

In the
United States Court of Appeals
for the **Second Circuit**

August Term, 2025
No. 23-7864

DARRYL BROWN,
Petitioner-Appellant,

v.

LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF
NEW YORK, ANTHONY J. ANNUCCI, IN HIS OFFICIAL CAPACITY AS THE
ACTING COMMISSIONER FOR THE NEW YORK DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION, MICHAEL KIRKPATRICK,
IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE CLINTON
CORRECTIONAL FACILITY,
Respondents-Appellees.

On Appeal from the United States District Court
for the Southern District of New York.

ARGUED: FEBRUARY 6, 2026
DECIDED: MAY 7, 2026

Before: CABRANES, NARDINI, and KAHN, *Circuit Judges.*

Petitioner Darryl Brown was convicted in New York Supreme Court, Bronx County of first-degree manslaughter after he shot and killed a person during an argument. Over Brown's objection, the trial court declined to instruct the jury on the state-law defense of justification. A divided panel of the First Department vacated Brown's conviction on the ground that the instruction should have been given, but the New York Court of Appeals unanimously reinstated the conviction. The New York Court of Appeals held that Brown was the first person in the confrontation to pull out a gun and thereby threaten the use of deadly force, which made him the initial aggressor under New York law, and that he was accordingly not entitled to a justification instruction. Brown sought habeas relief under 28 U.S.C. § 2254, arguing that the state courts violated his federal due process rights by denying him an instruction on a defense to which he was clearly entitled under state law, thereby rendering his trial fundamentally unfair. The United States District Court for the Southern District of New York (Vernon S. Broderick, *District Judge*) denied habeas relief. The district court agreed with the New York Court of Appeals that the trial court properly declined to charge the jury on justification under state law, and that Brown therefore had not made a predicate showing that would be required to establish a federal due process violation. We agree, and thus we AFFIRM the denial of Brown's petition.

KRISTEN SANTILLO, Gelber & Santillo PPC,
New York, NY, *for Petitioner-Appellant.*

TAE-HOON CHARLES WON (David M. Cohn,
on the brief), Assistant District Attorney,

Bronx County District Attorney's Office,
Bronx, NY, *for Respondent-Appellee.*

WILLIAM J. NARDINI, *Circuit Judge:*

Petitioner-Appellant Darryl Brown was convicted of first-degree manslaughter in New York Supreme Court, after he shot his daughter's boyfriend during an altercation in the lobby of his apartment building. The New York Court of Appeals ultimately affirmed the conviction. Brown sought federal habeas relief under 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York (Vernon S. Broderick, *District Judge*), claiming that the trial court violated his federal due process rights by declining to charge the jury on a justification defense.

The district court denied Brown's habeas petition, agreeing with the New York Court of Appeals that the trial evidence did not warrant a justification charge under state law. Specifically, the district court agreed that when Brown pulled out a gun during the argument, he was the first to threaten to use "deadly force." That made him the "initial aggressor" under N.Y. Penal Law § 35.15, which took away his right to argue self-defense. And because the trial court did not deprive Brown of a defense to which he was entitled under state law, there could be no due process violation.

We agree with the district court. As an initial matter, we have no remit on habeas review to second-guess the New York Court of Appeals' authoritative construction of N.Y. Penal Law § 35.15, which

defines the contours of the justification defense. In light of that settled state law, we discern no error (and hence no possible constitutional violation) in the New York Court of Appeals' application of law to the facts of this case. And even if we had doubts on that score (which we do not), we could not conclude on this record that the Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court, or that it made unreasonable determinations of fact. Accordingly, we AFFIRM the denial of Brown's petition.

I. Background

On March 20, 2014, Brown, an off-duty corrections officer, got into an argument in the lobby of his apartment building with Vonde Cabbagestalk, his daughter's boyfriend and the father of her child. The argument culminated in Brown shooting and killing Cabbagestalk. The State of New York charged Brown with murder in the second degree, N.Y. Penal Law § 125.25(1); manslaughter in the first degree, N.Y. Penal Law § 125.20(1); and criminal use of a firearm in the first degree, N.Y. Penal Law § 265.09. The case proceeded to trial in September 2016 in New York Supreme Court, Bronx County. Based on the evidence presented to the jury, the trial court decided that Brown was not entitled to a justification instruction under New York Penal Law § 35.15, and the jury convicted Brown of first-degree manslaughter. This appeal turns on whether Brown was deprived of a jury charge to which he was entitled under state law, and if so whether such a deprivation violated his federal due process rights by rendering his trial fundamentally unfair.

