Aftermath of a Shooting –Trial and Post-Conviction[1]

By Lisa J. Steele

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This article discusses trials and post-trial in a self-defense case. The legal process for criminal cases is called "criminal procedure"; it is governed by a series of rules, statutes, constitutional provisions, and customs. This article only covers the basic elements. Not every case will go through each of these steps --- look at them as channel markers, rather than mandatory way points.

A Guide to Trial Criminal Procedure

Jury or Bench Trial

As defendant, you have a constitutional right to a trial before a jury. You can waive that right and have your case heard by a judge (a "bench trial"). Most self-defense cases seem to be jury cases, but your attorney may suggest a bench trial if the facts in your case support it.

In either case, the trial judge's job is to impartially preside over the case. It is rare for a judge to ask questions if a jury is present because the question might bias the jury. In bench trials, a judge may ask more questions, but has to be careful not to interfere with the defendant's right to present his or her own defense.

The Trial Judge's Role in a Jury Trial

In general, the trial judge presides over the trial, conducts it in a fair, orderly, and efficient maner, rules on the admissibility of evidence and on other legal matters, adjudicates any motions or objections by the attorneys, and instructs the jury on the law at the end of the case.

The trial judge will tell the jury that nothing he or she says is intended to suggest to the jurors how the judge regards the case or what he or she thinks the jury should do. The judge's job is, in part, to remain neutral and to try not to form an opinion about the case. That does not mean that the judge will not form an opinion which he or she may express when the jury is out of the room, only that he or she is not supposed to convey that opinion to the jurors.

The Fact-Finder's Role

The jury (or the judge in a bench trial) is the sole judge of the facts. It decides what evidence to believe and what conclusions to draw from that evidence. It decides whether the prosecution has met its burden of proof.

Picking the Jury

Jury selection begins when a group of citizens is called to the courthouse as a panel. They see a brief videotape about the legal process, then come into the courtroom where your attorney and the prosecutor will pick those who will hear your case.

In Massachusetts, the procedure is very basic. You will have a questionnaire with some basic information about the prospective jurors. By statute (Gen. Laws ch. 234, § 28), the judge will ask the jurors as a group whether they are related to either party, whether they have any interest in the case, whether they have expressed or formed an opinion about the case, and whether they have any other bias or prejudice in the matter. The judge may ask questions about community attitudes towards the matter, possible exposure to prejudicial material, or preconceived ideas about whether certain types of witnesses are credible. The attorneys can ask the trial court to ask additional questions, but those are asked only at its discretion.

Then your attorney and the prosecutor will take turns challenging the jurors. Some challenges will be "for cause" – there's some reason to think the juror cannot be fair in your case, such as the person's relationship to the parties or witnesses, or a possible bias from the witness' job or prior experience with police. Each attorney also has a limited number of peremptory challenges which can be used at will. (There are a few exceptions; for example, neither side can use peremptory challenges to eliminate people purely because of their race.)

In Connecticut, the procedure is a bit more elaborate. Under the Connecticut constitution (Art. first, § 19), attorneys have a right to individually question each prospective juror privately. The attorneys alternate who asks questions first so that each has a chance to make a first impression with the prospective jurors. The procedure takes significantly longer, but it gives attorneys a better sense of each juror's personality and general views because the attorneys can tailor their questions to the jurors' responses.

The trial court will decide whether the jurors can take notes during the trial.

The parties are not allowed to talk to the jurors during the trial. Your attorney will likely remind you and your family to be particularly careful about conversations around the courtroom and court house, where you might be accidentally overheard by jurors. Courts vary about whether attorneys can contact jurors after the trial to find out about their reasoning.

Presenting Evidence

Once the jury is chosen and sworn in, the trial court clerk will read the charging document (information/indictment/complaint). The parties can ask the trial judge to give a "pre-charge", a summary of key legal concepts that will be important in the trial. Often, at the start of the trial, a judge will enter a *sequestration order* --- witnesses are not allowed to be in the court room when other witnesses testify, and are not allowed to discuss their testimony with each other; and the attorneys are not allowed to tell witnesses about other witnesses' testimony during the trial.

In Massachusetts, each attorney will normally give an opening statement which summarizes the evidence they expect to present. In Connecticut, opening statements are rare. (To some extent, Connecticut attorneys tell the jurors about their case during voir dire questioning.) In either case, opening statements are not themselves evidence --- they are the attorneys' opinions about what the evidence is likely to show.

The prosecution presents its evidence first. It has to prove every essential element of the case beyond a reasonable doubt. Essential elements include all the elements of the statute or common law crime --- generally the prosecutor does not have to prove *motive* (why a crime took place), but does have to prove *intent* (whether, for example, you acted in a deliberate, reckless, or negligent manner).

