

The Tactical Kentucky Concealed Carry Manual

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Updated 2009 and for the 2005-2006 KY CCDW Law Changes

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This manual was designed for my CCDW students and may be freely reprinted and distributed as long as it is printed in its entirety and gives credit to the author and links to the websites www.Kentucky-Concealed or www.Bankruptcy-Divorce.com for the latest edition. We appreciate comments and contributions, whether they are criticisms or not so that we may improve upon it. It comes from a course I taught in 1997 to police officers but that course lacked the knowledge and depth of this short manual. It is now meant to be used as a resource for police officers and textbook for CCDW permit instructors and/or others that want a concealed carry and self defense manual on Kentucky law. This manual is divided into Criminal Defense and a discussion of Civil Liability so you can read and understand the sections separately but the issues of law are a seamless web. It attempts to summarize the law so that it can be easily read in one evening or covered in a course and used as a reference.

1. FORWARD

Definition of Tactical: The strategic positioning of knowledge and resources to obtain maximum advantage. I am a trial lawyer by nature but I now primarily practice bankruptcy law. I have sued police departments and I have also been both a prosecutor and a criminal defense attorney. My other legal manuals on Bankruptcy, Divorce, Lemon Auto, Personal Injury and Wills were titled “tactical” manuals. These manuals are for general reference and information. They are not meant to help someone be crafty, but are instead meant to give deserving people the information and resources they need to know. A Kentucky Supreme Court judge in 1956 described the extreme tactical advantage that concealed carry places a person in as: “the undue advantage given to a person.” Carrying a concealed weapon is such an extreme advantage that carrying a concealed weapon is one of the few restrictions Kentucky makes. Carrying a concealed “weapon” is a crime unless you are trained and licensed to do so.

This manual is meant to be used as a reference whether you are a police officer or a civilian. Both the police officers and civilian’s right to carry a concealed deadly weapon are regulated. The only valid reason to carry a concealed deadly weapon is for self- protection. However violence in America is a fact of life. Homicide is the leading cause of death for young black males from 15-34 and the second leading cause for all males from 15-24¹. Using a weapon has automatic consequences and at least one officer in Kentucky has been sentenced for murder when he shot the driver of an auto in a 1931 case. In 1962 the cost for professional liability insurance costs for police officers was only 12 dollars per year. In 1992 the average cost was 900 and in 2009 the cost is now in the thousands per officer. In 1992 there was an average of one lawsuit filed for every 30 officers per year with 45 % of the lawsuits alleging abuse of force². The latest figures show that this rate is increasing. If deadly force is used there are often lawsuits filed by felons that go on the offense and sue the persons (normally an officer) that defended themselves. In today’s society we can even see persons that use suicide by cop as a method to support their families³. The cost became so high that police officers followed the contain and wait strategy at Columbine and waited for 45 minutes while 10 persons which should have been saved were killed after they arrived. It is estimated that one person is killed by the gunman every 15 seconds in such cases and police cannot wait. Today police are trained instead to be an “active shooter” and to neutralize the threat and save lives.

¹ Novello 1992 Journal of the American Medical Ass. 267

² Schmidt 1992 Americans for Effective Law Enforcement Executive director communication to William Geller 9-9-92 see also Recent Developments in Civil Liability Journal of Police Science and Administration 1976 June 2 197-202

³ Suicide by cop is a legal term of art for the people that force an officer to shoot. This has been done by some when they learn they have a horrible terminal disease and no funds to leave their family.

Any weapon may accidentally discharge in the heat of a situation and even a police officer can make a poor decision while under stress. Carrying a weapon should only be done if there is a need for it by those that have the maturity, training, psychological intelligence and emotional stability to do so.

The police can't be everywhere to prevent crimes from being committed. It is the officer's sworn duty to respond to a crime, perhaps catch the criminal, detain the perpetrator for prosecution and go home alive at the end of his shift. He arrives after the homicide has occurred too late to save the deceased. Personal Protection is your responsibility. You can't sue the police because they failed to save you from a criminal. In fact, the Supreme Court has repeatedly ruled that police are immune from suit even if they have knowledge and fail or refuse to act. But there are steps a person can take to protect himself or herself. A protection that is often effective, is simply locking up your car and home to prevent burglary, or avoiding confrontational situations. But there are occupations and times when something more effective is needed for protection.

I am licensed to carry a concealed deadly weapon and teach concealed carry. I have never pulled my gun out. I have no desire to harm any other person. However, I and my family have been shot at. My father laid in a coma for 7 days due to being black jacked in a robbery. A girlfriend was robbed, raped and killed at work. A wife was mugged while she was in her 9th month of pregnancy and a close personal friend that is a police officer in Jefferson County laid in a hospital for a week due to an attack. I have had a grenade placed on my door just because I defended a mother and child from an insane husband that attempted to kill them. All of these are reasons why I carry. I never want to be in the NRA armed citizen column. But I love the practice of law and that creates a need for personal protection.

If you carry a weapon for self protection you must know the applicable law, and be willing to protect yourself if the need arises. Hopefully it never arises. This manual does not explain how to shoot a gun or advocate gun control one way or another. I am only explaining what the law is in the state of Kentucky about Concealed Carry, Self Defense and Justifiable Homicide as an instructional manual. This is not legal advice because every fact situation is different which leads to different results, so let me make that disclaimer. Please consult an attorney if you are wishing to obtain legal advice about a specific situation. Justifiable homicide is an affirmative legal defense. It must be made at the start of the case and it shifts the burden of proof to the person claiming it. Justifiable Homicide and the less effective legal defense of necessity (sometimes called choice of evils or doctrine of comparative harm) is as much a part of Concealed carry law as tires and brakes are to a car. So is the civil liability that can arise. So for that reason, case law is used to explain when a person can and can't use deadly force in self defense. This document is an ongoing project that I am attempting to write for concealed carry instructors, police officers and others that wish to understand this limited area of the law and I accept suggestions.

I believe that anyone that carries a deadly weapon is foolish to carry it openly. Carrying a gun or other weapon openly invites predators to assault you and take the weapon away. It invites the most vicious of attacks by criminals who practice how to disarm police and citizens. Being careless, unwilling, unskilled or unable to use a weapon you are carrying is a disaster waiting to happen. Predators sense when their targets are timid, unable or unwilling to protect themselves. We constantly communicate with words, body language, etc. That is why people that are assaulted are often assaulted repeatedly because they communicate that they carry money, or are easy targets. Carrying openly gives away the tactical advantage of carrying a weapon concealed. It invites the criminal to attack you and it scares the public.

Frightening the public only causes an increase in restrictive gun laws. Don't expose a weapon unless your life is at risk and if you must carry, carry it concealed. These are my suggested basic rules of the road:

1. When in doubt keep it holstered and concealed. Removing it will expose you to:
 - a. being mugged by a criminal that wants the weapon,
 - b. having it stolen after you advertise you now have something to steal,
 - c. having an innocent child or person use the weapon injuring themselves with it or
 - d. being charged with a crime by someone that amuses himself by claiming you with threatening them with a gun.

The most common way for you to be charged with manslaughter results when an innocent bystander is shot. Often an undercover police officer may be mistakenly shot by the "Good Citizen" who accidentally comes to the aid of someone that is actually a crook. While an officer is attempting an arrest a prostitute will yell rape in order to attempt escape. The prostitute escapes and the citizen goes to prison. Whereas an officer may be required to use lethal force in his duties no citizen is ever required to defend a stranger with lethal force and in Kentucky if you do you must be correct in that decision. The law will allow you to make a mistake if you are defending yourself. But you can't make any mistake if you rush to defend another. Keep it concealed and holstered until the moment your life is in danger and you need it as a safety device.

2. 90% of all shootings happen at less than 3 yards in less than 5 seconds and involve less than 3 shots⁴. Most of the lawsuits are won by innocent bystanders that were injured due to two different types of poor marksmanship. Therefore when you choose a weapon remember that a bullet should not become a danger to innocent bystanders. Any bullet can go through several walls and strike an innocent party. You may want to choose a lightweight hollow point bullet that breaks apart and that cannot penetrate through the perpetrator to strike some innocent party on the other side. Also heavy recoil weapons such as a 44 magnum are hard to control and poorly placed shots are a danger to possible bystanders. Large weapons are also difficult or impossible to carry and conceal because they "print" and advertise their presence. The bullets researched to be effective at stopping an attack are listed on my website. Remember you are stopping an attack not killing a person. Killing someone but having them survive just long enough to kill you is fatal to you. A bullet that merely kills is not enough, it must stop the attack immediately. That may take a different kind of force that is overwhelming but perhaps not lethal. This kind of force can and often allows the attacker to live and to be prosecuted.
3. Never, Never, ever fire warning shots or shots at moving cars etc. These are shots that are risky or obviously dangerous to others and are never justified unless the auto is being used to kill the shooter. Your good intentions won't save you from a murder or manslaughter charge. Even if you are a police officer. A shot at a fleeing auto will almost guarantee a civil lawsuit because it

⁴ Rutledge, Devalis The Officer Survival Manual 1988 page 269

almost always endangers innocent bystanders. All the prosecutor or trial lawyer is required to prove is that you used deadly force with negligence to threaten, injure or kill to win that case.

4. In a shooting the 5 most common errors (reasons for criminal prosecution or civil lawsuits for damages) for citizens and officers are:
 - a. Failure to follow rules (such as police department standards)
 - b. Great marksmanship oops wrong target (shot an innocent person)
 - c. Right target oops poor marksmanship (shot the wrong and innocent person)
 - d. Lack of immediate danger to the shooter from the person injured
 - e. Talking too much (bragging or lying about the facts)
 - f. Tombstone courage (inattention, taking a bad position and/or missing danger signs)
5. Finally never use or threaten deadly force unless your life is in danger. The use or threat of deadly force is a felony or misdemeanor if it is not legally excused.

