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SUFFICIENCY OF PROVOCATION FOR VOLUNTARY MANSLAUGHTER IN NEW MEXICO: PROBLEMS IN THEORY AND PRACTICE

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I. INTRODUCTION

Jury instructions for the crime of voluntary manslaughter have become an important issue for New Mexico appellate courts. Recent cases presented the issue of what evidentiary showing at trial is necessary to require the uniform jury instruction on voluntary manslaughter. The answers the courts supplied show differing approaches to the problem and suggest the need to reexamine the function of voluntary manslaughter in the homicide law of New Mexico. This article will examine the standard used by recent cases to determine whether instructions on voluntary manslaughter should be presented to the jury in a murder prosecution and the application of this standard to evidence presented in each case.

II. BACKGROUND

Cases concerned with the relationship between murder and manslaughter present significant and recurring issues in the criminal law of New Mexico. Before analyzing these issues, it is important to set forth the position of voluntary manslaughter in New Mexico homicide law, as it is understood in theory and used in practice.

"Voluntary manslaughter" is one of four classifications of homicide in the New Mexico Criminal Code. The Code distinguishes among the four types of homicide for the purpose of allocating different punishments

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2. See N.M. Stat. Ann. §§ 30-2-1 (Supp. 1981). Until 1980, voluntary manslaughter was statutorily distinguished from murder by the absence of malice. With malice as the dividing line between murder and manslaughter, the relationship between the two degrees of homicide was clear. The presence of malice established murder, and the absence of malice meant that manslaughter was the highest degree of homicide that could be committed. In 1980, the concept of malice was eliminated from the definition of murder, but the requirement of absence of malice was retained in the definition of manslaughter. See N.M. Stat. Ann. § 30-2-1(A) (Supp. 1980) and compare N.M. Stat. Ann. § 30-2-3(A) (1978). However, the 1980 amendments also repealed § 30-2-2, the provision that defined
depending upon the felony degree. Murder in the first degree is a capital felony;\(^3\) murder in the second degree is a second degree felony;\(^4\) voluntary manslaughter is a third degree felony;\(^5\) involuntary manslaughter is a fourth degree felony.\(^6\)

The distinguishing mark of the crime of voluntary manslaughter is that the homicide be "committed upon a sudden quarrel or in the heat of passion."\(^7\) The New Mexico courts and the Uniform Jury Instructions—

malice. 1980 N.M. Laws ch. 21 § 2. The elimination of the statutory definition of malice renders the first sentence of the manslaughter statute a meaningless vestige of the repealed New Mexico homicide law. That sentence reads: "Manslaughter is the unlawful killing of a human being without malice." N.M. Stat. Ann. § 30-2-3 (1978). The relationship between murder and manslaughter no longer turns on the presence or absence of malice. The distinction between them must now be determined by reference to the different statutory elements that each offense requires.

It is not clear why the New Mexico legislature retained the now meaningless concept of malice in the definition of manslaughter after abolishing malice as a requirement for murder. The retention of "without malice" in the definition of manslaughter may have been a legislative oversight. The omission of the concept of malice in the murder statute may have been an attempt to bring the murder statute into line with the Uniform Jury Instructions on murder. The instructions do not include the word "malice." The Committee Commentary offers the following explanation for the elimination of "malice" in the second-degree murder instruction:

The jurors are not aided by being told that they must find . . . malice aforethought.

Indeed, those terms then have to be defined at great length. Consequently, those terms, and such definitions as "implied malice," are eliminated and the concepts incorporated within the phrase "intent to kill or do great bodily harm."

N.M. U.J.I. Crim., Approved Committee Commentaries 2.10 (1978).

The effect of the amendments on the law of voluntary manslaughter has not yet been felt, but may present some problems. For example, the mitigation from first-degree murder to voluntary manslaughter was clear under the version of the statute prior to the 1980 amendments. Because malice was an element of first and second degree murder, the existence of adequate provocation for voluntary manslaughter negated implied malice as defined in N.M. Stat. Ann. § 30-2-2(B) (1978) [(repealed 1980). N.M. Laws Ch. 21 § 2.] This result is not quite as clear after the 1980 amendments. Evidence of a sudden quarrel or heat of passion may be relevant to negate a willful, deliberate, or premeditated killing, but such evidence may be irrelevant to the other types of first degree murder, which are felony murder and the depraved mind murder. Therefore, in cases such as these, it may not be possible to reduce first degree murder to voluntary manslaughter. Only the lesser included offense relationship between murder in the first degree and murder in the second degree permits the conclusion that sufficient provocation, sudden quarrel, or heat of passion will reduce all first degree murder charges to voluntary manslaughter. See infra note 16.


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Criminal (hereinafter U.J.I.) have construed the statutory definition of voluntary manslaughter to require three elements. First, there must be provocation which would be sufficient to affect the ability to reason and to cause a temporary loss of self-control in an ordinary person of average disposition. Second, the killing must be committed while the accused is in fact in a state of fear, anger, rage, sudden resentment, terror or other extreme emotions produced by this sufficient provocation. Third, the killing must occur before the emotions subside and self-control and reason return to an ordinary reasonable person.

These elements qualify the “heat of passion” language in the statute by imposing the objective standard of the reasonable person. The fact that the defendant killed in the heat of passion or while in a state of extreme emotional stress is not, by itself, enough to mitigate a murder charge. The cause of the defendant’s emotions must be sufficient to arouse similar emotions in the reasonable person. The provocation need not, however, be so strong as to cause the reasonable person to kill. It is well settled that the reasonable person, regardless of the provocation or the degree of passion aroused, would not kill except in self-defense.

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8. N.M. U.J.I. Crim. 2.22 (Supp. 1981); also see State v. Nevares, 36 N.M. 41, 7 P.2d 933 (1932).
11. Heat of passion by itself may be sufficiently mitigating because a heat of passion killing is less culpable than is a killing without it. Several states have, on that theory, dispensed with the requirement that the provocation which results in emotional disturbance of the defendant be reasonable. See, e.g., Me. Rev. Stat. Ann. tit. 17, § 2551 (1964); N.H. Rev. Stat. Ann. § 630:2 (1974 & Supp. 1979). The Model Penal Code, however, has retained the “reasonable” requirement: “The reasonableness of such explanation or excuse shall (sic) be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.” Model Penal Code § 210.3(1)(b) (Part II, Vol. 1, 1980).
12. The ordinary person of average disposition will not be invested with the mental characteristics of the defendant which make him particularly susceptible to excitement, anger, or passion. State v. Nevares, 36 N.M. 41, 7 P.2d 933 (1932). No New Mexico court has considered whether the ordinary person may be invested with the physical characteristics of the defendant, if the characteristic played some part in the provocation. See, e.g., Regina v. Ramsey, 29 Crim. App. 14 (1942), where the court of appeals held that the trial judge erred in failing to call the jury’s attention to the fact that the defendant had but one leg and that the deceased knocked away one of the defendant’s crutches before the defendant stabbed the deceased. Compare, Model Penal Code, Proposed Official Draft (1962) § 210.3, which provides that the adequacy of provocation “shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”
Therefore, only the emotion need be reasonable, not the act of killing.\textsuperscript{14} The reasonable person standard is objective. In effect, the standard recognizes that humans sometimes yield to extreme emotions, that such emotions can lead to killings, and that such killings deserve lesser punishment.\textsuperscript{15}

The crime of voluntary manslaughter is unique in that it may be presented in two fundamentally different ways. In addition to being a separate crime, a claim of voluntary manslaughter can be a mitigating defense to murder.\textsuperscript{16} Evidence required to prove "heat of passion" as an element of a separate crime may be more than is necessary to prove mitigation of a murder charge. Thus it is important in weighing the evidence in a particular case to know whether voluntary manslaughter is charged as a separate offense, or raised as a defense. This dual role is the source of conflict in the theory behind voluntary manslaughter which presents troublesome problems for the courts. These alternatives must also be considered in the effort to set a general evidentiary standard.

Practical problems with the voluntary manslaughter charge reflect the problems of theory. Voluntary manslaughter is perhaps most often raised as a mitigating defense, because it offers a middle ground between murder and total exculpation for intentional homicides. An incentive exists, there-

\textsuperscript{14} Unlike self-defense, which requires that the act of killing be reasonable under the circumstances, N.M. Stat. Ann. § 30-2-7(A) and (B) (1978) and N.M. U.J.I. Crim. 41.41 (1978), voluntary manslaughter only requires that the emotional response, rather than the act of killing, be reasonable. See also, the discussion of the relationship between self-defense and voluntary manslaughter accompanying notes 73 to 99, infra.


\textsuperscript{16} When the elements of a sudden quarrel or heat of passion are established, an intentional killing is reduced from murder to voluntary manslaughter, a crime which carries a lesser penalty. The definition of second degree murder makes it clear how the crime of voluntary manslaughter can be raised as a defense. The second degree murder provision begins with the proviso that "[U]nless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree . . . ." N.M. Stat. Ann. § 30-2-1(B) (Supp. 1981).

There is no such explicit exemption of heat of passion homicides from murder in the first degree. Mitigation from murder in the first degree may be inferred, however, from the statutory language which describes murder in the second degree as a lesser included offense of murder in the first degree. N.M. Stat. Ann. § 30-2-1(B) (Supp. 1981). A lesser included offense is necessarily committed during commission of the greater offense. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975); N.M. U.J.I. Crim. 50.01 (1978 & Supp. 1981). Therefore, a successful defense to second degree murder would preclude a conviction of first degree murder. If the accused pleads that adequate provocation aroused extreme emotions and this prevents a second degree murder conviction, presumably the same evidence will also provide a defense to first degree murder. This evidence, however, will not exculpate, but rather will mitigate the degree of the crime to voluntary manslaughter.

fore, to request a voluntary manslaughter instruction in murder prosecutions. Such an instruction gives the jury the option of convicting of a lower degree of homicide rather than choosing between murder and acquittal. Both the prosecutor and the defense counsel, in the context of a particular case, may wish to offer this option to the jury, depending on their assessments of the strengths of the state's case and the strengths of exculpatory defenses. For example, if the defense counsel believes that, given the choice between a murder conviction and a self-defense acquittal, the jury is likely to choose murder, he may request the instruction on voluntary manslaughter and hope to induce a compromise verdict. In this example, the prosecutor would be likely to oppose such an instruction, preferring to have the jury choose only between conviction for murder and acquittal. In other cases, the prosecutor may request the voluntary manslaughter charge.\textsuperscript{17}

The issue of whether a voluntary manslaughter instruction is required in a murder case can arise on appeal in four different contexts. The question first arises where neither party has requested a voluntary manslaughter instruction and the defense does not object to the failure to instruct on manslaughter. The defendant is convicted of murder and appeals on the ground that the evidence required such an instruction.\textsuperscript{18} A second context for the issue occurs when the trial court, on its own, charges the jury on voluntary manslaughter and the defense does not object. The defendant is convicted of voluntary manslaughter and appeals on the ground that the evidence was insufficient to support the verdict.\textsuperscript{19} A third context occurs when the defense requests a manslaughter charge, but the trial court denies it. The defendant is convicted of murder and appeals on the ground that the failure to so instruct was error.\textsuperscript{20} The

\textsuperscript{17} If a prosecutor thinks that the claim of self-defense may prevail, he may request a voluntary manslaughter instruction predicated on a provocation of fear. This would avoid a complete acquittal.

\textsuperscript{18} See State v. Najar, 94 N.M. 193, 608 P.2d 169 (Ct. App. 1980). Although defense counsel informed the trial court that the defense did not desire an instruction on voluntary manslaughter, appellate counsel for the accused claimed that the failure to instruct was jurisdictional error. The court of appeals rejected the appeal and affirmed the murder conviction on the ground that Rule 41 (d) of the Rules of Criminal Procedure requires a request for instructions on lesser degrees or lesser included offenses. The failure to request a voluntary manslaughter instruction in a murder prosecution therefore prevented a claim of error on appeal.

\textsuperscript{19} See, e.g., Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976), where the supreme court reviewed the voluntary manslaughter conviction although "the defense made no objection to the giving of such an instruction at the trial." \textit{Id.} at 775, 558 P.2d at 44. See also, State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968) where the court indicated that the failure to object to a manslaughter instruction might constitute a waiver of the right to review a manslaughter conviction. The court did not decide the case on the waiver issue, however, because it found sufficient evidence to support the conviction. The court in Smith did not mention the waiver issue in reviewing and reversing the defendant's conviction.

\textsuperscript{20} Each of the cases cited in note 1, supra, arose in this context. For other cases arising in this context, see State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979); Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976); State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968); State v. Trujillo, 27 N.M. 594, 203 P. 846 (1921); State v. Castro, 92 N.M. 585, 592 P.2d 185 (Ct. App.), \textit{cert. denied}, 92 N.M.
question can arise in a fourth instance when the defense requests an instruction on manslaughter and the trial judge gives the instruction. The defendant is convicted of voluntary manslaughter and appeals, claiming that the evidence was insufficient to sustain the verdict.  

