

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

2 An issue you must consider in this case is whether the defendant killed
3 _____ (*name of victim*) while attempting to prevent a _____² in
4 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 was
8 immediately at hand and that it was necessary to kill the intruder to prevent the commission of
9 _____²; and
- 10 3. A reasonable person in the same circumstances as the defendant would have acted
11 as the defendant did.

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

15
16 USE 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. The essential elements
20 of the violent felony being committed or attempted must also be given. To instruct on the elements
21 of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute
22 the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.
- 23 3. Identify the place where the killing occurred.

1 [As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order
2 No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as
3 amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or
4 after December 31, 2020.]

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

19 The “pure” defense of property, i.e., not including a defense against force and violence, is
20 always limited to reasonable force under the circumstances. *See, e.g., State v. Waggoner*, 1946-
21 NMSC-001, 49 N.M. 399, 165 P.2d 122; *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361
22 P.2d 152. In *Brown*, the Court held that resort to the use of a firearm to prevent a mere trespass or
23 an unlawful act not amounting to a felony was unreasonable as a matter of law.

1 In defense of habitation, although the defendant is limited by the elements of imminent
2 threat, apparent necessity and reasonableness, he does not have to fear for the life of himself or
3 others or necessarily believe that great bodily harm will come to himself or others. An apparent
4 necessity to kill to prevent a violent felony is required. *Couch*, 1946-NMSC-014; *see also State v.*
5 *Boyett*, 2008-NMSC-030, ¶ 21, 144 N.M. 184, 185 P.3d 355 (requiring felony, in defense of
6 habitation context, to be a violent felony); *State v. Cardenas*, 2016-NMCA-042, ¶ 6, 380 P.3d 866
7 (same); *State v. Baxendale*, 2016-NMCA-048, ¶ 15, 370 P.3d 813 (same); Perkins, *Criminal Law*
8 1024 (2d ed. 1969). This instruction requires a determination of what constitutes a habitation, if
9 the structure is not obviously a home or apartment, under the particular facts of the case. *See*
10 *generally*, Annot., 25 A.L.R. 508, 521 (1923). *See also* commentary to UJI 14-1631.

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

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