The Expert Witness and Trial Strategy

Part 1 of an Interview with Massad Ayoob

Interview by Gila Hayes

We are fortunate to have the opportunity occasionally to share meals and hospitality with some of the genuine luminaries in field of self-defense instruction. These include master instructor, author and expert witness Massad Ayoob. A topic of discussion during one of Massad's recent visits was cases in which he was serving as an expert witness. An expert can serve myriad roles ranging from giving on-point testimony to explain facts laypersons on the jury are not expected to readily know, to working behind the scenes with the trial team to recommend how best to defend the case, essentially, guiding trial strategy. We took advantage of a recent visit to talk to Massad on the record about his experiences guiding trial strategy.

eJournal: The role of the expert witness on a trial team can have a greater depth than many of us realize because we tend to focus on what happens in the courtroom, with little awareness of what went before. With some 40+ years' experience testifying in the courts about use of force issues, you have much to teach us about the role of the expert.

Your long experience is always interesting, but more importantly, a clearer understanding of the expert witness' value on the trial team stands to makes us better consumers. I have read about situations where attorneys took complicated cases to trial with no expert and lost. Today, I would like to ask what role does the expert play in helping the attorney determine how best to defend a client?

Ayoob: An expert can bring a lot of things to an attorney, but attorneys – especially a new attorney – don't always take advantage of all the things an expert can bring. If this is an attorney's first case, or the attorney's first case of this type, the attorney has probably never worked in this field. An expert, by definition, works in the field, and that sort of thing is all that he or she does, so the expert has got a whole lot more experience. The attorney typically is licensed to practice only in his state or a few contiguous states, while the expert witness practices all over the country. We can hook that attorney up with attorneys elsewhere who have had similar cases and brainstorm with them about strategies that worked and didn't work for them in the past in similar cases. Of course, we can also do the same with experts.

The dynamics of violent encounters is a subject not normally taught in law school. A lot of attorneys, for example, have said, "Oh my gosh, he shot him in the back!" or "He shot him seven times! How can I defend that?"

As experts, we define for them the speed of fire, the resilience of the human body, and we may say, here are the books of Dr. Vincent DeMaio and Abdullah Fatteh. We can say look, here are guys who have been shot in the heart and kept going, here are guys who have been shot multiple times and kept going.

I recently did a case where the guy had been shot through the head with a .45 ACP hollow point, the wound track goes from just inside the centerline of the forehead to the ear canal. His score on the Glasgow Coma Scale was about where one of our students would be watching a video lecture right after lunch. He was responsive to questions, coherent, and unlike our students watching a video, combative. We have had cases of guys with brain matter hanging out of their heads who were still performing conscious, purposeful, activity.

eJournal: It seems another topic of considerable contention comes up in defense shootings with entry wounds in the back. I'd expect you've had your share of those.

Ayoob: My first one of those was 1984 to 1985. It involved a battered woman. The assailant came at her expressing homicidal intent, and she takes the revolver she borrowed from her son and fires: bang, bang, bang. He takes one to the chest, one just behind lateral mid-line, and one square in the back that killed him. They charged her with either manslaughter or second-degree murder, I would have to go back and look to be sure. We had to go into court in a full-blown trial to explain, look, here is how fast the body turns when the guy realizes, "Oh my, I was the wolf, she was the rabbit, but the rabbit has just grown fangs and is going for my throat!" He takes the first hit in the chest and as he is rapidly turning away, the second hits him in the side, and before she can process the change, she fired and he took a shot in the back.

We had to go into court and explain what we've known since our colleague on the Network advisory board, John Farnam, first published it in the 1970s: the average person can fire a double action revolver at a rate of four shots per second

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counting from shot one to shot four; with a self cocking semi-automatic pistol with the shorter trigger stroke, for the average person, it is five shots in a second and many people can go faster.

That is the first of three action-reaction paradigms that we must establish and bring together to form a Venn diagram. The second paradigm is the speed of the turn. The average person can make a quarter turn, about 90 degrees, in a quarter of a second and a half turn in approximately half a second.

Remember, being shot in the back does not necessarily mean square in the back. The legal profession uses the same standard as the medical profession: behind lateral mid-line is "in the back." If you touch your fingers to the top of your head at the crown of your skull, track down, across the ear canal, across the shoulder seam of your shirt, down the side seam of your shirt to the seam of your trousers to the common peroneal nerve, that is the lateral mid-line. Move ¼ inch behind that, and if hit there, you would be seen as having been shot in the back.

Finally, we have the time it takes for the individual who is shooting to perceive this unexpected change and stop shooting. If they had expected the guy to turn away, they wouldn't have been shooting at all, so the man is coming at them, and if they want to see their loved ones again, they feel they have to shoot as fast as they can.

