TAB 09:
Self-Defense
& Mental Health Defense

Issues in Self-Defense Law in North Carolina

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April 2017

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Contents

§ 14-51.2. Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm.

(a) The following definitions apply in this section:

(1) Home. - A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.

(2) Law enforcement officer. - Any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, probation officer, post-release supervision officer, or parole officer.

(3) Motor vehicle. - As defined in G.S. 20-4.01(23).

(4) Workplace. - A building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes.

(b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) 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.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

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

(2) The person sought to be removed from the home, motor vehicle, or workplace 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.

(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.

(4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman 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 law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

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

(e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman 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 law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.

(g) This section is not intended to repeal or limit any other defense that may exist under the common law. (2011-268, s. 1.)

§ 14-51.3. Use of force in defense of person; relief from criminal or civil liability.

(a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

(2) Under the circumstances permitted pursuant to G.S. 14-51.2.

(b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman 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 law enforcement officer or bail bondsman in the lawful performance of his or her official duties. (2011-268, s. 1.)

§ 14-51.4. Justification for defensive force not available.

The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who:

(1) Was attempting to commit, committing, or escaping after the commission of a felony.

(2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:

a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. (2011-268, s. 1.)

Self-Defense Provides Immunity from Criminal Liability

Author : John Rubin

Categories : Crimes and Elements, Procedure

Tagged as : immunityself-defense

Date : October 4, 2016

So say two statutes enacted by the General Assembly in 2011 as part of its revision of North Carolina's self-defense law. G.S. 14-51.2(e) and G.S. 14-51.3(b) both state that a person who uses force as permitted by those statutes—in defense of home, workplace, and vehicle under the first statute and in defense of self or others under the second statute—"is justified in using such force and is immune from civil or criminal liability for the use of such force . . . ." What does this protection mean in criminal cases? No North Carolina appellate cases have addressed the self-defense immunity provision. This blog post addresses possible implications.

Does North Carolina's immunity provision merely confirm that a person may rely on self-defense as an affirmative defense at trial and, if successful, not be convicted? Or, does it do more?

The immunity provision may do more. It may create a mechanism for a defendant to obtain a determination by the court, before trial, that he or she lawfully used defensive force and is entitled to dismissal of the charges.

Several states now have self-defense immunity provisions. The exact wording varies. Some have explicit procedures for determining immunity (*see* Ala. Code § 13A-3-23), but most are silent. In interpreting these statutes, the courts agree that the immunity provision does "not merely provide that a defendant cannot be convicted as a result of legally justified force." *See Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010). Surveying the various states with immunity provisions, one commentator has observed: "There is consensus that "Stand Your Ground" statutory immunity is not an affirmative defense, but rather a true immunity to be raised pretrial." *See* Benjamin M. Boylston, Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws, 20 Barry Law Review 25, 34 (Fall 2014).

North Carolina's immunity statute is in the silent camp. It does not describe procedures for determining immunity or elaborate on the meaning of the term. The statute appears to distinguish between defensive force as an affirmative defense and defensive force as the basis for immunity, providing that a person who meets the statutory requirements for defensive force is "justified" in using such force and is "immune" from liability. The first term appears to afford the defendant an affirmative defense—a justification—against criminal charges, while the second term appears to afford the defendant something more. *See also* G.S. 15A-954(a)(9) (providing that on motion of defendant court must dismiss charges if defendant has been granted immunity by law from prosecution).

North Carolina's self-defense immunity provisions may differ in that they protect a person from criminal "liability" while other states' provisions protect a person from criminal "prosecution." *See, e.g.,* Fla. Stat. § § 776.032(a) (protecting person from criminal prosecution and civil action and defining criminal prosecution as including arresting, detaining in custody, and charging or prosecuting); Colo. Rev. Stat. § 18-1-704.5 (protecting person from criminal prosecution and civil liability but not defining terms). Whether the difference is legally significant is unclear.

Have other state courts interpreted their self-defense immunity statutes as giving the defendant a right to a pretrial hearing on immunity?

Yes. Although the courts differ on the requirements for such hearings, discussed below, they have found that their self-defense immunity statutes give defendants the right to a pretrial hearing to determine immunity. *See, e.g., People v.*

Guenther, 740 P.2d 971, 975 (Colo. 1987).

In what kinds of cases involving defensive force have courts found a right to a pretrial immunity determination?

The answer depends on the particular statute. For example, the Alabama Court of Criminal Appeals held that its immunity provision applies to all claims of self-defense, not just those involving a "stand-your-ground" defense. *Malone v. State*, 2016 WL 3136212 (Ala. Crim. App., June 3, 2016). The Colorado Supreme Court held that its immunity statute applies to occupants of dwellings who use force against an unlawful entry as provided in its statute. *Guenther*, 740 P.2d at 979.

North Carolina's immunity provision is included in both G.S. 14-51.2 and G.S. 14-51.3, which together cover defense of home, workplace, vehicle, and person. Therefore, regardless of its exact meaning, the immunity provision applies to the use of defensive force in compliance with either statute.

What is the standard of proof at a pretrial immunity determination?

Most courts have held that the defendant has the burden to establish immunity by a preponderance of the evidence. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016); *Bretherick v. State*, 170 So.3d 766, 779 (Fla. 2015); *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008); *Guenther*, 740 P.2d at 981; *see also Harrison v. State*, 2015 WL 9263815 (Ala. Crim. App., Dec. 18, 2015) (adopting this burden before statute was revised to impose this burden). Because the defendant has the burden of proof, presumably the defendant presents evidence first.

Courts taking this view have rejected other burdens making it easier or harder for the State to resist immunity motions. For example, the Florida Supreme Court held that the existence of disputed issues of material fact (a standard common to summary judgment motions in civil cases) does not warrant a denial of immunity. *See Dennis*, 51 So.2d at 462–63. Similarly, the Florida Supreme Court held that the existence of probable cause does not warrant a denial of immunity; the court reasoned that its legislature intended the immunity provision to provide greater rights than already existed under Florida law. *Id.* at 463. The Florida Supreme Court refused, however, to require the State to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force, the standard at trial. *See Bretherick*, 170 So.2d at 775 (also citing decisions from other jurisdictions; two justices dissented).

Kansas and Kentucky appellate courts have held that the State need only establish probable cause that the defendant did not lawfully use defensive force. *See State v. Ultreras*, 295 P.3d 1020 (Kan. 2013); *Rodgers v. Commonwealth*, 285 S.W.3d 740, 756 (Ky. 2009). The Kansas Supreme Court has also held that a trial judge may set aside on immunity grounds a jury verdict of guilty. *See State v. Barlow*, 368 P.3d 331 (Kan. 2016).

What is the nature of the hearing?

In states in which the defendant has the burden of establishing immunity, the trial court holds an evidentiary hearing and resolves factual disputes. *See, e.g., Dennis*, 51 So.3d at 462–63; *Guenther*, 740 P.2d at 981. The South Carolina Supreme Court recently held that a judge may decide the immunity issue without an evidentiary hearing if undisputed evidence, such as witness statements, show that the defendant has not met his or her burden of proof. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016).

Kentucky and Kansas, which require only that the State establish probable cause that the defendant did not lawfully use defensive force, differ from each other. The Kentucky courts have held that an evidentiary hearing is not required and that the State may meet its burden with other record evidence. *See Rodgers*, 285 S.W.3d at 755–56. The Kansas Court of Appeals has held that an evidentiary hearing is required and that the rules of evidence apply at such hearings, but the judge should construe the evidence in a light favorable to the State, resolving conflicts in the evidence to the State's benefit and against immunity. *See State v. Hardy*, 347 P.3d 222, 228 (Kan. Ct. App. 2015), *review granted*, ___

P.3d ___ (Kan., Apr. 21 2016)

In all of the states, the court must dismiss the charges if the defendant prevails. *See also Fair v. State*, 664 S.E.2d 227, 230 (Ga. 2008) (holding that trial court may not reserve ruling until trial).

Is the defendant barred from relying on self-defense at trial if he or she loses a pretrial immunity motion?

No. Courts in other states have recognized that a defendant still may rely on defensive force as an affirmative defense at trial under the standards of proof applicable to the trial of criminal cases. *See, e.g., Bretherick*, 170 So.3d at 778; *Bunn*, 667 S.E.2d at 608. In North Carolina, the State has the burden at trial to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force.

As the foregoing indicates, the North Carolina self-defense immunity provision raises several questions, which await further answers.

A Warning Shot about Self-Defense

Author : John Rubin

Categories : Uncategorized

Tagged as : defenses, self-defensewarning shots

Date : September 7, 2016

Suppose John is facing a deadly assault and fears that he will be killed or suffer great bodily harm. John has a firearm but, rather than shoot his assailant, he fires a warning shot. The shot goes awry, strikes John's assailant, and kills him. May John rely on self-defense if charged with murder? The answer may be surprising.

John may not be able to rely on self-defense in this scenario. Under current North Carolina case law, his defense may be accident. Here's why.

Focusing on the intended result. Generally, a person may use deadly force—that is, force likely to cause death or great bodily harm—if reasonably necessary to save himself from death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. 34 (1975). Thus, in the above scenario, John would have the right to shoot and even kill his assailant if he met the other requirements for self-defense (for example, John wasn't the aggressor).

One might assume from this principle that if faced with a deadly assault, a person could opt to use nondeadly force if the person thought that a lesser degree of force would be sufficient to end the threat. North Carolina decisions define nondeadly force as force neither intended nor likely to cause death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. at 39. North Carolina decisions have also found that a warning shot may constitute nondeadly force. *See State v. Whetstone*, 212 N.C. App. 551, 558 n.4 (2011); *State v. Polk*, 29 N.C. App. 360 (1976). Thus, in the above scenario, one might conclude that John could rely on self-defense if he used non-deadly force to defend himself and unintentionally killed his assailant.

Since the mid-1990s, however, the North Carolina courts have tried to establish a firmer boundary between intentional and unintentional killings for purposes of self-defense. In various situations, they have held that a defendant who used nondeadly force and unintentionally killed could not rely on self-defense despite his claim that he was defending against a deadly assault. Thus, in addition to the warning shot scenario above, the courts have held that the defendant was not entitled to rely on self-defense based on evidence that he grabbed a gun from an assailant (or the assailant tried to grab the defendant's gun) and in the ensuing struggle the gun inadvertently went off and killed the assailant. *See, e.g.,*; *State v. Nicholson*, 355 N.C. 1, 30–31 (2002) (warning shots); *State v. Gray,* 347 N.C. 143, 166–67 (1997) (gun struggle), *overruled on other grounds*, *State v. Long*, 354 N.C. 534 (2001); *State v. Hinnant*, ___ N.C. App. ___, 768 S.E.2d 317, 319–20 (2014) (warning shots); *State v. Gaston*, 229 N.C. App. 407 (2013) (gun struggle).

