

Transcript of Podcast

Shawn Vincent:

Welcome to the podcast. I'm glad you're here. We are currently exploring the 36 *Lessons* for armed defenders. We've worked our way up to lesson number six. These next two podcasts are going to be about a concept that our friend Gary Eastridge calls the *window of justification*. You've learned so far that the use of deadly force in self-defense is only justified when you have a reasonable belief that you face the imminent threat of great bodily harm or death. We talked about how that means that the attacker has to have the ability, the opportunity, and the intent to cause you that serious harm. But what you find is that in fast-moving, dynamic self-defense scenarios, those elements can change quickly. And that, unless all three are aligned, you could be in some real legal hazard if you use deadly force. That's what we're calling the window of justification.

It means that in a lot of the cases that we explore, armed offenders either fire too soon, before that window has opened, or too late—after that window has closed. Today, for lesson number six: it is that you shouldn't shoot before the threat is imminent. We're going to talk about some cases where the armed defenders shot too soon in a scenario that may very well have been justified if they had had a little bit more forethought, better training, or the patience to wait until things were absolutely dire before going to the last resort of using deadly force. We'll be joined by Steve Moses, well-regarded firearms instructor and our good friend, and also Don West, National Trial Council for CCW Safe, and a veteran criminal defense attorney.

Shawn Vincent:

So far in the 36 *Lessons*, we've covered the core legal elements of self-defense. We've translated to what that means tactically—with the ability, the opportunity, the intent of the aggressor, as to whether our use of force is justified. We've talked about the importance of that being imminent. We've talked about the importance of the threat being severe. And then we've talked about the whole, what do you call that? The totality of the circumstances that investigators are going to look at, that the prosecutor's going to look at ... Essentially, the jury's going to eventually, if you get that far, have to take into account to see if your actions were reasonable. And when we do all of that work, I think it starts to become clear that there is, in a self-defense encounter, often what I like to call this *window of justification*, where there's a

moment where use of force wasn't yet justified, but then the person's gotten close enough to you, or they've exposed a weapon, or they've expressed or demonstrated their intent that the ability, the opportunity, and the intent are all lined up, and the window opens where it's sort of a now or never instance.

But then we've learned from several cases that, just as quickly, things change and that window can close. The person makes an effort to retreat, or they put the firearm away, or they change their attitude, or they raise their hands, or any number of things change, and just as fast as that window opened, it closes, but that doesn't change the sort of continuity of the fluidity of the dynamic situation that the armed defender is in. And we've seen cases where the armed defender gets in trouble. And I'm going to say, honestly, Steve, it's often because they're not well-trained—where they fire too soon, and we've seen others where armed defenders fire too late after that justification window has closed. So we're going to break this conversation into two parts for our members and our listeners. It's two separate lessons all under this umbrella of the window of justification.

But today, for this episode, I want to talk about “shoots too soon.” And Steve, one thing I've learned, and I mentioned a little bit from the work I've done with you, is that when an armed defender shoots too soon, it's very often because they're facing a very scary situation from someone who's being very aggressive, and they may not have had the training and developed the competence or the confidence to know how long it's going to take for them to retrieve their weapon and get it into play if they need to. And as a result, they present it too early. I see you nodding your head.

Steve Moses:

Yes, absolutely. Absolutely. “The only tool that I have that will defend me is my weapon, and I cannot think of anything else to do that access that weapon to protect myself, whether this is a valid threat or not.”

Shawn Vincent:

Yeah. And you're not talking about yourself because I know you have more tools than that. You're talking about the folks who haven't had the training.

Steve Moses:

Well, not only that, but a lot of people that can't put their training in context. Okay. That's one of the things is, okay, what might a situation look like? And one of the keys, I think, to having sufficient time to assess what my options are and actually perhaps break contact, a lot of it has to do with, have I thought about what I might have to do, and am I able to break contact? Because to me, the objective of surviving any kind of interaction with another person is going to be breaking contact, whether I force them to break or to allow myself to break. So one of the examples I think that we're going to talk about later is where people actually drew a gun, but still stayed at a scene in which they could have gotten in their car and driven away. And so it's just simple things like that that you have to be thinking about in advance. And the other thing is, training really is a critical part of this because if I know that I actually possess the skills to get my gun into action, then I can concentrate more so on what's taking place, trying to understand everything that's going on, being able to assess any threats that I might have, and then respond to it, which I think that might allow me to delay A: bringing my gun into play: or B: going ahead and shooting at someone.

