Supreme Court of New Jersey

Docket No. 089446

STATE OF NEW JERSEY, *Plaintiff-Respondent*, vs. JOHN T. BRAGG, *Defendant-Petitioner.*	CRIMINAL ACTION ON PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Sat Below: HON. HANY A MAWLA, J.A.D. HON. JOSEPH L. MARCZYK, J.A.D. HON. MARK K. CHASE, J.A.D.

BRIEF ON BEHALF OF AMICUS CURIAE THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY IN SUPPORT OF DEFENDANT-PETITIONER

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PRELIMINARY STATEMENT

A person's home is his castle—afforded special protections under the law. One of those protections includes an individual's right to defend the home. Generally, a person has a duty to retreat prior to using deadly force in self-defense. However, the Legislature carved out an exception to the general rule: actors have no duty to retreat before using deadly force when in their "dwelling." This case concerns the scope of the right to self-defense, specifically what showing connecting the defendant to the dwelling must be made before a trial court has to instruct the jury on the Castle Doctrine as an exception to the general duty to retreat.

Defendant John Bragg testified at his trial. He explained that the apartment in which the altercation occurred was his own; that he was living in the apartment. The trial court, following the model jury charge on self-defense, instructed the jury on self-defense, the use of deadly force, and the duty to retreat. The trial court then stopped following the model charge. The court did not include the charge on the Castle Doctrine contained in the model charge.

On appeal, the Appellate Division affirmed, finding that omitting the complete charge was not plain error. The panel noted that there was some evidence introduced that the apartment was Bragg's. But the court dismissed this evidence finding it was introduced through Bragg's "self-serving" testimony. This is one error in the Appellate Division's opinion that warrants reversal. Any testimony from

a defendant is arguably "self-serving." But the jury, not the Appellate Division, should be weighing a defendant's credibility. Additionally, limiting a defendant's testimony to only non-self-serving testimony would infringe upon a defendant's constitutional right to testify in his defense.

Another error was applying too narrow a definition of "dwelling" that was unconnected to the statutory language. "'Dwelling' means any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging." N.J.S.A. 2C:3-11. This is a broad definition, applying to much more than a mere residence and including temporary housing arrangements. The Appellate Division concluded that the apartment was not Bragg's because he was not on the lease and did not pay rent; the panel also relied on the fact that Bragg had an out-of-state driver's license. But nothing in the statutory language requires such a high burden akin to residency to show that a dwelling, or "a portion thereof," is a defendant's "place of lodging" "for the time being." Under the Appellate Division's restrictive analysis, no individual living in temporary housing would ever be able to avail themselves of the full right to self-defense. This cannot be so.

In a time where people more often have temporary housing situations, whether by choice or by circumstance, clear guidance on the Castle Doctrine is needed. The Legislature never intended for a "dwelling" to apply as narrowly as the Appellate

Division used the term here. This Court should express that no individual in New Jersey is deprived of a right to self-defense based on the transient nature of his living situation.

The Appellate Division's errors require reversal here. Incomplete and inaccurate jury charges, especially those dealing with the elements of an offense or an affirmative defense, provide a poor vehicle for rehabilitation on appeal. Bragg had a right to have the Castle Doctrine charged to the jury. It was ultimately up to the jurors to decide whether they believed the apartment was in fact Bragg's "dwelling," thereby obviating his duty to retreat before using deadly force.

STATEMENT OF AMICUS CURIAE

Amicus curiae, the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ), is a non-profit corporation organized under the laws of this State to, among other things, "protect and ensure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitution; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." ACDL-NJ By-Laws, Article II(a), http://www.acdlnj.org/about/bylaws. The ACDL-NJ is comprised of over 500 members of the criminal defense bar of this State, including attorneys in private practice and public defenders.

Over the years, the ACDL-NJ has participated as amicus curiae in numerous cases in this Court and in the Appellate Division. See, e.g., State v. Hill, 256 N.J. 266 (2024); State v. Olenowski, 255 N.J. 529 (2023); State v. F.E.D., 251 N.J. 505 (2022). Indeed, on various occasions, the ACDL-NJ has affirmatively been invited to file amicus briefs on matters of importance to the courts. See, e.g., State v. Hernandez, 225 N.J. 451 (2016); State v. Scoles, 214 N.J. 236 (2013); State v. Bishop, 429 N.J. Super. 533 (App. Div. 2013); State v. Cohen, 431 N.J. Super. 256 (App. Div. 2009).

Amicus seeks to participate in this matter to provide an in-depth analysis of the meaning of the term "dwelling" used in exceptions to the general rule that an actor has a duty to retreat prior to using deadly force in self-defense. See N.J.S.A. 2C:3-4 and N.J.S.A. 2C:3-11. Amicus has an interest in this Court adopting a clear standard that when there is some evidence that the dwelling is defendant's the dwelling, the failure of a trial court to instruct the jury on the Castle Doctrine after charging the jury on the general duty to retreat is plain error.

Amicus thus seeks to "assure [] that all recesses of the problem will be earnestly explored." See Whelan v. N.J. Power & Light Co., 45 N.J. 237, 244 (1965). Amicus' participation in this matter would certainly "assist in the resolution of an issue of public importance." R. 1:13-9.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The ACDL-NJ, as amicus curiae, respectfully incorporates by reference the statement of procedural history and facts set forth in Bragg's brief.

ARGUMENT

THE APARTMENT WAS BRAGG'S DWELLING, AND IT WAS PLAIN ERROR FOR THE TRIAL COURT TO CHARGE THE DUTY-TO-RETREAT WITHOUT ALSO INSTRUCTING THE JURY ON THE DUTY-TO-RETREAT EXCEPTION FOR DWELLINGS.

The analysis begins, as it must, with the statutory language. State v. Regis, 208 N.J. 439, 447 (2011). Here, that is the use-of-force self-defense statute, along with its exceptions (and exceptions to exceptions).