You've seen the procedure hundreds of times on movies and on television. The attorney asks the witness questions. There may be objections. Then the other attorney asks questions in cross-examination. And there may be a round or two of re-direct examination and re-cross examination. Eventually, the attorneys are finished with the witness and the next is called.

Ideally, testimony should not contain important surprises. The witnesses usually testify in accordance with their statements to police or defense investigators. Expert witnesses testify in accordance with their reports. Perry Mason-style witness confessions from the stand and surprise witnesses are extremely rare.

Normally, the defense in a criminal case does not have an obligation to do anything. It could ask no questions and put on no witnesses of its own, relying only on the prosecutor's burden of proof. Of course, very few defendants would do that, but it is possible. In a self-defense case, however, the defendant has the burden of introducing some evidence of the key elements of self-defense (more about that later). Once it has done so, the prosecutor must disprove self-defense beyond a reasonable doubt.

Burden of Proof in a Self-Defense Case

If you were accused of shooting and killing an aggressor and the prosecution charged you with murder, it would have to prove beyond a reasonable doubt that you caused the victim's death with the deliberate intent to kill.

Self-defense is an affirmative defense --- you need to put on evidence that you reasonably believed (both in your own eyes and that of a reasonable person standing in your place) that you or a third person were in imminent danger of death or serious bodily harm (an injury that might need hospital treatment or a sexual assault); that you could only save yourself or the other person by using deadly force; and, if you were outside of your home, that you could not retreat in complete safety. (The retreat rule exists in a minority of states including Massachusetts and Connecticut.)

Once the trial court has some evidence of all of those factors, then the prosecution has the burden to disprove self-defense beyond a reasonable doubt. (You may be able to establish all of those factors from the prosecution's witnesses' testimony.) Typically, the prosecution will try to show that you started the fight (you were the initial aggressor); you agreed to the fight (you were a mutual combatant); a reasonable person would not have believed he or she was in imminent danger (you overreacted); you could have retreated; you could have used less than deadly force; or you used force after the threat ended (such as you shot the victim in the back).

This is a very broad overview; a subsequent article will talk a bit more about the details of self-defense law in Massachusetts and Connecticut. Even with only a broad overview, you can see the defender's problem. By claiming self-defense, you essentially admit that you were there (no mistaken identity or alibi); you intentionally harmed the aggressor (it wasn't an accident); and you acted reasonably (you weren't acting under extreme emotional disturbance or in the "heat of passion"). You've effectively admitted a homicide, and are claiming that you have a legal justification for it. Worse, the trial judge decides whether there is sufficient evidence to justify a self-defense jury instruction, and thus shift the burden of proof on that issue to the prosecutor. That decision may be made late in the trial, after the trial judge has heard the bulk of the evidence – which may create a significant problem for the defense if the judge is unsatisfied and refuses to give a self-defense instruction.

Pursuing a self-defense claim is a very risky thing to do --- it can make the prosecutor's job much easier if, for example, you had left the scene and there wasn't a great deal of evidence otherwise linking you to the homicide. It also means that you and your attorney have a great deal of work to do.

What to Look for from a Witness

Every case involves witnesses. When you are thinking about both the prosecution's witnesses and those you would like to call as your witnesses, think about several factors --- Is the witness credible? Does his or her testimony make sense? Is it internally consistent? Is it consistent with other witnesses and with forensic evidence? Has it changed over time? Does the witness have a bias? Does he or she have a prior criminal record or a bad reputation? Does he ors she have applicable expertise? Does he or she speak and act in a credible way? Will he or she hold up well under cross-examination?

Your attorney will talk with your witnesses to try to prepare them for trial. He or she may have an investigator try to interview the prosecution's witnesses as well. In preparing a witness, an attorney will be careful not to suggest that the witness lie or improperly suggest they change their story to help your case. It is illegal for a witness to intentionally lie under oath (perjury). It is illegal to try to persuade someone to lie under oath. It is illegal to threaten, injure, mislead, or harass a witness or offer them something to change their testimony. It is also illegal to tamper with physical evidence.

Objections

Both attorneys will likely make numerous objections during your trial. The evidentiary rules are complex, but there are some very, very broad guiding principles.

Evidence should be relevant to the case, and should be more probative (illuminating) than prejudicial. (An attorney probably wouldn't try to offer evidence if it wasn't prejudicial to the other side --- this objection deals with the balance between that prejudice and the usefulness and trustworthiness of the evidence.)

