



Family Concerns for Armed Citizens *An Interview with Massad Ayob*

Interview by Gila Hayes

Before a defensive gun use arises, what kinds of discussions should the armed citizen have with his or her family to prevent a self-defense incident from cascading

into an even worse aftermath? Things can really go wrong if family members are caught off guard because they don't realize what is likely to happen after use of force! Network members frequently ask us what they should tell their family members about aftermath management, and we took those and related concerns to a man who has taught us much about managing the aftermath of a critical incident, Massad Ayob.

eJournal: Mas, we get a lot of questions from members about what they need to do to help their family members prepare for the realities of armed self defense. Perhaps it would make sense to start our questions and answers by asking what do armed families with children need to consider?

Ayob: First, with a family, you do have to be especially aware of safe storage of the firearm and all those basic precautions, but when the kids are old enough, the kids need to learn that you don't speak to an investigator until Mom and Dad have cleared it.

One should be careful not to say things like, "I'll blow away any ass that comes into the house," in front of the kids, because little Johnny in third grade is going to be squawking in the schoolyard the day after the shooting, "My Daddy said he was going to blow some ass away and now he did!" Those are going to be discoverable to investigators.

eJournal: Are they?!

Ayob: Oh, sure! Now, what is introducible in court is up to the judge and the 33-or-so exceptions to the

hearsay rule. The point is, once the cops are on it and the prosecutors know the statement is there, they think, "OK, this is telling us we are dealing with a blood-thirsty Rambo and let's intensify the investigation and be looking more intently at prosecuting."

eJournal: At what age is it appropriate to let young children know that you might kill to save their lives, and talk with them about related concerns?

Ayob: At the age they are responsible enough to handle it. As with having pets or teaching the children to handle the gun themselves, there is no one age demarcation. It is not like wow, you turned 16 so you get to apply for your driver's license. Well, the 16-year old can apply, but not all 16-year olds are created equal, and not all children mature at the same rate. I've seen surprisingly young kids that I would trust to be on a range with me with my back turned and a surprising number of adults that I would not!

eJournal: When you as the parent judge that the child's grasp of the real world is sufficient that having that discussion with them won't be traumatic, are you pretty frank about it?

Ayob: Yes, we are. You explain to the kid, "Look, bad things happen to good people. Here's the deal," and you'll find something the child has already experienced, "Remember when Grandma died, how sad it was and what a big blow it was to the whole family? Things like that occur continually in everybody's life, and we have to prepare to deal with them, even though they are ugly and they are unpleasant. People are going to be relying on you do to the right thing."

Basically, explain this to the kid just as you explain, "Here is how you use the car and drive it safely, here is how the gun operates and you use it safely, and you know we have a plan at home of what we're going to do if there's a fire; we've done fire drills here. You know

[Continued next page...]

August 2016

what we are going to do if there is a home invasion. We don't expect either of those things to happen, but we've drilled for both of them. You know what to do and because you know what to do, you really don't have to fear them as much as other people do."

Along with that is, "You know if something bad ever does happen, here is what the follow up is going to be. It is entirely possible that there's going to be an auto accident where Mom is driving but the other driver lies and you'll be asked questions. It could be entirely possible that something is going to happen at school that you get blamed for." The basic principles are exactly the same. Tell them, "You explain what happened. If you did do something—for example, you had to strike another kid to keep from being beaten up—you explain that you did so, and you explain that you will lodge a complaint against the kid who assaulted you, point out who saw it, point out any evidence that there might be and if things continue, say 'I want to call my Dad and my attorney.'"

For decades, I've taught people what is widely accepted now as the Five Point Checklist: explain that this is what happened, this person attacked me or what ever it was that led to the shooting, indicate that you will sign a complaint, that you are the victim/complainant, not the perpetrator. These two things from the beginning can do a great deal to set the tone of who's who and what's what in the eyes of both investigators and prosecutors and obviously later, jurors, should that become necessary.

Interestingly, the same principles work in other respects. The third of the Five Point Checklist would be, point out evidence, the fourth, point out witnesses and the fifth, should interrogation continue, would be, "Officer, you'll have my full cooperation after I've spoken with counsel."

Now, when my younger daughter was 16-years old, she was driving down a residential street and suddenly a vehicle driven by a chronological adult backs out of a driveway without looking at high speed right in front of her and hits her car. Well, she instantly dials 9-1-1 on her cell phone says, "There's been an accident," gets out of her car and as soon as the cops get there, the driver of the other car starts screaming, "This damned kid ran into me, she was speeding, blah, blah blah."

My kid has already told the officer, "This person pulled out in front of me at high speed, there was no way I could have avoided it without going into the opposing

lane and hitting another car. If you need me to make a statement, officer, I certainly will. I think that person and that person saw it." It was resolved very swiftly in favor of my daughter, in spite of the fact that the usual "he said, she said" would seem to favor the purported grown up over the 16-year old new driver.

The principles of the Five Point Checklist work on many levels and could in many ways be helpful to family members in any number of contacts with the criminal justice system.

eJournal: Sure! It seems that could be appropriate to defending against bullying or the many usual false accusations between children. Besides, using that protocol in other areas of life gives practice applying these coping skills. Maybe it would help put self defense into a more reasonable perspective, because the kid is already accustomed to coping with interventions by authorities using the Five Point Checklist.

Ayoob: Yes, it helps with many things that occur in their lives. We let the kids know also that a lot of the same rules apply to any trouble they might get into.

eJournal: Let's explore a possibly even more difficult question: What if Mom and Dad aren't of shared beliefs about self defense? It seems to me a very shaky position, knowing that your gun-hating spouse is going to be asked questions about your defensive gun use!

Ayoob: Spouses are not required to make incriminating statements about their spouses. After a shooting, everybody who knows the potential defendant may be interviewed. They can be subpoenaed into court to testify. Police detectives (in criminal trials) and police investigators (in civil) can say, "Well, the wife said this to me and I tell you now under oath, here is what she said." It might turn out to be inimical or at least construable as inimical to the defense.

