

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2019-019**

March 4, 2019

The UJI-Criminal Committee has recommended amendments to UJI 14-5170, 14-5171, 14-5172, 14-5173, and 14-5174 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

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New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
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Your comments must be received by the Clerk on or before April 3, 2019, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

14-5170. Justifiable homicide; defense of habitation.¹

~~[Evidence has been presented that]~~ An issue you must consider in this case is whether the defendant killed _____ (name of victim) while attempting to prevent a _____² in the defendant's _____³.

A killing in defense of _____³ is justified if:

1. The _____³ was being used as the defendant's dwelling; and
2. It appeared to the defendant that the commission of _____² was immediately at hand and that it was necessary to kill the intruder to prevent the commission of _____²; and
3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not kill in defense of _____³. If you have a reasonable doubt as to whether the defendant killed in defense of _____³, you must find the defendant not guilty.

USE [NOTE] NOTES

1. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not kill in defense of _____³."³
2. Describe the felony being committed or attempted.

3. Identify the place where the killing occurred.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Section 30-2-7A NMSA 1978 provides that a homicide is justifiable when committed in the necessary defense of property. Although this statute has been a part of New Mexico law since 1907, the New Mexico appellate courts have never given the statute a broad interpretation. *See also* commentary to UJI 14-5171. The New Mexico courts have consistently held, not always referring to the statute, that one cannot defend his property, other than his habitation, from a mere trespass to the extent of killing the aggressor. *State v. McCracken*, 22 N.M. 588, 166 P. 1174 (1917); *State v. Martinez*, 34 N.M. 112, 278 P. 210 (1929); *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946). *See generally*, Annot., 25 A.L.R. 508, 525 (1923).

The “pure” defense of property, i.e., not including a defense against force and violence, is always limited to reasonable force under the circumstances. *See, e.g., State v. Waggoner*, 49 N.M. 399, 165 P.2d 122 (1946); *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961). In *Brown*, the court held that resort to the use of a firearm to prevent a mere trespass or an unlawful act not amounting to a felony was unreasonable as a matter of law. In defense of habitation, although the defendant is limited by the elements of imminent threat, apparent necessity and reasonableness, he does not have to fear for the life of himself or others or necessarily believe that great bodily harm will come to himself or others. An apparent necessity to kill to prevent a felony is sufficient. *State v. Couch, supra*; Perkins, Criminal Law 1024 (2d ed. 1969).

This instruction requires a determination of what constitutes a habitation, if the structure is not obviously a home or apartment, under the particular facts of the case. *See generally*, Annot., 25 A.L.R. 508, 521 (1923). *See also* commentary to UJI 14-1631.

If the property being defended is not the defendant's habitation, he may kill the intruder only if the interference with the property is accompanied by a threat of death or great bodily harm. *See LaFave & Scott*, Criminal Law 399 (1972). In such a case, UJI 14-5171 (Justifiable homicide; self-defense) must be given.

14-5171. Justifiable homicide; self defense.¹

~~[Evidence has been presented that]~~ An issue you must consider in this case is whether the defendant killed _____ (name of victim) in self defense.

The killing is in self defense if:

1. There was an appearance of immediate danger of death or great bodily harm² to the defendant as a result of _____^{3,4} and
2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed _____ (name of victim) because of that fear; and
3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense you must find the defendant not guilty.