Evidence should come from the person who perceived the event or said something, not from others talking about what they were told by the observer or speaker. (There are numerous exceptions to this "hearsay" rule, which are well beyond the scope of this article.) Witnesses also can't speculate – they have to testify about what they saw and heard, not what they think someone else might have thought or believed.

Witnesses can't comment directly on each other's credibility --- one can't ask a witness whether another witness was lying if his or her testimony was different from the witness being questioned. (The attorney can imply this through questioning, but credibility issues are solely for the jury.)

Attorneys can't badger a witness with insulting or repetitive questions.

As discussed in the *Miranda* article, witnesses can't be compelled to incriminate themselves, or to testify against their spouses, and there are various protections regarding conversations with doctors, mental health professionals, lawyers, spouses, and minor children.

Memory and Good-Faith Errors

Witnesses' trial testimony may conflict with their prior statements, with the forensic evidence, and with other witnesses. That doesn't mean they are lying. The eye is not a camera; the mind is not a videotape. People can honestly see and recall things in very different ways. Your attorney will likely have a strategy for dealing with the mistaken witness, which will be different from how he or she deals with witnesses that may be intentionally lying.

In general, your attorney will ask about the witness' ability to perceive and remember. There is a large body of research dealing with perception and memory for eyewitness identification and for police officers involved in officer-involved shootings. Your attorney may draw upon that research in deciding how to cross-examine witnesses and suggest good-faith errors.

Reputation Evidence

You can generally present evidence of the aggressor's reputation and past bad acts, if you knew about them at the time. When the aggressor is a stranger, in Massachusetts, you can present some evidence about the aggressor's prior bad acts to show that he or she was indeed, more likely to be the aggressor.

You can, to some extent, introduce evidence of your own good character. If you raise your character, however, the prosecutor will be able to impeach you with any bad acts you may have committed, even if you were never arrested or convicted.

Experts

An expert witness is anyone who has information or skills beyond the jurors' common knowledge. His or her testimony helps the jurors understand that body of knowledge, which may include forensics, medicine, memory, perception, psychology, and many other topics.

If you have taken any formal self-defense training, you may want to call your trainer as an expert to talk about your training and, by inference, whether your actions were subjectively reasonable. You might want to talk with your trainers about whether their students have ever had to use their advice, and, if so, what happened. You may also want to ask whether the trainer has ever testified as an expert in court, and, if so, what happened. You may want to ask the trainer about his or her experience and about the sources for any advice given. You may want to keep a file with your notes and any handouts from classes you have attended, and books or articles that have been important to your understanding of lawful self-defense.

Even if you have not had any formal self-defense training, you may be able to call a trainer as an expert to talk about self-defense research and training to help the jury understand whether your actions were objectively reasonable. Your attorney will ask a proposed expert about his or her experience as a trainer and as an expert witness, and about the sources for his or her testimony.

The trial judge has a great deal of discretion to decide whether to allow any expert to testify. He or she has to decide whether the expert is qualified, whether the field is a legitimate expertise or science, whether the matter is within the jury's common knowledge, and whether the testimony is relevant and more probative than prejudicial. If the judge limits or excludes your expert, and you are convicted, it may be very difficult to successfully challenge this decision.

The Decision to Testify

You have an absolute constitutional right to testify in your own defense. That decision is yours alone. Your attorney will, of course, offer his or her advice, but the decision rests with you.

You can establish all of the elements of self-defense by cross-examination and circumstantial evidence, but it is not easy. It is very likely that you will need to testify in a self-defense case to establish that your actions were, in your mind (subjectively), reasonable. You may also need to testify to dispute the prosecution's witnesses' versions of the incident. You also may need to help a jury understand why you carried a particular kind of firearm or ammunition, what specifically led you to believe that you or another were in imminent danger, why you felt that you needed to use deadly force and why you fired as many shots as you did, why you didn't retreat, and so on.

Some of these questions are things you might want to think about now. Assume that you are trying to convince a skeptical, but fair-minded person who does not have any particular knowledge or experience with firearms that your decisions are reasonable.

Why do you carry a firearm? Do you carry it all the time, or only in certain situations, and why? Why do carry that particular firearm? Why do you load it with that particular kind of ammunition? If you routinely carry a spare magazine, why do you do that? If you routinely carry a knife or a back-up firearm, why do you do that? If, in a self-defense situation, you would typically fire at the aggressor's torso (center of mass), rather than trying to wound him or her, why would you do that? If, in a self-defense situation, you would typically fire many shots, rather than firing a single shot, evaluating the effect, and then firing again if necessary, why would you do that? (Yes, the answers may seem obvious, but they may not be obvious to that fair-minded juror whose knowledge of firearms comes mostly from Hollywood.)