You often have the case of the couple that has different political identities. He sees himself as a conservative and she sees herself as progressive, and maybe they've had the argument about "Why do you want to carry that gun? You've been hanging out with Republicans too long!" It might not turn out well if her first reaction when the cops come to the house and say, "Ma'am, we arrested your husband" is, "I've told him not to carry that

[Continued next page...]

August 2016

gun! I told him that he'd end up killing somebody!" It would be awfully good if the whole family were on the same wavelength, understanding the responsibility of self protection.

I grew up in a family where my Mom was a Democrat; my Dad was a Republican. Every single election, they cancelled out each other's vote. They went to the polls together, drove home together, laughed, understood and accepted. Neither changed their principles. At the same time, nothing was going to happen where one of them said, "See I told you if you voted for that damned Republican, this awful thing would happen and therefore this is your fault!"

What we are looking at here within the perspective of Armed Citizens' Legal Defense Network is the person whose action was either deliberately or unintentionally misunderstood, and who ends up falsely accused. This is one of those rare circumstances where different political identities can make a difference. What we have here is a unique area, and the couple simply has to sit down and communicate and say, "Here's the deal, I've made that decision."

Essentially, there has to be a meeting of the minds where the other party if nothing else understands why the other person has done it. They may disagree but they do understand. Maybe it is, "I hate that you smoke, so we have come to the agreement that you will smoke outside in the carport or the back yard." That's understood, but none of that is going to end up in the sort of recrimination or confused statement that could be used against a spouse [in court].

eJournal: You'd think people would be experienced in reaching those kinds of accommodations over differing beliefs within the family! Now that one family member is facing prosecution and possible prison time, the stakes are so high that we have to work together in unity!

Ayoob: If, let's say the parent was very, very strongly pro life, and the adult daughter said, "Mom, I think you have a right to know that for a number of reasons, I am going to have an abortion." There might be a heated argument, and for a while, there might be a "never darken my doorstep," but I would expect if the night after the procedure the daughter came home, the abortion went wrong and she hemorrhaged and was bleeding out, I would expect the mother to know what to do, to call the ambulance, and to be supportive.

Essentially, that is the sort of thing that you are going to have to work out with an anti-gun spouse. You'll need to understand, first, "We are not so much talking about guns. We are talking about self defense and the right to protect our children." I assure you, that while it seems stereotypically that the guy has the gun and the woman is the anti-gunner, I have seen many cases where it was exactly the opposite.

Actually, it gets uglier there, because a strong woman and what some might perceive as a weaker male, breaks more stereotypes and that takes people through the roof. Look at our mutual friend Glenn Meyer's work with mock juries, one of the things he noticed was that juries were unduly hard on highly competent women who physically harmed men, and were also unduly harsh on what they perceived as weak men who had done something stupid or made a mistake with a gun. Each violated a stereotype and our society does not seem to like those who break those boundaries. (See http://www.armedcitizensnetwork.org/images/stories/Network_2012-10.pdf)

There has got to be a meeting of the minds, there has got to be if nothing else a mutual respect for the decision. You might say, "Look what ever happens, if a man broke in and attacked our children, and all I had was a golf club, I would have hit him in the head with a golf club. You and I can decide later if it is worse to bash his brains out with a golf club and he dies, or shoot him in the head with a pistol and he dies, but I think we'd both agree that it is best to stop him from harming our children in what ever way we can. We are going to need to mutually support each other if that happens." That is the best I can offer.

eJournal: So let's imagine that the family has survived the incident. The police are there. You noted that a spouse can't be compelled to give a damaging statement. Does the same apply to kids and does it apply to questioning by first responders? What is police protocol for questioning children?

Ayoob: Make sure immediately that you invoke the fact that, "These are my children. They are juveniles. They cannot be interviewed without my permission. They will be interviewed only in the presence of defense counsel after we have spoke with defense counsel."

[Continued next page...]

August 2016

eJournal: In your experience, how do police generally handle questioning small children? Maybe we watch too many police shows, but you get the notion of everyone being separated and their statements taken. Now, you and I will both remember many years ago a certain bad piece of advice that went around under the title of "Green Room." The idea was that after a home defense shooting, you would gather everyone in the home to coordinate the statements before police arrived. I shudder at the collusive sound of that. What say you?

Ayoob: I am familiar with that, and I was shocked when it came out. The original teaching at that school was this: before you call the police, you take five minutes to gather up the kids and come up with your story. Exactly how they suspend the laws of time and space to achieve this, I do not know. Someone has heard gunfire from your house. Someone has called the police. The exact moment, to the second, of that call coming in will be recorded, as will be the time of your call. Those five minutes will have to be accounted for. You have decided to coach the children what to say before you call police, before you call emergency rescue to assist with the person you have shot. The impact on your indicia of malice and indicia of guilt has just profoundly increased. We do not teach that at my school!

eJournal: As a police investigator, wouldn't it raise a lot of questions in your mind, if there were four different people at a shooting scene all told you exactly the same thing?

Ayoob: [dryly] It sure would. Especially if it's by rote, word for word, as if coached by Dad.

eJournal: You mentioned a parent's right to invoke on behalf of juvenile children. Let's make the scenario worse—you are injured and not able to intervene. What is common in the police world as regards interrogating young children?

Ayoob: A lot of cops simply would not speak to the kids at that point, except to ask if they are all right. This will not be true of private investigators hired by plaintiff's counsel who will try to buttonhole kids or anyone they can on the street. I have seen some really outrageous stuff done by private investigators on behalf of plaintiff's counsel, including one who pretended to be a police officer doing an official investigation. Children are very vulnerable to adult projections of authority.

eJournal: It seems like you might be best off just taking your kids out of state for the short term!

Ayoob: A lot of people do, simply to deal with the trauma of what the kids go through. It is in the newspaper and tomorrow at school, some kid comes up and says, "My Daddy says your Daddy is a murderer! My Daddy says I can't play with you any more." That kind of stuff happens.

eJournal: As regards adult family members, what about admissibility of statements made by someone who is so shocked by foregoing events that they state crazy, inaccurate details. Do those statements end up in court?

