the defendant" would reach a particular conclusion. Our Supreme Court has concluded that such "reasonable person" language misstates the law on the duty to retreat because it suggests an objective standard of reasonableness rather than the correct "subjective standard of the defendant's actual knowledge." *State v. Ash*, 231 Conn. 484, 495 (1994); see also *State v. Rios*, 171 Conn. App. 1, 49-50 (observing that "reasonable person" language "risked diluting the jury's understanding of the need to ascertain whether the defendant had actual knowledge that he could retreat in complete safety"), cert. denied, 325 Conn. 914 (2017).

<sup>2</sup> See *State v. James*, 54 Conn. App. 26, 32-26 (1999).

<sup>3</sup> 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. Rodriguez*, 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).

## 2.8-4 Defense of Premises -- § 53a-20

Revised to November 17, 2015

The evidence in this case raises the issue of the defense of premises. This defense 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 *<insert applicable crimes any lesser included offenses>*, you must go on to consider whether or not the defendant acted justifiably in the defense of premises. 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 premises. It is a complete defense to certain crimes, including *<insert applicable crimes and any lesser included offenses>*. When, as in this case, evidence that the defendant's actions were in defense of premises 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 defense of premises. If the state fails to disprove beyond a reasonable doubt that the defendant acted in defense of premises in accordance with my instructions, you must find the defendant not guilty of *<insert applicable crimes and any lesser included offenses>* despite the fact that you have found the elements of (that crime / those crimes) proved beyond a reasonable doubt. The defendant has no burden of proof whatsoever with respect to this defense.

The statute defining this defense reads in pertinent part as follows:

a person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person when and to the extent that (he/she) reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises.

The term "premises" is generally defined as any real estate or building or any structure or vehicle or watercraft used for lodging persons overnight or for carrying on a business. [When a building consists of separate units, such as apartments or offices, each unit is a separate premises.]

To convict the defendant of *<insert applicable crimes>*, the state must disprove beyond a reasonable doubt one of the following elements:

### **Element 1 - Right to defend premises**

The first element is that the defendant had possession or control of the premises. The right to defend premises does not apply to everyone, but only to persons in possession or control of such premises, or persons privileged to be there, such as visitors or guests of the owner. The state can disprove this element by proving that the defendant was not in control of the premises or otherwise licensed or privileged to be there.

**Element 2 - From a criminal trespass**

The second element is that *<insert name of decedent/complainant>* was criminally trespassing on the premises. The right to defend premises does not allow the use of physical force every time someone enters those premises without consent. For example, force may not be used against someone who enters the premises merely by accident or mistake. Rather, physical force may be used only to prevent an actual or attempted criminal trespass. *<Instruct according to the type of criminal trespass that the facts support.>*<sup>1</sup>

**Element 3 - Actual belief that force was necessary**

The third element is that the defendant actually -- that is, honestly and sincerely -- believed that *<insert name of decedent/complainant>* was trespassing on the premises at *<identify location of premises>* and was refusing to leave after having been asked to. The defendant must have actually believed that the use of physical force was necessary to terminate the trespass.

"Physical force" means actual physical force or violence or superior physical strength. Physical force may not be used, however, if it reasonably appears that the trespasser is leaving or about to flee, nor may it be used once the trespasser has left the premises, for this would no longer be defensive force, but rather retaliatory and unlawful force.<sup>2</sup>

**Element 4 - Reasonableness of that belief**

The fourth element is that the defendant's belief was reasonable, and not irrational or unreasonable under the circumstances. You must ask whether a reasonable person in the defendant's situation, viewing the circumstances from the defendant's point of view, would have shared the belief. In other words, was the defendant's belief that the use of physical force was necessary to prevent or terminate the criminal trespass of *<insert name of decedent/complainant>* reasonable under the circumstances.

**[Deadly physical force**

*<If the state is claiming that the defendant used deadly physical force:>*

The defense of premises against a criminal trespasser allows only the use of reasonable physical force. The law distinguishes physical force from deadly physical force, and allows the use of deadly physical force only in limited circumstances.<sup>3</sup> The state is claiming that the physical force used by the defendant to defend the premises against the criminal trespass of *<insert name of decedent/complainant>* was 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.