If you are in the unlucky situation where you have been forced to defend yourself remember that you are very likely to be prosecuted and sued. People are in stress and confused after a shooting or while they are being questioned by police. They often attempt to talk the police out of prosecution. They often make presumptive or conflicting statements that look like lies. They make statements while they are unsure of the facts. They may offer answers that are guesses, trying to show that they know the facts because they fear looking stupid or try to please the officer. They may feel pressured to respond in detail to facts they do not remember because it all happened so fast. Some developed tunnel vision where they concentrate intently on one item and block out what was going on off to the side. People often offer what they think is the “right” answer hoping it will get them out of trouble. Some even lie from fear when placed under pressure. Your statements can and will be used against you so shut up and get an attorney.

This is not the time to talk and make a misstatement or lie. It is the time to find a very, very good attorney that understands how to defend an innocent defendant. But few attorneys understand the concepts or have had the training for a capital murder case. Of the few that are trained most of those have only represented guilty persons. Hiring an attorney that doesn't know how to handle a case for an innocent person is as bad as hiring someone that doesn't practice criminal law. If you have used a weapon and killed in self defense you will appear to be the aggressor when you are actually the victim. The predator chose to forfeit his life in the process of committing a crime. You simply had no other choice because you were facing a crippling or fatal injury. The person who caused you to use deadly force was a felon. His buddies and family will be felons also, or at least they are rarely “nice people.” Such people will lie and say that you were the aggressor, especially to escape prosecution themselves, or to win a lawsuit that will pay them perhaps millions. Worse, police and prosecutors can be under political or department pressure to convict someone for the alleged “murder”.

Don't look like a deer in the headlights wishing that you had read this manual and knew the law a little better. If you read it after the fact you read it too late. You should know the law, before you choose to carry a weapon. You should be able to make an intelligent decision about whether to shoot or don't

shoot. Otherwise you will pay a price. Invariably the only legal defense for either a citizen or an officer having pulled that weapon and used it is that you needed to do so in order to protect your own life or the life of a third person normally a family member in a situation where you had no other choice. You can't claim justifiable homicide by accident. Justifiable homicide means you 1. **had no other reasonable choice**, 2. **you intentionally shot**, and 3. **that you were right to do so**. Similarly the defense of necessity also called the Choice of Evils Doctrine is a claim that you **intentionally shot the aggressor** not "accidentally" shot him. Let me make that clear again or restate that. A politically incorrect way that has been used to say this is, "idiots go to prison so that they will not have accidents a second time and harm others." If you intentionally shot the aggressor, with justification, you are not criminally or civilly liable. If you "accidentally" shot the aggressor you have just admitted that you are automatically criminally and civilly liable. Accidentally tends to mean you negligently shot and should not have done it.

Even if you are justified and have the right to shoot under the circumstances, you will probably have expensive legal fees, emotional issues to live with the rest of your life and other costs that you do not want. Yet, for some people (especially police, bankers, guards, divorce or criminal lawyers and judges), there is a need to carry. But if you travel where angels fear to tread it is better to carry concealed.

The most common first question will be what type of weapon, bullet, holster or shot placement should a person use. This manual is about what the law is and not that subject but I will spend 2 short paragraphs on the subject. The choice of weapon, bullet or the placement of shots is an entire book. Attacks are normally sudden but they can be anticipated if you walk around aware of what is going on around you. Most victims aren't observant which gives the predator the advantage. A knife attack will normally involve 4-10 stabs from an attacker and the attack will last about 3 seconds that will seem an eternity but an attack can last longer. A gun incident will involve about 3 shots being fired within three seconds at about a distance of 9 feet. These are the statistics for about 90 per cent of the attacks. Notice there is little or no time to stop the attack once it begins and how close the predator is. However in review of most law enforcement material it seems that only sudden and utterly overwhelming force or the threat of sudden and overwhelming force will stop the attack of a predator. In the mind of a predator submission by a victim grants the predator permission to rob, rape, murder or assault. So the weapon, bullets and shot placement must allow for a sudden and completely overwhelming advantage that shocks the predator to immediately change his thinking and stop his attack. The Police "active shooter" program has a similar psychological strategy to stop attacks.

Each person is different and some women can conceal and shoot a 45 while some men can barely conceal or handle a 9 mm. Choice is highly subjective. The most common weapon used by police departments are Glocks in 9 mm or 40. However, police are not citizens being attacked. Police do not carry their weapons concealed. Police are normally responding to calls for help and their weapons are purchased in bulk for an entire department which has a budget. Personally I like the 357 sig, or 40 in a SIG 239 automatic for power, concealment and quick availability. This is what I like. It isn't necessarily what is best for you. Few people carry a 380, or less powerful weapon for self defense. However this is a book on the law of concealed carry and not what the best gun, bullet, shot placement or holster is. I will only say that your

choices should be tailored to your individual needs and that practice and training is far more important than the choice of weapon. Now onto the discussion of the law of concealed carry.

2. CARRYING A CONCEALED DEADLY WEAPON

Carrying a concealed deadly weapon in Kentucky is legally regulated and the right of Kentucky to regulate the right to bear arms is very limited but it exists in a couple of reasonable areas. If you fail to follow the rules even a police officer may have problems. A common situation where you would get into trouble for carrying a concealed deadly weapon is a traffic stop. Carrying a concealed deadly weapon includes having a weapon outside of plain sight but within the grasp of a person (for a car this normally meaning arms length which is anywhere in the auto other than the glove box). This includes having it under a seat of a car including the rear seat for the driver. The only exclusions for not having it in plain sight for a traffic stop in Kentucky is the glove box or having a concealed deadly weapon permit. If you do not have a concealed carry permit you have to display the weapon by placing it in clear view when you are stopped. This violates common sense and displaying it may alarm the officer, but you are not in violation of concealed carry if it is in plain view or in the glove box. There is a Kentucky case from the 1990's that implied that any storage compartment in a car was sufficient to be a glove box and excluded from the concealed carry requirement. Some cars do not have the glove box on the passenger side. These models include early Dodge Dakota pickups and Corvettes where the "glove" box was a rear hatch. What a glove box is may continue to be a controversy.

Convicted felons may not purchase or possess guns at all by state and federal law. The basis for felons not carrying guns is outlined in *Posey v Commonwealth* a 2006 Kentucky Supreme Court case from Jefferson County. In *Posey*, the Supreme Court ruled that KRS 527.040 was reasonable legislation in the interest of public safety and convicted felons are not endowed with the natural right to possess firearms. *Posey* was given a 15 year sentence. In *Lickliter v. Commonwealth*, 142 S.W.3d 65, 70 (Ky. 2004), the court also ruled that a felon cannot carry a firearm even if he fears that sometime in the near future he will be killed as such the principle of necessity was not available to a felon unless the danger is **immediate**.

The state of Kentucky specifically prohibits minors from concealed carry and purchasing a firearm. Kentucky has "a policy of special protection of minors from injury." *Pike v. George*, Ky., 434 S.W.2d 626, 629 (1968) see also OAG 94-014. Minors may not purchase a gun by statute and do not qualify for a concealed carry permit. However minors can technically acquire and own a gun by a gift or an inheritance which is not a purchase. If a minor possesses a gun it would probably be a legal problem unless the minor was supervised properly.

In the state of Kentucky, an adult without a felony record has a very broad constitutional right to own a firearm. The state can only deny a person the right to carry a concealed weapon

and deny felons the right to carry or possess a firearm within. But the right of the state of Kentucky to regulate the carrying of a concealed weapon is very strong. Here is the following 50+ year old case that demonstrates this point. This case has never been overturned.

Holland v Commonwealth
Morton HOLLAND, Appellant
V
COMMONWEALTH of Kentucky, Appellee.
Court of Appeals of Kentucky.
October 5, 1956

Prosecution of a deputy sheriff for carrying a concealed deadly weapon. The Circuit Court, Perry County, C.C. Wells, Judge, entered judgment of conviction and defendant appealed. The Court of Appeals, Moremen, Judge, held that where deputy sheriff went outside of the county in which he was appointed to locate an alleged offender for the purpose of offender's arrest pursuant to a warrant which had been delivered to him, he had the right to carry a concealed deadly weapon.

Judgment reversed with instructions that indictment be dismissed.
MOREMEN, Judge.

".....Section 1, subd. 7 of the Bill of Rights, which is concerned with inherent and inalienable rights, grants to all citizens:

‘The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.’

The foregoing section highlights the broadest legal expression of the right to bear arms. Some states give the legislature the right to regulate the carrying of firearms; at least one state prohibits even the possession of firearms. See cases collected in the annotation of Pierce v State of Oklahoma, 42 Okl. Cr. 272, 275 P. 393, 73 A.L.R. 833. In our state, the legislature is empowered only to deny to citizens the right to carry concealed weapons. The constitutional provision is an affirmation of the faith that all men have the inherent right to arm themselves for the defense of themselves and of the state. The only limitation concerns the mode of carrying such instruments. **We observe, via obiter dicta, that although a person is granted the right to carry a weapon openly, a severe penalty is imposed for carrying it concealed.** If the gun is worn outside the jacket or shirt in full view, no one may question the wearer's right so to do; but if it is carried under the jacket or shirt, the violator is subject to imprisonment for not less than two nor more than five years. The heavy emphasis, we suppose, is upon the undue advantage

given to a person who is able suddenly to expose and use a weapon, although the gun itself is the vicious instrument.....".

The right to carry and the right to carry on certain property that does not belong to them is the only restriction for people.

3. KENTUCKY JUSTIFIABLE HOMICIDE LAW

First if you are involved in a shooting immediately hire the best attorney you can. Do not make statements to the police while you are too emotional and your statements are unreliable. If you make statements you will be under extreme stress and may have mistakes of memory or may make emotional statements that are likely to be misconstrued. These misstatements of the facts will be used against you at a later trial. During a shooting an individual's emotions and psychological state often distort the facts of what is happening. A participant may think that people are closer or farther away than they actually were. Often time is distorted and the entire event may take place seemingly in slow motion giving you what seems like a long time to take the shot although it was actually only a fraction of a second. What are actually innocent statements about what you believed happened can make you look like an idiot, guilty and/or a liar. These statements will be used against you later criminally or civilly. The police know about these distortions in perception. These physical and psychological effects are often grouped together and they are called tachy psychia. These effects happen to people under stress or a strong hypnotic trance. Yet your statements are treated as a confession.