Ayoob: Excited utterances, spontaneous utterances absolutely can be used.

eJournal: Once some time has passed, is it likely that the spouse or family will be taken into an interrogation room and questioned?

Ayoob: If I were the investigator, I would surely be attempting to interview them. After all, they are witnesses to a homicide!

eJournal: Can the family member decline?

Ayoob: She can, but then there is the concern that, "Well, ma'am, usually innocent people who are victims, as you claim to be, talk to the police. Usually suspects who have something to hide, don't. Ma'am, you see the position you are putting me in. Wouldn't it just be much easier if you just answered these few questions for me?"

eJournal: In your work as an expert witness, have you seen situations where the spouse gave statements that made defending the shooter much harder?

Ayoob: Yes, absolutely. Remember, if spouse was cool with handling life-threatening emergencies that had to be solved with deadly force, these issues would not come up. That kind of person would not be likely to blurt something or get something confused, or show a little confirmation bias, "I told him that gun would get him in trouble and get him sent to prison!"

eJournal: We've all known people who have that kind of spouse and they dearly love them. They would sooner

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die than leave that spouse! So we have a problem. We've agreed that the spouse is going to be asked to give a statement; we've already agreed we can't "green room" them and tell them what to say!

Ayoob: What you can do is discuss rationally before anything happens before there ever is a fact issue, "This is how we would handle any emergency. This element is different; that element is different, but essentially, we work together, we do the right thing, and if we have worked together and done the right thing, we should get the right outcome. "

eJournal: We've talked about family members present during an incident, but I hear from a lot of members needing to know how their spouse can represent their interests on their behalf if they get in a shooting while they're apart, with our member perhaps held incommunicado at the criminal justice center. From your experienced viewpoint, what should the spouse be ready to do?

Ayoob: First, for your audience, the trusted other needs to understand that the spouse belongs to the Network and knows the after hours emergency phone number. We want legal representation there as soon as is humanly possible. As a spouse, one of the first things I would ask is who is the lead investigator and in whose custody are you right now. Not just the department, but also the name of the arresting officer and investigating officers.

eJournal: Presumably, the spouse should know the name of their husband or wife's attorney, but are there any other details that need to be handled by the family at the local level?

Ayoob: It would be a really good idea for the spouse to have a power of attorney, for the spouse to, if necessary, be able to put up the house as collateral if needed for a large bond, things of that nature.

eJournal: I see a certain percentage of people in the Network who honestly don't have close family members

who can shoulder the responsibilities at the local level. In fact, I'm frequently surprised how often someone's question makes it seem he or she indeed is that isolated. Still, I believe we need to establish and nurture ties in our own communities, because there are tasks that the Network really cannot undertake. If you need the title to your house for collateral, a Network representative really cannot go inside your private dwelling and retrieve it for you. We're great at getting your lawyer the money or getting an attorney to you, but there are private matters that aren't appropriate for us to undertake. It often concerns me when a member says there is no one they can rely upon. Some have outlived their families, or for other reasons really do not have anyone serving as the "trusted other" you described. What then?

Ayoob: A good friend, a fellow member of the gun club. No man is an island!

eJournal: Now, before we let you go, what have I failed to ask that people need to know?

Ayoob: These questions are not the usual things I get asked in interviews! Remind people that they need to know the rules and the laws where they live, because they vary. This is the kind of advice you need to get from an attorney who practices in your area.

eJournal: Yes, that is a good assignment to leave us with. You've made it clear that many of the issues we discussed—like questioning juvenile witnesses and admissibility of certain statements—is subject to extreme variations city to city, state to state. Our members would do well to take up this and related questions with attorneys practicing in their own states. Thank you!

Learn more about Massad Ayoob at <http://massadayoobgroup.com/who/> and watch for the opportunity to participate in one of his courses, hosted all across the nation and listed at <http://massadayoobgroup.com/schedule/>.

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President's Message

by Marty Hayes, J.D.

In case you haven't noticed, let me share a little secret. We are smack dab in the middle of political season 2016, and the presidential election is sure to be a doozy. While I don't like to speak of politics here

in the members' online journal, occasionally we make an exception, and this election calls for one of those exceptions.

What is at stake, literally, is the future of the armed citizen and the citizen's right to keep and bear arms; the right to carry a gun in public and the right to use that gun in self defense. I cannot recall a presidential election that was so polarized on the issue of guns and self defense. On one side, the candidates want to severely limit your ability to own and use guns in defense of yourself and your family. The other side has committed to keeping your right to bear arms solidly intact. Interestingly, the third party candidates are split on the issue.

Now, having said all that, there is actually very little one set of candidates can do by themselves. After all, the current occupant of the White House would like to ban and confiscate all personally held firearms, but were thwarted by a Congress that has refused to go along and a United States Supreme Court that has ruled that American citizens DO have the right to personally own guns and use them in self defense. The separation of powers has kept President Obama's lust for gun control at bay. But the 2016 election could re-write the history of gun ownership, and here is how it could happen.

First, let's talk about the Supreme Court. Currently there is one vacant position on the Court and the U.S. Senate is refusing to bring the current nomination for that vacancy to the floor of the Senate for hearings and a vote. The next president will be able to nominate at least one justice, or the current nominee could be confirmed. But in addition to the current nomination of Merrick Garland for Supreme Court justice, there appears to be at least one more Court vacancy looming on the horizon. It is possible that an additional two or three more Supreme Court justices could either die in office,

become infirm or retire, all within the next four to eight years. That means that whichever party wins the White House will get to establish the political leanings of the Court for the foreseeable future.

