

Subsection B makes the belief of the private citizen in the existence of the above referenced scenarios subjective and requires the person exercising force to know or have reason to believe that the recipient of the use of force “unlawfully and with force” entered or attempted to enter the user of the force’s residence, vehicle or place of employment. The presumption would also exist if the user of force knew or believed the recipient of the force was attempting to kidnap the individual or family or the recipient of the force was committing or attempting to commit a felony. Subsection B (2) requires that the user of the force did not provoke the recipient. Subsection B (3) requires that the user of the force “was not otherwise engaged in criminal activity.”

FISCAL IMPLICATIONS

The AOC states that “HB 168 attempts to codify some of the common law of justifiable homicide. There have been many appellate court decisions which have further defined and clarified the defense of justifiable homicide since its codification. Furthermore, the elements of justifiable homicide have been set out in Uniform Jury Instructions, under Rules 14-5170 through 14-5174 New Mexico Rules Annotated. The new standards proposed by HB 168 may upset well established law and lead to more litigation and appellate review. This would increase the workload of the courts without the resources necessary to handle the increase.” AOC analysis also explains there will also be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

LOPD analysis explains the bill would likely have little impact on the department’s budget. It is possible that the bill would somewhat decrease the number of prosecutions for use of force based on the bill making some such prosecutions more difficult.

SIGNIFICANT ISSUES

The NMAG states there exists a possibility HB 168 may be challenged as it may function to deprive an individual of life without due process at the hands of a civilian in situations where there is not an immediate threat of death or great bodily harm.

The AOC explains that the bill’s proposed subsection B creates presumptions which may conflict with current, established law.

Subsection B(1)(a) would say that the use of force is presumed to be reasonable if the person “knew or had reason to believe that the person against whom the deadly force was used unlawfully and with force entered, or was attempting to enter unlawfully and with force, the person's occupied habitation, vehicle or place of business or employment.” In *State v. Couch*, 1946-NMSC-047, the New Mexico Supreme Court recognized that one cannot defend property, other than his habitation, to the extent of killing an aggressor for the mere purpose of preventing a trespass. See also *Brown v. Martinez*, 1961-NMSC-040. A person may use reasonable force to protect his property from unlawful interference by another; however, no force is reasonable if a request to cease the unlawful interference would have been sufficient. Deadly force may be used in protection of a person's real or personal property if the interference with the property is accompanied by a deadly force.

Subsection B(1)(c) would say that the use of force is presumed to be reasonable if the person “knew or had reason to believe that the person against whom the deadly force was used was

committing or attempting to commit a felony.” Presumably this would fall under the proposed subsection A(3), which would authorize the use of deadly force “when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed in the person's presence.” However, the New Mexico Court of Appeals has held that “deadly force in the apprehension of suspected felons is justifiable only when the citizen has probable cause to believe he or she is threatened with serious bodily harm or the use of deadly force.” *State v. Johnson*, 1998-NMCA-019. Creating a presumption of reasonableness which is lower than this well established standard would lead to lengthy litigation and appeals on this issue.

LOPD expresses concern that the bill modifies 30-2-7 NMSA 1978, which applies to “citizens.” Of note, “there is a companion statute (30-2-6 NMSA 1978) which applies to ‘public officers’ or ‘public employees’ or those ‘acting at their command.’ There does not appear to be any case law discussing whether a public employee can also be a citizen. In other words, the bill might amend language that is arguably inclusive of police. The question over whether the amended statute would apply to police officers might arise because the bill seems to overturn the existing situation where 30-2-6 NMSA 1978 currently ‘is intended to provide police officers a wider scope of privilege than the general public with regard to the use of deadly force.’ *State v. Mantelli*. This bill would seem to make 30-2-7 NMSA 1978 the one providing a “wider scope of privilege,” and thus providing greater protections for ‘citizens’ than ‘public officers.’ Thus, a public officer might seek protection under it.”

LOPD also points out the bill may have an effect on the Department of Justice settlement agreement in Albuquerque and suggests legal experts on that matter be consulted.

AODA analysis states “HB 168 would expand the justifiable homicide statute to include ‘use of force, including deadly force,’ to apply to cases that do not result in a person’s death. It is also an attempt to codify conditions that would create a presumption that using force, including deadly force, against another person, even if the use of force resulted in death, was reasonable.”