Motions for a Finding of Not Guilty

At the close of the State's evidence, and again at the close of all evidence, the defense attorney will typically ask the trial court for a required finding of not guilty in a motion made outside of the jury's presence. If the trial court finds that, viewing the evidence in the light most favorable to the prosecution (i.e. concluding that all the prosecution's witnesses and evidence is credible), the prosecutor has failed to prove an element of the case, or disprove an element of self-defense, then it will enter a verdict of not guilty and end the trial. These motions are rarely successful unless the prosecution

has made a drastic mistake and forgotten to present evidence on a key element of the case.

Closing Argument

Finally, the attorneys each make a final 30-minute argument to the jury summarizing the evidence in a way most favorable to their case. In Massachusetts, the defense goes first, followed by the prosecution. In Connecticut, the prosecutor goes first, then the defense, then the prosecutor can present a rebuttal.

The closing argument has to be limited to the evidence. Neither attorney can give his or her personal opinion about witness credibility, although they may suggest reasons why the jury might conclude that a witness is not believable. They can't allude to evidence that was not presented at trial, but the defense can comment on police failures to test certain evidence or follow proper police procedures.

If the defendant has not testified, the prosecution can't allude to the defendant's choice to exercise his right to avoid self-incrimination. If you have testified, the prosecution can, and will, remind the jury of your interest in the outcome of the case and of any inconsistencies in your testimony.

Generally, attorneys can't comment on the failure of one side or the other to call a missing witness, even if the witness was available and would seem important to that side's case. The prosecutor isn't allowed to insult the defendant, or the defense attorney, or otherwise improperly inflame the jury's passions or sympathies or appeal to prejudice. A defense attorney is held to a similar standard under the ethics rules.

Typically, the defense can't suggest that someone else committed the crime unless there was supporting evidence for that theory at trial. Neither attorney can suggest that the jury nullify the law, and the court will not instruct the jury about this option.

Jury Instructions

Finally, the judge tells the jury about the law governing the case. Typically, the parties will have discussed proposed jury instructions before the closing argument, so that they can tailor their argument to the exact words the judge will use. The exact words used by the trial judge are very important --- normally judges rely on standard instructions that have been upheld by appellate courts. If you want to read the standard instructions, you can find them in your local law library.

Verdict

After all of this, the jury finally can begin deliberating the evidence. In a criminal trial, the jury's verdict must be unanimous. Typically, the case starts with more jurors than will deliberate in the case – the alternate jurors are dismissed prior to deliberations, but need to remain isolated from prejudicial information until the verdict is reached in case someone falls ill or is disqualified, and they must replace the missing juror.

If the jurors are exposed to prejudicial external information, such as conversing with others about the case during deliberations or doing their own research, then their verdict may be tainted, and the case remanded for a new trial.

Normally, the jury will have the physical exhibits in the jury room during deliberations. (Judges may decide not to send both firearms and ammunition into the jury room at the same time.) It can ask for testimony to be replayed or re-read by the court

reporter. In some cases, the jury receives a copy of the trial judge's instructions. It can ask the judge questions about the law if it did not understand the jury instructions.

If the jury cannot reach a verdict after a reasonable length of time, the case ends in a mistrial. The prosecution can then begin the trial again.

Sentencing

If you are convicted, then you will be sentenced. Sometimes the sentencing hearing is held on the same day as the verdict. In other cases, there is a delay while the probation department prepares a confidential pre-sentence report describing the offense, your prior record (if any) and any factors affecting the sentence, and the victim or his/her family's desires for a sentence. You will have a right to make a statement to the judge at sentencing --- you should discuss with your attorney whether to make a statement and what to say. Some judges say that a heartfelt, honest statement at sentencing can affect their decision.

The statute will generally state the maximum and minimum term for sentencing. The judge can impose any amount of time within that range. Massachusetts has a set of sentencing guidelines – these are not mandatory, but many judges tend to sentence within the recommended ranges. You should talk with your attorney about the guidelines recommendations.

Appeals

If you are convicted, you have a statutory right to challenge the validity of your conviction through an appeal. Normally, this will not delay the start of your sentence. (You can apply for an appeal bond if you have particularly strong issues in your case and if the court concludes you are not a flight risk, or a danger to the community.) If you were indigent at trial, or have become indigent due to your conviction and incarceration, you will have the assistance of appointed counsel for an appeal. (In a few cases, you can also take an appeal in the middle of a case, an *interlocutory appeal*, but these are uncommon.)