Shawn Vincent:

Don, from a legal perspective, tell me a little bit about this idea, this window of justification, and when people get in trouble for shooting too early.

Don West:

You touched upon the concept of totality of the circumstances early on in this conversation. And I think some people don't realize fully, especially when they're going through a scenario, and especially when they may not have had the kind of intensive training, not just with the operation of the firearm, but understanding the legal boundaries, where the pivot points are in the decision-making. And they get to the point that they shoot too early when they may very well believe they needed to shoot and that they were legally justified in shooting, but through lack of training or fear or perhaps panic at the moment go outside those parameters of reasonableness

because, in order for the jury to acquit you and to essentially allow the justifiable use of deadly force in a scenario like that, they have to believe not only were your actions reasonable to you, but that they are also reasonable to them. So in that sense, your perceptions have to sync up with how the jury views this thing.

And I think when people shoot too soon, it's probably because in their mind, they're fearful and they believe they are being threatened, but somehow it's not the articulable, clear threat of great bodily harm or death that they're facing. It's probably a little too speculative, perhaps a little too ambiguous, and they act anyway. And then when the jury sees that, they find that, well, maybe the threat really wasn't imminent because you're the person who has to somehow channel what was happening in your brain through your lawyer to the jury for them to understand what you were thinking. And if you can't articulate what you did and why you did it in a convincing fashion, it's entirely possible that the jury won't be convinced as well that you had a clear, deadly force threat that was imminent. So we can talk about maybe some hypotheticals, if not actual cases, that we've talked about over the years.

But for example, I think when somebody says, "This guy was threatening to me, he was intimidating to me, he was approaching fast, and then he put his hand in his pocket, so I shot him." Well, "put the hand in the pocket" is explained perhaps by someone that's not sufficiently trained or truly understands the legal boundaries as: he could have had a gun. He could have had a weapon. I didn't know what he had, so I made the decision to shoot. Now, as you talked about before, there may have been 15 decisions he could have made before that moment that would have extricated him or broken the contact, but nonetheless, he would be seen, I think, by a jury as shooting too soon, and that's because it wasn't clear that indeed he was facing a deadly force threat. Even perhaps ... Well, sometimes these are fixed after the fact if it were to turn out indeed that he had a gun or some way to inflict immediate deadly force.

Shawn Vincent:

We find- If you think someone has a gun and they turn out to have a gun, that's better for you at trial, but you can't know that until you see the gun.

Don West:

So I think that's part of it. The speculation is what we're talking about. Is it a real threat, or is it somewhat speculative at that point? And is it a deadly force threat and imminent? All of that stuff fits into what you're thinking at the moment when you decide whether or not you have to use deadly force in response. And if you shoot too soon before you can articulate it to yourself and then ultimately have to articulate it to a jury, you're opening yourself up to the prosecution simply claiming that maybe there was a threat of some sort, we'll never know because he shot the guy dead before he even knew what was going on.

Shawn Vincent:

Yeah. So as you're explaining that, a certain case came to mind when he talked about that hand in the pocket, which we'd call a *furtive movement*, right? Steve, you agree with that? Yeah, yeah. So it means that there's a reason to fear that this might go the wrong way, but you don't know yet. And I thought about the Gerald Strebent case, and this is the Marine veteran sniper who was also a professional MMA artist called The Finishing Machine, and he was rear-ended at night ... on a rainy night on this highway. The person who rear-ended him happened to be drunk. Gerald Strebendt didn't know this. He was probably, he just won some money playing video poker, so he was probably going to try to pay him off so he didn't have to call the cops and face a DUI in this situation. But right after the accident, he was calling out threats and swearing at Strebendt.

Strebendtt's the kind of guy ... he had some firearms in his backseat, and he grabbed it. He claimed the car was immovable because of the accident. And this guy kept approaching him, and he was yelling at him to stay back. He got on the phone with 9-1-1 and said, "This guy's not responding to me. Stay back, back away." Eventually, the guy reached into his hand ... and on the 9-1-1 call, he actually says, "He's reaching for something in his pocket. I don't know what it is. " And then he fires. One round in the middle of this guy's head drops him dead. And what's funny is I sent you guys some cases to consider for shoots too soon. I thought about sending this case, and then I thought twice about it because we know, and I didn't just tell our listeners about this, but we know that at a certain point, this drunk motorist got close enough where he actually was able to put his hand on Strebendt's rifle, which tactically, Steve, is too late.