A person may use force against another person "when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." N.J.S.A. 2C:3-4(a).

The use of deadly force is justifiable if "the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm." N.J.S.A. 2C:3-4(b)(2). But the actor generally has a duty to retreat before using deadly force. Specifically, deadly force is not justifiable if "[t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating." N.J.S.A. 2C:3-4(b)(2)(b).

The duty to retreat exception does not apply, however, if the actor is in his "dwelling." "The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor." N.J.S.A. 2C:3-4(b)(2)(b)(i).

To sum, a justifiable use of force is a defense to a crime. But prior to using deadly force as a justifiable defense, the actor first has a duty to retreat. That duty to retreat, however, does not arise when the actor is in his dwelling.

The trial court gave the self-defense charge. (20T 35:10 to 36:9.)[1] The trial court also gave the general use-of-deadly force charge, including instructing the jury on the duty to retreat. (20T 37:3 to 39:6, 40:3–23.) The trial court, however, did not charge the jury on the exception to the duty to retreat if Bragg was in his dwelling. See Model Jury Charges (Criminal), "Justification – Self Defense in Self Protection (Updated)," at p. 3 (rev. Nov. 13, 2023) ("An exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including the porch, unless he/she was the initial aggressor.").

On appeal, the Appellate Division affirmed, finding that the failure to charge the complete self-defense charge was not plain error because (1) the apartment did not qualify as Bragg's dwelling and (2) the jury found Bragg to be the aggressor. State v. Bragg, No. A-3502-21 (App. Div. May 7, 2024). "The State presented

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[1] Amicus adopts the abbreviations used by Petitioner.
Def. Supp. Br. refers to the Defendant's Supplemental Brief.

substantial objective evidence showing the apartment was not defendant's dwelling. Defendant presented only his self-serving testimony." (slip op. at 19–20.) The panel also speculated that "it is clear the jury did not believe defendant's testimony and was obviously convinced he was the aggressor." (Id. at 20.)

This Court must reverse the appellate panel's opinion. The court's analysis narrowly focused on whether the apartment was Bragg's own. (See id. at 11–12 (noting that Bragg "was not on the lease and paid no rent" and that Bragg had an out-of-state driver's license).) But this analysis does not comport with the broad statutory definition of dwelling, which includes no onus of showing residency.

This Court must also set forth clear guidance instructing trial courts to charge the Castle Doctrine when the duty to retreat is charged. When the trial record contains any evidence that the dwelling was the defendant's dwelling, then it is plain error for a trial court to instruct the jury on the duty to retreat but omit a charge on the Castle Doctrine. Whether a dwelling qualifies as the defendant's dwelling is a factual question for the jury to resolve.

1. The term "dwelling" includes a broad array of housing arrangements, including temporary housing.

A. Definition of dwelling

The Legislature defined "dwelling" in the justification defense chapter of the Code. "'Dwelling' means any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging

except that, as used in 2C:3-7, the building or structure need not be the actor's own home or place of lodging." N.J.S.A. 2C:3-11(c).[2]

The statutory language is broad. Each clause evinces a legislative intent that the definition of dwelling encompasses a wide array of housing arrangements from temporary to permanent.

To begin with, the statute applies to "any" building or structure. The Legislature intended a dwelling to apply to even "movable or temporary" structures, thus not limiting dwelling to places in permanent buildings. The statute also includes "a portion thereof," indicating that a person's dwelling may exist in a smaller unit in a larger building, such as a room in a hotel. See State v. Bass, 224 N.J. 285 (2016).

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[2] It should be noted upfront that the model jury charge for self-defense omits the definition of dwelling. This includes the current charge, which was recently updated, Model Jury Charges (Criminal), "Justification – Self Defense in Self Protection (Updated)," (rev. Nov. 13, 2023), and the charge in effect at the time of Bragg's trial, Model Jury Charges (Criminal), "Justification – Self Defense in Self Protection (Updated)," (rev. June 13, 2011).

The charge identifies there is no duty to retreat from a dwelling, and that a dwelling "includes a porch or other similar structure," but there is no citation to the definition of N.J.S.A. 2C:3-11(c). By contrast, the intruder charge includes the definition of dwelling, albeit an incomplete one, see infra n.4, explaining that "[t]he term 'dwelling' means any building or structure though movable or temporary, or a portion thereof, which is used as a person's home or place of lodging. A dwelling includes the entranceway of a building or structure." Model Jury Charges (Criminal), "Justification – Use of Force Upon an Intruder," at p.2 (rev. Sept. 12, 2016).

This Court should direct the Supreme Court Committee on Model Criminal Jury Charges to revise the model charges so that juries are instructed based on the statutory definition of dwelling. See State v. Fair, 256 N.J. 213, 239 (2024), cert. denied, 144 S. Ct. 2572 (2024) (asking Committee to revise language for charge); State v. Olenowski, 255 N.J. 529, 614 (2023) (referring issue to Committee for its consideration).

Broader than the physical characteristics of a dwelling is the legislative intent to encompass housing arrangements based on the actor's intent. First, the Legislature expressly excluded any permanency requirement to a dwelling. The phrase "for the time being" indicates that the statute explicitly protects transience. The statute is not limited to an individual's permanent residence. Thus, the Appellate Division's reliance on Bragg's out-of-state driver's license and having a car registered in another state, should not have been germane to an analysis of whether the apartment was Bragg's dwelling.

Second, a dwelling includes a "home" or "place of lodging."[3] Whether a dwelling is the actor's home is only part of the equation. Yet that is the sole side of the equation the appellate panel focused on. Similar to the use of the phrase for "the time being," the "home or place of lodging" language demonstrates the Legislature intended the statute to apply much more broadly than just to someone's permanent home. The statute incorporates short-term living. Therefore, the panel did not need to consider whether Bragg "was not on the lease and paid no rent" for the apartment, because the apartment could have been his place of lodging without it having been his home.[4]

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[3] Bragg's brief discusses the evidence introduced at trial demonstrating that he lived in the apartment. (Def. Supp. Br. at 27–28, 35–36.)

