

Transcript: Escalation of Force

0:00 • Don West I'm Don West, National Trial Counsel for CCW Safe, and I'm here again with Law of Self Defense expert Andrew Branca. Thanks, Andrew. Good to see you again.

Andrew Branca Happy to be here.

0:10 • Don West In one of our other segments, we talked about a hypothetical situation, one you're familiar with, one that you often use in your teachings, where someone's making some decisions, finding themselves in a parking lot with someone approaching them. Obviously, a scary situation. We talked about some of the things you might do in order to strip away the ambiguity, to figure out what's actually going on and what defensive action, if any, you need to take. So, let's kind of set that up, set that up for us if you would, and then we'll get to the point where you've used your voice and that hasn't worked. You're still not exactly sure what is happening, but you're giving serious thought to going to your gun. You don't think that you can legally, nor that you should, but you're starting to think about whether or not you need to.

1:05 • Andrew Branca Right. So of course, we know statistically that it's very common for a defender to get his gun out, display the gun, and for that itself to stop the threat. The bad guy sees the gun, decides this is more of a fight than he wants to be in, he wasn't anticipating that, and he runs away. But you can't count on that happening, obviously. I personally am reluctant to encourage people to display the gun in the expectation that that will solve the problem. I think if people are going to pull a gun, well, they have to be prepared then for the possibility they'll actually need to use that gun.

1:44 • Andrew Branca That's different than saying if you've pulled the gun, you have to shoot it. That's not true. Often, you pull the gun, display the gun, and it changes the dynamics of the interaction, where the person now perceives that you have a gun. They decide they don't want to attack you after all. Maybe they drop their knife; maybe they turn to run away. You don't want to be shooting the person under those circumstances. So, I think you need to be prepared if you've pulled the gun, and then if you feel you have the luxury, consistent with safety, not increasing your jeopardy, of not having to fire the shot—if you can, consistent with safety, not have to fire the shot, you're almost always better off not firing the shot. Because, as you and I have talked about before, once the shot is fired, it becomes a completely different game for the prosecutors.

2:30 • Don West Absolutely, without question. Once the bullet flies, when someone is at risk of dying, it's viewed completely differently.

2:39 • Andrew Branca And, we know how prosecutors treat those situations before the shot is fired varies wildly within the country. In many states, you could pull the gun facing a threat of some sort, and if there's some uncertainty about it, but you're a pretty good guy, you don't have a prior record, you're otherwise a responsible gun owner, you may get the benefit of the prosecutor's discretion in that situation. Once you pull the trigger, I think you should expect to be arrested.

3:12 • Don West Certainly you should expect, well, the police have to come, don't you think? I mean, I've had cases where a gun was displayed, and the police officer said, "Well, if the other guy doesn't complain, we won't investigate."

Andrew Branca "Why did you even call us?"

Don West Yeah. I'd say if a trigger's pulled, the police are going to come.

3:32 · Don West So I know that what we're really talking about is, if you pull the gun too quickly, you run a significant risk of being arrested for assault, because you've threatened somebody who wasn't a true threat to you. At least the facts didn't establish that they were a true threat.

3:55 · Andrew Branca Or at least that's a narrative a prosecutor might decide to take to trial to make that case. Remember, the prosecutor himself doesn't know what happened with any degree of certainty, right? He wasn't there. He's just looking at the evidence, and if he sees a narrative he thinks he can sell to a jury, well, then you've made yourself vulnerable to having to defend that decision in front of a jury.

Don West And of course, if you go to the gun too late, that's when you could wind up being carried by six.

Andrew Branca Right. That's when you could end up losing that physical fight.

4:24 · Andrew Branca Right. The top priority has to be winning that physical fight. If you don't win the physical fight, everything else becomes rather less pressing.

