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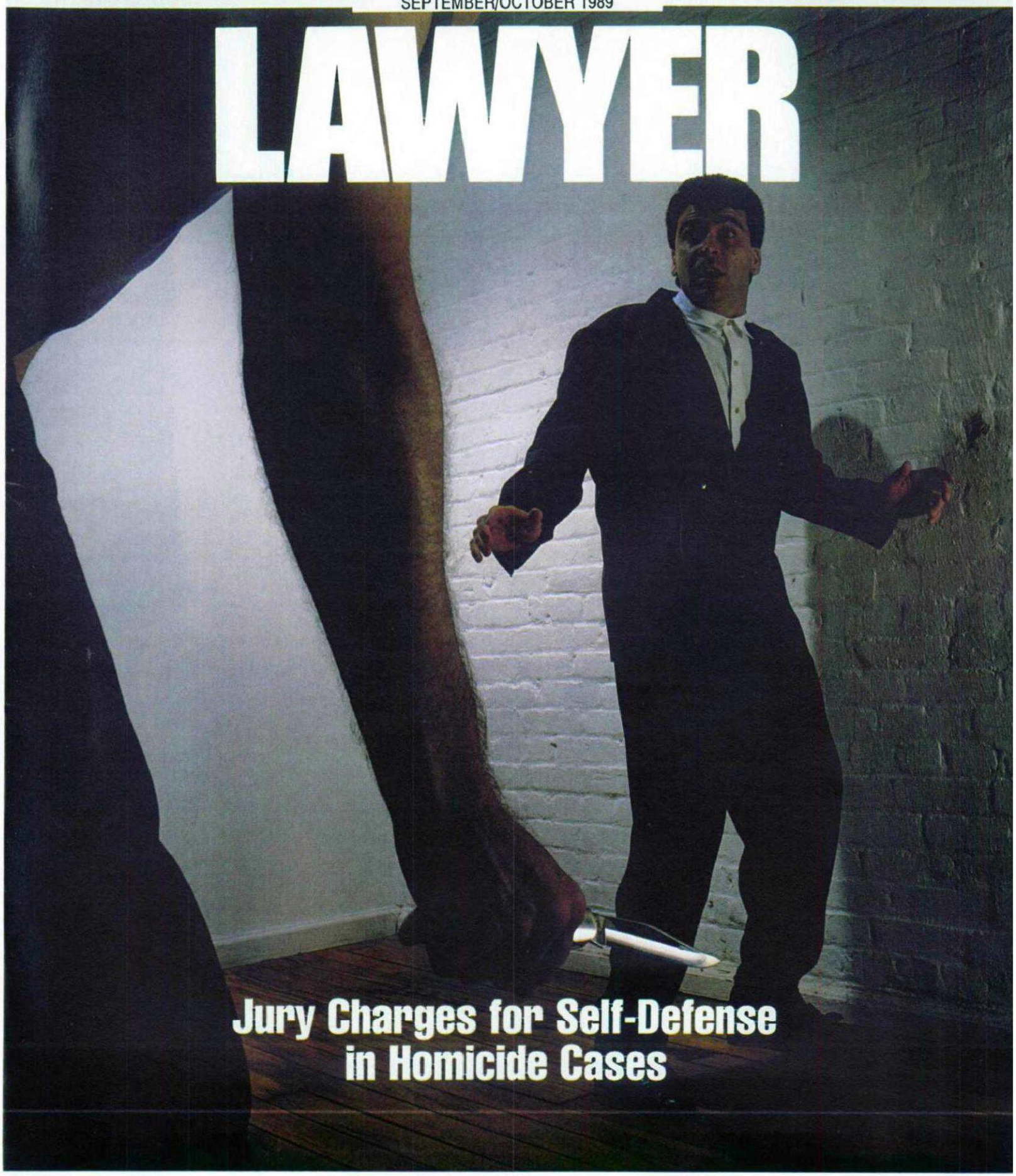

Jury Charges for Self-Defense in Homicide Cases

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By Jack B. Swerling and F. Patrick Hubbard

The recent case of *State v. Fuller*, 377 S.E.2d 328 (S.C. 1989), highlights the difficulties involved in preparing jury instructions that satisfy two conflicting concerns.

On the one hand, instructions should be general so that they can be applied evenly to all cases and so that trial judges have clear guidance in charging juries. Consistent with this concern, a trial judge need not use a more specific charge requested by the defendant if the general jury charge adequately covers the facts involved.

On the other hand, since the specific facts of each case are unique, a general instruction may not be sufficiently specific to inform the jury of the particular doctrines applicable to the facts involved.

Striking the proper balance between these concerns can be extremely important where a defendant, charged with murder, is claiming that he or she acted in self-defense and that a standard, general charge will not adequately address the specific facts of his or her case.

Fuller involved this situation, and the Supreme Court reversed Fuller's conviction for manslaughter and remanded the case for a new trial because the trial judge's standard charge did not satisfy the concern for specificity.

