

CHAPTER FOUR

WHEN CAN I LEGALLY USE MY GUN: PART I. UNDERSTANDING THE LAW OF JUSTIFICATION; SOME BASIC LEGAL CONCEPTS

I. Ignorance of the law is NEVER an excuse!

Now we start to get into the meat of our discussion: when is it legal to use a gun as a weapon? The purpose of this chapter is to look at the essential, basic legal concepts of the law of when and under what circumstances a person is legally justified in using force or deadly force against other persons or animals. Know when you may legally shoot, because Georgia law is clear: ignorance is never an excuse! That is why it is critical you know the law so that you are in the best possible situation to preserve your legal rights if you ever need them.

II. Gun owners need to know the law

Of particular importance to Georgia gun owners are the defenses found in Title 16, Chapter 3 of the Official Code of Georgia, entitled “Defenses To Criminal Prosecution,” which we cover in detail throughout this book. The full text of relevant provisions of that chapter of the Official Code of Georgia are found in the Appendix.

III. To legally use force or deadly force, you must be “justified.” What is legal justification?

A. Basic definition of justification: a legal excuse

So, when is it legal to use force or deadly force against another person? When is it legal to even threaten to use force or deadly force against another? The answer is when there is a legal “justification.” A legal justification is an acceptable reason or excuse under the law for taking an action that would otherwise be a crime. In Georgia, legal justification is a defense to specific types of conduct that might otherwise be a crime.

Example:

Mike is forced to change a flat tire on the interstate and, while he is standing near his car, a vicious dog appears from the woods and is clearly about to attack. Mike draws his handgun and shoots the dog.

Mike has discharged his firearm while standing near a public highway, which is ordinarily a crime. Why will Mike likely be not guilty of the crime of “discharge of a gun or pistol near a public highway?” Because he was legally justified in shooting the dog! That is, the law will likely say Mike’s excuse for discharging his firearm near the highway—protecting himself from a vicious animal—makes Mike’s action of discharging a firearm near a public highway reasonable and, therefore, legally justified.

PRACTICAL LEGAL TIP

A defense to prosecution is not the same as a bar to prosecution. A “bar to prosecution” is where a person can’t be prosecuted for engaging in certain conduct, whereas a “defense to prosecution” allows prosecution for the conduct, but offers defendants a justification that must be demonstrated with evidence in court. —*Matt*



B. Basic requirement: you must admit your action

If a person wants the potential protection of legal justification in Georgia — in order to raise the defense of justification in court — a person is required to admit all of the elements of the crime for which they are charged except the intent to commit the crime. In other words: you must admit to committing the act, without admitting you intended to do so. Then, the person must present evidence of justification before a jury will be given an instruction that “a person is legally justified to use force if...” In plain English, a person will not be allowed to say “I didn’t do it, but if I did do it, I was justified!” You must admit the underlying elements of the charge.

Example:

Jane is walking home one night, when a man jumps out of the bushes and demands her purse. Jane pulls out her handgun and points it at the man, who then runs away. Unfortunately, Jane does not call the police, but the criminal immediately does, reporting a crazy woman threatening him with a gun. Jane ends up charged with aggravated assault, even though Jane was the victim.

Justification is a legal defense in Georgia. If Jane is tried for aggravated assault, she must admit in court that she did pull her handgun and point it at the would-be robber in order to offer a legal justification. Then, in order for the jury to consider a legal justification defense (*i.e.*, receive a jury instruction from the judge), she must offer some evidence of why she is legally justified under the law for having pulled her weapon (in this example, Jane believed she was being robbed). The result is that Jane is entitled to have the judge instruct the jury that they may find Jane not guilty because she was justified in her action. The jury will then decide whether they believe Jane and whether she is guilty or not guilty of the crime of aggravated assault.

PRACTICAL LEGAL TIP

A jury instruction is a statement or “charge” given to the jury by the judge in a case, informing them of the particular laws that apply in the case. —*Matt*



On the other hand, if Jane does not admit to the elements of the criminal offense she is charged with, she will not be allowed to offer a legal justification defense under Georgia law. Legal justification is, therefore, literally the law of “Yes, I did it, BUT...!” Once Jane has admitted the elements of the offense and offered evidence of her justification, the prosecutor must prove her LACK of a justification beyond a reasonable doubt: the burden is always on the state to disprove a defense of justification (more on this later in the book). See *Hall v. State*, 235 Ga. App. 44 (1998).

IV. Categories of force

Anytime a person makes intentional physical contact with another person, he (or she) has used force. The Official Code of Georgia (our set of laws) divides or categorizes uses of force into different levels. Whether or not a use of force was justified under the law often depends on how that force is categorized. These categories, which we will address throughout this book, are: 1) the threat of force, 2) force, and 3) deadly force.