To make a long story short, these decisions rest on the phrasing of the first requirement for self-defense in murder cases. The requirement is often phrased as follows: The defendant must have believed in the need to kill to avoid death or great bodily injury. Focusing on the first part of this requirement, decisions have held that the defendant must literally "believe in the need to kill," shown by an intent to kill or at least an intent to use deadly force. *See also* North Carolina Pattern Jury Instruction—Crim. 206.10 at p. 2 n.4 (June 2014). In other words, the evidence must show that the defendant intentionally shot *at* his assailant in self-defense. Under this approach, a defendant who uses nondeadly force, such as firing a warning shot or struggling over a gun without intending to fire it, is not entitled to claim self-defense even if he believes his actions will address the threat he is facing. Because he does not believe in the need to kill, his defense, if any, is accident, not self-defense.

It's possible that the courts did not intend to impose such a blanket requirement. The courts may have rejected the defendant's claim of self-defense in particular cases because it doubted that the defendant believed he was facing death or great bodily harm, which is also part of the "belief" requirement. Language from some cases suggests that the defendant's perception of the threat against him is the critical inquiry for the "belief" requirement, not the method of force he used or the ultimate result. *See State v. Richardson*,341 N.C. 585, 590 (1995); *see also* John Rubin, The Law of Self-Defense in North Carolina at 47–48 (UNC Sch. of Gov. 1996). The literal language of the "belief" requirement and cases applying it may not support this narrower focus, however. *See also State v. Crawford*, 344 N.C. 65, 77 (1996) (refusing to modify jury instruction requiring that defendant have believed in need to kill).

The potential impact of accident as a defense instead of self-defense. What is the impact of applying accident instead of self-defense principles to warning shot, gun struggle, and other murder prosecutions in which the defendant acted defensively but did not intend to kill or use deadly force? The case law on accident is relatively undeveloped in these situations, making the rules less certain than in self-defense cases. Based on the above decisions and the additional ones cited below, here are some possibilities to consider.

1. Jury instructions. The courts have held that the defendant is not entitled to have the jury instructed on self-defense in these cases. Still, some explanation to the jury about self-defense principles may be necessary. For the defense of accident to apply, the defendant must have engaged in lawful conduct and must not have acted with culpable negligence. *See, e.g., State v. Riddick*, 340 N.C. 338 (1995). The firing of warning shots or use of physical force to gain control of a gun could be considered unlawful or criminally negligent unless the defendant had the right to take those actions to defend himself. Accordingly, a hybrid instruction of some kind, explaining how principles of self-defense may make the defendant's actions permissible, may be necessary.

2. Evidence. The courts have sometimes found that the defendant could not offer the sort of evidence allowed in self-defense cases to explain why the defendant believed it necessary to take defensive action—for example, evidence of previous instances in which the victim acted violently, which made the defendant reasonably believe it necessary to use force in self-defense. *See State v. Strickland*, 346 N.C. 443, 445–46 (1997) (finding such evidence inadmissible in support of defense that court characterized as accident defense). Again, however, for the jury to determine whether the defendant acted lawfully and without culpable negligence—requirements for an accident defense—such evidence would seem to be relevant.

3. Lesser offenses. The courts have held that a defendant who did not act with the intent to kill or at least use deadly force is not entitled to a jury instruction on imperfect self-defense, which reduces murder to voluntary manslaughter. A defendant may still be entitled to an instruction on involuntary manslaughter. A person may be found guilty of involuntary manslaughter if he killed another person by either (1) an unlawful act that does not amount to a felony and is not ordinarily dangerous to human life or (2) a culpably negligent act or omission. *See State v. Wilkerson*, 295 N.C. 559, 579 (1978). The cases do not provide clear direction on how to apply these elements to the kinds of cases discussed in this post, however. For example, *State v. Hinnant*, 768 S.E.2d at 320–21, presented a seeming Catch-22 to a defendant who claimed that he fired two warning shots and inadvertently hit the victim. The court held that he was not entitled to a voluntary manslaughter instruction based on imperfect self-defense because he did not intend to shoot anyone, but he was not entitled to an involuntary manslaughter instruction because he intentionally discharged a firearm under circumstances naturally dangerous to human life.

4. Whether the defendant testifies. The cases recognize that for a defendant to rely on self-defense, he need not testify. Other evidence may show that he met the requirements of self-defense, including the requirement in a murder case that he believed in the need to kill to avoid death or great bodily harm. *See State v. Broussard*, ___ N.C. App. ___, 768 S.E.2d 367, 370 (2015). As a practical matter, however, a defendant who relies on self-defense will often take the stand to explain what happened. The defendant's testimony about his intent when he fired or took other actions will likely be critical to whether the case is governed by self-defense principles or the evolving rules on accident.

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The Statutory Felony Disqualification for Self-Defense

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Categories : Procedure, Uncategorized

Tagged as : defenses, jury instructions, pattern jury instructionsself-defense

Date : June 7, 2016

I am working on a new edition of the self-defense book I wrote in 1996. As in the story of Rip Van Winkle, a lot has changed in twenty years. Most notably, the General Assembly adopted new statutes in 2011 on self-defense and related defenses. This blog post addresses one of those provisions, in G.S. 14-51.4, which disqualifies a person from relying on self-defense while committing, attempting to commit, or escaping from the commission of a felony. North Carolina appellate courts have not yet considered the meaning of this provision. *Cf. State v. Rawlings*, ___ N.C. App. ___, 762 S.E.2d 909 (2014) (felony disqualification did not apply to case in which defendant's offense predated enactment of provision, and court expressed no opinion on proper construction of provision).

What felonies are disqualifiers? Interpreted literally, the language in G.S. 14-51.4 covers all felonies, regardless of the nature of the offense or its relationship to the incident in which the need for defensive force arose. To take an extreme example, a woman in possession of a little more than one and a half ounces of marijuana, a felony in North Carolina, could not rely on self-defense to justify the use of defensive force if her abusive boyfriend, for reasons unrelated to her marijuana possession, began to beat and threaten to kill her. Such a result would represent a drastic change to self-defense law in North Carolina and elsewhere, which provides for forfeiture of a person's right to act in self-defense only when the person is "at fault" in some sense for bringing about the conflict. *See* John Rubin, The Law of Self-Defense in North Carolina § 2.1(b), at pp. 14–15 (UNC Sch. of Gov., 1996) (discussing underlying principles of self-defense).

The structure of G.S. 14-51.4 suggests that the General Assembly did not intend such a result and intended to retain a "fault" requirement, although not expressly stated in the statute. The statute contains two subsections. Subsection (1) contains the felony disqualifier. Subsection (2) contains the "aggressor" disqualifier, which provides that a person forfeits the right of self-defense (subject to certain exceptions) if he or she "provokes the use of force against himself or herself." The aggressor doctrine has been the principal means by which North Carolina and other jurisdictions have expressed the concept that a person who is at fault in provoking an encounter generally loses the right to self-defense. The pairing of the felony and aggressor disqualifier provisions suggests that both are mechanisms for addressing the impact of fault in an encounter involving the use of defensive force.

Decisions from jurisdictions that have adopted crime disqualification language support this view. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(e), at p. 154 & n.64 (2d ed. 2003) (identifying jurisdictions). For example, Indiana's self-defense statutes state that a person is not justified in using defensive force while committing or escaping after the commission of a crime. The Indiana Supreme Court rejected a literal application of this exception, finding that such an interpretation "would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process." *Mayes v. State*, 744 N.E.2d 390, 393–94 (Ind. 2001). The Court found that its legislature "could not have intended that a defense so engrained in the jurisprudence of this State be dependent upon . . . happenstance . . . ."

We conclude that because a defendant is committing a crime at the time he is allegedly defending himself is not sufficient standing alone to deprive the defendant of the defense of self-defense. Rather, there must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

Florida and a few other states provide that self-defense is unavailable during the commission of a "forcible felony," defined by Florida statute to include certain dangerous felonies such as robbery, burglary, and any other felony that involves the use or threat of physical force or violence against any individual. Florida's courts have recognized the explicit limits of this provision, holding that the right of self-defense is only lost during the commission of one of the enumerated felonies or a felony that has as an element the use or threat of physical force or violence. *Perkins v. State,* 576 So. 2d 1310, 1313 (Fla. 1991). The concurring opinion in *Perkins* observed further that a broader disqualification would violate a defendant's state constitutional rights in two respects. First, it would violate a defendant's fundamental right to defend his or her life and liberty in court by asserting a reasonable defense. Second, it would violate the fundamental right to meet force with force in the field when attacked illegally and without justification, the "right to life itself." 576 So. 2d at 1314. The concurrence observed that the State has a compelling interest in disallowing the use of self-defense only when "a person's own unprovoked, aggressive, and felonious acts set in motion an unbroken chain of events leading to a killing or other injury." *Id.*

The foregoing suggests that the felony disqualification statute in North Carolina contains some causation limitation, which would bring it more in line with North Carolina's established law on aggressors. The exact nature of the limitation will depend on further appellate interpretation.

How should trial judges handle the matter? The felony disqualification statute affects how trial judges instruct the jury on self-defense. In the absence of any North Carolina appellate opinions so far, the pattern jury instructions track the language of the statute. The instruction is to be given to the jury in cases in which the evidence shows that the defendant engaged in a disqualifying felony. *See, e.g.,* N.C.P.I.—Crim. 2016.10 at p. 4 n.6 (June 2014) (first-degree murder). If a causal connection is a required part of the felony disqualifier, additional language may be necessary. The Indiana courts have found it to be reversible error for jury instructions to include a blanket statement that one committing a crime may not assert self-defense; the instructions should indicate that a defendant "may not be precluded from asserting the defense of self-defense if there is no immediate causal connection between his or her crime and the confrontation which occasioned the use of force." *Smith v. State*, 777 N.E.2d 32, 36 (Ind. Ct. App. 2002); *accord Fuentes v. State*, 952 N.E.2d 275 (Ind. Ct. App. 2011). The Indiana courts have found that the failure to include such language may not be error, however, if not specifically requested. *See Smith*, 777 N.E.2d at 36.

It also may be inappropriate for trial judges to instruct the jury about the felony disqualification if the evidence doesn't show that the felony had a causal relationship to the conflict. The North Carolina courts have consistently held that it is error to instruct on the aggressor doctrine, which likewise disqualifies a defendant from asserting self-defense, unless there is evidence that the defendant was the initial aggressor. *See, e.g., State v. Juarez*, ___ N.C. App. ___, 777 S.E.2d 325, 332 (2015) (citing principle and cases), *review granted*, ___ N.C. ___, 781 S.E.2d 473 (2016).

