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Investigating Self-Defense Homicides

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The advocacy for the investigators and prosecutors during any investigation and subsequent adjudication should ultimately be for the facts and evidence. However, from time to time, police investigators shade their fact-finding function into an attempt to achieve what they believe to be "justice." This is especially common in self-defense cases.

Contemporary laws pertaining to self-defense such as "Stand Your Ground" and the "Castle Doctrine" represent significant changes to the civil rights of Americans when it comes to defending themselves and others with deadly force. As a result, we have seen extraordinary changes in our criminal justice system. However, such laws are not without their controversy.

Officers have to be meticulous at the crime scene and prevent bias from coloring their assumptions when civilians use deadly force and claim self-defense.

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POLITICAL CASES

SELF-DEFENSE CASES often present political, racial, and police practices challenges at all levels of the criminal and civil justice systems.

The prosecutors' own beliefs regarding gun ownership, community activism, and media influence can also become key elements in their determinations as to whether to prosecute the person who asserts that he or she killed in self-defense. So as with police uses of force and officer-involved shootings, politics and speculation rather than forensic facts can affect the investigation's outcome and a prosecutor's decision to move forward toward filing on and prosecuting the citizen shooter.

As one who has investigated hundreds of officer-involved shootings, I am keenly aware that when a shooting involves one of their own, police agencies and investigators spare no resources or expenses in their attempt to reconcile statements and forensic evidence in an effort to resolve the shooting, hopefully in favor of the officer or officers involved.

In such cases, the county prosecutor usually works in lock-step with police investigators and forensic technicians in arriving at legal determinations. Depending upon the fact pattern, more often than not the prosecutor rules that the involved officer's use of deadly force was legally justified. In my line of work, this is referred to as a "good shoot."

Civilians' deadly force cases are different from those that in-

volve police officers. However, the documented fact patterns of many civilian self-defense homicide incidents are not dissimilar from those in officer-involved shootings. A felony is being committed and the citizen defender and perhaps his or her family are suddenly threatened without warning often in the dead of night.

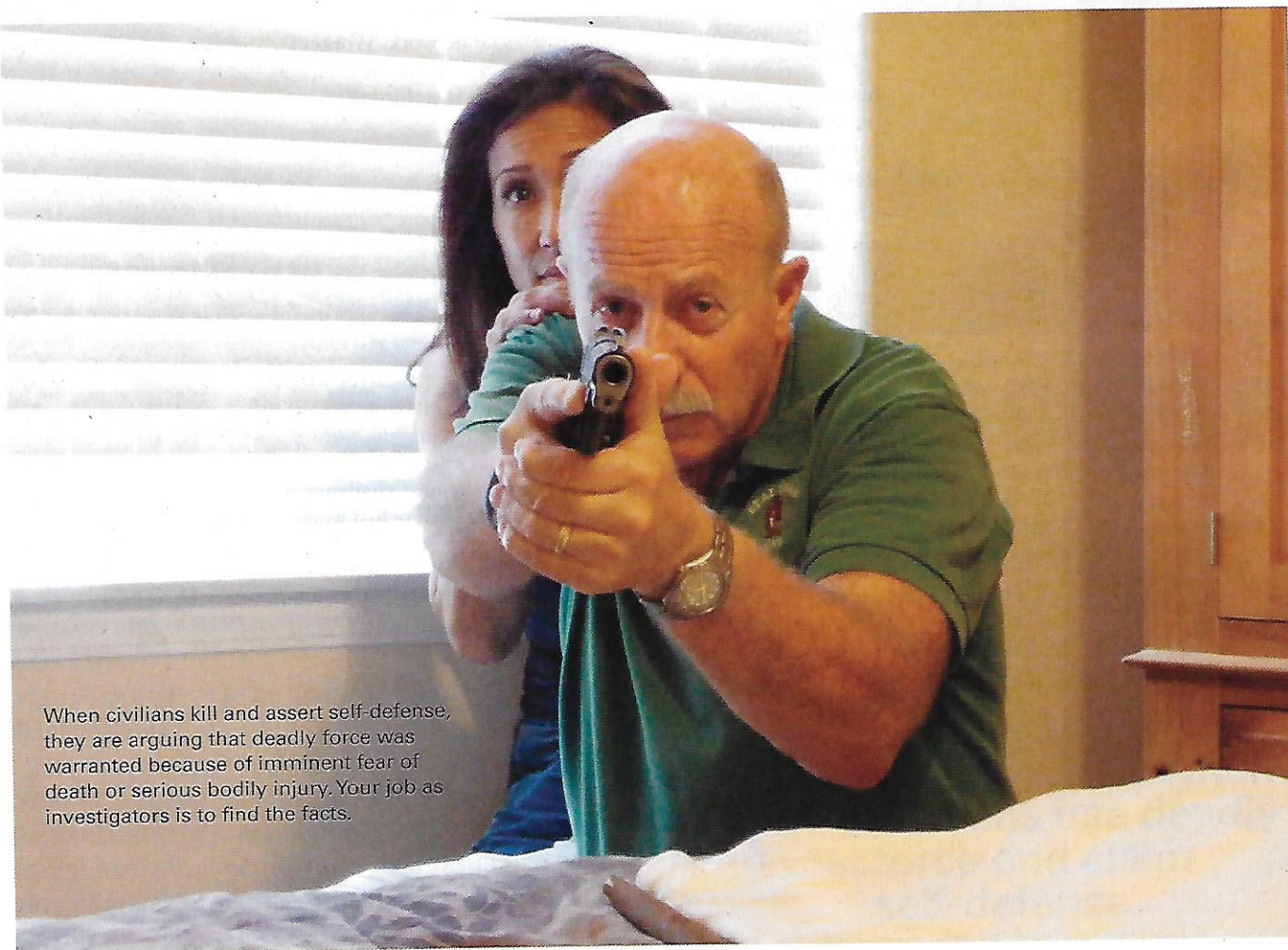
Such confrontations are rapidly evolving events; there is no police back-up immediately available; and there is often a disparity of force posed by the assailant or assailants. So the civilian defender experiences a sincere belief, based upon a totality of circumstances that his life or the lives of others in his family or at his business are under threat, that he is forced to use deadly force to stop that threat.