Each of these situations is a variation on the question of when an instruction on voluntary manslaughter is required or merited. The evidence of provocation and heat of passion sufficient to require or merit an instruction on voluntary manslaughter in New Mexico is not clear. Certainly the absence of any evidence of this nature will make such an instruction improper. If some evidence exists, however, two questions arise. The first is what is the test for measuring the sufficiency of the evidence to decide whether an instruction is mandated. The second is what evidence meets the test which is adopted. The first question can be answered only by discussing the theory behind the charge of voluntary manslaughter. The second is concerned with how this theory is expressed in practice.

III. THEORY BEHIND THE USE OF THE VOLUNTARY MANSLAUGHTER PLEA

The dual role of manslaughter in the New Mexico homicide scheme has resulted in two different and inconsistent standards for measuring the evidence required for a voluntary manslaughter instruction. Looking at voluntary manslaughter primarily as a separate criminal offense, New Mexico courts have required that the evidence of heat of passion and provocation be sufficient to support a conviction in order to warrant a manslaughter instruction. The UJI, on the other hand, view manslaughter more as a defense to murder. Accordingly, the UJI require that the evidence need only raise a reasonable doubt that the defendant acted in the heat of passion upon adequate provocation before an instruction on manslaughter is required. This conflict in the theory behind the charge of voluntary manslaughter must be cured before the courts can develop a general evidentiary standard.


21. The appellant in State v. Modesto Martinez, Ct. App. Docket No. 5105, has made such a claim in a case presently before the New Mexico Court of Appeals. See also, Territory v. Trapp, 16 N.M. 700, 120 P. 702 (1911), where the court stated that if the trial court had erred in giving an instruction requested by the defendant, the error "was invited by appellant, and he cannot be heard to complain here." Id. at 705, 120 P. at 704. The court held, however, that there was no error in submitting the voluntary manslaughter instruction to the jury.

22. See, e.g., Smith v. State, 89 N.M. 770, 777, 558 P.2d 39, 46 (1976) and State v. Trujillo, 27 N.M. 594, 603, 203 P. 846, 849 (1921) in which voluntary manslaughter convictions were reversed because there was no evidence to support such a charge.
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A. The Judicial Standard

New Mexico cases have adopted the standard of "evidence sufficient to support a conviction." The genesis of this standard was State v. Trujillo, a 1921 case. The court in State v. Lopez relied on Trujillo, and explicitly set forth the standard in the following terms:

We fully recognize the rule to be as argued by appellant and as stated in State v. Trujillo, 27 N.M. 594, 203 P. 846 (1921), that it is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required.

In 1976 the court in Smith v. State re-examined the Trujillo rule. All three courts refused to permit voluntary manslaughter to be used as a defense to murder where it could not also be established as a separate crime.

In Smith, the defendant was tried for a particularly egregious murder. At trial, the judge instructed the jury that it could find the defendant guilty of first degree murder, second degree murder, or voluntary manslaughter. The defendant did not object to the voluntary manslaughter instruction. The jury acquitted the defendant on the murder charges but convicted him of voluntary manslaughter. No evidence of provocation, heat of passion, or sudden quarrel was produced. Sufficient evidence to convict existed on both degrees of murder. The New Mexico Court of Appeals affirmed the conviction on the ground that provocation is not an element of voluntary manslaughter and voluntary manslaughter is a lesser included offense of murder. According to the court of appeals, the absence of any evidence of provocation did not preclude a voluntary manslaughter instruction or a conviction of voluntary manslaughter.

The New Mexico Supreme Court reversed the court of appeals and set aside the voluntary manslaughter conviction. The court observed that the legislature defined voluntary manslaughter to include the elements of provocation and heat of passion, elements which are not part of murder.

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23. See cases cited supra note 1.
24. 27 N.M. 594, 602, 203 P. 846, 849 (1921). The Supreme Court of New Mexico reversed a voluntary manslaughter conviction where there was no evidence to support the conviction, although there was evidence sufficient to support the murder charge.
26. 79 N.M. at 286, 442 P.2d at 598. This language was quoted approvingly in Smith v. State, 89 N.M. 770, 775, 558 P.2d 39, 44 (Ct. App. 1976).
27. 89 N.M. 770, 773, 558 P.2d 39, 42 (1976).
After setting forth the statutory definition of voluntary manslaughter, the supreme court ruled: "There must be some evidence that the killing was committed 'upon a sudden quarrel' or in the 'heat of passion' in order for a conviction of voluntary manslaughter to stand; so much is clearly required by our statute." Relying on *Trujillo* to hold that the trial court erred in instructing the jury on voluntary manslaughter contrary to the evidence, the court reversed the conviction and discharged the defendant. The offenses of murder and voluntary manslaughter are thus distinct and require proof of different elements.

In *Smith*, the supreme court did not indicate exactly how much evidence of provocation would be necessary to support a conviction of voluntary manslaughter. The court ruled only that the evidence in *that* case was not sufficient. The court did not need to address that question because the transcript showed no such evidence in *Smith*. After *Smith*, assuming that there is some evidence of provocation, the traditional test for assessing the sufficiency of the evidence to support a conviction would probably apply. That test requires that the evidence be sufficient to support a verdict of guilt beyond a reasonable doubt.

By requiring enough evidence to support a voluntary manslaughter conviction before a defendant can be convicted, *Smith* and *Trujillo* set the standard for trial courts to use in deciding whether a voluntary manslaughter instruction is proper in a murder case. This standard seems too stringent when considering voluntary manslaughter in its other function—as a mitigating defense. Further, the standard places the defendant in the peculiar position of having to prove his defense beyond a reasonable doubt, making voluntary manslaughter as a defense to murder unique. Evidence sufficient to *raise* a reasonable doubt warrants an instruction on any other defense in New Mexico. For example, a defendant is entitled

30. *Id.* at 774, 558 P.2d at 43 (1976).
31. *Id.*
32. *Id.* at 772, 558 P.2d at 41.
33. The reasoning behind this traditional test also supports the *Smith* analysis. A conviction for a crime which the evidence does not show was committed violates due process, and such a conviction is unconstitutional. *See*, e.g., *Vachon v. New Hampshire*, 414 U.S. 478 (1974); *In re Winship*, 397 U.S. 358 (1970); *Johnson v. Florida*, 391 U.S. 596 (1968); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).
34. *See* *State v. Manus*, 93 N.M. 95, 101, 597 P.2d 280, 286 (1979). (Where the defendant requested the instruction and was held to have a burden of producing sufficient evidence to warrant the instruction). When the prosecutor requests the instruction on voluntary manslaughter, presumably the burden would fall on the prosecutor. The burden of proving voluntary manslaughter, as opposed to the burden of producing evidence to get the instruction, always rests with the prosecution. The burden of proof is beyond a reasonable doubt. *N.M. U.J.I. Crim.* 2.20 and 2.21. (Supp. 1981).
to the instruction on intoxication whenever he produces evidence which would raise a reasonable doubt as to his sobriety when he committed the act. He need not prove his drunkenness, merely raise a doubt as to whether he was sober. Under the Smith–Trujillo test, by contrast, a defendant charged with murder must prove beyond a reasonable doubt that he acted in the heat of passion in order to use voluntary manslaughter as a defense to murder.

Using the Smith–Trujillo test to decide when the evidence requires a voluntary manslaughter instruction produces other unfortunate results. First, an accused charged with murder but convicted of voluntary manslaughter goes free if the evidence of an intentional killing would support a murder conviction but fails to support a voluntary manslaughter conviction. The court of appeals in State v. Melendez stated: "[t]he necessity of discharging from further proceedings defendants who should have been convicted for first or second degree murder, is a soul-wrenching and mind-searing repugnancy in the law." Freeing a possible murderer is an excessive price to pay to remedy the error of an incorrect instruction where the trial court endeavors to make voluntary manslaughter a mitigating defense as well as a separate crime.

Second, the possibility that a voluntary manslaughter conviction would be reversed when voluntary manslaughter instructions are given may create an incentive in trial judges to refuse requests for voluntary man-

41.15 (1978). Once there is sufficient evidence to raise a reasonable doubt as to the existence of the required intent, the court must give an instruction on the defense. Defenses which do not negate an element of the offense are called affirmative defenses because the elements of the defense justify the crime. In New Mexico all defenses, including affirmative defenses, must be overcome by proof beyond a reasonable doubt. See, e.g., the defense of entrapment, N.M. U.J.I. Crim. 41.35 (1978), and the defense of habituation, N.M. U.J.I. Crim. 41.40 (1978). There is, however, no constitutional prohibition to shifting the burden of proving the elements of the defense to the defendant. See, e.g., Patterson v. New York, 432 U.S. 197 (1977), where the New York law placed on the defendant the burden of establishing the affirmative defense of extreme emotional disturbance by a preponderance of the evidence in a murder prosecution. See also, Leland v. Oregon, 343 U.S. 790 (1952) where the United States Supreme Court upheld Oregon's procedure by which the defendant had the burden of proving beyond a reasonable doubt his defense of insanity.

37. See, e.g., Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976); State v. Trujillo, 27 N.M. 594, 203 P. 846 (1921); State v. Melendez, 20 N.M. St. B. Bull. 387 (Ct. App. Feb. 12, 1981); State v. Castro, 92 N.M. 585, 592 P.2d 185 (Ct. App.) cert denied, 92 N.M. 621, 593 P.2d 62 (1979). The facts in Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976) vividly demonstrate the cost of the Smith–Trujillo test. In Smith, the defendants had, or attempted to have sexual intercourse with the victim, wrapped the victim with a chain and played tug of war with the chain, struck the victim with a pipe, and threw her in an oil tank, where she drowned. The jury acquitted the defendants of murder. Id. at 771–72, 558 P.2d at 40–41. Because the record was devoid of any evidence of sufficient provocation, the supreme court reversed, stating that under the circumstances, the manslaughter instruction was erroneous. Id. at 778, 558 P.2d at 46.
38. 20 N.M. St. B. Bull. 387 (Ct. App. Feb. 12, 1981). [Ed. note: After this article was written, but before final publication, this case was reversed by the New Mexico Supreme Court. 97 N.M. 738, 643 P.2d 607 (1982).]
39. 20 N.M. St. B. Bull. at 391.
slaughter instructions. Almost all of the cases addressed in this article came to the appellate courts on claims of erroneous denials of manslaughter charges. Trial judges may reasonably assume that the risk of discharging a guilty defendant dictates a course of action which precludes a voluntary manslaughter instruction at the trial level and leaves the issue to the appellate court. Only if the appellate court reverses and remands for a new trial on voluntary manslaughter will the trial court feel safe in instructing the jury on manslaughter. The delays and use of appellate resources to obtain what is in effect a declaratory judgment are part of the costs attending the Smith-Trujillo test. Appellate courts may be reluctant to reverse murder convictions which are supported by sufficient evidence where the evidence also supports a manslaughter charge, and the jury was denied the opportunity to choose between the two.  

The most important cost of the Smith-Trujillo test, however, is the loss in many cases of the mitigating defense function to the defendant who killed in the heat of passion. This test effectively denies one of the important aspects of voluntary manslaughter—reducing the degree of a homicide to reflect lesser culpability because killing occurred in the heat of passion upon adequate provocation.

B. The U.J.I. Approach

The U.J.I. tries to allow voluntary manslaughter to serve as a defense to murder as well as a separate crime. Recognizing that voluntary manslaughter can be a defense as well as a criminal offense, the U.J.I. includes two separate instructions on voluntary manslaughter. Uniform Jury Instruction 2.20 sets forth the elements of manslaughter when it serves as a mitigating defense to murder. Uniform Jury Instruction 2.21 describes the elements essential for conviction when manslaughter is the highest degree of homicide charged. Only the latter instruction requires proof of sufficient provocation beyond a reasonable doubt of conviction of voluntary manslaughter. The existence of the two instructions reflects the U.J.I. solution to the apparent conflict between the two functions of the crime of voluntary manslaughter.

The U.J.I. were amended in 1981. The old U.J.I. (voluntary manslaughter as a defense in a murder prosecution) provided: "If you find that the defendant acted as a result of sufficient provocation or if you have a reasonable doubt as to whether he so acted, you must find him not guilty of second degree murder, and you should proceed to consider whether he is guilty of voluntary manslaughter." This instruction, which

41. N.M. U.J.I. Crim. 2.20 (1978). This instruction is for manslaughter as a lesser included offense.
was in effect until September, 1981, emphasized the defense aspect of voluntary manslaughter. It omitted heat of passion, sudden quarrel, or sufficient provocation which are elements of voluntary manslaughter as a separate crime. Without these affirmative elements, voluntary manslaughter could be more readily used as a defense.