Is imperfect self-defense still available against a murder charge? Yes, it appears so. The felony and aggressor provisions in G.S. 14-51.4 disqualify a person from relying on the "justification" defenses in G.S. 14-51.2 and G.S. 14-51.3. Those two statutes describe the circumstances in which the defendant is entitled to acquittal when defending his or her home and other interests, himself or herself, and other people. Satisfaction of those circumstances constitutes "perfect" self-defense and "justifies" the defendant's conduct. Imperfect self-defense, although a variation of self-defense, reduces murder to voluntary manslaughter, does not result in acquittal, and is typically not considered a justification defense. The statutory disqualification for commission of a felony therefore does not appear to deprive a defendant of imperfect self-defense.

The pattern jury instructions appear to recognize this result. The felony disqualification is included in the portion of the instructions addressing the defendant's right to engage in perfect self-defense; it is not included as basis for precluding a defendant from reducing murder to voluntary manslaughter. *See* N.C.P.I—Crim. 206.10 at pp. 10–11 (June 2014) (stating that jury may return verdict of voluntary manslaughter if the defendant kills in self-defense but was the aggressor without murderous intent or used excessive force). This result is also consistent with existing self-defense law. If a person provokes a conflict by an action that is not life threatening, whether or not the action is a felony, the person is considered an aggressor without murderous intent and may rely on imperfect self-defense against a murder

charge. *See* John Rubin, The Law of Self Defense § 3.3(d), at pp. 71–72.

Commission of a disqualifying felony would, however, preclude a defendant from asserting self-defense against an assault charge. The reason is that North Carolina law does not recognize imperfect self-defense against charges other than murder. Consequently, if the defendant is charged with an assault and does not meet the requirements for perfect self-defense—by having committed a disqualifying felony, among other things—the defendant loses all rights to self-defense.

Is "Justification" a Defense to Possession of a Firearm by a Person with a Felony Conviction?

Author : John Rubin

Categories : Uncategorized

Tagged as : deleveaux, felon in possession, firearms, justificationself-defense

Date : August 2, 2016

North Carolina law prohibits a person who has been convicted of a felony from possessing a firearm. The prohibition, set forth in G.S. 14-415.1, contains narrow exceptions, such as for antique firearms. The question has arisen in several cases whether a person with a prior felony conviction may possess a firearm if necessary to defend himself or others—in other words, whether the person may rely on a justification defense.

So far, the North Carolina appellate courts have withheld final judgment on the question. Several North Carolina decisions acknowledge that other courts have recognized that a person with a prior felony conviction may assert a justification defense to a charge of illegally possessing a firearm. These decisions set forth the requirements for the defense and measure the defendant's conduct against them. They do not recognize the defense explicitly, however, stating that assuming the defense exists, the defendant did not satisfy the requirements. *See, e.g., State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015); *State v. Monroe*, 233 N.C. App. 563, 571 (2014) (Stroud, J., dissenting) (arguing for explicit recognition of defense and noting that several North Carolina decisions have relied on the test for the defense, "although only assuming *arguendo* that it would apply because the facts in those cases did not satisfy the test"), *aff'd per curiam*, 367 N.C. 771 (2015).

In anticipation that the North Carolina courts would allow the defense in appropriate circumstances, this post provides a brief summary of the defense and potential issues.

The defense may go by different names. Defendants raising the defense have used various labels to describe it, including duress, coercion, necessity, and self-defense. *See U.S. v. Nolan*, 700 F.2d 479 (9th Cir. 1983) (so noting); *see also State v. Monroe*, 233 N.C. App. at 565 (noting blurring of duress and necessity defenses). It is probably most accurate to call the defense simply a "justification" defense because the courts have merged the requirements into a single defense in this context.

Almost all federal courts recognize the defense. Like North Carolina law, federal law prohibits a person with a prior felony conviction from possessing a firearm. Of the twelve federal circuit courts of appeal, eleven have recognized a justification defense in limited circumstances. Only the Eighth Circuit has withheld judgment. *See U.S. v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007) (recognizing that first, second, third, fourth, fifth, sixth, ninth, tenth, and eleventh circuits have recognized defense); *U.S. v. Kilgore*, 591 F.3d 890 (7th Cir. 2010) (recognizing defense); *U.S. v. Mason*, 233 F.3d 619 (D.C. Cir. 2000) (also recognizing innocent possession defense); *compare U.S. v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009).

The Fourth Circuit has held that an attorney provided ineffective assistance of counsel by advising a client that no such defense is "ever available." *U.S. v. Mooney*, 497 F.3d at 404.

The federal courts have found that the federal statute does not preclude the defense. Like North Carolina's statute, the federal prohibition on possession of a firearm by a person with a felony conviction does not specifically provide for a justification defense. In recognizing the availability of the defense, the federal courts have observed that "'Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." The failure to

provide specifically in a statute for a common-law defense does not preclude the defense. *U.S. v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (quoting *U.S. v. Bailey*, 444 U.S. 394, 415 n.11 (1980)).

The federal courts also have rejected the argument that because possession of a firearm by a person with a felony conviction is a strict liability offense, a justification defense is unavailable. *See U.S. v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983) (noting availability of defense even though federal firearms laws "impose something approaching absolute liability"). As one court noted, "[c]ommon sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life." *U.S. v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990); *see also U.S. v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (author of opinion suggests that statute might not pass constitutional muster if it is not subject to justification defense).

In another context, the North Carolina courts rejected the argument that the defense of necessity is inapplicable to DWI prosecutions, which the State characterized as a strict liability offense. *See State v. Hudgins,* 167 N.C. App. 705 (2005).

The test for the defense is strict. In cases in which defendants have sought to rely on justification as a defense, the North Carolina courts have referred to the test stated in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Under *Deleveaux*, the defendant has the burden to show by a preponderance of the evidence that:

1. he was under an unlawful and present, imminent, and impending threat of death or serious bodily injury;
2. he did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
3. he had no reasonable legal alternative to violating the law; and
4. there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

The test may differ slightly in other circuits, but the defense is still available only in rare instances. *See, e.g., U.S. v. Mooney*, 497 F.3d 397, 406 (4th Cir. 2007) (requiring that defendant be under unlawful and present threat of death or serious bodily injury and that defendant not have recklessly placed himself in situation where he would be forced to engage in criminal conduct).

These requirements are stricter than for self-defense. For example, a defendant who acts recklessly (or negligently) loses the defense, while a defendant must have been the aggressor to lose the right of self-defense.

North Carolina decisions finding that the defendant failed to satisfy the test demonstrate its strictness. A defendant may fail the test by unnecessarily possessing a gun before or after the incident in which he needed the gun. For example, in *State v. Craig,* 167 N.C. App. 793 (2005), the defendant's evidence showed that his girlfriend handed him a gun while he was on the floor being kicked by several men; however, because the defendant unnecessarily kept the gun after he got away from his assailants and was no longer under an imminent threat, the court found the evidence was insufficient to warrant a justification instruction to the jury. In *State v. Boston*, 165 N.C. App. 214 (2004), the defendant took a gun with him to confront a person who had threatened to kill him and, after chasing the person, put the gun on the ground so they could "fight like men," at which time the person shot the defendant four times. The court held that the defendant was not entitled to a jury instruction on justification because he was not under an imminent threat when he made the decision to carry the gun. *See also State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015) (defendant stated only that he got gun an hour earlier because people were threatening his life; evidence of generalized fear insufficient).

Defendants have satisfied the test in some instances. Although the test is strict, defendants have satisfied it in some instances, illustrated by the evidence they presented in the following cases:

- In *U.S. v. Ricks*, 573 F.3d 198 (4th Cir. 2009), the defendant knocked a gun away from his partner, who was acting erratically and talking incoherently; the defendant then removed the clip and threw the pieces in different

directions. After his partner ran off, the defendant put the clip and gun underneath some clothes on top of a dresser in the bedroom that the two shared. The defendant's partner returned with the police 15 to 30 minutes later, and the defendant retrieved the gun after several inquires by the police. The court found that the trial court erred in failing to instruct the jury on justification as a defense.

- In *U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007), the defendant's ex-wife put a gun to his head and, after he took it away, he called his boss and said he was bringing it in to give to the police. He then walked directly to his place of employment to turn in the gun. The court found that the defendant was prejudiced by his attorney's advice that a justification defense was unavailable.
- In *U.S. v. Gomez,* 92 F.3d 770 (9th Cir. 1996), after the government inadvertently disclosed that the defendant was an informant against a murder-for-hire conspirator, the defendant received repeated death threats and went on the run, living on the streets, riding buses for hours, and falsely telling his parole agent that he was illegally using drugs so he could go back to jail, where he received additional death threats. After his release, the defendant obtained a shotgun, which the government discovered when it served a subpoena on him in the murder-for-hire case. The court held that the trial court erred in denying the defendant's request to present evidence about why he had a gun.
- In *U.S. v. Panter*, 688 F.2d 268 (5th Cir. 1982), the defendant was tending bar when he was stabbed by a bar patron after an argument; as he was fighting back, he fell on the floor beneath his assailant. The defendant reached underneath the bar for a club that he knew was there and found a pistol, which he used to shoot his assailant. The defendant then placed the pistol on the bar. The court found that the trial court erred in instructing the jury that it could not consider the defendant's reasons for possessing the firearm.

See also U.S. v. Rice, 214 F.3d 1295, 1297 (11th Cir. 2000) (comparing additional cases). Decisions such as these, as well as North Carolina decisions acknowledging the test for a justification defense, suggest that in appropriate circumstances defendants may be able to rely on the defense.

§ 14-51.2. Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm.

(a) The following definitions apply in this section:

(1) Home. - A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.

(2) Law enforcement officer. - Any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, probation officer, post-release supervision officer, or parole officer.

(3) Motor vehicle. - As defined in G.S. 20-4.01(23).

(4) Workplace. - A building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes.

(b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) 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.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

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

(2) The person sought to be removed from the home, motor vehicle, or workplace 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.

(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.

(4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman 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 law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

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

(e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman 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 law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.

(g) This section is not intended to repeal or limit any other defense that may exist under the common law. (2011-268, s. 1.)

§ 14-51.3. Use of force in defense of person; relief from criminal or civil liability.

(a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

(2) Under the circumstances permitted pursuant to G.S. 14-51.2.

(b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman 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 law enforcement officer or bail bondsman in the lawful performance of his or her official duties. (2011-268, s. 1.)

