

SELF-DEFENSE: LAW AND ISSUES

*It must be se offendendo, it cannot be else.
Hamlet, Act. V, Sc. 1.*

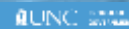
Joseph L. Hyde, Assistant Professor



State v. McLymore, 380 N.C. 185 (2022).

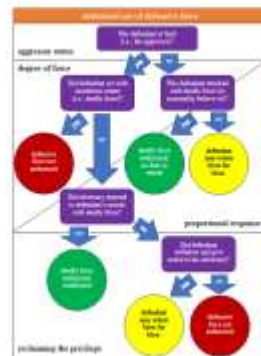
“[T]here is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions.²”

² However, to the extent the relevant statutory provisions do not address an aspect of the common law of self-defense, the common law remains intact.



ROADMAP

- I. Aggressor status
- II. Degree of force
- III. Proportional response
- IV. Reclaiming the privilege



SOURCES OF SELF-DEFENSE RULES

I. Common law

G.S. 4-1 (common law declared in force)

II. Statutes

G.S. 14-51.1 (1993 – 2011)

G.S. 14-51.2, 51.3, 51.4 (2011 – present)

III. Caselaw

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POINTS OF CONTACT



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THE NORRIS TEST

The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:

- (1) defendant believed it necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant's belief was reasonable; and
- (3) defendant was not the aggressor in bringing on the affray; and
- (4) defendant did not use excessive force.

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STATUTORY SELF-DEFENSE

A person is justified in using deadly force and does not have a duty to retreat if:

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

G.S. 14-51.3

This justification is not available to a person who used defensive force and who:

- (1) Was committing a felony.
- (2) Initially provokes the use of force against himself or herself.

G.S. 14-51.4

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AGGRESSOR STATUS

- Common law privilege of crime prevention authorized the use of force to prevent a breach of the peace.
- Self-defense was developed to give a measure of protection to one too much at fault to be entitled to the privilege of crime prevention.



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aggressor status

WHAT MAKES A PERSON AN AGGRESSOR?

- A person is at fault if his conduct resulted in the need to use force.
- An aggressor is one who aggressively and willingly entered a fight without legal excuse or provocation . . .
- . . . or who continues to pursue a fight that the other person seeks to leave.

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aggressor status

THE AGGRESSOR DOCTRINE:
In general, the right of self-defense is available only to a person who is without fault.

- N.C.P.I. – CRIM. 206.40 (man-slaughter)
- N.C.P.I. – CRIM. 206.10 (murder)
- N.C.P.I. – CRIM. 308.45 (assault)

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aggressor status

Illustrative Case

State v. Hicks, 385 N.C. 52 (2023).

- Held the trial court did not err by giving aggressor instruction when:
 - There was conflicting evidence as to whether the defendant acted as the aggressor; and
 - Although defendant testified to a violent attack, she did not exhibit obvious injuries; and
 - Although defendant testified that she shot the victim while trying to escape, the evidence showed he was shot in the back from at least six inches away.

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DEGREE OF FORCE

- A distinction is made between deadly force and nondeadly force.
- E.g., the common law distinguishes between an aggressor with murderous intent and one without murderous intent.

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degree of force

- Deadly force is defined as force likely to cause death or great bodily harm.
- An aggressor with murderous intent is one who attacks with deadly force.
- **An aggressor with murderous intent forfeits all right to use defensive force.**

WHAT CONSTITUTES DEADLY FORCE?

degree of force

THE DOCTRINE OF IMPERFECT SELF-DEFENSE

- Applies when a person has a reasonable belief in the need to use deadly force.
- And was an aggressor without murderous intent or used excessive force.
- A person who kills his adversary under these circumstances is guilty of at least voluntary manslaughter.

degree of force

State v. Holloman, 369 N.C. 615 (2017).