Appeals can challenge decisions made by the trial judge and the prosecutor; the validity of the trial process; and sometimes the statute under which you were convicted. They cannot challenge the credibility of the prosecution's witness --- that decision is made by the jury or, in a bench trial, the judge. Your challenge also has to be based strictly on the record at trial – the testimony, exhibits, and court papers. Challenges to your conviction because of new evidence, or mistakes made by your attorney, follow a different procedure.

The vast majority of criminal appeals end with the judgment being affirmed. You should talk with an appellate counsel after a conviction, but do not be surprised if he or she is, at best, cautiously optimistic about your case.

Appeals can take a long time. The court reporter's office must prepare a transcript of the testimony in your case. Once that is done, your attorney will use that transcript to prepare a legal challenge to your conviction called a "brief. The prosecution will respond to it with its own brief. Your attorney may file a reply to the prosecutor's brief. When all the briefs are received, the appellate court (a group of experienced judges) will review the case and make a decision.

Appeals can also involve many steps. Most states have two layers of appellate courts --- the intermediate appellate court which handles the vast majority of criminal and

civil cases, and a state supreme court which handles the most serious cases and is the final arbitrator of the state constitution and its laws. A typical criminal case will start in the intermediate appellate court. Whichever party is unsuccessful will likely ask the state supreme court to review the matter. If the state supreme court becomes involved, it will ask for another set of appellate briefs on the questions it wants to decide. (Some serious cases can start in a state supreme court, or be transferred to it and heard directly, but this is uncommon.) Unless there is a federal constitutional issue involved, the decision of the state's supreme court will end the appeal.

If there is a federal constitutional issue involved, the party who loses before the state supreme court can ask the Supreme Court of the United States for review. If the U.S. Supreme Court declines to review the case (the result in over 90% of cases which seek its review), the appeal is complete.

Habeas and Motions for New Trial

If you want to challenge your conviction because your trial attorney made a serious mistake (provided ineffective assistance of counsel) or because there is newly discovered evidence of your innocence, you can do so in a separate civil proceeding. In Connecticut, and in the federal system, you would file a habeas petition. (Counsel would be assigned to you if you are indigent.) In Massachusetts, your trial attorney or appellate attorney would normally file a Motion for New Trial under Rule 30 of the Rules of Criminal Procedure.

In either case, the procedure is like a trial --- you can call witnesses to support your claim that your conviction was badly flawed. Here, however, you have the burden of proving your innocence. The prosecution will respond to your witnesses and claims. Again, these challenges are rarely successful, unless there was an egregious error in your case.

You can appeal an adverse decision by a habeas court or of a trial court denying a motion for new trial. It will follow the same procedure as a direct criminal appeal, although your odds of success are even lower.

After you exhaust your state rights, you can challenge your conviction in federal court, alleging that your state conviction violated your federal constitutional rights. By this point, your case has likely been through several layers of state courts --- the trial, the direct appeal, a habeas trial or motion for new trial hearing, and an appeal of that decision --- the odds of success in federal habeas court are low, but it is possible. The federal habeas rules are complex, and you should consult with a specialist if your case is headed in that direction.

Further Reading:

Massachusetts:
Massachusetts Rules of Criminal Procedure
Overview of Mass. Criminal Procedure
Massachusetts District Attorneys Association

An Attorney's Summary of Mass. Murder Laws
Perjury Statutes

Self Defense Law:
Commonwealth v. Boucher, 403 Mass. 659, 663 (1989) (excessive force in self-defense is manslaughter)
Commonwealth. v. Harrington, 379 Mass. 446 (1980) (elements of self-defense)
Commonwealth v. Toon, 55 Mass. App. Ct. 642 (2002) (self-defense jury instruction)

General Laws ch. 278 § 8A (Castle Statute)

Connecticut:
Connecticut Practice Book (contains criminal procedure rules)
Overview of Conn. Criminal Procedure
Jury Duty in Connecticut
Conn. Office of Victim Services
Conn. Victim's Rights Statutes

An Attorney's Comment on Conn. Murder and Manslaughter Laws

Self Defense Law
Summary
OLR Research Report on Self-Defense Law (2002)
OLR Research Report on "Castle Law" (2007)
General Statutes 53a § 18 (self-defense in general)
General Statutes 53a § 19 (defense of person)
General Statutes 53a § 20 (defense of premises)
General Statutes 53a § 21 (defense of property)

State v. Corchado, 188 Conn. 653 (1982) (constitutional right to jury instruction)
State v. DeJesus, 194 Conn. 376 (1984) (summary of elements)

General:
Top 10 Myths about Jury Trials