Now, the commonly quoted reaction time for humans of a quarter of a second is absolutely true but you have to bear in mind: that is reaction to anticipated stimulus. Your hand is hovering over the button; you are waiting for the sound of the beep, and it is "beep!" "slap!" and you slap the button in .23 - .26 seconds or better.

What you have here is totally different from reaction to an anticipated stimulus. If unexpected, there is a cognitive element added, and you have to go through Colonel John Boyd's OODA loop. You have to observe that he is turning away. You have to orient and ask, "What does this mean?" It means, he is no longer coming at me trying to kill me. You have to decide, "What do I need to do?" Uh, stopping shooting would be a pretty good idea! And you have to finally act: the first physical manifestation of the reaction loop. That means getting the finger off the trigger. Now remember, the extensor muscles are not as strong as the flexor muscles in the hand. How long does that take? Any human would be hard-pressed to do that in under 7/10 of one second. One recent study in Australia indicated 1.14 seconds for reaction to unanticipated stimulus.

Now we bring the Venn diagram together. You are firing at a rate of one shot per .20 to .25 seconds. He can turn in as little as .25 seconds. It is going to take you the better part of a second or more than a second to process that, react, and stop shooting.

It gives us the nuclear-grade soundbite, "Counselor, what the prosecution demands from this defendant is not humanly possible!"

eJournal: Do you customarily present all of that science yourself or are you one of a choir of experts?

Ayoob: I generally do it all myself because it is all within my expertise. It is something all of us in the business teach all the time: action-reaction paradigms, OODA loop, etcetera. In the battered woman's case, the jury took two hours to determine not guilty on all charges and three of the jurors waited outside on the courthouse steps to hug the defendant and tell her that they thought her trial had been an outrage. Lawyer Mark Seiden, who was the defense attorney, orchestrated an absolutely brilliant case.

eJournal: Was the man who attacked that woman armed with any weapon beyond his considerable, brute strength?

Ayoob: Brute strength. He was her common-law husband, was 45 years old and weighed 230 pounds. The battered woman was 63 with severe arthritis. He had gone through the usual battering husband paradigm of verbal abuse, then the push and the shove, to the slap, to the closed fist, and on the day that she told him she wanted him to get out, he became enraged and started beating her.

Remember that this happened back in the 1980s. She reached for the wall phone to call 911; he rips the phone out of the wall, wraps the cord around her neck, throttles her until she is unconscious and leaves her for dead. He then went out and she regained consciousness, crawled on her arthritic hands and knees to the next-door neighbor's house, and called the police. While the police were there, the common-law husband came back to the house and was arrested.

We were able to get the county deputies to come in and testify that as they were putting him in the car, he was screaming, "Mary, you bitch, I'll kill you for this." He was subsequently bonded out, and then he came back to do it. She had, thank God, borrowed her son's revolver.

eJournal: I have heard you describe different trial strategies using the terms "rifle approach," and "shotgun approach," to describe different tactics. Would you say the battered women's shot in the back defense was a multi-faceted presentation or did it focus on a single issue?

Ayoob: In a rifle case, they bore deeply and powerfully into one issue. When we say a shotgun case, we mean they're spraying everything at the defense, hoping it hits a vital target. The battered woman's case was pretty much a rifle case: an unarmed man shot in the back. What we had there was a confluence of two very common myths: The unarmed man, killed with a gun, tends reflexively to be seen as the victim. It is seen as a modern, well-developed nation dropping a bomb on a Third World island, or something. It is seen as having taken unfair advantage.

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I have talked to attorneys who never in three years of law school heard the phrase "disparity of force." Any one of us would have realized that a 230-pound healthy man in the prime of life attacking a woman who was old enough to have qualified for Social Security and who was crippled by arthritis, was a clear and present danger of death or great bodily harm.

The other problem was the shot in the back. Literally every culture sees a man shot in the back as the victim of a cowardly ambush. One would think that even if this is not taught in law school, it would at least be taught to prosecutors or in continuing legal education (CLE), but apparently that is not common.

eJournal: Thank goodness you had the expertise to explain why her use of force was reasonable, since apparently no one else understood it. Ideally, though, the facts you just explained should influence charging decisions that prosecutors have to make and continue all the way up through to decisions judges have to make about how to go forward with the trial. Were you allowed any opportunities to explain that justification before it went to trial?

Ayoob: In that case we did not. They did not bother to take depositions, and we had an unusually unpleasant, snarky prosecutor. The majority of prosecutors are not soulless politicians who pander to the public. The great majority of them already have more actual criminals than they can deal with and no interest whatsoever in making criminals out of innocent people.

What I have found is that if you have a typical, honest prosecutor, and you have an attorney who is respected by the prosecutor's office, then if your attorney calls and says, "My client, the man you are prosecuting, would like to talk to you. I will be with him, of course, and we will record it," that is so uncommon that you may literally get a double take from the prosecutor and hear, "This isn't something that happens every day! OK, we will give this a try."