[4] The intruder model jury charge omits the crucial "for the time being" statutory language. The charge reads, "any building or structure though movable or temporary, or a portion thereof, which

The legal definition of a "lodging place" highlights that short-term living was part of the legislative intent in defining dwelling. A "lodging place" is "[a] place of rest for a night or a residence for a time; a temporary habitation." BLACK'S LAW DICTIONARY (4th ed. 1968). In 1971, the Criminal Law Revision Commission had this definition available to them. We can infer that they intended to incorporate it in the statute. See State v. Olivero, 221 N.J. 632, 643 (2015) (using Black's Law Dictionary for definition of "place of business" for interpretation of burglary statute).

A broad reading of "lodging" is consistent with the common dictionary definition of the term as well. See State v. Twiggs, 233 N.J. 513, 535 (2018) (relying on dictionary to interpret statutory language). "Lodging" includes (1) "a place to live" and (2) "sleeping accommodations" or "a temporary place to stay." Merriam-Webster.com Dictionary, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/lodging.

The plain meaning of the term "lodging" should put the legal issue in perspective for this Court. Was there sufficient evidence presented at trial that the apartment was a "temporary place" for Bragg "to stay" or that the apartment was his "sleeping accommodations"? Through that lens, the answer is clear: Yes. The trial

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is used as a person's home or place of lodging." Model Jury Charges (Criminal), "Justification – Use of Force Upon an Intruder," at p. 2 (rev. Sept. 12, 2016). This Court should instruct the Committee on Model Criminal Jury Charges to revise the jury charge to include the "time being" language.

court should have instructed the jury that Bragg did not have a duty to retreat if the jury concluded the apartment was Bragg's "sleeping accommodations" or a "temporary place [for him] to stay."

B. History of Castle Doctrine Exception to Duty to Retreat

The Castle Doctrine is an exception to the general duty to retreat before using deadly force and was first adopted judicially in New Jersey, not legislatively. In 1971, this Court adopted this exception, "which ha[d] not hitherto been squarely presented to this court." State v. Bonano, 59 N.J. 515, 519 (1971). A prior case had hinted at the viability of the defense but did not squarely adopt it. State v. Abbott, 36 N.J. 63, 67 (1961).

In Bonano, the defendant "was standing in the doorway of his home" holding a revolver when the assailant "approached the house and commenced to mount the porch steps." Bonano, 59 N.J. at 517. The assailant drew a knife and made threats. Ibid. Ultimately, the defendant fired the revolver and mortally wounded the assailant. Ibid. On appeal, this Court assessed the defendant's self-defense claim and considered whether "the defendant in this case, standing on the threshold of his own home, required to seek refuge indoors rather than resort to deadly force." Id. at 518.

The Court recounted the general rule of self-defense, noting that some jurisdictions always required retreat, but others rejected this broad doctrine,

specifying that "one who is attacked may defend himself, even to the point of killing his assailant, as long as he had a right to be at the place where he was attacked." Id. at 519. The Court noted that, to date, New Jersey recognized the duty to retreat "as an expression of the more humane and enlightened rule." Ibid.

New Jersey would continue to follow this general rule but carve out the Castle Doctrine. Ibid. The Court explained that the Castle Doctrine was a "well nigh universal rule." Ibid. (citing Clark & Marshall, LAW OF CRIMES (7th ed.) § 7.03, p. 493). The Court decided to leave the resolution of the issue of whether the defense would extend to the "curtilage" of a home "to another day," and limited the Castle Doctrine to "the dwelling house itself," which includes "a porch or other similar appurtenance." Id. at 520.

Nearly simultaneously as this Court was judicially adopting the Castle Doctrine, legislators were preparing to revise the criminal statutes. In adopting the duty to retreat rule for the new Criminal Code, the Criminal Law Revision Commission relied upon the Model Penal Code. Final Report of the New Jersey Criminal Law Revision Commission (Volume I), Section 2C:3-11 at p. 33–34 (1971). There was no pre-criminal code statutory exception, as the rule had just been adopted by the Supreme Court in Bonano. The definition of "dwelling" was pulled from Model Penal Code § 3.11. The Model Penal Code Commentary supports a broad reading of "dwelling" that encompasses temporary housing: "The definition

settles the question of whether a tent, caravan or hotel bedroom may be regarded as a dwelling. . . . This would seem to suggest that all places should be covered that can be said to be in any sense a person's home, even temporarily." MODEL PENAL CODE AND COMMENTARIES, PART I, § 3.11 cmt. 3, at 162 (AM. L. INST. 1985).

New Jersey made its own duty to retreat exceptions more restrictive than the Model Penal Code in only one specific area. Model Penal Code § 3.04 did not require a duty to retreat in a place of work. The Commission rejected this approach: "We have eliminated this as an exception to the retreat rule, being of the opinion that places of work should not be equated with dwellings for this purpose." Final Report of the New Jersey Criminal Law Revision Commission (Volume II: Commentary), Comment 10(c)(i) to 2C:3-4 at p. 87 (1971). No limitations on "dwelling" were noted.

C. There is little applicable caselaw to shed light on the meaning of the term "dwelling."

The cases analyzing the meaning of dwelling within the context of N.J.S.A. 2C:3-4 and 2C:3-11 generally arise in the context of assessing whether a physical location is in fact a dwelling. See, e.g., Bonano, 59 N.J. at 519–20 (adopting Castle Doctrine and holding that "porch or other similar physical appurtenance" is part of defendant's "dwelling house"); Abbott, 36 N.J. at 67 (noting there would be duty to retreat from common driveway); State v. Canfield, 470 N.J. Super. 234, 303 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023) (finding that curtilage of home

was outside scope of "dwelling")[5]; State v. Bilek, 308 N.J. Super. 1, 11 (App. Div. 1998) (finding "doorway or entranceway" to apartment was within definition of "dwelling"); State v. Martinez, 229 N.J. Super. 593, 603–04 (App. Div. 1989) (finding dwelling included "doorway or right in front of the door").

