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*)]

1 [or]

2 [committed the act of __________________ (*describe defendant's conduct*
3 *that constituted the alleged crime*), in response to _______________'s (*name of victim*) act
4 of __________________ (*describe conduct of victim giving rise to an appearance of*
5 *immediate danger of harm to defendant*), where _______________'s (*name of victim*) act was
6 the [lawful and][3] foreseeable result of __________________ (*describe defendant's alleged*
7 *unlawful act that resulted in victim's conduct*)][4].

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

15 USE [~~NOTE~~] NOTES

16 1. This instruction must be given in all self defense cases in which first
17 aggressor is an issue.

18 2. Use only applicable bracketed element or elements established by the
19 evidence.

20 3. If the lawfulness of the victim's conduct is at issue, e.g., may have been
21 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, 144 N.M. 746, 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.

[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. — [~~In~~] 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

1 responded with force which would ordinarily create a substantial risk of death or great bodily
2 harm[.]" 1998-NMSC-044, ¶ 7 (internal quotation marks and citation omitted). Thus, the
3 right of self-defense can be reinstated if the victim responds by escalating the conflict or
4 pursues the conflict after the defendant attempts to disengage. *See* 2 Wayne R. LaFave,
5 *Substantive Criminal Law* § 10.4(e) (3d ed. Oct. 2017 update); *see also Territory v. Clarke*,
6 1909-NMSC-005, ¶ 8, 15 N.M. 35, 99 P. 697 (upholding conviction where jury was
7 instructed that defendant could claim self defense if "defendant in reality and in good faith
8 endeavored to decline any further struggle before the fatal shot was fired").

9 The state bears the burden of proving that the defendant was the first aggressor
10 beyond a reasonable doubt. *See State v. Pruett*, 1918-NMSC-062, ¶ 9, 24 N.M. 68, 172 P.
11 1044[(1918), the court stated that an instruction on this subject, or at least some part of it,
12 is habitually given in New Mexico with instructions on self-defense. The committee believed
13 that the use of this instruction, as with all instructions, is limited to cases where the matter
14 has been put in issue by the evidence. *See* Annot., 55 A.L.R.3d 1000 (1974); LaFave &
15 Scott, Criminal Law 395 (1972)].

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

21 The bracketed "lawful" term in this instruction should be used and defined if there

1 is an issue about whether the victim's use of force may have been a lawful response to the
2 defendant's conduct. *See* Use Note 3. For example, *State v. Southworth* held that the
3 self-defense instruction was improper because it did not require the jury to determine
4 whether the victim acted reasonably in defense of her home when she used potentially
5 deadly force against the trespassing defendant. *See* 2002-NMCA-091, ¶¶ 18-19, 132 N.M.
6 615, 52 P.3d 987 ("The trial court should instruct the jury that [the defendant] had the right
7 to stand his ground and did not need to retreat unless he was threatened with lawful force.
8 In order to determine whether the force used by [the victim] was lawful, the jury must
9 conclude that [she] acted reasonably in defending her home against the perceived threat of
10 the commission of a felony (similar to the elements of defense of habitation set for in UJI
11 14-5170).").

12 Similarly, *State v. Denzel B.* held that the self-defense instruction was improper
13 because it failed to instruct the jury that the victim's conduct, grabbing the defendant by the
14 shirt after the defendant pushed him, may have been protected by the parental privilege. *See*
15 2008-NMCA-118, ¶¶ 3-4, 17, 144 N.M. 746, 192 P.3d 260 ("We therefore hold that when
16 a child asserts self-defense as justification for battery against his parent, the jury must first
17 determine whether the parent's use of physical discipline was reasonable under the
18 circumstances."). In both *Southworth* and *Denzel B.*, the court held that the jury must be
19 instructed that the state must prove that the defendant did not act in self-defense, taking into
20 account whether the victim's response to the defendant's conduct was lawful under the
21 particular circumstances of the case. *Accord State v. Lara*, 1989-NMCA-098, ¶¶ 7-9, 109

1 N.M. 294, 784 P.2d 1037 (explaining defendant had no right to defend against store
2 employees who had a lawful right to seize defendant for shoplifting).
3 [As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or
4 filed on or after December 31, 2019.]