Often, also, the attorney will make the expert available. You sit down and explain, and let your client answer the questions, and very often what we find is that if not right then within a few days, the prosecutor will say, "We had not seen that side of it. Upon review, in light of new evidence" (which is always a face-saving thing), "we have decided that this is inexpedient to prosecute and is being dismissed in the interest of justice."

eJournal: [Ironically] Not that the defendant did what was right, but that it is not a winner for us to prosecute.

Ayoob: Occasionally, you will find a prosecutor who will stand up and say, "Dammit, he done the right thing and that guy needed killin'," but I would not count on it. I recall one anti-gun prosecutor in Indiana. Here's what had happened: A woman had, let's say it this way, made some bad choices in life. She winds up deep into a drug dealing group and ends up going to prison. Her son, who by the time of the incident was 11 years old, went to live with her mother. Basically, while biologically his grandmother, she was for all intents and purposes, his mom.

The grandmother's husband, who essentially became the boy's stepdad, had taught him things like how to change a tire, how to go fishing, and how to shoot. He kept a .45 auto in the house and he had taught the boy how to shoot it. Well, he dies, and now there is just the grandmother/mother and the 11-year-old boy. In prison, the mother had apparently told her gangbanging friends that her dad has a whole, big gun collection that they could steal and fence.

Now, remember prescription drugs and guns are the two things they can steal from you and sell on the black market for more than their intrinsic value instead of a dime on the dollar. So, this evil POS comes to the house saying that he is a friend of the boy's birth mother. When he enters the house, he puts a blade to the mom's throat and demands the guns. The little boy sees this, runs upstairs, and grabs his dad's .45, comes running down, points it at the guy, and says, "Let go of my mom," which is what he calls his grandmother. The guy tries to use her as a human shield but spins her around so fast that she goes past him, and that 11-year-old boy executed a perfect heart shot with a 230-grain .45 caliber Black Talon bullet. The guy turns, stumbles outside and collapses and dies.

The anti-gun prosecutor was an honest man who, while he believed differently than you and I do on the gun issue, saw the reality of what would have happened. He protected that kid, he would not allow the child's name to be made public, he ruled the shooting to be a justifiable homicide and when an anti-gun group demanded that he charge the mother with negligence for leaving a loaded gun where an 11-year-old boy could reach it, he told them to pound sand! Not all anti-gun prosecutors are monsters!

eJournal: We should set aside our prejudices and concentrate on building bridges between ourselves and prosecutors. What role does an expert witness have in building those kinds of bridges?

Ayoob: Because it is not taught in law school, part of our job is explaining use of force to the defense attorney.

eJournal: How do you get past fearful or prejudiced attitudes towards gun use for self defense?

Ayoob: Well, I can't go to them. I can't chase the ambulance. If they come to me, and say, "Here is what we've got. Can you be any help at all?" I can say, "Yes, here is what I can do for you. Here is what you can do using us and using the facts that you have. If you feel your client can handle getting his word across, sit your client down with the district attorney and the chief investigator."

I recommend that it all be videotaped not just audio recorded because any of us can become a little bit sarcastic when we perceive ourselves to be under attack. You can end up saying something in a tone of voice with a facial expression that shows that I know this means the opposite of what I am saying. With

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my students, the example I use is that if someone was to say to me tomorrow, “Gosh, I think it is a tie whether Janet Reno or Eric Holder was the finest attorney general America has ever had.” I might go [snorting], “Yeah! Right!”

If there was only the black-and-white of a printed transcript it would sound like I was agreeing with that instead of mocking it. We are creatures of inflection. Anytime you are sitting down and discussing your incident, you want it on videotape so in case there was some sarcastic remark, if something like that spontaneously emerges, anyone watching it can say, “Come on, it is obvious that he was being sarcastic, not confessing to a crime.”

eJournal: Isn’t there a lot of risk for the client and thence for the attorney, in agreeing to talk to the prosecutor or district attorney?

Ayoob: There is if you have a guilty client! One of the things that we have to constantly remember is that a high 90th percentile of the criminal defendants who are represented by criminal defense lawyers are either guilty, or guilty of a lesser, included offense. That is why the whole “Never talk to the police” meme came up. What could a guilty person say that is not going to inculpate them further or now enmesh them in perjury, as well? And, if they said it under the auspices of an attorney, they are opening the door for the attorney to be charged with subornation of perjury which, where I come from, is a class four felony in and of itself and will cost you your bar card and your hard-earned occupation and career for the rest of your life. Of course, they will say, “Don’t talk to the police” and same ones say, “I never put my client on the stand.”