At that point, Strebendt had almost waited too long to fire if he really thought this guy was going to be a threat, and he risked having this rifle wrestled out of his hands. But then clearly, at some point, the guy let go and backed off and was some yards away when he reached in his pocket, and Stretman decided to fire. And so maybe Don and Steve, it's interesting to bring this up because within a single encounter, it could be too early to shoot, the window might be open, closed, be too late to shoot, and then a second or two later be too early to shoot again in sort of a second part of this confrontation.

Steve Moses:

Strebendt was rear-ended, correct?

Shawn Vincent:

Stewart was rear-ended, yeah.

Steve Moses:

Okay. And was he backing away?

Shawn Vincent:

No, actually we know now that he had brake-checked the guy. He pulled in front of him because ...

Steve Moses:

When he was out of his car, was he backing away from the cars?

Shawn Vincent:

He backed away, up to 80 feet away. Then he stopped backing away. Well, that's

Steve Moses:

We'll then, what he just did—he just essentially blinded himself. He was facing directly into the headlights more than likely. So, had he instead, and again, we're just doing the ... Wednesday morning quarterback, instead of backing away, had he gone off laterally to one side, ideally the bar ditch as opposed to the other lane, he would have been able perhaps to assess the situation a little bit better. So that's one of the reasons that we always teach our students, if you can avoid it, do not back away, go off on a lateral, go off on an arc. And so had that occurred, this may have turned out a little bit differently.

The second thing is, and again, I'm always harping on people getting training, is just because someone reached out there and got a hold of your gun does not necessarily mean that you're out of the fight if you're willing to put in the time to train with the people that can teach you properly. Because if you can shoot from retention, whether it is with a long gun, which is much more difficult, but mostly we're talking about concealed carriers, not people armed with rifles, but with handguns. You can be taught how to shoot from retention, that is, with your hand literally in contact ... well, you can't see this, of course, but I literally have the inside of my forearm braced against my pectoral muscle. That's very difficult to take that away from me.

And if I am entangled with someone, I can probably put enough shots into them low to diminish them quite effectively. So if people would just say, "Hey, I'm going to open up my mind, I'm going to train, I'm going to learn how to do this stuff," it gives you more options. So my concerns about someone at eight to 10 feet, no matter how large they are, and they're threatening me, unless they actually start physical motion towards me, I see no reason to shoot because I know that I can control that gun in a very tight, entangled space.

Shawn Vincent:

And Steve, real quick, before I go back over to Don, I just want to mention, this guy's an MMA fighter and a Marine sniper. So he'd had training, but I think you'd point out that the kind of training that a Marine sniper has is not always compatible with civilian self-defense. Is that right?

Steve Moses:

Well, that and also just his ability to read the situation if he had just gone straight back, and he had his headlights right in his face. I can just kind of tell you from high school stuff that, "Oh yeah, we figured out real quick that if you were going to get in a fistfight with someone, you wanted them looking at the headlights, not you. "

Don West:

I wanted to point out that, well, as you guys just talked about how dynamic these things are and how they can change in a minute and turn the other way, and it could be too soon, then too late, and then et cetera. But I want to illustrate with the hypothetical that we were talking about a minute ago, just how factually intensive these are, because when you're in that situation, you're taking in all of the information that you can at the moment, but you're not limited to that information. In fact, the prosecution will dig well into your past, and they'll look forward from the incident to see if there's information that they think, in legal terms, is material and relevant. Does it help explain what happened? Would it be valuable or useful to a jury to figure out what happened? So let's take our situation where the guy's approaching, we'll call it a parking lot situation where this fellow's approaching our guy, and he's trying to figure out what's going on.

And then as he gets closer and closer, he puts his hand in his pocket. Well, let's say that ... back up 15 minutes, and they were in a bar or a restaurant and had words, and the guy did the right thing for him, he broke contact. He went out in the parking lot. He was getting ready to go home, and this guy followed him out. So that's a little more information and a little more context as he's approaching him, and he gets within 20 or 30 feet perhaps, our guy decides to display his firearm at low ready because he doesn't know what's going on and he's reasonably concerned about this guy who's coming after him, but he doesn't point it at him and he doesn't shoot. And now this

guy, as he's approaching him, says, "Oh, you have a gun?" "Yeah, big shot, huh? Well, I have one too." And then he reaches into his pocket.

Now he's 15 feet away, right? So we have a completely different scenario, and I think one that people would be able to clearly relate to as our guy doing some good things, some smart things. Maybe he could have run around to the other side of the car. I don't know what could have happened, but the context of his decision, "Was it too soon or not?" seems a lot more well thought out than the first time that we talked about it. And my point is: every case is like that. There's never a case that's just simple and absolutely clear-cut because much of what's happening is only happening in your own head. And that's why I ...