§ 14-51.4. Justification for defensive force not available.

The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who:

(1) Was attempting to commit, committing, or escaping after the commission of a felony.

(2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:

a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. (2011-268, s. 1.)

Self-Defense Provides Immunity from Criminal Liability

Author : John Rubin

Categories : Crimes and Elements, Procedure

Tagged as : immunityself-defense

Date : October 4, 2016

So say two statutes enacted by the General Assembly in 2011 as part of its revision of North Carolina's self-defense law. G.S. 14-51.2(e) and G.S. 14-51.3(b) both state that a person who uses force as permitted by those statutes—in defense of home, workplace, and vehicle under the first statute and in defense of self or others under the second statute—"is justified in using such force and is immune from civil or criminal liability for the use of such force . . . ." What does this protection mean in criminal cases? No North Carolina appellate cases have addressed the self-defense immunity provision. This blog post addresses possible implications.

Does North Carolina's immunity provision merely confirm that a person may rely on self-defense as an affirmative defense at trial and, if successful, not be convicted? Or, does it do more?

The immunity provision may do more. It may create a mechanism for a defendant to obtain a determination by the court, before trial, that he or she lawfully used defensive force and is entitled to dismissal of the charges.

Several states now have self-defense immunity provisions. The exact wording varies. Some have explicit procedures for determining immunity (*see* Ala. Code § 13A-3-23), but most are silent. In interpreting these statutes, the courts agree that the immunity provision does "not merely provide that a defendant cannot be convicted as a result of legally justified force." *See Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010). Surveying the various states with immunity provisions, one commentator has observed: "There is consensus that "Stand Your Ground" statutory immunity is not an affirmative defense, but rather a true immunity to be raised pretrial." *See* Benjamin M. Boylston, Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws, 20 Barry Law Review 25, 34 (Fall 2014).

North Carolina's immunity statute is in the silent camp. It does not describe procedures for determining immunity or elaborate on the meaning of the term. The statute appears to distinguish between defensive force as an affirmative defense and defensive force as the basis for immunity, providing that a person who meets the statutory requirements for defensive force is "justified" in using such force and is "immune" from liability. The first term appears to afford the defendant an affirmative defense—a justification—against criminal charges, while the second term appears to afford the defendant something more. *See also* G.S. 15A-954(a)(9) (providing that on motion of defendant court must dismiss charges if defendant has been granted immunity by law from prosecution).

North Carolina's self-defense immunity provisions may differ in that they protect a person from criminal "liability" while other states' provisions protect a person from criminal "prosecution." *See, e.g.,* Fla. Stat. § § 776.032(a) (protecting person from criminal prosecution and civil action and defining criminal prosecution as including arresting, detaining in custody, and charging or prosecuting); Colo. Rev. Stat. § 18-1-704.5 (protecting person from criminal prosecution and civil liability but not defining terms). Whether the difference is legally significant is unclear.

Have other state courts interpreted their self-defense immunity statutes as giving the defendant a right to a pretrial hearing on immunity?

Yes. Although the courts differ on the requirements for such hearings, discussed below, they have found that their self-defense immunity statutes give defendants the right to a pretrial hearing to determine immunity. *See, e.g., People v.*

Guenther, 740 P.2d 971, 975 (Colo. 1987).

In what kinds of cases involving defensive force have courts found a right to a pretrial immunity determination?

The answer depends on the particular statute. For example, the Alabama Court of Criminal Appeals held that its immunity provision applies to all claims of self-defense, not just those involving a "stand-your-ground" defense. *Malone v. State*, 2016 WL 3136212 (Ala. Crim. App., June 3, 2016). The Colorado Supreme Court held that its immunity statute applies to occupants of dwellings who use force against an unlawful entry as provided in its statute. *Guenther*, 740 P.2d at 979.

North Carolina's immunity provision is included in both G.S. 14-51.2 and G.S. 14-51.3, which together cover defense of home, workplace, vehicle, and person. Therefore, regardless of its exact meaning, the immunity provision applies to the use of defensive force in compliance with either statute.

What is the standard of proof at a pretrial immunity determination?

Most courts have held that the defendant has the burden to establish immunity by a preponderance of the evidence. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016); *Bretherick v. State*, 170 So.3d 766, 779 (Fla. 2015); *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008); *Guenther*, 740 P.2d at 981; *see also Harrison v. State*, 2015 WL 9263815 (Ala. Crim. App., Dec. 18, 2015) (adopting this burden before statute was revised to impose this burden). Because the defendant has the burden of proof, presumably the defendant presents evidence first.

Courts taking this view have rejected other burdens making it easier or harder for the State to resist immunity motions. For example, the Florida Supreme Court held that the existence of disputed issues of material fact (a standard common to summary judgment motions in civil cases) does not warrant a denial of immunity. *See Dennis*, 51 So.2d at 462–63. Similarly, the Florida Supreme Court held that the existence of probable cause does not warrant a denial of immunity; the court reasoned that its legislature intended the immunity provision to provide greater rights than already existed under Florida law. *Id.* at 463. The Florida Supreme Court refused, however, to require the State to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force, the standard at trial. *See Bretherick*, 170 So.2d at 775 (also citing decisions from other jurisdictions; two justices dissented).

Kansas and Kentucky appellate courts have held that the State need only establish probable cause that the defendant did not lawfully use defensive force. *See State v. Ultreras*, 295 P.3d 1020 (Kan. 2013); *Rodgers v. Commonwealth*, 285 S.W.3d 740, 756 (Ky. 2009). The Kansas Supreme Court has also held that a trial judge may set aside on immunity grounds a jury verdict of guilty. *See State v. Barlow*, 368 P.3d 331 (Kan. 2016).

What is the nature of the hearing?

In states in which the defendant has the burden of establishing immunity, the trial court holds an evidentiary hearing and resolves factual disputes. *See, e.g., Dennis*, 51 So.3d at 462–63; *Guenther*, 740 P.2d at 981. The South Carolina Supreme Court recently held that a judge may decide the immunity issue without an evidentiary hearing if undisputed evidence, such as witness statements, show that the defendant has not met his or her burden of proof. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016).

Kentucky and Kansas, which require only that the State establish probable cause that the defendant did not lawfully use defensive force, differ from each other. The Kentucky courts have held that an evidentiary hearing is not required and that the State may meet its burden with other record evidence. *See Rodgers*, 285 S.W.3d at 755–56. The Kansas Court of Appeals has held that an evidentiary hearing is required and that the rules of evidence apply at such hearings, but the judge should construe the evidence in a light favorable to the State, resolving conflicts in the evidence to the State's benefit and against immunity. *See State v. Hardy*, 347 P.3d 222, 228 (Kan. Ct. App. 2015), *review granted*, ___

P.3d ___ (Kan., Apr. 21 2016)

In all of the states, the court must dismiss the charges if the defendant prevails. *See also Fair v. State*, 664 S.E.2d 227, 230 (Ga. 2008) (holding that trial court may not reserve ruling until trial).

Is the defendant barred from relying on self-defense at trial if he or she loses a pretrial immunity motion?

No. Courts in other states have recognized that a defendant still may rely on defensive force as an affirmative defense at trial under the standards of proof applicable to the trial of criminal cases. *See, e.g., Bretherick*, 170 So.3d at 778; *Bunn*, 667 S.E.2d at 608. In North Carolina, the State has the burden at trial to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force.

As the foregoing indicates, the North Carolina self-defense immunity provision raises several questions, which await further answers.

A Warning Shot about Self-Defense

Author : John Rubin

Categories : Uncategorized

Tagged as : defenses, self-defensewarning shots

Date : September 7, 2016

Suppose John is facing a deadly assault and fears that he will be killed or suffer great bodily harm. John has a firearm but, rather than shoot his assailant, he fires a warning shot. The shot goes awry, strikes John's assailant, and kills him. May John rely on self-defense if charged with murder? The answer may be surprising.

John may not be able to rely on self-defense in this scenario. Under current North Carolina case law, his defense may be accident. Here's why.

Focusing on the intended result. Generally, a person may use deadly force—that is, force likely to cause death or great bodily harm—if reasonably necessary to save himself from death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. 34 (1975). Thus, in the above scenario, John would have the right to shoot and even kill his assailant if he met the other requirements for self-defense (for example, John wasn't the aggressor).

One might assume from this principle that if faced with a deadly assault, a person could opt to use nondeadly force if the person thought that a lesser degree of force would be sufficient to end the threat. North Carolina decisions define nondeadly force as force neither intended nor likely to cause death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. at 39. North Carolina decisions have also found that a warning shot may constitute nondeadly force. *See State v. Whetstone*, 212 N.C. App. 551, 558 n.4 (2011); *State v. Polk*, 29 N.C. App. 360 (1976). Thus, in the above scenario, one might conclude that John could rely on self-defense if he used non-deadly force to defend himself and unintentionally killed his assailant.

Since the mid-1990s, however, the North Carolina courts have tried to establish a firmer boundary between intentional and unintentional killings for purposes of self-defense. In various situations, they have held that a defendant who used nondeadly force and unintentionally killed could not rely on self-defense despite his claim that he was defending against a deadly assault. Thus, in addition to the warning shot scenario above, the courts have held that the defendant was not entitled to rely on self-defense based on evidence that he grabbed a gun from an assailant (or the assailant tried to grab the defendant's gun) and in the ensuing struggle the gun inadvertently went off and killed the assailant. *See, e.g.,*; *State v. Nicholson*, 355 N.C. 1, 30–31 (2002) (warning shots); *State v. Gray,* 347 N.C. 143, 166–67 (1997) (gun struggle), *overruled on other grounds*, *State v. Long*, 354 N.C. 534 (2001); *State v. Hinnant*, ___ N.C. App. ___, 768 S.E.2d 317, 319–20 (2014) (warning shots); *State v. Gaston*, 229 N.C. App. 407 (2013) (gun struggle).

To make a long story short, these decisions rest on the phrasing of the first requirement for self-defense in murder cases. The requirement is often phrased as follows: The defendant must have believed in the need to kill to avoid death or great bodily injury. Focusing on the first part of this requirement, decisions have held that the defendant must literally "believe in the need to kill," shown by an intent to kill or at least an intent to use deadly force. *See also* North Carolina Pattern Jury Instruction—Crim. 206.10 at p. 2 n.4 (June 2014). In other words, the evidence must show that the defendant intentionally shot *at* his assailant in self-defense. Under this approach, a defendant who uses nondeadly force, such as firing a warning shot or struggling over a gun without intending to fire it, is not entitled to claim self-defense even if he believes his actions will address the threat he is facing. Because he does not believe in the need to kill, his defense, if any, is accident, not self-defense.