The caselaw, however, does not contain much analysis on a defendant's relationship to a dwelling. In State v. Bass, this Court indicated that a motel room qualifies as a dwelling. 224 N.J. at 320–23. There, the term "dwelling" arose in the context of the intruder exception for the use of deadly force under N.J.S.A. 2C:3-4(c). Id. at 321. Ultimately, the Court's decision rested on whether the victims were intruders within the meaning of the statute. Id. at 321–23. But there was no dispute that the motel room, which defendant checked into that night, was his dwelling. A rented room in a motel or hotel is the type of housing that the broad term "dwelling" should extend to because it is "sleeping accommodations" or a "temporary place to stay."

a. Caselaw outside of New Jersey

Out-of-state decisions have a similar focus on physical characteristics of what qualifies as a dwelling, rather than analyzing the sufficiency of a defendant's

5 In Canfield, the court analyzed the meaning of the term "dwelling" in the Castle Doctrine, but the court did not cite to or rely upon the definition of dwelling in N.J.S.A. 2C:3-11. 470 N.J. Super. at 304 ("The term 'dwelling' is not defined in N.J.S.A. 2C:3-4(b)(2)(b)(i) nor in any other subsection or paragraph of N.J.S.A. 2C:3-4.").

relationship to the dwelling needed to invoke the exception.[6] One example from Pennsylvania, however, proves useful for the present analysis.

In Com. v. Hornberger, the appellate court affirmed the trial court's granting of a new trial due to erroneous jury instructions that did not correctly charge the Castle Doctrine as an exception to the duty to retreat. 74 A.3d 279 (Pa. Super. Ct. 2013). The "dwelling" in Hornberger was not the defendant's traditional or primary residence. Id. at 280. It was not even a place in which the defendant had ever slept or necessarily "intended to sleep." Id. at 286. The "dwelling" was the primary residence of an acquaintance of the defendant's friend—an acquaintance that permitted the defendant and his friend to temporarily stay in the apartment. Id. at 280–81.

The defendant, Seth Hornberger, and his friend found themselves in Snyder County, Pennsylvania, in the early morning hours, with no place to go. Id. at 280–81. Hornberger's friend knew someone who lived nearby, Thomas Bingaman, having stayed there previously. Ibid. Without receiving permission from Bingaman, who was not home, Hornberger and his friend entered Bingaman's apartment. Id. at 281.

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[6] More than two-thirds of the states have stand-your-ground laws (whether legislatively or judicially created), where the duty to retreat exception applies without limitation to an actor's dwelling. NAT'L CONF. OF STATE LEGISLATURES, Self-Defense and "Stand Your Ground," (Mar. 1, 2023), available at https://www.ncsl.org/civil-and-criminal-justice/self-defense-and-stand-your-ground (last accessed Jan. 9, 2025). These laws give broader authority to exercise lethal self-defense in public without limitation to the actor's presence in his own dwelling. So, there are not many states where a dwelling would be relevant to the analysis, thereby limiting the body of law analyzing the scope of the meaning of "dwelling."

Upon returning home, Bingaman, although upset, permitted them to stay, notified them that someone else would be coming to stay in the apartment, and went to sleep. Ibid. After Bingaman went to sleep, the new guest arrived, and an altercation broke out between him and Hornberger's friend. Ibid. Hornberger intervened and killed the new guest. Ibid.

In its analysis, the appellate court noted that the trial court's erroneous instructions were premised on its determination that defendant had a duty to retreat if the jury found that either (1) the apartment was not his dwelling or (2) both defendant and the victim had an equal right to be there. Id. at 285. But these instructions were "erroneous and prejudicial since they 'could have allowed the jury to find [the defendant] guilty without the Commonwealth having established that [the defendant] did not act in justifiable self-defense." Ibid. Instead, in ordering a new trial, the trial court found—and the appellate court agreed—that the jury simply should have been instructed directly on the Castle Doctrine, that is, "if it were to find that [the] apartment was [the defendant's] dwelling at the time of the incident, then [the defendant had no] duty to retreat unless [he was] the initial aggressor[]." Ibid.

Quoting the trial court's examination of the evidence at trial, the appellate court noted that the defendant "raised a valid question for the jury as to whether [the] apartment qualified as a temporary lodging, and hence a dwelling" because of testimony that "Bingaman gave [the defendant and his friend] permission to remain

in the premises for an indefinite period of time." Id. at 286. It was "irrelevant that [the defendant] intended to sleep or stay at [the apartment] for the residence to be [his] dwelling at the time of the incident." Ibid. Taken together with Pennsylvania's nearly identical statutory definition of "dwelling" as "any building or structure though movable or temporary, or a portion thereof, which is for the time being the home or place of lodging of the actor," the court found that there was a "viable jury question as to whether [the] apartment may be deemed a dwelling for [the defendant]." Ibid. (quoting 18 Pa.C.S.A. § 501).

Other courts have also applied this plain meaning interpretation of the definition of "dwelling," or have otherwise relied on longstanding principles of law, to find that a dwelling is not limited to permanent housing situations. See, e.g., United States v. McClenton, 53 F.3d 584, 587 (3d Cir. 1995) ("A hotel guest room is intended for use as human habitation, albeit, in most circumstances, on a transient or temporary basis. Thus, a hotel guest room falls easily within this definition [of dwelling].");[7] United States v. Graham, 982 F.2d 315, 316 (8th Cir. 1992) (using the same definition as in McClenton to find that "[t]he structures used as shelters for weekend fishing retreats fall within this definition"); State v. Geiger, 556 A.2d 1100,

[7] The definition of dwelling cited in McClenton was a "building or portion thereof, a tent, a mobile home, a vehicle or other enclosed space which is used or intended for use as a human habitation, home or residence." McClenton, 53 F.3d at 587 (quoting BLACK'S LAW DICTIONARY (6th ed. 1990)).