When you have a true self-defense case, you have an innocent person. The truth is going to be their strongest defense and nothing is going to change it. We saw it most recently, most starkly, nationwide in the trial of Derek Chauvin in the death of George Floyd. When he announced, outside the hearing of the jury, that he would not take the witness stand, I just stood up and walked away from the television set. I knew right then that it was guaranteed that he was going to be convicted and he was.

When it comes down to something like that, it is not “Who did it?” We know that you did it, and you have stipulated that you did it. The question becomes, “WHY did he do it?” Only the person who did it can fully explain that.

eJournal: When you first take a case, do you sometimes have to initially convince the attorney that his client is actually innocent?

Ayoob: Sometimes, yes. I have spent many, many years dealing with many, many defense lawyers. I spent two years in the mid-1990s as co-vice chair of the forensic evidence committee for National Association of Criminal Defense Lawyers. The other vice chair was Mark Seiden. We served under a great defense lawyer who chaired the committee, Drew Findling of Atlanta. I have met a whole lot of these folks. On the average – not always, obviously, but on the average – defense lawyers tend to be a bit to the left on the political spectrum. A great many of them are in that particular practice because they perceive themselves to be protecting the downtrodden, if not the innocent. A whole lot of them are anti-gun and reviewing gun evidence or researching gun-related or violence-related evidence, is as repugnant to them as if the judge had assigned them to defend a child pornographer and they had to examine the evidence. Their reaction is like, “Yuck! I don’t want to touch this.”

You have to explain, “No, your client shooting him seven times is not automatically indicia of malice. No, there are any number of situations that could account for that shot in the back.” Again, it is not something that is taught in law school. The dynamics of violent encounters are not taught in law school, either. They may be taught in CLE (continuing legal education) in specific seminars for cases of this type. You will find the occasional criminal defense lawyer who really knows his guns and all these dynamics. The aforementioned Mark Seiden is one good example as are Terry Cassidy, who retired a while ago from defending law enforcement officers and use of force cases at the Porter Scott firm, and Missy O’Linn, whose sole practice is defending police in use of force cases, but they are few and far between.

eJournal: Now and then I run across an attorney’s bio page that includes military service then he or she became a police officer and then became an attorney. That always warms my heart because I feel like here is someone who has a broader set of experiences and they are not just relying on what they were taught in law school.

Ayoob: Mark Seiden was a homicide detective from Metro Dade, Miami before he became an attorney.

eJournal: Talk about understanding the dynamics of violent encounters! Unfortunately, I think Mark is the exception and lawyers like him are rare. That creates such a need for an expert like you to sit down with less experienced attorneys and spell out what the science and experience shows to be true. I have always wondered how you get into their heads and help them see the human factors. No one would have wanted your 63-year-old battered woman client to have been killed, so why was there ever any question about justification for her self-defense shooting? How do you make the appeal to view that shooter as a valuable human being?

Ayoob: It is not my job and they would probably feel insulted if I said, “You owe your client an expert witness.” It is my job to tell them, “Here is how you can do your job for your client in this particular circumstance – one you have not dealt with before. Here is how other attorneys have dealt with it. Here is how you would use me or another expert in my field to deal with it.” That IS a part of my job.

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Most of us, like Manny Kapelsohn (another Network Advisory Board member) who does more work on the expert witness side than even I do, will occasionally lecture at CLE programs. That is us kind of giving back. We can't reach every attorney in America, we can't take every case in America, but we can tell attorneys all over, if you get one of these cases, here is how you can establish something that is so far out of the common knowledge that not only is it something that the jury pool will not understand and will need to have explained, but will also need to be explained for most of America's 1,000,000+ attorneys who didn't get much instruction on self-defense law in law school.

Law school is three years. When asked, attorneys' standard answer is, "Law school taught me the law. On the job training in the courtroom and CLE taught me trial tactics." That really is pretty much the case. Law school is three years of a great sea of contract law, marital law, family law, maritime law, and some criminal law thrown in. There is no time for the subtleties of this or of that nuance of any given type of case. That is why attorneys network within the various lawyers' associations, talk to other lawyers about similar cases. That is why I belong to the National Association of Criminal Defense Lawyers and so does Marty Hayes and others in our field. I am not a practicing attorney, but it gives me contact with other cases and attorneys who have had cases like the ones that I will be dealing with in the future. All of us learn from one another. Networking is part of education.

eJournal: Yes, it is and ideally, education should be a life-long endeavor, so there is much yet to be done. I know you have a lot of other interesting details about the ins and outs of defending use of force in self defense, so in the interest of not cutting anything out, let's take a break for now and come back next month for the second half of this interesting talk.