A. What if a person uses greater force than the law allows?

The use of a legally appropriate level of force is important because if

a person uses more force than is “reasonably believed to be necessary” (see Section V), that person may not be legally justified in using that level of force. It is important to understand the differences in the levels of force and the circumstances under which the law allows the use of each.

For example, if a person uses deadly force, and the law allows only for the use of force, that person will not be legally justified. Likewise, if a person uses force when no force is legally allowed, that use of force will not be legally justified.

Example:

Harry Homeowner looks out his window and sees a person standing on his front lawn. Harry yells at the fellow to get off his land. The fellow on the lawn does not respond. Harry rushes out to confront the fellow and demands that he leave Harry’s lawn.

Because this gentleman has remained on Harry’s property after Harry has given him an order to leave, he is a trespasser! But what degree of force may Harry use to remove the trespasser? The law, as discussed later, will show that Harry is only allowed to use that degree of force necessary to end the trespass. If Harry uses deadly force against the trespasser, he will not be legally justified and could be found guilty of using unlawful force against the trespasser. Ultimately, using the correct degree of force is critical in determining whether a person has committed a crime or a legally justified action.

B. “Force” and “deadly force”

In order to understand “the threat of force,” it’s important to start with the concept of force. “Force” is not defined in the Official Code of Georgia; “deadly force,” on the other hand, is defined. The State of Georgia has defined deadly force by statute in Official Code of Georgia Annotated § 16-3-21(a) as “force which is intended or likely to cause death or great bodily harm.”

1. Deadly force does not have to cause death!

On the surface, the legal definition of deadly force seems simple. However, the meaning of what is and is not deadly force can be legally tricky. A particular action does not necessarily have to result in death to be legally defined as deadly force—it just needs to be capable of causing death or great bodily harm.

Example:

Jim is being robbed and beaten by a group of individuals when he manages to draw his handgun and fire it at one of the most aggressive assailants. His shot misses his intended target but breaks the group up, causing the would-be robbers to flee.

In our example, even though the bullet did not kill or even strike any of his assailants, Jim legally used deadly force because his conduct fit the legal definition of “intended or likely to cause death or great bodily harm.” Thus, death is not a prerequisite for the existence of deadly force! Likewise, almost any object can be used as a weapon in a particular circumstance. Therefore, in this section of the law, the focus is on the object’s intended use and not just on the object itself.

2. “Intended or likely” as a component of deadly force

Deadly force, by its legal definition, occurs when a person takes an action that is *intended* or *likely* by the actor to cause death or great bodily harm. This knowledge or intention to cause serious bodily harm or death is called a person’s mental state. A prosecutor must prove beyond a reasonable doubt that a person possessed a particular mental state applicable to a crime in order to meet the state’s burden of proof and convict someone of a crime.

Often a person’s intent is easy to judge by circumstances. For example, if a person is the would-be victim of robbery, and the person resists by pulling his or her gun and firing at the robber, the law will likely find the victim used justifiable deadly force, because the victim of the crime resisted and used force that the victim intended to cause death or great bodily harm.

However, the weapon used is not always dispositive evidence of someone’s intent to use deadly force. Hammers, toasters, knives, baseball bats, tire irons, and almost any other object can be “capable of causing” great bodily harm or death under a particular circumstance. The case legally turns, then, on how the person is using the force.

C. What are threats of force? “Stop or I will...”

The law in Georgia allows for the use of force when an individual reasonably believes it necessary to defend himself (or another) against “the imminent use of unlawful force” (see O.C.G.A. § 16-3-21, “Use of force in defense of self or others”). Likewise, given the

right circumstances, you may legally threaten the use of deadly force to defend yourself from death, great bodily injury, or from the commission of what is known as a “forcible felony.”

Example:

Billy is walking to his car after work when three individuals with baseball bats confront him in the parking lot and surround him in an aggressive manner. Fearing that they are about to assault him with the bats, Billy draws his gun and clearly demands that the aggressors leave him alone, at which point they all flee from the scene.

Has Billy legally used deadly force by showing his gun? No: Billy has used the threat of deadly force. Billy’s threat was to create apprehension that he would use deadly force if necessary. If Billy believed these misguided ballplayers intended the imminent use of force, he could threaten the use of force – and in this case, the use of deadly force – to prevent the attack.

D. Warning shots

Warning shots get a lot of good folks in legal trouble! Warning shots are commonly portrayed in movies and television as a good idea—and people like to mimic what they see in movies and on TV! Leaving completely aside all practical issues of whether under a particular set of circumstances a warning shot is a good idea (and experience has taught us that very rarely are they a good idea), what does Georgia law say about warning shots?