The amended version of the U.J.I. does not change the instructions’ emphasis on the mitigating defense aspect of voluntary manslaughter in murder prosecutions. Uniform Jury Instruction 2.20 still does not require proof of provocation for conviction of voluntary manslaughter. Furthermore, the jury is told in another instruction, the 1981 version of U.J.I. 2.10, that the state, in order to convict on a second degree murder charge, must prove beyond a reasonable doubt that the defendant did not act as a result of sufficient provocation. Therefore, evidence raising a reasonable doubt on the issue of provocation and heat of passion will permit provocation to operate as a defense to murder.

42. The 1981 version of 2.20 is substantially different from that approved in 1978. The 1981 instruction provides in its entirety:

For you to find the defendant guilty of voluntary manslaughter, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: 1. The defendant killed __________ (name of victim); 2. The defendant knew that his acts created a strong probability of death or great bodily harm to __________ (name of victim or any other human being); 3. This happened in New Mexico on or about _____ day of _____, 19___.

The difference between second degree murder and voluntary manslaughter is sufficient provocation. In second degree murder the defendant kills without having been sufficiently provoked, that is, without sufficient provocation. In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, that is, as a result of sufficient provocation. Sufficient provocation reduces second degree murder to voluntary manslaughter.

In treating provocation as a defense rather than an element of a separate offense, U.J.I. 2.10 and 2.20 set forth a logical standard for measuring the evidence which will merit an instruction on voluntary manslaughter. That standard, however, is inconsistent with the standard adopted by the New Mexico appellate courts. In order to warrant U.J.I. instruction 2.20, evidence sufficient to raise a reasonable doubt is all that is required. In contrast, the New Mexico courts require evidence sufficient to convict as a prerequisite for the instruction. Uniform Jury Instruction 2.20 eliminated provocation as an element for conviction of voluntary manslaughter when murder is charged. By eliminating provocation, U.J.I. 2.20 virtually rewrote the voluntary manslaughter statute by permitting conviction without proof of the heat of passion which is specified in the statute.  

A second instruction, which embodies the function of the voluntary manslaughter charge as a separate offense, however, does acknowledge the statutory requirement of provocation. When murder is not charged, U.J.I. 2.21 on voluntary manslaughter includes a requirement that "the defendant acted as a result of sufficient provocation." This element was added to U.J.I. 2.21 in 1981. The instruction, unlike U.J.I. 2.20, reflects the statutory requirement of heat of passion.

The U.J.I. scheme of including two different instructions for voluntary manslaughter attempts to resolve the conflicting functions of voluntary manslaughter. When murder is charged and voluntary manslaughter is serving both as a mitigating defense and a separate offense, U.J.I. 2.20 provides that a conviction for voluntary manslaughter need not require proof beyond a reasonable doubt that the defendant acted as a result of sufficient provocation when the defendant is charged solely with the offense of voluntary manslaughter however, U.J.I. 2.21 then requires proof of the provocation element beyond a reasonable doubt.

44. Neither provocation nor heat of passion are included as elements in the 1981 amendment to N.M. U.J.I. Crim. 2.20, just as they were not in the previous formulation. The elements of manslaughter in the 1978 version of N.M. U.J.I. Crim. 2.20 (1978), were (1) the defendant killed . . . ; (2) the defendant had an intent to kill or do great bodily harm . . . ; and (3) this happened in New Mexico.

45. It is only in N.M. U.J.I. 2.21 (Supp. 1981), the voluntary manslaughter instruction to be used when murder is not charged and when voluntary manslaughter is not used as a mitigating defense, that proof of provocation is required for conviction. N.M. U.J.I. Crim. 2.21 (Supp. 1981). The 1981 version of 2.21 includes the element of the defendant's acting "as a result of sufficient provocation," where as the 1978 version of 2.21 did not contain this element.


47. The previous version of U.J.I. 2.21 (1978) did not include provocation as an element of voluntary manslaughter. See note 45, supra. In State v. Morgan, N.M. ___ P.2d ___ (Memorandum Opinion, Ct. App. Docket No. 5044, 1981) cert. granted, ___ N.M. ___, ___ P.2d ___. (Sup. Ct. Docket No. 13890, 1981) the defendant, convicted of voluntary manslaughter under the previous version of U.J.I. 2.21, appealed his conviction on the ground that a voluntary manslaughter conviction cannot stand where there is no instruction by the court or finding by the jury that the defendant acted as a result of adequate provocation. The court of appeals affirmed the opinion, and the Supreme Court of New Mexico agreed to review the conviction.
This solution can be criticized as inconsistent with statutory and judicial law in New Mexico. The two jury instructions provide for both roles of voluntary manslaughter. The statutory definition of voluntary manslaughter, however, does not include two different versions. Further, as pointed out above, New Mexico case law dictates a different solution. The Smith-Trujillo test does not recognize that the statute creates two different types of voluntary manslaughter. Instead, the test reconciles the possible conflict in the dual role of voluntary manslaughter by requiring proof beyond a reasonable doubt of heat of passion upon adequate provocation for both conviction of voluntary manslaughter and mitigation from murder. In other words, New Mexico case law does not permit evidence of provocation, which may raise a reasonable doubt as to murder but which is insufficient to convict of voluntary manslaughter, to function as a mitigating defense.

To justify the departure from New Mexico law, the writers of the instructions looked to constitutional law. In according significance to the defense aspect of voluntary manslaughter, the drafters of the U.J.I. relied on the United States Supreme Court opinion of Mullaney v. Wilbur. In Mullaney, a murder prosecution in Maine, the trial court instructed the jury that the defendant had the burden of proving by a preponderance of evidence that he acted in the heat of passion on sudden provocation in order to negate malice and reduce the homicide from murder to voluntary manslaughter. The United States Supreme Court held that due process "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation . . ." to convict of murder. The relationship between murder and voluntary manslaughter in Maine was critical to the Court; the two homicides represented different degrees of culpability on the basis of the presence or absence of heat of passion. The Court considered absence of heat of passion to be an essential element of malice, and, therefore, an essential element of murder. Thus, the Court held that, under In re Winship, which requires proof beyond a reasonable doubt as to every element of a crime, the prosecution had to prove the absence of heat of passion beyond a reasonable doubt.

In the New Mexico murder statute, the relationship between murder and voluntary manslaughter is the same as the one that existed in Maine's

49. See supra text accompanying notes 22 through 34.
51. The Court in Mullaney focused on voluntary manslaughter as a defense to murder. The court did not consider the aspect of voluntary manslaughter as a separate crime. The Court did not address the question of what evidence is sufficient to support a conviction of voluntary manslaughter as a separate crime. Mullaney left open the question of whether evidence which only raises a reasonable doubt as to the existence of heat of passion also permits a voluntary manslaughter conviction beyond a reasonable doubt. Id. at 704.
statutory scheme. The elements of voluntary manslaughter establish a defense to murder. This structure, according to Mullaney, requires proof of the absence of these elements beyond a reasonable doubt. The U.J.I. codifies this requirement. For example, consistent with Mullaney, U.J.I. 2.10, the instruction for second degree murder, requires as the third element that the "defendant did not act as a result of sufficient provocation. This element must be proved by the state beyond a reasonable doubt. Uniform Jury Instruction 2.20, the instruction for voluntary manslaughter as a defense in a murder prosecution, repeats the Mullaney requirement. The Mullaney decision, therefore, supports the U.J.I. scheme, and may require it as a federal constitutional matter, despite state law to the contrary.

The U.J.I. provides a logical and satisfactory solution to the problem of the dual role of the voluntary manslaughter plea. The U.J.I. makes voluntary manslaughter a true lesser included offense of murder. Voluntary manslaughter under this structure would necessarily be committed whenever murder is committed. The U.J.I. succeeds in avoiding conflicting roles for voluntary manslaughter. Under the U.J.I., voluntary manslaughter is not a hybrid serving both as a defense to murder and a separate crime with additional and different elements from murder. Under the U.J.I., in a murder trial, if evidence of provocation and heat of passion is sufficient to cause reasonable doubt in the minds of the jury as to whether the killing was the result of such passion, then the jury must be instructed on voluntary manslaughter. If the jury decides that

53. See supra note 16 and accompanying text.
54. N.M. U.J.I. Crim. 2.10 (Supp. 1981). The 1978 version of N.M. U.J.I. Crim. 2.10 (1978) is worded much the same as its successor. The only difference between the two is that this third element, quoted in the text, was previously bracketed and is no longer. The 1978 Use Note stated that the bracketed third element must be used "if provocation is in issue." N.M. U.J.I. Crim. 2.10 (1978).
55. N.M. U.J.I. Crim. 2.10 (Supp. 1981) provides:
   For you to find the defendant guilty of second degree murder . . . the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: . . . [that the defendant killed the victim, that the defendant knew that his acts created a strong probability of death or great bodily harm to the victim, that the defendant did not act as a result of sufficient provocation, and that the event took place in New Mexico on a certain date].
56. N.M. U.J.I. Crim. 2.20 (Supp. 1981) includes the following language: "[f]or you to find the defendant guilty of voluntary manslaughter, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: . . . ."
57. Voluntary manslaughter is a lesser included offense of murder under the Uniform Jury Instructions because the elements of voluntary manslaughter are also included in the elements of murder. Thus the U.J.I. has succeeded in eliminating the conflict between voluntary manslaughter as separate crime and as a defense. Under the statute, however, voluntary manslaughter is a separate crime because the elements of voluntary manslaughter, such as heat of passion or sudden quarrel, are not included in the elements of murder. N.M. Stat. Ann. § 30-2-3(A) (1978).
58. Neither N.M. U.J.I. Crim. 2.20 (Supp. 1981), the 1978 version, nor the Committee Commentary expressly state that evidence sufficient to raise a reasonable doubt requires voluntary man-
the killing was committed due to sufficient provocation or that they have reasonable doubt as to whether it was so committed, the homicide is reduced from murder to voluntary manslaughter. The voluntary manslaughter conviction cannot successfully be challenged on the ground of insufficient evidence, because a killing by a defendant who knew that his acts created a strong probability of death or great bodily harm is all that is required for conviction under the U.J.I. No additional requirements of heat of passion, sudden quarrel or adequate provocation exist under U.J.I. 2.20. Voluntary manslaughter may be brought as a charge or raised as a defense without contradictory evidence requirements or peculiar results.

IV. CURRENT PRACTICE IN NEW MEXICO LAW

Despite the advantages of the U.J.I. scheme, New Mexico courts continue to accede to the Smith–Trujillo requirement that enough evidence for an independent conviction of voluntary manslaughter exist before that plea can be raised as a defense to a murder charge. Some of the difficulties of this requirement have been discussed above. On a purely practical level, the trial court, in order to rule on the propriety of a voluntary manslaughter instruction, must decide whether evidence is sufficient to support a conviction. This inquiry has proven troublesome. This article undertakes an analysis of recent New Mexico cases bearing upon the question and comments on other aspects of the law related to voluntary manslaughter in New Mexico, particularly self-defense. The cases demonstrate the need to reconsider how voluntary manslaughter fits, or should fit, into the current statutory homicide scheme.

slaughter instruction. In fact, the Committee Commentary to N.M. U.J.I. Crim. 2.20 (Supp. 1981) states that the test is “evidence sufficient to support a verdict of conviction of manslaughter.” The test of evidence sufficient to support a verdict is inconsistent with the language of N.M. U.J.I. Crim. 2.10, however, and the commentary is unlikely to be followed. If there is evidence sufficient to raise a reasonable doubt, such evidence, under the instruction, requires an acquittal of murder even though it may not support a finding of provocation or heat of passion beyond a reasonable doubt. It would make no sense to require evidence sufficient for conviction to get the instruction on voluntary manslaughter. This is precisely the problem the instruction was intended to resolve. N.M. U.J.I. Crim. 2.10, which concerns second degree murder, and expressly mentions voluntary manslaughter as a lesser included defense, further supports this reading.

59. This result is suggested by the language of N.M. U.J.I. Crim. 2.10 and 2.20 (Supp. 1981), although the Committee Commentary to U.J.I. 2.20, see supra note 58, the statute, and New Mexico case law require evidence of heat of passion or sudden quarrel upon adequate provocation to sustain a conviction of voluntary manslaughter. See supra notes 22–34, and accompanying text for a discussion of the test adopted by the New Mexico courts for judging the sufficiency of the evidence for a voluntary manslaughter conviction.

60. N.M. U.J.I. Crim. 2.20, in the 1978 or 1981 version, does not instruct the jury that they must find the existence of sudden quarrel or heat of passion in order to convict the defendant of voluntary manslaughter.

