

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

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

5 A killing in defense of _____³ is justified if:

6 1. The _____³ was being used as the defendant's dwelling; and

7 2. It appeared to the defendant that the commission of _____²
8 was immediately at hand and that it was necessary to kill the intruder to prevent the
9 commission of _____²; and

10 3. A reasonable person in the same circumstances as the defendant would have
11 acted as the defendant did.

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

16 USE [NOTE] NOTES

17 1. If this instruction is given, add to the essential elements instruction for the offense
18 charged, "The defendant did not kill in defense of _____."³

19 2. Describe the violent felony being committed or attempted.

20 3. Identify the place where the killing occurred.

21 [As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court

1 Order No. 19-8300-016, effective for all cases pending or filed on or after December 31,
2 2019.]

3 **Committee commentary.** — [~~Section 30-2-7A~~]NMSA 1978, Section 30-2-7(A)
4 (1963) provides that a homicide is justifiable when committed in the necessary defense of
5 property. Although this statute has been a part of New Mexico law since 1907, the New
6 Mexico appellate courts have never [~~given the statute a broad interpretation~~]interpreted the
7 statute broadly. *See also* commentary to UJI 14-5171 NMRA. The New Mexico courts have
8 consistently held, not always referring to the statute, that one cannot defend his property,
9 other than his habitation, from a mere trespass to the extent of killing the aggressor. [~~*State*~~
10 ~~*v. McCracken*, 22 N.M. 588, 166 P. 1174 (1917); *State v. Martinez*, 34 N.M. 112, 278 P. 210~~
11 ~~(1929); *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946). *See generally*, Annot., 25 A.L.R.~~
12 ~~508, 525 (1923);] *State v. Couch*, 1946-NMSC-047, ¶ 30, 52 N.M. 127, 193 P.2d 405 (“The~~
13 ~~. . . rule limiting the amount of force which may be lawfully used in defense of other~~
14 ~~property does not apply in defense of habitation.”); *State v. Martinez*, 1929-NMSC-040, ¶~~
15 ~~9, 34 N.M. 112, 278 P. 210 (explaining that “[e]ven if deceased was a trespasser [on the~~
16 ~~defendant’s land], taking his life for that reason was not justifiable”); *State v. McCracken*,~~
17 ~~1917-NMSC-029, ¶ 8, 22 N.M. 588, 166 P. 1174 (addressing trespass on open lands and~~
18 ~~holding that the defendant did not have the right to use deadly force “to enable him to enter~~
19 ~~upon the land and construct his fence,” even if he did legally possess the land). *See*~~
20 ~~*generally*, Annot., 25 A.L.R. 508, 525 (1923).~~

21 The “pure” defense of property, i.e., not including a defense against force and

1 violence, is always limited to reasonable force under the circumstances. *See, e.g., State v.*
2 *Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122[~~-(1946)~~]; *Brown v. Martinez*,
3 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152[~~-(1961)~~]. In *Brown*, the [e]Court held that
4 resort to the use of a firearm to prevent a mere trespass or an unlawful act not amounting to
5 a felony was unreasonable as a matter of law.

6 In defense of habitation, although the defendant is limited by the elements of
7 imminent threat, apparent necessity and reasonableness, he does not have to fear for the life
8 of himself or others or necessarily believe that great bodily harm will come to himself or
9 others. An apparent necessity to kill to prevent a violent felony is ~~[sufficient]~~required. [*State*
10 *v. Couch*, 1946-NMSC-014[*supra*]; *see also State v. Boyett*, 2008-NMSC-030, ¶ 21, 144
11 N.M. 184, 185 P.3d 355 (requiring felony, in defense of habitation context, to be a violent
12 felony); *State v. Cardenas*, 2016-NMCA-042, ¶ 6, 380 P.3d 866 (same); *State v. Baxendale*,
13 2016-NMCA-048, ¶ 15, 370 P.3d 813 (same); Perkins, Criminal Law 1024 (2d ed. 1969).

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

17 If the property being defended is not the defendant's habitation, he may kill the
18 intruder only if the interference with the property is accompanied by a threat of death or
19 great bodily harm. *See LaFave & Scott*, Criminal Law 399 (1972). In such a case, UJI
20 14-5171 (Justifiable homicide; self-defense) must be given.

21 [As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or

**UJI-CRIMINAL
14-5170**

**Supreme Court Approved
November 1, 2019**

1 filed on or after December 31, 2019.]