We will discuss the two major Kentucky statutes controlling the defense of **Justifiable Homicide** where a person is allowed to use deadly force in self-defense. Kentucky has adopted the Castle Doctrine, which deals with the right to use self-defense in defense of a home from burglary or defense of property. What the Castle Doctrine actually does is to give the individual the presumption of acting in fear of his life when he is protecting his home or auto. This shifts the burden of proof back from the Defendant to the prosecutor for the defense of Justifiable Homicide when he is in his home or auto. It can give the Defendant a directed verdict unless the prosecutor has evidence that there was no justification.

Kentucky's statutes are not the only criminal statutes that can be used to punish a person for the improper use of force. You can be prosecuted in federal court. In 1977 a police officer Marvis Hogan was convicted under 18 U.S.C. 242 for the death of a man in Scottsville KY on Sept 28 1974. Although the officer in this case claimed self defense he was ordered to serve 5 years under federal charges. U.S. V Mavis Hogan No. 77-5061 sentence confirmed in 1977.

Kentucky's law includes a long standing ruling that no person in Kentucky is required to retreat. Retreat or firing warning shots often exposes the person to a greater danger than standing his ground. Other states have required the person to "retreat to the wall" before deadly force can be used as a defense. Retreat often places the innocent person at a greater risk of injury. The Massachusetts case of Commonwealth v Schaefer involved the prosecution of a battered wife where the defense of justifiable homicide did not apply because the shooting was entirely avoidable by the Defendant. In dicta⁵ it stated that a person had to use every effort and perhaps retreat from his home but that wasn't the ruling which convicted her. In dicta the Tennessee v Garner 471 US 1,11, (1985) case stated that a police officer should perhaps fire a warning shot but this noble idea often exposes innocent people to greater dangers and it wasn't the reason the police officer was sued for when he shot an unarmed child that was running away.

You may meet deadly force in all 50 states with deadly force. This means that you can use a gun to defend yourself from a knife. You may only meet non deadly force with non deadly force. Deadly force means a risk of death or serious bodily injury. Therefore a person with a club who endangers the risk of death or serious injury you may be shot with a gun. Both forces are potentially lethal therefore you may use one to defend yourself from the other. But you may protect yourself with deadly force if and only if you are in a reasonable fear of serious personal injury (a crippling injury) or fear for your life from the person against whom you are protecting yourself. You may never use deadly force against someone for mere insults, the threat of a minor assault or to stop a theft. The right to use physical force in self defense is found in the KRS 503. sections. The minimum factors that must exist for you to use deadly force include.

1. The Threat must be a threat of Imminent (Immediate) Death or Serious Injury See

KRS 503.050 503.030 the words imminent and immediate are interchanged in the statutes.

⁵ Dicta is a judge's comment on something that does not involve the subject or issues of the case that he is deciding.

2. **The Use of deadly force must be in the defense of life not property.** Notice that Kentucky has a statute that in defense of property such as a burglary, arson and in defense of sexual assaults or car jacking there is a presumption of the threat of deadly force the mere defense of property is not allowed. See 503.055
3. **The Use of deadly force is a defense only for the innocent party.** See case law under this section an aggressor cannot use the defense.
4. **The Harm or risk you faced was reasonable fear of another Deadly Force** See KRS 503.050 and case law.
5. **The Burden of Proof is normally upon the person that uses deadly force** (Kentucky has a presumption however in defense of home, crimes of sexual assault, car hijacking and this burden shifts to the prosecutor in those cases 503.055)
6. **In Kentucky there is no duty to retreat although other states may require retreat or at least preclusion and reasonable efforts to avoid the encounter.** See 503.080(3), 503.050, 503.055

3.1.KRS 503.020 JUSTIFICATION AS A DEFENSE

In any prosecution for an offense, justification, as defined in chapter 503.020 is a defense. However do not confuse Justifiable homicide with the defense of necessity which Kentucky calls the choice of evils doctrine or excusable homicide. The choice of evils doctrine claims that if you are offered a choice then a person may break the law when to follow it would cause a greater risk or harm to life and/or property than the harm that would be caused by obeying the law. The difference is that choice of evils doctrine cannot be used as a defense for an intentional homicide. You can't excuse killing one person to avoid the intentional killing of another under this doctrine. However the risk of a minor injury maybe excused to prevent a death.

An easily understood example would be that if a trespass would prevent the death of several people then the trespass may be "excused" under the choice of evils doctrine. The Necessity or choice of evils doctrine normally makes what would be wrongful conduct "excused" not justified and therefore it is not as strong a defense as justification. Whereas "excused" implies that the conduct was wrong but forgiven justified means that the conduct was correct under the circumstances and that it was proper conduct and no forgiveness is required. Kentucky states lists the Choice of Evils as a "justified" defense and Courts may confuse it with the rule of justifiable homicide. The reader should be mindful that justification is a conscious choice of conduct must be utilized in only the most serious or dire of

circumstances and its use places the shooter in serious legal jeopardy since he/she must demonstrate the reasonable nature of their action.

Justifiable Homicide involves self defense as a legal defense against criminal charges and in the State of Kentucky fortunately another statute also makes this a defense to civil liability. Notice the two statutes and how they differ.

503.120. Justification General provisions.

(1) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

(2) When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

(Enact. Acts 1974, ch. 406, 37.)

KRS 503.030. Choice of evils. (Also called doctrine of necessity or competing harms)

(1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an **imminent** public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that **no justification can exist under this section for an intentional homicide.**

(2) When the defendant believes that conduct which would otherwise constitute an offense is necessary for the purpose described in subsection (1), but is wanton or reckless in having such belief, or when the defendant is wanton or reckless in bringing about a situation requiring the conduct described in subsection (1), the justification afforded by this section is unavailable in a prosecution for any offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

Justifiable Homicide is a legal defense as long as the belief that the Defendant's life is in danger is reasonable. Deadly force can be used to defend a third person. However if deadly force is used to defend the life of another the threat must be actual not just believed under KRS 503.070.

Although 503.100 says that the Defendant must believe that the threat existed it does not remove the requirement that the threat actually existed when deadly force is used to protect another.

503.100. Prevention of a suicide or crime.

(1) The use of **physical force** by a defendant upon another person is justifiable when the defendant **believes** that such force is **immediately** necessary to prevent such other person from:

- (a) Committing suicide or inflicting **serious physical injury** upon himself; or
- (b) Committing a crime involving or threatening **serious physical injury** to person, substantial damage to or loss of property, or any other violent conduct.

(2) The use of **deadly physical force** by a defendant upon another person is justifiable under subsection (1)(b) **only when the defendant believes** that the person whom he seeks to prevent from committing a crime is likely to endanger human life.

(3) The limitations imposed on the justifiable use of force in self-protection by KRS 503.050 and 503.060, for the protection of others by KRS 503.070, for the protection of property by KRS 503.080, and for the effectuation of an arrest or the prevention of an escape by KRS 503.090 apply notwithstanding the criminality of the conduct against which such force is used.

(Enact. Acts 1974, ch. 406, 35.)

Justifiable Homicide occurs when a person is not legally liable due to his acts being proper under the circumstances. This is an affirmative defense that must be asserted by the Defendant at the beginning of the case. When the Justifiable Homicide defense is used the Defense goes on the offensive and is required to prove the elements of Justifiable homicide. Normally the Defendant has no obligation to put on any evidence but Justification shifts this burden of proof to the Defendant. Under the Kentucky version of the statute the burden however is upon the prosecution when the incident occurs in the home of the Defendant.

Justification and a discharge in bankruptcy are affirmative defenses. If justification is proven, the judge is forced to issue a ruling of not guilty in the lack of any other evidence or in the alternative the judge will be forced to inform the jury of their obligation to issue a not guilty verdict. Bankruptcy is also an affirmative defense. If you were sued for a debt that you filed bankruptcy against it is your responsibility to advise a judge if you are later sued for that debt. Advising the judge that an earlier bankruptcy case had discharged a debt would get an immediate dismissal in any later lawsuit for a discharged debt. If affirmative defenses are used as a defense in litigation the person using them is required to initially plead the defense at the start of the case and prove it. Once proven affirmative defenses are perfect defenses and the judge **must** issue a verdict for the defendant.

Severe injury normally means something more than a slap, punch, simple cut or broken bone and means something more like a disabling or crippling injury. The force therefore does not have to mean that you must die from the injury or force you are threatened with.

Justifiable homicide is an affirmative defense that requires that you prove that the facts occurred. Justifiable homicide is a defense to murder and the **intentional** killing of another. You can't accidentally shoot someone and also effectively claim that you intentionally used justifiable homicide. Normally the burden of proof in criminal cases is upon the prosecution. Under the theory of Justifiable Homicide the burden of proof shifts to the Defendant. But under the Kentucky Statute the Defendant does not have the burden of proof if the shooting occurs while the Defendant is in his home or auto during a hijacking. Justifiable Homicide as a defense has 4 main elements which always exist, and 2 items (factors), which are considerations that may or may not enter into a case.

Excusable homicide is slightly different. Excusable homicide is a defense for Manslaughter. Manslaughter is a negligent killing. As an example imagine that while a gun is in its holster the weapon malfunctions due to being defectively manufactured and discharges going through the person carrying the weapon and strikes an innocent bystander killing the innocent bystander. Although there may have been some slight negligence on the part of the person who carried the weapon, any negligence was so slight or there was such an overriding and supervening cause that the defendant will not be held liable. Excusable homicide is only a defense when there was no intentional loss of life and the negligence of the Defendant is such a minor part of the loss of life or injury that there is no legal liability. In a negligent killing there is almost always criminal and civil liability. It is very rare that the acts of others so completely took over events that you can be excused for killing someone. Excusable homicide is a much weaker defense than justifiable homicide and is normally limited to freak accidents. If the prosecutor has a weak case he still wins.