ELEMENTS OF SELF-DEFENSE

WHILE THIS ARTICLE is not intended to be a legal opinion on the laws regarding self-defense and deadly force, it is important to provide some legal context. While there are some slight differences in the laws governing the use of deadly force between various states, there are five basic elements regarding the legal justification of its use to resolve deadly confrontations.

1. Innocence—The defender must be seen as an innocent party. This means that the citizen using deadly force must not be viewed as the aggressor in the confrontation who initiated or escalated the conflict.

2. Imminent Fear—The citizen asserting self-defense must have



When civilians kill and assert self-defense, they are arguing that deadly force was warranted because of imminent fear of death or serious bodily injury. Your job as investigators is to find the facts.

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been in imminent fear of either serious bodily injury or death to himself or another person or persons. That fear must be seen as having been objectively reasonable in consideration of the "totality of circumstances" that transpired during the incident. It is important to keep in mind that ultimately the person shot does not even have to have been found to be actually armed with a weapon, as long as the individual's expressed fear for her life or that of another is seen to have been objectively reasonable at the moment she used deadly force.

3. Disparity of Force—If it is objectively reasonable, safe, and practical for a defender to stop a threat using a skill or weapon that is less than lethal, he is required to do so. A person is also required to cease using deadly force once the threat of serious bodily injury or death has ended.

Disparity of force also refers to circumstances where the assailant is larger, stronger, younger, or faster; and/or when the citizen is threatened by more than one assailant. In such situations, it might be completely reasonable for a defender to elevate to the use of deadly force. It is also important to bear in mind that defending persons are not required to resort to less-lethal means of defense before using deadly force.

4. The Retreat Option—A number of states require that a defending person disengage from a deadly threat, but only if it is safe and practical to do so. However, it is important to remember that defenders are not required to place themselves and others at greater risk by attempting to escape from a deadly threat.

Human factors such as "the reactionary gap," action-reaction perception lag time, and stress-induced psychophysiological challenges play a major role as to whether it is actually safe or prudent to retreat.