In addition to the Supreme Court, also at stake in this election is the Congress, especially the U.S. Senate. The Senate is currently run by one party, which has taken a pro-gun stance, refusing to consider anti-gun legislation as well as holding off on the aforementioned Supreme Court justice nomination. If the current party stays in control, it will keep this check in place. What happens, however, if the Senate swings over to the other party, as it does quite often? What happens with an eager gun control president and gun control Senate in place? What happens if our Supreme Court is lost for the next couple of generations? What happens when that Court starts upholding lower court rulings allowing more and more onerous restrictions against the armed citizen? This country will be at a tipping point.

Whom to Vote For?

Many of my friends have been disenchanted with this year's political process, as I, too, have been. But, just because my candidate of choice did not win either party's nomination, it doesn't mean that there isn't a clear choice for me to make. I WILL NOT sit out this election, and I WILL NOT vote for any candidate who has no chance of winning. Unfortunately for America, we still have the two-party domination and that will not change by November.

The Lesser of Two Evils?

I don't buy it. One candidate is blatantly in favor of gun control. The other, while once a mild control advocate who denounced his former stance on the subject, is stating he will NOT allow more gun control legislation to become law, and has also vowed to appoint conservative Supreme Court justices. That is not evil to me.

It's All About Power

I have been involved in presidential and local politics my whole adult life. I currently am a precinct committee officer in my local county. But, as the decades roll by,

[Continued next page...]

August 2016

and I see little change in the political process, I have come to the conclusion that politics is all about power, who has it, and who wants it. Doesn't matter if it is for a local town council position, or the highest office in the land. Most candidates start out wanting to use the power they will gain by winning office for the public good. Unfortunately, many if not most are quickly subverted to worrying about the next election, and their good intentions take a back-seat to re-election concerns. Such is life, and there is nothing we can do about it in the present. What we can do, is not throw our vote away, when there is a clear choice for the future of our country.

On the Local Front

Even if the national politics disgusts you (and who could blame you), you should have local elections to get involved in that can make a difference. For example, in my local area, we have a first year State Representative, Lynda Wilson, who is a staunch conservative and

graduate of multiple firearms courses I have been involved with. She is the real deal, and is now running for State Senate in WA State. I wish her well.

To the North of us, we have a long-time State Senator, Pam Roach, who has decided to attempt to gain a seat on the Pierce County Council. She too is a staunch conservative and friend of WA gun owners, and we also wish her well in her election. I only bring up these two examples to illustrate that even if you live in a "progressive" state that is lost to the liberal end of the political spectrum, you can still do some real good by helping the local candidates that might keep the freedom-devouring wolf away from your doorstep. Although all the heat and light is shown on the national level, it is our local elected officials who have the ability to say "yea" or "nay" to local gun control laws.

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Attorney Question of the Month

Shooting someone in self defense is universally recognized as an act of deadly force, but what about self defense with a knife? While a knife can certainly be used as a deadly weapon, often a knife cut is not deadly, not debilitating, and may heal without medical treatment. With that in mind, our question of the month is—

Does the court always consider the knife a deadly weapon? Are there possible situations in which a person defending him- or herself with a knife might NOT be viewed as attempting to kill another?

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That would depend. Unless you were a stick of butter, a butter knife would likely not be considered a deadly weapon. That said, in the heat of a violent encounter, it may be difficult to distinguish a butter knife from a knife capable of inflicting grievous injury. This would be akin to the analogy of shooting someone threatening you with what later turned out to be an airsoft replica weapon.

Should you draw a knife to defend yourself, if the knife had a sharp point and/or a sharpened edge, it would definitely be considered a deadly weapon. Even if it was just a butter knife, should the person being threatened perceive it to be a deadly weapon, unless that perception would be deemed clearly unreasonable using the “reasonable person” standard, it would still be considered a deadly weapon.

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I think knives may be scarier than guns for many people. Under Ohio's definition of deadly weapon, a knife certainly qualifies. I think that the question will be more fact driven than most shooting cases. Again under Ohio

law, where death does not result, the court uses a standard of “was the force used excessive under the circumstances?” The type of knife wound, stabbing vs. slicing, may be argued as more desperate or defensive respectively. I don't think that a court will ever find that a knife is not a deadly weapon, but how and to what extent it is used will be the key factors in establishing self defense.

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Ohio is inconsistent with its view on whether a knife is a deadly weapon. It is situation and device specific.

Revised Code §2923.11 provides:

“Deadly weapon” means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

A knife will be considered a deadly weapon if it is used as a weapon.

An Ohio concealed carry permit is called a “concealed handgun permit” and does not authorize the carrying of any deadly weapon [like a knife]. For concealed carry purposes, the cases consider a knife as a deadly weapon if it is designed to be used as a weapon.

In *State v. Anderson*, 2 Ohio App. 3d 71 (1981), a frisk search of a criminal damaging suspect yielded a folding knife with a locking four-inch blade which could not be easily opened with one hand. The court reversed a concealed carry conviction, because the state did not prove beyond a reasonable doubt that the instrument was either: (i) designed or specially adapted for use as a weapon; or (ii) possessed, carried or used as a weapon.

In *State v. Cattleedge*, 2010 Ohio 4953 (Ohio App., 2010), the court reviewed the confusing and contradictory case law in Ohio:

[Continued next page...]

August 2016

{¶12} In *State v. Flowers* (May 1, 1985), 1st Dist. No. C-840564, the court held the trial court's determination that appellant's knife was designed as a weapon was not supported by sufficient evidence. The knife in question was a folding knife with a serrated, four-inch, curved blade. However, the tip of the knife blade was not sharp, the blade could only be opened by using two hands, and the blade did not lock in the open position.

{¶13} The court in *Flowers* cited to *State v. Sears* (Feb. 27, 1980), 1st Dist. No. C790156. In *Sears*, the court found the knife in question was not a deadly weapon. The knife was a folding knife, required two hands to open, had a four-inch blade, and locked in place. The court discounted the relevancy of the locking feature, stating that anyone who had ever utilized a folding knife knew this feature made the knife more useful for a multitude of lawful purposes and does not make the knife per se designed for use as a weapon. The court indicated the knife was otherwise "just like any other pocket knife." *Id.*

{¶14} In *State v. Manning* (Feb. 16, 2001), 2d Dist. No. 18347, the court found the knife in question to be a deadly weapon. In *Manning*, the blade on the knife was less than two inches in length, was pointed and sharp, was concealed inside a cylinder that could easily and quickly be manipulated to make the knife available to use as a weapon, and could be opened using only one hand.