With justifiable homicide either the jury must rule guilty or innocent. There is no lesser charge or range of punishment if the prosecutor has a poor case. Juries are also far more likely to rule that a killing was negligent than intentional. With excusable homicide the lawyer has to only show that the Defendant had some degree of negligence that caused the death or injury to win a civil or criminal case. Several different charges exist for the varying degrees of negligence which will still allow a conviction or civil liability. Here are the elements of justification for the use of deadly force:

1. **The threat must be Immediate Unavoidable Death or Serious Injury**⁶ in other words you made the choice to use that force at the time of the event when you faced the specific danger and did not plan it or place yourself into danger.⁷
2. **The Use of deadly force must be in the defense of life not property**⁸ (Note that the Kentucky version of the Castle Doctrine may give a person the presumption of acting in fear of his life when he is protecting his home or auto and implies that defense of property is proper.)
3. **The Use of deadly force as a defense is only for the innocent party.** You must not have been the aggressor or have escalated the conflict⁹ and
4. **The Harm or risk you faced was another Deadly Force**¹⁰ Deadly force can also mean serious injury. Serious injury normally means crippling injury. You cannot defend against insulting

⁶ Under this section there must be a showing of a specific and **imminent** threat to defendant's person in order to justify the giving of an instruction. *Damron v. Commonwealth*, 687 S.W.2d 138, 1985 Ky. LEXIS 251 (Ky. 1985).

⁷ The option provided by this section must be a choosing on the part of the defendant which is sufficiently contemporaneous with the offense sought to be justified so as to be considered a part of the *res gestae*. *Duvall v. Commonwealth*, 593 S.W.2d 884, 1979 Ky. App. LEXIS 510 (Ky. Ct. App. 1979).

⁸ Choice of evil defense applies to an **imminent** physical injury, not to a financial or property injury. *Greer v. Commonwealth*, 748 S.W.2d 674, 1988 Ky. App. LEXIS 66 (Ky. Ct. App. 1988). (However a Burglary often includes a threat to life and can lead to a different conclusion) When defendant was convicted of manslaughter, his counsel was not ineffective for not seeking a jury instruction on the use of deadly force in protection against burglary, under KRS 503.080(2)(b), because counsel presented strong evidence of self-protection justifying defendant's use of deadly force when he believed deadly force was necessary to protect himself against death or serious physical injury, under KRS 503.050(2), and (2) the issue would have required the jury to determine whether defendant believed the victim was about to commit burglary. *Fuston v. Commonwealth*, 217 S.W.3d 892, 2007 Ky. App. LEXIS 70 (Ky. Ct. App. 2007).

⁹ One who is without fault, is excused for slaying an antagonist, if he in good faith believes upon reasonable grounds, that he is in danger of death or great bodily harm at the hands of the antagonist, and there appears to him in the exercise of a reasonable judgment no other safe way to avoid the danger or apparent danger, except to kill, although the danger may be only apparent and no real danger is **imminent**. *Banks v. Commonwealth*, 196 Ky. 639, 245 S.W. 296, 1922 Ky. LEXIS 580 (1922). Among the factors that qualify or enter into the legal right of self-defense are reasonableness of the defendant's belief of **imminent** danger of great bodily injury or loss of life, the necessity or reasonable judgment of necessity to shoot to avert that danger, real or apparent, and the absence of aggression by defendant. *Taul v. Commonwealth*, 249 S.W.2d 45, 1952 Ky. LEXIS 793 (Ky. 1952). Evidence that accused attacked deceased without provocation justified instruction that he could not be acquitted on ground of self-defense if he brought on the difficulty by assaulting and striking deceased. *Elschide v. Commonwealth*, 280 Ky. 690, 134 S.W.2d 600, 1939 Ky. LEXIS 197 (1939) Evidence that defendant, with gun in his possession, went to place where deceased was and commenced conversation resulting in altercation in which deceased was killed, justified instruction that plea of self-defense was not available if defendant sought out deceased for purpose of bringing on or engaging in a difficulty and killing or injuring him, notwithstanding testimony of defendant that he went to see deceased to apologize for previous misunderstanding. *Toncray v. Commonwealth*, 291 Ky. 471, 165 S.W.2d 8, 1942 Ky. LEXIS 261 (1942). Where one has provoked assault, he may not regain right of self-defense merely by backing away from the assailant. *Toncray v. Commonwealth*, 291 Ky. 471, 165 S.W.2d 8, 1942 Ky. LEXIS 261 (1942).

¹⁰ There was no error in refusing to instruct on self-defense since there was no evidence that the appellant acted out of any need for self-protection; at most was her testimony that the victim might have jumped at her or verbally

words or risk of a non serious injury with deadly force. The threatened injury defended against must be extreme. This can be the crushing blow delivered by a foot or hand in certain cases. It can also be any injury that would normally disable.

5. **The Burden of Proof is normally upon the person that uses deadly force.**¹¹ However in Kentucky there is an exception when the confrontation occurs in the home. The Castle Doctrine places the burden of proof on the prosecution if the Defendant is defending the home or his auto. Also a directed verdict may be had when there is no evidence that shows you didn't use force in self defense.¹²
6. **In Kentucky there is no duty to retreat.** (In some states outside Kentucky you may also be required to retreat)

3.2. THE FIRST ESSENTIAL ELEMENT FOR JUSTIFIABLE HOMICIDE: IMMEDIATE DANGER OF UNAVOIDABLE DEATH OR SERIOUS INJURY

Killing a spouse because you lived under domestic abuse or because you believed that you may be harmed later is not justifiable homicide. Recently the battered spouse defense has been used in attempts

abused her. No one could seriously contend that her use of deadly physical force was necessary at that time to protect herself against death or serious physical injury. Cecil v. Commonwealth, 888 S.W.2d 669, 1994 Ky. LEXIS 124 (Ky. 1994).

¹¹ Where accused pleads self-defense to homicide prosecution, burden is on accused to convincingly show that killing is in defense of life. Terrill v. Commonwealth, 277 Ky. 155, 125 S.W.2d 1015, 1939 Ky. LEXIS 621 (1939).

When accused admits, or it be shown beyond doubt, that he fired the fatal shot, it becomes his duty to demonstrate to the jury that his act was in self-defense. Banks v. Commonwealth, 277 Ky. 647, 126 S.W.2d 1122, 1939 Ky. LEXIS 710 (1939).

Accused, seeking to excuse homicide on ground of self-defense, must satisfy jury that killing was excusable and convincingly establish that it was in self-defense. Newsome v. Commonwealth, 287 Ky. 447, 153 S.W.2d 949, 1941 Ky. LEXIS 568 (1941).

Where a defendant pleads self-defense it is incumbent upon him to convince the jury of the truth of his evidence. Satterfield v. Commonwealth, 288 Ky. 758, 157 S.W.2d 89, 1941 Ky. LEXIS 166 (1941).

¹² Where the defendant admits the killing, but relies on self-defense, he is not entitled to a directed verdict even though the evidence is as consistent with his claim of self-defense as it is with Commonwealth's claim of unjustifiable homicide. Caudill v. Commonwealth, 292 Ky. 761, 166 S.W.2d 1011, 1942 Ky. LEXIS 125 (1942).

Testimony of accused and his wife, who were only eyewitnesses, that deceased attacked accused with a knife after initiating an argument, was sufficient to entitle accused to a directed verdict of acquittal, where physical evidence supported accused's story. Cecil v. Commonwealth, 294 Ky. 44, 170 S.W.2d 882, 1943 Ky. LEXIS 372 (1943).

In homicide cases where the defendant admits the killing and relies upon the plea of self-defense, defense of another, or of his home, supported by uncontradicted evidence, it is the duty of the trial court to direct the acquittal of the defendant or to set aside a verdict of conviction, and it is the further duty of the Court of Appeals to reverse such conviction. Holcomb v. Commonwealth, 280 S.W.2d 499, 1955 Ky. LEXIS 159 (Ky. 1955).

to justify such killings. This theory attempts to claim that the threat was continuous and that it was therefore immediate at the time of the killing wherein the spouse had faced previous serious threats of death or severe bodily injury that cause the battered spouse to subjectively perceive the threat to be more immediate. The “battered spouse” defense has not generally been an effective defense since it was almost always avoidable or the threat was not immediate.

To kill or use deadly force and be excused from criminal punishment the harm must be imminent. You cannot use deadly force in revenge for what happened in the past or in fear that you might have deadly force used against you in the future. These elements may reduce the murder charge to a lesser homicide charge by showing that the killing was done in passion but the individual will still face a homicide charge. If you believe that you must shoot, one of the first requirements is that you have the belief that the requirement to shoot is imminent. It is defined by KRS 503.010 (4) as:

Imminent means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is **imminent** can be inferred from a past pattern of repeated serious abuse or rape.

The failure to have imminent danger means that you are inherently going to face a manslaughter or murder charge. This is apparently true even if you shoot a hired killer just as Mr. Lickliter did in 2004.¹³ In that case Mr. Lickliter claimed that the “victim” was going to use physical force against him when they got back to Tennessee if Mr. Lickliter told anyone that the victim was a hired killer. In ruling against Mr. Lickliter and giving the jury instructions on manslaughter the court said that:

The justification is also available when there is a mistaken belief in the existence of use or **imminent** use of unlawful physical force by another. KRS 503.120(1). "**Imminent**" is defined in KRS 503.010(3) as impending danger. The dictionary also lists "impending" as being synonymous with "**imminent**" and further defines it as, "About to occur at any moment." Webster's II New Riverside University Dictionary 611 (1984). Here, it was abundantly clear from all the evidence that **Lickliter** never believed, mistaken or otherwise, that the threat was **imminent**. The victim was killed in Fayette County KY while he slept in the back of the truck. There simply was no evidence that the physical force was **imminent**. To require any type of self-defense instruction under these circumstances would be ludicrous.

Immediate harm has certain factors that must exist for the person to have the reasonable belief that he is in immediate danger. Normally a person must observe three factors for the threat to be an immediate threat to his life or a threat of serious bodily injury. Another way to explain the

¹³ Failure to instruct the jury on self-protection, imperfect self-protection, second-degree manslaughter, and reckless homicide was not error as defendant never believed that the threat from the victim was **imminent**. Lickliter v. Commonwealth, 142 S.W.3d 65, 2004 Ky. LEXIS 173 (Ky. 2004).

elements of the justification defense is that the attacker must possess the Ability, Opportunity and the Jeopardy of such harm to the person who claims that their act was justified.