It's possible that the courts did not intend to impose such a blanket requirement. The courts may have rejected the defendant's claim of self-defense in particular cases because it doubted that the defendant believed he was facing death or great bodily harm, which is also part of the "belief" requirement. Language from some cases suggests that the defendant's perception of the threat against him is the critical inquiry for the "belief" requirement, not the method of force he used or the ultimate result. *See State v. Richardson*,341 N.C. 585, 590 (1995); *see also* John Rubin, The Law of Self-Defense in North Carolina at 47–48 (UNC Sch. of Gov. 1996). The literal language of the "belief" requirement and cases applying it may not support this narrower focus, however. *See also State v. Crawford*, 344 N.C. 65, 77 (1996) (refusing to modify jury instruction requiring that defendant have believed in need to kill).

The potential impact of accident as a defense instead of self-defense. What is the impact of applying accident instead of self-defense principles to warning shot, gun struggle, and other murder prosecutions in which the defendant acted defensively but did not intend to kill or use deadly force? The case law on accident is relatively undeveloped in these situations, making the rules less certain than in self-defense cases. Based on the above decisions and the additional ones cited below, here are some possibilities to consider.

1. Jury instructions. The courts have held that the defendant is not entitled to have the jury instructed on self-defense in these cases. Still, some explanation to the jury about self-defense principles may be necessary. For the defense of accident to apply, the defendant must have engaged in lawful conduct and must not have acted with culpable negligence. *See, e.g., State v. Riddick*, 340 N.C. 338 (1995). The firing of warning shots or use of physical force to gain control of a gun could be considered unlawful or criminally negligent unless the defendant had the right to take those actions to defend himself. Accordingly, a hybrid instruction of some kind, explaining how principles of self-defense may make the defendant's actions permissible, may be necessary.

2. Evidence. The courts have sometimes found that the defendant could not offer the sort of evidence allowed in self-defense cases to explain why the defendant believed it necessary to take defensive action—for example, evidence of previous instances in which the victim acted violently, which made the defendant reasonably believe it necessary to use force in self-defense. *See State v. Strickland*, 346 N.C. 443, 445–46 (1997) (finding such evidence inadmissible in support of defense that court characterized as accident defense). Again, however, for the jury to determine whether the defendant acted lawfully and without culpable negligence—requirements for an accident defense—such evidence would seem to be relevant.

3. Lesser offenses. The courts have held that a defendant who did not act with the intent to kill or at least use deadly force is not entitled to a jury instruction on imperfect self-defense, which reduces murder to voluntary manslaughter. A defendant may still be entitled to an instruction on involuntary manslaughter. A person may be found guilty of involuntary manslaughter if he killed another person by either (1) an unlawful act that does not amount to a felony and is not ordinarily dangerous to human life or (2) a culpably negligent act or omission. *See State v. Wilkerson*, 295 N.C. 559, 579 (1978). The cases do not provide clear direction on how to apply these elements to the kinds of cases discussed in this post, however. For example, *State v. Hinnant*, 768 S.E.2d at 320–21, presented a seeming Catch-22 to a defendant who claimed that he fired two warning shots and inadvertently hit the victim. The court held that he was not entitled to a voluntary manslaughter instruction based on imperfect self-defense because he did not intend to shoot anyone, but he was not entitled to an involuntary manslaughter instruction because he intentionally discharged a firearm under circumstances naturally dangerous to human life.

4. Whether the defendant testifies. The cases recognize that for a defendant to rely on self-defense, he need not testify. Other evidence may show that he met the requirements of self-defense, including the requirement in a murder case that he believed in the need to kill to avoid death or great bodily harm. *See State v. Broussard*, ___ N.C. App. ___, 768 S.E.2d 367, 370 (2015). As a practical matter, however, a defendant who relies on self-defense will often take the stand to explain what happened. The defendant's testimony about his intent when he fired or took other actions will likely be critical to whether the case is governed by self-defense principles or the evolving rules on accident.

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The Statutory Felony Disqualification for Self-Defense

Author : John Rubin

Categories : Procedure, Uncategorized

Tagged as : defenses, jury instructions, pattern jury instructionsself-defense

Date : June 7, 2016

I am working on a new edition of the self-defense book I wrote in 1996. As in the story of Rip Van Winkle, a lot has changed in twenty years. Most notably, the General Assembly adopted new statutes in 2011 on self-defense and related defenses. This blog post addresses one of those provisions, in G.S. 14-51.4, which disqualifies a person from relying on self-defense while committing, attempting to commit, or escaping from the commission of a felony. North Carolina appellate courts have not yet considered the meaning of this provision. *Cf. State v. Rawlings*, ___ N.C. App. ___, 762 S.E.2d 909 (2014) (felony disqualification did not apply to case in which defendant's offense predated enactment of provision, and court expressed no opinion on proper construction of provision).

What felonies are disqualifiers? Interpreted literally, the language in G.S. 14-51.4 covers all felonies, regardless of the nature of the offense or its relationship to the incident in which the need for defensive force arose. To take an extreme example, a woman in possession of a little more than one and a half ounces of marijuana, a felony in North Carolina, could not rely on self-defense to justify the use of defensive force if her abusive boyfriend, for reasons unrelated to her marijuana possession, began to beat and threaten to kill her. Such a result would represent a drastic change to self-defense law in North Carolina and elsewhere, which provides for forfeiture of a person's right to act in self-defense only when the person is "at fault" in some sense for bringing about the conflict. *See* John Rubin, The Law of Self-Defense in North Carolina § 2.1(b), at pp. 14–15 (UNC Sch. of Gov., 1996) (discussing underlying principles of self-defense).

The structure of G.S. 14-51.4 suggests that the General Assembly did not intend such a result and intended to retain a "fault" requirement, although not expressly stated in the statute. The statute contains two subsections. Subsection (1) contains the felony disqualifier. Subsection (2) contains the "aggressor" disqualifier, which provides that a person forfeits the right of self-defense (subject to certain exceptions) if he or she "provokes the use of force against himself or herself." The aggressor doctrine has been the principal means by which North Carolina and other jurisdictions have expressed the concept that a person who is at fault in provoking an encounter generally loses the right to self-defense. The pairing of the felony and aggressor disqualifier provisions suggests that both are mechanisms for addressing the impact of fault in an encounter involving the use of defensive force.

Decisions from jurisdictions that have adopted crime disqualification language support this view. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(e), at p. 154 & n.64 (2d ed. 2003) (identifying jurisdictions). For example, Indiana's self-defense statutes state that a person is not justified in using defensive force while committing or escaping after the commission of a crime. The Indiana Supreme Court rejected a literal application of this exception, finding that such an interpretation "would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process." *Mayes v. State*, 744 N.E.2d 390, 393–94 (Ind. 2001). The Court found that its legislature "could not have intended that a defense so engrained in the jurisprudence of this State be dependent upon . . . happenstance . . . ."

We conclude that because a defendant is committing a crime at the time he is allegedly defending himself is not sufficient standing alone to deprive the defendant of the defense of self-defense. Rather, there must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

Florida and a few other states provide that self-defense is unavailable during the commission of a "forcible felony," defined by Florida statute to include certain dangerous felonies such as robbery, burglary, and any other felony that involves the use or threat of physical force or violence against any individual. Florida's courts have recognized the explicit limits of this provision, holding that the right of self-defense is only lost during the commission of one of the enumerated felonies or a felony that has as an element the use or threat of physical force or violence. *Perkins v. State,* 576 So. 2d 1310, 1313 (Fla. 1991). The concurring opinion in *Perkins* observed further that a broader disqualification would violate a defendant's state constitutional rights in two respects. First, it would violate a defendant's fundamental right to defend his or her life and liberty in court by asserting a reasonable defense. Second, it would violate the fundamental right to meet force with force in the field when attacked illegally and without justification, the "right to life itself." 576 So. 2d at 1314. The concurrence observed that the State has a compelling interest in disallowing the use of self-defense only when "a person's own unprovoked, aggressive, and felonious acts set in motion an unbroken chain of events leading to a killing or other injury." *Id.*

The foregoing suggests that the felony disqualification statute in North Carolina contains some causation limitation, which would bring it more in line with North Carolina's established law on aggressors. The exact nature of the limitation will depend on further appellate interpretation.

How should trial judges handle the matter? The felony disqualification statute affects how trial judges instruct the jury on self-defense. In the absence of any North Carolina appellate opinions so far, the pattern jury instructions track the language of the statute. The instruction is to be given to the jury in cases in which the evidence shows that the defendant engaged in a disqualifying felony. *See, e.g.,* N.C.P.I.—Crim. 2016.10 at p. 4 n.6 (June 2014) (first-degree murder). If a causal connection is a required part of the felony disqualifier, additional language may be necessary. The Indiana courts have found it to be reversible error for jury instructions to include a blanket statement that one committing a crime may not assert self-defense; the instructions should indicate that a defendant "may not be precluded from asserting the defense of self-defense if there is no immediate causal connection between his or her crime and the confrontation which occasioned the use of force." *Smith v. State*, 777 N.E.2d 32, 36 (Ind. Ct. App. 2002); *accord Fuentes v. State*, 952 N.E.2d 275 (Ind. Ct. App. 2011). The Indiana courts have found that the failure to include such language may not be error, however, if not specifically requested. *See Smith*, 777 N.E.2d at 36.

It also may be inappropriate for trial judges to instruct the jury about the felony disqualification if the evidence doesn't show that the felony had a causal relationship to the conflict. The North Carolina courts have consistently held that it is error to instruct on the aggressor doctrine, which likewise disqualifies a defendant from asserting self-defense, unless there is evidence that the defendant was the initial aggressor. *See, e.g., State v. Juarez*, ___ N.C. App. ___, 777 S.E.2d 325, 332 (2015) (citing principle and cases), *review granted*, ___ N.C. ___, 781 S.E.2d 473 (2016).

Is imperfect self-defense still available against a murder charge? Yes, it appears so. The felony and aggressor provisions in G.S. 14-51.4 disqualify a person from relying on the "justification" defenses in G.S. 14-51.2 and G.S. 14-51.3. Those two statutes describe the circumstances in which the defendant is entitled to acquittal when defending his or her home and other interests, himself or herself, and other people. Satisfaction of those circumstances constitutes "perfect" self-defense and "justifies" the defendant's conduct. Imperfect self-defense, although a variation of self-defense, reduces murder to voluntary manslaughter, does not result in acquittal, and is typically not considered a justification defense. The statutory disqualification for commission of a felony therefore does not appear to deprive a defendant of imperfect self-defense.