61. See supra note 42.

62. See supra text accompanying notes 34 through 40.
The recent cases decided by New Mexico appellate courts can be divided into three broad categories. Six cases involved situations where the claimed passion was fear. Three cases presented situations where extreme emotional stress was engendered in the context of a confrontation between the defendant and his former wife or girlfriend. A third group focused on the legality of the provoking conduct. Each category will be examined separately.

A. Provocation of Fear

The New Mexico appellate courts addressed several issues in reviewing the six cases in which the defendants claimed fear as the provoked emotion. These issues concern the relevance of the build-up of provocation over time, the sufficiency of circumstantial evidence of provocation where the defendant does not testify as to provocation, the relationship between self-defense and voluntary manslaughter, and the adequacy of provocation which was induced by the defendant’s conduct. These four issues will be analyzed separately.

1. Build-up of Provocation

In *State v. Benavidez*, the evidence showed that the victim had at one time stolen a television set belonging to the defendant. The victim had introduced the defendant’s son to heroin and had assaulted the defendant’s son in the past. The victim threatened both the defendant and his son with death on the afternoon of the shooting. The highly intoxicated victim came to the defendant’s home and engaged the defendant in an argument. During the argument, the victim made a gesture which could have been an attempt to strike or move for a weapon. The trial court refused the defendant’s request for an instruction on voluntary manslaughter. The defendant was convicted of murder. The Supreme Court of New Mexico held that the evidence met the standard of provocation sufficient to sustain a conviction of voluntary manslaughter.

In addition to focusing on the events immediately preceding the killing, the court in *Benavidez* expressly relied on events in the past as bearing on the sufficiency of the provocation. The court deemed that the relations between the victim and the defendant over a period of time were relevant.

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66. 94 N.M. 706, 616 P.2d 419 (1980).
to assess the provocation. The court did not indicate, however, in precisely what way the prior encounters between the victim and the defendant were relevant. It is difficult to tell how much weight the court gave these factors and how they would be applied in future cases.

In State v. Farris,\(^\text{67}\) decided two months later, the supreme court cast doubt on the relevance of past events. In Farris, the defendant shot and killed his estranged wife. There was evidence that the defendant and his wife of 20 years had separated several times before because of the wife's alleged boyfriends. During the final separation, the wife's boyfriend and brother threatened the defendant twice. The defendant bought a gun for protection. On the day of the shooting he arranged to meet his wife. He went to the family home and a quarrel ensued. The wife poked the defendant in the chest and told him to leave her boyfriend alone. She said that the boyfriend could come to her house any time he wanted. The defendant "lost his head" and shot her.\(^\text{68}\) The trial court did not instruct the jury on manslaughter. The defendant was convicted of first degree murder.

The court in Farris cited Benavidez and stated that of the circumstances relied on in Benavidez, the "most important are those within the res gestae of the killing. For there must be evidence of a sudden quarrel or heat of passion at the time of the commission of the crime."\(^\text{69}\) The court in Farris then ignored the prior circumstances which might have provoked the defendant and decided the adequacy of the provocation on the basis of the evidence at the time of the killing. The court held that the evidence at the time of the killing—the wife's talking to the defendant and poking him in the chest—was not sufficient to show provocation.

By ignoring the prior relationship between Farris and his wife and considering only the circumstances at the time of the killing, the supreme court in Farris did not give effect to any build-up of provocation over a period of time. The events immediately preceding the act of killing may by themselves be insufficient provocation. Considered together with the prior provocative events, however, those events may unleash emotions previously held in check. To deny consideration of prior events as evidence of a build-up of provocation is to consider the adequacy of provocation out of context.

Farris and Benavidez appear to be inconsistent in their views of the significance of acts of provocation prior to the killing. Perhaps a distinction can be found in the relationship of the prior provocations to the

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\(^{67}\) 95 N.M. 96, 97, 619 P.2d 541, 542 (1980). This case is included among those concerning fear for purposes of comparison with Benavidez. Farris is also discussed with those cases involving non-fear emotions. See infra text accompanying notes 129 through 131.

\(^{68}\) 75 N.M. at 96, 619 P.2d at 541.

\(^{69}\) Id. at 97, 619 P.2d at 542.
final provoking acts. In *Farris*, the prior provocations were not fear-producing incidents. In *Benavidez*, the assault on the defendant’s son and threats to the defendant related to the defendant’s fear. These prior acts may have built up the defendant’s fear of the victim so that, at the time of the killing, the argument and the arm motion of the victim gave rise to adequate provocation.

One problem with this distinction is that the court in *Benavidez* did not limit its consideration of past events to those which might provoke fear. The court also referred to acts of the victim that aroused other emotions, such as anger. For example, the victim’s actions of theft and of introducing the son to heroin elicit emotions of a different nature than do the assault and threats. Another problem with this distinction is that the prior provocative circumstances in *Farris*—a marital relationship in which the defendant’s wife allegedly had several boyfriends—are directly related to the evidence of provocation at the time of killing when the wife poked the defendant and told him to leave her boyfriend alone.

The only explanation which might serve effectively to distinguish *Benavidez* from *Farris* is the nature of the passion aroused. *Benavidez* involved some provocation of fear whereas *Farris* involved the provocation of anger, jealousy, or other extreme emotions typical of marital and other male-female relationships. This distinction is unsatisfactory, however, because emotions unleashed in a troubled relationship may cause just as much of a temporary loss of self-control in an ordinary person of average disposition as would the emotion of fear or terror. Indeed, both types of emotions are listed in U.J.I. 2.22.70 Nor is such a distinction suggested by the statute, which includes both sudden quarrel and heat of passion.71

It is important to note that *Farris* did not overrule *Benavidez* insofar as *Benavidez* sanctioned consideration of prior provocative circumstances. *Farris* qualified *Benavidez* by stating that the most important of the circumstances relevant to provocation are those which exist at the time of the killing. *Farris* is a troublesome case because the court chose to ignore prior provocation and focused solely on the evidence of provocation at the time of the killing. The defendant in *Farris* was no less entitled to present voluntary manslaughter to the jury as a means of mitigating a murder charge than was the defendant in *Benavidez*. Whether the evidence in either case merited a conviction of voluntary manslaughter rather than murder should have been a jury question. The court’s removal of this issue from the jury in *Farris* cannot be justified. It does not solve the question of what standard of evidence is required to support an instruction on voluntary manslaughter.

2. Proof of Provocation of Fear by Circumstantial Evidence

One case involving fear resulted in reversal of a murder conviction because the court considered evidence of provocation to be sufficient to require a voluntary manslaughter instruction. In State v. Maestas, the New Mexico Supreme Court had before it only evidence presented by the state's witnesses. The defense did not produce any evidence. The state's evidence showed that an argument took place between the defendant and the victim at a bar. Later, the defendant was seated in his car and the victim, who was intoxicated, left the bar and approached the car. The victim either staggered or lunged toward the car and then leaned into the car window. The defendant shot the victim after the victim was at the car. After the shooting, a knife, similar to a knife owned by the victim, was found near the victim's body. The trial court gave no voluntary manslaughter instruction.

On appeal, the court concluded that the evidence was sufficient to warrant a voluntary manslaughter instruction. Although the court did not state the reasons for its conclusion, it apparently viewed the evidence as supporting inferences that the defendant believed that the victim intended to attack him, feared an attack, and killed as a result of the fear provoked by the victim's conduct. No evidence was introduced of past provocation leading up to the argument between the defendant and the victim, and there was no evidence of any threatening gesture made by the victim toward the defendant.

In Maestas, the supreme court did not require direct evidence of adequate provocation to merit a voluntary manslaughter instruction. After Maestas, the fact that the defendant does not testify that he was provoked, that he feared the victim, and that he killed while in the state of fear will not defeat a manslaughter defense if circumstantial evidence gives rise to those inferences.

3. Provocation of Fear and Self-Defense

Another murder case meriting reversal was State v. Montano, decided by the New Mexico Court of Appeals. The evidence showed no prior provocative incidents between the defendant, a woman, and the victim, a man, before the day of the killing. About 8:00 a.m. on the day of the killing, the victim and a friend went to the defendant's home and drank beer until 10:00 a.m., when they left to watch a parade. They returned to the defendant's house until the bars opened early in the afternoon and returned again around 6:00 p.m., when the friend passed out in the car. The friend entered the house when he awoke and both men remained in

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72. 95 N.M. 335, 622 P.2d 240 (1981).
the defendant's house despite her wishes that they leave. The victim was hostile, and knocked a hole in a wall when the defendant refused to cook for him. Near midnight, the friend agreed to leave and take the victim with him. The victim became angry, looked threateningly at the defendant, and started to rise from his chair near the kitchen table, where the defendant had left a gun. The defendant explained at trial that the gun was on the table because she had been threatened by teenagers and she knew the men were too drunk to defend her. The defendant grabbed the gun and backed into the kitchen sink. The gun discharged, killing the victim. The trial judge denied defendant's request for voluntary manslaughter instruction. She was convicted of murder in the second degree.

The court of appeals examined the evidence and concluded that it warranted an instruction on voluntary manslaughter. The court found that evidence that the victim became angered, looked threateningly at the defendant, and started to rise, suggested a sudden quarrel. Furthermore, the victim's conduct in rising from his chair near the table permitted the inference that he was making a move for the gun on the table. These circumstances, in addition to the victim's drinking, his refusal to leave, and his earlier violent conduct led the court of appeals to hold that a jury could find that the defendant acted from fear due to sufficient provocation. The court stated that the fact that the defendant testified that she did not intend to shoot did not preclude the defense of voluntary manslaughter because her testimony was not conclusive. The other evidence supported a conviction of voluntary manslaughter, and the failure to give an instruction on this issue required reversal.

The Montano case follows a line of New Mexico cases which view voluntary manslaughter as closely related to self-defense where the passion involved is fear. In State v. Lopez, decided in 1968, the Supreme Court of New Mexico stated that "when facts are present which give rise to a plea of self-defense, it is not unreasonable that if the plea fails, the accused should be found guilty of voluntary manslaughter." Under this reasoning, voluntary manslaughter is a lesser included defense of self-defense in a murder prosecution. If the jury accepts the argument of self-

74. Id. at 236, 620 P.2d at 890.
75. The court of appeals in Montano also ruled that the failure to instruct the jury on self-defense was error. Id. at 235, 620 P.2d at 889. The court found that the evidence that the defendant shot the victim out of fear of death or great bodily harm was sufficient to permit the inference that she acted reasonably under the circumstances. The evidence was sufficient to raise a reasonable doubt that she did not act in self-defense and therefore required an instruction on self-defense.
77. 79 N.M. 282, 442 P.2d 594 (1968).
78. Id. at 285, 442 P.2d at 597.
VOLUNTARY MANSLAUGHTER

defense, the defendant is acquitted. If the jury rejects the self-defense theory, it may choose voluntary manslaughter rather than murder as the degree of homicide.

The relationship between self-defense and voluntary manslaughter is based on the emotion of fear. To establish self-defense, the defendant must show that he feared immediate death or great bodily harm, that he killed as a result of that fear, and that he acted as a reasonable person would have acted in the same circumstances. The same fear of death or great bodily harm, if caused by sufficient provocation, will establish voluntary manslaughter.

When the defendant’s act of killing is “reasonable,” self-defense applies. The defendant’s perception of the danger must be reasonable, and his act of killing must also be reasonable. By comparison, voluntary manslaughter applies where the defendant’s fear is provoked by conduct or circumstances which “would affect the ability to reason and cause a temporary loss of self-control in an ordinary person of average disposition.” Voluntary manslaughter does not require that the defendant’s act of killing be reasonable. This difference accounts for the exculpatory effect of self-defense as opposed to the mitigating significance of voluntary manslaughter. “Imperfect self-defense,” where the defendant’s act of killing is unreasonable, establishes voluntary manslaughter. Self-defense fails where in the same circumstances, a reasonable person would not have been in fear of death or great bodily harm. Voluntary manslaughter also fails at this point.

*State v. Melendez* arose in the context of an appeal from a conviction of voluntary manslaughter rather than murder. This case, like *Montano*, involved both claims of self-defense and voluntary manslaughter. There was evidence that the defendant and friends were shot at twice by someone in a car owned by a man named Tegada. About three hours later that

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81. N.M. U.J.I. Crim. 41.41 (Supp. 1981) provides: “3. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.”
82. See, e.g., State v. Dickens, 23 N.M. 26, 165 P. 850 (1917); State v. Chesher, 22 N.M. 319, 161 P. 1108 (1916); State v. Vansickel, 20 N.M. 190, 147 P. 457 (1915).
85. This term is used in W. LaFave & A. Scott, Criminal Law 397 (1972).
evening, the defendant and his companions were driving around, saw the Tegada car and decided to talk to the occupants and tell them to stop shooting. According to the defendant's testimony, as they were about to stop near the Tegada car, a door of the car opened and a shot was fired at the car in which the defendant was a front seat passenger. Fearing he would be shot, the defendant grabbed a rifle and shot it, killing one of the occupants of the Tegada car. He had picked up the rifle from his brother-in-law after the first shooting incident earlier that evening. The defendant was charged with murder. The trial judge instructed the jury on both self-defense and voluntary manslaughter. The jury acquitted the defendant of murder, returned a verdict of guilty on the voluntary manslaughter charge, and rejected the defendant's claim of self-defense.

