PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2022-027

September 1, 2022

The Uniform Jury Instructions - Criminal Committee has recommended amendments to UJI 14-5173 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before September 30, 2022, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

14-5173. Justifiable homicide; public officer or employee.[1]

An issue you must consider in this case is whether the killing of _____ (*name of victim*) was justifiable homicide by a public officer or employee.

The killing was justifiable homicide by a public officer or public employee if:

1. At the time of the killing, [~~_____ (*name of defendant*)~~] the defendant was a public officer or employee;

2. The killing was committed while [~~_____ (*name of defendant*)~~] the defendant was performing the defendant's duties as a public officer or employee;

3. The killing was committed while[2]

[overcoming the actual resistance of _____ (*name of victim*) to the execution of _____][3]; or

[overcoming the actual resistance of _____ (*name of victim*) to the discharge of _____][4]; or

[retaking [_____ (*name of victim*)] [a person], who had committed _____[5](*name felony*) and who had [been rescued][6] [escaped]]; or

[arresting [_____ (*name of victim*)] [a person], who had committed _____[5] (*name felony*) and was fleeing from justice]; or

[attempting to prevent the escape from _____[7] by [_____ (*name of victim*)] [a person] who had committed _____(*name felony*).];[5] [~~and~~

[~~4. A reasonable person in the same circumstances as _____ (*name of defendant*) would have reasonably believed that _____ (*name of victim*) posed a threat of death or great bodily harm to _____ (*name of defendant*) or another person.~~]

4. The defendant believed that _____ (*name of victim*) posed a threat of death or great bodily harm to the defendant or another person.

5. Under the totality of the circumstances, a reasonable officer would have acted as the defendant did. The following factors may be considered in evaluating the totality of the circumstances:

[the officer's training]
[the officer's experience]
[the officer's expertise]
[the feasibility of giving a warning prior to using deadly force]
[the feasibility of taking lesser measures than using deadly force]
[(*other factor(s)*)][8]

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

USE NOTES

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

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Insert the name of the felony. The essential elements of the felony must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.

6. Use only the applicable parenthetical alternative.

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

8. Element 5 is not an exhaustive list. Use any applicable bracketed phrase or insert description of factor(s).

[As amended, effective October 1, 1985; January 1, 1997; April 25, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. – [~~Although the Section 30-2-6 NMSA 1978 requires that the defendant "necessarily committed" the killing, "necessarily" is defined as "probable cause" to believe. The Committee has used the definition of "probable cause", "reasonable person in the same circumstances as the defendant" in this instruction for purposes of clarity.~~] *See* NMSA 1978, § 30-2-6 (1989).

Since before statehood, New Mexico case law has interpreted this justifiable homicide defense to apply to only law enforcement officers with arrest authority. *See Territory v. Gutierrez*,

1905-NMSC-018, 13 N.M. 138, 79 P. 716; *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62; *State v. Gabaldon*, 1939-NMSC-060, 43 N.M. 525, 96 P.2d 293; *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033; *Cordova v. City of Albuquerque*, 1974-NMCA-101, 86 N.M. 697, 526 P.2d 1290; *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272. However, the committee did not find it necessary to limit the application to law enforcement officers with arrest authority.

In considering the reasonableness of the officer's actions, the jury should consider whether it was feasible for the officer to give a warning prior to using deadly force and whether the officer should have done so. § 30-2-6(B).

This instruction has been modified to meet the requirements of Section 30-2-6(B) as amended in 1989 and recommended in *Mantelli*, 2002-NMCA-033, ¶ 48. The parenthetical options to name either the victim or another person reflect the possibility that the person justifiably killed in retaking, arresting, or preventing the escape of a felon may not be the felon.