The pattern jury instructions appear to recognize this result. The felony disqualification is included in the portion of the instructions addressing the defendant's right to engage in perfect self-defense; it is not included as basis for precluding a defendant from reducing murder to voluntary manslaughter. *See* N.C.P.I—Crim. 206.10 at pp. 10–11 (June 2014) (stating that jury may return verdict of voluntary manslaughter if the defendant kills in self-defense but was the aggressor without murderous intent or used excessive force). This result is also consistent with existing self-defense law. If a person provokes a conflict by an action that is not life threatening, whether or not the action is a felony, the person is considered an aggressor without murderous intent and may rely on imperfect self-defense against a murder

charge. *See* John Rubin, The Law of Self Defense § 3.3(d), at pp. 71–72.

Commission of a disqualifying felony would, however, preclude a defendant from asserting self-defense against an assault charge. The reason is that North Carolina law does not recognize imperfect self-defense against charges other than murder. Consequently, if the defendant is charged with an assault and does not meet the requirements for perfect self-defense—by having committed a disqualifying felony, among other things—the defendant loses all rights to self-defense.

Is "Justification" a Defense to Possession of a Firearm by a Person with a Felony Conviction?

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Categories : Uncategorized

Tagged as : deleveaux, felon in possession, firearms, justificationself-defense

Date : August 2, 2016

North Carolina law prohibits a person who has been convicted of a felony from possessing a firearm. The prohibition, set forth in G.S. 14-415.1, contains narrow exceptions, such as for antique firearms. The question has arisen in several cases whether a person with a prior felony conviction may possess a firearm if necessary to defend himself or others—in other words, whether the person may rely on a justification defense.

So far, the North Carolina appellate courts have withheld final judgment on the question. Several North Carolina decisions acknowledge that other courts have recognized that a person with a prior felony conviction may assert a justification defense to a charge of illegally possessing a firearm. These decisions set forth the requirements for the defense and measure the defendant's conduct against them. They do not recognize the defense explicitly, however, stating that assuming the defense exists, the defendant did not satisfy the requirements. *See, e.g., State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015); *State v. Monroe*, 233 N.C. App. 563, 571 (2014) (Stroud, J., dissenting) (arguing for explicit recognition of defense and noting that several North Carolina decisions have relied on the test for the defense, "although only assuming *arguendo* that it would apply because the facts in those cases did not satisfy the test"), *aff'd per curiam*, 367 N.C. 771 (2015).

In anticipation that the North Carolina courts would allow the defense in appropriate circumstances, this post provides a brief summary of the defense and potential issues.

The defense may go by different names. Defendants raising the defense have used various labels to describe it, including duress, coercion, necessity, and self-defense. *See U.S. v. Nolan*, 700 F.2d 479 (9th Cir. 1983) (so noting); *see also State v. Monroe*, 233 N.C. App. at 565 (noting blurring of duress and necessity defenses). It is probably most accurate to call the defense simply a "justification" defense because the courts have merged the requirements into a single defense in this context.

Almost all federal courts recognize the defense. Like North Carolina law, federal law prohibits a person with a prior felony conviction from possessing a firearm. Of the twelve federal circuit courts of appeal, eleven have recognized a justification defense in limited circumstances. Only the Eighth Circuit has withheld judgment. *See U.S. v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007) (recognizing that first, second, third, fourth, fifth, sixth, ninth, tenth, and eleventh circuits have recognized defense); *U.S. v. Kilgore*, 591 F.3d 890 (7th Cir. 2010) (recognizing defense); *U.S. v. Mason*, 233 F.3d 619 (D.C. Cir. 2000) (also recognizing innocent possession defense); *compare U.S. v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009).

The Fourth Circuit has held that an attorney provided ineffective assistance of counsel by advising a client that no such defense is "ever available." *U.S. v. Mooney*, 497 F.3d at 404.

The federal courts have found that the federal statute does not preclude the defense. Like North Carolina's statute, the federal prohibition on possession of a firearm by a person with a felony conviction does not specifically provide for a justification defense. In recognizing the availability of the defense, the federal courts have observed that "'Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." The failure to

provide specifically in a statute for a common-law defense does not preclude the defense. *U.S. v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (quoting *U.S. v. Bailey*, 444 U.S. 394, 415 n.11 (1980)).

The federal courts also have rejected the argument that because possession of a firearm by a person with a felony conviction is a strict liability offense, a justification defense is unavailable. *See U.S. v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983) (noting availability of defense even though federal firearms laws "impose something approaching absolute liability"). As one court noted, "[c]ommon sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life." *U.S. v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990); *see also U.S. v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (author of opinion suggests that statute might not pass constitutional muster if it is not subject to justification defense).

In another context, the North Carolina courts rejected the argument that the defense of necessity is inapplicable to DWI prosecutions, which the State characterized as a strict liability offense. *See State v. Hudgins,* 167 N.C. App. 705 (2005).

The test for the defense is strict. In cases in which defendants have sought to rely on justification as a defense, the North Carolina courts have referred to the test stated in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Under *Deleveaux*, the defendant has the burden to show by a preponderance of the evidence that:

1. he was under an unlawful and present, imminent, and impending threat of death or serious bodily injury;
2. he did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
3. he had no reasonable legal alternative to violating the law; and
4. there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

The test may differ slightly in other circuits, but the defense is still available only in rare instances. *See, e.g., U.S. v. Mooney*, 497 F.3d 397, 406 (4th Cir. 2007) (requiring that defendant be under unlawful and present threat of death or serious bodily injury and that defendant not have recklessly placed himself in situation where he would be forced to engage in criminal conduct).

These requirements are stricter than for self-defense. For example, a defendant who acts recklessly (or negligently) loses the defense, while a defendant must have been the aggressor to lose the right of self-defense.

North Carolina decisions finding that the defendant failed to satisfy the test demonstrate its strictness. A defendant may fail the test by unnecessarily possessing a gun before or after the incident in which he needed the gun. For example, in *State v. Craig,* 167 N.C. App. 793 (2005), the defendant's evidence showed that his girlfriend handed him a gun while he was on the floor being kicked by several men; however, because the defendant unnecessarily kept the gun after he got away from his assailants and was no longer under an imminent threat, the court found the evidence was insufficient to warrant a justification instruction to the jury. In *State v. Boston*, 165 N.C. App. 214 (2004), the defendant took a gun with him to confront a person who had threatened to kill him and, after chasing the person, put the gun on the ground so they could "fight like men," at which time the person shot the defendant four times. The court held that the defendant was not entitled to a jury instruction on justification because he was not under an imminent threat when he made the decision to carry the gun. *See also State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015) (defendant stated only that he got gun an hour earlier because people were threatening his life; evidence of generalized fear insufficient).

Defendants have satisfied the test in some instances. Although the test is strict, defendants have satisfied it in some instances, illustrated by the evidence they presented in the following cases:

- In *U.S. v. Ricks*, 573 F.3d 198 (4th Cir. 2009), the defendant knocked a gun away from his partner, who was acting erratically and talking incoherently; the defendant then removed the clip and threw the pieces in different

directions. After his partner ran off, the defendant put the clip and gun underneath some clothes on top of a dresser in the bedroom that the two shared. The defendant's partner returned with the police 15 to 30 minutes later, and the defendant retrieved the gun after several inquires by the police. The court found that the trial court erred in failing to instruct the jury on justification as a defense.

- In *U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007), the defendant's ex-wife put a gun to his head and, after he took it away, he called his boss and said he was bringing it in to give to the police. He then walked directly to his place of employment to turn in the gun. The court found that the defendant was prejudiced by his attorney's advice that a justification defense was unavailable.
- In *U.S. v. Gomez,* 92 F.3d 770 (9th Cir. 1996), after the government inadvertently disclosed that the defendant was an informant against a murder-for-hire conspirator, the defendant received repeated death threats and went on the run, living on the streets, riding buses for hours, and falsely telling his parole agent that he was illegally using drugs so he could go back to jail, where he received additional death threats. After his release, the defendant obtained a shotgun, which the government discovered when it served a subpoena on him in the murder-for-hire case. The court held that the trial court erred in denying the defendant's request to present evidence about why he had a gun.
- In *U.S. v. Panter*, 688 F.2d 268 (5th Cir. 1982), the defendant was tending bar when he was stabbed by a bar patron after an argument; as he was fighting back, he fell on the floor beneath his assailant. The defendant reached underneath the bar for a club that he knew was there and found a pistol, which he used to shoot his assailant. The defendant then placed the pistol on the bar. The court found that the trial court erred in instructing the jury that it could not consider the defendant's reasons for possessing the firearm.

See also U.S. v. Rice, 214 F.3d 1295, 1297 (11th Cir. 2000) (comparing additional cases). Decisions such as these, as well as North Carolina decisions acknowledging the test for a justification defense, suggest that in appropriate circumstances defendants may be able to rely on the defense.

Selected Mental Health Issues in Criminal Cases

John Rubin, © UNC School of Government

May 2017

I. Capacity to Proceed

A. Offense Date

The discussion in this part applies to offenses committed on or after Dec. 1, 2013, when revisions to North Carolina's capacity statutes took effect. For a discussion of the procedures that apply to offenses committed before Dec. 1, 2013, see *infra* I.E., Resources.

B. Requirement of Capacity

1. Standard: A defendant lacks the capacity to proceed in a criminal case if, by reason of mental illness or defect, he or she is unable to: understand the nature and object of the proceedings; comprehend his or her situation in reference to the proceedings; or assist in his or her defense in a rational or reasonable manner. G.S. 15A-1001(a). The question of capacity relates to the defendant's mental status at the time of the proceeding, not to his or her mental status at the time of the alleged offense.

2. Applicable to all phases: Due process and North Carolina law prohibit the trial or punishment of a person who is incapable of proceeding. The question of the defendant's capacity to proceed may be raised at any time.

C. Procedure for Determining Capacity

1. Questioning capacity: The defendant, prosecutor, or trial judge may question the defendant's capacity to proceed. Generally, when the defendant's capacity is questioned, the judge orders an evaluation of capacity. G.S. 15A-1002. The pertinent AOC forms combine a motion questioning capacity and an order for an evaluation locally or at Central Regional Hospital depending on the offense. AOC-CR-207B, Motion and Order Appointing Local Certified Forensic Evaluator (Dec. 2013); AOC-CR-208B, Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed (Dec. 2013).

2. Determination of incapacity: If following an evaluation of capacity the trial judge finds the defendant incapable of proceeding, the judge must determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntarily commitment. The judge must make this determination regardless of the nature of the offense charged. If the judge finds grounds for commitment, the specific procedures in the ensuing commitment proceedings depend on whether the judge designates the crime as violent or nonviolent—for example, if the crime is designated as violent, a hospital may not release the defendant without a further court hearing. The criteria for continued commitment is the same—that is, whether the defendant is

mentally ill and poses a danger to self or others. G.S. 15A-1003.

