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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

GONZALO AGUILAR,

Appellant.

NO. 3

20 Eagle Street
Albany, New York
January 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Aguilar.

3 MS. HOTH: Good afternoon, Your Honors. Jan Hoth
4 for appellant Gonzalo Aguilar. I'd like to reserve three
5 minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MS. HOTH: When a jury asked to rehear all
8 definitions discussed, any response that does not include
9 the definition of justification which had been previously
10 charged to the jury cannot be considered meaningful. All -
11 - -

12 JUDGE SINGAS: Isn't this case Almodovar? Isn't
13 it the same case that's already been decided?

14 MS. HOTH: Absolutely not, Your Honor. First of
15 all, in Almodovar, when asked to give the charges, the
16 court sought clarification. Here, the court never sought
17 clarification. So everybody was just basing this on what -
18 - - as they were reading the note.

19 JUDGE TROUTMAN: But what about the fact that the
20 note, when it said all definitions discussed, it was
21 followed by a listing of the counts?

22 MS. HOTH: Yes.

23 JUDGE TROUTMAN: Etcetera, etcetera.

24 MS. HOTH: And clearly by listing several of the
25 counts and then adding an etcetera, the jury was meaning to

1 limit their request to all definitions discussed as to the
2 charges. They were making it clear. We don't want to hear
3 reasonable doubt. We don't want to hear presumption of
4 innocence. We want to hear all definitions discussed as to
5 all of the charges.

6 JUDGE SINGAS: But - - - but what you just said,
7 though, is you editorializing. How do we know? Maybe they
8 did want to hear presumption of innocence or interested
9 witness, or you know what I mean? Like, the etcetera
10 anyone can fill in what etcetera means.

11 MS. HOTH: Right. I mean, I don't disagree, but
12 in that case, all means all and justification should have
13 been given. So working with the note as the court read it,
14 the court was reading the etcetera and the list of charges
15 to mean they wanted all definitions relevant to the
16 charges.

17 JUDGE TROUTMAN: And they didn't follow - - - did
18 they follow up with a request for it when it wasn't given?

19 MS. HOTH: No, they did not, Your Honor. But
20 taken in context here, this note, just reading this note
21 took the court four pages of transcript. There was that
22 many requests in it. But more importantly, the jury asked
23 for all definitions discussed and - - - and then listed a
24 couple of cases. So if we work from the assumption that
25 they wanted all definitions discussed as to the charges,

1 they have to believe that that's what the court gave them.

2 JUDGE TROUTMAN: But we work from the assumption
3 that the court is to meaningfully respond. And if the
4 court misses something, they - - - there will be another
5 note, if that's what they wanted.

6 MS. HOTH: Well, not necessarily. They asked for
7 all. Why aren't they in there assuming they got all and
8 that by not hearing justification, the court doesn't think
9 it's a relevant definition for deliberations.

10 JUDGE TROUTMAN: So you're saying it doesn't
11 matter that they didn't seem to express in a subsequent
12 note that they still had a problem because they didn't get
13 justification?

14 MS. HOTH: I'm saying that we can always
15 speculate as to what a jury is thinking.

16 JUDGE TROUTMAN: And I understand that. And as a
17 trial judge, you're - - - the judge's responsibility is to
18 meaningfully respond. Did the note say justification?

19 MS. HOTH: No. The note - - -

20 JUDGE TROUTMAN: Then, can it be charged
21 separately?

22 MS. HOTH: Excuse me, Your Honor?

23 JUDGE TROUTMAN: Can justification be given as a
24 charge separate from the other portions?

25 MS. HOTH: Well, no. Once justification - - -

1 once the court decides that the defense has made out a
2 justification defense and it's - - - and as here, is going
3 to charge it, it's now part of the charges.

4 JUDGE TROUTMAN: It gave the charge of
5 justification. But when a jury is asking, quite frankly,
6 it can take hours to read a jury - - - jury instructions.
7 And the jury clearly understands everything they asked for.
8 It's going to take the same time to read it all over again.
9 So they do excise out things they want read back.