Shawn Vincent:

That's subjective. Yeah.

Don West:

Yeah. Subjective, it has to be reasonable, meaning you have to have a pretty good basis for thinking the way you think, even if you're wrong, but I keep talking about articulating it because the legendary Massad Ayoob really taught me this at one point, how important it is not just to do it right, but be able to say it right and to be able to put it in the courtroom because the jury wasn't there. They don't know any more about what your thinking was than what you're able to tell them. And when you can articulate the clear threat, articulate your thinking and why you believe that threat was both imminent and of a deadly forced nature in the same convincing way that you believed it at the time, you have a much better likelihood of the jury thinking, yes, he thought he was reasonable when he did what he did, and so do I.

Shawn Vincent :

You talked earlier about this idea of fear. You're in a situation like this, and it's very natural to be afraid of a threat. And I was working, just the way we kind of do these things, record well in advance of when I do a lot of the writing about it and the final

edit, and I was working on the content for the article for reasonable, that the threat must be, your belief must be reasonable that you face the imminent threat of great bodily harm or death. And the first, when you and I were working on the Zimmerman case together, that was my first real encounter with self-defense law. And I remember reading the statute, and the statutes are less clear than you'd like them to be. They talk about when use of force is justified, but this and that and under this circumstance, and the Florida use of force statute talks about a "reasonable belief of great bodily harm or death," but then when it gets to sort of the stand your ground or the castle doctrine portion, it talks about situations where the actor is presumed to have "reasonable fear" of imminent peril of great bodily harm or death.

And for a long time, I kind of used the terms *a reasonable fear* and *reasonable belief interchangeably*, but there's a really important distinction between the two because an imminent belief, I think, is bound in rational evidence, and a reasonable fear or a fear, just fear in itself, is often unreasonable. I suppose you can have a justifiable, reasonable fear, but when you're making actions based out of fear, they're not often good decisions. They're not often rational, right? And so, and also we see in almost every self-defense case that we look at, except for the ones that are probably driven by a sense of anger or revenge or real lust for murder that gets disguised as self-defense, all the other cases, I think it's fair to reasonably believe that the defender was afraid of the situation, whether it's a scary person in a parking lot or someone pounding on their door at 4:00 AM in the morning, or any number of these circumstances that we see, the fear is legitimate and genuine. It just doesn't translate directly to a reasonable belief that they face both the imminent threat of a great bodily harm attack or death, right?

Don West:

Yeah. I think when you use the word fear, it runs the risk of clouding, making it a little bit more murky. When, on the other hand, if you reasonably believe that you are facing an imminent threat of great bodily harm or death, you have very good reason to be afraid. No question.

Shawn Vincent:

Yeah. The reason is good. Yeah. So you'd be afraid for bad reasons, but genuinely afraid. But if your belief is there that you face death or a savage mauling, then the ...

Don West:

So then you don't confuse the question for the other people, the people that have to decide whether you are acting reasonably—was your conduct driven by a reasonable belief or was it driven by irrational or panic, a panicked belief of some sort? We all have irrational beliefs. I think, I know I've got some out there, and I think ... And Steve will certainly talk some more, no doubt, about how the lack of training, I think, makes you more prone to reacting, overreacting perhaps, or reacting irrationally to a much lower level actual threat than what someone with good training and experience and insight would. So when you have that spot of when you're overreacting, then you run the risk of the jury believing that you were acting unreasonably, even though they may very well conclude that you did face a threat of some sort, your response to it was grossly disproportional or even irrational.

Shawn Vincent:

Well, let me tee you up for that, Steve. Remember the Alexander Weiss case? This guy's up in Minnesota, and he's going to coach a basketball game, driving, and he sees a car kind of skid over to the side and hit the wall on the other side of the shoulder. So, Good Samaritan that he is, he pulls over, pulls in front of them, and he's going to see if they're okay. The guy gets out, he's loaded up on drugs, and he's got a friend in his car and a girl in the back, and he's acting macho. I'm getting ahead of myself. He didn't get out yet. Alexander Weiss pulls in front of him. This guy decides to go, but he doesn't realize someone's pulled in front of him, so he just rear-ends a guy. So Alexander Weiss gets out of his car: "Let's change information." This guy comes up, I remember the article saying shoulders hunched, fist balled, making threats.