Additionally, *Mantelli* goes beyond simply referring to the statutory requirement for "probable cause" by the defendant and incorporates an objectively reasonable standard which takes into account "the expertise and experience of the officer." *Id. Mantelli* calls for a jury to consider the totality of the circumstances to decide if a defendant's use of deadly force was reasonable and constituted a justifiable homicide. *Id.* ¶ 31. In considering the totality of the circumstances, *Mantelli* suggests consideration of the officers' training and experience, but this is not a complete nor exhaustive list of circumstances that may be considered in assessing objective reasonableness. *See id.* ¶¶ 31, 36-37, 48.

The totality of the circumstances has been defined by other jurisdictions as "the whole picture." *See State v. Williams*, 99-1006, p. 10 (La. App. 5 Cir. 3/30/99); 735 So.2d 62, 71; *State v. Hebert*, 95-1645 p. 7 (La. App. 3 Cir. 6/5/96); 676 So.2d 692, 697; *State v. Duhe*, 2012-2677, p. 8 (La. 12/10/13); 130 So.3d 880, 886; *State v. Perez-Jungo*, 329 P.3d 391, 397 (Idaho 2014). Furthermore, the totality of the circumstances includes "both the quantity and quality of the information known by the police" at the time of the event. *Reed v. Pompeo*, 810 S.E.2d 66, 73 (W. Va. 2018) (internal quotation marks and citation omitted).

This instruction also omits the statutory grounds of justifiable homicide when acting in obedience to a judgment of the court. The committee believed that the provision applies exclusively to death penalty judgments and would never be prosecuted. A special bracketed sentence would have to be drafted to follow Use Note 3 if the defense of acting in obedience to a judgment is raised.

[As amended by Supreme Court Order No. _____, effective _____.]

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 09/02/2022, 10:29 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Fri, Sep 2, 2022 at 10:29 AM
Reply-To: nmcourtswebforms@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Your Name:	Zach
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Email:	zjones@nmag.gov
Proposal Number:	Proposal 2022-027
Comment:	I am making this comment in my personal capacity, not a professional one. I do not speak for the Attorney General. In proposed element three, I don't believe it's necessary to specify the felony that the victim would have committed. I think that has the potential to be unnecessarily prejudicial to a decedent; I think it's enough to just say "felony." I do appreciate the expansion from a purely objective analysis to a subjective and objective analysis (proposed elements four and five). The committee should consider one factor in element five that perhaps focuses on some facet of the decedent's demeanor, conduct, or status. Thank you for your consideration.

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Proposed Revisions to UJI - Criminal; Proposal 2022-027: Justifiable Homicide by a Peace Officer

1 message

Rami Newman <rami@roblesrael.com> Thu, Sep 29, 2022 at 1:19 PM
Reply-To: rami@roblesrael.com
To: "rules.supremecourt@nmcourts.gov" <rules.supremecourt@nmcourts.gov>
Cc: Taylor Rahn <taylor@roblesrael.com>

Dear Ms. Garcia and the Justices of the New Mexico Supreme Court,

The purpose of this email is to provide you with a letter from Taylor S. Rahn, dated September 29, 2022, regarding Proposal 2022-027: Justifiable Homicide by a Peace Officer.

Thank you for your time and attention to this matter. Please contact me should you have any questions or concerns.

Sincerely,

Rami Newman

Paralegal

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September 29, 2022

Elizabeth A. Garcia
Clerk of Court New Mexico Supreme Court
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VIA E-MAIL AND U.S. MAIL

Re: Proposed Revisions to UJI-Criminal
Proposal 2022-027: Justifiable Homicide by a Peace Officer

To Ms. Garcia and Justices of the New Mexico Supreme Court:

I have been a member of the New Mexico Bar since 2013 and am currently a member in good-standing.

Since becoming a member of the Bar in 2013, I have represented law enforcement agencies and individual officers in administrative, civil, and criminal matters involving application of use of force arising under both state and federal law. Additionally, I am recognized as a Professional Lecturer by the New Mexico Department of Public Safety in the law regarding use of force and have delivered approximately 200 hours of training on this topic to law enforcement throughout New Mexico and across the United States. I am writing these comments as a member of the Bar and not on behalf of or at the request of any particular client.