10 MS. HOTH: But there's no indication in this note
11 that justification, which having been charged to the jury,
12 is now considered an element. It's now something that the
13 People have to disprove beyond a reasonable doubt. Mr.
14 Aguilar was charged with unjustified homicide, unjustified
15 assault, not homicide and assault. So by saying all
16 definitions discussed, putting in a couple of the charges,
17 yes, they're limiting it to the charges, but the charges
18 now include justification.

19 CHIEF JUDGE WILSON: So let me just ask. Sorry.
20 As somebody who has never been a trial judge, let me - - -
21 let me ask it from a lay perspective, almost. I think all
22 you can correct me if I'm wrong, that when the charges were
23 given here, the counts were read and then justification was
24 read separately; is that right?

25 MS. HOTH: Well, it not separately so much as

1 each count was read. And then the court explained
2 justification. So he did not, as my adversary points out,
3 say and then another element. But they were - - - they
4 were given justification and told in their charge - - -

5 CHIEF JUDGE WILSON: There was a separate part
6 there where what the components of justification are was
7 laid out.

8 MS. HOTH: Um-hum.

9 CHIEF JUDGE WILSON: And that wasn't done nine
10 times; is that right? It was just done once?

11 MS. HOTH: Well, I - - - I believe that the
12 actual definition of justification would have been given
13 the first time, and then after each count that it applied
14 to the court would remind the jury that justification - - -
15 if they found that the People had proven all of the
16 elements of that count, they then had to decide whether
17 they had disproven beyond a reasonable doubt justification.
18 But that does not segregate or - - - we could speculate it
19 did. But there's nothing on the record to suggest that
20 that separates out their request when they're asking for
21 charges.

22 By charging the jury with justification, the
23 court made it an element that the People had to disprove.
24 If you're asking for all definitions discussed, you can't
25 exclude justification and say that you've meaningfully

1 responded to a request for all. It's not all.

2 CHIEF JUDGE WILSON: So I'm trying to see which -
3 - - we might be making both arguments in the alternative, I
4 suppose. One would be that so long as justification is
5 given anywhere in a set of charges, because it is a part of
6 the People's burden, it is necessarily incorporated into
7 each. And so the form in which each of the charges were
8 given doesn't really matter. Automatically every time that
9 someone asks for a - - - any count to be read back, and
10 there's justification that's been given, you have to read
11 the justification defense as well.

12 MS. HOTH: Yes, Your Honor. There are - - -

13 CHIEF JUDGE WILSON: Is that what you're arguing?

14 MS. HOTH: Yes. Yes, Your Honor.

15 CHIEF JUDGE WILSON: Okay. So it doesn't matter
16 where or how this is structured?

17 MS. HOTH: Yes, Your Honor. I mean, I believe
18 the CJ - - - CJI now actually suggests that the court
19 explain it's another element. And - - -

20 CHIEF JUDGE WILSON: So if the note had said we
21 would like you to read back Count I?

22 MS. HOTH: Yes. And if Count I --

23 CHIEF JUDGE WILSON: Or Count III?

24 MS. HOTH: - - - has a justification defense,
25 then - - -

1 CHIEF JUDGE WILSON: If the justification defense
2 were applicable to Count I, even if it wasn't physically
3 contained in the - - - in the instructions and the charges,
4 the judge read them.

5 MS. HOTH: Well, no, no, no, it has to be - - -

6 CHIEF JUDGE WILSON: Referenced.

7 MS. HOTH: It has to be - - - it has to be the
8 defense. The court has to have charged justification - - -

9 CHIEF JUDGE WILSON: Somewhere.

10 MS. HOTH: - - - as to Count I.

11 CHIEF JUDGE WILSON: Right.

12 MS. HOTH: And then if the jury comes and says,
13 we want Count I - - -

14 CHIEF JUDGE WILSON: Yeah. Let me see if I can
15 make this clearer. So suppose the court reads, let's make
16 it Count II. But suppose the Court reads Count I, right,
17 which the elements of the crime, and then reads the
18 justification fully, explains justification, and then moves
19 on to Count II and reads the elements of the crime for
20 Count II and says, and if you find it's justified without
21 reading back the elements of justification, your view is -
22 - - or your argument is, that if all the jury wants is
23 Count II read back. The judge has to read back the
24 definitions of justification?