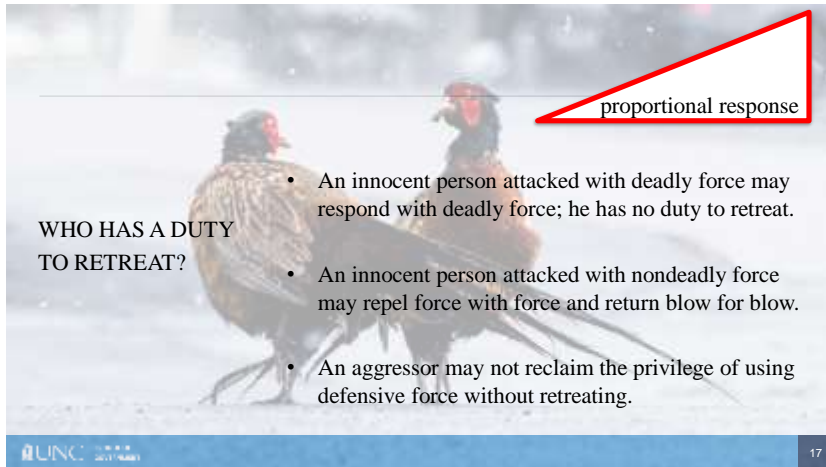
- Trial court instructed the jury: if one provokes a fight with the intent to use deadly force, he is an aggressor and cannot claim he acted lawfully to defend himself.
- Noted: defensive force statutes don't distinguish between aggressors with murderous intent and those without.
- Held: provisions allowing an aggressor to use defensive force do not apply to an aggressor with murderous intent.

Illustrative Case

PROPORTIONAL RESPONSE

- The privilege of using defensive force depends on necessity, real or apparent.
- One who seeks to justify the use of force must show: (1) that he actually believed such force was necessary and (2) that his belief was reasonable.



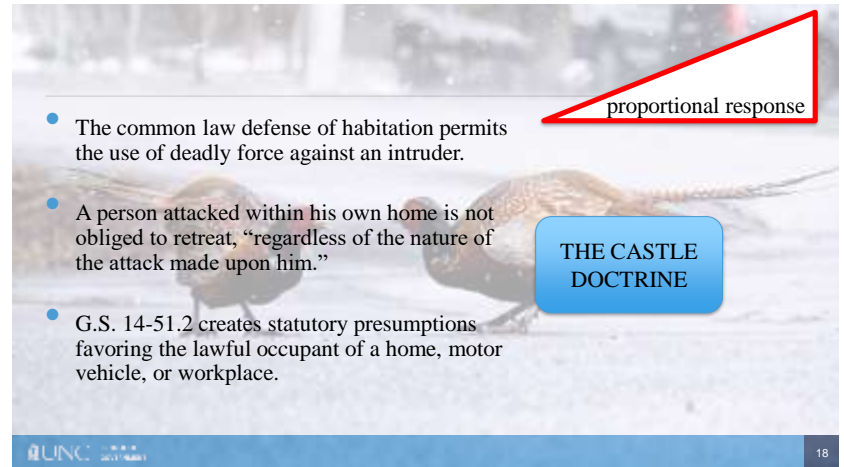


proportional response

WHO HAS A DUTY TO RETREAT?

- An innocent person attacked with deadly force may respond with deadly force; he has no duty to retreat.
- An innocent person attacked with nondeadly force may repel force with force and return blow for blow.
- An aggressor may not reclaim the privilege of using defensive force without retreating.

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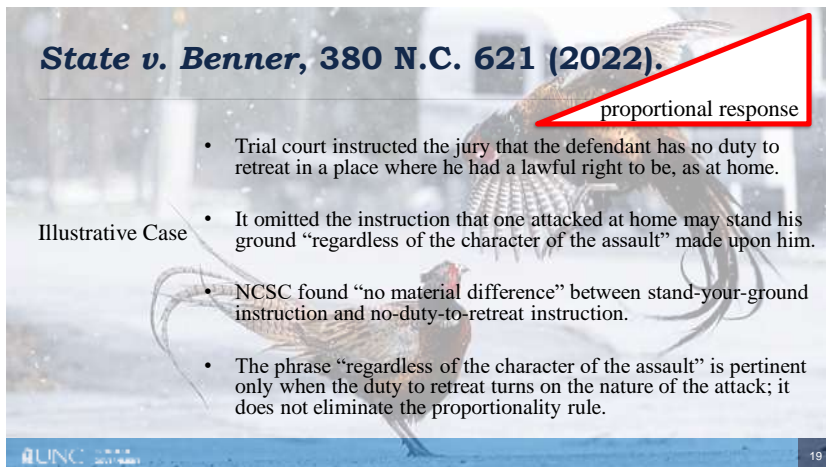


proportional response

- The common law defense of habitation permits the use of deadly force against an intruder.
- A person attacked within his own home is not obliged to retreat, “regardless of the nature of the attack made upon him.”
- G.S. 14-51.2 creates statutory presumptions favoring the lawful occupant of a home, motor vehicle, or workplace.