USE [NOTE]NOTES

1. For use when the self defense theory is based on[:] necessary defense of self against

any unlawful action; reasonable grounds to believe a design exists to commit a felony; or reasonable grounds to believe a design exists to do some great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

3. Describe unlawful act, felony, or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. UJI 14-5190 NMRA (assailed person need not retreat), must be given if at issue. If at issue, UJI 14-5191 NMRA (self defense; limitations; aggressor) and UJI 14-5191A NMRA (first aggressor; exceptions to the limitation on self defense) should also be given.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~This instruction is a combination of the elements of self-defense contained in Subsections A and B of Section 30-2-7 NMSA 1978. The elements of the defenses originated in the Kearny Code, Crimes and Punishments, Art. 2, Sec. 1. The source of the more specific language of Subsection A of Section 30-2-7 NMSA 1978 is derived from Laws 1907, ch. 36, § 11, and the language of Subsection B of Section 30-2-7 NMSA 1978 is derived from Laws 1853-54, p. 86. The present statute was adopted in 1963, but as indicated in the report of the Criminal Law Study Committee (N.M. Legislature 1961-62), the policy was to retain the provisions of existing criminal laws wherever possible.~~

~~Although numerous New Mexico decisions deal with the principles of self-defense, few of the cases discuss the principles in terms of the statutory language. In the context of another justifiable homicide statute, Sections 40-24-12 and 40-24-13 NMSA 1953 (repealed by Laws 1963, Chapter 303, Section 30-1) the defense of a police officer to a killing of a fleeing felon, the supreme court has said that these statutes are merely a legislative recognition of the common law. See Alaniz v. Funk, 69 N.M. 164, 364 P.2d 1033 (1961). In addition, the supreme court has indicated that there is no requirement that the jury be instructed in the precise language of the statutes. State v. Maestas, 63 N.M. 67, 313 P.2d 337 (1957).~~

~~The New Mexico courts have not had occasion to catalog the unlawful actions which will allow a person to respond with a deadly force. For example, the type of felony which will allow a killing in self-defense has not been limited. See e.g., State v. Beal, 55 N.M. 382, 387, 234 P.2d 331 (1951). Cf. Alaniz v. Funk, supra. The supreme court has said that the phrase "great personal injury" means something more than a mere battery not amounting to a felony. Territory v. Baker, 4 N.M. (Gild.) 236, 264-66, 13 P. 30 (1887). There has been no attempt to define the "unlawful act" which will allow the use of deadly force, although in a related context it has been said that the use of deadly force to prevent an unlawful act not amounting to a felony is unreasonable as a matter of law. Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961). (The court in Brown indicates that the rules of law governing the use of justifiable force apply to both civil and criminal cases.)~~

~~In view of the decisions requiring reasonableness and fear or apprehension of death or great bodily harm, the absence of specific definitions of unlawful act, felony or act creating a great personal injury does not appear to be crucial. Regardless of how the act is characterized or identified;~~

it must be of such a quality as to create a fear of death or great bodily harm. Thus it would appear that Subsections A and B of Section 30-2-7, *supra*, are redundant.]

New Mexico cases recognize deadly force may be justified to defend against an actual or apparent and imminent threat of harm in three basic circumstances: self defense, defense of another, and defense of habitation. See generally *State v. Rudolfo*, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170 (self defense); *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537 (defense of another); *State v. Cardenas*, 2016-NMCA-042, 380 P.3d 866 (defense of habitation); UJI 14-5170 NMRA (defense of habitation), UJI 14-5171 NMRA (self defense); UJI 14-5172 NMRA (defense of another); see also NMSA 1978, § 30-2-7 (recognizing defenses).

The threat of harm required for self-defense or defense of another is that of death or great bodily harm. See, e.g., *Rudolfo*, 2008-NMSC-036, ¶ 17. For defense of habitation, the justification for use of deadly force arises from a threat of a violent felony by an intruder into the home. *Cardenas*, 2016-NMCA-042, ¶ 18. These defenses provide “a complete justification to homicide” based on “the reasonable belief in the necessity of using deadly force.” *State v. Coffin*, 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477; see also NMSA 1978, § 30-2-8 (when killing is justified or excused the defendant must be acquitted). “It is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for . . . defense, should be able to take reasonable steps to defend [against] harm.” Wayne R. LaFave, *Substantive Criminal Law*, § 10.4(a) (3rd ed.; Oct. 2017 Update). Deadly force may not be used solely to defend one’s personal property. See *State v. Baxendale*, 2016-NMCA-048, ¶ 12, 370 P.3d 813 (quoting *Brown v. Martinez*, 1961-NMSC-040, ¶ 22, 68 N.M. 271, 361 P.2d 152).

