

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; [~~and~~]

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 while²
[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 of felony*) and who had [been rescued]⁶ [escaped]]; or

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

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

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 NMSA 1978, Section 30-2-6 (1989)[~~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. Unless the parties stipulate or the court deems naming the felony unfairly prejudicial, insert [Insert] the name of the felony. If named, [The] 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. 22-8300-036, effective December 31, 2022.]

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; and *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272.

1 However, the committee did not find it necessary to limit the application to law enforcement
2 officers with arrest authority.

3 In considering the reasonableness of the officer's actions, the jury should consider whether
4 it was feasible for the officer to give a warning prior to using deadly force and whether the officer
5 should have done so. NMSA 1978, § 30-2-6(B).

6 This instruction has been modified to meet the requirements of NMSA 1978, Section 30-
7 2-6(B) as amended in 1989 and recommended in *Mantelli*, 2002-NMCA-033, ¶ 48. The
8 parenthetical options to name either the victim or another person reflect the possibility that the
9 person justifiably killed in retaking, arresting, or preventing the escape of a felon may not be the
10 felon.

11 Additionally, *Mantelli* goes beyond simply referring to the statutory requirement for
12 “probable cause” by the defendant and incorporates an objectively reasonable standard which takes
13 into account “the expertise and experience of the officer.” *Id.* *Mantelli* calls for a jury to consider
14 the totality of the circumstances to decide if a defendant's use of deadly force was reasonable and
15 constituted a justifiable homicide. *Id.* ¶ 31. In considering the totality of the circumstances,
16 *Mantelli* suggests consideration of the officer's training and experience, but this is not a complete
17 list of circumstances that may be considered in assessing objective reasonableness. *See id.* ¶¶ 31,
18 36-37, 48.

19 The totality of the circumstances has been defined by other jurisdictions as “the whole
20 picture.” *See State v. Williams*, 99-1006, p. 10 (La. App. 5 Cir. 3/30/99); 735 So. 2d 62; *State v.*
21 *Hebert*, 95-1645, p. 7 (La. App. 3 Cir. 6/5/96); 676 So. 2d 692; *State v. Duhe*, 2012-2677, p. 8 (La.
22 12/10/13); 130 So. 3d 880; *State v. Perez-Jungo*, 329 P.3d 391, 397 (Idaho 2014). Furthermore,
23 the totality of the circumstances includes “both the quantity and quality of the information known

1 by the police” at the time of the event. *Reed v. Pompeo*, 810 S.E.2d 66, 73 (W. Va. 2018) (internal
2 quotation marks and citation omitted).

3 Element 5 provides a nonexclusive, open-ended list of specific factors frequently relevant
4 to determining reasonableness under a totality of the circumstances. Based on the evidence
5 adduced by either party, the trial court can approve including a wide variety of other relevant
6 factors as long as they are not unfairly prejudicial to either party. The committee believes the trial
7 court is in the best position to decide whether to avoid the jury’s giving undue weight to additional
8 factors by leaving them to the argument of counsel.

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

14 [As amended by Supreme Court Order No. 22-8300-036, effective December 31, 2022.]