About Massad Ayoob: *Armed Citizens' Legal Defense Network is fortunate to have enjoyed the guidance of Massad as part of our Advisory Board from Day One. We've been personally associated with him for quite a lot longer, with Network President Marty Hayes first meeting Massad in the early 1990s when he began hosting his classes in the Pacific Northwest.*

Mas has been a court-recognized expert witness for the courts in weapons and shooting cases since 1979, and served as a fully sworn and empowered, part time police officer for 43 years, mostly at supervisor rank. Ayoob founded the Lethal Force Institute in 1981 and served as its director until 2009, and now trains through Massad Ayoob Group. Author of numerous books, articles, videos and podcasts, he has appeared on CLE-TV delivering continuing legal education for attorneys through the American Law Institute and American Bar Association. Mas was named president of the Second Amendment Foundation in September of 2020, and he continues to teach nationwide. Check out his classes at https://massadayoobgroup.com/events/ and get registered for a class.

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President's Message

by Marty Hayes, J.D.

One of the most interesting and frustrating aspects of the Network's fight against the Washington State Office of Insurance Commissioner (OIC) was the issue that arose when the OIC claimed it was against "public policy" to have insurance to provide for the legal defense when accused of a crime. Now, for a moment, let's discuss the phrase "public policy." Black's Law Dictionary defines public policy as: "Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."

That means that "public policy can be determined by either the legislature declaring that an act is bad, (take, for instance, drunk driving) or by courts deciding that a particular act while not necessarily against the law, is also bad for society as a whole.

Where this public policy argument became part of Network v. OIC was the idea that it is against "public policy" to allow a person to escape punishment for an intentional injury against another, simply because they had purchased an insurance policy. There are many different cases from different jurisdictions which discussed whether insuring against liability for intentionally injuring someone in self defense was against "public policy." In the early days of the OIC going after the "Self-Defense Insurance Industry" it was deemed illegal by the OIC, pertaining to programs like the ill-fated NRA-branded Carry Guard program, along with the USCCA's program. You can read more at https://www.insurance.wa.gov/news/illinois-union-pays-102000-fine-sale-illegal-nra-branded-policies and https://www.insurance.wa.gov/news/kreidler-fines-uscca-100000-illegal-insurance-sales-policies. That took place back in 2019 and 2020. Neither entity chose to actually fight the OIC and its claim that their activities were illegal and against public policy.

Interestingly, early in our discussions with the OIC, we made the case to them that there was nothing wrong about providing a legal defense against charges resulting from an act of self defense. We were ready to take this fight to court, but by the time the actual legal fight began, they had come to the same conclusion and dropped that issue from their legal arguments.

Now, that issue has morphed into the OIC saying it is okay to insure against the defense costs if you are being criminal charged, but also saying that if found guilty, one would need to pay back the defense costs.

This sets up a very dangerous situation, where perhaps one was offered a very favorable plea deal before trial, setting up circumstances where paying back the legal defense funding would be required. Before signing up with any company, you should not just sign up online, but be sure to call them and ask this one vital question: "If I choose to take a plea, am I required to pay back the defense funding?" and, of course, any other questions you might have. You are welcome to call the Network to get that question and any other questions you might have answered.

A final comment on this point, it is our belief and position that there is nothing wrong with having your legal defense costs paid for by another, without any requirement to pay those costs back if a jury found you guilty of a crime or you decided to plead guilty to a lesser crime instead of risking trial.

To this end, we asked our group of Network Affiliated attorneys to discuss why an innocent person might decide to take a guilty plea instead of going to trial. They have provided a rich resource of commentaries that we are publishing in this month's journal, with more carried over to next month, due to the number of responses. I hope you enjoy their commentaries in the following column.

Check out the Better Business Bureau

Occasionally I do a search of our competitors in the BBB, to see what kind of complaints or issues they have been having. Having said that, I would strongly recommend you check out the company you are planning on relying upon for your legal defense, to see what kind of complaints, if any, the company is receiving and how they resolve it. To help you with that job, I have listed the web links for you here:

United States Concealed Carry Association
https://www.bbb.org/us/wi/west-bend/profile/gun-safety/us-concealed-carry-association-0694-1000008667

Texas Law Shield/U.S. Law Shield
https://www.bbb.org/search?find_country=USA&find_text=Texas%20Law%20Shield&page=1

CCW Safe
https://www.bbb.org/us/ok/oklahoma-city/profile/litigation-support/ccw-safe-llc-0995-90032667

Second Call Defense
https://www.bbb.org/us/oh/west-chester/profile/insurance-services-office/second-call-defense-0292-90012427

Firearms Legal Protection
https://www.bbb.org/us/tx/addison/profile/legal-services/firearms-legal-protection-0875-90552898

Armed Citizens' Legal Defense Network, Inc.
https://www.bbb.org/us/wa/onalaska/profile/support-groups/armed-citizens-legal-defense-network-inc-1296-22506307

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No Visit to the NRA Annual Meeting

Until the last week of this month, the Network was headed to the NRA Annual Meeting. We had looked forward to meeting many members in the convention hall where we had reserved a booth and scheduled a special booth event for our Advisory Board members to be available to meet and chat with our members and others who were attending the meeting. Alas, only days after our booth and supplies were loaded on a semi and hauled off for the trek to Houston, we received word that the NRA had canceled the event.