The court of appeals in Melendez reversed the voluntary manslaughter conviction on the ground that the evidence was insufficient to support the verdict. The court of appeals disregarded the evidence of the shot from the Tegada car immediately prior to the defendant's shot because of the jury's rejection of self-defense. The court of appeals assumed that the jury's verdict meant that it did not believe that the occupants of the Tegada car fired at the defendant. Stating that the evidence of self-defense was obliterated by the jury's verdict, the court of appeals considered only the evidence of the first shooting encounter about three hours before the defendant killed the victim. Although the court of appeals accepted the earlier incident as adequate provocation, it decided that the lapse of three hours was too long a cooling period for the provocation and the heat of passion to concur. The court of appeals thus concluded that the evidence was insufficient to support a conviction of voluntary manslaughter. Under the Smith-Trujillo test the court of appeals reversed defendant's conviction and discharged him.

Melendez was decided incorrectly and serves as an example of the inadequacy of the Smith-Trujillo test. The court's explanation for its refusal to consider the circumstances immediately prior to the killing is unsatisfactory. The standard for measuring the sufficiency of the evidence is whether the evidence would support a verdict of guilty. The evidence in the record included testimony by the defendant that there was a shot fired from Tegada's car immediately before he shot the victim. The court's rejection of this evidence on the basis of the jury's rejection of self-defense forced the court to speculate as to the reasons for the jury's

89. Id.
verdict. The jury's verdict could have been based on any of three legitimate grounds under the instructions on self-defense given: (1) the jury did not believe that the defendant was fired upon; (2) the jury, although believing that the defendant was fired upon, did not believe that the defendant reasonably feared death or great bodily harm, perhaps because the defendant went looking for Tegada's car with a rifle; or (3) the jury, although believing that the defendant was fired upon and was in fear of death, believed that a reasonable person in the same circumstances would not have fired the rifle into the Tegada car but instead would have fled. It is impossible to ascertain which of the possibilities led to that verdict. Each of these possibilities would have permitted the jury to reject the defendant's claim of self-defense.\textsuperscript{92} The latter two are completely consistent with a conviction for voluntary manslaughter. By ignoring two of the three possible reasons for the jury's rejection of self-defense, the court of appeals erred in that it failed to look at the evidence in the light most favorable to the verdict. In assessing the sufficiency of the evidence to support a conviction, the reviewing court must draw all reasonable inferences in support of the verdict.\textsuperscript{93}

The court of appeals in \textit{Melendez} in effect decided the sufficiency of the evidence issue by reference to the jury's supposed findings. No New Mexico court has ever suggested that the jury's verdict, or the findings which support it, are factors to consider in assessing the sufficiency of the evidence. Furthermore, consideration of the jury verdict is unworkable. The same standard of evidence sufficient to support a conviction also determines whether an instruction on voluntary manslaughter is required. The trial judge cannot take into account the jury's verdict before

\textsuperscript{92} See, N.M. U.J.I. Crim. 41.41 (Supp. 1981), which provides:

\begin{quote}
Evidence has been presented that the defendant killed (name of victim) while defending himself.

\textbf{If defendant killed (name of victim) in self-defense you must find him not guilty.}

\textbf{The killing is in self-defense if:}

1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of . . . ; and

2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed (name of victim) because of that fear; and

3. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense.
\end{quote}

\textsuperscript{93} See, e.g., State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968); State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966); and State v. Crouch, 75 N.M. 533, 407 P.2d 671 (1965). The court in \textit{Lopez} stated that appellate review of the sufficiency of the evidence "is limited to a determination of whether the verdict is supported by substantial evidence when viewed in a light most favorable to the State, and with all permissible inferences indulged in support of the verdict." 79 N.M. at 283, 442 P.2d at 595.
deciding whether to give the voluntary manslaughter charge to the jury. The trial judge can only look at the evidence in the record. The appellate court is subject to the same limitation. It may consider only the evidence in the record and decide whether it is sufficient to support the jury’s verdict of guilt. The appellate court cannot selectively consider some evidence and disregard other evidence. Nor can it reject some evidence on the ground that it is not credible, or that the jury did not believe it. The appellate court, like the trial court, should apply the standard in the same way. The court should accept the credibility of the evidence and the inferences in support of voluntary manslaughter, and then ask if there was evidence sufficient to enable the jury to conclude that voluntary manslaughter was proven beyond a reasonable doubt. If the court of appeals was concerned about the apparent inconsistency between the self-defense verdict and the voluntary manslaughter conviction, it should have addressed that problem directly instead of engaging in a speculative exercise to decide what evidence should be considered in judging the sufficiency of the evidence.

It is curious that the Melendez court ignored the Montano case and the other New Mexico cases which state that where facts give rise to a plea of self-defense, the accused may be convicted of voluntary manslaughter if the jury rejects the plea of self-defense. As discussed above, the doctrine of imperfect self-defense recognizes that the critical difference between self-defense and voluntary manslaughter lies not in provocation or the emotion of fear, but rather in the reasonableness of the defendant’s conduct in killing. The jury verdict in Melendez illustrates this distinction. The jury could have believed that the defendant was provoked by the occupants of Tegada’s car earlier in the evening and that, just before the fatal shot, the provocation was sufficient to arouse fear of death or great bodily harm, but that the defendant’s act of shooting and killing was not


98. See supra text accompanying notes 77 through 93.
reasonable under the circumstances. This view of the evidence, based on inferences favorable to the jury’s verdict, would support the manslaughter conviction. By inferring that the jury disbelieved the provocation immediately prior to the killing, the Melendez case runs counter to the doctrine of imperfect self-defense recognized in New Mexico.99 The Melendez decision is unlikely to survive in view of contrary New Mexico cases. The New Mexico Supreme Court granted certiorari to review the court of appeals’ decision.100

4. Defendant-Induced Provocation of Fear

In two cases, the supreme court affirmed murder convictions where the trial court failed to instruct the jury on voluntary manslaughter and the defendant’s conduct played a role in causing the victim to induce fear in the defendant.101 In State v. Garcia,102 the defendant was the aggressor in an altercation with the deceased. When the defendant pulled out a gun, the deceased started to run away. The defendant then aimed the gun with both hands, crouched slightly, hesitated, and fired a shot which killed the victim. The defendant admitted that he had accomplished his purpose of warning and scaring the victim before he aimed and fired. The supreme court held that the circumstances of the shooting failed “to establish a prima facie case for manslaughter . . .”103 but failed to explain why.

One possible rationale for the result in Garcia may be that the court found the evidence that the defendant was the aggressor in the quarrel determinative, although the opinion does not explicitly rely on this factor.104 If the court believed that the aggressor status of the defendant was conclusive, it is unclear why the circumstances of the altercation were not more fully described in order to demonstrate this fact. If this were indeed the rationale in Garcia, the court did not explain why the fact that a defendant was the aggressor in a quarrel with the victim should nec-


100. After this article was written, the New Mexico Supreme Court reversed the court of appeals decision in Melendez. State v. Melendez, 97 N.M. 738, 643 P.2d 607 (1982).

101. State v. Garcia, 95 N.M. 260, 620 P.2d 1285 (1980); State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981). One case outside New Mexico which addressed this issue is Edwards v. Regina [1973] 1 All E.R. 152 (P.C. 1972), reprinted in part in S. Kadish and M. Paulsen, Criminal Law and Its Processes 232 (3d ed. 1975). In Edwards the defendant killed the deceased, whom he was trying to blackmail, when the deceased attacked the defendant with a knife. The trial judge rejected the defendant’s plea of provocation because the provocation was caused by the victim’s reaction to the blackmail attempt. The conviction was reversed on the ground that, when the hostile reaction by the person sought to be blackmailed goes to extreme lengths, this might constitute sufficient provocation even for the blackmailer.

102. 95 N.M. 260, 620 P.2d 1285 (1980).

103. Id. at 262, 620 P.2d at 1287.

104. The court did use the word “aggressor” in its description of the facts. Id. at 261, 620 P.2d at 1286.
essarily prevent a voluntary manslaughter instruction or conviction. An intent to pick a fight is not the same as an intent to kill; nor does it immunize an aggressor from fear or heat of passion.

Clearly, where the aggressor either tries to stop the fight or finds it necessary to defend himself against unreasonable force by the victim of his initial aggression, the aggressor may claim self-defense. Acts of the victim in the course of an altercation with the defendant may provoke the defendant to fear or rage. If, in responding to the defendant’s aggression, the victim’s acts involve the use of unreasonable force, the defendant’s act of killing may amount to voluntary manslaughter under the doctrine of imperfect self-defense. If the defendant does not attempt to end the fight or the victim does not use unreasonable force, it is not clear whether the victim’s reasonable defensive actions may be considered, as a matter of law, to be insufficient provocation. Perhaps Garcia implicitly answers this question in the affirmative by rejecting the claim that a manslaughter instruction was required where the victim ran away from the defendant-aggressor.

A scenario involving the imperfect self-defense by an aggressor deserves further analysis. Suppose a defendant starts a fight with a victim. The victim defends himself by using reasonable force only. During the fight, the victim is prevailing and the defendant-aggressor fears serious harm. Without abandoning the fight, the defendant then stabs and kills the victim. This situation would not give rise to a self-defense claim because the victim did not resort to unreasonable force. The issue of whether these facts would amount to sufficient provocation to sustain a conviction of voluntary manslaughter in the absence of a claim of self-defense has not been addressed in New Mexico. One might conclude that the aggressor forfeits his right to the mitigating effect of voluntary manslaughter in this situation when his acts cause the victim to provoke the defendant. This position, however, ignores the circumstances of the altercation and removes from jury consideration whether the victim’s acts may cause fear or rage in a person of ordinary disposition. Furthermore, the use of “sudden quarrel” in the language of the statute suggests that a fight, no matter who is the aggressor, may give rise to very strong emotions that might result in a homicide. The statute does not approve of such a killing, but it does recognize that a killing under such circumstances merits mitigation from murder to manslaughter. In summary, aggressor status ought not to be determinative and automatically result

106. See supra note 85 and accompanying text for a discussion of imperfect self-defense.
107. The sufficiency of provocation is measured by its effect on the ordinary person of average disposition. N.M. U.J.I. Crim. 2.22 (Supp. 1981).
in forfeiture of the mitigating defense of voluntary manslaughter. Instead, the defendant's aggression should be considered by the jury in light of the circumstances surrounding the killing when deciding whether provocation was sufficient.

Apart from the aggressor factor, Garcia might be rationalized on the ground that the circumstances of the shooting afford no inference of fear. Taking aim and shooting someone while he is running away does not suggest fear on the part of the defendant. This explanation, however, does not take into account other emotions which might have been aroused by the immediately preceding altercation. The defendant might have been so angered in the encounter with the victim that even when the victim abandoned the altercation, rage and anger were still acting on the defendant. Certainly the lapse of seconds would not be deemed sufficient time for those emotions to have cooled in the ordinary person.

Perhaps the court in Garcia focused entirely on the manner of the killing and felt that these circumstances precluded the existence of an extreme emotion. The manner of killing suggests a cool and deliberate act. On the other hand, the evidence may also support the inference that the killing was committed in the heat of anger. The latter inference permits an instruction on voluntary manslaughter if the provocation was adequate. This inference is also permissible on the basis of circumstantial evidence. The defendant need not testify that he killed in the heat of passion if the circumstances tend to show adequate provocation of fear or other extreme emotion.

Because the court's reasoning is incomplete, Garcia is subject to a number of interpretations. The case may have been decided correctly, but it is impossible to discern whether the defendant's aggressor status or the deliberate nature of the killing was the important factor in the decision.

The other case involving aggressive conduct by the defendant prior to the alleged provocative acts of the victim is State v. Martinez. Evidence was presented at trial that in the course of a robbery the defendant and

109. The Uniform Jury Instructions list emotions that are included within the statutory phrase, "heat of passion." These emotions are anger, rage, sudden resentment, terror, or other extreme emotions. N.M. U.J.I. Crim. 2.22 (Supp. 1981).
110. See infra notes 138 to 142 and accompanying text for a discussion of the New Mexico cases which have addressed the issue of what period of time will amount to sufficient cooling time to prevent a voluntary manslaughter instruction.
111. See supra text accompanying notes 109, 110.
the victim, an employee of an auto sales shop, engaged in a struggle. The accused and the deceased both suffered bruises, lacerations, and gunshot wounds. The wounds on the body of the deceased included many lacerations of the scalp, a fractured skull, a bullet wound in the left arm and chest, and bruises and contusions on both forearms that were described by experts as defensive wounds. In addition, wire was found wrapped around the victim’s neck. The defendant suffered a severe hand wound and multiple wounds on his legs and head.