25 MS. HOTH: Um-hum.

1 CHIEF JUDGE WILSON: Okay.

2 MS. HOTH: Yes.

3 CHIEF JUDGE WILSON: I just want to get that
4 clear. Okay. Got it.

5 MS. HOTH: Yes, Your Honor.

6 JUDGE SINGAS: So would that be true for any
7 defense?

8 MS. HOTH: I'm sorry?

9 JUDGE SINGAS: Would that be true for any
10 defense, like, insanity if you ask for definitions - - -

11 MS. HOTH: If the defense is one that the People
12 are required to disprove beyond a reasonable doubt, like
13 justification, then yes, it would apply because that now,
14 once the court is charging that defense, it's placing the
15 burden on the People to disprove it. So it's adding an
16 element to a crime. They have to prove the elements in the
17 statute, and then they have to prove - - - disprove beyond
18 a reasonable doubt that the actions were justified. And if
19 I could take a moment, I would like to discuss the
20 interested witness charge here and say that clearly - - -

21 JUDGE TROUTMAN: Is it preserved?

22 MS. HOTH: No, it was not. But as this court has
23 made clear very recently in People v. Cabrera, futility
24 does apply when the legal claims were foreclosed by
25 precedent from this court. And this court back in 1989,

1 reviewed the question of the appropriateness of charging a
2 jury that the defendant is an interested witness as a
3 matter of law, and found that that was appropriate. That
4 decision has never been questioned in any state court
5 since.

6 JUDGE TROUTMAN: What about the delay here? The
7 appeal, it was delayed a num - - -

8 MS. HOTH: It was delayed an extraordinarily long
9 time and not through any fault of Mr. Aguilar, which is why
10 the First Department ruled that he could continue with this
11 appeal. I can - - -

12 JUDGE TROUTMAN: But does that come into play
13 with respect to your suggestion about the futility?

14 MS. HOTH: Well, no, the futility existed at the
15 time of his trial, and that's why counsel didn't object to
16 the charge. And it's only coming into play now because in
17 1989, this court said the charge was appropriate.

18 JUDGE TROUTMAN: So it came into play pursuant to
19 Cabrera; is that what you're arguing?

20 MS. HOTH: No. In 2002, Mr. Aguilar was tried,
21 did not object to the charge. In 2006, the Second Circuit
22 first started ruling that charging a jury that a defendant
23 is an interested witness creates - - - could, could create
24 a motive to lie and is an improper charge. 2007, they
25 reiterated, and then in 2019, they went even further.

1 JUDGE TROUTMAN: But that's what I was ask - - -
2 that's why I was asking you about the passage of time.

3 MS. HOTH: Right.

4 JUDGE TROUTMAN: Because there's take - - -
5 there's been such a long time with respect to his appeal.
6 Not that it's necessarily his fault, but just wondering how
7 you would see that impacting the laws changing because
8 there's time - - -

9 MS. HOTH: Right.

10 JUDGE TROUTMAN: - - - that's going by. And his
11 appeal is just sitting on the shelf. So would that
12 arguably give someone an incentive to be less than in a
13 hurry to go through the process, hoping that the law will
14 change to their favor?

15 MS. HOTH: Well, I think that's quite a wish.
16 I'm sure all defendants hope the law changes in their
17 favor, but they'd be wishing for that sooner rather than
18 later. And I don't think any - - -

19 JUDGE TROUTMAN: But you do concede it's an
20 oddity here that this one took so long.

21 MS. HOTH: Well, yes, this is an outlier in how
22 long it took Mr. Aguilar to get his appeal heard. No
23 question about it. But again, I do think it's important
24 that it was not his fault. This is not gamesmanship on his
25 part. And I'd be happy to send the court all the motion

1 papers that we engaged in to gain him this right to appeal.

2 JUDGE RIVERA: Let me just ask you quickly to do
3 that math for me. From the time that counsel, if they were
4 aware, would have under your scenario, would have requested
5 the charge, and when the case - - - and when there's a case
6 that would have, again, a counsel in the same position,
7 alerted counsel, ah, I've got an opportunity to request
8 that charge. How much time had passed?

