

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2019-020**

March 4, 2019

The UJI-Criminal Committee has recommended amendments to UJI 14-5191 NMRA and the adoption of new UJI 14-5191A 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
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

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.

14-5191. Self defense; limitations; aggressor.¹

~~[Self defense is not available to the defendant if he [started the fight] [or] [agreed to fight][†] unless:—~~

~~— [1. The defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and —~~

~~— 2. _____ (name of victim) responded with force which would ordinarily create a substantial risk of death or great bodily harm];—~~

~~{OR}—~~

~~— [1. The defendant tried to stop the fight;—~~

~~— 2. The defendant let _____ (name of victim) know he no longer wanted to fight; and—~~

~~— 3. _____ (name of victim) became the aggressor.]]~~

Before you consider whether the defendant acted in self defense, you must first decide whether the defendant was the first aggressor. The defendant was the first aggressor if the defendant

[started the fight with _____ (name of victim)]²

[or]

[agreed to fight with _____ (name of victim)]

[or]

[intentionally provoked a fight in order to harm _____ (name of victim)]
[or]
[committed the act of _____ (describe defendant's conduct that constituted the alleged crime), in response to _____'s (name of victim) act of _____ (describe conduct of victim giving rise to an appearance of immediate danger of harm to defendant), where _____'s (name of victim) act was the [lawful and]³ foreseeable result of _____ (describe defendant's alleged unlawful act that resulted in victim's conduct)]⁴.

The burden is on the state to prove beyond a reasonable doubt that the defendant was the first aggressor. [If the defendant was the first aggressor, the defendant cannot claim self defense. If the defendant was not the first aggressor, you should proceed to decide whether the defendant acted in self defense.]⁵ [If you find that the defendant was the first aggressor, you must then decide whether _____ (name of victim) became the aggressor. If _____ (name of victim) became the aggressor, the defendant may claim self defense even though the defendant was the first aggressor.]⁶

USE [NOTE] NOTES

1. This instruction must be given in all self defense cases in which first aggressor is an issue.
2. Use only applicable bracketed element or elements established by the evidence.
3. If the lawfulness of the victim's conduct is at issue, e.g., may have been privileged or justified, give appropriate definition.
4. This alternative should be used when the defendant provoked the victim through an unlawful act and the victim responded in a lawful manner. *See State v. Denzel B.*, 2008-NMCA-118, 192 P.3d 260; *see also* committee commentary, *infra*.
5. Use this bracketed alternative in cases where UJI 14-5191A NMRA will not be given.
6. Use this bracketed alternative in cases where UJI 14-5191A will be given. If UJI 14-5191A will be given, it should immediately follow this instruction.

Committee commentary. — [H] A defendant's "claim of self defense may fail if the defendant was the aggressor or instigator of the conflict." *State v. Lucero*, 1998-NMSC-044, ¶ 7, 126 N.M. 552, 972 P.2d 1143 (internal quotation marks and citation omitted). In *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887, the defendant was a first aggressor when he entered a convenience store with a knife intending to rob the store and subsequently stabbed and killed a patron who tried to stop the robbery. *Id.* ¶ 6. The Supreme Court held that it is "well established in this jurisdiction that a defendant who provokes an encounter, as a result of which he finds it necessary to use deadly force to defend himself, is guilty of an unlawful homicide and cannot avail himself of the claim that he was acting in self-defense." *Id.* *Lucero* then clarified that if the defendant was an aggressor or instigator of the conflict, self-defense is still available if the "defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and [the] [victim] responded with force which would ordinarily create a substantial risk of death or great bodily harm." 1998-NMSC-044, ¶ 7 (internal quotation marks and citation omitted) (second alteration in original). Thus, the right of self-defense can be reinstated if the victim responds by escalating the conflict or pursues the conflict after the defendant attempts to disengage. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(e) (3d ed. Oct. 2017 update); *see also* *Territory v.*

Clarke, 1909-NMSC-005, ¶ 8, 15 N.M. 35, 99 P. 697 (upholding conviction where jury was instructed that defendant could claim self defense if “defendant in reality and in good faith endeavored to decline any further struggle before the fatal shot was fired”).