1. Are warning shots a use of deadly force?

First, the term “warning shot” does not appear in the Official Code of Georgia. Without clear guidance from statutory law, courts are left to determine if the action of firing a warning shot is to be considered under either the use of force standard or the use of deadly force standard.

Although the firing of a warning shot is not *per se* legally forbidden, you should be aware that if you fire a warning shot, it is highly likely that your conduct will be judged under the legal standard that you have used deadly force and not just mere force. This means that a person may only be allowed the legal argument of justification if a warning shot is fired in situations in which deadly force is justified under the law. There is little appellate court case law demonstrat-

ing how Georgia courts have addressed the issue of warning shots. Every gun owner should be aware that one likely argument a prosecutor may put forth against a defendant at trial is that the simple discharge of a firearm is an action that is capable of causing death or serious bodily harm. Such an argument, if successful, will shift the analysis of warning shots into the use of deadly force arena of whether a person intended that action or not.

Why is it important whether the law classifies a warning shot as a use of force or a use of deadly force, even if no one is injured? Let's take a look at an example:

Example:

Harry Homeowner looks outside during broad daylight and sees a trespasser on his property. Not knowing what the trespasser is doing, Harry grabs his firearm to investigate. Harry confronts the trespasser and demands that he leave the property, but the trespasser ignores Harry. Being both scared and agitated, Harry fires a "warning shot" to get the trespasser's attention and compliance.

Does Harry's discharging his gun fit the definition of the use of deadly force? Likely, yes. Harry very likely may be guilty of a crime and not have a justification available as a defense, because he used a higher degree of force than the law allows.

2. Warning shots: "But, I never meant to hurt anyone!"

Going back to our example, assume Harry will say he fired the warning shot, but that he never aimed at or even meant to hit anyone. In fact, assume Harry will say he only shot into the dirt to get the trespasser to leave. How will the law view Harry's "warning shot?"

First, Harry Homeowner was confronted in this example with a mere trespasser and under Georgia law as we will see later, a person may legally use force, but not deadly force to remove a trespasser. Based on our facts, there is no reason for Harry to believe the trespasser intended to commit a forcible felony, which is a requirement for the use of deadly force to prevent a trespass.

Therefore, if the "warning shot" that was fired by Harry is legally classified as deadly force under the law, Harry will not be legally justified, and instead, a jury may decide he is guilty of a crime such as aggravated assault. So, the classification is the difference between

guilt and innocence in this example. Now, let us change the example a bit to see how things may get even more complicated:

Example:

Harry Homeowner confronts the same trespasser (Tom) as before and fires a warning shot. This time, however, the shot startled Tom out of his zoned state of self-meditation and wandering in which he likes to contemplate the universe. Tom was so deep in his personal world, he didn't realize he had accidentally wandered onto Harry's property. In fact, Tom the trespasser was so deep in meditative strolling and enjoying the Georgia air that he didn't even hear Harry's verbal demands, but, the sound of Harry's 30.06 hunting rifle got Tom's full attention! As a result, Tom does exactly what his 25 years of police training have taught him—he draws and fires at Harry, believing that Harry's shot had meant to end his days of strolling and meditation!

Where do we start the legal analysis? First, Harry Homeowner is in what lawyers often call a “big mess!” Harry has very likely used unlawful deadly force against a mere trespasser. After Harry's shot, does this turn our absent-minded wandering Tom into a victim who reasonably believes his life is threatened? Does this fact then allow Tom the trespasser some legal justification to return fire, etc.?

Continuing the issue, if our wandering Tom Trespasser then returns fire at Harry, is Harry then legally justified in using deadly force to defend himself? Or, because Tom is an accidental trespasser, is Tom required to retreat first before he takes any action? Keep in mind that Harry knows nothing about Tom's meditation or walks—he is just confronted with a trespasser who did not respond to verbal requests, but has now responded to Harry's “warning shot” with muzzle flashes from a pistol. Ultimately, you can see how messy this type of scenario can become, which all started with a well-intentioned “warning shot.”

After the dust clears (assuming perfect knowledge), Harry likely used a higher degree of force than the law allows. But who decides if a “warning shot” is a “warning shot” and not a shot at someone that simply missed? Who decides if a response to a situation is reasonable? In the vast majority of cases in Georgia, a jury ultimately decides. There are no bright lines on warning shots, so be advised

that a warning shot can potentially be viewed as a use of deadly force, whether you subjectively intended it to or not, and, therefore, should never be used without careful consideration.