THE CASTLE DOCTRINE

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proportional response

State v. Benner, 380 N.C. 621 (2022).

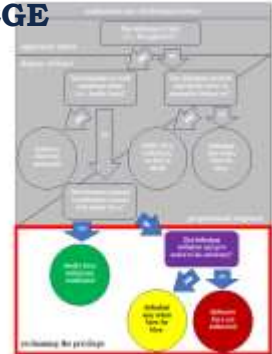
Illustrative Case

- Trial court instructed the jury that the defendant has no duty to retreat in a place where he had a lawful right to be, as at home.
- It omitted the instruction that one attacked at home may stand his ground “regardless of the character of the assault” made upon him.
- NCSC found “no material difference” between stand-your-ground instruction and no-duty-to-retreat instruction.
- The phrase “regardless of the character of the assault” is pertinent only when the duty to retreat turns on the nature of the attack; it does not eliminate the proportionality rule.

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RECLAIMING THE PRIVILEGE

- In general, an aggressor forfeits the privilege of using defensive force.
- G.S. 14-51.4 creates an additional disqualification: commission of felony.
- One who is thus disqualified may reclaim the privilege under certain conditions.



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reclaiming the privilege

- At common law, an aggressor without murderous intent could reclaim the privilege only by withdrawing from the fight and giving notice to his adversary.
- G.S. 14-51.4 provides that one who initially provoked the use of force is justified in using defensive force if:
 - he withdraws, in good faith, from physical contact and indicates clearly that he desires to withdraw and terminate the use of force; or
 - he is confronted with deadly force, he has no reasonable means to retreat, and the use of deadly force is the only way to escape the danger.

HOW DOES A PERSON RECLAIM THE PRIVILEGE?

reclaiming the privilege

THE FELONY DISQUALIFIER

- The common law concept of fault precluded from claiming self-defense one whose conduct resulted in a justifiable use of force, such as one committing a robbery.
- G.S. 14-51.4 provides that the statutory justification is not available to a person who used defensive force and who:
 - (1) initially provoked the use of force against himself, or
 - (2) who was committing a felony.
- The Court of Appeals had held that the felony disqualifier applies to any felony, such as PFF, regardless of the causal nexus with the use of force.

reclaiming the privilege

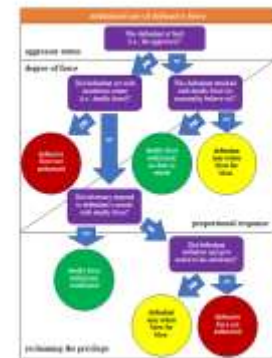
***State v. McLymore*, 380 N.C. 185 (2022).**

- Trial court instructed the jury the defendant could not justify his use of deadly force because he was committing PFF.
- On appeal, the defendant argued he retained a common law right of self-defense, notwithstanding G.S. 14-51.3. NCSC disagreed, holding G.S. 14-51.3 supplants the common law.
- Defendant also argued G.S. 14-51.3 incorporated a causal nexus requirement. NCSC agreed, holding that, to satisfy the felony disqualifier, the State must prove that but for the felony, the confrontation would not have occurred.

Illustrative case

RECAPITULATION

- I. Aggressor status
- II. Degree of force
- III. Proportional response
- IV. Reclaiming the privilege





REMAINING QUESTIONS

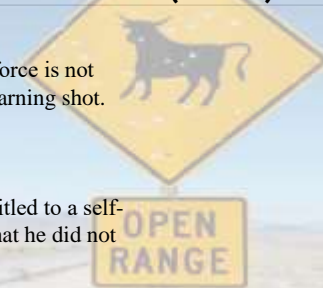
1. Application of felony disqualifier.
2. Status of Imperfect Self-defense.
3. Persistence of common law defense of habitation.

State v. Cook, 254 N.C. App. 150 (2017), aff'd per curiam, 370 N.C. 506 (2018).

“[A] person under an attack of deadly force is not entitled to defend himself by firing a warning shot.

....

In sum, ... the defendant is not entitled to a self-defense instruction where he testifies that he did not intend to shoot the attacker.”



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