1. Ability means that the person that attacked has the ability, capacity and power to kill or cripple. This may mean that a person was:
 - a. Female facing a rape or unarmed male (notice rape normally inherently involves the intimidation or threat of death or serious injury)
 - b. Outnumbered by several persons (However you are no longer outnumbered when there is only one left and he is not attacking and is withdrawing)
 - c. Able bodied and you are disabled
 - d. Facing a foe that has known superior fighting skills
 - e. Facing a much stronger opponent
 - f. Had a weapon capable of doing it or was going for such a weapon (including your weapon).
 - g. When facing an unarmed person(s) you may show that a disparity of force existed and that your perception of **imminent** death or severe injury was reasonable by a knowledge of any of the above.
2. Opportunity means that the attacker is fully **capable** of doing it
3. Jeopardy means that the attacker is acting in such a manner that the reasonable and prudent person would believe that the person intends to do it. Notice that if the belief is not reasonable then the defense fails.

3.3. THE SECOND ESSENTIAL ELEMENT FOR JUSTIFIABLE HOMICIDE: ONLY IN DEFENSE OF LIFE

Early in our history deadly force was allowed to prevent property, misdemeanors and escape of minor felons. But the Supreme Court has repeatedly allowed civil liability (lawsuits) even against the police when they have used deadly force to stop escape, loss of property or misdemeanor crime. Deadly Force should only be used to protect life not property. You may use deadly force to defend yourself, or others from serious bodily harm but never use it to prevent a simple theft¹⁴.

¹⁴ Even if trespass is made with actual force, right to take life does not arise until owner in possession of realty is assaulted by trespasser and has reasonable grounds to believe that it is necessary to kill or wound in order to protect life or prevent great bodily harm. Shepperd v. Commonwealth, 322 S.W.2d 115, 1959 Ky. LEXIS 297 (Ky. 1959) (decided under prior law).

Owner in possession of realty is entitled to use such means as in the exercise of a reasonable judgment are necessary to protect premises from forcible invasion and prevent forcible attempt to divest owner of possession of his property, and in defense of such rights, an assault and battery upon a trespasser will be justified, but in no case is the taking of life or infliction of great bodily harm permissible where the invasion is made without actual force even though forcible in law. Shepperd v. Commonwealth, 322 S.W.2d 115, 1959 Ky. LEXIS 297 (Ky. 1959) (decided under prior law).

Kentucky's Castle Doctrine gives the presumption of a reasonable belief that you are facing an immediate deadly threat to anyone who is assaulted or faced with a burglar in his home or vehicle. Kentucky allows you to defend yourself from a burglar or arsonist who is attempting to commit a crime. This law was codified and passed by our legislature in 2006.

In 2006, several new sections to Kentucky's laws on self-defense were added. Some of them may have retroactive effects. The general self Defense section is KRS 503.050. The statute gives individuals a much greater presumption that they perceive their lives to be in danger. This is often called the Castle Doctrine. The Castle Doctrine allows people a greater degree of right to use self defense in their homes and underscores that a person has no duty to retreat. The rule that retreat is not required has been the law since 1931 but the new code expands on this right. The new code also shifts the burden of proof to the prosecutor to prove a lack of reasonable belief that immediate jeopardy existed. Together with Section 503.055 these sections specifically explain when the person gains the presumption that he has the right to use deadly force. If a person has the presumption that he had a reasonable belief and the presumption of innocence the state has a very difficult position of proving the person was not justified and the defendant has a great likelihood that the case will be dismissed by directed verdict and never decided by jury.

Burglars are at extreme risk in Kentucky. The statute should not be read that persons have the right to use deadly force to merely defend property. Under the U.S. case of Garner v Tennessee, lethal force may not be used against a person whose only crime is a misdemeanor property crime. The law does not allow a person (homeowner or police officer) to take life when he has no actual fear of personal harm. The Castle Doctrine merely shifts the burden of proof to the prosecutor when a person is defending his life in his home or vehicle. Outside the home or his auto an individual has the burden of proof to show that his belief of death or serious harm was reasonable.

The important part of the Castle Doctrine is set in bold. There are exceptions following the important part which is in normal type. Notice that the defense of justifiable homicide and

the presumption of operating under fear of your life is not restricted in 1(b) to the homeowner, but can be used by a “person,” which means 3rd parties such as a police officer or any 3rd party.

KRS 503.055. Use of defensive force regarding dwelling, residence, or occupied vehicle Exceptions.
(The Castle Doctrine)

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(2) The presumption set forth in subsection (1) of this section does not apply if:

(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;

(b) The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used;

(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a peace officer, as defined in KRS 446.010, who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties, and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a peace officer.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(Enact. Acts 2006, ch. 192, 2, effective July 12, 2006.)

TENNESSEE V. GARNER, 471 U.S. 1, 11 (1985).

In *Garner*, a police officer shot a young African American male for a misdemeanor offense. The legal defense at trial was that the officer was preventing the escape of a criminal. Under old English law deadly force could be used to capture any fleeing suspect or criminal. The Supreme Court stated that the state's interest was far less important than a human life when the suspect is unarmed and non-dangerous. Consequently, this dictate may require officers to permit some suspects to escape.

The "Fleeing Felon Rule" - "The use of deadly force is limited to preventing the escape of dangerous felony suspects. If the suspect poses no immediate threat to the officer and no threat to others, the use of deadly force is not justified. It is unfortunate when a suspect who is in sight escapes, but the fact that the police officer arrives a little late or is a little slower afoot does not normally justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." *Garner*, 105 S.Ct., at 1701.

In order to use deadly force the officer must have one of two circumstances:

- a) Deadly Force Defense - The suspect must threaten the officer with a weapon this may be a car, a knife, a gun or some other deadly object. (in most states a person may also defend family or employees)

OR

- b) Fleeing Felon Defense - (3) elements must simultaneously exist:
 - (1) the officer must have probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm;
 - (2) The use of deadly force is NECESSARY to prevent escape;
 - (3) The officer must give a WARNING of the imminent risk of deadly force - if feasible.

3.4. THIRD ESSENTIAL ELEMENT FOR JUSTIFIABLE HOMICIDE: INNOCENCE ESCALATION & LACK OF AGGRESSION,

A person cannot go on the hunt and claim killing in self defense. You cannot escalate an argument to a deadly level and then claim self defense. KRS 503.060 sections 2 and 3 set out the problems of using force only when you are defending yourself from deadly force being used on yourself. The important sections are again in bold.

503.060. Improper use of physical force in self-protection.

Notwithstanding the provisions of KRS 503.050, the use of physical force by a defendant upon another person is not justifiable when:

(1) The defendant is resisting an arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest, although the arrest is unlawful; or

(2) **The defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person; or**

(3) **The defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:**

(a) **His initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or**

(b) **He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.**

3.5. THE FOURTH ESSENTIAL ELEMENT FOR JUSTIFIABLE HOMICIDE: EQUAL DEADLY FORCE

In order to claim justifiable homicide as a self defense you must be confronted with deadly force. Notice that deadly force can be met with deadly force. This doesn't mean that it has to be an equal level of deadly force. You can use a shotgun to defend yourself from a knife attack. The shotgun is deadlier but both a shotgun and a knife are deadly weapons and they are both deadly force.

Factors that show that deadly force is being used include the nature of the attack. Mere fists can be a deadly weapon and cases in Kentucky have stated that even a kick from a boot is a "deadly weapon". When a person is being attacked there are many elements that may show that deadly force had to be used in defense. These factors that show the reasonableness of a belief that even an unarmed attack was a threat of deadly force and include:

1. If a woman had to defend herself from a man
2. Size age and ability of the attacker
3. Force of numbers
4. Nature of the crime being committed example rape is almost always the threat of deadly force and often the perpetrator is unarmed in rape attacks.

If a person is attacked the innocent person must stop the attack in order to prevent the assailant from continuing the attack and killing or injuring the defender. The object is not to kill the predator but to use sufficient force to stop the attack. The predator should not be allowed to continue the attack and kill the innocent party. A mortally wounded assailant can often live just long enough to still kill or injure his victim. **Often the use of deadly force isn't sufficient. Instead in order to defend a person an overwhelming use of force sufficient to stop the attack is required. This may even be non lethal use of deadly force in a manner that is overwhelming to the attacker.** Often it isn't enough to just use deadly force. The force used must instantly stop the attack and leave the predator unable to further attack or injure. As a result a knife club or even a fist may be defended against by another form and greater level of deadly force such as a gun.

3.6. THE FIFTH ESSENTIAL ELEMENT FOR JUSTIFIABLE HOMICIDE: BURDEN OF PROOF IS UPON THE DEFENDANT.

The burden of proof is always upon the Defendant to prove self defense. However in Kentucky, if the Defendant is in the process of defending his home the burden shifts to the police and prosecutor to prove that there was no reasonable fear of serious bodily harm or death. This becomes a difficult burden for the prosecutor.

Kentucky's new home intruder law, or Castle Doctrine, allows the individual a greater degree to use such force in defense of his home by giving him the presumption of operating under the reasonable fear of deadly force. Kentucky is now "incredibly generous" under KRS 508.080 for the use of deadly force, in that any person may use deadly force against a burglar who has any criminal purpose in mind -- even petty theft or simple assault. Notice that the crimes of robbery burglary criminal trespass or other felonies imply the likely use of force. The relevant statute states:

503.080 Protection of property.

(1) *The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent:*

(a) The commission of **criminal trespass, robbery, burglary, or other felony involving the use of force**, or under those circumstances permitted pursuant to KRS 503.055, in a dwelling, building or upon real property in his possession

or in the possession of another person for whose protection he acts; or
(b) Theft, criminal mischief, or any trespassory taking of tangible, movable property in his possession or in the possession of another person for whose protection he acts.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that the person against whom such force is used is:

(a) Attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) Committing or attempting to commit a burglary, robbery, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, of such dwelling; or

(c) Committing or attempting to commit arson of a dwelling or other building in his possession.