They have a verbal altercation. Weiss feels like you can't really leave the scene of an accident, but he's threatened by this guy. He goes to his car, he gets his phone, and he gets his pistol. And he goes back, the guy gets in his face again, he makes a gesture to his pistol, and just like you described earlier, he's like, "Okay, big guy. You got a gun, you're going to go ahead and show me what you got." And he basically dared Alexander Weiss to shoot him, and without knowing what else to do, he did shoot him

once in the chest, killed him, and faced ... I forget what his charges were that he faced, but he went to trial twice. The jury mistried twice on this case. It was such a close call because I think ... we talk about reasonableness. I think the jury had thought that of the two people there, Alexander Weiss probably was the most reasonable actor, but was he ever sincerely in fear of imminent death or great bodily injury from this other guy, who was unarmed and clearly blustering?

And so Steve, when you explore this, I think if he had more training, that would've been one thing. And you said something in the Strebendt case that I think you can expound upon a little bit here. And that's a way to move away from this threat without just backing up. So see if you can flesh those ideas out for me.

Steve Moses:

Well, I mean, I think maybe the point I was trying to make was that if from the very get-go, if you see something that looks like it may turn into conflict of any type, breaking contact immediately or forcing a break in contact, if you yourself cannot, then vacate the premises, I think that's what we should try to do. And in many instances, we do things just for the very reason that you said, "Well, I'm supposed to remain here at the scene of an accident." Where, I mean, I see people do stuff where I've seen people who have gotten into elevators with a dangerous-looking individual. These were females, and they said, "I knew better, but I didn't want to be rude."

Shawn Vincent ([31:08](#)):

That's the Kristen McMains case. Yeah.

Steve Moses ([31:14](#)):

I think the main thing right then is once ... And of course, you can't tell who is deadly or dangerous if unarmed or armed anymore. There are so many people out there, very slight 14-year-old girls that can take down a grown man and choke him out. And so anytime that another person is coming across as being potentially violent or confrontational, I think putting myself, putting a barrier between them and myself, getting away, I mean, he very easily could have just gotten back into his car, locked the door. And if he wanted to remain there, call 9-1-1 or driven away and while

driving, call 9-1-1. But I mean, I kind of understand what ... I don't want to use the word goated him, but I think he was trying to do the right thing. And then I am a little bit surprised when the other person said, "Well, just shoot me." And he just did. To me, that would be very hard to defend without saying he was coming. I was telling him to stay back. He continued coming. I knew that there was another male with him. I feared for my life.

Shawn Vincent:

And that's true. The other guy did get out of the car. I didn't make that detail clear. Well, that's two against one.

Steve Moses:

Yes, absolutely. So I can see where that's justifiable, but I also kind of believe, as he put himself in that situation, he had the opportunity, of course, if he went into that vehicle to retrieve that firearm, to at that point remain in the car or leave.

Shawn Vincent:

But the topic of this podcast is *don't shoot too early*. And when you have an unarmed person in front of you and a little bit of space, and they dare you to shoot them, and fair to say that's too early, Don?

Don West:

Yeah. I've yet to run that up the flagpole in court, but I'm guessing it would not be warmly received. It would be the new single best defense, wouldn't it? Especially when there's no other witnesses.

Shawn Vincent:

The nanny-nany-boo-boo defense. Yeah.

Don West:

He said, "Shoot me. " So I did. What's the big deal? Yeah.

Steve Moses:

Now, in all fairness, and I've seen this on body cameras carried by police officers, I've seen that where a large person who was just saying, "Shoot me, shoot me, shoot me," and kept closing in on the officer. And that officer felt like, "Wow, I have no other options." And indeed, that's what happened. And they found that person not guilty of using excessive force. And I've also seen them where they held off too long, and then they ended up in a scuffle. And when I say scuffle, it actually went badly for the officer. So yes, if somebody's moving in on you and saying, "Shoot me, shoot me. " Well, then it's time to exhaust all of your other options first before you go ahead and take them up on that.

Don West:

Yeah. Well, Steve, I don't think in your scenario, though, the officer would have shot this guy in any part of his decision-making because the guy was telling him to shoot him, except perhaps that also communicates how reckless and dangerous this guy is when he's inviting the officer to shoot him. As long as he's moving in and he is posing that imminent threat, the idea of shoot me does not become the consent for the police officer to shoot him, but becomes part of the decision-making process. How crazy is this guy, and how much danger am I in if this guy's willing to basically die on his way to get me?