We are sorry to miss the opportunity to visit with you. Maybe we can get together next year in Louisville. Until then, I will stay in touch with you through this column.

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Attorney Question of the Month

As our Network President Marty Hayes indicated in his column this month, we often turn to our Affiliated Attorneys for a broader understanding of how various principles of law are applied across the nation. Looking more deeply into one of the issues the Washington Office of Insurance Commissioner originally raised but later dropped, we asked our affiliated attorneys to share their knowledge and experience with innocent clients who plead guilty when given an attractive plea offer. We asked--

Why might an innocent person choose to plead guilty to a crime they did not commit? Have you seen this occur first-hand?

So many attorneys wrote in to share their thoughts that we will run the first half of their responses this month and wrap up this question in our October edition.

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I believe criminal defendants often plead guilty to crimes they did not commit, for any number of reasons. A common reason is that, while they maintain their innocence, the risk that they might be found guilty by a jury that no one can control or guarantee, and have a very heavy sentence imposed, may be a very risky gamble, compared to accepting a plea bargain on a less serious charge, for an agreed shorter sentence. Thus, a sure thing versus a gamble.

I worked as an expert witness in the case of a young police officer who pled guilty to a charge of reckless homicide or some similar manslaughter-like offense, on a plea agreement that he would be sentenced to about 3 or 4 years, and would be eligible for parole in about 2 1/2 years. He had fired one shot, killing a man in a pickup truck he had approached at night. The driver had put his parked truck in gear and knocked the officer down. Whether the officer had fired while falling, or after he had already fallen and the truck was moving away from him was unclear, and was contested.

While defense counsel and I believed the officer had honestly feared for his life and had fired in self defense, he was an exceedingly poor witness. His story varied slightly each time he told it, which would have been capitalized on by the prosecution if the case went to trial. The officer had a wife and two young children. He said he took the plea bargain because if he went to trial and was convicted, he might be in prison until his children were in college. The plea bargain took away that grim possibility, in return for a sentence he felt he and his family could tolerate.

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This question implies that a person's innocence is a known quantity. This might be the case in the typical TV legal drama, where a person who is truly innocent is charged with a serious crime (usually murder), and the star of the show defends the person and ultimately proves his innocence. In reality, whether a person is guilty of a crime can be much more nuanced. Consider the following actual example.

Dave Defendant wants to get money from his bank's drive-up ATM. There is a car at the ATM, so he waits his turn. Dave observes the car's driver, Victor Victim, appear to retrieve money from the ATM and then no further activity for some time. It appears to Dave that Victor may be just counting his cash and unaware that he is holding up the line. Dave taps the horn on his car to alert Victor of Dave's presence, hoping maybe Victor will pull ahead to finish counting while letting Dave access the ATM.

Victor has a different reaction. He thinks Dave was being rude and impatient, so he gets out of his car and storms back toward Dave's car to give Dave a piece of his mind. Victor is young and big – a bit intimidating. Dave is older, slighter, and not a physical person. He has no desire to get into a confrontation with Victor. Dave is legally carrying, so he holds up his handgun (pointing straight up, not at Victor), just to let Victor know that he is armed. Victor stops and calls 911 and reports being threatened with a gun. Dave is charged with aggravated assault with a firearm. Dave insists, and believes, he is innocent.

The DA offers Dave one year of probation if Dave pleads guilty, and the case will be dismissed after one year if Dave does not get into any more trouble (under the state's "first offender" program). If Dave goes to trial and loses, he probably will get several years of probation, and perhaps even some prison time. The trial judge may not offer first offender treatment if Dave insists on a trial.

Dave insists he is innocent under the laws of the state. He can plead guilty, get only probation, and know with certainty the case will be dismissed and Dave will have no record of conviction. Or, he can go to trial and perhaps be found guilty and serve a longer sentence and be a convicted felon for life. Under these circumstances, many people will choose to plead guilty.

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You ask, "Why might an innocent person choose to plead guilty to a crime they did not commit? Have [I] seen this occur first-hand"?

Yes, I have, and I can well-address it, as a former state prosecutor, state public defender, and federal prosecutor, who has tried over 400 felony cases.

People plead guilty to crimes they did not commit every day in the good ol' USA. Often, frankly, it is because of the quality of the lawyer they hired. Most lawyers are not skilled trial lawyers and of the few that are, many simply have neither the time nor dedication to actually try a case. It is a very rigorous process and requires complete dedication to the client and their case.