{¶15} In *State v. Graham* (Oct. 23, 1998), 6th Dist. No. S-97-050, the court found there was sufficient evidence that the knife at issue was a deadly weapon. The knife was a folding knife with a four and one-half inch blade and had a hole incorporated into the knife's blade designed to permit the knife to be opened with one hand. The court found that, at the least, evidence of one-handed operation was sufficient to submit the matter to the jury as a question of fact, and the jury apparently resolved the question in favor of the state.

{¶16} In *State v. Wheeler* (Mar. 19, 1999), 2d Dist. No. 17197, the court found insufficient evidence that the knife at issue was a weapon. The knife was a "butterfly" knife, which is a knife sheathed by a two-part, hinged handle that is exposed by disengaging a clasp and pulling apart the unhinged portions of the handles to make a united handle. The knife required two hands to open. The defendant, who was a tool and die worker, made the knife, and the court noted he used the knife for

carpentry, as a scribe, for shaving boards, opening packages and bags, and deburring steel at work.

{¶17} In *Mayfield Heights v. Greenhoff* (Nov. 14, 1985), 8th Dist. No. 49741, the trial court found there was insufficient evidence to find the two knives at issue were deadly weapons. One knife was a pocketknife with a three and one-half inch blade, and the other was a two-inch folding razor. The appellate court examined the weapons and found that neither object had features that would demonstrate it was per se designed for use as a weapon. The court called the pocketknife an "ordinary" pocketknife that required two hands to open and had no spring attachment. The razor folded into a two-inch sheath. Without further evidence of any other characteristics, the court found neither to be a deadly weapon.

{¶18} In *State v. Ratcliff* (Oct. 26, 1983), 4th Dist. No. 82 CA 13, the court found the knife was not a deadly weapon. At issue in the case was what the court termed an "ordinary" pocketknife, which required two hands to open and could not be locked in an open position. The blade itself was about two and one-half inches long, with the total length of the open blade and knife being just less than six inches.

{¶19} Based upon the above cases, the following characteristics may, but not always, support a finding that a folding knife is a deadly weapon within the definition of R.C. 2923.11(A):

- (1) a blade that can easily be opened with one hand, such as a knife with a switch, a spring-loaded blade, or a gravity blade capable of instant one-handed operation;
- (2) a blade that locks into position and cannot close without triggering the lock;
- (3) a blade that is serrated;
- (4) a blade tip that is sharp;
- (5) an additional design element on the blade, such as a hole, that aids in unfolding the knife with one hand;
- (6) does not resemble an "ordinary" pocket knife; and
- (7) is a type of knife considered a weapon for purposes of R.C. 2923.20(A)(3).

I could find no case discussing whether a knife carried via a pocket clip that renders the knife partially visible could be considered a concealed weapon. Ohio generally permits the open carry of weapons without a permit.

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As to the second part of the question, the statutory definition of a deadly weapon includes the use of the knife (which is capable of inflicting death) as a weapon. It seems to me that use in self defense is a use as a weapon. If the knife is being used in self defense, it does not matter legally in Ohio whether the defender is trying to kill the attacker, as long as the self defender was in reasonable fear of death or great bodily harm.

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Michigan Criminal Jury Instruction 17.10 provides:

(1) A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.

(2) Some objects, such as guns or bombs, are dangerous because they are specifically designed to be dangerous. Other objects are designed for peaceful purposes but may be used as dangerous weapons. The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that is likely to cause serious physical injury or death, it is a dangerous weapon.

(3) You must decide from all of the facts and circumstances whether the evidence shows that the _____ in question here was a dangerous weapon

Thus in Michigan, whether or not a knife is a deadly weapon is a question of fact for the jury. But since a person who is using a knife in self defense is normally using it in such a way that it will cause physical injury, the answer is usually "Yes," it is a deadly weapon.

However, that is not the end of the inquiry, MCL 780.972 provides:

Sec. 2. (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

Thus, even if the jury finds that the use of a knife by the defendant was deadly force or a deadly weapon the use of the weapon may be permissible, depending on the circumstances.

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Part one: Does the court always consider the knife a deadly weapon?

Yes, a knife most likely will always be classified as a deadly weapon. Caveat in Alabama - most of our crimes dealing with some degree of physical injury say the injury can be caused by a deadly weapon or dangerous instrument - therefore, the knife will most likely be included regardless of how it is fashioned, except maybe a butter knife.

Part two: Are there possible situations in which a person defending him- or herself with a knife might NOT be viewed as attempting to kill another?

Yes. As with all crimes (except speeding tickets) intent is a necessary element so to become a murder or attempted murder there must be an intent - doesn't matter what weapon or instrument was used. In Alabama self defense is a complete defense so the member is still likely to be charged with the murder or attempted murder but the evidence will show self defense and render a not guilty. No intent, so to say. A prosecutor could look at the circumstances and say it was clearly self defense and not indict but given these are elected officials in our state they usually charge and let the courts and juries sort it out.

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In Idaho, a knife is a deadly weapon by definition, as an instrument likely to cause serious bodily injury or death. Idaho Code Section 18-907(b) (the statute enhances the crime of battery to aggravated battery when a deadly weapon is employed).

The Idaho Supreme Court has also defined a deadly weapon as, "Our Supreme Court has defined a deadly weapon as a weapon which is likely to produce death or great bodily injury. If it appears that the instrumentality is capable of being used in a deadly or dangerous manner and it may fairly be inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, its character as a dangerous or deadly weapon may be thus established, at least for the purposes of that occasion.