Steve Moses:

The difference there is that forward motion. And then again, you should have a police officer that has skills other than guns. Most of them have asbatons. In a lot of instances, asbatons don't work well on people that want to fight you. Many of them have tasers. Many of them have OC. Many of them have training. And so they do in many instances have options, but I've also seen plenty of videos where just these big,

massive guys were coming in on these much smaller officers, and indeed they used a handgun to defend themselves. Now you've got Alexander Weiss, which I'm going to assume was probably in most instances, most people today, they didn't fight a lot in high school. In many instances, some of them have never been in a physical altercation in their life because the penalties for being involved in any kind of a scuffle can get you expelled from school.

Shawn Vincent:

I don't want to lose my AP credit, Steve. Yeah.

Steve Moses:

I just don't believe that he probably had the same options, or he didn't think he had the same options as someone else. But again, just somebody just says, "Okay, shoot me, and they're both standing there." To me, that's a bad shoot.

Shawn Vincent:

Yeah. Yeah. Yeah. It was a narrow ... We always say you don't win a criminal prosecution as a defendant, you only survive it. The guy faced two trials, and it just so happened that both juries were hung. They couldn't come up with a unanimous verdict. There was at least one person on each jury that was unwilling to convict him. And after two tries, the prosecutor said, "Well, that's that. We can do our best, and this is how people feel about it. " But you don't want ... The prosecution's punishment in itself, and there's no reason to take that chance if you can just walk away from it, which is the lesson. You've talked, Steve, about our lesson number one, at least half a dozen times this podcast, which is the goal of self-defense is to break contact. And to stand there when a guy is saying, "Shoot me, shoot me." And to not say, "You know what? No, I'm leaving and see if you can get away." There's a wasted opportunity.

Steve Moses:

Or just walk away. Just walk away. You can replace that car.

Don West:

Let me point out too that when you say the jury was hung, meaning they were non-unanimous and they told the judge, it didn't matter how long they continued to deliberate, they were never going to reach a unanimous verdict. So the judge then declares a mistrial, and it starts over with a new jury on another day. It might be the following day, but it could be six months later. I think it's important to point out that I don't know who Alexander Weiss's counsel was. So I don't know if he hired private counsel or may have had court-appointed counsel, but I assure you that if he hired private counsel, he spent a lot of money, maybe all of his money. And when the case was declared a mistrial because of the hung jury, that case was over. That lawyer gets paid again to try the case a second time.

Shawn Vincent:

Oh no, it's not a buy one get one?

Don West:

My representation agreement specifically excludes retrials, but I'll do one for the same fee, and you put all the possible contingencies, it doesn't happen all that often, but you put that stuff in there so everybody knows you're hiring my team and me to try this case until it's over. That doesn't typically include an appeal. That would be a separate fee to me, hopefully not. I don't like that kind of work, but to some law firm to do the appeal. And then if you are successful on appeal,

You would get a new trial, and you would have a new fee, perhaps a new lawyer. So pretty quickly, your resources are exhausted, no matter how substantial they are early on. And the reason I interrupted our conversation to mention that is CCW Safe members are guaranteed full representation and full cost of defense throughout the process. And I don't mean just from the beginning to the end of the first trial, but I mean from the beginning to the end of the case. So if there's a retrial, we pay for the lawyers to try the case again. If there's a bad verdict, we pay for the appeal. If the case is granted a new trial at the end of the appeal process, we pay for the new trial and

then another appeal if necessary. So until the case is procedurally resolved, you're covered not just for attorney's fees, but for the costs of transcripts, for expert witnesses, investigative, all that stuff. And I think those benefits are hidden or just not well known by most people when they look at hiring a lawyer and paying what it costs to defend themselves.

Shawn Vincent:

You don't have the imagination to think that you might have to try this case twice, that the jury could be hung. It's tough to know that if you haven't seen the legal system at work before. Yeah.

Don West:

I've had cases where I tried the case and a mistrial was granted after a guilty verdict because of something that had happened during the trial, and the judge reserved ruling and then granted the mistrial, and we tried it again, and he was acquitted. So in the first trial, he was convicted, got a new trial based upon some improper comments, and in the second trial, he was acquitted. So all of that crazy, crazy stuff can happen. As it's often said, there's a non-zero chance of something going very, very wrong.