Consequently, especially when the punishment is minimized or the lawyer feels the offer is otherwise a reasonable resolution, rather than exert the time, energy, and dedication, they will tell the client to, "take the deal."

Additionally, many clients cannot afford the cost of skilled criminal trial defense. As a result, they start out thinking they will be protected and aggressively defended but, when the invoices start rolling in, they realize it is not sustainable.

Finally, many clients have their cases disposed of by plea for fear of the consequences of going to trial and the potential for a judge who punishes a client if they are found guilty.

Taking your case to trial requires courage and determination, from the client ... as well as the attorney.

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Every experienced criminal defense attorney has had this situation arise dozens and dozens of times over the course of a career ... and there are countless reasons why an attorney might counsel a client to plead in this fashion.

- The innocent client, with a prior conviction for statutory rape involving a 14 year old virgin. (Had that one.)
- The client who is going to go to pieces on the stand and blow his chances to bits. (Had that one.)
- The client who made statements to the police without his attorney present, instead of keeping his big mouth shut, where the attorney, no matter how skilled, is not going to be able to unring that bell. (Had that one.)
- The client who forsakes a great self-defense defense, because even though he will win on that count, they have him dead solid perfect on a felon in possession of a firearm charge that will send him to prison for a mandatory five years stretch. (Had that one.)
- The client with past background warts so large that the jury is going to want to fry him, no matter how innocent he is. (Had that one.)

And on and on and on.

Any attorney who claims that, "I never plea bargain my clients' cases!" is either a liar, a rookie, or a complete idiot. Trials are ALWAYS 50-50 chances. You're either gonna win or you're gonna lose and there is absolutely no way to accurately forecast which it is going to turn out to be. Sometimes it is better to choose the devil you do know, instead of the devil you don't know.

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This is a very good question because it happens very often in courts across the USA. Life and its outcomes are often less than perfect and many choices along the way can be very tough to make. Sometimes a fair amount of creativity goes into crafting a plea agreement to which parties can agree.

People who find themselves in the criminal justice system routinely plead to something mostly better, or at least less-bad, than the likely outcome at trial. Occasionally, people plead too quickly instead of having a trial. (And if one asks the average prison inmate, they probably will all say they're wrongly imprisoned.)

Plea bargaining can be a double-edged sword. Sometimes it works out better for a client to plead to a completely different charge than the original. For example, a person charged with driving with a suspended driver's license pleads to a noise ordinance violation. A plea to a non-driving offense is very advantageous to a person in that situation due the fact that the creative agreement results in the defendant avoiding collateral damage to his driving privileges. Same for a DUI client who pleads to reckless driving instead and saves a distinguished

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career with entities that frown on DUIs. Other good outcomes can be pleading to misprison of a felony when the person was charged with transporting heavy-duty drugs for sale. By doing so they can avoid prison all together instead of serving close to a decade. Such results are great outcomes in cases with high likelihood of conviction.

In situations more pertinent to the Network's members and how this may play out in self-defense cases, plea agreements can be bittersweet. Let's say in a great self-defense case, the government offers a plea that the defendant can't refuse. The outcomes may have been much better had the individuals taken a concealed weapons class and acted slightly differently. In such cases, the defendants plead to a felony offense with a probation term instead of a long, mandatory prison sentence. This might happen to untrained individuals with nevertheless very strong self-defense claims, or in situations which are not clear cut self-defense situations but with some strong factors in favor of the defendant.

People in that situation feel very alone having to make a very tough decision. The odds of success at a jury trial could be very high, but the client risks a long mandatory minimum sentence in the event of conviction. A better and less bittersweet example is pleading to a misdemeanor offense in a serious felony case with a strong self- or other real defense claim. In such cases a misdemeanor plea saves the person a lot of money, stress and the risk of a felony conviction with a long prison term even though the outcome may not be exactly perfect. Getting outright dismissals of charges is generally very difficult, even in great cases.

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The question arises from time to time of why would someone who has a valid defense to a crime, such as the use of deadly force, enter into a plea bargain or submit a "no contest" plea? The fact is that this happens frequently, at least in Tennessee.

Several years ago I was involved in a case where a young man was being attacked by two larger men. There were several identifiable witnesses who gave statements that the young man did not start the fight, that he was being attacked physically by two men at the same time, and that he pulled a gun that he illegally possessed (he did not have a permit) and shot one of the attackers. In that matter, the district attorney in a progressively "liberal" community was very much against citizens carrying firearms for self defense. The decision was made to charge the individual with multiple attempted homicide and other crimes involving serious felonies. Although the young man had a good legal and factual defense and likely would have prevailed on a self-defense claim, his risk, if he lost, was a minimum 10 years in prison under a statute that had no allowance for early release if the crime involved the use of a firearm. The plea offer? He was given the chance to plead to a lesser felony charge and would be able to and did receive supervised probation but no incarceration. The young man decided it was better to accept a felony conviction rather than to risk spending much of his life in prison.