The accused in *Martinez* claimed that the evidence of the struggle and his serious wounds warranted instructions on self-defense and voluntary manslaughter. The trial court refused to give the requested instructions, and the defendant was convicted of both armed robbery and felony murder. The New Mexico Supreme Court affirmed both convictions.

Addressing the claim of self-defense, the supreme court held that the evidence was insufficient to raise a reasonable doubt as to whether the defendant acted in self-defense. The court rejected the evidence of the defendant’s wounds as bearing on self-defense because it found that the wounds had been inflicted by the defensive movements of the victim when he resisted the offensive attack of the accused. The court held that the struggle alone was insufficient to warrant a self-defense charge to the jury. The supreme court apparently decided the self-defense issue by deciding that the defendant was the aggressor in the struggle with the victim. The court did not use the word “aggressor,” however, nor did it cite any New Mexico cases which deny self-defense to an aggressor.\(^1\)

With respect to the voluntary manslaughter issue, the supreme court rejected the defendant’s claim that the evidence of the struggle and the presence of wounds on the defendant were sufficient to require an instruction to the jury on manslaughter. Using the same reasoning it used in rejecting self-defense, the court stated that the defendant’s wounds were “proof that the victim tried to defend himself against the defendant’s deadly attacks. Defendant’s wounds alone do not constitute sufficient evidence to support an inference of provocation or acts in the heat of passion.”\(^1\) The court adopted the aggressor concept from the self-defense analysis and applied it to voluntary manslaughter. The accused in *Martinez* lost both the right to claim self-defense and the right to reduce his crime from murder to manslaughter because, as aggressor, he caused the victim’s acts which induced the accused’s fear.

Although the language of the opinion suggests that the defendant’s aggressor status was critical,\(^1\) the supreme court in *Martinez* did not

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2. State v. Martinez, 95 N.M. at 424, 622 P.2d at 1044.
3. The court stated “the fact that he [defendant] was injured constitutes some proof that the victim may have struck and shot defendant. However, it also constitutes proof that the victim tried
expressly rely on the aggressor doctrine to deny voluntary manslaughter to the accused. The court did not expressly consider whether exceptions to the aggressor doctrine in self-defense apply to voluntary manslaughter. Presumably, a victim’s use of unreasonable force or the accused’s abandonment of the fight may restore the aggressor-accused’s right to a voluntary manslaughter charge just as it restores his right to self-defense. This would be consistent with the doctrine of imperfect self-defense, which recognizes that a jury may logically decide the defendant acted in the heat of passion but also acted unreasonably in killing. This view of the evidence would not exculpate, but would mitigate a murder charge to manslaughter.

B. Provocation of Emotions Other Than Fear

The New Mexico Supreme Court affirmed several murder convictions in cases where the defendant killed a woman with whom he had had a romantic involvement. In each case, the trial court refused the accused’s...

to defend himself against defendant’s deadly attacks. Defendant’s wounds alone do not constitute sufficient evidence to support an inference of provocation or acts in the heat of passion.” Id. at 424, 622 P.2d at 1044.


120. See supra note 85 and accompanying text for a discussion of imperfect self-defense.

121. Two of the cases involving emotions other than fear, State v. Lujan, 94 N.M. 232, 608 P.2d 1114 (1980) and State v. Farris, 95 N.M. 96, 619 P.2d 541 (1980), are discussed fully in text. A third case, State v. Robinson, 94 N.M. 693, 616 P.2d 406 (1980), discussed the same issue, but contained so little evidence of actual provocation that it does not inform a general evidentiary standard. Unlike Lujan and Farris, the evidence in Robinson disclosed neither words as provocation nor build-up of provocation during the relationship. The accused presented no evidence of provocation or heat of passion because he claimed alibi. The state’s evidence showed that the defendant and the victim had dated sporadically for about one year. Several days before the homicide, the defendant and his girlfriend broke up. On the evening of the killing, the accused saw his ex-girlfriend with another man in a car and chased them at high speeds. When both cars stopped in front of the other man’s house, the accused shot the man and then shot his ex-girlfriend. He was convicted on two counts of first degree murder for the deaths of the ex-girlfriend and the other man. Voluntary manslaughter instructions were refused.

The Supreme Court in Robinson held that no instruction on manslaughter was justified or appropriate. The court acknowledged that the evidence of the defendant’s seeing his former girlfriend with another man “may support an inference of smoldering desire within the defendant to avenge Christine dating another male by doing away with both of them, but it would not support an inference of a ‘sudden quarrel’. Nor can such facts be held to give rise to that provocation recognized in the law as being adequate and proper to negate the presumption of malice.” Id. at 701, 616 P.2d at 414.

The Robinson case properly rejected voluntary manslaughter as a mitigating defense. Unlike Lujan and Farris, where there was evidence that the defendant’s spouse had “cheated” on him, there was no evidence in Robinson that the accused knew he had been wronged by his ex-girlfriend. Moreover, there was no provoking incident in Robinson like those in Lujan and Farris. The sight of his former girlfriend in a car with another man, in the absence of testimony by the accused as to provocation, is insufficient circumstantial evidence to warrant an instruction of voluntary manslaughter.
requests for voluntary manslaughter instructions. All three defendants were convicted of murder, and the convictions were affirmed.

1. Words as Provocation

In *State v. Lujan*,\(^{122}\) the defendant killed his ex-wife and her male friend. On the evening of the killing the defendant was "taunted" by his ex-wife. The words used by her in taunting the defendant were not described in the opinion. One hour later the defendant returned to the place he had last seen his ex-wife and shot and killed her. Nearly one hour later, he went to the home of his ex-wife's male friend and shot him. The defense claimed that a build-up of stress due to his wife's infidelity, a divorce, and worries about his children contributed to his emotional outburst on the evening of the killings. The trial court, however, excluded evidence which tended to support this theory—testimony that the defendant knew of his ex-wife's adultery with the male friend and testimony that the ex-wife contracted venereal disease from someone other than the defendant. The accused requested an instruction on voluntary manslaughter, but the trial judge denied the request. The jury convicted the defendant of first degree murder of both his former wife and her friend.

The supreme court, applying the test of *Smith*\(^{123}\) and *Trujillo*\(^{124}\) to the evidence, held that there was no evidence that the homicide was committed either in the heat of passion or upon a sudden quarrel. The court rejected the evidence of taunting by the ex-wife because "words alone cannot be sufficient provocation to reduce a murder charge to voluntary manslaughter."\(^{125}\)

The court followed prior New Mexico cases in holding that words alone are insufficient provocation.\(^{126}\) This doctrine, however, imposes an unnecessary limitation on the use of voluntary manslaughter as a mitigating defense. To say that words alone cannot amount to adequate provocation is to deny to the jury the assessment of whether the words, by themselves, might "arouse anger, rage, fear, sudden resentment, terror or other extreme emotions . . . such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition."\(^{127}\) Words can indeed inflict emotional injury. Racial

\(^{122}\) 94 N.M. 232, 608 P.2d 1114 (1980).
\(^{123}\) 89 N.M. 770, 558 P.2d 39 (1976). The judicial test for deciding whether a voluntary manslaughter instruction is required is discussed in the text accompanying notes 23 to 40, supra.
\(^{124}\) 27 N.M. 594, 203 P. 846 (1921).
\(^{125}\) State v. Lujan, 94 N.M. 232, 234, 608 P.2d 1114, 1116 (1980).
epithets, for example, may be far more provocative than a simple assault accompanied by threats. If the recipient of the words perceives that the words were intended to provoke, his emotional response may be extreme.

To accept words as sufficient provocation will not necessarily permit an unwarranted expansion of voluntary manslaughter as a mitigating defense. Human nature responds to many kinds of incitement. It is artificial to exclude words from the types of provocation which will allow a reduction from murder to manslaughter. The proper limitation should be the test of the ordinary person with an average disposition. This objective test would eliminate those claims of provocation which do not deserve the benefit of the mitigating effect of voluntary manslaughter. It is important to remember that the provocation formula does not exculpate; it merely reduces the degree of the crime.

Although the opinion in Lujan does not disclose the content of the ex-wife's words, the description of the words as "taunting" suggests that their purpose was to provoke the defendant. If the taunt referred to the ex-wife's infidelity and adultery and reflected on the defendant's cuckoldry, a jury might reasonably find that such words would arouse the passion of the ordinary person.

In Lujan, the supreme court did not consider that evidence of the prior relationship between the defendant and his former wife had any bearing on the issue of provocation, although prior provoking events were considered relevant in measuring the sufficiency of the evidence in State v. Benavidez. The court assumed that the ex-wife's taunting of the accused was the only evidence of provocation, and concluded that words alone are not sufficient provocation. It ignored the possibility that evidence of the wife's adultery and the divorce may have supported an inference of a build-up of provocation over time that culminated in the taunting words that ignited the defendant's pent-up emotions. In fact, the court upheld the trial court's evidentiary ruling which excluded evidence of the wife's adultery during the marriage, although this was known by the defendant.

The rejection of past provocations in Lujan, like the rejection of such evidence in Farris, prevents consideration of the provocation issue in context and ignores the build-up of emotions which can precede the final provocative act.

128. S. Kadish and M. Paulsen, Criminal Law and Its Processes (3d. ed. 1975), suggest that this limitation cannot be justified. Kadish and Paulsen note that the Model Penal Code does not impose such a limitation and that the Homicide Act of England abandoned it. See also. Annot., 2 A.L.R. 3d, 1292 (1965); Note, Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man, 106 U. Pa. L. Rev. 1021 (1958); and W. LaFave and A. Scott, Criminal Law 578 (1972), on this issue.

129. See supra note 12 for a discussion of the reasonable ordinary person test.

130. 94 N.M. 706, 616 P.2d 419 (1981). See supra notes 104 to 135 and accompanying text for a discussion of build-up of provocation.

Like the *Lujan* case, *State v. Farris* involved the killing of a spouse, a build-up of provocation during a stormy marriage, and words of provocation. The defendant in *Farris* shot and killed his estranged wife after a quarrel, in which the wife poked the defendant in the chest and told him to leave her boyfriend alone and that the boyfriend could come into the house anytime he wanted. After discounting the relevancy of the prior provoking circumstances of their marital relationship of 20 years, the supreme court stated that words alone are inadequate provocation, and held that the "mere addition of poking the chest to 'words alone' is insufficient to show provocation at the time of killing."  

The supreme court in *Farris* not only denied the provocative effect which words may have but also denied the added effect that words may have when accompanied by provocative conduct. Poking someone in the chest during a quarrel is hardly an innocuous act. It accentuates the nature of the words and heightens the emotional response to those words. Furthermore, when the words and the poking are considered in the context of the history of the wife's attachment to "boyfriends" during the course of marriage, it is difficult to understand why the evidence in *Farris* was insufficient to present to the jury the question of voluntary manslaughter.

Perhaps even more than the accused in *Lujan*, the defendant in *Farris*, because of the poking, deserved the opportunity to present his claim for mitigation to the jury. Whether the ordinary person, under the circumstances confronting the accused, would have been aroused to passion which would affect his ability to reason, and whether that would cause a temporary loss of control, should be a jury decision. It is inappropriate for the courts to remove the issue of sufficient provocation from jury consideration simply because the evidence of provocation includes "words alone" or "the mere addition of poking in the chest."

It is unfortunate that the New Mexico courts conclude that words cannot amount to sufficient provocation because that conclusion precludes the jury's consideration of the adequacy of the provocation. Comparing taunting words in *Lujan* and the words and poking in *Farris* with the types of provocation in the *Maestas*, *Benavidez*, and *Montano* cases, all of which required voluntary manslaughter instructions, it is difficult to see how the defendants in those cases were any more entitled to present

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132. *Id.*
133. This issue is discussed in the text accompanying notes 64 to 71, *supra*.
134. 95 N.M. at 97, 619 P.2d at 542.
136. *State v. Benavidez*, 94 N.M. 706, 708, 616 P.2d 419, 421 (1980) (victim's gesture could have been attempt to strike or move for weapon).
their claims for mitigation to the jury than were the defendants in *Lujan* or *Farris*.

2. Cooling Time

If there is a distinction between *Lujan* and the three cases listed above, it is in the existence of cooling time rather than in the type of provocation. In *Lujan*, the accused killed his former wife one hour after the initial provocation and killed her paramour one hour after that. In *Maestas*, *Benavidez*, and *Montano*, the killings occurred immediately after the provocation.