1. *The Feasibility of Taking Lesser Measures Than Using Deadly Force*

This proposed insertion should be rejected because it does not accurately state the current state of the law in New Mexico. It is axiomatic that jury instructions must accurately state the applicable law. State v. Montoya, 2015-NMSC-010, ¶ 25, 345 P.3d 1056, 1063. Section 30-2-6 itself does not require an officer to consider or prove lesser intrusive types of force would not have been effective prior to using deadly force. Moreover, there is no New Mexico case law interpreting Section 30-2-6 to include this requirement. Finally, the body of law upon which Section 30-2-6 is based specifically rejects the evaluation of lesser intrusive alternatives as a requirement for the justification of deadly force. Accordingly, including lesser intrusive alternatives as a factor for evaluating an officer's use of deadly force is an incorrect statement of the law.

"Section 30-2-6, 'Justifiable homicide by public officer or public employee,'" has evolved in response to the Supreme Court's pronouncements on the use of deadly force by law enforcement officers." State v. Mantelli, 2002-NMCA-033, ¶ 23, 131 N.M. 692, 697, 42 P.3d 272, 277. New Mexico courts have often looked to the Fourth Amendment standards articulated for use of force. See Alaniz v. Funk, 1961 -NMSC- 140, ¶10, 69 N.M. 164, 168, 364 P.2d 1033, 1035–36 (1961) (applying, in excessive force case brought against a police officer, an objective reasonableness test that is similar to the test in Graham v. Connor); Mantelli, 2002-NMCA-033, ¶¶ 28-29, 131 N.M. 692 (explaining that, in tort actions brought under § 1983 and the NMTCA, the reasonableness of the use of deadly force by police officers is an objective test from the perspective of officers on scene, with understanding that officers must often make split-second decisions in difficult situations about what force is necessary) (quoting Archuleta v. LaCuesta, 1999-NMCA-113, ¶ 8, 128 N.M. 13); State v. Ellis, 2008-NMSC-032, ¶ 25, 144 N.M. 253, 259, 186 P.3d 245, 251 (finding Graham instructive in a criminal case in regard to the instruction that should be given as to the limits an officer's right to use force where a criminal defendant claimed he was entitled to a self-defense instruction based upon the officer's use of excessive force).

The United States Supreme Court has cautioned against a lesser intrusive evaluation of government conduct generally. "[T]he reasonableness of any particular government activity does not necessarily turn on the existence of alternative 'less intrusive' means." Illinois v. Lafayette, 462 U.S. 640, 647, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). "The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decision ... and require courts to indulge in unrealistic second guessing." Id. at 11, 109 S.Ct. 1581 (internal quotations and citations omitted). In United States v. Sharpe, 470 U.S. 675, 686–87, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), the Supreme Court stated that

> a creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable."
>
> Id., at 686–87, 105 S.Ct. 1568.

The Tenth Circuit and various other circuits have likewise cautioned against using lesser intrusive means as a factor for evaluation force. In United States v. Melendez–Garcia, 28 F.3d 1046 (10th Cir.1994), the Tenth Circuit stated: "We must avoid unrealistic second guessing of police officers decisions in this regard and thus do not require them to use the least intrusive means in the course of a detention, only a reasonable ones." Id. at 1052 (internal quotations omitted). The Tenth Circuit explained that the Fourth Amendment "do[es] not require [police officers] to use the least intrusive means in the course of a detention, only reasonable ones." United States v. Melendez–Garcia, 28 F.3d at 1052. See Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir.2001) (stating that "the reasonableness standard does not require that officers use alternative less intrusive means.")(quotation and citation omitted); Dickerson v. McClellan, 101 F.3d 1151, 1160 (6th Cir.1996) ("[T]he Fourth Amendment does not require officers to use the best technique