[*<Include as warranted by evidence:>* Deadly physical force may be used in defense of premises in specific circumstances.

- A person may use deadly physical force in defense of premises in order to prevent an attempt<sup>4</sup> by the trespasser to commit (arson / a crime of violence).<sup>5</sup> *<Insert appropriate definition:>*
  - Arson is the reckless causation of damage to a building by intentionally starting a fire or causing an explosion.
  - In the context of this defense, a crime of violence refers to burglary, which is the unlawful entering or remaining in a building with the intent to commit another crime.
- A person may use deadly physical force when (he/she) reasonably believes that deadly physical force is necessary to prevent or end a forcible unlawful entry into (his/her) dwelling or place of work, and for the sole purpose of such prevention or termination. [Dwelling means a building which is usually occupied by a person at night, whether or not that person is actually present.]

Deadly physical force is allowed in (this / these) situation[s] even when the person has no fear that (he/she) will be harmed by the trespasser, unless the state proves beyond a reasonable doubt that the circumstances in question did not occur.]

### **Conclusion**

You must remember that the defendant has no burden of proof whatsoever with respect to this defense. Instead, it is the state that must disprove beyond a reasonable doubt that the defendant acted in the defense of premises 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]. The state need not disprove all of the elements of the defense of premises. Instead, it can defeat the defense by disproving any part of defense of premises beyond a reasonable doubt to your unanimous satisfaction.

If you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements of *<insert applicable crimes>*, you shall then find the defendant not guilty and not consider the defense.

If you unanimously find that all the elements of *<insert applicable crimes and any lesser included offenses>* have been proved beyond a reasonable doubt, you shall then consider the defense of premises. If you unanimously find that the state has disproved beyond a reasonable doubt at least one of the elements of the defense, 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, then on the strength of that defense alone you must find the defendant not guilty of <insert applicable crimes> despite the fact that you have found the elements of (that crime / those crimes) proved beyond a reasonable doubt [and not consider any of the lesser-included offenses].

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<sup>1</sup> General Statutes §§ 53a-107, 53a-108, and 53a-109 define criminal trespassing. The defendant's request for an instruction on this defense should specify the degree of criminal trespass that he or she is claiming occurred. If the elements of some degree of criminal trespass are not present, then this defense does not apply. See *State v. Brunette*, 92 Conn. App. 440, 448-49 (2005).

<sup>2</sup> *State v. Ghiloni*, 35 Conn. Sup. 570 (App. Sess. 1979), cert. denied, 175 Conn. 758 (1978); see also *State v. Taxiltaridis*, 2 Conn. App. 617, 619-20 (1984).

<sup>3</sup> Section 53a-20 (1) also permits a person to use deadly physical force "in defense of a person as prescribed in section 53a-19." In such a case, the defense would not be defense of premises, but defense of person. See Self-Defense and Defense of Others, Instruction 2.8-1, and Duty to Retreat, Instruction 2.8-3.

<sup>4</sup> The existing statutory scheme allows deadly force to protect premises against attempted arson. Criminal attempt is defined at General Statutes § 53a-49, arson at General Statutes §§ 53a-111 through 53a-113. Under this statutory scheme, therefore, one may justifiably use deadly force against someone in the act of setting a fire in violation of our arson statutes, but not one second after the blaze has begun. This result, while at first glance anomalous, is consistent with the law of self-defense, which allows deadly force only to prevent death or serious bodily injury, or to prevent a forcible entry into or a violent felony within a dwelling. Any other interpretation would result in a retaliatory and unlawful use of force.

<sup>5</sup> The term "crime of violence," in the context of § 53a-19, "involves only those offenses which fall within the traditional common-law definition and do not, by their essential elements, necessarily involve the use of deadly force or infliction of great bodily harm." *State v. Terwilliger*, 314 Conn. 618, 661-62 (2014). "Only the crimes of arson and burglary fall within that definition." *Id.*, 662.

#### ***Commentary***

In order for this defense to apply, the defendant would have had to be privileged to be on the premises, and the victim would have had to be a criminal trespasser. *State v. Garrison*, 203 Conn. 466, 472 (1987).