Under New Mexico law, the danger [to the defendant need not] involved may be either real [but need only be] or apparent [under] based on the circumstances known to or perceived by the accused. *Rudolfo*, 2008-NMSC-036, ¶ 17; *State v. Cheshier*, 1916-NMSC-083, 22 N.M. 319, 161 P. 1108[-(1916)]; *State v. Roybal*, 33 N.M. 187, 262 P. 929 (1928); *State v. Vansickel*, 20 N.M. 190, 147 P. 457 (1915). The danger under the circumstances must be such as would excite the fears of a reasonable person. *State v. Cheshier*, *supra*; *State v. Vansickel*, *supra*; *State v. Dickens*, 23 N.M. 26, 165 P. 850 (1917).] The apparent danger must be imminent. *Jernigan*, 2006-NMSC-003, ¶ 5; *Territory v. Baker*, 1887-NMSC-021, ¶ 11, 4 N.M. 236, 13 P. 30. [*supra*; *State v. Vansickel*, *supra*. The danger must arouse a fear of death or great bodily harm or a fear of peril to life or limb. *State v. Cheshier*, *supra*; *State v. Vansickel*, *supra*. The defendant must in fact entertain such a fear of death or great bodily harm or a fear of peril to life or limb. *State v. Cheshier*, *supra*; *State v. Vansickel*, *supra*. The defendant must act solely upon that fear.] The defendant also must believe in the existence of the apparent danger. *State v. Parks*, 1919-NMSC-041, ¶ 6, 25 N.M. 395, 183 P. 433 [-(1919)]. New Mexico uses a hybrid test, judging the appearance of actual danger and actual apprehension subjectively while judging whether the use of deadly force was reasonable objectively. *Coffin*, 1999-NMSC-038, ¶ 15.

The instruction does not require a separate instruction in the event the victim is an innocent bystander, i.e., a person who did not instigate the action which required the defense. Under New Mexico law, if the circumstances would justify the use of deadly force in self-defense, the defendant is not guilty of homicide if he unintentionally kills a third person. *State v. Sherwood*, 1935-NMSC-082, 39 N.M. 518, 50 P.2d 968[-(1935)]. See generally, *LaFave, supra*, § 10.4(g); Annot., 55 A.L.R.3d 620 (1974).

~~[The elements of this instruction contain some general principles of self-defense which are often given as separate instructions. For example, the principle of apparent necessity. See California Jury Instructions Criminal, 5.51. In addition, the] The third element of “a reasonable man under the same circumstances as the defendant,” includes the principle that the defendant’s right to use force may end when the danger ceases or the adversary is disabled. See, e.g., *State v. Benally*, 2001-NMSC-033, ¶ 43, 131 N.M. 258, 34 P.3d 1134 (Baca, J., dissenting). [*State v. Garcia*, 83 N.M. 51, 54, 487 P.2d 1356, 1359 (Ct. App. 1971). See also, California Jury Instructions Criminal, 5.52 and 5.53.]~~

Self-defense is not available to an aggressor unless ~~[he]~~ the aggressor first tries to stop the fight ~~[he started]~~ or unless it is necessary to defend ~~[himself]~~ against an unreasonable force. See [*State v. Padilla*, 90 N.M. 481, 565 P.2d 352, cert. denied, 91 N.M. 3, 569 P.2d 413 (1977) and] *State v. Chavez*, 1983-NMSC-037, ¶ 6, 99 N.M. 609, 661 P.2d 887; UJI 14-5191 NMRA; UJI 5191A NMRA.