A. New York's Defense of Justification

The New York legislature has statutorily created a justification defense, which establishes that a person will not be held criminally responsible for the use of force under certain circumstances. As relevant here, N.Y. Penal Law § 35.15 provides:

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:
 - (a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or
 - (b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force . . .
2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating

A few things emerge about the justification defense from § 35.15 and New York case law. For one thing, “[j]ustification in New York is a defense, not an affirmative defense; therefore, when the defense is raised on a proper evidentiary record, the People bear the burden of disproving it beyond a reasonable doubt.” *See Jackson v. Edwards*, 404 F.3d 612, 622 (2d Cir. 2005) (internal quotation marks and citation omitted).

Second, a justification charge is not given automatically in every case. The trial evidence must warrant it, though the record must be viewed in the light most favorable to the defendant. *See id.* at 622–23. A defendant is entitled to the instruction “‘if on any reasonable view of the evidence, the fact finder might have decided that defendant’s actions were justified’” under § 35.15. *Id.* (quoting *People v. Padgett*, 60 N.Y.2d 142, 145 (1983)). “In order to be entitled to a justification instruction,” a defendant who has used deadly force “must show both that he subjectively believed that deadly force was necessary under the circumstances and that a reasonable person in his situation would have held this belief.” *Blazic v. Henderson*, 900 F.2d 534, 540 (2d Cir. 1990) (citing *People v. Goetz*, 68 N.Y.2d 96, 115 (1986)). The term “deadly physical force” is defined as “physical force which,

under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.” N.Y. Penal Law § 10.00(11).

Third, even if a defendant makes both the subjective and objective showings, there are certain circumstances that will nonetheless make him ineligible for a justification instruction. Among other things, a defendant cannot be justified in the use of force if he was the initial aggressor. N.Y. Penal Law § 35.15(1)(b). An initial aggressor is “the first person who uses, or threatens the imminent use of, physical force.” CJI2d[NY] Justification: Use of Physical Force in Defense of a Person, Penal Law § 35.15(1); *People v. Brown*, 33 N.Y.3d 316, 321 (2019), *reargument denied*, 33 N.Y.3d 1136 (2019).

The New York Court of Appeals has interpreted § 35.15(1)(b) in a few ways relevant here. The Court of Appeals has approved a jury instruction stating that “[t]he actual striking of the first blow or inflicting of the first wound . . . does not necessarily determine who was the initial aggressor.” *People v. Valentin*, 29 N.Y.3d 57, 60 (2017). Instead, where “mere physical force is employed against a defendant, and the defendant responds by employing deadly physical force, ‘the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force.’” *Brown*, 33 N.Y.3d at 321 (quoting *People v. McWilliams*, 852 N.Y.S.2d 523, 524 (4th Dep’t 2008)); *id.* at 321 n.4 (collecting cases). A person who first *threatens* the imminent use of deadly physical force, like a person who first threatens the use of nondeadly physical force, is likewise deemed to be an initial aggressor under New York law. *See Brown*, 33 N.Y.3d at

322; *Valentin*, 29 N.Y.3d at 60, 62; *see also* CJI2d[NY] Justification: Use of Deadly Physical Force in Defense of a Person, Penal Law § 35.15(2) (defining initial aggressor as “the first person who uses, or threatens the imminent use of, deadly physical force”). Where a person is an initial aggressor, his use of force is justifiable only if he withdrew from the encounter and effectively communicated his withdrawal to the other person, but the other person “persists in continuing the incident by the use or threatened imminent use of unlawful physical force.” N.Y. Penal Law § 35.15(1)(b).

B. Proceedings at Trial

At Brown’s trial, the jury heard testimony from three witnesses about the events surrounding the shooting.