9 MS. HOTH: Four years.

10 JUDGE RIVERA: Four years?

11 MS. HOTH: Four years, yes. It was in two - - -
12 two - - - four years. In 2006 is when the Second Circuit
13 in United States v. Gaines indicate - - - first indicated
14 its disapproval of this charge. And as I've said, as time
15 has passed, it has repeatedly and - - - restricted the
16 charge more and more. Every district court that tries to
17 abide by the previous ruling gets smacked down again. They
18 don't like it in any form whatsoever. And even when, as
19 here, the court says, well, just because that he has an
20 interest in the case doesn't mean you automatically reject
21 his testimony. The Second Circuit, even that's not worth
22 it. It - - -

23 JUDGE SINGAS: But in those Second Circuit cases,
24 they were saying that he had a motive to lie. And I think
25 that's a - - -

1 MS. HOTH: Yes, but the Second Circuit - - -

2 JUDGE SINGAS: - - - critical distinction.

3 MS. HOTH: - - - has also said that it's not
4 dependent on the language used, that what is the troubling
5 aspect in these charges is when the court's charge gives
6 rise to the inference that because the defendant has an
7 interest in the outcome of the case, he has the motive to
8 lie. That clearly undercuts the presumption of innocence,
9 because only a guilty defendant has a motive to lie. It's
10 particularly troubling here because this was a credibility
11 contest. We had Mr. Aguilar with his testimony as to what
12 happened, and we had these other witnesses with their - - -
13 they were not interested witnesses. They were - - -

14 JUDGE TROUTMAN: So in this particular instance,
15 did the charge say that the defendant had a motive to
16 testify falsely?

17 MS. HOTH: No, it did not use that particular
18 language. It said that he was an interested witness, and
19 the jury was allowed to use that interest in the outcome of
20 the case in assessing his credibility.

21 JUDGE TROUTMAN: Okay. Does that matter?

22 MS. HOTH: Yes, it does because that's what the
23 Second Circuit has said is giving rise to the inference
24 that by having a motive - - -

25 JUDGE TROUTMAN: So it's an - - - it's a - - -

1 it's an inference, regardless of whether the court
2 specifically suggests - - - said the defendant - - -

3 MS. HOTH: Exactly. That is what the Second
4 Circuit has ultimately come down to, that even regardless
5 of the specific language the court's using, if the upshot
6 inference from that charge is that a motive to - - - an
7 interest in the outcome gives you a motive to lie, it's an
8 improper charge.

9 CHIEF JUDGE WILSON: Thank you.

10 MS. HOTH: Thank you.

11 MR. KRESS: Good afternoon and may it please the
12 court. Stephen Kress, on behalf of the People. I guess if
13 I can, I'll start with the interested witness charge first
14 and first address the preservation issue. Cabrera
15 absolutely did not say that there's a futility exception to
16 the preservation rule whenever a claim was foreclosed by
17 precedent from this court. In fact, Cabrera expressly
18 discussed *People v. Martin*, which is a case that was
19 decided in 1980 shortly after the Supreme Court decided
20 *Payton v. New York*, which said, you can't make a
21 warrantless arrest inside somebody's home without exigent
22 circumstances.

23 The law in New York at the time of the trial, in
24 that case, said you absolutely could make a warrantless
25 arrest inside the home. It was actually a statute. I

1 mean, the law was absolutely clear. This claim was
2 foreclosed. And this court nonetheless, in Martin, said
3 the claim has to be preserved. Peque is another example,
4 and there are even more. So I actually think Cabrera made
5 clear that that is not an exception to - - - that is not an
6 exception to the preservation requirement. So this claim
7 is obviously unpreserved, and the court should not reach it
8 based on some futility exception that just doesn't exist in
9 the case law.

10 Turning to the merits, I also want to respond to
11 something my adversary said, the Second Circuit, and let me
12 be as clear as I can about this, has never said that this
13 interested witness charge is unconstitutional or unlawful
14 in any way. They've never said that you can't tell a jury
15 that the defendant is an interested witness. And in fact -
16 - -

17 CHIEF JUDGE WILSON: Doesn't it seem like a bad
18 idea?

19 MR. KRESS: Well - - -

20 CHIEF JUDGE WILSON: In the sense, Counsel, it
21 means the defense, you know - - - sorry, the People are
22 perfectly able to cross examine on interest, right, to
23 their heart's content. But when the court gives an
24 instruction, it's sort of like putting a thumb on the scale
25 a little bit. That's the difference.