Shawn Vincent ([41:25](#)):

I like to say that. I like to say "non-zero chance." Steve, in the Alexander Weiss case, just to wrap it up, would you agree that it was a ... Well, we talk about training, that's Lesson 2: Get Training ... since you've harped on lesson one and lesson two several times. I think in a way, if he had even reached for where his gun was as an attempt to de-escalate or even intimidate this guy, if he had done that with any confidence, the fellow might have believed him. If he said, "Go ahead and shoot me, " he didn't believe him. And I think that was because he just didn't make that motion with confidence. He didn't pull it off. And so he would have known either not to do it or to do it with enough confidence backed with a verbal cue or something that would have projected his seriousness to not put himself in that position.

Steve Moses:

Well, that may be true. It may not be true. In many instances, you get those people that are inebriated.

Shawn Vincent:

Yeah. See, we're a podcast. We're allowed to speculate and make stuff up. Come on. Okay. But no, I take your point.

Steve Moses:

By the same token, I want to do that. I want to be able to demonstrate that I did that. If I am charged with a crime and just showing I had that competence and I knew I could take my care of myself and I had no other choices, and then and only then did I use my firearm to defend myself. But that's very, very true. And yes, people that are comfortable with violence, they can tell if that other person is either somewhat inept or they're terrified.

Don West:

I'm not sure that Shawn is old enough to at least seen it on its original run, but you might be, Steve, the Andrew Griffith show, Andy of maybe ... So I'm talking about the Barney Fife who pulls the gun and he's out here all.

Shawn Vincent:

Or shoots himself in the foot with it.

Don West:

Yeah, that's exactly right. So I think someone on the other side of him would tune in pretty quickly that this guy is much more likely to have an accidental discharge than to take control of the situation and ...

Shawn Vincent:

More of a Freido fumbling with a pistol while they assassinate his father or try to ...

Steve Moses:

Well, and the other thing is that most of the people that are serious about concealed carry, they don't carry their firearms in the glove compartment. That is a recipe for getting it stolen. The chances are that you're going to be able to get to your gun while in your car or when you need it, it's probably going to be in the car, and you're someplace else. And so it's one thing for someone to reach in there and pull a gun out of the console and everything. And it's another thing for a person who has that gun in a holster on their body and can present it with competence.

Shawn Vincent:

I'm glad you brought that up because, Don, since you mentioned how surprisingly common mistrials are, and Steve, since you mentioned the perils of keeping your firearm in the glove box, let's talk about Michael Dunn for a minute. This is the Loud Music Case from Jacksonville. Michael Dunn pulls in with his fiancée at this gas station at night. It's Black Friday, I think, and it's after dark, and he pulls next to this SUV, this Dodge Durango that's full of teenagers who had popped in to get some breath mints before they were going to go to the mall to try to pick up girls. And they're playing some rap music pretty loud. Michael Dunn rolls down his window, and he says, "Hey, could you turn down your music?" And the guy says, "All right." But the guy in the backseat, his name's Jordan Davis, a 17-year-old kid, gets pissed off that this old white guy's asked him to turn his music down and just starts cussing up a storm and yelling.

Even his friends at trial said that they were surprised at how visceral and angry his reaction was. So after some exchange of disputed content, Dunn decides that he's threatened by this guy and he reaches into his glove compartment, pulls out his, I think it's a semi-automatic pistol. I know that because he didn't keep it avround chambered, so he had to rack it. That was a big point during trial. And he claimed that

Jordan Davis had put something that looked like the barrel of a shotgun up against the window. They never found anything that looked like this, but he claimed it, and then he claimed Jordan Davis was going to get out of the car after a specific threat of, "I'm going to kill you. " And then he unloaded through the door, and he happened to strike Jordan Davis in a spot that caused him to bleed out.

The kids pulled away, drove off. Incidentally, he fired a few times at the vehicle as it drove away.

This isn't relevant to our conversation now, but it will be later for one of our other lessons, which is going to be a Lesson 30: Call 9-1-1. He didn't call 9-1-1. He got in the car and drove all the way back home to Satellite Beach, which is at least an hour and a half away, I think. So all this is to say in our conversation to be shot too soon, we don't know if his claim of this something that looked like the barrel of a shotgun that was tilted up on the window is true or not. It doesn't seem like it was. He was facing what the evidence shows was an unarmed person who was angry, separated by two car doors, and he had decided before the moment was imminent, and this is part of the problem, Steve, with keeping a firearm essentially unloaded in your glove compartment, that he had to go through the effort of opening the compartment, getting his firearm, unholstering it, charging it, and then deciding that it's imminent now to get into the fight, and that he fired before anyone else besides him claims it was time.