Raymond Wolf, a postal worker who was delivering mail at the time, saw the entire interaction. Wolf testified that shortly before the shooting, he entered the apartment building and saw three people talking in the lobby: Brown, Cabbagestalk, and a third person whom the police were unable to locate for trial, *People v. Brown*, 71 N.Y.S.3d 422, 425 n.1 (1st Dep’t 2018). Wolf heard Brown tell Cabbagestalk to stay away from his daughter, and Cabbagestalk answered that Brown could not tell him where to be. Cabbagestalk began getting in Brown’s face, and the third person tried to break up the argument, telling Cabbagestalk to relax. Cabbagestalk proceeded to swing at Brown’s face, and Brown stepped back. Wolf subsequently saw Brown holding a gun “at an angle[] [a]t his waist,” Joint App’x at 474–75, and heard Cabbagestalk say “you going to pull a gun out, you

better use it” while swiping at Brown’s gun, *id.* at 473, 482–83. Wolf heard the gun go off, and Cabbagestalk fell to the ground. When the shot was fired, according to Wolf, Cabbagestalk was two feet away from Brown, and Brown was leaning back.

Yvette Flores, who lived on the first floor of the building, saw the beginning of the argument through the peephole of her apartment door and, after her sightline was lost when the parties walked away, continued to hear the altercation. Flores testified that she saw Brown, his daughter and her baby, and Cabbagestalk standing in front of Brown’s apartment. Brown and Cabbagestalk walked away and Flores could not see the rest of the interaction, but she heard Cabbagestalk and Brown continue to argue. Flores then heard Brown’s daughter yell “no daddy no,” followed by a loud boom. *Id.* at 339.

Another neighbor, Sheila Thomas, witnessed part of the argument between Brown and Cabbagestalk from outside while looking through the windows of the lobby door as she prepared to enter the building with her groceries. Thomas testified that she saw Brown and Cabbagestalk walking at a slow pace, with Cabbagestalk following Brown. She could tell they were having a disagreement, but could not hear what was being said. Thomas testified that when she saw the men, they were between six and seven feet apart. They passed out of her view, and then she heard a gunshot.

At the close of these witnesses’ testimony, the trial court decided that it would not submit the criminal use of a weapon count

to the jury, and it preliminarily ruled that it would not grant Brown's request to instruct the jury on the defense of justification.

After the trial court indicated that it would not give a justification charge, Brown declined to testify. Defense counsel told the trial court that Brown would have testified only that he feared for his life—which would be relevant only if the jury were instructed on the defense of justification. The defense did, however, call an expert to testify as to how corrections officers like Brown are trained to use firearms and deadly force. The expert testified that officers are trained to draw a weapon if they perceive a threat, even if the person threatening them is not displaying a weapon. He further testified that if officers feel that their lives are in jeopardy and their firearm could be taken and used against them, "that escalates the situation to enough where we can use deadly lethal force." *Id.* at 653.

Following the close of the defense's case, the trial court reaffirmed its ruling on justification. The jury deliberated for nine hours and returned a verdict acquitting Brown of second-degree murder but finding him guilty of first-degree manslaughter. The court sentenced Brown to eighteen years in prison.

C. The Direct Appeal

Brown appealed his manslaughter conviction, arguing that the trial court committed reversible error by failing to charge the jury on justification. *Brown*, 71 N.Y.S.3d at 426. A majority of the First Department agreed, reasoning that the evidence—when viewed in the light most favorable to Brown as required under New York law—

supported “a conclusion that [Brown] feared for his life, and reasonably believed that deadly physical force was necessary to defend himself against Cabbagestalk’s imminent use of deadly physical force.” *Id.* at 427. In its view, Wolf’s testimony “described an escalating series of aggressive actions and verbal threats made by Cabbagestalk immediately before defendant fired his weapon.” *Id.* Based on that testimony, a jury could have concluded that Brown “reasonably believed that Cabbagestalk, who was younger and taller than [Brown], and just two feet away, would gain control of [Brown’s] gun,” and that Cabbagestalk’s statement to Brown (“you going to pull a gun out, you better use it”) constituted a threat to take Brown’s gun and use it against him, particularly because Cabbagestalk was “grabbing for the gun at the same time he made the threat.” *Id.* at 427–28. The majority further reasoned that the initial aggressor doctrine, which disallows a justification instruction if the defendant was the first person to use or threaten to use deadly force, did not apply here because Brown “held [the gun] by his side” and “did not point it at Cabbagestalk” or threaten him. *Id.* at 431.