Virtually all modern case law requires that the use of deadly force be reasonable with that determination evaluated with special attention to the facts and circumstances of each particular case. See, e.g., *Graham v. Connor*, 471 U.S. 1 (1985). In the context of deadly force “reasonable” means that the actor be in fear of proportionate harm or force against him. See, *State v. Johnson*, 1998-NMCA-019, cert. den., Cf., *Tennessee v. Garner*, 471 U.S. 1 (1985) (A police officer may not use deadly force to apprehend a fleeing felon who does not pose a “significant threat” of death or great bodily injury to the officer or another.). HB 168 would establish a presumption that use of deadly force was reasonable, even if used against, for example, someone that pushed their way into a residence, car or business after they had been told to leave and would be prosecuted for trespass if they returned, or had been ejected for shoplifting, given a no trespass order and then forced their way back into a store. By virtually any standard use of deadly force would not be a proportional response.

The existing law covers most of the presumptions on justifiable homicide that the bill targets. Self-defense is now available to anyone charged with an unlawful killing if (1) they were put in fear by an apparent danger of immediate death or great bodily injury; (2) the killing resulted from that fear; and (3) a reasonable person in the same circumstances would have acted as the defendant did. See, e.g., *State v. Anderson*, 2016-NMCA-016, cert. den., *State v. Mantelli*, 2002-NMCA-033, cert. den. and UJI 14-5171. Defense of habitation is also

available and is virtually identical to self-defense. See, UJI 14-5190 and *State v. Cardenas*, 2016-NMCA-042, cert. den. It has both a subjective standard that focusses on the perception of the defendant at the time of the incident and an objective standard that focusses on how a reasonable person in the same circumstances would have acted. *Id.* Instructions for self-defense (*Anderson, Mantelli*), and defense of habitation (*Cardenas*), are mandatory if there is evidence for them that could be decided in a defendant’s favor.

HB 168 does not clarify “force” as it is used in describing the type of entry and removal to support a presumption that the use of deadly force was reasonable. “Unlawful” is also a sweeping term that could apply to things as simple and mundane as trespass or more serious crimes. There is likewise no guidance regarding “provoke” and “was not otherwise engaged in criminal activity” to indicate what it might be appropriate to void a presumption that the person using deadly force acted reasonably. The bill uses the term “habitation” which is probably intended to refer to a person’s living quarters, instead of the more commonly used term of “dwelling.” See, e.g., Sects. 30-3-8, 30-7-4, 30-14-8, 30-16-3 and 30-16-4, NMSA 1978. It also refers to “occupied habitation” in one subparagraph but only “habitation” in another and does not indicate how the distinction should be interpreted.

HB 168, as drafted, states, “use of force, including deadly force” in its predicate but subsequently states, “against whom deadly force was used” in listing the circumstances in which the reasonableness presumption would apply. (Emphasis added.) The subparagraph which lists just the person, person’s spouse or family, would preclude application from actions based on protection of an un-related stranger or friend.

PERFORMANCE IMPLICATIONS

The states courts are participating in performance based budgeting. This bill may impact the courts’ performance based budgeting measures, which may result in a need for additional resources. For example, the courts’ performance measure clearance rates may be impacted if increased litigation on the issue of justifiable homicide increases the amount of judge and clerk time needed to process and dispose of these types of cases.

ADMINISTRATIVE IMPLICATIONS

AOC analysis states there will be an administrative impact on the court resulting from added judicial and clerical time needed to monitor and dispose of these types of cases.

TECHNICAL ISSUES

AGO analysis states HB 168 draws no distinction between situations calling for use of deadly force as opposed to non-deadly force. The following terms could be defined or further clarified: “lawful,” “great personal injury,” “apprehend,” “suppressing,” “riot,” and “keeping and preserving the peace.”

The AGO goes on to say whether the belief underlying the use of force is subjective or objective may also be stated more directly. There may also be a contradiction as subsection A. (3) requires a felony justifying use of force be committed in the presence of the individual using force, whereas subsection B. (1) (C) requires only that the individual using force reasonably believe that a felony was committed or there existed an attempt to commit a felony.

The LOPD explains it may be desirable to re-codify the statute if the bill is passed. NMSA 30-2-7 is currently in article II of the criminal code, titled “homicide,” and in which all the statutes deal with homicide and its defenses. The bill, however, would amend NMSA 30-2-7 to encompass not just homicides but “the use of deadly force” (i.e. aggravated assaults, etc.).

OTHER SUBSTANTIVE ISSUES

The AGO states it is not apparent whether there is a presumption of deferring to law enforcement when possible or whether pursuant to HB 168 would treat private citizens and law enforcement differently.

TR/sb/al