

CHAPTER THREE

JUSTIFIABLE USE OF FORCE

<u>No.</u>	<u>Subject</u>
3-101	Use of Force in Defense of a Person
3-102	Use of Force in Defense of Occupied Structure
3-103	Use of Force in Defense of Property
3-104	Use of Force by Aggressor
3-105	Use of Force to Prevent Escape from Custody
3-106	Peace Officer's Use of Force to Prevent Escape from Institution
3-107	Use of Force by Parent, Guardian, Teacher
3-108	Private Person's Use of Force in Resisting Arrest
3-109	Justifiable Use of Force as a Defense
3-110	Issues--Justifiable Use of Force as a Defense

INSTRUCTION NO. [3-101]

[Use of Force in Defense of a Person]

A person is justified in the use of force or threat to use force when and to the extent that he/she reasonably believes that such conduct is necessary to defend **[himself/herself]** **[another]** against the imminent use of unlawful force.

However, a person is justified in the use of force which is intended or likely to cause death or serious bodily harm only if he/she reasonably believes that such force is necessary to prevent **[imminent death or serious bodily harm]** to **[himself/herself]** **[another]** or **[commission of a forcible felony]**.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-101 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused _____ Withdrawn _____ By _____

[Use of Force in Defense of a Person, No. 3-101, 2009, Source and Comment]

SOURCE: MCA § 45-3-102 (2007); See also Ch. 332, Laws of 2009

COMMENT: If the "forcible felony" is used in the second paragraph, give instruction # 2-103 from Chapter 2 defining the term.

INSTRUCTION NO. [3-102]

[Use of Force in Defense of Occupied Structure]

A person is justified in the use of force or threat to use force when and to the extent that the person reasonably believes that the use of force is necessary to **[prevent] [terminate]** another's unlawful **[entry into] [attack upon]** an occupied structure.

However, a person is justified in the use of force likely to cause death or serious bodily harm only if:

[1] the entry is made or attempted and he/she reasonably believes that the force is necessary to prevent an [assault upon] himself/herself or another then in the occupied structure;

OR

[2] he/she reasonably believes that the force is necessary to prevent the commission of a forcible felony in the occupied structure.

GIVEN: _____

DISTRICT JUDGE

SOURCE: MCJI 3-102 (2009)

Plaintiff's Proposed Instruction No. _ Defendant's Proposed Instruction No. _

Given as Instruction No. ___ Refused ___ Withdrawn ___ By ___

[Use of Force in Defense of Occupied Structure, No. 3-102, 2009, Source and Comment]

SOURCE: MCA § 45-3-103 (2007); See also Ch. No. 332, Laws of 2009

COMMENT: The second paragraph should be used only where there is some evidence that the force used by the Defendant was likely to cause death or serious bodily harm. Identical definitions of "forcible felony" are provided in MCA § 45-2-101 and § 45-3-101; See also definition instruction, # 2-103 from Chapter 2.

INSTRUCTION NO. [3-103]

[Use of Force in Defense of Other Property]

A person is justified in the use of force or threat to use force when and to the extent that he/she reasonably believes such conduct is necessary to **[prevent]** **[terminate]** another's **[trespass on]** **[wrongful interference with]** **[real property other than an occupied structure]** **[personal property]** lawfully **[in his/her possession]** **[in the possession of another who is a member of his/her (immediate family) (household)]** **[in the possession of a person whose property he/she has a legal duty to protect]**.

However, he/she is justified in the use of force likely to cause death or serious bodily harm only if he/she reasonably believes that such force is necessary to prevent the commission of a forcible felony.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-103 (2009)

Plaintiff's Proposed Instruction No. ___ Defendant's Proposed Instruction No. ___

Given as Instruction No. ___ Refused ___ Withdrawn ___ By ___

[Use of Force in Defense of Other Property, No. 3-103, 2009, Source and Comment]

SOURCE: MCA § 45-3-104 (2007); See also Ch. 332, Laws of 2009

COMMENT: Cite as MCJI 3-103. Use second paragraph only if there is some evidence that the force used by the Defendant was likely to cause death or serious bodily harm. "Forcible felony" is defined in MCA § 45-2-101 and § 45-3-101; see also definition instruction # 2-103 from Chapter 2.

See *State v. Claric*, 271 Mont. 141, 894 P.2d 946 (1995), (overruled in part on other grounds by *Faulconbridge v. State*, 333 Mont. 186, 142 P.3d 777 (2006)) in which the Court affirmed the denial by the district court of the Defendant's offered instruction on justifiable use of force in defense of property when Defendant was unable to establish lawful ownership of the property.

INSTRUCTION NO. [3-104]

[Use of Force by Aggressor]

The use of force in defense of a person is not available to a person who purposely or knowingly provokes the use of force against himself/herself unless:

[1] such force is so great that he/she reasonably believes that he/she is in imminent danger of death or serious bodily harm and that he/she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant.

OR

[2] in good faith he/she withdraws from physical contact with the assailant and indicates clearly to the assailant that he/she desires to withdraw and terminate the use of force but the assailant continues or resumes the use of force.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-104 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Use of Force by Aggressor, No. 3_104, 2009, Source and Comment]

SOURCE: MCA § 45-3-105 (2007); See also Ch. 332, Laws of 2009; See also, *State v. Gonzales*, 278 Mont. 525, 926 P.2d 705(1996) (*overruled in part on other grounds by Whitlow v. State*, 343 Mont. 90, 183 P.3d 861 (2008)); *State v. Cartwright*, 200 Mont. 91, 650 P.2d 758 (1982); and *State v. Sorenson*, 190 Mont. 155, 619 P.2d 1185 (1980).