5. The "Castle Doctrine"—Castle laws are in effect in 46 states, and they govern the use of deadly force in defense of one's home. Essentially, a person's use of deadly force in defense of his or her home when attempting to stop or prevent a felony is seen as having been justified provided the totality of circumstances support the claim of self-defense and/or defense of another.

INVESTIGATION PITFALLS

THERE ARE A NUMBER OF COMMON PROBLEMS I have seen as a forensic expert when reexamining and analyzing law enforcement investigations of civilian shooting incidents where a self-defense claim is asserted. And once critical mistakes are made, it can be very difficult if not impossible to salvage an investigation. For an attorney defending an unfairly arrested and prosecuted client, identifying these investigative and prosecutorial mistakes is critical.

Here's a quick discussion of common investigative and prosecutorial mistakes that can hamper self-defense cases.

★ **Faulty, incomplete initial investigation by first responders.**—Reconciling statements with forensic evidence is a common problem in any complex investigation. Depending upon the jurisdiction, it is not unusual for patrol officers rather than experienced detectives to be the first "investigators" on-scene in any shooting.

Generally in smaller agencies, the average patrol officer and supervisor may lack experience in crime scene management, forensic interviewing, and the identification and collection of



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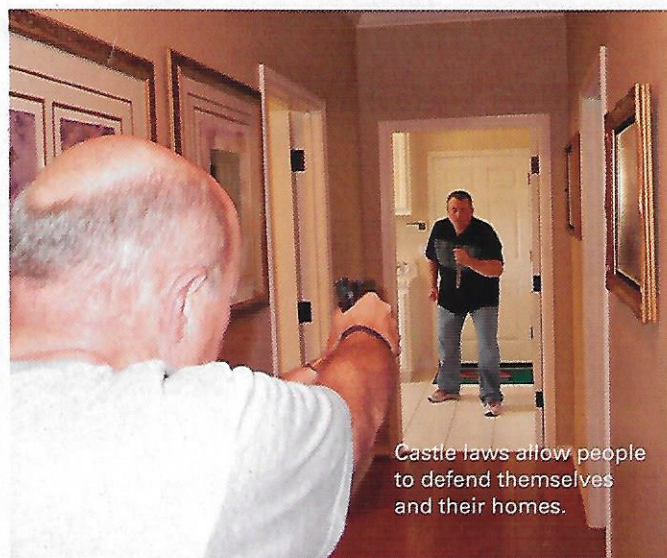
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Castle laws allow people to defend themselves and their homes.

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evidence. As a result, a problem could immediately arise if the first officer or officers on-scene do a mediocre to poor job establishing and securing the crime scene and interviewing witnesses and the person asserting self-defense.

★ **Manipulating, damaging, and/or destroying a crime scene.**—The first moments of any crime scene investigation are critical. Every minute that passes, evidence can be moved, adulterated, destroyed, not identified, and/or lost forever. Officers and other emergency personnel and their vehicles have a tendency to destroy crime scenes by unintentionally displacing and destroying evidence.

Officers knowingly and unknowingly manipulate crime scenes by moving evidence; turning on lights at the scene; damaging, destroying and/or discarding critical trace evidence; moving bodies; and picking up weapons that the deceased subject was holding when shot.

The ability or failure to properly secure a crime scene and to identify, document, and collect forensic evidence that is either exculpatory or incriminating can make or break any case for investigators or prosecutors.

★ **Failure to properly identify and obtain initial statements from involved parties, witnesses, and suspects.**—Identifying and sequestering involved parties and obtaining their initial statements is critical in any investigation where self-defense is asserted. The average police officer lacks experience and skill in conducting forensic interviews where a civilian defender is involved because these types of shootings are rare. Self-defense shooting investigations are not taught in police academies, basic detective school, or even in most homicide courses.

Many detectives also lack experience and skills in conducting forensic cognitive, behavioral, and kinesic interviews with involved parties. The psychological dynamics associated with stress memory recall such as plausible possibilities, perseveration, occultation, and victim trauma syndrome can hinder initial statements. And the psychophysiological impairments of temporal distortion, loss of near vision, perceptual narrowing, and auditory occlusion or exclusion at the time of the incident can further impair memory and unintentionally distort a defender's statement as to what transpired. That means the interviewer

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needs to be aware of how these factors can influence memory.