"For cases tried after Fuller the challenge for lawyers is clear. It is their responsibility to request specific self-defense instructions where the general Davis charge is not adequate to guide the jury in applying the law to the particular facts involved."

The standard charge used in the trial in *Fuller* was taken from *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984). *Davis* contained the following "instruction on self-defense [to] be used in those cases where the facts indicate that a self-defense charge is appropriate." *Id.* at 46, 317 S.E.2d at 453.

Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own

life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

If you have a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense then you must find him guilty. [*Id.* at 46, 317 S.E.2d at 453.]

These instructions satisfy the concern for providing a clear, general instruction applicable to all self-defense cases.

In his appeal, Fuller claimed that the *Davis* instruction did not satisfy the competing concern of specificity in his case because the *Davis* instruction did not adequately instruct the jury of the legal significance of certain facts in his case.

Fuller had been charged with the murder of two men, and he did not deny shooting the two victims. Instead, he claimed that he shot in self-defense after the victims had threatened "to take care of niggers like you," possibly removed something from the trunk of their car, blocked Fuller's car, drove their car into his car after it had crashed into a steel rail, and yelled "we're going to take care of you." *State v. Fuller*, 377 S.E.2d at 330.

Fuller shot four times as the men exited the car because he saw something shiny in one man's hand and thought it was a gun.

The Supreme Court, in an opinion written by Justice Toal, agreed with Fuller concerning the inadequacy of *Davis* in terms of these facts and held that it was error for the trial judge to charge *Davis* as an exclusive self-defense charge when Fuller's counsel repeatedly requested additional charges.

> We intended that the *Davis* charge cure the difficulties the trial bench encountered in charging the burden of proving self-defense. We did not, however, intend for the trial courts to eradicate the body of common law self-defense by accepting *Davis* as an exclusive charge. . . . In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge. [*Id.*]

The Court also held that because of the facts involved, specific requested charges should have been given concerning three aspects of self-defense:

- that a defendant "has the right to act on appearances";
- that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense"; and
- that "an individual had no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury." 377 S.E.2d at 331.

Justices Harwell, Chandler and Finney concurred with this decision. Chief Justice Gregory dissented because of his view that the *Davis* instruction adequately addressed such concerns as appearances and the duty to retreat, although it did so in general language. 377 S.E.2d at 331-32.

It should be noted that *Fuller* does not require the reversal of all self-defense cases decided prior to *Fuller* where the standard *Davis* instruction was the only self-defense charge used at trial. An appellant who relies on *Fuller* must be prepared to show three things:

- that he or she requested a more specific charge, see 377 S.E.2d at 330;
- that given the unique "facts and circumstances" of his or her case, *Davis* was not an "appropriate charge" because it did not fully and fairly cover the points involved in the requested charge; and
- that the failure to combine the general language of *Davis* with a more specific instruction resulted in prejudicial error.

For cases tried after *Fuller* the challenge for lawyers is clear. It is their responsibility to request specific self-defense instructions where the general *Davis* charge is not adequate to guide the jury in applying the law to the particular facts involved. In addition, lawyers will have to identify the facts which require a more specific instruction. While individual lawyers will have various approaches to both tasks, two guidelines should be helpful to any lawyer.

First, each requested instruction should be specific and should be written and submitted to the trial judge on a separate page. Specificity helps to focus the issues both at trial and, if necessary, on appeal. Oral requests for charges and objections to a trial judge's charge may be adequate to preserve a record, but they lack the precision and care that results from written requests.

Written requests also help provide the opportunity to satisfy the requirement of Rule 20 of the South Carolina Rules of Criminal Procedure that requests for instructions must have "citation to authorities relied upon." Writing each request on a separate page has two advantages. For the trial involved, the page can be used by the lawyer before and during trial to list facts to support the argument that the specific instruction is required because the general *Davis* charge is not adequate. A copy of each page also can be placed in a file or notebook for use in later cases.

Second, the requests should be drafted as soon as possible. Rule 20 requires that all "requests for legal instruction to the jury shall be submitted at the close of evidence, or at such time as the trial judge shall reasonably direct." However, in most cases requested instructions should be drafted before the time contemplated in Rule 20 so that the requests can be used to structure the presentation of the case.

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Drafting Self-defense Instructions

Fortunately, the research necessary for drafting self-defense instructions has been facilitated by a number of useful authorities. The following are particularly helpful in this respect:

W. McAninch & W. Fairey, *The Criminal Law of South Carolina* 493-510 (2d ed. 1989);

W. LaFave & A. Scott, *Criminal Law* 557 (2d ed. 1986);

40 *Am. Jur.2d* Homicide Sections 139-169, 480, 519-521;

40 *C.J.S.* Homicide Sections 114-138, 374-384;

11 *S.C. Digest* Homicide Sections 108-121, 300; see Sections 186-195, 276, 340-41.

Though not meant to be a substitute for research using the above authorities, the following checklist of factors and cases can be a helpful guide in preparing self-defense instructions.

Interest threatened and defended.

- **Threat to self of death or serious bodily injury.**

State v. Davis, supra;
State v. Green, 118 S.C. 279, 110 S.E. 145 (1921) (spring gun).