Two justices dissented. In their view, “[Brown’s] drawing of his gun in the course of his confrontation with Cabbagestalk constituted the threatened use of deadly physical force.” *Brown*, 71 N.Y.S.3d at 438. Brown could not have satisfied the subjective prong of the two-step justification inquiry, the dissenters said, because there was no evidence that he “actually believed” Cabbagestalk would use deadly physical force at the time Brown drew his gun. *Id.*

The New York Court of Appeals unanimously reversed and reinstated Brown's conviction. It held that "Brown was the initial aggressor as a matter of law" and therefore his use of force was not justifiable under N.Y. Penal Law § 35.15(1)(b). *Brown*, 33 N.Y.3d at 320–21. As the court explained, "[i]f mere physical force is employed against a defendant, and the defendant responds by employing deadly physical force, 'the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force.'" *Id.* at 321 (quoting *McWilliams*, 852 N.Y.S.2d at 524). Relying on its precedent, the Court of Appeals explained that "the imminent threat to use a gun against another is, necessarily, a threat of deadly physical force." *Id.* at 322 (citing *People v. Dodt*, 61 N.Y.2d 408, 414–15 (1984)). The Court of Appeals determined that Brown's conduct constituted an imminent threat because he "placed his gun in a position where he was readily able to aim and fire it imminently, and did so before Mr. Cabbagestalk's efforts to 'swipe' at the gun," a conclusion that was bolstered by the "circumstances surrounding that act." *Id.*

Having determined that Brown's act of drawing the gun made him the initial aggressor, the Court of Appeals considered whether a reasonable jury could have concluded that Brown withdrew from the encounter after threatening the use of deadly force, which would still allow him to claim justification. *Id.* at 323; *see* N.Y. Penal Law § 35.15(1)(b). Because there was no evidence that Brown withdrew after pulling out his gun, the court held that Brown was indeed not entitled to a justification instruction.

The Court of Appeals also considered whether there was a reasonable view of the evidence under which Cabbagestalk and not Brown was the initial aggressor. *Brown*, 33 N.Y.3d at 323. It concluded that “[n]o reasonable view of the evidence supports the proposition that Mr. Brown was ever threatened by Mr. Cabbagestalk with the imminent use of deadly force prior to the point at which Mr. Brown drew his gun.” *Id.* at 323.

D. The District Court Decision

Brown then sought habeas relief in federal court, contending that his federal due process rights were violated when he was denied a justification charge. Magistrate Judge Katharine H. Parker filed a Report and Recommendation recommending that the district court deny Brown’s habeas petition. *Brown v. James*, No. 1:20-cv-10491, 2021 WL 11593759 (S.D.N.Y. Aug. 31, 2021). The district court agreed and denied the petition, concurring with the New York Court of Appeals that when Brown pulled out his gun he became the initial aggressor as a matter of law, and that he was accordingly not entitled to a justification charge under New York law. In rejecting Brown’s argument that Cabbagestalk was the initial aggressor, the district court emphasized that (1) Wolf did not testify that any of Cabbagestalk’s swings made contact with Brown and (2) Wolf did not describe Brown’s gun as “holstered” when Cabbagestalk swiped at it. *Brown v. James*, No. 1:20-cv-10491, 2023 WL 4351194, at *3 (S.D.N.Y. July 5, 2023). Thus, the district court held that none of Cabbagestalk’s actions “can reasonably be interpreted as deadly force,” and instead that “the evidence at trial establishes that [Brown] immediately

responded to the victim’s use of ordinary force with deadly force’ by shooting the victim.” *Id.* (quoting *People v Irizarry*, 157 N.Y.S.3d 287, 288 (1st Dep’t 2021)) (alterations adopted). Having concluded that Brown was the initial aggressor, the district court dismissed the petition because Brown failed to establish that he was erroneously deprived of a jury instruction to which he was entitled under New York law. And without such a predicate showing, Brown could not establish that his trial had been fundamentally unfair, in violation of his federal due process rights.