★ **Trying to force a square peg into a round hole.**—Perhaps the most egregious problem with self-defense cases that I am familiar with as a forensic expert is where detectives initially make a non-forensic and flawed speculative assumption regarding a defender's presumption of guilt. In such instances, detectives then attempt to wrap their "investigation" around the defective foundation of their case. Police investigators need to be scrupulously neutral and not reach conclusions as to whether the incident they are investigating is a "good shoot" or a "bad shoot."

★ **Failure to properly reconcile statements with crime scene evidence.**—It is the sworn obligation of law enforcement to bring all of its investigative and forensic resources to bear when investigating any homicide incident. It is also the responsibility of officers and detectives to spend equal amounts of time and energy determining what behavior is exculpatory and innocent and what may be criminal. These are codified professional police practices.

A significant problem that I find in self-defense shooting investigations is the investigating officers' failure to reconcile statements with forensic evidence. Again, this issue more often than not arises when officers speculate and make non-forensic credibility determinations from inexperience, personal biases, and/or being poorly informed or misinformed in the areas of crime scene management and forensic interviewing techniques.

While on-scene, investigators need to attempt to reconstruct the crime scene as best they can, using statements and obvious forensic evidence in order to reconcile the statements of the involved parties and witnesses. This is especially important in cases where a person asserts self-defense, the suspect assailant in a residence or business is deceased, and there are no witnesses to the shooting.

Police investigators and prosecution experts should not be able to testify against a defendant who asserts self-defense by using "would-a, could-a, should-a" opinions made with the benefit of 20/20 hindsight. I would argue that the professional legal standard for the investigation and legal review of any shooting homicide incident where self-defense is asserted should be: (1) Was the shooting objectively reasonable? (2) Was there any duty for the shooter to retreat? and (3) Does the legal principle of "Stand Your Ground," if relevant, apply in the circumstances presented?

It is important that detectives and prosecutors work as a team to objectively determine the facts of a case that are supported by evidence. Non-fact-based, non-forensic speculation and untested credibility determinations have no place in the presentation of evidence before the trier of fact.

A RED FLAG

DEFENSE ATTORNEYS AND PROSECUTORS need to be keenly aware of what I refer to as "Red Flag Warnings." These are themes of investigative and/or prosecutorial misconduct in any investigation and prosecution of any homicide where self-defense is asserted. The discovery, analysis, and proper presentation of these themes before the triers of fact appear to resonate positively with them and can lead to an appropriate verdict of acquittal for defendants who have justifiably used deadly force for self-defense.

★ **Officers and prosecutors failing to adhere to codified stan-**

dards of conduct.—The reasonable expectation of the American people is that police officers and prosecutors are here to protect us both physically and constitutionally. When officers, detectives, or prosecutors behave in any manner that suggests or confirms their inexperience, negligence, or intentional refusal to adhere to codified standards of police and legal practices and/or constitutional protections of the people, juries become suspicious and critical.

Judges and jurors are also skeptical when police officers invoke counsel by way of the prosecutor when being interviewed by defense investigators when they are not criminal or civil defendants. This is also the case when prosecutors interfere with and/or obstruct the defense's attempts to uncover exculpatory physical evidence and witness statements. Each side should be provided equal and unobstructed access to witnesses. The only way to accomplish this goal is through transparency and equal access.

Examples of a lack of prosecutorial and defense transparency and evidentiary access include, but are not limited to: police advising witnesses not to speak with the defendant's investigators and experts; not making investigating officers available for interviews; prosecutors encouraging investigating officers to invoke their right to counsel in criminal cases not jointly involved in civil litigation (also referred to as "lawyering up"); prosecutors invoking counsel on behalf of officers and civilian forensic staff without their permission; not providing timely access to forensic evidence for examination; prosecutors interfering with defense investigators' interviews of witnesses; defense attorneys, investigators or experts concealing statements and evidence; and opposing attorneys being deceptive or overtly lying to each other, investigators, and experts to thwart, obstruct, or deny the ability to investigate, examine and/or present evidence in court.

The discovery, analysis, and proper presentation of a theme of investigative and/or prosecutorial malpractice is critical to the defense of any wrongfully accused and prosecuted civilian defender forced to resort to the use of deadly force to save the life of themselves or others.

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