3. Termination of criminal proceedings: The judge must dismiss the criminal charges on any of the grounds specified in G.S. 15A-1008, including when it appears to the satisfaction of the court that the defendant will not gain the capacity to proceed. *See also Jackson v. Indiana,* 406 U.S. 715 (1972) (defendant must be released if neither likely to gain capacity nor subject to civil commitment). For certain grounds, the dismissal is with prejudice; for others, it is without prejudice to refiling, including if the defendant gains the capacity to proceed following a dismissal on that ground.

D. Evidence Issues Involving Capacity Evaluation

1. At capacity hearing: A capacity evaluation is admissible at a capacity hearing, and the evaluator may testify about the evaluation. G.S. 15A-1002(b)(1a). As with other expert testimony, discussed *infra* in VII.B., Expert Opinion, the expert may give an opinion about the ultimate issue to be decided—for example, whether the defendant is unable to understand the proceedings—but may not do so in the form of a legal conclusion—for example, whether the defendant has the capacity to proceed.

2. At trial: The doctor-patient privilege does not protect the results of a court-ordered capacity evaluation. Generally, the Fifth Amendment privilege against self-incrimination precludes the use of a court-ordered capacity evaluation at trial except when the defendant offers expert testimony in support of a mental health defense. *See also State v. Atkins,* 349 N.C. 62, 107–08 (1998) (applying this exception to allow the State to use a capacity evaluation to rebut mental health evidence offered by the defendant at the sentencing phase of a capital trial). The Sixth Amendment right to counsel also precludes the use at trial of those portions of a capacity evaluation of which counsel for the defendant did not have notice—for example, inquiry into the circumstances of the alleged offense; however, even if counsel did not have specific notice of the scope of the evaluation, the evaluation is admissible to rebut expert testimony in support of a mental health defense. *See State v. Davis,* 349 N.C. 1, 43–44 (1998) (reaching this conclusion because counsel should have anticipated that the evaluation could be used to rebut a mental health defense).

E. Resources

John Rubin, Capacity to Proceed (Spr. 2015), *in* North Carolina Superior Court Judges' Benchbook; 1 John Rubin & Alyson Grine, North Carolina Defender Manual Ch. 2, Capacity to Proceed (2d ed. 2013); Benjamin M. Turnage, John Rubin & Dorothy T. Whiteside, North Carolina Civil Commitment Manual Ch. 8, Commitment of Defendants Found Incapable of Proceeding (2d ed. 2011).

II. Capacity Issues During Criminal Investigation

A. Statements by the Defendant

1. Voluntariness: Under the Due Process Clause, a defendant's statement to law enforcement must be voluntary in all the circumstances, including circumstances related to the defendant's mental condition. *Compare, e.g., Davis v. North Carolina*, 384 U.S. 737 (1966) (holding in all the circumstances, including the defendant's low mentality, that the defendant's statements were the involuntary product of police coercion), *with State v. Fisher*, 158 N.C. App. 133 (2003) (recognizing that mental illness may render a confession involuntary but finding that the circumstances supported the trial judge's determination that the defendant's confession was admissible in this case).

2. Knowing and voluntary waiver of *Miranda* rights: In cases in which the police must give *Miranda* warnings, the defendant's mental condition is a factor in determining whether he or she knowingly and voluntarily waived *Miranda* rights. *See, e.g., State v. Fincher,* 309 N.C. 1 (1983) (finding that a defendant's youth and mental retardation do not compel the conclusion that he or she could not validly waive *Miranda* rights, but stating that the characteristics of the defendant should be "carefully scrutinized" in such cases; holding that the totality of the circumstances supported the trial judge's determination that the defendant validly waived his rights in this case).

B. Consent Searches and Voluntariness

A consent to search must be voluntary in all the circumstances, including circumstances related to the defendant's mental condition. *See, e.g., State v. James*, 118 N.C. App. 221 (1995) (recognizing limited mental capacity as a factor in evaluating voluntariness of consent; finding that the circumstances supported the trial judge's determination that the defendant voluntarily consented to the search); G.S. 15A-221 (defining "consent" to search as a statement made "voluntarily" giving officers permission to search).

C. Resources

Robert L. Farb, Arrest, Search, and Investigation in North Carolina (5th ed. 2016); 1 John Rubin & Alyson Grine, North Carolina Defender Manual Ch. 14, Suppression Motions (2d ed. 2013); Jeff Welty, The Law of Interrogation in North Carolina (June 2012), *in* North Carolina Superior Court Judges' Benchbook.

III. Capacity Issues During Formal Proceedings

A. Waiver of Counsel

1. Capacity to proceed: A defendant must have the capacity to proceed, described *supra* in I.,

Capacity to Proceed, to waive the right to counsel.

2. Capacity to represent self: The U.S. Supreme Court has held that states may refuse to honor a defendant's waiver of counsel and request to proceed pro se at trial if the defendant is not capable of self-representation. The Court recognized that a defendant, although capable of proceeding, may not have the mental capacity to represent himself or herself at trial. *Indiana v. Edwards,* 554 U.S. 164 (2008). The N.C. Supreme Court has taken the position that, although the trial judge must determine whether a waiver of counsel is knowing, voluntary, and intelligent, the judge has the discretion whether to conduct an *Edwards* inquiry and determine whether the defendant is capable of self-representation. *State v. Lane*, 365 N.C. 7 (2011).

3. Knowing and voluntary waiver of counsel: In addition to having the capacity to proceed (and perhaps the capacity for self-representation), a defendant must knowingly and voluntarily waive counsel in accordance with constitutional and statutory requirements. A defendant may forfeit the right to counsel by serious misconduct. *State v. Cureton*, 223 N.C. App. 274 (2012).

4. Resources: 1 John Rubin & Alyson Grine, North Carolina Defender Manual § 12.6, Waiver of Counsel, (2d ed. 2013); Jessica Smith, Counsel Issues (Jan. 2010), *in* North Carolina Superior Court Judges' Benchbook.

B. Guilty Pleas

1. Capacity to proceed: A defendant must have the capacity to proceed, described *supra* in I., Capacity to Proceed, to enter a guilty plea.

2. Capacity to plead guilty: The standard for capacity to plead guilty is the same as the standard for capacity to proceed generally.

3. Knowing and voluntary entry of plea: In addition to having the capacity to proceed, a defendant who wants to plead guilty must do so knowingly and voluntarily in accordance with constitutional and statutory requirements.

4. Resources: Jessica Smith, Pleas & Plea Negotiations in Superior Court (June 2015), *in* North Carolina Superior Court Judges' Benchbook; 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual Ch. 23, Guilty Pleas (2d ed. 2012).

C. Decision Making

1. Concessions of guilt: The North Carolina appellate courts continue to follow *State v. Harbison*, 315 N.C. 175 (1985), and require that the defendant consent to a concession of guilt during trial. If the assertion of a mental health defense effectively admits guilt to a greater offense, such as with a diminished capacity defense, the defendant may need to consent to the assertion of the defense.

2. Other decisions: Under North Carolina law, if a defendant and his or her attorney reach an

absolute impasse, the defendant's wishes control even as to strategic or tactical decisions. The North Carolina courts have recognized that this principle does not require an attorney to carry out an unlawful act or assert a frivolous or unsupported claim. *See* John Rubin, At an Impasse Again, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 6, 2016). The North Carolina courts have not assessed whether ceding such authority to a marginally capable client is affected by the decisions in *Edwards* and *Lane* discussed *supra* in III.A, Waiver of Counsel.

3. Resources: 1 John Rubin & Alyson Grine, North Carolina Defender Manual § 12.8, Attorney-Client Relationship (2d ed. 2013); 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual § 28.6, Admissions of Guilt; § 33.6, Admissions of Guilt During Closing Arguments; Jessica Smith, Ineffective Assistance of Counsel Claims (July 2010), *in* North Carolina Superior Court Judges' Benchbook.

IV. Mental Health Defenses

A. Diminished Capacity

1. Definition: The defendant lacked the mental capacity to form the specific intent required for conviction of the charged offense.

2. Effect: The defense "negates" the specific intent required for conviction—that is, the defense prevents the State from proving beyond a reasonable doubt that the defendant had the specific intent required for conviction of the offense.

3. Offenses affected: The defense is available against any offense that requires the State to prove specific intent, including first-degree murder (intent to kill), robbery (intent to commit larceny), indecent liberties (sexual purpose), and attempts (intent to commit crime). Generally, the effect is to reduce the charged offense to a lesser degree (for example, first-degree murder is reduced to second-degree murder), although in attempt cases no lesser offense may exist.

4. Burdens: The burden of production to obtain an instruction is on the defendant; the burden of persuasion is on the State to prove specific intent beyond a reasonable doubt.

5. Instructions: N.C.P.I—Crim. 305.11 (June 2009).

6. Resources: John Rubin, The Diminished Capacity Defense, Administration of Justice Memorandum No. 92/01 (Sept. 1992).

B. Voluntary Intoxication

1. Definition: The defendant's ingestion of drugs or alcohol rendered him or her unable to form the specific intent required for conviction of the offense.

2. Effect: The defense "negates" the specific intent required for conviction—that is, the defense

prevents the State from proving beyond a reasonable doubt that the defendant had the specific intent required for conviction of the offense.

3. Offenses affected: The defense is available against any offense that requires the State to prove specific intent, including first-degree murder (intent to kill), robbery (intent to commit larceny), indecent liberties (sexual purpose), and attempts (intent to commit crime). Generally, the effect is to reduce the charged offense to a lesser degree (for example, first-degree murder is reduced to second-degree murder), although in attempt cases no lesser offense may exist.

4. Burdens: The burden of production to obtain an instruction is on the defendant by showing through substantial evidence, in the light most favorable to the defendant, that he or she was "utterly incapable" of forming the specific intent required for conviction; the burden of persuasion is on the State to prove specific intent beyond a reasonable doubt.

5. Instructions: N.C.P.I—Crim. 305.10 (June 2009) and 305.11 (June 2009)

6. Resources: John Rubin, The Voluntary Intoxication Defense, Administration of Justice Memorandum No. 93/01 (Apr. 1993).

C. Automatism (Unconsciousness)

1. Definition: The defendant, though capable of physical action, is not conscious of what he or she is doing. Unconsciousness as the result of voluntary ingestion of alcohol or drugs does not qualify. Dicta suggests that unconsciousness may not be raised if it results from insanity (*State v. Fields,* 324 N.C. 204 (1989)), but that dicta may not be a reliable basis for denying the defense.