1 MR. KRESS: I don't agree with that, Judge. I
2 think this charge in particular, actually, I think it is
3 designed to benefit the defendant because there are some
4 jurors who might naturally be inclined to disbelieve a
5 defendant's testimony.

6 CHIEF JUDGE WILSON: Well, I mean, the charge the
7 federal courts tend to give is, and other courts, I think,
8 is something like you should judge the credibility of the
9 defendant the same way you should judge the credibility of
10 any other witness.

11 MR. KRESS: Well, it's actually if you look at
12 the charge that was recently approved in United States v.
13 Jenkins, and I think this is also tracking the - - - the
14 model charge, they say treat the defendant's testimony like
15 you would the testimony of any other interested witness.
16 So they are directly saying that the defendant is an
17 interested witness. So I don't think any court has ever
18 said that that is off limits. In fact, the Supreme Court
19 has said - - -

20 JUDGE TROUTMAN: In this particular instance, did
21 the charge say you you're not required to disbelieve or
22 believe the defendant simply because he is an interested
23 witness?

24 MR. KRESS: Yes. Yes, Your Honor, it does say
25 that. And I believe that is also reflected in the pattern

1 charge. And while I think of it, let me also note that the
2 pattern jury instruction on witness credibility in general
3 was amended in 2021 and now includes a provision saying
4 treat the defendant's witness - - - or excuse me, treat the
5 defendant's testimony like you would the testimony of - - -
6 of another witness. So juries are now, or at least in the
7 pattern instruction, should be - - - should be admonished
8 that way.

9 And if I can just make one more tangential point
10 on - - - on this note as well, we were talking about the
11 delay between the filing of the appeal and when this is
12 ultimately being heard. The defendant actually brought a
13 federal habeas proceeding in 2017, where he alleged a
14 violation of his right to a speedy appeal, which has been
15 recognized by the Second Circuit. And one of the factors
16 to consider in that analysis is basically, whose fault is
17 it for all of this delay. And the federal court determined
18 that it was the defendant's, like he was at fault for most
19 of the delay in this case simply by inaction. So I will
20 just note that tangentially.

21 And I guess I can respond or turn now to the
22 response to the jury note. So I think if we're going to -
23 - -

24 JUDGE RIVERA: So Counsel, since - - - since the
25 - - - you correct me if I'm wrong. I understand the note

1 to have said all definitions. It didn't say all counts,
2 all charges and all definitions. Why doesn't that get you
3 closer to - - - to seeing it the way your adversary argues
4 it that - - - that that should mean also justification?

5 MR. KRESS: Well, so - - - so I think if we're
6 going to start from the presumption that they're asking for
7 the definitions of the crimes, which is, I think, what my
8 adversary said in her opening argument, then we are exactly
9 in Almodovar. That's what happened in Almodovar, where
10 they said, we want a definition. It's actually, I think,
11 almost exactly like the hypothetical that Chief Judge
12 Wilson was asking, which they said we would like the
13 definition for Counts I, II and IV. And Counts I and II
14 justification had been charged. The judge asked for
15 clarification. The jury sends a note back with a list of
16 the charges.

17 So they're asking for the - - - the elements of
18 the crimes. The judge gives them the elements of the
19 crimes doesn't mention justification, because here, just
20 like here, it was not charged as an element. They went
21 through all the elements and the judge said, well, at least
22 in this case, and I think we've done the same way in - - -
23 in Almodovar, justification is thereafter charged as the
24 defense. And what this court said was perfectly fine. You
25 didn't have to charge, or it was not error for the judge in

1 that case to not give a supplemental instruction on
2 justification. And so I think we have almost exactly the
3 same facts here.

4 JUDGE SINGAS: But there they ask for
5 clarification. So I guess the argument here is why not ask
6 for clarification if it's not clear what the jury is asking
7 for why isn't it incumbent upon a judge to ask for a
8 clarification and then respond accordingly? Do you think
9 this note is open to a different interpretation?