A person defending his or her dwelling or place of work does not have a duty to retreat before using deadly physical force. *State v. Amado*, 254 Conn. 184, 196-97 (2000). This is consistent with the exception from the duty to retreat from one's dwelling when confronted with deadly physical force.

## 2.8-5 Defense of Personal Property -- § 53a-21

Revised to December 1, 2007 (modified November 17, 2015)

The evidence in this case raises the issue of the use of force against another to defend personal property. This defense 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 each element of *<insert applicable crimes and any lesser-included offenses>*, you must go on to consider whether or not the defendant acted justifiably in the defense of personal property. 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 personal property. It is a complete defense to certain crimes, including *<insert applicable crimes and any lesser included offenses>*. When, as in this case, evidence that the defendant's actions were in defense of personal property 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 defense of personal property. If the state fails to disprove beyond a reasonable doubt that the defendant acted in defense of personal property in accordance with my instructions, you must find the defendant not guilty of *<insert applicable crimes and any lesser included offenses>* despite the fact that you have found the elements of (that crime / those crimes) proved beyond a reasonable doubt. The defendant has no burden of proof whatsoever with respect to (his/her) defense.

The statute defining this defense reads in pertinent part as follows:

a person is justified in using reasonable physical force<sup>1</sup> upon another person when and to the extent that (he/she) reasonably believes such to be necessary to *<insert as appropriate:>*

- prevent an attempt by such other person to commit (larceny / criminal mischief involving property).
- regain property that (he/she) reasonably believes to have been acquired by larceny within a reasonable time prior to the use of such force.

To convict the defendant of *<insert applicable crimes>*, the state must disprove beyond a reasonable doubt one of the following elements:

*<Select either A. or B. depending on the evidence supporting the defense:>*

### **A. TO PREVENT A LARCENY OR CRIMINAL MISCHIEF INVOLVING PROPERTY**

#### **Element 1 - Prevented larceny or criminal mischief**

The first element is that the defendant was preventing another person, *<insert name of other person>*, from committing (larceny / criminal mischief involving property). *<Insert as appropriate:>*

- Larceny is the wrongful taking of the property of another with the specific intent to keep it for (himself/herself) or a third person. *<Instruct according to the type of larceny that the facts support.>*<sup>2</sup>
- Criminal mischief involving property is when a person, knowing (he/she) has no right to do so, intentionally damages tangible property of another.<sup>3</sup>

The property could belong to the defendant or to any other person for purposes of this defense.

**Element 2 - Actual belief that force was necessary**

The second element is that the defendant actually -- that is, honestly and sincerely - believed that *<insert name of decedent/complainant>* was committing (larceny / criminal mischief involving property) and that physical force was necessary to prevent the completion of the crime.

"Physical force" means actual physical force or violence or superior physical strength. Physical force may not be used, however, if it reasonably appears that the perpetrator was ceasing the criminal act, for this would no longer be defensive force, but rather retaliatory and unlawful force.

**Element 3 - Reasonableness of the belief**

The third element is that the defendant's belief that physical force was necessary was a reasonable belief. That is, would 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, have shared that belief? It may not have been actually necessary to use force, but if the defendant reasonably believed that force was necessary in order to regain the property, then such force was justified.

**Conclusion**

You must remember that the defendant has no burden of proof whatsoever with respect to this defense. Instead, it is the state that must disprove beyond a reasonable doubt that the defendant acted in the defense of property 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]. The state need not disprove all of the elements of the defense of property. Instead, it can defeat the defense by disproving any one of the elements of defense of property beyond a reasonable doubt to your unanimous satisfaction.

If you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements of *<insert applicable crimes>*, you shall then find the defendant not guilty and not consider the defense.

If you unanimously find that all the elements of *<insert applicable crimes and any lesser included offenses>* have been proved beyond a reasonable doubt, you shall then consider the defense of personal property. If you unanimously find that the state has disproved beyond a reasonable doubt at least one of the elements of the defense, 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, then on the strength of that defense alone you

must find the defendant not guilty of *<insert applicable crimes>* despite the fact that you have found the elements of (that crime / those crimes) proved beyond a reasonable doubt [and not consider any of the lesser-included offenses].