State v. Missenberger, 86 Idaho 321, 327, 386 P.2d 559, 562 (1963)

State v. Hernandez, 818 P.2d 768, 772 (Idaho App. 1991)

In Idaho, attacks with a "sulphur gun," sock filled with batteries, and even a longboard (4 foot skateboard) have been found to be deadly weapons. I would think that any weapon that COULD be used to kill will be a deadly weapon, no matter what injuries were actually inflicted. If you stab someone with a knife, and the single stab renders the person otherwise unable to defend themselves, then the only reason death would not result is if the attacker does not fully prosecute his attack to kill the victim. The victim would be defenseless, so the victim certainly should be able to defend himself with a gun before he gets stabbed.

A big "Thank you!" to all of the Network Affiliated Attorneys who responded to this question. Please return next month when we raise a new topic of discussion with our Affiliated Attorneys' comments.

*[End of article.
Please enjoy the next article.]*

Book Review

The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege

by Jim Fleming

P.O. Box 1569, Monticello MN 55362

140 pages, illustrated

order at <http://www.authorjimfleming.com>

Reviewed by Gila Hayes

Several months ago, Network Advisory Board member James Fleming commented on Facebook that he had turned over his latest book, *The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege*, for final editing. When I expressed how eager I was to read it, Jim and his wife Lynne graciously sent a pre-release copy that I enjoyed reading over the Independence Day holiday. I think our members will enjoy Jim's new book, too, so let me share some of what I learned to whet your appetite for more.

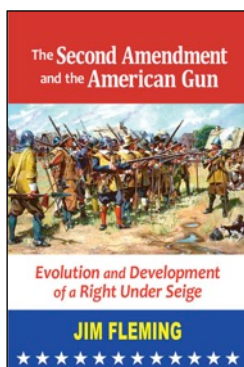
We have been fighting to protect the Second Amendment for so long that the stalemate seems permanent. Fleming's introduction, however, asserts the impasse could break at any time, so freedom lovers need to fight effectively to defend the Constitution.

Protecting the Constitution requires a clear understanding of it, something that has not always been easy for America's citizens. Fleming explains, "The purpose of this book is to assist the non-legally trained citizen in understanding the Second Amendment: how it originated, what it was intended by the Founders of our nation to mean, and where we might go from here in terms of that right surviving the onslaught of attacks now being made against it in the courts, in the legislatures, and in the media."

First, we must understand how our government developed. Fleming explains briefly why the Articles of Confederation, ratified a mere six years before the 1787 Constitutional Convention, proved insufficient. The independent States, lacking a common currency, couldn't fund troops or pay off foreign debts. Shay's Rebellion illustrates some of the problems, he cites.

Still, many feared a centralized government, and with good reason. Fleming asserts that both the Federalists

and their opponents "believed that the principal threat to the future of the new republic was a tyrannical government." An armed citizenry, "capable of confronting and defeating a standing army," was the key remedy put forward. They hoped citizen soldiers could serve and then return to their "communities and occupations with their arms when the danger passed," he observes.



History taught our founders' English ancestors the value of weapons against tyrants. Fleming outlines the battles for power that wracked England, quoting Blackstone and others to show that the right to possess weaponry for self

preservation is cited in the same context as other fundamental human rights. He quotes St. George Tucker, a prominent Virginian, who wrote, "The right of self defense is the first law of nature," adding that when government disarms citizens, "liberty, if not already annihilated, is on the brink of destruction."

Tucker, Fleming continues, identified four individual liberties: owning and carrying weapons, "freedom of religion, freedom of speech, and freedom to assemble." To Tucker's assertion that the right to bear arms "offers a strong moral check against usurpation and arbitrary power of rulers," Fleming adds the words of other early American leaders who recognized the rights of an armed citizenry to stop government power grabs.

In that context, the militia was the focus of many of the founder's arguments. Should states control their local militias or should a powerful central government direct them? Tracing government dictates from the 1800s to 1900s to today, Fleming weighs whether, in light of the Second Amendment's preface about "a well regulated militia," the Founders intended the right to own weapons only for militiamen. Before sharing his conclusion, however, he teaches how scholars interpret the Constitution. Should we seek the original intent of the Founder's words, rely on court rulings in earlier cases, weigh the costs against the benefits of one decision over another, or apply other standards?

For a time, the Constitution was held to restrict only Federal intrusions, Fleming continues, outlining *United States v. Cruikshank* (1876) and *Presser v. Illinois* (1886), in which the Supreme Court indicated that the Second Amendment shouldn't interfere in a state's

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August 2016

legislation. He later explains the evolution of the 14th Amendment's application to gun rights cases. Federal circuit court decisions in 2001 and 2002 (*Emerson* and *Silveira*) were 180 degrees apart on whether the Second Amendment affirmed an individual right, establishing a reason to argue a right to keep and bear arms case before the Supreme Court. Then *Parker v. District of Columbia* began the *Heller* case, he outlines, and this handgun ban challenge spun off into two important Supreme Court cases, of which armed citizens are rightly proud.

The three-judge district appellate court ruling upholding armed guard Dick Heller's right to have a handgun in his home acknowledged that the right to bear arms predated the government our Constitution defines, Fleming quotes. The Second Amendment identifies "the People" as the object of the right, just as is done in the first, fourth, ninth and tenth amendments, he points out. Those rights apply to individuals; so do the Second Amendment rights, he emphasizes. The *Heller* chapter sketches out the arguments made by the plaintiff and respondent, then Fleming details the 5-4 decision.

The majority in *Heller* separated the Second Amendment's preface about militias from the operative clause identifying the people's right to keep and bear arms, Fleming states. He summarizes individual rights, reasonable restrictions, how laws are evaluated to determine Constitutionality, and the interplay between the majority opinion and dissents. He closes the chapter by reminding the reader, "The *Heller* court did not address the question of how the ruling might be applied to challenge state gun laws and regulations."

After *Heller*, lower courts began to rule that a state can't regulate gun possession in the homes of law-abiding citizens, Fleming writes, citing decisions from OH, NY, NJ, IL. He explains that state and Federal Circuit courts continue to define Second Amendment limits. He further predicts that the Court will "not accede to calls for the Second Amendment to be 'modernized' at the expense of its original meaning."

