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 harm[2] 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. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

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 (1963) (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 (1963) (requiring that the defendant be acquitted when the killing is justified or excused). "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. Chesher*, 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. Chesher, 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. Chesher, 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. Chesher, supra; State v. Vansickel, supra. The defendant must act solely upon that fear.~~] The defendant must also 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.~~]

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]