available as long as their method is reasonable under the circumstances."); Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir.1994) ("We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of force is reasonable under Tennessee v. Garner [471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)] and Graham v. Connor."), cert. denied, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 34 (1994); Schulz v. Long, 44 F.3d 643, 649 (8th Cir.1995) ("[T]he Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within the range of conduct which is objectively 'reasonable' under the Fourth Amendment."); Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994) ("Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment.... Officers thus need not avail themselves of the least intrusive means of responding to an exigent situations; they need only act within that range of conduct we identify as reasonable."), cert. denied, 515 U.S. 1159, 115 S.Ct. 2612, 132 L.Ed.2d 855 (1995); Menuel v. City of Atlanta, 25 F.3d 990, 996–97 (11th Cir.1994) ("[T]he Fourth Amendment does not require officers to use the least intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable."). In V–1 Oil, Co. v. Means, 94 F.3d 1420 (10th Cir.1996), the Tenth Circuit stated: "Police are not required to use the least intrusive means in the course of a stop, only reasonable means." Id. at 1427.

In conclusion, there is no support in the statute itself, or court interpretation of the statute, to support the inclusion of lesser measures in the UJI. Moreover, such an instruction is inconsistent with the precedent upon which the statute is based. Additionally, for the reasons set forth by the cases cited above, such a requirement is inadvisable. Finally, no such requirement is applied in other self-defense instructions in New Mexico.

2. The Court should Not Include Officer's Training as a Factor

Training for law enforcement is often based upon department policy. Accordingly, inviting the jury to be instructed upon an officer's training will inevitably invite presentation of use of force policies. Departments may choose restrictions in policy that go beyond the strict requirements of the law. For example, there is no law that specifically imposes a deadline for completing use of force reports. However, most departments require timely completion of use of force reports. Additionally, many departments may ban the use of chokeholds, although under an evaluation of the totality of the circumstances, the use of a chokehold may be objectively reasonable. Finally, departments may choose to require as a matter of policy that officers consider lesser intrusive alternatives. As discussed above, the consideration of lesser force measures is not a proper requirement for evaluating use of force.

As referenced above, New Mexico thus far has generally referred to Fourth Amendment case law in assessing use of force by law enforcement. Under federal law, the violation of police training or procedure is not only rejected as an explicit requirement, but it is also routinely excluded from evidence. See Tanberg v. Sholtis, 401 F.3d 1151, 1167 (10th Cir.2005) ("Even if [the defendant officer] violated the SOPs, this violation would not create a violation of a clearly established constitutional right ex nihilo."); Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir.2001) (excluding expert affidavit which stated that the "officers' use of force did not conform with

accepted police guidelines and practices" because "claims based on violations of state law and police procedure are not actionable under § 1983."); Wilson v. Meeks, 52 F.3d 1547, 1554 (10th Cir.1995) ("[V]iolation of a police department regulation is insufficient or liability under section 1983."); Romero v. Bd. of County Comr's of County Lake, 60 F.3d 702, 704 (10th Cir.1995) ("[V]iolations of state law and police procedure generally do not give rise to a § 1983 claim.") (citations omitted), cert. denied, 516 U.S. 1073, 116 S.Ct. 776, 133 L.Ed.2d 728 (1996).

Even assuming the New Mexico Supreme Court does not wish to wholly adopt the reasoning from federal case law, from a commonsense standpoint, training/policy is an inadvisable basis for liability. If officers are going to be held to the standards of their department, which although they must meet minimum legal requirements, may have variability in protections that are provided beyond what is legally required, then officers will necessarily be subjected to different standards for use of force. This will also create a disincentive for departments to train their officers to a standard *beyond* what is required by law, because it would increase officers' liability to receive training at a higher standard.

There may be some types of training that are relevant to an officer's use of force. For example, training on how to properly discharge a firearm or the likely consequence of applying a certain technique, may have some bearing on the evaluation of deadly force. This could be captured in the "other" factors subject to limitation as to improper substitution of training/policy as the legal standard.