2. Effect: The defense is a complete defense to the offense charged.

3. Offenses affected: The defense is available against any offense except perhaps one in which the required mental state is recklessness or negligence and the defendant, knowing of his or her tendency to black out, puts himself or herself in a position where that tendency would be particularly dangerous, such as driving a car.

4. Burdens: The burden of production to obtain an instruction is on the defendant; the burden of persuasion is on the defendant unless the defense arises from the State's evidence, in which case the burden of persuasion is on the State to prove beyond a reasonable doubt that the defendant acted voluntarily.

5. Instructions: N.C.P.I.—Crim. 302.10 (June 2009).

6. Resources: Jeff Welty, All You Need to Know about Automatism, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 14, 2011).

D. Involuntary Intoxication

1. Definition: As a general defense to an offense, the defendant, because of involuntary

intoxication, must meet the standard for insanity. Few North Carolina cases have addressed the general defense of involuntary intoxication, but commentators have suggested this standard. *See* 2 Paul H. Robinson, Criminal Law Defenses § 176(c), at p. 341 (1984); Rollin M. Perkins & Ronald N. Boyce, Criminal Law at p. 1001 (3d ed. 1982). As a defense to an offense in which impairment is an element, the impairment need be involuntary only. *See* Perkins at 999.

2. Effect: The general defense is a complete defense to the offense charged.

3. Offenses affected: The general defense is available against any offense.

4. Burdens: The burden of production to obtain an instruction and the burden of persuasion to prove the defense to the satisfaction of the jury is on the defendant.

5. Instructions: There is no pattern instruction.

6. Resources: Shea Denning, Is Automatism or Involuntary Intoxication a Defense to DWI, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 28, 2012).

E. Insanity

1. Definition: The defendant, by a defect of reason caused by disease or a deficiency of the mind, was incapable of knowing the nature and quality of his or her act or, if he or she did know, was incapable of distinguishing between right and wrong in relation to the act.

2. Effect: The defense is a complete defense to the offense charged. A defendant found not guilty by reason of insanity is subject to civil commitment proceedings as provided in G.S. 15A-1321.

3. Offenses affected: The defense is available against any offense.

4. Burdens: The burden of production to obtain an instruction and the burden of persuasion to prove the defense to the satisfaction of the jury is on the defendant.

5. Instructions: N.C.P.I.—Crim. 304.10 (June 2009).

6. Resources: Benjamin M. Turnage, John Rubin & Dorothy T. Whiteside, North Carolina Civil Commitment Manual Ch. 7, Automatic Commitment—Not Guilty by Reason of Insanity (2d ed. 2011); Shea Denning, Not Guilty by Reason of Insanity, N.C. Crim. L., UNC Sch. of Gov't Blog (Nov. 2, 2015).

V. Pretrial Procedure

A. Funds for Mental Health Expert

1. Extent of right: An indigent defendant has a constitutional and statutory right to funds for an expert on a proper showing of need.

2. Application: In noncapital cases, an indigent defendant is entitled to apply ex parte for funds for a mental health expert in all cases and, if an open hearing would disclose confidential information, may apply ex parte for funds for other types of experts. In capital cases, a defendant must first apply to the Office of Indigent Defense Services (IDS) for funds for an expert; if IDS denies the request, the defendant may apply to the court for funds for an expert.

3. Required showing: The defendant must make a "threshold showing of specific necessity" to obtain funds for an expert—that is, the defendant must make a preliminary, particularized showing of need.

4. Resources: 1 John Rubin & Alyson Grine, North Carolina Defender Manual Ch. 5, Experts and Other Assistance (2d ed. 2013); N.C. Commission on Indigent Defense Services, Rules for Providing Legal Representation in Capital Cases, Part 2D, Appointment and Compensation of Experts and Payment of Other Expenses Related to Legal Representation in Capital Cases at pp. 20–21 (Sept. 2015).

B. Discovery

1. Notice of defense: The defendant must give notice of all affirmative defenses if he or she has requested and received discovery from the State and the State requests discovery (that is, if the State is entitled to reciprocal discovery). G.S. 15A-905(c)(1). The defendant must give notice of an insanity defense regardless of whether the defendant sought discovery from the State. G.S. 15A-959(a).

2. Notice of expert testimony: The defendant must give notice of any expert witness that the defendant reasonably expects to call as a witness at trial if the State is entitled to reciprocal discovery. G.S. 15A-905(c)(2). The defendant must give notice of the intent to offer expert testimony relating to a mental disease, defect, or other condition bearing on whether the defendant had the mental state required for the offense charged regardless of whether he or she sought discovery from the State. G.S. 15A-959(b).

3 Disclosure of examinations and tests; production of report: The defendant must disclose to the State examinations and reports that the defendant intends to introduce at trial, or that were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony, if the State is entitled to reciprocal discovery. G.S. 15A-905(b). The defendant must furnish to the State a report of any expert the defendant reasonably expects to call at trial if the State is entitled to reciprocal discovery. G.S. 15A-905(c)(2). The State is not entitled to discovery of internal defense documents made by the defendant or by his or her attorneys or agents. G.S. 15A-906. For example, the State may not obtain the work of nontestifying defense experts unless a testifying expert bases his or her opinion on that work.

4. Examination of defendant: If the defendant intends to rely on expert testimony in support of a mental health defense, the court may order the defendant to submit to a psychiatric examination at the State's request. *See State v. Boggess,* 358 N.C. 676 (2004).

5. Discovery by defendant: Generally, defendants obtain their own mental health records without court involvement through a request and release to the custodian of the records. Some institutions may require a court order and, if an open hearing would disclose confidential information, a defendant may have grounds to apply ex parte for an order requiring production of the records.

6. Resources: Robert L. Farb, Discovery in Criminal Cases (May 2015), *in* North Carolina Superior Court Judges' Benchbook; 1 John Rubin & Alyson Grine, North Carolina Defender Manual § 4.6A, Evidence in Possession of Third Parties; § 4.8, Prosecution's Discovery Rights (2d ed. 2013); John Rubin, What Are Permissible Discovery Sanctions against the Defendant?, N.C. Crim. L., UNC Sch. of Gov't Blog (Sept. 12, 2013).

VI. Trial Procedure

A. Jury Selection

The parties may ask questions of prospective jurors about their attitudes toward mental health matters, such as mental illness and substance abuse. *See, e.g., State v. Avery,* 315 N.C. 1, 20 (1985) (recognizing that "in certain cases appropriate inquiry may be made in regard to whether a juror is prejudiced against the defense of insanity," although holding in this case that the trial judge did not abuse his discretion in finding that questions were improper stake-out questions) (citation omitted).

B. Closing Arguments

Several cases concern the scope of prosecutors' closing arguments—for example, whether the arguments improperly denigrated mental health matters or the defendant's mental health experts—and are subject to general limits on closing argument.

C. Resources

Robert L. Farb, Jury Selection (Aug. 2015), *in* North Carolina Superior Court Judges' Benchbook; Jessica Smith, Jury Argument: Content of Opening and Closing Statements (Apr. 2012), *in* North Carolina Superior Court Judges' Benchbook; 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual Ch. 25, Selection of Jury; Ch. 33, Closing Arguments (2d ed. 2012).

VII. Evidence Issues

A. Lay Testimony

1. Basic requirements: Unlike expert testimony, lay testimony must be based on the witness's personal knowledge. N.C. R. Evid. 602. A lay witness may give testimony in the form of an opinion if rationally based on the witness's perception and helpful to the jury. N.C. R. Evid. 701.

The courts have sometimes characterized such opinion testimony by a lay witness as a "shorthand statement of fact."

2. Testimony about mental state : Subject to the above requirements, a lay witness may testify about a person's mental condition—for example, whether a person was drunk—but may not offer an opinion requiring scientific knowledge or special expertise.

3. Resources: Kella W. Hatcher, Janet Mason & John Rubin, Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina § 11.9, Lay Witnesses (2015).

B. Expert Opinion

1. Basic requirements: Revised N.C. Rule of Evidence 702, effective for actions arising on or after October 1, 2011, reflects the *Daubert* requirements for the admission of expert testimony. *See State v. McGrady*, 368 N.C. 880 (2016). The revised rule may or may not have a significant effect on the admissibility of otherwise admissible expert psychological testimony. *See Foreman v. American Road Lines, Inc.*, 623 F. Supp. 2d 1327, 1335 (S.D. Ala. 2008) (finding no reason to believe that clinical psychologist's "combination of clinical observations, test results, and professional judgment in forming opinions concerning diagnostic impressions and recommendations . . . is scientifically suspect to the point of warranting *Daubert* intervention"); *U.S. v. West-Bey*, 188 F. Supp. 2d 576, 583 (D. Md. 2002) (observing that the "ferment" of *Daubert* appears to have bypassed psychiatric testimony in criminal matters).

2. Testimony about mental state: An expert may testify to an ultimate issue in the case but may not do so in the form of a legal conclusion. For example, an expert could testify that the defendant did not have the capacity to plan but could not testify that the defendant lacked the capacity to premeditate and deliberate, a legal conclusion.

3. Basis of opinion: An expert may testify to the basis of his or her opinion, including statements made by the defendant to the expert, regardless of whether the underlying information is inadmissible. The trial judge retains the discretion to limit testimony about the basis of an expert's opinion if the probative value is outweighed by its prejudicial effect, etc., under N.C. Rule of Evidence 403. The opposing party may cross-examine the expert about matters the expert considered and did not consider in forming his or her opinion.

4. Resources: Kella W. Hatcher, Janet Mason & John Rubin, Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina § 11.10, Expert Testimony (2015); John Rubin, The Voluntary Intoxication Defense, Administration of Justice Memorandum No. 93/01, at p. 8 (Apr. 1993); John Rubin, The Diminished Capacity Defense, Administration of Justice Memorandum No. 92/01, at p. 4–5 (Sept. 1992).

VIII. Sentencing

A. Noncapital

1. Mitigating factors: Mental condition insufficient to constitute a defense; age, immaturity, or limited mental capacity; duress. G.S. 15A-1340.16(e).

2. Resources: Robert L. Farb, Appellate Cases: Structured Sentencing Act and Firearm Enhancement (Feb. 2010).

B. Capital

1. Mitigating factors: Mental or emotional disturbance; age; impairment of capacity to appreciate criminality of conduct or conform conduct to requirements of law; duress. G.S. 15A-2000(f).

2. Resources: Jeffrey B. Welty, North Carolina Capital Case Law Handbook, Ch. 6, Mitigating Circumstances (3d ed. 2013).