We granted a certificate of appealability, and this appeal followed.

II. Standard of Review

We review the denial of a habeas petition *de novo*. *Carew v. Morton*, 150 F.4th 150, 159 (2d Cir. 2025). We have jurisdiction pursuant to 28 U.S.C. § 2253(a).

III. Discussion

A. Federal Habeas Review of State-Law Jury Instructions

To obtain relief, a state habeas petitioner like Brown must first establish that he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Here, he contends that the purported instructional error violated his federal constitutional rights. The claim advanced by Brown has two components: (1) that the trial court erroneously declined to give a jury charge to which he was entitled under New York law, and (2) that this

state-law error “violated some right which was guaranteed to the defendant by the Fourteenth Amendment.”” *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)). Even if Brown establishes that there has been a federal due process violation, he can obtain habeas relief only if he satisfies the further requirements of § 2254(d) that (3) the error led to a conviction that was either (i) contrary to (or an unreasonable application of) clearly established federal law as determined by the Supreme Court, or (ii) based on an unreasonable determination of facts. *See Jackson*, 404 F.3d at 621. If we determine at the first step that the justification instruction was correctly denied under New York law, then we need not reach the second or third steps of this inquiry.

Our first task is therefore to determine whether the state court deprived the defendant of a jury charge on a defense to which he was entitled under state law. We begin with this question because “[w]hat due process requires will often depend on what state law is.” *Davis*, 270 F.3d at 123. “States are free to define the elements of, and defenses to, crimes,” *id.*, subject to certain outer constitutional limits. *See, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1977); *Martin v. Ohio*, 480 U.S. 228, 232 (1987); *see also Kahler v. Kansas*, 589 U.S. 271, 279 (2020). In determining whether the defendant was entitled to the jury charge in question, we do not “reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Davis*, 270 F.3d at 123 n.4 (stating that we must “defer to state-court interpretations of the state’s laws, so long as those interpretations are themselves constitutional”). “In other words, our role here is not to

interpret New York's law of justification, but to determine whether the evidence was sufficient to warrant a justification charge under that law." *Davis*, 270 F.3d at 124 n.4.

If this first inquiry yields the conclusion that there was instructional error under state law, we turn to the second question: "whether the trial court's refusal to give the justification instruction 'so infected the entire trial that the resulting conviction violates due process.'" *Jackson*, 404 F.3d at 624 (quoting *Cupp*, 414 U.S. at 147). In the past, we have held that habeas relief is warranted for a state court's wholesale failure to charge the jury on justification "where the erroneous failure to give such a charge was sufficiently harmful to make the conviction unfair." *Davis*, 270 F.3d at 123–24; *see also Jackson*, 404 F.3d at 625. We have found such unfairness where the defendant had a "compelling" and "highly credible" justification defense, the omission of which was "catastrophic" for the defendant. *Davis*, 270 F.3d at 131–32; *see also Jackson*, 404 F.3d at 625–26 (granting habeas relief in a case that, we concluded, was not materially different from *Davis*; concluding that "the probabilities are substantial that, if given a justification charge, Jackson's jury might well have acquitted"). By contrast, we have denied habeas relief, even in the face of similar instructional error, where giving a justification charge "would not have altered the result of the trial." *Blazic*, 900 F.2d at 542.