Voluntary manslaughter requires more than the concurrence of sufficient provocation and heat of passion. It requires that the act of killing be within a period of time after the sufficient provocation before the "ordinary person would have cooled off. . . ."\(^1\) The courts have deemed time lapses of three and one-half hours,\(^2\) three hours,\(^3\) one hour and forty minutes,\(^4\) and forty minutes\(^5\) to be too long even to present a jury question as to whether the ordinary person would have cooled off. A cooling-off period of at least forty minutes will prevent in New Mexico, as a matter of law, a voluntary manslaughter instruction.

3. Significance of Emotions Other Than Fear

According to the appellate courts, none of the three cases in which the defendants claimed provocation of extreme emotions other than fear required instructions on voluntary manslaughter.\(^6\) The supreme court held that the evidence in each case was insufficient to warrant submission of voluntary manslaughter to the jury. Furthermore, no New Mexico appellate decision of which the author is aware has ever said that a voluntary manslaughter charge was either erroneously withheld from the jury or correctly given to the jury where the evidence showed a killing due to an emotion other than fear.\(^7\) The failure of New Mexico courts to approve evidence of "other emotion" provocation as sufficient to raise the issue of manslaughter suggests their reluctance to accord the same significance

\(^7\) 144. In addition to the three cases discussed in the text and cited in note 143, supra, see, e.g., State v. Nevarez, 36 N.M. 41, 7 P.2d 933 (1932); State v. Trujillo, 27 N.M. 594, 203 P. 846 (1921); State v. Castro, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).
to such provocation that the courts give to provocation of fear.\textsuperscript{145} The courts have relied on the doctrines of "cooling time" and "words as insufficient provocation" to avoid recognizing that emotions other than fear can serve as the basis of a voluntary manslaughter instruction. This reluctance is hard to understand in view of the statutory language and the Uniform Jury Instructions, neither of which limits the type of passion or emotion which will permit murder to be reduced to manslaughter. If the reason for this reluctance is the notion that the ordinary person would be less likely to be moved to kill by emotions such as jealousy, rage, or anger than he would be moved to kill by fear, the New Mexico courts are infringing on the jury's function of applying the ordinary person test to the evidence of provocation. Jurors, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are . . . much better qualified to judge of the sufficiency and tendency of a given provocation and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.\textsuperscript{146}

\textbf{C. Lawful Acts as Provocation}

In several cases, the New Mexico courts have focused on the legality of the provoking conduct of the victim rather than on the emotional reaction of the defendant to the victim's provocation. The courts crystallized this focus in an additional rule for assessing the sufficiency of provocation—lawful acts by the victim cannot amount to sufficient provocation to warrant an instruction on voluntary manslaughter.

The genesis of this rule was a 1979 decision by the New Mexico Supreme Court. In \textit{State v. Manus},\textsuperscript{147} the court stated that lawful acts of a police officer can never rise to the level of sufficient provocation. In \textit{Manus}, police officer Wasmer had arrested the accused's wife for driving violations. The defendant approached the police car with a loaded shotgun. The shotgun discharged, inflicting wounds from which Officer Wasmer died.

\begin{itemize}
  \item \textsuperscript{145} Compare the so-called "unwritten law" in N.M. Stat. Ann. § 40A-2-4 (1953), repealed in 1973 after passage of the New Mexico Equal Rights Amendment. 1973 N.M. Laws, ch. 241, § 6. The unwritten law provided not a partial defense, but a full defense to a homicide prosecution where a male defendant killed his spouse or her paramour in the act of sexual intercourse.
  \item \textsuperscript{146} Maher v. People, 10 Mich. 212, 81 Am. Dec. 781 (1862). The court in \textit{Maher} added that the judge must to some extent decide upon the sufficiency of the alleged provocation. Only "when it is so clear as to admit of no reasonable doubt upon any theory that the alleged provocation could not have had any tendency to produce such a state of mind, in ordinary men" may the judge properly keep the issue from the jury. \textit{Id.} at 220, 81 Am. Dec. at 786.
  \item \textsuperscript{147} 93 N.M. 95, 597 P.2d 280 (1979).
\end{itemize}
At trial, prosecution and defense presented conflicting testimony concerning the shooting. The defendant testified that on the night of the shooting he had taken the shotgun out of his house to investigate what he thought might be prowlers. He approached the police car to report suspected prowlers. He was blinded by the lights of the police car and he was shot at from behind the light. He then fired his own gun. He did not remember firing the shotgun, and did not testify that he was in fear. Charged with the first degree murder of Officer Wasmer, Manus submitted an instruction on voluntary manslaughter. The trial court refused the instruction and Manus was convicted of first degree murder.

The Supreme Court of New Mexico affirmed the first degree murder conviction and rejected the claim that the evidence warranted an instruction to the jury on voluntary manslaughter. The court considered that the only evidence which might show sufficient provocation was the defendant's testimony, which was controverted, that Officer Wasmer fired the first shot. The court concluded that the defendant's version of the shooting was insufficient provocation as a matter of law.

The supreme court stated that "[a]cts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation." The supreme court acknowledged that the issue of whether the police officer used excessive force was normally a jury question, but stated that the defendant bore the burden of introducing evidence to establish sufficient provocation. In the absence of any evidence to show that the officer's act of shooting at the defendant was unreasonable or involved the use of excessive force, the court concluded that the defendant failed to introduce sufficient evidence of provocation to warrant an instruction on voluntary manslaughter.

The supreme court did not explain why the lawful acts of a police officer can never give rise to sufficient provocation. The court simply cited several cases from other jurisdictions. These cases do not appear to bear the weight that the court has placed on them.

Two cases on which the court relied stated that a lawful arrest cannot amount to sufficient provocation. These cases involved unsuccessful

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148. The state's evidence showed that the defendant was angry about Officer Wasmer's stopping his wife, got his shotgun and approached the police cars at a trot. He had some words with the officers. When he was told to put his shotgun down, the defendant pointed his gun at the officers and fired at Wasmer. Id. at 100, 597 P.2d at 285.

149. Id.

150. The court cited the following cases: People v. Roman, 256 Cal. App. 2d Supp. 656, 64 Cal. Rptr. 268 (Ct. App. 1967); Suhay v. United States, 95 F.2d 890 (10th Cir.), cert. denied, 304 U.S. 580 (1938); State v. Nolan, 354 Mo. 980, 192 S.W.2d 1016 (1946).

151. Two of the cases cited dealt with arrests as provocation. The defendants in both cases claimed that an unlawful arrest warranted an instruction on voluntary manslaughter where the defendant killed the arresting officer. People v. Roman, 256 Cal. App. 2d Supp. 268, 64 Cal. Rptr. 268 (Ct. App. 1967); Suhay v. United States, 95 F. 2d 890 (10th Cir.), cert. denied, 304 U.S. 580 (1938).
claims of unlawful arrest. They are not analogous, however, to the claimed provocation in *Manus*. The defendant in *Manus* did not assert that his request for a voluntary manslaughter charge was premised on an illegal arrest. Instead, he claimed that the officer's shooting at him was the provocative act. Furthermore, the emotional reaction to an unlawful arrest may be quite different from the response to being the target of a firearm. A person who believes he is being illegally detained may display anger or rage. On the other hand, fear may be the predominant emotion of one who is the target of a bullet.

The result in *Manus* might be better supported by an analysis of who caused the assault. The claimed provocation in *Manus* is like the defensive conduct of the victim in *State v. Martinez*, where the court refused a voluntary manslaughter conviction on the ground that the defendant caused the conduct which he then claimed was provocation. Like the defendant in *Martinez*, the defendant in *Manus* may be said to have caused the victim to respond as he did. *Manus* approached the police car at night carrying a shotgun. This conduct might reasonably have caused Officer Wasmer to believe that his own life was in danger. If Officer Wasmer then shot at *Manus*, the fear experienced by *Manus* was thus caused by his own actions.

The court also viewed the provocation as caused by the defendant. The court in *Manus* quoted *Wharton's Criminal Law and Procedure* to the effect that a defendant forfeits the defense of provocation when he intentionally causes the victim to do acts that allegedly provoke the de-

In one case the court accepted the legal premise that an unlawful arrest would amount to sufficient provocation but found that the arrest of the defendant was lawful. 256 Cal. App. 2d at 271. In the second case involving an arrest, the federal court stated that no arrest, lawful or unlawful, could be sufficient provocation to reduce murder to manslaughter. 95 F.2d at 895.

The other case cited by the New Mexico Supreme Court involved facts closer to those in *Manus*, but that case offered no support for the court's position. In *State v. Nolan*, 354 Mo. 980, 192 S.W.2d 1016 (1946) an officer was arresting the defendant for committing a felony. The defendant ran and the officer chased him and fired at him. The defendant returned the fire and killed the officer. The court in *Nolan* rejected a self-defense claim but upheld the voluntary manslaughter conviction where the officer acted lawfully in using deadly force to stop an escaping felon. *Id.* at ___, 192 S.W.2d at 1021-1022.

152. Some jurisdictions view an illegal arrest as sufficient to arouse a heat of passion in the reasonable person. See W. LaFave & A. Scott, Criminal Law 575 (1972) and the cases cited therein. See also Annot., 66 A.L.R. 353 (1905); Moreland, The Use of Force in Effecting or Resisting Arrest, 33 Neb. L. Rev. 408 (1954); Dickey, Culpable Homicides in Resisting Arrest, 18 Corn. L.Q. 373, 375-76 (1933).

Other jurisdictions, however, reject an illegal arrest as sufficient provocation on the ground that a reasonable person could not be aroused to a heat of passion by an illegal arrest. See W. LaFave & A. Scott, Criminal Law at 575.


154. See supra note 117 and accompanying text.

The court did not indicate whether defendant-induced provocation was a separate ground for its decision or whether the defendant’s acts were merely relevant in determining whether the victim’s acts were lawful. The discussion of the legality of Wasmer’s conduct immediately following the quotation about the defendant-caused provocation suggests, however, that the court viewed the defendant’s conduct as bearing on the legality of the officer’s exercise of force. The court may have seen the defendant’s conduct of approaching a police car at night with a shotgun as creating a lawful justification for Wasmer’s defensive actions.

The court in Manus apparently viewed the adequacy of provocation as dependent upon the lawfulness of the victim’s conduct together with a consideration of who caused the chain of reactions leading to death. The Manus decision may indicate that if the defendant causes a victim to fight back or to respond with reasonable force in self-defense, the victim’s acts will not constitute sufficient provocation. It is clear from Manus that a lawful arrest or the lawful exercise of force in making a lawful arrest will be insufficient provocation in any event.

The decision in Manus stated the “lawful act” doctrine in terms of the lawful acts of a peace officer. The court’s reliance on the defendant-induced provocation, however, signaled that it might apply the lawful provocation rule to non-police victims. Three years later, in State v. Marquez, the New Mexico Court of Appeals extended the Manus rule to include a victim who was not a peace officer and whose provocation consisted of acts in defense of herself or her home.

The claimed provocation in Marquez was the victim’s act of throwing a vase at the accused. The defendant broke into the home of the victim, a former girlfriend, picked up a knife in the kitchen, and awaited her return. When the victim and her mother arrived home, the defendant confronted them in the den. The victim became angry and accused the defendant of breaking into the house. According to the defendant’s testimony, he argued with the victim about a date she had. He then ordered her to sit by him. When she refused, he began stabbing her. She broke away and ran, but he caught up with her in the kitchen. She then threw a vase at him.

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156. The quotation appears in State v. Manus, 93 N.M. 95, 100, 597 P.2d 280, 284 (1979).
157. See supra notes 112–120 and accompanying text for a discussion of other New Mexico cases that have rejected defendant-induced provocation as sufficient to merit an instruction on voluntary manslaughter.
158. The court did not specifically find that the defendant’s acts justified Wasmer’s conduct because the court said that it was the defendant’s burden to show that the officer’s act was unlawful. In the absence of evidence on this issue, the court assumed that Officer Wasmer’s conduct was legal. 93 N.M. at 101, 597 P.2d at 284 (1979).
The victim's mother testified that her daughter threw the vase at the
defendant when he first entered the den where they were seated. The
defendant continued into the room and sat down. According to the mother,
the defendant took out a knife and began stabbing the victim only after
the two of them refused to lie down in front of him as he ordered.

The defendant was tried for murder. He requested an instruction on
voluntary manslaughter. The trial court denied the request, and the de-
fendant was convicted of second degree murder.