1101 (Me. 1989) (recognizing that defendant's room at inn was his dwelling); see also Walker v. State, 205 Ala. 197, 200 (1921) ("The law has been long settled that a guest in a dwelling house is entitled to the protection the law affords to the owner or more permanent occupant." (quoting Crawford v. State, 112 Ala. 1, 27 (1896)).

D. Public policy supports a broad definition of "dwelling."

A broad reading of the definition of "dwelling" comports with numerous public policies. A person's home is granted higher protection in many areas of law.

The Castle Doctrine itself was adopted to protect people and keep them safe in their homes. "The home is accorded special treatment within the justification of self-defense." State v. Montalvo, 229 N.J. 300, 319 (2017).

In the Fourth Amendment context, "a person's home is entitled to the highest form of protection against warrantless searches." State v. Wright, 221 N.J. 456, 460, 466–68 (2015). To that end, an apartment is deemed occupied and constitutionally protected "[r]egardless of the disarray in the apartment and the fact that it was not fully furnished." State v. Randolph, 228 N.J. 566, 589 (2017).

In the burglary context, the term building or structure has been broadly applied by this Court to protect the inhabitants inside. See Olivero, 221 N.J. at 640–42 (citing legislative history of burglary statute and common-law origins of burglary applying to dwellings).

In the landlord-tenant context, New Jersey has passed the Anti-Eviction Act,

N.J.S.A. 2A18-61.1 et seq., which prevents the removal of lessees and tenants, as well as their assigns, under-tenants, and legal representatives, subject only to certain exceptions. See Cashin v. Bello, 223 N.J. 328, 337 (2015) (citing legislative history of Anti-Eviction Act and its purpose to protect tenants from being "unfairly and arbitrarily ousted from housing").

2. Jury charges, particularly incomplete and inaccurate charges like the one here omitting the Castle Doctrine, are reversible under the plain error standard.

There was an inaccurate and incomplete jury charge here. This is not a case with a mere failure to give a charge. The trial court charged and explained self-defense. (20T 35:10 to 36:9.) The trial court then charged and explained use of deadly force. (20T 37:3 to 38:15.) As part of the use-of-force charge, the court instructed the jury that Bragg had a duty to retreat.

> Even if you find that the use of deadly force was reasonable, there are limitations on the use of deadly force. If you find that the defendant, with purpose of causing death or serious bodily harm to another person, provoked or incited the use of force against himself in the same encounter, then the defense is not available to him. If you find that the defendant knew he could avoid the necessity of using deadly force by retreating, provided that the defendant knew he could do so with complete safety, then the defense is not available to him. In your inquiry as to whether a defendant who resorted to deadly force knew that an opportunity to retreat with complete safety was available, the total circumstances, including the attendant excitement accompanying the situation, must be considered.

[20T 38:16 to 39:6 (emphasis added).]

> The State has the burden to prove to you beyond a reasonable doubt that the defense of self-defense is untrue. This defense only applies if all the conditions or elements previously described exist. The defense must be rejected if the State disproves any of the conditions beyond a reasonable doubt. The same theory applies to the issue of retreat. Remember that the obligation of the defendant to retreat only arises if you find that the defendant resorts to the use of deadly force. If the defendant does not resort to the use of deadly force, one who is unlawfully attacked may hold his position and not retreat whether the attack upon him is by deadly force or some lesser force. The burden of proof is upon the State to prove beyond a reasonable doubt that the defendant knew he could have retreated with complete safety. If the State carries its burden, then you must disallow the defense. If the State does not satisfy this burden and you do have a reasonable doubt, then it must be resolved in favor of the defendant and you must allow the claim of self-defense and acquit the defendant.
>
> [20T 40:3–23 (emphasis added).]

Critically though, the trial court erred by failing to include the complete duty-to-retreat charge. Specifically, that there is no duty to retreat within the actor's dwelling. The Castle Doctrine is incorporated into the model charge for self-defense but was omitted from the court's instruction to the jury. See Model Jury Charges (Criminal), "Justification – Self Defense in Self Protection (Updated)," at p. 3 (rev. Nov. 13, 2023) ("An exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including the porch, unless he/she was the initial aggressor.").

The use-of-force charge was simply inaccurate and incomplete without this critical exception to the duty to retreat. The trial court correctly noted that the State bore the burden of proof to negate the self-defense claim, and that any reasonable doubt must be resolved in favor of Bragg. But Bragg had no duty to retreat if the jury found that he was in his dwelling.

This Court has consistently explained that "[b]ecause proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. Bunch, 180 N.J. 534, 541–42 (2004) (quoting State v. Nelson, 173 N.J. 417, 446 (2002)). See also State v. Cooper, 256 N.J. 593, 608 (2024) ("Indeed, so critical are these instructions that failures to provide accurate instructions on material issues 'are presumed to be reversible error.'" (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). When assessing the prejudice of an incorrect charge, the error must be evaluated in "in the context of the entire charge" and "in light of the totality of the circumstances." State v. Rochat, 470 N.J. Super. 392, 456, certif. denied, 252 N.J. 79 (2022) (quoting State v. DiFrisco, 137 N.J. 434, 491 (1994)).

Courts have routinely found reversible error when dealing with incorrect and incomplete self-defense jury charges. In State v. Kelly, this Court unambiguously declared that "if any evidence raising the issue of self-defense is adduced, either in the State's or the defendant's case, then the jury must be instructed" on the

self-defense charge. 97 N.J. 178, 200 (1984) (emphasis added). Similarly, in State v. Montalvo, this Court concluded that it was plain error "capable of producing an unjust result" where a trial court did not instruct the jury with an adequate self-defense charge. 229 N.J. at 321–24.