The state bears the burden of proving that the defendant was the first aggressor beyond a reasonable doubt. See *State v. Pruett*, 1918-NMSC-062, ¶ 9, 24 N.M. 68, 172 P. 1044[-(1918)], the court stated that an instruction on this subject, or at least some part of it, is habitually given in New Mexico with instructions on self-defense. The committee believed that the use of this instruction, as with all instructions, is limited to cases where the matter has been put in issue by the evidence. See *Annot.*, 55 A.L.R.3d 1000 (1974); *LaFave & Scott, Criminal Law* 395 (1972)].

[This instruction is not to be given if the defendant knew that there was no further danger from his opponent. See *LaFave & Scott, Criminal Law* 395 (1972). See also *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356[-(1971)], where it was held erroneous to instruct the jury that the defendant could not pursue the aggressor after the aggressor was no longer able to continue the conflict or present a danger to the defendant.]

The bracketed “lawful” term in this instruction should be used and defined if there is an issue about whether the victim’s use of force may have been a lawful response to the defendant’s conduct. See Use Note 3. For example, *State v. Southworth* held that the self-defense instruction was improper because it did not require the jury to determine whether the victim acted reasonably in defense of her home when she used potentially deadly force against the trespassing defendant. See 2002-NMCA-091, ¶¶ 18-19, 52 P.3d 987 (“The trial court should instruct the jury that [the defendant] had the right to stand his ground and did not need to retreat unless he was threatened with lawful force. In order to determine whether the force used by [the victim] was lawful, the jury must conclude that [she] acted reasonably in defending her home against the perceived threat of the commission of a felony (similar to the elements of defense of habitation set for in UJI 14-5170).” (emphasis added)).

Similarly, *State v. Denzel B.* held that the self-defense instruction was improper because it failed to instruct the jury that the victim’s conduct, grabbing the defendant by the shirt after the defendant pushed him, may have been protected by the parental privilege. See 2008-NMCA-118, 192 P.3d 260, ¶¶ 3-4, 17 (“We therefore hold that when a child asserts self-defense as justification for battery against his parent, the jury must first determine whether the parent’s use of physical discipline was reasonable under the circumstances.”). In both *Southworth* and *Denzel B.*, the court held that the jury must be instructed that the state must prove that the defendant did not act in self-defense, taking into account whether the victim’s response to the defendant’s conduct was lawful under the particular circumstances of the case. *Accord State v. Lara*, 1989-NMCA-098, ¶¶ 7-9, 109 N.M. 294, 784 P.2d 1037 (explaining defendant had no right to defend against store employees who had a lawful right to seize defendant for shoplifting).

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

[NEW MATERIAL]

14-5191A. First aggressor; exceptions to the limitation on self defense.¹

If you find beyond a reasonable doubt that the defendant was the first aggressor, you must then decide whether [the following exception applies]² [any of the following exceptions apply]. If [the exception applies]² [one of these exceptions apply], _____ (name of victim) became

the aggressor, and the defendant is no longer the first aggressor.

[1. The defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and

2. _____ (*name of victim*) responded with force which would ordinarily create a substantial risk of death or great bodily harm]²;

[OR]

[1. The defendant tried to stop the fight;

2. The defendant let _____ (name of victim) know he no longer wanted to fight; and

3. _____ (name of victim) continued to fight the defendant.]

If the state proves beyond a reasonable doubt that _____ (*name of victim*) did not become the aggressor, the defendant is still the aggressor and cannot claim self defense. If after deliberation you find that _____ (*name of victim*) became the aggressor, you should proceed to decide whether the defendant acted in self defense.

USE NOTES

1. This instruction must be given in conjunction with UJI 14-5191 NMRA in all self-defense cases in which there is an issue regarding whether a first aggressor regained the right to claim self defense because the victim became the aggressor.

2. Use applicable bracketed alternative or alternatives.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* Committee commentary to UJI 14-5191 NMRA.

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