The court in Marquez held that neither version of the vase-throwing
incident was sufficient provocation to submit a voluntary manslaughter
charge to the jury. The court stated that because the defendant's testimony
established that the vase was thrown after the stabbing had begun, the
victim's act in no way provoked the accused. Looking at the mother's
version, the court concluded that the assault with a vase did not provoke
the defendant because the defendant did not react to it. Instead, he con-
tinued into the den and sat down. Only after the victim and her mother
refused to lie down as he ordered did he react by stabbing. The provocation
was the non-compliance with the defendant's commands, rather than the
thrown vase.

Although the court of appeals could have dismissed the defendant's
claim of provocation on the above grounds, it went further and added
that even if the assault with the vase provoked the defendant, it was not
adequate provocation. The court found that the victim was exercising a
legal right in throwing the vase at the accused. The defendant, according
to the court, was a burglar for breaking into the house, and the victim
had the right to throw the vase in defense of herself or her home. Citing
Manus, the court stated that "the exercise of a legal right, no matter how
offensive, is not provocation adequate to reduce homicide from murder
to manslaughter."160

The court in Marquez also suggested another ground for rejecting the
asserted provocation. It noted that the victim's provocation was induced
by the defendant. "If there was any provocation, it was not brought about
by . . . throwing a vase, but by defendant's illegal entry into . . . [the]
home."161

Neither the Manus court nor the Marquez court explained why the
lawfulness of a victim's conduct should be determinative in rejecting the
mitigation that voluntary manslaughter offers. Nor is it clear as a matter
of policy that the legality of the victim's act should preclude a man-

160. Id. at 749, 634 P.2d at 1301.
161. Id. The court in State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979) also relied on the fact
that the defendant's conduct caused the victim's lawful response. See supra notes 101–120 and
accompanying text for a discussion of defendant-induced provocation.
slaughter instruction. Neither the statute nor the Uniform Jury Instructions suggest that the defense function of voluntary manslaughter is available only when the provoking acts are unlawful.

The court in Manus did not advance policy reasons in support of its rule that lawful conduct by a peace officer is insufficient provocation. If the unstated justification for such a rule is the protection of an officer in the lawful discharge of his duties, this policy is not served by depriving the defendant of the availability of voluntary manslaughter. The defendant who kills in the heat of passion is not deterred by the lawfulness of his provoker's conduct. Deterrence assumes the ability to reason or react rationally to events. A person committing voluntary manslaughter, by definition, responds emotionally, not reasonably. Thus, it is difficult to see how the court's rule furthers a policy of protection of police officers. It is equally difficult to perceive any other policy justification for the lawful act doctrine.

Courts which hold that an arrest can never amount to sufficient provocation assume that a reasonable man could never be provoked by the circumstances of an arrest. This assumption is not always a tenable one. For instance, an undercover police agent may be given orders to arrest a known criminal who is believed to be armed and dangerous. The undercover agent then spots the defendant, whom he mistakenly believes to be the wanted criminal, but who is in fact an innocent person. Without a warning to the defendant, the agent jumps the defendant and wrestles him to the ground in an attempt to gain control of him. Largely out of anger, and perhaps partly out of fear, the defendant reacts to this assault by wielding a knife and stabbing to death his attacker, who unbeknownst to the defendant, is an officer of the law. Though the officer was acting in the line of duty to make the arrest, this would appear to be a situation in which a jury might reasonably find that the acts of the arresting officer were provocation sufficient to cause even a reasonable man to experience the same emotions which the defendant manifested when he was assaulted. It is possible that an arrest as described above might provoke even a reasonable man into a heat of passion. It thus becomes clear that the sweeping rule that an arrest, lawful or otherwise, can never amount to sufficient provocation, may serve injustice to defendants in certain circumstances.

162. The authorities who discuss the issue of an arrest as provocation do not question the doctrine that a lawful arrest cannot amount to adequate provocation. Nor do they provide much explanation of the development and rationale underlying this rule. The focus of these discussions is the issue of whether an illegal arrest may be sufficient provocation. See, e.g., W. LaFave & A. Scott, supra note 152, at 575. Model Penal Code and Commentaries 58 (Part II, 1980); Dickey, supra, note 152, at 375–376.
Two other examples highlight the invalidity of the "lawful-unlawful act" distinction as a factor in measuring the adequacy of provocation. A lawful search of an innocent person's home by a police officer who lawfully destroys valued possessions might reasonably arouse a heat of passion in the reasonable man. If the innocent person kills the officer in the heat of passion, the factors other than the lawful search may be significant in assessing the reasonableness of the emotional reaction. To shield some highly provocative acts behind the legality of the conduct is to deny the mitigating effect of voluntary manslaughter.

On the other hand, an unlawful arrest may involve no provocation, yet the New Mexico rule might permit a voluntary manslaughter conviction simply because the arrest was unlawful. For example, suppose a uniformed officer hands a defendant an arrest warrant, advises him he is under arrest and attempts to escort the defendant to the police cruiser. The defendant becomes provoked with the officer's attempt, struggles with the officer and kills him. The New Mexico rule suggests that if there was a defect in that attempted arrest the accused would be entitled to a voluntary manslaughter instruction. Yet a defect in an arrest might result from so technical a thing as an invalid warrant, which would have little or no effect on the emotions of the reasonable person. Predicating a defendant's right to a voluntary manslaughter instruction on the validity of the warrant gives undue significance to the illegality of the conduct and ignores the circumstances manifesting the presence or absence of adequate provocation.

The purpose served by voluntary manslaughter does not support the "lawful act" doctrine. Voluntary manslaughter is designed to afford an accused a measure of mitigation when he kills in the heat of passion upon adequate provocation. Whether the provocation is lawful or unlawful should not be determinative. The legality of the victim's conduct is a factor in considering the sufficiency of the provocation, but it is one circumstance of many which surround the events that lead to the killing. Singling out the lawfulness of the victim's conduct imposes a new element of voluntary manslaughter—that the victim's provocation be unlawful. No such element is suggested by the statute. To add such a requirement would deprive the jury of its function in evaluating the reasonableness of the defendant's emotional reaction to the provocation. The circumstance that the victim was acting lawfully should be but one factor for

163. For example, a search for drugs could legitimately include looking into picture frames or other valuable items.
164. The Model Penal Code Commentary on the crime of manslaughter recognizes that provocation is a concession to human weakness and that inquiry into the reasons for an actor's formulation of an intent to kill will sometimes reveal factors that should have significance in grading.
the jury to consider. The mitigating function of voluntary manslaughter, focusing as it does on the reasonableness of the defendant's passion, would suggest that the victim's conduct may be relevant to the assessment of the reasonableness of the defendant's emotional response. The acts of the victim, if lawful, should not be conclusive.

An additional reason opposes the court's lawful act doctrine. Defendants may not know the subtleties which make an arrest or a search lawful or unlawful. Even police officers are often forced in the heat of the moment to guess whether their conduct will be judged with hindsight to be lawful.\textsuperscript{166} Defendants who kill in the heat of passion are even less likely to know, evaluate, or think about the lawfulness of the victim's claimed provocation. A requirement of illegal provocation for voluntary manslaughter would impose a factor which is not ascertainable at the moment of the homicide and which is extraneous to an assessment of the defendant's culpability. Even if defendant is cognizant of the legality of the victim's conduct, a defendant may mistakenly believe that the victim's act is unlawful. A court's subsequent determination that the victim acted legally should not prevent a defendant from attempting to persuade a jury that a reasonable person would have thought that the victim's acts were unlawful and would have been provoked similarly into a heat of passion. Even self-defense does not require that the victim be an incontrovertible threat of imminent danger to the defendant. A reasonable belief that one's life is in danger is sufficient to raise self-defense,\textsuperscript{167} even if the victim presented no actual threat and acted lawfully.

The recent adoption of the lawful act doctrine in New Mexico runs counter to the modern trend to leave the evaluation of the adequacy of provocation to the jury. Courts in the past tended to restrict narrowly the types of provoking circumstances which could be submitted for jury consideration.\textsuperscript{168} This traditional view did not permit a jury to find provocation and return a manslaughter conviction "in any and all situations

\textsuperscript{166} The court in \textit{Manus} recognized the difficulty of determining the legality of police conduct when it quoted from \textit{Mead v. O'Connor}, 66 N.M. 170, 173, 344 P.2d 478, 480 (1959), a passage which said that courts "recognize the fact that emergencies arise when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court." 93 N.M. at 100, 597 P.2d at 285.

\textsuperscript{167} The first element of the Uniform Jury Instruction on self-defense states: "There was an \textit{appearance} of immediate danger of death. . . ." (emphasis added) N.M. U.J.I. Crim. 41.41 (Supp. 1981).

\textsuperscript{168} \textit{See} S. Kadish \& M. Paulsen, Criminal Law and Its Processes 225 (3d ed. 1975); W. LaFave \& A. Scott, Criminal Law 574 (1972); Model Penal Code and Commentaries 57-58 (Part II, 1980). For example, "words alone, no matter how insulting, could not amount to adequate provocation." \textit{Id.} at 58. New Mexico, likewise, does not permit provocation by words to be submitted to a jury. \textit{See supra} notes 122-137 and accompanying text for a discussion of the New Mexico rule on words as provocation.
in which the jury should find the circumstances reasonably provocative.\textsuperscript{169}

There is a growing trend to sweep away these rigid rules limiting provocation to only certain circumstances.\textsuperscript{170} The Model Penal Code\textsuperscript{171} and many jurisdictions\textsuperscript{172} have abandoned the preconceived notions as to what is sufficient provocation.

The question of whether a lawful arrest can amount to adequate provocation should be one for the jury, not the judge, to decide. Juries are much better qualified to judge the emotional reaction of the reasonable person.\textsuperscript{173} If the defendant reasonably believes he is being wantonly assaulted when in truth an officer is merely attempting lawfully to arrest him, and the defendant kills in response to the situation as he perceives it, he should be at least permitted to present his case to the trier of fact. Carving out a broad categorical exception based on the legal status of the victim’s conduct, would, in some instances, unjustly deprive a defendant of a defense to which he should be entitled.

\section*{V. CONCLUSION}

The lawful arrest rule sets up yet another barrier to obtaining a voluntary manslaughter instruction in New Mexico. Further, the application of the \textit{Smith–Trujillo} test to the evidence in the cases which are the subject of this article indicates that it is generally difficult to have voluntary manslaughter submitted to the jury in a murder prosecution in New Mexico. The \textit{Smith–Trujillo} test, which requires evidence sufficient to support a conviction as a condition for a voluntary manslaughter instruction, sets such a high standard of proof that it is difficult to meet except in the self-defense situation. Furthermore, this test produces the “grotesque outcome”\textsuperscript{174} of complete discharge of the accused where the trial judge miscalculates the sufficiency of the evidence. The remedy of complete discharge for incorrectly submitting voluntary manslaughter to the jury has provided an incentive for trial judges to refuse instructions on this issue.\textsuperscript{175} The effect of the \textit{Smith–Trujillo} test, as it has been applied recently, has been

\begin{footnotes}
\item[170] \textit{Id.} at 226; \textit{See also} W. LaFave and A. Scott, Criminal Law, at 575.
\item[172] \textit{See} the list of jurisdictions included in S. Kadish and M. Paulson, Criminal Law and Its Processes, at 226. England has also decided to leave the issue of the adequacy of provocation to the jury. \textit{See} English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, Part I, § 3.
\item[173] \textit{See} the quotation from Maher v. People, 10 Mich. 212, 81 Am. Dec. 781 (1862) which appears in the text accompanying note 146, \textit{supra}.
\item[175] \textit{See supra} text accompanying notes 23 to 60.
\end{footnotes}
the disparagement of voluntary manslaughter as a mitigating defense. Taken together with the lawful arrest rule and the provocative words doctrine, the Smith–Trujillo test means that a voluntary manslaughter instruction is not used in New Mexico as often as it should be.

The recent cases suggest the need for re-examination of the role of voluntary manslaughter in the New Mexico homicide scheme. The dual purpose of manslaughter in New Mexico has created problems for the courts. When trial courts permit voluntary manslaughter to serve as a mitigating defense to murder, appellate courts often reverse the convictions. When the trial courts view voluntary manslaughter more as a separate and distinct crime, the defendant is deprived of its mitigating purpose.

The solution lies in removing the conflict in the roles. Voluntary manslaughter could serve both functions without an inherent conflict if it were redefined to be a true lesser included offense of murder. For example, if voluntary manslaughter required an intent to kill, while murder were defined to require an intent to kill plus the absence of heat of passion due to adequate provocation, the tension which currently exists would disappear. Voluntary manslaughter could then operate as both a mitigating defense and a crime at the same time. The drafters of the Uniform Jury Instructions attempted such a compromise in the instructions on murder and voluntary manslaughter. Instructions, however, cannot change the statutory definition of voluntary manslaughter. The responsibility rests with the legislature. The homicide law in New Mexico should be revised to resolve the contradiction in the murder-manslaughter scheme.