Dealing specifically with the duty-to-retreat charge, the Appellate Division found plain error and reversed where a complete charge was not given. State v. Martinez, 229 N.J. Super. 593, 604 (App. Div. 1989). In Martinez, the court reversed a manslaughter conviction where the trial judge informed the jury of the general duty to retreat, instructed the jury that "a man need not retreat when attacked in his own dwelling house," but failed to include a charge instructing the jury that a porch or similar appurtenance was part of a dwelling under the law. Id. at 603–04. Notably, defense counsel did not request that this specific further instruction be given. Ibid.

The Appellate Division held that the incomplete instruction was inaccurate, thereby constituting plain error because, "the trial court may have led the jury to believe that defendant had a duty to retreat and, therefore, his use of deadly force was not justifiable when, in fact, the jury could properly have concluded that no such duty to retreat existed." Id. at 604. "It is clear that whether or not defendant was required to retreat in this situation was dependent, in part, upon whether the jury believed that defendant was in or at his dwelling house when he employed deadly force in self-protection." Ibid. The panel concluded that the incomplete charge

deprived the jury of making this factual determination. Ibid.

In another matter, the Appellate Division found plain error where defense counsel did not request a self-defense charge and did not object when the judge indicated no charge would be given. State v. O'Carroll, 385 N.J. Super. 211, 235 (App. Div. 2006). Nonetheless, on appeal the panel reversed the first-degree murder conviction concluding that it was error for the judge to omit a self-defense charge. Id. at 237. The court noted that a self-defense charge must be given if evidence existed "to provide a rational basis for [its] applicability." Id. at 236 (quotation omitted). Reversal was necessary because the evidence adduced at trial "supplied a minimal basis for self-defense" to be charged to the jury. Id. at 236–37.

A. This Court should elucidate a clear standard that the duty-to-retreat charge must be accompanied by a charge on the Castle Doctrine.

Clear guidance from this Court is needed on the standard a reviewing court should apply in assessing whether the failure to include the Castle Doctrine in a duty-to-retreat charge is plain error. Aside from the opinion here, the issue has been addressed by the Appellate Division in another recent case. The stark contrast between the standards applied in these two cases demonstrate a need for this Court to impose uniformity.

Focusing on the "initial aggressor" aspect of the duty-to-retreat exception, the Appellate Division in State v. Minaya-Acosta concluded that it was plain error for

the trial court to not charge the duty-to-retreat exception after instructing the jury on the general duty to retreat. No. A-1827-21 (App. Div. Mar. 8, 2024) (slip op. at 16–19).[8] There, the State conceded that the failure to include the duty-to-retreat charge rendered the charge incorrect. Id. at 18. Nonetheless, the State argued the conviction was not reversible under the plain error standard. Ibid.

The panel rejected the State's arguments because it found those arguments to be "premised on factual determinations within the province of the jury, to be made after it has been properly charged." Id. at 19. The court noted the role for the jury and that self-defense could have defeated criminal charges "[i]f the jury believed even part of defendant's version." Ibid.

The court found that charging the jury on the general duty to retreat, but failing to include the exception in the instruction, was prejudicial. "But because the charge imposed on defendant a duty to retreat, the jury was foreclosed from considering self-defense based on the facts presented. This critical error raises reasonable doubt on whether the jury reached a result it otherwise might not have reached." Ibid.

Minaya-Acosta and Bragg were decided within two months of each other. And different panels reached different conclusions on how plain error should apply to an incorrect duty-to-retreat charge. This was not just a different conclusion on

[8] This unpublished opinion is not cited for any precedential purpose, but to highlight for the Court that this is a live issue that the Appellate Division is currently grappling with different results. See R. 1:36-3. A copy of the opinion is appended to this brief. (ACDL-NJa1 to 20.)

the application of the different fact patterns. In Bragg, the panel weighed and assessed the facts and made credibility determinations when determining whether the charge was required. By contrast, the Minaya-Acosta panel left all factual determinations to be made by the jury. One panel ruled the exception to the duty to retreat was a fact question for the jury, while the other panel ruled that the evidence presented was "self-serving" and did not justify reading the instruction to a jury.

This Court should address the inconsistent applications of the plain error rule to charges for the duty-to-retreat and its exception. A uniform standard is needed. That standard should mirror the Minaya-Acosta approach, rather than the Bragg approach.

This Court should explain that the duty-to-retreat exception is part of the use-of-deadly-force charge, and the exception cannot be extricated from the general rule. Whether any specific dwelling is actually the dwelling of the defendant is a question "premised on factual determinations within the province of the jury, to be made after it has been properly charged." See Minaya-Acosta, No. A-1827-21 (slip op. at 19). If there is a modicum of evidence, that is "any evidence," Kelly, 97 N.J. at 200, that the dwelling is the defendant's, then a court must charge the Castle Doctrine when the use-of-force and duty-to-retreat charge is given to a jury.

3. The Appellate Division took a factual question away from the jury's purview, and reversal is necessary.

Whether the apartment was Bragg's dwelling—his "sleeping accommodations" or "temporary place to stay"—was a factual question for the jury to resolve. The Appellate Division opinion, however, improperly weighed the totality of evidence presented as to whether the apartment was Bragg's. It is true there may be evidence on both sides of the issue, but ultimately the question should have been "whether the jury believed that [Bragg] was in or at his dwelling house." See Martinez, 229 N.J. Super. at 604.

The Appellate Division applied too harsh of a standard in reviewing the evidence adduced at trial. The court reasoned that "The State presented substantial objective evidence showing the apartment was not defendant's dwelling. Defendant presented only his self-serving testimony." (slip op. at 19–20.) In using this standard, the panel erred.