COMMENT: Cite as MCJI 3-104. In preparing this instruction either #1 or #2 should be selected based upon the defense asserted.

INSTRUCTION NO. [3-105]

[Use of Force to Prevent Escape from Custody]

A [peace officer] [person] who has an arrested person in his/her custody is justified in the use of such force as is necessary and reasonable to prevent the escape of the arrested person.

GIVEN _____
DISTRICT JUDGE

SOURCE: MCJI 3-105 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Use of Force to Prevent Escape from Custody, No. 3-105, 2009, Source and Comment]

SOURCE: MCA § 45-3-106(1) (2009).

COMMENT: MCA § 45-3-106(1) (2009) limits the amount of force which will be justified in preventing an escape to the amount of force that would be justified if the person having custody of the arrested person were making an arrest. Reference should be made to MCA, Title 46, Ch. 6, for relevant sections on "arrest" and a definition of "custody" should be provided.

INSTRUCTION NO. [3-106]

[Peace Officer's Use of Force to Prevent Escape from Institution]

A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he/she reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution **[under sentence for an offense] [awaiting trial for an offense] or [awaiting commitment for an offense].**

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-106 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Peace Officer's Use of Force to Prevent Escape from Institution, No. 3-106, 2009, Source and Comment]

SOURCE: MCA § 45-3-106(2) (2009).

INSTRUCTION NO. [3-107]

[Use of Force by Parent, Guardian, or Teacher]

[A parent] [An authorized agent of any parent] [A guardian] [A master] [A teacher] is justified in the use of force as is reasonable and necessary to restrain or correct his/her [child] [ward] [apprentice] [pupil]. In determining whether or not the force used is justified as reasonable and necessary you should consider along with all other evidence:

- [1] the age of the child; and whether he/she is old enough to understand the punishment and benefit by it;
- [2] the nature and degree of seriousness of the act for which the punishment was inflicted;
- [3] the instrument used to inflict the punishment; and
- [4] the nature of the injuries resulting from the punishment.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-107 (2009)

Plaintiff's Proposed Instruction No.____ Defendant's Proposed Instruction No.____

Given as Instruction No.____ Refused _____ Withdrawn _____ By _____

[Use of Force by Parent, Guardian or Teacher, No. 3-107, 2009, Source and Comment

SOURCE: MCA § 45-3-107 (2009); *State v. Straight*, 136 Mont. 255, 347 P.2d 482 (1959).

COMMENT: The first sentence of the proposed instruction is the statutory language. The factors to be considered are drawn from *State v. Straight*, 136 Mont. 255, 347 P.2d 482 (1959).

INSTRUCTION NO. [3-108]

[Private Person's Use of Force in Resisting Arrest]

A person is not authorized to use force to resist an arrest which he/she knows is being made by a **[peace officer] [private person summoned and directed by a peace officer to make the arrest]**, even if he/she believes that an arrest is unlawful and the arrest in fact is unlawful.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-108 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Private Person's Use of Force in Resisting Arrest, No. 3-108, 2009, Source and Comment]

SOURCE: MCA § 45-3-108 (2009).

INSTRUCTION NO. [3-109]

[Justifiable Use of Force as a Defense - Burden of Proof]

If the Defendant has offered evidence of justifiable use of force, the State has the burden of proving beyond a reasonable doubt that the Defendant's actions were not justified.

If you find that he/she has offered evidence of justifiable use of force, but that the State has failed to prove beyond a reasonable doubt that the Defendant's actions were not justified, you must find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 3-109 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

**[Justifiable Use of Force as a Defense - Burden of Proof, No. 3-109, 2009,
Source and Comment]**

SOURCE: Ch. No. 332, Laws of 2009

COMMENT: Note that 45-3-115 and 46-15-322(2) still provide that justifiable use of force is an affirmative defense that requires notice by the defendant. The Commission eliminated the affirmative defense language that appears in 1999 edition of the MCJI because it is a legal term of art that has no meaning to a jury.

INSTRUCTION NO. [3-110]

[Issues--Justifiable Use of Force as a Defense]

The Defendant has offered evidence of justifiable use of force in this case. You are to consider the following requirements of the law in determining whether the use of force claimed by Defendant was justified:

- [1] The danger of harm to the Defendant must be a present one **[and not threatened at a future time] [and not made by a person without the present ability to carry out the threat.];**
- [2] The force threatened against the Defendant must be unlawful;
- [3] The Defendant must actually believe that the danger exists, that is, use of force is necessary to avert the danger and that the kind and amount of force which defendant uses is necessary;
- [4] The Defendant's belief, in each of the aspects described, must be reasonable even if it is mistaken.
- [5] A person who is lawfully in a place or location and who is threatened with bodily injury or loss of life has no duty to retreat from a threat, or summon law enforcement assistance prior to using force.

Even if you determine the use of force by Defendant was not justified, the state still has the duty to prove each of the elements of the crime charged beyond a reasonable doubt.

GIVEN: _____

DISTRICT JUDGE

SOURCE: MCJI 3-110 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

SOURCE: MCA § 45-3-115 (2007); MCA § 45-3-105 (2007); Ch 332, Laws of 2009; See also *State v. Hagen*, 311 Mont. 117, 53 P.3d 885 (2002); *State v. Graves*, 191 Mont. 81, 622 P.2d 203 (1981) (concurring opinion of Justice Sheehy); *State v. Stone*, 266 Mont. 345, 880 P.2d 1296 (1994); and *State v. Archambault*, 336 Mont. 6, 152 P.3d 698 (2007).

COMMENT: In *State v. Stone*, the Court suggested that the language in parenthesis for subsection #1 be given in those cases in which the Defendant is the initial aggressor so that the language is not inconsistent with the language of Instruction No. 3-104 or MCA § 45-3-105.