

1 **14-5174. Justifiable homicide; aiding public official.<sup>1</sup>**

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

5 1. At the time of the killing, \_\_\_\_\_ (*name of defendant*)  
6 was acting at the command and in the aid or assistance of a public officer or employee;

7 2. The killing was committed while<sup>2</sup>  
8 [overcoming the actual resistance of \_\_\_\_\_ (*victim*)  
9 to the execution of \_\_\_\_\_<sup>3</sup>]

10 [overcoming the actual resistance of \_\_\_\_\_ (*victim*)  
11 to the discharge of \_\_\_\_\_<sup>4</sup>]

12 [retaking [\_\_\_\_\_ (*name of victim*)] [a person],  
13 who committed \_\_\_\_\_ and who had [been rescued]<sup>5</sup>  
14 [escaped]]

15 [arresting [\_\_\_\_\_ (*name of victim*)] [a person]  
16 who committed \_\_\_\_\_<sup>6</sup> and was fleeing from justice]  
17 [attempting to prevent the escape from \_\_\_\_\_<sup>7</sup>

18 of [\_\_\_\_\_ (*name of victim*)] [a person], who  
19 committed \_\_\_\_\_<sup>6</sup>]; and

20 3. A reasonable person in the same circumstances as  
21 \_\_\_\_\_ (*name of defendant*) would have reasonably believed that

1 \_\_\_\_\_ (*name of victim*) posed a threat of death or great bodily harm  
2 to \_\_\_\_\_ (*name of public officer or public employee*) or another  
3 person.

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

7 **USE [~~NOTE~~] NOTES**

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

11 2. Use only the applicable bracketed phrase.

12 3. Insert description of legal process being executed.

13 4. Insert description of legal duty.

14 5. Use only applicable parenthetical alternative.

15 6. Insert name of felony.

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

17 [As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by  
18 Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after  
19 December 31, 2019.]

20 **Committee commentary.** — The elements of this instruction are similar to the  
21 instruction for a killing by the public officer. *See* commentary to UJI 14-5173. As a matter

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

9 Section 30-2-7C NMSA 1978 contains a justifiable homicide provision for one who,  
10 on his own initiative, kills a fleeing felon or kills to suppress a riot or to keep and preserve  
11 the peace. The committee was of the opinion that, not only was the defense rarely available,  
12 it had an uncertain common-law basis. *See generally* Perkins, Criminal Law 989 (2d ed.  
13 1969). The committee further believed that the public policy behind the statute should be the  
14 subject of legislative review. For these reasons, no instruction interpreting the statute was  
15 included. A special instruction must be drafted under the guidelines of the General Use Note  
16 in the event that the evidence justifies giving an instruction based on the statute.