The Appellate Division made a credibility determination even though that is the quintessential role of the jury. "Our legal system is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses." State v. Cole, 229 N.J. 430, 450 (2017) (quoting Kansas v. Ventris, 556 U.S. 586, 594, n.* (2009) (alterations omitted)). The panel improperly gave weight to the State's "substantial" and "objective" evidence and discounted Bragg's own testimony as "self-serving." Instead, the panel should have applied the longstanding principle

that "if any evidence raising the issue of self-defense is adduced, either in the State's or the defendant's case, then the jury must be instructed" with the self-defense charge. Kelly, 97 N.J. at 200.

There is no self-serving testimony exception to this general principle. Any statement or evidence put forth by the defense could be called self-serving. Yet jurors are entrusted to weigh the credibility of a "defendant's self-exculpatory statement." Cole, 229 N.J. at 450 (citing Model Jury Charges (Criminal), "Statements of Defendant" (rev. June 14, 2010)). Indeed, the panel's minimization of Bragg's testimony as "self-serving" raises potential constitutional concerns, infringing upon a defendant's absolute right to testify at his own trial. See State v. Savage, 120 N.J. 594, 628 (1990) (holding that "a criminal defendant is entitled to testify on his or her own behalf under Article I, paragraphs 1 and 10 of our State Constitution").

Because there was some evidence presented at the trial that the apartment was Bragg's dwelling, the duty to retreat exception should have been charged. There was evidence introduced at trial that the apartment was a place Bragg "went to stay for an undetermined period of time," such that the jury could conclude that the apartment was Bragg's dwelling, at least for that night. See Hornberger, 74 A.3d at 286. The State may dispute the sufficiency of that evidence and what inferences can

be drawn from it. But it is ultimately a question for the jury to weigh competing evidence. Cole, 229 N.J. at 450.

The failure to charge was prejudicial because the prosecution focused explicitly on Bragg's duty to retreat. Bragg's ability to retreat was a focus of the prosecution's cross-examination. (18T 249-6 to 256-12.) And the prosecutor made this a theme in summation, asking the jury "why would [Bragg] have not just run out of the apartment?" (19T 141:6–7, 142:8–10; See Def. Supp. Br. at 28–32.)

The summation by the prosecutor here mirrored the remarks made by the prosecutor in Bonano, where this Court first adopted the Castle Doctrine. In Bonano, the prosecutor highlighted "the alternative courses of action open to defendant at the time of the encounter," and specifically commented to the jury "What could this defendant have done? Gone in the house and shut the door? Possibly." Bonano, 59 N.J. at 521. Just as in Bonano, the prosecutor's focus here "was clearly capable of leaving in the minds of the jury the thought that the defendant perhaps should have retreated." See ibid.

Because Bragg was prejudiced by this, the failure to charge the Castle Doctrine was plain error necessitating reversal of the convictions.

4. The Appellate Division improperly (and incorrectly) speculated on the jury's deliberations to conclude there was no prejudice.

The Appellate Division's reason for taking this factual question away from the jury is based on assumptions about the inner workings of the jury's deliberation. But it is not the province of the courts "to speculate on how the jury arrived at a verdict." State v. Goodwin, 224 N.J. 102, 116 (2016). This foundational principle is the basis for limiting a court's ability to review jury verdicts—including generally allowing inconsistent verdicts and prohibiting verdict molding. Subject only to certain narrow exceptions, courts must accept a jury's verdict even if it produces inconsistencies across multiple charges. That is not what the Appellate Division did here.

"The secrecy surrounding jury deliberations is necessary not only to prevent the unsettling of verdicts after they have been recorded, but also as an aid to the deliberative process itself." State v. Athorn, 46 N.J. 247, 251 (1966). This Court has consistently applied this rationale, always affirming the general rule against speculating about a jury's deliberations, even in the face of inconsistent verdicts. See, e.g., Goodwin, 224 N.J. at 116 ("We therefore must resist the temptation to speculate on how the jury arrived at a verdict."); State v. Banko, 182 N.J. 44, 54–55 (2004) ("We must accept the arguably inconsistent verdicts, and decline to speculate on the reasons for the jury's determination."). And while this general rule is tempered by narrow exceptions, these exceptions do not apply here. See Banko, 182

N.J. at 55–56 (noting that the general rule on accepting inconsistent verdicts does not insulate a verdict from reversal due to insufficiency of the evidence or other defects in the proceeding, such as a misleading jury charge).

Similarly, this Court has repeatedly held that courts may not mold verdicts for specific offenses according to speculation about the jury's foundation for the verdict. See, e.g., State v. R.P., 223 N.J. 521, 526 (2015) ("[A] verdict may not be molded where doing so would require a court to speculate about the jury's findings."); State v. Muhammad, 182 N.J. 551, 578 (2005) ("In reviewing a jury finding, we do not attempt to reconcile the counts on which the jury returned a verdict of guilty and not guilty."); State v. Crisantos, 102 N.J. 265, 273 (1986) ("In general, it is speculative to forecast what verdict a jury would have returned if properly instructed on the basis of the verdict that a jury returned after an incomplete instruction."); State v. Grunow, 102 N.J. 133, 148 (1986) ("The tradition of the common law does not permit us to speculate upon the foundations of a jury verdict. An individualized assessment of the reason for a jury verdict would be based either on pure speculation, or would require inquiries into the jury' deliberations that courts generally will not undertake." (quotation and alterations omitted)).