10 MR. KRESS: So I will say, I think seeking
11 clarification would have been the most prudent thing to do
12 for the judge here, but that doesn't mean that the approach
13 he took was wrong. And I'll actually point out in *People*
14 *v. Malloy*, which is a case we cite in our brief, the court
15 noted in that case that it would have been better to seek
16 clarification, but nonetheless upheld - - - held that the
17 judge had given a meaningful response. And so I think
18 sure, the judge could have asked for clarification here,
19 but the approach he took was to say, I'm going to give the
20 jury what you know, it seems very clear that they're asking
21 for which is at least the elements of the crime. And if
22 they want more, they can ask for more. And I think it's
23 perfectly reasonable to err on the side of giving them what
24 you are confident they want, as opposed to giving them too
25 much. Because, like, as this court said in *Malloy*,

1 sometimes if you - - -

2 JUDGE TROUTMAN: Did the judge remind the jury
3 that they could receive more if that - - - if that answer
4 was insufficient here?

5 MR. KRESS: So the judge didn't specifically say
6 that. In prior to - - - or excuse me, sort of at the end
7 of its initial instructions, the judge said, if you have
8 any questions about the law, send me a note. And then when
9 the judge was responding to this note, he began by reading
10 the note and then said I'm going to give you - - - or he
11 then said, "I will give those definitions again in a
12 minute". And so I think he's communicating to the jury.
13 I'm going to try to answer your question as best I can.

14 And so I don't think there's any reason for them
15 at that point after he gives his supplemental instructions,
16 which don't include justification, I don't think there's
17 any reason for them to think, oh he must not think that
18 justification is, you know, that we wanted it. I think
19 that if they felt that that was something they had included
20 in their definitions or in their note, they would have felt
21 comfortable asking that. This is a very different case
22 from People v. Taylor, for example. I think that's the
23 point I'm trying to make.

24 JUDGE CANNATARO: Why take the chance, though,
25 especially, you know, I ask, why take the chance because

1 you have to sort of assume that the jury found it
2 sufficient, and not that they thought, well, I guess
3 justification isn't important. But in this case, you have
4 the additional factor that after the jury left and the
5 judge having not clarified the note, counsel actually said
6 please charge them on justification. And the court
7 declined that request. I mean, it's - - - it's like you
8 have a chance, an open door to do it. And you keep saying
9 no. So why is it the better course just to do that instead
10 of coming here and having an appeal where we have to sort
11 of divine why we got silence from the jury after that
12 charge was given?

13 MR. KRESS: So I, I think People v. Malloy speaks
14 to this where in that case the jury asked a question about
15 reasonable doubt, and the judge simply reread his initial
16 instruction on that. And the issue was basically whether
17 the judge should have done something more. And what the
18 court essentially said in that case is more isn't always
19 better. You know, if - - - if you instruct the jury on
20 something that they haven't asked for you might be
21 communicating to them, or you might be suggesting that a
22 particular issue is more important than they might think it
23 is. You know, they might have said - - -

24 JUDGE CANNATARO: And your adversary's position
25 is by not defining something, you're making that issue seem

1 less important than it actually is. But which - - - which
2 are we to choose?

3 MR. KRESS: Well, I think they'll know what they
4 asked for or what they wanted to - - - what they wanted to
5 know about in their note and if they - - - justification
6 was an important issue in this case. It was the only
7 defense the defendant testified. It was discussed at
8 length on summation. So if they really wanted to know
9 about it, I think they would ask a question about it. And
10 I think if you go beyond that, let's assume for this moment
11 - - - or for the sake of argument that the jury in this
12 case hadn't been asking about justification, and they get a
13 justification charge back and they're saying, well, we
14 didn't ask for this. Judge must really want us to - - - to
15 consider this. I'm not sure why. It could - - - it could
16 confuse them or distract them. And so I think that's - - -

17 JUDGE RIVERA: Just to be clear on the record,
18 did the judge provide anything else other than the elements
19 of all of the charges? Anything else in response to this
20 note?

21 MR. KRESS: He provided the elements of the
22 charges. And I think what you might be leading to is that
23 within the charges, there were certain terms of art that
24 were used, like intent and things like that. He also
25 provided those definitions. So it's the charges and the

1 definitions of the specific terms used therein.

2 JUDGE SINGAS: And there are specific terms in
3 justification, true?

4 MR. KRESS: Yes.

5 JUDGE SINGAS: And do you know if those were
6 defined?

7 MR. KRESS: Yes. I believe when he was given the
8 justification charge, things like, you know, deadly
9 physical force or something like that.