*(3) A person does not have a duty to **retreat** if the person is in a place where he or she has a right to be.*

Effective: July 12 2006

MONDIE THE DETERMINED AND UNWANTED HOUSEGUEST

The 2005 Mondie case is criminal not civil. However, it explains the new Kentucky law standard for persons that face a burglar or arsonist. Mondie is a criminal case where the Defendant asked for a jury instruction on self defense and he was denied. On appeal, the Supreme Court sent the case back because Mondie could have properly used justification and the Castle Doctrine as a defense. **Understand that this case involves a simple assault where no serious injury was threatened.**

In Mondie, McGowan came to Mondie's residence and argued with Mondie in the driveway. Mondie told McGowan to leave and McGowan refused. Mondie then went inside his home and McGowan followed inside. Mondie again told McGowan to leave. McGowan hit Mondie in the mouth. Mondie went to his bedroom, returned with gun, and told McGowan to leave. McGowan hit Mondie in the face once more. Mondie then shot McGowan. McGowan then left and drove away.

Mondie was indicted for First-Degree Assault in connection with the shooting. Mondie submitted instructions that included one for protection against burglary. The trial court refused to give the instruction and the Court of Appeals affirmed, stating that "the record did not support

Mondie's claim of burglary." The Supreme Court reviewed the record and determined that the jury could have reasonably believed that McGowan had entered or remained in Mondie's home with the intent to assault him which qualifies for the essential elements of burglary. KRS 503.080, now allows the use of deadly physical force in such circumstances and it is justifiable when the defendant believes that the person against whom such force is used is committing or is about to commit a burglary. The court stated that KRS 503.080 is an "incredibly generous" rule for the use of deadly force because a resident can use deadly force against a burglar who has any criminal purpose in mind even petty theft or simple assault

3.7. THE SIXTH ESSENTIAL ELEMENT FOR JUSTIFIABLE HOMICIDE: RETREAT

In some states you are required to "retreat to the wall" and to have no choice left before defending yourself by the use of deadly force. In Kentucky, **you have no duty to retreat.** Kentucky has never required the individual to retreat from a fight. Often a retreat will escalate a fight. To require a person to run away will often place him and others at a greater risk. Kentucky has never required a person to retreat, but many states do require that you "retreat to the wall" and have nowhere else to retreat to before you use deadly force. I will first quote several statutes and then the case law that demonstrates there has never been a duty for a police officer or a citizen to retreat.

503.050. Use of physical force in self-protection Admissibility of evidence of prior acts of domestic violence and abuse.

(4) A person does not have a duty to **retreat** prior to the use of deadly physical force.

(Enact. Acts 1974, ch. 406, 30; 1992, ch. 173, 2, effective July 14, 1992; 2006, ch. 192, 3, effective July 12, 2006.)

503.080. Protection of property.

(3) A person does not have a duty to **retreat** if the person is in a place where he or she has a right to be.

503.055. Use of defensive force regarding dwelling, residence, or occupied vehicle Exceptions. (The Castle Doctrine)

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

Neither citizens nor officers should be required to retreat or place themselves in danger. There have been at times rules in some more liberal states that claimed that retreat was required. What is really being said is often that the confrontation was avoidable and that since it was avoidable that the criminal and civil defenses did not apply. In order to explain the principle best, I will use a civil case which would still probably allow a lawsuit even in Kentucky. In Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991), a deputy sheriff failed to take cover and stood in an open parking lot trying to "talk down" a suicidal woman seated in her car with a loaded gun. When the woman raised the gun and took aim at the deputy, he shot and mortally wounded her. The District Court Judge stated that the officer was "negligent" (civilly liable not criminally liable) and was the sole cause of the woman's death. The 10th Circuit Court of Appeals confirmed the bench trial decision and stated that the deputy, "forced the deadly confrontation" by standing in the open, disregarding his own safety, and caused her death. In these negligence cases, when the officer violates policy the regulations of the department may be used for or against him to show standard of normal police conduct. These regulations and standard operations manuals are fully admissible¹⁵ and the failure to have a policy is evidence of the failure to properly supervise and train the department. Police Departments have the affirmative duty to train and have such policies¹⁶. The principle was that this confrontation was avoidable and against department standards. The standard is what the reasonable person or officer under the circumstances would do. Notice that the Kentucky statute allows the police officer and the private citizen to use deadly force in a situation like this and excuses criminal

¹⁵ See Dillenbeck v City of Los Angeles 468 P 2d 129 (1968) and Grudt v City of Los Angeles 468 P 2d 825.

¹⁶ Roberts v Williams 302 f 2d 972 (1969)

liability. However, a standard of negligence may still allow civil recovery especially if innocent bystanders which present no risk are harmed.

A 1931 Kentucky Supreme Court decision, *Gibson vs. Commonwealth*, bluntly spells out the right of self-defense without retreat. "It is the tradition that a Kentuckian never runs," the opinion states. "He does not have to." Even when defending others KRS 503.070 allows the use of deadly force and does not require retreat. In 2006 Kentucky went so far as to codify that citizens could even protect their own property in the course of a burglary and use deadly force and that they were not required to retreat to the wall. If officers or citizens were required to retreat it often made the situation more risky not less risky and prevented people from defending other family members and employees. Officers are allowed and at times required to use whatever force is necessary to perform their duties while a citizen is never legally required to use force.

4. CIVIL LIABILITY

We have been talking about the use of justifiable homicide as a defense to criminal liability for the use of deadly force in self defense. But if you are involved in a shooting there are often two trials against you. First you may be tried criminally by the state for the assault or killing of the person you shot. Second you will often be sued civilly for damages by the survivor(s) or the estate of the person you killed. You may be in a federal or state court. The law that establishes the amount of physical force you can use without criminal liability may also establish the level you can use under a civil case.

Merely because a person is excused from criminal liability does not mean that he is excused from civil liability or a lawsuit for the use of deadly force. You can easily be found innocent of a criminal killing and still sued civilly for that same killing. Even if you are justified and there is a defense a police department or insurance company may settle the case to avoid publicity or excess liability. In order to be found innocent of the criminal killing there only needs to be sufficient evidence to prove a reasonable doubt of your innocence. In order to find

a person civilly liable the evidence only needs to show that more likely than not you used excessive force.

I cut my first teeth in civil litigation by suing a police department for damages to property in a trailer park during the shooting death of a mentally disabled man. The disabled man was disoriented and fired a harmless shot into the air when police arrived due to a phone call. Three police officers reportedly fired over 100 rounds into the man and trailer emptying effectively every round they had in their possession and patrol cars into the man and the trailer. They destroyed the trailer, and damaged surrounding trailers and homes. I did not represent the man. My lawsuit was for innocent bystanders and the damage to property that resulted from the alleged excessive use of force when evidence showed that the man was on the ground dead after the first couple of rounds. If they had injured or killed innocent bystanders the recovery would have been much greater. Notice that the defense of justifiable homicide does not protect civilians or police from their injuries to third parties or from negligently using excessive force and causing more harm than was necessary.

Fortunately, the costs were small, but this does give you the example that you may be criminally excused and still be held civilly liable even though a killing or use of deadly force was justified. That case settled without publicity before trial. Police are human. They will make human mistakes and have accidents. Just like having a car accident, there are times when they have to take out the checkbook and pay for the accident. The cost for their insurance has sky rocketed to thousands of dollars per year for the cost of coverage today.

No one likes to pay. However, if you make a mistake don't stand in public and claim that the innocent or innocent bystanders deserved to die. When you give an incredulous defense, the judge or jury will consider you a liar or an idiot and will discount anything you say for the rest of the trial. They will normally award an even higher amount, certainly disbelieve anything else you have to say, and it will cause negative public good will that will cost a lot more than any amount sued for. In the future no one will believe you even if you are clearly innocent and you will pay much higher prices for future cases.

There are several laws that can be used to find civil liability. If the use of force is completely justified it is a complete defense in a civil proceeding as well as a criminal

proceeding. Under a new Kentucky law, a Defendant can even recover his attorney fees in a civil trial if he is wrongfully sued and wins. This new law deters nuisance lawsuits and it is listed below. However, there are federal statutes that may provide a victim with the right to sue that are discussed later. Notice that the magic word “shall” be granted is used which means that the judge is required to award attorney fees costs and lost wages if the person was justified.

503.085. Justification and criminal and civil immunity. The Exceptions

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term criminal prosecution includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

The most important law for officers and police departments that are sued for civil liability is:

SEC. 1983. - CIVIL ACTION FOR DEPRIVATION OF RIGHTS

This law states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Originally, this statute was designed to prevent actions similar to the Jim Crow laws of that era. Jim Crow laws were designed to take away the right to vote and other civil rights from African Americans. In the 1960's Section 1983 was expanded to allow persons to sue for other rights that were denied. One of those rights is the right of search and seizure or the right to equal protection or substantive due process. When a person is injured by a police officer and the officer is wrong in assaulting the person the police department and the officer may be held liable for the wrongful "seizure" or injury. Police officers rarely have sufficient personal assets to justify a lawsuit in federal court therefore the Police Department's liability insurance company or the police department, or the city or county is often the actual object in a lawsuit. In a similar argument, if the person was not supposed to be injured then substantive due process was violated, and the officer or police department may be held liable.

MONROE v. PAPE 365 U.S. 167 (1961)

Although this is a search and seizure, and false arrest case, it is the first 1983 case which opened up the right to sue for 1983 cases. Six African American children and their parents brought a lawsuit in federal district court against Chicago and thirteen police officers for violation of their rights under the Fourteenth Amendment. Without a warrant, the police officers broke into their home and made them stand naked in the living room. Every room was destroyed in the search. The father was taken to the police station and detained on "open" charges for ten hours while he was interrogated about a two-day-old murder. The city of Chicago and the officers were eventually held liable under Section 1983. The Supreme Court decided that when the police officers acted illegally, they acted outside their scope of authority but "under the color" of state law. Originally police departments used to defend these cases and the defendant was required to show malice on the part of the officers. Malice has been eliminated and is not required.