Don West:

I think Shanw, you're making an important point that just struck me that it's evident, I think, because of what you were talking about, the lack of training and insight and really exceptionally poor judgment that Michael Dun exercised that night, how he was essentially held hostage by his own emotions because he was so angry at these kids for raising hell and disrespecting him and all that stuff. He may very well have fired both too soon and too late. And what I mean, what I mean by that is maybe too soon the first time around of the shots that ultimately took the life of Jordan Davis, but then as the vehicle was fleeing, he shot it as it was leaving.

And I think that if we go back to the trial process, if I'm not mistaken, he was convicted of attempted murder on all of those shots he fired after the car was leaving and that the jury hung, hung on the murder count as to Jordan Davis. That's correct. They were unanimously convinced that he didn't have, or at least that the prosecutor disproved self-defense as to the death of Jordan Davis, but none of them had a problem whatsoever on all of those attempted murder counts in Florida with a firearm while the vehicle was leaving. That got him enough years for multiple life sentences standing alone

Shawn Vincent:

I think 20 each. So as a man in his 50s, I think, that's a life sentence, 60 years, right? But then he came back around and tried him again. And I think, I'll have to check my notes. I think it was a first-degree murder. I know they were after first-degree. Yeah. Those Jacksonville prosecutors love charging first-degree when second-degree was more appropriate.

Don West:

I think part of our point here, though, is even if he screwed up badly and he seemingly did on the first series of shots, the second series of shots were inexcusable legally. And as a result, the jury didn't have any trouble convicting him of all of those. The judge didn't have any trouble giving him consecutive sentences, which, under Florida law, there's no time off for good behavior. So he was going to serve the rest of his life in prison as of that moment, and it never should have happened.

Shawn Vincent:

When you talk about the totality of the circumstances, Don, what that is, is we can't read the mind of the defender. So we have to use evidence from before and after to give us some insight into what their mindset was, right? And the mindset has to be that they reasonably believe they face imminent death or great bodily injury. It can't be because they're panicked or too afraid or so angry that they were seeing red and acting irrationally out of some sort of rage or revenge or anger, right? And a guy who shoots at a retreating vehicle after he'd had been disrespected by a teenager, which is what the prosecutors alleged and what some of his statements seem to indicate, makes

you think, "Well, this guy was acting out of anger afterwards." It's easy to think he was acting out of anger beforehand, right? So yeah, I think you're right.

We talk about this window of justification, and a lot of these cases where they shoot too soon, they shoot too late too. Steve, I suspect you had some comment on this.

Steve Moses:

Yes, yes, yes. There are just people out there that don't think about the consequences of their action and they will not be disrespected. They are literally willing to kill or go to prison in order for that to occur. And so anytime that we have an interaction with someone, it may very well be with someone like that, that does something that is just so irrational, just so unthinkable. And to them, that's just normal everyday thinking.

And we just see what happens any time that you have a potential altercation and either party has access to a firearm. So if you're the one that has access to the firearm, then the standard for you is going to be really high in order to not let this situation get out of hand. You really have to take that extra step to make sure that doesn't happen.

Shawn Vincent:

Let's underscore that. If you're going to assume the responsibility of being an armed defender, a concealed carrier, you just have to be willing to be smarter and better than an asshole.

Steve Moses:

Anything that he may say to you or she may say to you or they may say to you, it's just you're just going to have to put on your raincoat, and yeah, we can go home and see about it later. And then what typically happens, still kind of pissed off about it for a week and two weeks. Okay, you don't really think about it. And then later you're going, "Wow, I am really glad that I didn't go ahead and act upon my emotions at the time."

Shawn Vincent:

So you're saying Michael Dunn had just put his car in reverse and moved to a different spot. He could have avoided the whole thing. You're saying that if Alexander Weiss had, when he went back to his car to get his gun and his phone, he thought, "You know what? Let me just go block down and call the cops on this one." Or when the guy said, "Go ahead and do it, go ahead and shoot me. " He said, "You know what? My bad guy, not today. How about you go your way? I go mine." That would've been a better result.? I don't ...

Steve Moses:

Absolutely.

Shawn Vincent:

What a wimp. What a wimp, Steve. No, that's the whole point. And so it's either irrational fear, pride, or lack of training that we see causes people to shoot too early, before the window of justifications open in these cases.

Steve Moses:

Which means you need to be thinking about all of this stuff well in advance.

Shawn Vincent:

All right, everyone, that's the podcast for today. I appreciate you listening through to the end. Next time, we're going to do part two of our window of justification series that is don't shoot after the threat is imminent. There's a lot more cases that apply. We'll talk to you soon. Until then, be smart, stay safe, and take care.