Fleming educates readers on how the protections in the Bill of Rights are incorporated into the Constitution through the 14th Amendment, which assures that, "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Through this amendment,

American citizens are assured that the Bill of Rights must also be honored by the various states. He adds that this protection was really first applied in 1925 in a First Amendment decision. Known as "constitutional incorporation," this incorporation was not applied to Second Amendment rights until 2010 when Otis McDonald challenged Chicago's handgun registration scheme, first in district court, then in the Seventh Circuit Court of Appeals and finally before the Supreme Court.

In *McDonald's* 5-4 decision, the Court again acknowledged that state and local laws cannot trample Second Amendment rights, Fleming writes. Supreme Court Justice Thomas declared that, "The Second Amendment is fully applicable to the states because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship," he quotes. Justice Alito wrote, "It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an even-handed manner." The *McDonald* decision, Fleming explains, while not overturning Chicago gun registration laws, returned it to the lower court to correct its ruling.

Fleming writes briefly of the flurry of court challenges raised since. Too many activists predicted unrealistic effects from the *Heller* and *McDonald* decisions, he wrote prophetically in advance of the blow the Ninth Circuit dealt in *Peruta*. He further warns about the number of issues the Supreme Court left undecided in *Heller* and *McDonald*. "There is simply no way for the court to address all the possible questions that might arise in a single case, or even a half-dozen for that matter. That is, after all the function of the lower courts, and the Supreme Court has obviously taken the position that it is now time for them to do that work," he explains.

Concealed carry is the next battlefield. Fleming explains how in *Moore v. Madigan* the Seventh Circuit court struck down IL law prohibiting carry of a gun outside the home. The Circuit Courts remain divided, and he tallies the success in IL, minus the losses in NJ and MD, suggesting there is cause for optimism by pointing out, "A factor that should not be overlooked is that the majority of the states recognize an individual right to bear arms under their own state constitutions."

[Continued next page...]

Fleming's final pages discuss ongoing attacks on Second Amendment rights by figures ranging from the President, law commentators, legal analysts, political lobbyists and persons of influence, including retired Supreme Court Justice John Paul Stevens. Other claims assert that the Second Amendment's protections don't extend to modern firearms, that it only protects arms suitable for military/militia functions, that restrictions can be based on the destructive potential of the gun in question, and whether the Constitution can even apply to modern societal conditions.

Preserving the Constitution requires educated citizens. Fleming closes his book with this thought: "My hope is that you can take from this book information necessary for you to develop your own understanding and appreciation of our right to keep and bear arms." The founders were deeply distrustful of the armies a tyrannical government could throw against rebellious subjects, he adds. They penned the Constitution and the Bill of Rights with the understanding that citizens needed to own guns so they could defend their communities, not only to serve in an organized militia. "Americans need to not only understand the background and history of the Second Amendment, but the constant need to protect that Second Amendment. Once it is gone, the rest of the Bill of Rights will quickly follow, for there will be no one left to protect it," he concludes.

In *The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege*, Fleming has written an important yet supremely readable book. I cannot recommend it highly enough. Watch for its release soon at <http://www.authorjimfleming.com>, then get it, learn its lessons, and then pass it along to others.



Jim Fleming practices law in MN, an attorney of more than 30 years trial and appellate court experience in MN, NE and has argued both civil and criminal appellate cases in the State appellate courts as well as before the Eighth Circuit court of Appeals. The Network

appreciates his service on our Advisory Board, as well as his scholarship in this new book, and his earlier book *Aftermath: Lessons in Self-Defense*. Learn more about Fleming at <http://www.authorjimfleming.com> where we encourage Network members and readers to submit the Contact form asking to be notified when *The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege* is available, as the book's release was briefly delayed after we received our early review copy.

*[End of article.
Please enjoy the next article.]*

August 2016



News from Our Affiliates

Compiled by Josh Amos
and Gila Hayes

It is our pleasure to recognize two of the Network Affiliated Instructors for their high performance levels in promoting the Armed Citizens' Legal Defense Network.

Let's first give a bit of news from affiliated instructor, John Pemberton. John has a busy schedule as the owner of Spartan Dynamics in South Bend, Indiana, where he promotes education, good training, and responsibility for all of his armed citizen students. Spartan Dynamics hosts a wide range of classes from novice to advanced, pistol, shotgun, rifle, legal issues for armed citizens, as well as armed and unarmed combatives, classes for ladies...and more.

In addition to his leadership with Spartan Dynamics and partnership with the Armed Citizens' Legal Defense Network, John also continues to promote his messages of education, training and responsibility with his active partnership with Kodiak Firing Range and Training Facility, also in South Bend, Indiana. This level of effort in promoting high standards for armed citizens deserves a mention. So if you or people you care about are looking for high quality training in the Indiana area, contact John Pemberton at [Spartan Dynamics](#).

Through all of his classes, John supports the Armed Citizens' Legal Defense Network and introduces us to his students. Our Network grows stronger through the efforts of members like John. Thank you, John!

We are also impressed this month with Richard Smith who is instructor/owner at the [Firearms Training Academy](#) in Davie, FL where Richard teaches a wide range of high education-level classes for armed citizens from beginner to advanced instructor. Richard knocked it out of the park in mid-July when three of his students joined the Network after taking Richard's class the weekend before. Well-done, Richard!

We also appreciated referrals from our friends at Darnall's Gun Works in Bloomington, IL (http://darnalls.com/?page_id=81). Susan and Ron Darnall's instructors give each student a copy of our Foundation's complimentary booklet *What Every Gun Owner Needs to Know About Self-Defense Law* and it is always fun when one of those students mails in an

application, cites the Gun Works when joining online or mentions these good affiliates when they call in to join.