The words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" contained in 42 U.S.C. 1983 does not exclude acts of an official or police officer when the officer cannot show authority under state law, custom, or usage to do what he or she did. Chicago was held liable, which allowed the attorneys to collect damages plus attorney fees. Punitive damages are often possible.

This case flooded the courts with other cases because now police officers (and the police departments that failed to properly train or supervise them) can be sued under Section 1983 if what they did arose out of a "misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Prior to this case, police officers seemed to enjoy an immunity similar to judges while they performed their ministerial duties. Notice the lawsuit directly is not for the death, but instead, is for the wrongful taking, misuse of power and/or acting outside the scope of authority. Therefore you can have a defense of justifiable homicide for a death and still be successfully sued for the abuse of power that happened with the same event. Likewise, a burglar can be incarcerated for the burglary and a drug charge that occurs in the same break in.

Recovery in a section 1983 action must be based upon the deprivation of a federal statutory or constitutional right. But since this is civil liability, you only have to prove that facts are more likely true than not. Primarily the court is involved with police misconduct and the Fourth Amendment. Municipal and state liability provides deep pockets to pay for the litigation if there is a basis for recovery. Lawsuits can also be based on the failure to protect, or for a false arrest.

1983 AND THE USE OF DEADLY FORCE

1983 cases must be based on a violation of rights. This can be when someone violates:

1. The 14th Equal Protection Amendment rights of the individual;

2. The 8th Amendment right against cruel and inhuman treatment; or,
3. The 4th Amendment right against search and seizure.

It is far more common when an officer uses deadly force that he is sued for a 4th amendment violation that prohibits improper searches or seizures. It may be hard to understand that the use of deadly force is a seizure but if you take a life you have “seized the body of the person and taken it.” An order of arrest, execution or imprisonment is an order to seize the body.

Seizure cases start with the principle of Brower that says that a "seizure" occurs when there is a " ... governmental termination of freedom of movement through means intentionally applied." Brower v. County of Inyo, et al, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). The Brower Court stated a "violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act ... " Brower, 489 U.S., at 596, 109 S.Ct. 1378 Notice that this requires something more than an accident. "[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." Brower, 489 U.S., at 596, 109 S.Ct. 1378; Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001).

Graham established "*objectively reasonable*" as the constitutional standard for liability for unreasonable use of force in Fourth Amendment seizure cases In order to make an arrest officials have to use force "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham v. Conner, 490 U.S. 386, 396, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989). The question has always been a problem of how much force " ... [T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application ..." Graham, 490 U.S., at 396 "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical

application .. its proper application requires careful attention to facts and circumstances of each case ..." Graham, 490 U.S., at 396.

The "reasonableness" test looks at:

- 1) The severity of the crime;
- 2) Whether the suspect poses an **immediate** threat to the safety of officers or others; and,
- 3) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Reasonableness is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Graham, 490 U.S., at 396-97. "Allowance must be made for the fact that officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving." Graham, 490 U.S., at 396. Such judgments do not require detachment when you face an upturned knife. However an officer's "subjective" intent or motivation could be relevant to the officer's credibility. Graham, 490 U.S., fn. 12, pg. 399. See also Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), cert. denied, 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995). A felon was protecting himself against a police dog and attempting escape in a junk yard.

OFFICERS CAN MAKE ERRORS MISTAKE ... LOOKING IN HINDSIGHT

Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001)

Officers have always had the right to defend themselves from the threat of force. But what if the officer makes a mistake? In Anderson, an officer was working as a security guard at a mall. He was informed that a suspect appeared to have a gun under his sweater. After observing the suspect for about twenty minutes, he noticed a bulge and followed him out into a parking area where plaintiff was ordered to his knees and to put his hands up. He complied, but when the suspect reached into his left back pocket to turn off his walkman, the officer believed he was reaching for a weapon and shot him three times. A jury dismissed the civil lawsuit. Notice this case is very similar to Amadou Diallo the famous 1999 case in New York that settled.

On appeal, the court ruled Russell did not violate Section 1983. There was no evidence to refute Russell's testimony of the facts. Once Russell perceived the bulge consistent with the shape of a gun, he was justified in believing that Anderson was armed and dangerous. The Plaintiff argued that Russell did not have to shoot and that he could have used the protective pillars for cover rather than shooting. The court responded that "[t]he suggestion that the officers might have responded differently is exactly the type of judicial second look that the case law prohibits." In other words under a 1983 lawsuit the court was not going to second guess what the officer should or could have done and instead look at only if the shooting was permissible or in other words justifiable.

The Plaintiff also argued that the officer's decision to shoot was unreasonable given that the violation of having a concealed weapon was only a misdemeanor. The court stated, "at the precise moment that Russell used deadly force, he reasonably believed that Anderson posed a deadly threat to himself and others, making the nature of the suspected criminal activity at issue at the time Russell approached Anderson irrelevant." The court then quoted a prior case and stated ... "the Fourth Amendment does not require omniscience.... officers need not be absolutely sure.... of the nature of the threat or the suspect's intent to cause them harm – the Constitution does not require that certitude precede the act of self-protection."

Later in a case called Medina v. Cram, 252 F.3d 1124 (10th Cir. 2001), the court affirmed that they look how the officers acted at the moment not at what they could have done differently. In Medina, the officers failed to take cover or use pepper spray. The court found that even if the officers' failure to take cover contributed to the need to use force, such actions are not reckless or deliberate conduct. The court does not evaluate the officers' conduct from a 20/20 perspective of hindsight but rather than the perspective of an officer making a split-second judgment under the circumstances of the moment.

Officers are allowed to make mistakes because the nature of the job, which means that they are making choices under pressure. The 4th Amendment uses an "objective reasonableness" standard where the officer does not have to be perfect - or choose the least harmful method. The officer only needs to "objectively reasonable" in his choice and within the ball park of possible decisions. There are always inherent dangers which prevent us from

requiring that officers make perfect decisions under pressure. The job naturally entails split second decisions where the officer rarely has all of the facts and the circumstances are rapidly changing from moment to moment with:

- a. Extreme emotions under tense circumstances where his life or the life of others is at risk;
- b. The need to act **immediately**;
- c. Often the failure to act means that the officer is taking a chance that he or others will be hurt. If the person being arrested is compliant and poses little or no risk, then the chances of being injured are reduced. Often however if the person is struggling or using force, the risk or chances increase to a point that the officer must take action.
- d. Many times officers have limited resources and limited backup in situations. The more choices the officer has to eliminate the threat the less likely is his need to use deadly force to instantly stop the threat.

In judging the officer, his behavior before the shooting is irrelevant. Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996) - An officer's actions "leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force." The state of mind of the person shot or his intentions are irrelevant. Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999) Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996). The fact that the man was mentally disturbed is also irrelevant. Wood v. City of Lakeland (FL), 203 F.3d 1288 (11th Cir. 2000) In Fourteenth Amendment cases, the officer is allowed to be less than perfect and to even violate police department policy. Instead gross negligence that "shocks the conscience" is closer to what is required. Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000 "even if ... the actions of the [officer] violated departmental policy or were otherwise negligent, no rational fact finder could conclude ... that those peace enforcement operatives acted with conscience-shocking malice or sadism towards the unintended shooting victim." Claybrook, at 360.

OFFICER ERROR, MISTAKEN IDENTITY, REASONABLENESS

Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001)

When the 14th Amendment is violated the court looks at the substantive due process that is guaranteed by the liberties in the 14th Amendment which require equal protection and treatment of all citizens. This is often used when allegations of racial treatment are involved. In 14th Amendment cases, we are looking at the issue of negligence instead of seizure. Just because the “seizure” was reasonable in the shooting does not mean that negligence did not exist. The 14th Amendment cases look at whether there was right to shoot. These substantive due process cases are never violations of mere negligence. Instead they are such negligence that we are shocked by the acts of the officers under the circumstances.

Examples of this type of lawsuit include the shooting of a handcuffed suspect, or the shooting of a child playing with a handgun. These types of cases don't involve poor marksmanship at the right person and hitting an innocent person. Instead the officer has chosen to shoot a non combatant who was an innocent person. If the shot was intentional (I knew it was a harmless child and I shot) there is instant liability. If the shot was negligent (I thought that the child was the dangerous felon) then the court looks at the factors that made his decision. In some cases although the officer may have had the right to shoot but his actions are so offensive and so unjustified that they violate fundamental rights of freedom. The beginning of this theory was Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952) - In Rochin officers pumped the stomach of a narcotics suspect to obtain incriminating evidence - the court said that this behavior by the officers "shocked the conscience."

An early case that used this theory for deadly force was Milstead. In Milstead a 911 operator reported that the suspect had been shot in the neck and his fiancé assaulted. Upon arrival, officers heard calls for help and saw two figures fighting on the floor. One man withdrew and warned the officers that the other had a gun. The remaining man pointed a gun at officer Proctor who withdrew while firing four shots. Proctor fell backward onto a deck. Officer Kibler heard someone yell “I am going to kill all of you” and then saw someone crash through the door and run. When the man turned toward Kibler he fired two shots. The officer shot Milstead by mistake. The assailant then killed himself. Milstead's fiancée was already dead. Milstead died shortly after arriving at the hospital.

The court held that deadly force is justified when it is necessary to prevent the escape and an officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Facts “must be filtered through the lens of the officer’s perceptions at the time of the incident in question...this limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight and limits the need for decision-makers to sort through conflicting versions of the actual facts, and allows them to focus instead on what the police officer reasonably perceived.”

The court described two situations when an officer may mistakenly use deadly force. First poor marksmanship, right target, they shoot at an individual, and hit the wrong person. Second good marksmanship, wrong target, in this case, they intentionally shot the wrong person where the Fourth Amendment applies.

Kibler had reason to believe that:

- 1) A woman had been stabbed,
- 2) Milstead had been shot in the neck,
- 3) The intruder was armed with a gun,
- 4) The intruder had apparently shot at Officer Proctor,
- 5) The intruder had threatened to kill all of the officers (Including Kibler).