V. In the law, what does it mean to “reasonably believe force is necessary?”

In Georgia, the legal standard for a justified use of force is generally expressed as a person must “reasonably” believe that the use of force is “necessary” to defend against another’s “imminent use of unlawful force.”

But what does “reasonable” mean? Further, when is something “necessary”—and who decides whether it is or not? The answers to these questions are how the legal process decides guilt or justification. For all gun owners, these concepts are critical.

A. How does the law determine “reasonable?”

In determining what is reasonable, the law often uses a standard known as the “reasonable person” standard to evaluate a person’s conduct. It uses a hypothetical “reasonable person.” Who is a reasonable person, and how does he or she act? The reasonable person isn’t you; he or she isn’t the party you have protected yourself against; the reasonable person isn’t even the juror determining what is reasonable. The reasonable person is a hypothetical person who only acts upon deliberation and contemplation: one who acts “reasonably,” given all the circumstances. Ultimately, a reasonable person is whoever a jury says it is.

The legal analysis behind the reasonable person goes like this: if a person used force or even deadly force, they must act like a reasonable person would have acted under the same or similar circumstances in order to be legally justified! However, if a person fails to act like a reasonable person, their conduct will fall below the acceptable legal standard and will not be justified. The reasonable person standard is the law’s attempt to make the concept of reasonableness an objective and measurable test.

Under this standard, the law does not focus on whether you subjectively (or personally) believed force was reasonable, but whether a “reasonable person” would have considered it reasonable, an objective standard. If the legal system (and ultimately, again, this could be a jury) determines that a reasonable person would have believed

that force was necessary in response to another person using unlawful force against you, then you will be found legally justified in using force.

Keep in mind, however, that judges, juries, and prosecutors are simply human beings, and people can have vastly different ideas of how a reasonable person should act under any given circumstances. This is particularly true if asked to decide whether force or deadly force was necessary or not.

PRACTICAL LEGAL TIP

Throughout this book, we refer to juries making the ultimate determination of fact. There are, however, some limited occasions where a judge makes the determinations. For example, if all parties waive their right to a jury, the Court may conduct what is called a “bench trial.” —*Matt*



B. What does “necessary” mean under the law?

When does someone have a reasonable belief that force is “necessary”? In Georgia, it ultimately may be a jury that is tasked with determining whether someone had a reasonable belief if an action was necessary or not, given all the circumstances. Clearly, “necessary” attempts to convey a sense of urgency for the use of force, but again, it usually falls back to the jury to decide if this standard was met in a particular case.

C. There is no presumption of what is “reasonable”: prosecutors are allowed to second-guess

As we have discussed, the issue of whether a belief of the necessity to use force or deadly force was or was not reasonable is left to the jury, and prosecutors are allowed to question and “second-guess” the reasonableness of the timing and/or degree of force used by a defendant.

Accordingly, because there is no statute in Georgia law that will automatically presume you have acted reasonably when using force or deadly force, a prosecutor has the opportunity to argue that a person’s use of that force was neither necessary nor reasonable, given the circumstances. While there is no “duty to retreat” in Georgia

(Georgia in fact has a “stand your ground” law we will discuss later), the lack of a presumption of reasonableness allows for arguments by prosecutors in court like “should have used lesser force,” and so forth. In these circumstances, a jury will decide the issue of the reasonableness of a person’s belief and whether the force used was necessary, deciding ultimately, whether or not a person is guilty of a crime. As we shall see, though, no matter how much a prosecutor may remonstrate against the acts of a gun owner acting in self-defense or defense of others or property, it is still the government’s burden to prove the defendant guilty beyond a reasonable doubt, and to disprove a defendant’s defense of justification, if properly submitted to a jury.

VI. The burden of proof in criminal cases

In criminal cases, the prosecution (the attorneys who act on behalf of the state) have the burden of proof. This means that it is the State’s responsibility to present enough evidence to prove the defendant committed a crime. This burden of proof that the prosecutor bears is a standard called “beyond a reasonable doubt.” It is the highest level of proof used in the American justice system. The state’s job at trial in attempting to prove the defendant’s guilt includes eliminating any reasonable doubt that the defendant’s conduct was justified.

We are now ready to look at under what circumstances Georgia law allows a person to use deadly force to protect themselves and others in the next chapter.

PRACTICAL LEGAL TIP

A word about juries. Juries are not “picked” in Georgia. Rather, they are the first six people that are not “struck” from the pool of folks called a jury pool. Most of the time, in my opinion, juries get it “right,” but after years of practice, some juries’ decisions leave you scratching your head... That is why these legal presumptions can be critical. — *Matt*