Homicide requires as an element that the killing was unlawful. *Benally*, 2001-NMSC-033, ¶ 10. Because self defense, defense of another, or defense of habitation justifies the defendant’s actions, when established they negate the element of unlawfulness. *State v. Armijo*, 1999-NMCA-087, ¶ 14, 127 N.M. 594, 985 P.2d 764. Once sufficient evidence has been presented to create a jury issue on the elements of one of these defenses, unlawfulness becomes an element the state must prove, and therefore it bears the burden to disprove these defenses beyond a reasonable doubt. *State v. Parish*, 1994-NMSC-073, ¶¶ 11, 13, 118 N.M. 39, 878 P.2d 988.

~~[The committee found no New Mexico cases specifically holding that the state had the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. See generally, Annot., 43 A.L.R.3d 221 (1972). In *State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970), a manslaughter case, the court held that the defendant was only required to produce evidence which would raise a reasonable doubt in the minds of the jurors and that the general reasonable doubt instruction was sufficient to place the burden on the state to prove its case. Cf. *State v. Parker*, 34 N.M. 486, 285 P. 490 (1930). Because these instructions do not require the jury to find the killing was unlawful as one of the elements, a sentence was inserted in this and similar defenses telling the jury that the burden was on the state to prove beyond a reasonable doubt that the defendant did not kill in self-defense. See also, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).~~

~~— Since *Mullaney* was decided, the Supreme Court of the United States upheld a jury instruction in a manslaughter case which placed the burden upon the defendant of proving his affirmative defense by a preponderance of the evidence, stating:—~~

~~— We thus decline to adopt as a constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in the previous cases holding that the due process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it~~

to the statutory defense at issue here.—

—— Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

—— UJI 14-5171 (Justifiable homicide; self-defense) must be given if the defendant kills another while defending his property, other than his habitation, if there is evidence that the victim's interference with the defendant's property was accompanied by a threat of death or great bodily harm.]

[Commentary amended by Supreme Court Order No. _____, effective _____.]

14-5172. Justifiable homicide; defense of another.¹

[Evidence has been presented that] An issue you must consider in this case is whether the defendant killed _____ (name of victim) while defending another.

The killing was in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm^[4]² to _____^[2]³ as a result of _____^[2]⁴; and
2. The defendant believed that _____^[2]³ was in immediate danger of death or great bodily harm from _____ (name of victim) and killed _____ (name of victim) to prevent the death or great bodily harm; and
3. The apparent danger to _____^[2]³ would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of another. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE [NOTE]NOTES

1. For use when the defense theory is based ~~[upon:]~~on a reasonable ground to believe a design exists to commit a felony; a reasonable ground to believe a design exists to do great bodily harm; or a defense of spouse or other member of the family, a necessary defense against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, “The defendant did not act in defense of another.”

2. The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

3. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

~~[3:]~~4. Describe the unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

~~[4. — The definition of great bodily harm, UJI 14-131, must be given if not already given.]~~
[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — This instruction is a combination of the defense of spouse or family against any unlawful action, Subsection A of Section 30-2-7 NMSA 1978 and the defense of another against a felony or act which would result in some great personal injury to the other person, Subsection B of Section 30-2-7 NMSA 1978. *See e.g., State v. Beal*, 55 N.M. 382, 234 P.2d 331 (1951). For a discussion of the history of these statutes and the general rules which apply to defense

of another, see the commentary to UJI 14-5171.

Under Subsection A of Section 30-2-7 NMSA 1978 the defense of another against any unlawful action is limited to defending one's wife or family. On the assumption that the equal rights amendment guarantees that a wife is also entitled to this defense, the instruction is designed to be used for defense of any member of the family. *See generally*, Daniels, The Impact of the Equal Rights Amendment on the New Mexico Criminal Code, 3 N.M.L. Rev. 106, 109 (1973).