Believing that Milstead had been shot in the neck, it was not unreasonable for him to believe that it was the intruder who had run through the door. Because of the poor lighting he could not be sure whether he was holding a gun, and in the second or two after the person crashed through the door, he had to decide whether to fire. In this instance of mortal danger his mistake was tragic but not unreasonable. Other cases on this point include Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991) – Where an officer could have had probable cause to believe that a suspect posed a deadly threat even though the suspect turned out to be unarmed. and Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991) - The fact that no weapon was later found was not relevant to the officer's reasonable belief that the subject was reaching for a weapon.

Monroe v. City of Phoenix, 248 F.3d 851 (9th Cir. 2001)

Sergeant Sherrard became involved in a fight for control of his gun after disarming Monroe who had a hunting knife. The officer suspected him of having a pocket pistol and was in the process of searching him after a burglar alarm went off in the area. Monroe struck the officer in the head and they ended up wrestling on the hood of the patrol car. The perpetrator lifted Sherrard off the ground and pushed him against the car and then the officer felt a tug on his gun belt and could not see the plaintiff's hands. The officer drew his gun, ordered Monroe to stop and said that if he didn't that he would shoot him. The fighting continued and Sherrard shot the plaintiff in the stomach. In looking at the reasonableness the court stated. "Surely he was not required to wait and be seriously injured or killed before exercising his judgment in bringing the situation under control ... The suspect needs not be armed or pose an **immediate** threat to the officers or others at the time of the shooting. *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997).

Fisher v. City of Memphis, 234 F.3d 312 (6th Cir. 2000) see also Ciminilo

In *Fisher* an officer was found liable when he wounded a passenger in a vehicle that he shot at when the vehicle drove toward him forcing him to jump on to the hood of his police car. The court ruled that statutes dealing with the duty of police officers to arrest individuals suspected of breaking the law was not relevant since the issue in this case was self-defense. The court also applied the Fourth Amendment test even though the plaintiff was not the intended target of the officer's use of force. By shooting at the driver of the moving car, he intended to stop the car effectively seizing everyone inside, including the plaintiff, thus, because the defendant "seized" the plaintiff by shooting at the car, the district court did not err in analyzing the defendant's actions under the Fourth Amendment.

However notice shooting at a moving auto or firing warning shots would normally guarantee negligence and criminal and/or civil liability if the shot injures an innocent bystander. When an innocent person is injured the defense of justification cannot exist. You would be claiming that you intentionally shot an innocent person under such facts. When the innocent bystander is shot it is almost always a negligent act.

RIGHT OF A CITIZEN TO RESIST A POLICE OFFICER

State v. Wright, 310 Or. 430, 799 P.2d 642 (1990), aff'g, 100 Or. App. 22, 784 P.2d 445 (1989).

This case is mentioned but it is very rarely used. It is a reminder that when the police do use excessive force or steps outside being an officer that it can escalate a situation and backfire. In State vs. Wright, the court stated that an arrestee has the right to use reasonable force only in self-defense against an officer who is using excessive force during a lawful arrest. This was a state statute that gave citizens this right. However in this case the criminal's case was dismissed. Although the defendant had a right to defend himself if the officer used excessive force, in this case the officer had not used excessive force.

Although it is stated negatively by saying when a citizen cannot use self defense KRS 523.060 implies that a citizen may use even deadly force if he is justified and the officer is acting outside the color of his official authority or uses excessive force. Certain acts such as rape, or taking bribes are clearly outside an officer's, judges or prosecution attorney's official duties. Similarly if a police officer were to be found pulling an armed bank robbery and threatened a person with deadly force a citizen could use deadly force in defense and the officer would be treated just like any other perpetrator. Participating in an armed bank robbery, arson, rape or murder is definitely outside a police officer's official authority and duties. However, this is very unlikely to ever happen and it would be the Defendant's burden to prove such facts.

503.060. Improper use of physical force in self-protection.

Notwithstanding the provisions of KRS 503.050, the use of physical force by a defendant upon another person is not justifiable when:

(1) The defendant is resisting an arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest, although the arrest is unlawful

CONVICTION AND BRINGING THE LAWSUIT

Normally a conviction of the felon at least limits if it does not eliminate the felons right to bring a lawsuit. It certainly proves that the officer had probable cause to arrest the subject.

Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001)

During a fight with police a woman threw a knife, bottle and glass at the officers before being shot. She was wounded when officers fired four shots each at her. Although she was convicted of attempted murder and battery the Court concluded she could sue because the conviction did not determine whether the officers' acts were reasonable. Although the Court found that the officers acted reasonably and the case was dismissed this case shows that a conviction does not guarantee that police or the city will not be sued.

SUMMARY JUDGMENT PRACTICE

Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001)

Summary Judgment is when a case can be decided because there is no disagreement of the facts and as a matter of law an issue such as whether or not it should be dismissed can be decided without a jury. Similarly a Directed Verdict is when there is so little evidence or a case is so poor that there can be no conviction verdict or hope for one party¹⁷. Officer Hubbard responded to an armed robbery. He approached Thompson, who matched the description of a fleeing subject as he was getting into his car. Thompson fled with Hubbard in pursuit. Thompson's arms seemed to be reaching for a weapon. Hubbard yelled, "stop" and when Thompson continued to move, he fired killing Thompson. No weapon was found and there were no witnesses.

The officer asked for the case to be dismissed in a summary judgment motion stating essentially that there was no case. The Court ruled that "Plaintiff's may not stave off summary judgment armed with only the hope that the jury might disbelieve witnesses' testimony." "...An officer is not Constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."

¹⁷ Where the defendant admits the killing, but relies on self-defense, he is not entitled to a directed verdict even though the evidence is as consistent with his claim of self-defense as it is with Commonwealth's claim of unjustifiable homicide. *Caudill v. Commonwealth*, 292 Ky. 761, 166 S.W.2d 1011, 1942 Ky. LEXIS 125 (1942).

Testimony of accused and his wife, who were only eyewitnesses, that deceased attacked accused with a knife after initiating an argument, was sufficient to entitle accused to a directed verdict of acquittal, where physical evidence supported accused's story. *Cecil v. Commonwealth*, 294 Ky. 44, 170 S.W.2d 882, 1943 Ky. LEXIS 372 (1943).

In homicide cases where the defendant admits the killing and relies upon the plea of self-defense, defense of another, or of his home, supported by uncontradicted evidence, it is the duty of the trial court to direct the acquittal of the defendant or to set aside a verdict of conviction, and it is the further duty of the Court of Appeals to reverse such conviction. *Holcomb v. Commonwealth*, 280 S.W.2d 499, 1955 Ky. LEXIS 159 (Ky. 1955).

Although the summary judgment was upheld the common thread was whether the police acted reasonably. This case is related to Milstead.

In the context of criminal liability if there is no evidence the prosecutor can offer to rebut a justifiable homicide a judge could be required to give a directed verdict and it would be legal malpractice in my opinion for the criminal defense attorney to fail to ask for a directed verdict in those circumstances. To continue to put on evidence and risk conviction when the client could have been acquitted would be grounds for ineffective assistance of counsel.

COMMON LAW NEGLIGENCE AND CIVIL LIABILITY

In a 1983 case an officer's conduct must normally "shock the conscience" for him to be liable if the negligence involves a criminal. An officer may use the force that is necessary in the performance of his duties and this is far greater than the amount of force a person may use to defend themselves. As an example an officer can perform an ordered execution on a condemned prisoner while a citizen can only defend himself from deadly force. But if the case involves the officer and an innocent party there is no special status for the officer. He is held liable just like any other citizen for any accident and it is just as if he had a car accident. The private citizen is required to use reasonable care. Each state has different standards of care for negligence. And department policy can set the standard for officer conduct. Both the FBI and IACP have set policy guidelines for the amount of force and when it can be used. These regulations and standard operations manuals are fully admissible¹⁸ and the failure to have a policy is per se evidence of the failure to properly supervise and train the department. Police Departments have the affirmative duty to train and have policies¹⁹.

Although an officer may not be liable for shooting a dangerous fleeing felon or protecting himself he can be sued for negligence if he is careless with his weapon, or points it at a criminal and shoots an innocent party. The Department as his supervisor will normally also be held liable under the legal theory of Respondeat superior. Negligence is best defined as the lack of reasonable care. Reasonable is always defined by the judge or jury and looking at the circumstances.

¹⁸ See Dillenbeck v City of Los Angeles 468 P 2d 129 (1968) and Grudt v City of Los Angeles 468 P 2d 825.

¹⁹ Roberts v Williams 302 f 2d 972 (1969)

Negligence can involve the failure to lock up a gun in some states, or someone being mistakenly shot while a gun was being cleaned. In New York one police officer hid his glock in an oven with the expected result which could have injured others but luckily didn't and only caused property damage. An officer or citizen could be sued for negligently defending himself just as for any other accident. Even when force is justified, "negligence" can be proven by showing an officer violated a departmental regulation governing the use of force. Just because a person had the right to defend themselves does not mean they had the right to fail to follow department rules or otherwise be negligent. State laws often establish statutory privileges to use deadly force as a defense to common law assault or battery (threatened or actual serious physical violence), but not negligence. Murphy v. City of Minneapolis, 292 N.W.2d 751 (Minn. 1990). **If a person has training they are held to a greater degree of care not a lesser.** Department policy or rules and restrictions therefore limit the police officer and establish his boundaries of reasonable care.

CONCLUSION

Whenever these issues arise always consult an attorney that understands these areas of the law. In some cases where negligence actually existed it may be best to settle and pay a claim that is proper. However, before a citizen or officer that is involved in a shooting makes a statement they should consult an attorney.

When carrying a concealed deadly weapon it is important to remember that the purpose of the weapon is protection from the threat of death or severe injury at the hands of a criminal. It is therefore of paramount importance that the person carry the weapon and act with the utmost care, maturity and common sense. Please read the manual thoroughly and remember when in doubt you should act logically, reasonably and safely. Never fire a weapon unless you are sure of your target and you are sure the threat is one of immediate death or severe bodily injury. And if you must carry, carry the weapon totally concealed so that it is not taken from you by predators and used against you, is stolen or becomes the object of a child's play and death.