This Court's decision in State v. Federico is particularly instructive. 103 N.J. 169 (1986). There, the victim agreed to accompany the defendant and another man back to the defendant's residence. Id. at 171. Once there, the defendant committed

various acts that terrorized the victim. Ibid. Eventually, the victim was able to escape the defendant's residence, found police, and reported that she had been confined and threatened. Ibid. Among other things, the defendant was indicted for kidnapping. Id. at 171–72. At the end of trial, the court instructed the jury that the kidnapping count required the "State [to] prove beyond a reasonable doubt that the defendant confined the victim for a substantial period and that the confinement was for the purpose of terrorizing or inflicting bodily harm on her." Id. at 172. "The court did not, nor was it requested to, instruct the jury on [unharmed release]"—that kidnapping, a first-degree crime, becomes a second-degree crime if the defendant released the victim unharmed, in a safe place before apprehension. Ibid. At sentencing, the defendant raised for the first time whether the kidnapping was properly considered first or second degree, but the court ruled that the victim's escape did not qualify as an "unharmed release" and sentenced him for first-degree kidnapping. Ibid. The Appellate Division, however, reversed and remanded for a new trial on the grounds that the defendant was entitled to have the jury consider the issue of unharmed release because "there was evidence from which the jury might have concluded that [the victim] was unharmed and that [the defendant] had abandoned any attempt to continue to confine her." Id. at 172–73.

In affirming the Appellate Division's decision, this Court noted that "the failure to charge the jury on an element of an offense is presumed to be prejudicial

error, even in the absence of a request by defense counsel." Id. at 176. The State argued that, nevertheless, this Court should "mold the verdict to constitute a conviction for second-degree kidnapping," given that a guilty verdict on kidnapping implicitly includes "the essential elements of second-degree kidnapping." Id. at 176–77. But this Court refused to do so because it "would force [the Court] to speculate about how the jury would have determined the matter if it had been properly charged." Id. at 177. This Court also noted that "[its] respect for the unique role of the jury in criminal cases precludes [it] from trying to salvage the conviction by tampering with the jury's deliberations." Ibid. ("The only alternative is to reverse the kidnapping conviction and remand the matter for a new trial.").[9]

One more example solidifies the point. Relying on Federico, the Appellate Division in State v. Holden reversed a conviction based on an erroneous jury instruction, finding the failure to correctly charge the elements of one offense to the jury was plain error even if the jury convicted the defendant on other related charges. 364 N.J. Super. 504, 507, 513–17 (App. Div. 2003). The court concluded that the jury did not find the defendant guilty on one offense "in conjunction" with the other offense, thus the court could not "salvage the conviction" on the offense with erroneous instructions by relying on the conviction for the other offense. Id. at 517

[9] In fact, the failure to charge the jury on the element of "unharmed release" was so serious that this Court also reversed and remanded "the convictions that [were] unrelated to the kidnapping count, which was the most serious charge against [the defendant]." Federico, 103 N.J. at 177.

(quoting Federico, 103 N.J. at 177). The Holden panel even went so far as to acknowledge that it would have been "highly unlikely" for the jury to find the defendant not guilty, but "in the absence of a clear and accurate charge on the elements of the crime, we are speculating on exactly what the jury might have done had they been properly instructed," and such speculation would be improper. Id. at 517. Ultimately because the Appellate Division "cannot definitively say that the jury concluded that the State proved each element of the offense [] beyond a reasonable doubt, we are constrained under our existing law to reverse the conviction." Ibid.

The Appellate Division should have refrained from speculating on the jury's verdict, just as the Holden panel did. Instead, the panel here "tr[ied] to salvage the conviction by tampering with the jury's deliberations." See Federico, 103 N.J. at 177. Despite the jury not being instructed on the Castle Doctrine, the Appellate Division speculated that such instruction would not have had any impact on the jury's verdict. (slip op. at 20.) Specifically, the Appellate Division relied on the fact that "the jury found defendant guilty of kidnapping" to conclude that "it is clear the jury did not believe defendant's testimony and was obviously convinced he was the aggressor." Ibid. The panel believed that, without the jury being properly charged on the Castle Doctrine, a guilty verdict on kidnapping implicitly negated the essential elements of self-defense, "regardless of whether the apartment belonged to

defendant." Ibid. The panel should not have speculated on what the jury believed. See Goodwin, 224 N.J. at 116.

But, more importantly, that speculation was wrong. There was nothing "obvious[]" to be inferred from the jury's verdicts. There would be nothing inherently inconsistent with a jury concluding that the State met the elements of kidnapping, but also believing Bragg was not the initial aggressor. Quite simply, one of the other individuals could have been the initial aggressor, leading Bragg to defend himself with force. Even after being initially attacked, the jury could have concluded that Bragg could have gone too far in trying to subdue his assailants, resulting in the kidnapping guilty verdict. Thus, there would be no inconsistency between a not guilty verdict on attempted murder (based on a valid use of force self-defense) and a guilty verdict on kidnapping. See ibid. And the Appellate Division should have "resist[ed] the temptation to speculate on how the jury arrived at a verdict." See ibid.

Even if a not guilty on attempted murder and a guilty on kidnapping would have been inconsistent, and even if it would have been "highly unlikely" for the jury to find Bragg not guilty for attempted murder based on self-defense, see Holden, 364 N.J. Super. at 517, this Court "accept[s] inconsistent verdicts in our criminal justice system," Goodwin, 224 N.J. at 116.

The prejudice inherent to an incorrect and incomplete jury charge has been repeatedly emphasized by our courts. The erroneous self-defense charge given here justified a finding of plain error mandating reversal. The Appellate Division should not have speculated about the jury's rationale in reaching a verdict to support the panel's finding of no plain error. As a result, this Court must reverse the Appellate Division decision.

CONCLUSION

For the foregoing reasons, this Court should adopt clear guidance that it is plain error for a trial court to charge the jury on the duty to retreat but fail to instruct on the Castle Doctrine, and, thus, this Court should reverse the Appellate Division's opinion. The Court should also refer this matter to the Supreme Court Committee on Model Criminal Jury Charges to revise the model charges for self-defense that include the term "dwelling" to provide instruction on the meaning of that term.

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Dated: January 9, 2025

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