4:32 · Don West So let's try to put all of this in a cauldron and stir it up a little bit and talk about the sequence of events leading up to the lethal use of force. Let's talk about what is often called the 21-foot rule, sometimes called the Tueller Drill. In my experience, it's often misunderstood. And like the telephone game, by the end of the line, whether it's gone through a number of legitimate firearms instructors who don't themselves understand what it really means, or people just talking about what the 21-foot rule means, it's something that's often distorted, and the reliance is misplaced in a self-defense situation. So why don't you take a minute and talk about what's known as the 21-foot rule, and then we'll sort of stake out the ground and fill it in from there.

5:35 · Andrew Branca Sure. So, the 21-foot rule is, as Don says, very often mis-taught, or misunderstood by the students to whom it's being taught. It was developed by a police officer in Salt Lake City, Dennis Tueller, who was a trainer for his department as well. He and his fellow officers ran into this situation with some frequency, where there's a suspect who has some kind of impact weapon, who's some distance away from the officer. Obviously, if the suspect is very far away, a hundred yards away, he's not yet a threat with that impact weapon. He can't bring a baseball bat to bear, for example. But at some closer distance, as he comes in closer proximity, there comes a point where he can be on that officer with that impact weapon before the officer could effectively defend himself.

6:22 · Andrew Branca And then the question becomes, well, what is that distance? At what point is he close enough to actually bring that force to bear before the officer could defend himself? What Dennis Tueller did was he ran a bunch of empirical studies, which just means he had his officers run a certain distance with a fake impact weapon and timed how long it took them to close the relevant distance. And the relevant distance here is, well, how much time does the defending officer need to get his gun out in order to effectively defend himself? Dennis figured that was about a second and a half, which frankly I think is rather ambitious for most police officers I know.

7:00 • Andrew Branca But, let's pretend it's a second and a half. If it takes a second and a half for a police officer to defend themselves, the relevant question is, well, what distance can the aggressor cross in a second and a half? And that distance turns out, for most people, to be about 21 feet.

7:20 • Don West That was pretty consistently established across a wide range of people doing it. A wide range of trained police officers. The police officers sort of collectively were able to unholster, draw the weapon and fire two rounds in about a second and a half. And as you said, that may be ambitious for the trained police officer. I think Dennis Tueller was in SWAT; I think he had some very trained police officers that he was working with. And I would venture to say that unless you are trained as a police officer, or have extensive training at the range, it's unlikely you could consistently duplicate the second and a half, especially under circumstances that may be less controlled. You may not have the same gun that you usually have. You may have it in a different spot on your person, etc. That can all affect that response time.

Andrew Branca Absolutely.

8:25 • Don West So what the Tueller Drill, or the Tueller study, effectively showed is that if a police officer can draw and fire a gun within a second and a half, they can stop someone coming at them within 21 feet.

8:42 • Andrew Branca Right. So, what people really need to understand about the Tueller Drill, the core message of the Tueller Drill, is that someone can be an imminent deadly force threat at a greater distance than you might think would be the case. So, someone armed with a knife could be an imminent deadly force threat when they're 10 feet away or 15 feet away. Now, they can't touch you yet with the knife, but the point is, they could cross that distance quicker than you would be able to defend yourself against an attack. And that distance can be substantially longer than you might otherwise expect if you were not familiar with the Tueller Drill.

9:20 • Don West Sure. So if you're standing here, I think what's significant to me: we know about the handicapped parking spot case. Michael Drejka was prosecuted in that tragic shooting, where he was violently pushed to the ground, drew his weapon and shot his attacker, and was successfully prosecuted. When he was interviewed by the police (which is a whole other story: the extended interview that he gave without counsel, and how that was featured in his trial), he mentioned the 21-foot rule, and the state ran with that with their expert and essentially undermined any value, any significance, that it may have had for him in his defense.

10:00 • Don West So for my purposes, what that means to me is that if you've got person A and person B here, person B can run to where person A is in about a second and a half, and that's going to be about 21 feet. That's all it really means. A trained police officer could shoot that guy, but if you're not as fast and not as well-trained, the person is going to be on you in a second and a half.