Third, even if we conclude that there was instructional error, and that the error violated due process, we may grant habeas relief only if Brown's conviction "was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). “These standards require federal courts to give the ‘benefit of the doubt’ to merits decisions issued by the courts of the sovereign States.” *Klein v. Martin*, 607 U.S. ___, 146 S. Ct. 589, 596 (2026) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). In order to obtain relief, a petitioner convicted on state charges must “establish that the state court ‘blundered’ so badly that every fairminded jurist would disagree’ with the decision.” *Klein*, 607 U.S. ___, 146 S. Ct. at 596 (quoting *Mays v. Hines*, 592 U.S. 385, 392 (2021)) (alteration adopted). This is because federal habeas review of state convictions “intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. The Failure to Give a Justification Instruction Did Not Violate Due Process

The New York Court of Appeals held that Brown was the initial aggressor and therefore ineligible for a justification instruction because his act of drawing his gun “in a position where he was readily able to aim and fire it imminently” was “an imminent threat of deadly physical force.” *Brown*, 33 N.Y.3d at 322. This ruling can essentially be divided into two parts, one legal and one factual. As a legal matter, the Court of Appeals held that the imminent threat to use deadly force makes one an initial aggressor under N.Y. Penal Law § 35.15(b). *Id.* We are without power to second-guess the Court of Appeals’

articulation of that legal standard. *Estelle*, 502 U.S. at 67–68; *Davis*, 270 F.3d at 123 n.4. Accordingly, we limit our review to how that court applied the standard in this case. As relevant here, the Court of Appeals concluded that Brown’s action of drawing a gun, and holding it in a way that allowed it to be readily aimed and imminently fired, constituted just such an imminent threat to use deadly force.

As an initial matter, we discern no error in the New York Court of Appeals’ assessment of the evidentiary record before the state trial court as to the key facts at issue here, namely that Brown pulled out a gun and held it by his side. These conclusions were supported by ample and un rebutted witness testimony: namely, Wolf’s testimony that he saw Brown holding the gun at his waist and that he heard Cabbagestalk state that Brown “pull[ed] a gun out,” and all three witnesses’ testimony that they heard a gunshot go off in short order. There was no evidence in the state court record that could have allowed the jury to reach a contrary conclusion.

Armed with these undisputed facts, we likewise see no error in the New York Court of Appeals’ application of state law to those facts: that Brown threatened Cabbagestalk with a gun and was therefore the initial aggressor. It is self-evident that the use of a firearm constitutes the use of deadly force. And, like the district court, we agree with the New York Court of Appeals’ conclusion that in the context of this case—where the parties were in a heated argument that was starting to get physical—Brown’s display of the gun, and then holding it at his waist ready to aim and fire in an instant, constituted a threat to imminently use deadly force.

Brown argues that a reasonable inference could be drawn that his act of drawing a firearm was not, in fact, a threatened imminent use of deadly physical force. He contends that “the jury could have found that Brown’s act of drawing his lawfully-possessed service firearm, and holding it at his side, pointed away from Cabbagestalk, was a defensive display or brandishing of his weapon” that “did *not* threaten the imminent use of deadly physical force.” Appellant’s Br. at 34. Under Brown’s interpretation of events, he drew his weapon to deter Cabbagestalk’s attempts to hit him, and fired it only after Cabbagestalk tried to take the gun from him. Thus, according to Brown, the Court of Appeals’ rejection of his gloss on the facts was the result of inferences drawn against him instead of in his favor, as required when assessing the availability of a justification defense. In support of his argument, Brown points to our decisions in *Davis* and *Jackson*, where we granted habeas relief on the grounds that New York state courts erroneously drew inferences against the defendant when denying a justification instruction. Neither ruling aids Brown’s arguments here.

Davis involved an extraordinarily unusual set of facts supporting a justification offense, and we concluded that the New York courts had both unreasonably applied settled law and made unreasonable determinations of fact. There, the New York Appellate Division affirmed the denial of a justification instruction in a case where the defendant, Davis, fatally shot a person who had previously robbed him at gunpoint, raped him, and threatened his life. 270 F.3d at 121. When Davis next passed this person on the sidewalk, the