3. *The Court Should Consider Revising the Factors to Focus on the Circumstances Presented, Not the Officer*

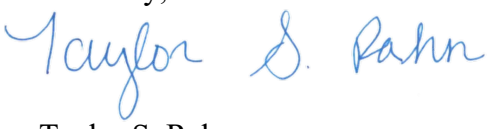
Graham, which New Mexico courts and law have referenced regarding the standard for deadly force by officers has only three (3) enumerated factors for the totality of circumstance test: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396; see also Ellis, 2008-NMSC-032, ¶35 (citing Graham). Significantly, each of these factors focuses on the circumstances of the use of force, not the officer. The proposed additions of officer's training, experience, and expertise, all focus on the officer. In addition to the specific concerns about training, the proposed factors focused on the *officer* may invite the jury to assess the officer's actions subjectively, instead of objectively from the perspective of the reasonable officer. See Graham, at 397 ("As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" considering the facts and circumstances confronting them, without regard to their underlying intent or motivation."). It also invites some subjectivity into the standard itself, implying that an officer with less expertise/experience may be held to a lower standard than one with more expertise or experience.

4. *The Court Should Consider Adding Language it has Adopted Regarding Officer's Conduct*

New Mexico courts have observed, "[t]he objective standard ... takes into consideration the 'fact that police officers are often forced to make splitsecond judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." State v. Lymon, 2021-NMSC-021, ¶ 32, 488 P.3d 610, 621 (citation omitted). This Court should consider adding this language to the revised UJI.

Thank you for your consideration of my comments.

Sincerely,



Taylor S. Rahn

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 09/30/2022, 12:27 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Fri, Sep 30, 2022 at 12:27 PM
Reply-To: nmcourtswebforms@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Your Name:	Alan Robert Taradash NM Bar No. 2656
Phone Number:	505-934-3400
Email:	artaradash@gmail.com
Proposal Number:	UJI 14-5173 (3),(4), and subsecs. 4&5
Comment:	1. Police are neither adequately examined for prejudice, bigotry, and qualities of good judgment both before being given a gun and a bad nor are they annually and quarterly examined to determine mental fitness, devoid of prejudice, to have the power to kill. This proposed change will allow personal prejudice to be used as one of the totality of circumstances just as "stand your ground" laws permit private individuals legally murder others based on an individuals own fears derived from bigotry. There are too many examples of this for the Court to not take judicial notice of this reality. Just a few years ago the Sheriff or Deputy stoped a motorist, a Black woman with three minor children in her back seat for a "ticket offense" of a non working taillight. After initially stopping, fearful, she drove off. The officer's response was to fire his weapon multiple times at her car thereby endangering her life and the children over a traffic ticket offense. The Supreme Court cannot possibly be blind to the differential treatment Black and Brown people receive from police routinely as a function of racism. The white teenage picked up for some minor offense is routinely sent home whereas a Black or Brown child in the same circumstances is jailed and booked. The reality of the disparate treatment at the hands of police due SOLELY to racism cannot be overlooked by this Court. Nation wide and locally, if white citizens were murdered by police in the numbers proportionately as non white citizens, there would be a major uproar. This proposed rule change will institutionalize and legalize police murder of non white citizens and this Court cannot countenance that. Moreover, excessive police force routinely indicates that police training fails to train officers that part of their job is NOT punishment; but, rather, it is only to stop violations of the law and arrest where appropriate. I have been in the active of the practice of law for 52 years and have defended cases from DWI to murder via court appointments and have experience the very disparate treatment which extends to fabrication of evidence by both the police and the District Attorney in order to try to convict non white defendants. The proposed rule changes that allow for individual subject claimed fear prompted by individual officer racism and bigotry will only serve to worsen this problem. If the Court wants to know the origin of this problem look to the Papal Bulls of the 15th Century that empowered European "explorers" to subjugate, harm and murder if necessary indigenous inhabitants of "discovered" lands. The United States has institutionalized this "white supremacy and entitlement" in numerous was through its laws, regulations and decisions of its Supreme Court in 1823 and 1893 (the United States is a "white Christian country". Should the Court desire a complete briefing on the matters asserted here I would be pleased to provide it upon request. Alan Robert Taradash, NM Bar No. 2656.