## **B. TO REGAIN PROPERTY WRONGFULLY TAKEN OR WITHHELD BY ANOTHER**

### **Element 1 - Regain property recently and wrongfully taken**

The first element is that the defendant was using force in order to regain property that (he/she) believed was wrongfully taken or withheld by someone. The property could belong to the defendant or to any other person for purposes of this defense.

Furthermore, this use of force must occur within a reasonably short time after the perceived larceny or damage occurred. There is no fixed time limit in which the defendant must act; rather, it is up to you to determine what was reasonable in light of all the existing circumstances. The use of reasonable physical force may be justified when only a short time has passed. However, the more time has passed since the perceived larceny or damage, the less reasonable the use of force will be. Whether the amount of time passed is reasonable is a question of fact for you to determine given the evidence in the case.

The property in question need not have been actually taken or withheld; indeed, it may rightfully have belonged to the other person.

### **Element 2 - Actual belief that force was necessary**

The second element is that the defendant believed that physical force was necessary to regain the property. You must ask whether the defendant actually -- that is, honestly and sincerely -- believed that physical force was necessary to regain the property. "Physical force" means actual physical force or violence or superior physical strength. A person must only use as much force as is reasonably necessary to recover the property. (He/She) may not use force to inflict punishment or vengeance. Also, (he/she) may not unnecessarily wound the other person, or use a dangerous weapon.

### **Element 3 - Reasonableness of belief**

The third element is that the defendant's belief that physical force was necessary was a reasonable belief. That is, would 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, have shared that belief? It may not have been actually necessary to use force, but if the defendant reasonably believed that force was necessary in order to regain the property, then such force was justified.

### **Conclusion**

You must remember that the defendant has no burden of proof whatsoever with respect to this defense. Instead, it is the state that must disprove beyond a reasonable doubt that the defendant acted on a reasonable belief that physical force was necessary to regain the property 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 and deliberated]. The state need not disprove a]ll of the

elements of the defense of property. Instead, it can defeat the defense by disproving any one of the elements of defense of property beyond a reasonable doubt to your unanimous satisfaction.

If you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements of <insert applicable crimes>, you shall then find the defendant not guilty and not consider the defense.

If you unanimously find that all the elements of <insert applicable crimes and any lesser included offenses> have been proved beyond a reasonable doubt, you shall then consider the defense of personal property. If you unanimously find that the state has disproved beyond a reasonable doubt at least one of the elements of the defense, 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, then on the strength of that defense alone you must find the defendant not guilty of <insert applicable crimes> despite the fact that you have found the elements of (that crime / those crimes) proved beyond a reasonable doubt [and not consider any of the lesser-included offenses].

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<sup>1</sup> The statute limits the use of this defense to reasonable force, expressly stating that a person "may use deadly physical force under such circumstances only in defense of person as prescribed in section 53a-19." A defendant is thus not entitled to a charge on defense of personal property if deadly physical force was used. See *State v. Weber*, 31 Conn. App. 58, 68-73, cert. denied, 226 Conn. 908 (1993). See Self-Defense and Defense of Others, Instruction 2.8-1, particularly the requirement that a person confronted with deadly physical force must surrender property if he or she knows that the attacker would then flee.

<sup>2</sup> General Statutes §§ 53a-122 -- 53a-125b define larceny. The defendant's request for an instruction on this defense should specify the degree of larceny that he or she is claiming occurred. If the elements of some degree of larceny are not present, then this defense does not apply. See *State v. Brunette*, 92 Conn. App. 440, 448-49 (2005) (discussing criminal trespass and the defense of premises).

<sup>3</sup> General Statutes §§ 53a-115 -- 53a-117a define criminal mischief. See footnote 2.

### ***Commentary***

"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).

See generally *State v. Anonymous* (1977-9), 34 Conn. Sup. 612, 615-18 (App. Sess. 1977) (minimal facts supported defendant's request to instruct on defense of personal property).

"Although one may be privileged to enter another's property to retrieve his goods, the act must be reasonable, and burglary is an unreasonable act even if the occupant of that house had

stolen items from the defendant." *State v. Gelormino*, 24 Conn. App. 563, 571, cert. denied, 219 Conn. 911 (1991).