The prior versions of Subsection B of Section 30-2-7 NMSA 1978 specifically listed the persons who could be defended by deadly force. For example, in *State v. Brooks*, 59 N.M. 130, 279 P.2d 1048 (1955), the court held that the term "mistress," one of the persons entitled to be defended, was not a partner in an illicit relationship but was the feminine of master. By eliminating the shopping list of persons who could be defended, it would appear that the legislature clearly intended to broaden the scope of this defense. *See generally*, Perkins, Criminal Law 1019 (2d ed. 1969).

Some authorities have said that the person using deadly force in defense of another stands in the shoes of, and is bound by the intent of, the person defended. In *State v. Maestas*, 63 N.M. 67, 313 P.2d 337 (1957), the supreme court declined to decide if New Mexico would follow that authority. The supreme court held that the district court had instructed the jury that the defendant was to be judged on the basis of his own perception of the danger under the circumstances and, therefore, the defendant had no complaint. Because the statute uses the term "reasonable grounds to believe a design exists, etc.," it appears that New Mexico law does not require the person intervening to know the actual facts, but only to act as a reasonable person under the circumstances. *See generally*, Perkins, *supra*, at 1020-21. LaFave & Scott 397 (1972). The defendant in defense of another must entertain a reasonable belief that the person attacked is in danger. *Territory v. Baker*, 4 N.M. (Gild.) 236, 264-66, 13 P. 30 (1887).

The 1981 amendments to UJI 14-5172 are intended only to clarify the essential elements of justifiable homicide in the defense of another.

14-5173. Justifiable homicide; public officer or employee.¹

~~[Evidence has been presented that]~~ An issue you must consider in this case is whether the killing of _____ (name of victim) was justifiable homicide by a public officer or employee.

The killing was justifiable homicide by a public officer or public employee if:

1. At the time of the killing, _____ (name of defendant) was a public officer or employee; and
2. The killing was committed while _____ (name of defendant) was performing ~~[his]~~~~[her]~~ the defendant's duties as a public officer or employee;
3. The killing was committed while²
[overcoming the actual resistance of _____ (name of victim)
to the execution of _____³]
[overcoming the actual resistance of _____ (name of victim)
to the discharge of _____⁴]
[retaking [_____ (name of victim)] [a person], who
committed _____⁵ and who had [been rescued]⁶ [escaped]]
[arresting _____ (name of victim)] [a person], who

committed _____⁵ and was fleeing from justice]
[attempting to prevent the escape from _____⁷ by
[_____ (name of victim)] [a person] who committed
_____⁵]; and

4. A reasonable person in the same circumstances as _____
(name of defendant) would have reasonably believed that _____ (name of
victim) posed a threat of death or great bodily harm to _____ (name of
defendant) or another person. The burden is on the state to prove beyond a reasonable doubt that the
killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable,
you must find the defendant not guilty.

USE [NOTE]NOTES

1. For use when the defense is based on NMSA 1978, Section 30-2-6[~~NMSA 1978~~].
If this instruction is given, add to the essential elements instruction for the offense charged, “The
killing was not justifiable homicide by a public officer or employee.”

2. Use only the applicable bracketed phrase.
3. Insert description of legal process being executed.
4. Insert description of legal duty.
5. Insert the name of the felony.
6. Use only the applicable parenthetical alternative.
7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by Supreme
Court Order No. _____, effective _____.]

Committee commentary. — Although the Section 30-2-6 NMSA 1978 requires that the
defendant “necessarily committed” the killing, “necessarily” is defined as “probable cause” to
believe. The committee has used the definition of “probable cause,” “reasonable person in the same
circumstances as the defendant” in this instruction for purposes of clarity.