10 JUDGE SINGAS: How about when he was giving the
11 additional charges after the jury note and defining the
12 terms? Are they the same terms that are in justification?

13 MR. KRESS: No, I don't believe that - - - I
14 don't believe that they are. No. I think the ones that
15 are as elements of the crimes are - - - are different if I
16 remember correctly. But - - - and I guess I will also just
17 note that prejudice is also a component of this analysis.
18 And so I think even if you were to conclude that the judge
19 got it wrong and misinterpreted the note, there was no
20 prejudice to the defendant here. The judge mentioned at
21 sentencing that he thought the defendant's testimony was -
22 - - was incredible. And it really was. I think you could
23 have charged the jury forty times on justification, and it
24 really wasn't going to matter in this case.

25 I actually think it would have been harmful to

1 the defendant to charge justification again, because the
2 more the jury hears what the elements - - - or excuse me,
3 what the requirements are of that defense, the less likely
4 they're going to find that the defendant has - - - has
5 satisfied it. Unless there any other questions from the
6 court, I'd ask that the judgment be affirmed.

7 CHIEF JUDGE WILSON: Thank you.

8 MS. HOTH: Your Honors, nowhere in the decision
9 of Almodovar did this court say that the court does not
10 have to charge justification in response to a jury note
11 asking for all counts. It was decided on the unique
12 procedural posture in that counsel only objected after the
13 court had gotten the complete recharge, returned to
14 deliberations, and the court said, well, while you maybe
15 should have given it, bringing the jury back into the
16 courtroom was going to place undue emphasis on
17 justification. That's not what happened here.

18 And in fact, counsel was sandbagged by the court
19 because the court kept saying, I'm going to read all of the
20 elements. Well, justification at that point was an
21 element. Whether the court specifically said it's an
22 element, the point is that once it's introduced, the People
23 have to disprove it the same as they have to prove
24 elements. Three times, the court announced to counsel and
25 the jury that it would be rereading all of the elements.

1 And why would counsel think anything but justification is
2 going to be read? It's part and parcel. He then hears a
3 charge where the court not only rereads every element of
4 the charge, but redefines every legal concept associated
5 with those charges, except for justification.

6 And my adversary keeps saying that it's too much.
7 Too much for what? That was the defense. So it's not too
8 much. It's fair. You read all the charges that the
9 prosecution alleged my client committed, and then you read
10 the charge related to his defense. And as far as Malloy
11 goes, that's a simple concept. They asked for a recharge
12 on reasonable doubt. They got the recharge on reasonable
13 doubt. And then the court said, well, since they didn't
14 ask for more, it was okay. But here they didn't get part
15 of what they asked for, part of what defense counsel, when
16 he realized it was missing, believed they had asked for.
17 The court said they didn't ask for that, but that just
18 makes no sense based on the record.

19 And again, it was a completely different
20 procedural posture. They - - - this jury was told they
21 were coming back, that the court was not giving them a full
22 answer to their note. They knew, they finished lunch,
23 they're coming back and hearing more from the judge. So
24 having him recharge justification at that point is not
25 placing undue emphasis. It's placing equal emphasis. Here

1 is what the charges are. Here's what the defense is. This
2 was a case that came down to credibility. And this also
3 ties directly into the interested witness charge. It was a
4 strict credibility case. Giving a charge that eliminates
5 the defense. It just makes no sense. It is so
6 prejudicial. It's signaling this is what I think all
7 definitions mean and it doesn't include your defense.

8 And then I'm going to charge the jury that in
9 assessing your credibility, Mr. Defendant, they can
10 consider that you have an interest in the outcome of the
11 case. But none of these other people do. We had six
12 witnesses claiming that despite smoking weed, smoking
13 ketamine, drinking, they were chill. They were calm. They
14 were not aggressive. This was all Mr. Aguilar and his
15 friends' doing. The jury had every right to assess their
16 claims and Mr. Aguilar's claims under the same standards,
17 with the same amount of information, and the court's charge
18 did not do that here. Thank you.

19 CHIEF JUDGE WILSON: Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Gonzalo Aguilar v. People, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

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