- **Threat of death or serious bodily injury to others.**

State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987);
State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985);
State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978); *State v. Hewitt*, 205 S.C. 207, 31 S.E.2d 257 (1944);
State v. Woodham, 162 S.C. 492, 160 S.E. 885 (1931);
State v. Francis, 152 S.C. 17, 149 S.E. 348 (1928);
State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928); *State v. Bradley*, 126 S.C. 528, 120 S.E. 240 (1923);
State v. Hayes, 121 S.C. 163, 113 S.E. 362 (1922);
State v. Cook, 78 S.C. 253, 59 S.E. 862 (1907).

- **Threat of unlawful arrest.**

State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919).

Conduct of deceased.

- **Mere words not sufficient.**

State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951);
State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941).

- **Words accompanied by hostile acts may establish self-defense.**

State v. Fuller, supra;
State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920).

Factual circumstances relevant to threat.

- **Prior difficulties between the deceased and the defendant.**

State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957);
State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926);
State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924);
State v. Gibbs, 113 S.C. 256, 102 S.E. 333 (1920);
State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908);
State v. Thrailkill, 71 S.C. 136, 50 S.E. 551 (1905).

- **Relative sizes, ages and weights of victim and defendant may be taken into consideration.**

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

- **Deceased's reputation for violence.**

State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976);
State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924);
State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923);
State v. Thrailkill, 71 S.C. 136, 50 S.E. 551 (1905).

- **Uncommunicated threats by deceased against the defendant.**

State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987);
State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981);
State v. Mason, 215 S.C. 457, 56 S.E.2d 90 (1949).

- **Intoxication of deceased.**

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

Necessity for deadly force.

- **Self-defense based on necessity.**

State v. Osborne, 202 S.C. 473, 256 S.E.2d 561 (1943), cert. denied, 320 U.S. 763.

- **Duty of retreat except:**
- **Where retreat would increase likelihood of defendant suffering serious bodily harm or if reasonably apparent that it would.**

State v. Fuller, supra;
State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937).

- **At home.**

State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985);
State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955);
State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908) (curtilage of home).

- **Where lawfully occupying property.**

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978);
State v. Davis, 214 S.C. 34, 51 S.E.2d 86 (1945).

- **At place of business or employment.**

State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924);
State v. Davis, 214 S.C. 34, 51 S.E.2d 86 (1945);
State v. Bowers, 122 S.C. 275, 115 S.E. 303 (1923).

- **As guest.**

State v. Bodie, 213 S.C. 325, 49 S.E.2d 575 (1948);
State v. Osborne, 202 S.C. 473, 21 S.E.2d 178 (1942), cert. denied, 320 U.S. 763 (1943).

- **At club if club member.**

State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1921).
(Note: These exceptions apply even if deceased aggressor also had a right to be present.)
State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953);
State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928).)

- **One who is justified in firing the first shot in self-defense is justified in continuing to fire until the danger ceases.**

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

• **In determining need for deadly force, age and physical characteristics of the defendant are relevant.**

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

• **Defendant need not wait until aggressor "gets the drop on him."**

State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936).

Reasonable belief in need for deadly force in self-defense.

• **Defendant may act on appearances.**

State v. Fuller, supra;
State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955);
State v. Blackstone, 157 S.C. 278, 154 S.E. 161 (1930);
State v. Boyd, 155 S.C. 432, 152 S.E. 677 (1930).

• **Belief must be reasonable.**

State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987);
State v. Davis, supra;
State v. Finley, 277 S.C. 548, 290 S.E.2d 808 (1982).

• **Reasonableness judged from point of view of "battered spouse."**

State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986).

Defendant's role in causing threaten ing situations.

• **Defendant must be without fault in bringing on the difficulty.**

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984);
State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919) (mutual combat);
State v. Woodham, 162 S.C. 492, 160 S.E. 885 (1931);
State v. Harvey, 110 S.C. 274, 96 S.E. 300 (1918);
State v. Rowell, 75 S.C. 494, 56 S.E. 23 (1906) (language).

• **Situations where defendant not at fault: Mutual combat, but then withdrawal.**

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978);
State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

• **Exercising right of ejectment from one's premises.**

State v. Brooks, 252 S.C. 504, 167 S.E.2d 307 (1969);
State v. Martin, 149 S.C. 464, 147 S.E. 606 (1929);
State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923);
State v. McIntosh, 40 S.C. 349, 18 S.E. 1033 (1893).

Right to instruction on self-defense where any evidence to support.

State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984);
State v. Adkinson, 280 S.C. 85, 311 S.E.2d 79 (1984).

Burden of proof on the state.

State v. Bellamy, 293 S.C. 103, 359 S.E. 2d 63 (1987);
State v. Davis, supra; see *Yates v. Aiken*, 108 S. Ct. 534 (1988).

Clarity of instruction and due process.

Compare *Thomas v. Leeke*, 725 F.2d 246 (1984) with *Smart v. Leeke*, ___ F.2d ___ (1989).