James Emmick, owner operator of Firearms Training of Western New York is providing the same greatly appreciated referrals. He teaches a variety of concealed carry licensing courses, as well as training in home defense and introduction to concealed carry and other topics. He offers a free class to those who host his programs in their home, office or club for 12 or more students. Learn more about Emmick's classes at <https://ftwny.com> or on his Facebook page <https://www.facebook.com/Firearms-Training-of-Western-New-York-140469209341927/>.

Karl Rehn and his crew at KR Training do a great job of introducing their students to the Network. Karl and his instructors teach a variety of classes, ranging from introductory to expert handgun skills, rifle and reloading classes, as well as the TX license to carry class, hunter education and a lot more, including hosting IPSC matches. KR Training has a lot to offer students in Texas and nearby states, and for those of us too far away to travel to his courses, the blog at <http://blog.krtraining.com> provides well-thought out and documented commentary that is well worth your time.

Jason Klinner of WISE Firearm Training near Quincy, IL, teaches students on his private shooting range, and coaches them through skills including many of the NRA fundamental shooting classes, concealed carry licensing classes and customized programs for individuals who contact Jason and his team to learn how to be safe gun owners and hone their shooting skills. Learn more at <http://wisefirearmtraining.com/classes/> and <https://www.facebook.com/WISEfirearmtrainingQuincy/>.

The strength of the Armed Citizens' Legal Defense Network depends upon the kinds of high quality new members that John, Richard, the crew at Darnall's, James, Karl and Jason and all the rest of our wonderful affiliates have brought onboard. We thank them all for their hard work in telling people about the Network.

We also appreciate all of our members who are out there in their communities being the great examples of armed citizens that they are and introducing new, quality people to our way of life. It has been said that you can judge someone by the company they keep. We're all in this together and you make us proud, members!

*[End of article.
Please enjoy the next article.]*

August 2016



Editor's Notebook

by Gila Hayes

Preparedness and ability to survive a mass killer attack is on the minds of most armed citizens. The Munich mass shooting reports reminded me of NRA News contributor Dom Raso's warning that gun-free zones, especially

busy shopping malls, are extremely attractive to terrorists wishing "to be remembered for killing more innocent people than the terrorists before him." His commentary is refreshing after the tidal wave of psychobabble following the Miami club shooting, and vapid and repetitive excuses that murderers suffered as bullied children, so act out of revenge for juvenile cruelty.

Intended victims cannot afford to get too worried about motivations, despite studies into bullied killers, or terrorist's ideology. Those explanations are little more than distractions to keep the ordinary citizen from developing sound defense strategies. For the man or woman, taking the family to a big shopping mall for an afternoon, why a killer attacks matters not. See <https://www.nranews.com/series/commentators/episode/commentators-season-6-episode-15-radical-islamic-terrorists-targeting-gun-free-malls>.

Claude Werner also posted an insightful blog about what to look for when protecting innocents in busy social settings. Trust your intuition if something feels "off," he teaches. If you feel uneasy but don't know why, figure out what is wrong and take action, whether that entails preventive safeguards or reactions when an attack is underway. In the latter, if you can, flee the scene, don't hunker down and hide, he suggests. Read it all at <https://tacticalprofessor.wordpress.com/2016/07/17/situational-awareness-in-social-settings/>.

On related topics, I'm a semi-regular reader of the *CP Journal*, having learned much from Patrick Van Horne and Jason Riley's book, *Left of Bang*. For *CP Journal* subscribers, every Sunday brings an email citing half a dozen useful articles on timely topics, plus there's much to think about on their blog, like the posting at <http://www.cp-journal.com/the-collective-mood-and-you/>.

A recent *CP Journal* lead me to a column in the *Los Angeles Times* (<http://www.latimes.com/business/la-fi-orlando-cost-lone-wolf-20160623-snap-story.html>) about increased budgets to keep public venues like theme parks and mega-malls "safe." Businesses are responding to terror attacks against large crowds with precautions like the metal detectors outside SeaWorld, explosives-sniffing dogs at Disneyland, closed circuit cameras in shopping destinations, bag checks at nightclubs and armed guards at schools and movie theaters. And still terrorists launch surprise attacks like Florida's club shooting or the Bastille Day truck attack.

The June shooting in the Tel Aviv market provides an interesting contrast. There, two Palestinians who were illegally in Israel, killed four civilians in an upscale market area that was, interestingly, adjacent to the military headquarters. Even seemingly safe venues, turn dangerous. This spotlights the lie behind feel-good preventions, like metal detectors and bag checks, which do little to thwart a determined terrorist.

The take-home lesson for ordinary armed citizens?

1. Having a gun for self defense is essential.
 - (a) Stay out of places that restrict ordinary safety precautions. Those in charge have made it clear that your well being doesn't rate their consideration.
 - (b) Even if it is uncomfortable or inconvenient, find a way to carry your gun within the constraints of your area's laws. If the law does not allow you to carry a gun, see 1) (a).

After passage of the recent CA gun restrictions a non-member emailed to ask if we would defend a member who, [and these are his words] fed up with the ever-more-restrictive laws, carried a gun in knowing violation of the most recent set of restrictions.

As Massad Ayoob has famously written, if you were an enthusiastic snow skier, would you find a way to move out of Florida to a state with snow every winter and lots of opportunities to ski? If your state government so disregards your personal safety as to strip you of your right to armed self defense, doesn't moving where you can exercise that right deserve serious consideration?

[End of August 2016 eJournal.
Please return for our September 2016 edition.]

August 2016

About the Network's Online Journal

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In addition, material presented in our opinion columns is entirely the opinion of the bylined author, and is intended to provoke thought and discussion among readers.

To submit letters and comments about content in the **eJournal**, please contact editor Gila Hayes by e-mail sent to editor@armedcitizensnetwork.org.

The Armed Citizens' Legal Defense Network, Inc. receives its direction from these corporate officers:
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We welcome your questions and comments about the Network.

Please write to us at info@armedcitizensnetwork.org or PO Box 400, Onalaska, WA 98570 or call us at 360-978-5200.



August 2016