person started to turn around and reach to his waistband, and Davis shot him in the back. In the Appellate Division's view, (1) Davis lacked a reasonable belief that the victim was about to shoot him because Davis had not seen a gun on the victim's person, and (2) Davis failed to offer a "convincing reason why he did not retreat from the scene at the time of the actual shooting." *Id.* at 129, 130 (citation omitted). We granted habeas relief. In our view, the former conclusion ignored that Davis knew that the victim "had robbed, raped, and beaten other people at gun point," and had indeed "robbed Davis at gun point three times, forced him to strip naked twice, raped him once, once urged his co-assailant to shoot Davis, and at their last meeting, after raping him, promised to kill Davis when he next saw him." *Id.* at 129. That is, we believed the Appellate Division inappropriately discounted evidence of Davis's subjective fear, and the reasonableness of that fear. We also held that the Appellate Division had "no basis" to conclude that Davis might have retreated safely because "[i]f Davis's reasonable belief that [the victim] had a gun had been correct, he had one or two seconds left to live" as they stood there on the sidewalk and the victim pulled out a gun, and Davis thus could not have retreated with "complete safety," as required by N.Y. Penal Law § 35.15(2)(a). *Id.* at 130. Put simply, we found grievous fault with the New York court's application of the subjective and objective inquiries required by § 35.15—namely, that it did so in a way that failed to draw obvious inferences in Davis's favor, in contravention of state law. And we concluded that the New York court's decision was based on an unreasonable determination of the

facts, in light of the evidence presented in the state proceeding, in contravention of 28 U.S.C. § 2254(d)(2). *Id.* at 133.

In *Jackson*, the defendant fatally shot a severely inebriated man who had attempted to take a set of keys from the defendant by force, including by punching the defendant. 404 F.3d at 624. The state trial court, as affirmed by the Appellate Division, stated that Jackson would have been entitled to a justification instruction only if “there was a burglary being committed or an arson,” but held that “none of that is applicable in this case.” *Id.* at 617; *see* N.Y. Penal Law § 35.15(2)(b), (c) (providing, as relevant here, that a person may be justified in the use of deadly force if “[h]e or she reasonably believes that such other person is committing or attempting to commit” a burglary or a robbery and satisfies the conditions in § 35.15(1)). The federal district court granted Jackson’s habeas petition because, as relevant here, it agreed with Jackson that the trial court improperly denied Jackson a justification instruction. *Id.* at 617–18. We affirmed, agreeing with the district court that “[v]iewing the evidence in the light most favorable to Jackson,” a jury could have concluded that Jackson thought the victim was about to burglarize or rob him, thereby justifying his use of force pursuant to N.Y. Penal Law § 35.15(2)(b) or (c), and that Jackson reasonably “believed that simply striking back or announcing that he had a gun would not have prevented the robbery and that he was required to use his weapon,” *id.* at 624. Thus, as in *Davis*, we sharply disagreed with the state courts’ assessment of the subjective and objective prongs of the justification instruction inquiry and held that the state courts

erroneously failed to draw inferences in the defendant's favor, as required by New York law.

Critically, neither *Davis* nor *Jackson* involved the "initial aggressor" doctrine set forth in N.Y. Penal Law § 35.15(b). In both of those cases, our decisions turned on the subjective and objective criteria of the defense of justification. And in both cases, the trial evidence permitted inferences favorable to the defendant about what he actually feared, or objectively could have feared, from the person he ultimately shot. By contrast, the initial aggressor doctrine turns not on what the defendant *feared*, but rather on the objective circumstances of what he *did* and whether his actions would reasonably be perceived as a threat to imminently use deadly force. Applying that legal standard here, even accepting Brown's contention that he intended his display of the firearm to be "defensive" and to deter Cabbagestalk from hitting him, such a deterrent effect would have been produced only by impressing upon Cabbagestalk that Brown would shoot him. And threatening to shoot someone comfortably qualifies as the threatened use of deadly physical force. Brown points to no plausible inference, based on the trial evidence, that his pulling of the gun was not such a threat. *Davis* and *Jackson* are therefore of little help to Brown.

We likewise agree with the district court, and the New York Court of Appeals, that no reasonable view of the evidence permits the conclusion that Brown withdrew from his confrontation with Cabbagestalk after drawing his gun, which is the only way he could still have been eligible for the defense upon the determination that he

was the initial aggressor. *See Brown*, 33 N.Y.3d at 323. As the district court explained, review of the trial transcripts does not reveal any testimony that Brown withdrew from the confrontation with Cabbagestalk. *Brown*, 2023 WL 4351194, at *3. We also agree that no reasonable view of the evidence reveals that Cabbagestalk was actually the initial aggressor. That is, there is no evidence that Cabbagestalk threatened Brown with deadly physical force before Brown got out his gun—the only remaining theory that might have permitted a justification instruction here. *Brown*, 33 N.Y.3d at 323–24.