14-5174. Justifiable homicide; aiding public official.¹

[~~Evidence has been presented that~~] An issue you must consider in this case is whether the
killing of _____ (name of victim) was justifiable homicide by a person aiding
a public officer or public employee if:

1. At the time of the killing, _____ (name of defendant) was
acting at the command and in the aid or assistance of a public officer or employee;
2. The killing was committed while²
[overcoming the actual resistance of _____ (victim) to the
execution of _____³]
[overcoming the actual resistance of _____ (victim) to the
discharge of _____⁴]
[retaking [_____ (name of victim)] [a person], who
committed _____ and who had [been rescued]⁵ [escaped]]
[arresting [_____ (name of victim)] [a person] who
committed _____⁶ and was fleeing from justice]
[attempting to prevent the escape from _____⁷ of

[_____ (name of victim)] [a person], who committed _____⁶]; and

3. A reasonable person in the same circumstances as _____ (name of defendant) would have reasonably believed that _____ (name of victim) posed a threat of death or great bodily harm to _____ (name of public officer or public employee) or another person.

The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE [NOTE]NOTES

1. For use when the defense is based on NMSA 1978, Section 30-2-6~~[NMSA 1978]~~. If this instruction is given, add to the essential elements instruction for the offense charged, “The killing was not justifiable homicide by a public officer or employee.”

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Use only applicable parenthetical alternative.

6. Insert name of felony.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The elements of this instruction are similar to the instruction for a killing by the public officer. *See* commentary to UJI 14-5173. As a matter of law, the person who aids a public officer stands in the same position as the officer and has no more rights than the officer. *State v. Gabaldon*, 43 N.M. 525, 533, 96 P.2d 293 (1939). For example, the person fleeing must actually be a felon. The defendant is not entitled to kill a misdemeanor even if under the circumstances the latter appears to be a felon. *State v. Gabaldon, supra*. In this respect, this defense is unlike the defense of another, where the defendant may act on an appearance of danger to another. *See* commentary to UJI 14-5172. For the reasons for omitting the defense of “acting in obedience to a judgment of the court,” *see* commentary to UJI 14-5173.

Section 30-2-7C NMSA 1978 contains a justifiable homicide provision for one who, on his own initiative, kills a fleeing felon or kills to suppress a riot or to keep and preserve the peace. The committee was of the opinion that, not only was the defense rarely available, it had an uncertain common-law basis. *See generally* Perkins, Criminal Law 989 (2d ed. 1969). The committee further believed that the public policy behind the statute should be the subject of legislative review. For these reasons, no instruction interpreting the statute was included. A special instruction must be drafted under the guidelines of the General Use Note in the event that the evidence justifies giving an instruction based on the statute.

APR - 3 2019

Mr. Moya,



Please accept this comment on Proposal 2019-019, regarding the Uniform Jury Instructions on Duty to Retreat, etc.

In the self-defense instruction's commentary (14-5171), it cites to cases that involve other defense, such as defense of habitation. That commentary cites to *State v. Cardenas*, 2016-NMCA-042, and appropriately says that *Cardenas* held (as it does) that a violent felony is necessary for defense of habitation.

However, in the instruction for defense of habitation (14-5170), it doesn't say anything about a violent felony being necessary, and *Cardenas* is not cited at all. (Actually, it looks like the commentary wasn't touched at all, including updating the citations to the vendor neutral cites. Probably that commentary should be completely reworked.) Regardless, the commentary primarily depends on *State v. Couch*, 1946-NMS-047, for the idea that any felony is sufficient for defense of habitation. That case depends on the justifiable homicide statute, now at §30-2-7. That statute doesn't require a violent felony. (The annotations, naturally, mostly cite to *Couch* on defense of habitation.) Of course, even in *Couch*, the felony was arguably violent and was certainly dangerous.

Either way, the instruction for defense of habitation talks about it only needing to be a felony, and the commentary for self-defense talks about it having to be a violent felony. Those can't both be true. But I believe that the Committee needs to fix the clear conflict between the two UJIs.

(Another question that perhaps the committee can answer if necessary, but perhaps it can't be answered, is what constitutes a violent felony? Does it have to be a [mandatory and/or optional] serious violent offense?)

Thank you for your consideration.

Jonathan L. Ibarra