10:35 • Andrew Branca Sure. And of course, 21 feet is also not a magic number. It's very contingent on the specific circumstances. So, say that aggressor is uphill from you. Well, they're going to cross 21 feet in much less than a second and a half, because they're running downhill. It also can be complicated by your own ability to maintain distance, to back off from that threat. So maybe we'll talk later about this element of avoidance, but there's lots of good reasons to retreat from a threat if you can do so

consistent with safety, and one of them is to maintain the distance. Because, as we know from the Tueller Drill, distance is time, and time is life.

11:13 • Andrew Branca Time gives you the opportunity to make decisions to act in self-defense. The more time you can give yourself, the more likely you are to win that physical fight. And the more distance you can maintain from the threat, the more likely you are to win that physical fight.

11:30 • Don West If you wait until the person is within 21 feet of you, unless you are an exceptionally skilled person at the level of a trained police officer, you can't react quickly enough to defend yourself.

11:42 • Andrew Branca Yeah, probably not. And by the way, even if you can, another thing to keep in mind is, most of us, when we're carrying a gun for personal protection, as I do myself, are carrying a handgun, typically these days most likely a 9mm. But you can shoot someone twice with a 9mm, and they don't vaporize. They're not instantly *not* a threat. If they're charging at you across 21 feet with a machete, they're very likely to still be able to strike you with that machete, even with two bullet holes in them. So even if you could draw in a second and a half and get good center-mass hits, that doesn't mean you're safe from that threat. You may have mortally wounded that person. They may ultimately die from those bullet wounds, but they may not do it until after they've grievously wounded you with that machete.

12:37 • Don West I've actually personally spoken with forensic pathologists about that specific issue, and I've been told to my face someone can be shot in the heart, shot with a shotgun, and still have 5 to 15 seconds of mobility before they lose enough blood to lose consciousness. Unless they're hit in the head and dropped because of that kind of injury, the loss of blood is what kills people when they're shot in the torso, and they can still function almost normally for a significant period of time.

13:08 • Don West I want to talk more about this framework and this notion of the 21 feet and its significance if you find yourself in a parking lot with someone approaching you. Before we end this segment, though, and pick it up again: what's your sense of how the 21-foot notion is misunderstood? What's some of the urban lore around that?

13:35 • Andrew Branca Yeah. The most common misconception about the Tueller Drill that I see is that people are taught it, or understand it, as if it were the entirety of self-defense law, as if it's all they need to justify their use of defensive force: "Well, the person is within 21 feet, so I can shoot them in self-defense." When they do that, what they're presuming is that the other requirements of self-defense are also already present. But the Tueller Drill doesn't cover those. For example, who was the initial aggressor? Now, we're all going to think, "Well, I'm the good guy. Of course I wasn't the aggressor." But remember, the people evaluating your use of force after the fact, to determine whether or not it was lawful, don't know who the initial aggressor was. They weren't there. They didn't see what happened. It could be an open question.

14:20 • Andrew Branca Maybe the person you defended yourself against had friends there, and they're going to say you were the initial aggressor. Well, that's not covered by the Tueller Drill. If, for example, you were the initial aggressor, or people believed that you were, the fact that the other person is within 21 feet doesn't save your claim of self-defense. You lost it when you were found to be the initial aggressor. So, I think sometimes people hear these pieces of self-defense law, like the Tueller Drill, that are useful tools in evaluating a self-defense claim, but they define them too broadly. They give them too

much scope in terms of what they cover. Really, the most common misperception is that it's taught, or it's understood, as if the Tueller Drill were itself the entirety of a legal justification for use of force. It's one component, but it's not everything that's required for that use of force to be lawful.

15:14 · Don West Almost to the extent that if you're within the 21 feet, you're good to go; if you're outside the 21 feet, it's not justified. And we know neither is true.

Andrew Branca Neither is true. Absolutely right.

15:28 · Don West Well, good. It's a pleasure, as always, to speak with you. Thanks so much, and we'll talk again soon.

Andrew Branca Absolutely. Thank you.

Don West I'm Don West, National Trial Counsel for CCW Safe.