Even if we entertained some residual doubt about whether the state courts had properly denied a justification defense, we would still conclude—under the third prong of our habeas inquiry—that Brown failed to satisfy § 2254(d), which calls for especially deferential federal review of state convictions. Brown has not shown, as he must, that the New York Court of Appeals acted contrary to clearly established federal law as set forth in Supreme Court precedent. Even in *Davis* and *Jackson*, where we granted habeas relief, we did not conclude that the New York courts had acted “contrary to” federal law as provided in § 2254(d)(1). As in *Davis*, “there is no indication that the [state courts] construed the due process clause in a manner ‘opposite to’ the Supreme Court’s rulings.” 270 F.3d at 133.

Nor has Brown satisfied the alternative prong of § 2254(d)(1)—namely, that the New York Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court. It bears repeating that, “[i]n order to obtain a writ of habeas corpus in federal court on the ground of error in a state court’s instructions to

the jury on matters of state law, the petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by federal law." *Casillas v. Scully*, 769 F.2d 60, 63 (2d Cir. 1985). Our Court has read *Cupp v. Naughten*, 414 U.S. 141 (1973), to establish a due process violation where a state court's instructional error "so infected the entire trial that the resulting conviction violates due process." *Jackson*, 404 F.3d at 624 (quoting *Cupp*, 414 U.S. at 147). In *Davis*, we held that the state court unreasonably applied that standard where the defendant had a "clear right" to a case-determinative jury charge on self-defense, where denial of that instruction was "catastrophic," and where the trial was therefore "egregiously at odds with the standards of due process" clearly established by *Cupp*. *Davis*, 270 F.3d at 132–33; *see also Jackson*, 404 F.3d at 627–28 (reaching the same conclusion in a similar case).

Here, by contrast, it cannot be said that the New York Court of Appeals unreasonably applied *Cupp* when it concluded that Brown was not entitled to a justification defense. Even if we disagreed with that conclusion, we could hardly say that *every* fairminded jurist would similarly disagree. *See Klein*, 146 S. Ct. at 596. That is indeed a high bar to surmount. As the Supreme Court has repeatedly admonished, a state court cannot be faulted as having unreasonably applied federal law unless its decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Having reviewed the New York Court of Appeals' decision, we detect nothing that could be remotely

described as the sort of “extreme malfunction[.]” for which federal habeas relief is reserved. *Klein*, 146 S. Ct. at 596 (internal quotation marks omitted). Even insofar as Brown contends that the Court of Appeals applied its own precedents inconsistently, he does not argue and cannot show that the decision was a “novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *United States v. Lanier*, 520 U.S. 259, 266 (1997); *see also Metrish v. Lancaster*, 569 U.S. 351, 359 (2013); *Rogers v. Tennessee*, 532 U.S. 451, 461–62 (2001); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Finally, we reach the same conclusion with respect to the final question posed by § 2254(d)(2)—whether the state court decision was based on an unreasonable determination of fact based on the evidence in the state proceeding. As explained earlier, the New York Court of Appeals relied on facts that were clearly supported by the witness testimony presented at trial, and those facts were essentially undisputed. Brown was the first (and only) antagonist to pull out a gun during his argument with Cabbagestalk; Brown held the gun at his waist, where it could be readily aimed and fired; and he indeed did so shortly after the gun was drawn, killing Cabbagestalk. The New York Court of Appeals therefore cannot be said to have based its decision on unreasonable findings of fact.

IV. Conclusion

In sum, we hold that the New York Court of Appeals did not erroneously deprive Brown of a justification instruction to which he

was entitled under state law when it concluded that his conduct rendered him an initial aggressor under N.Y. Penal Law § 35.15(b). And because there was no state-law instructional error, there cannot have been a federal due process violation. The decision of the district court dismissing the petition is AFFIRMED.