In another recent case in Nashville, a police officer was being prosecuted by the district attorney for shooting an individual who was running away from a chase and who was displaying a handgun. The officer shot and the man died. Much of the chase was on "housing projects" security video but not an important few seconds that would have supported the officer's theory of the case. The officer was being tried for murder.

Because of the recent convictions in the Floyd-Chauvin trial, there were concerns that the jury would also convict because it was a white officer and a black man that was killed. Again, it was a strong case of justifiable use of force. There had been several rulings by the trial judge that would be strong issues on appeal. The case was locally very high profile in the "Black Lives Matter" movement.

If the officer was unsuccessful at trial on the claim of justifiable use of force, he was looking at perhaps 40 or more years in prison. If the officer lost at trial but was able to prevail on some issues on appeal, he might spend several years in jail waiting on an appeal. On the eve of trial, he was offered a chance to enter a plea to a low grade felony that would require approximately 30 months in jail (likely less than the appeal window) and for which he might be released in as little as 12-15 months. The officer accepted the plea.

As these two examples show, it is not an uncommon occurrence for someone who is innocent or even who has a viable defense to nevertheless accept a plea deal if the risks of losing at trial are too great or if, frankly, the costs of hiring a trial attorney and expert witnesses are too great. It is critical to understand that the criminal court system is not always about justice. Sometimes, it is simply about the facts that a) government has unlimited resources to prosecute the individual and b) sometimes a small punishment is acceptable if the consequences of a loss at trial are too much to bear. The fact is that just because someone enters a "no contest" or other plea, it should not be construed as absolute proof that a jury would have concluded that the person did commit the crime.

Thank you, affiliated attorneys, for your comments about this topic. Members, please return next month for the second half of this discussion.

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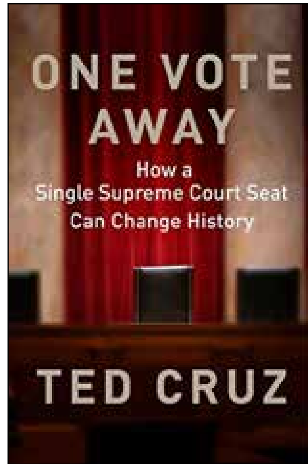
Book Review

One Vote Away: How a Single Supreme Court Seat Can Change History



By Ted Cruz
Regnery Publishing, Sept. 29, 2020
Hardcover: 256 pages $13.99; Kindle Edition $14.99
ISBN-13 978-1684511341

Reviewed by Gila Hayes

Although it was written by a prominent politician, I didn't read this month's book, *One Vote Away*, because of any political leanings. I'd seen quotes that piqued my interest in the US Supreme Court's role in preserving or eroding constitutional principles and I wanted to learn more. In focusing on a handful of key cases in which outcomes hinged on a single vote, Cruz did not disappoint. He aptly quotes Justice William Brennan who illustrated "the most important legal principle at the Supreme Court...with a grin while holding up five fingers, the 'Rule of Five.' As he would say, 'with five votes, you can accomplish anything'—no matter what the law or Constitution said otherwise," an activist, Cruz writes, who "excelled at persuading his fellow justices to join him in reshaping America."

Cruz knows the Supreme Court. "For nearly two decades, my professional life revolved around the Supreme Court, and it is an extraordinary institution," he writes. "Living legends have walked those marble halls. The victories they have won for justice and rule of law—and, at times, the damage they have inflicted on our nation—have been incalculable." I wanted to learn more about the courts Cruz, who clerked for Chief Justice William Rehnquist in 1996, and as TX Solicitor General argued a number of cases before the Supreme Court, knows so well.

In his introduction, Cruz writes that judges should apply the law, not "decide policy matters." This went astray long ago when "activists on the far left decided that democracy was too cumbersome. It was too slow. And it was too difficult to persuade their fellow citizens that their policy prescriptions were sound and wise. So instead, they resorted to litigation, trying to get judges to mandate the public policy outcomes they wanted—even if the voters disagreed." In deciding those matters, the Supreme Court, Cruz charges, has given itself more power than the founding fathers intended, "well beyond what it is entitled to under the constitution."

The accusation of judicial activism is bogus when judges "strike down laws that violate the constitution" but true judicial activism does occur when "a judge disregards the law to follow his or her own policy preferences," Cruz explains. He illustrates this principle by dissecting pivotal cases in which a single vote harmed or preserved the constitution.

These cases involved religious liberty, school choice, the Second Amendment, U.S. sovereignty, abortion, free speech, capital punishment and whether the US Supreme Court can overrule voter decisions.

Cruz starts appropriately with the First Amendment. Underscoring the amendment's importance, he writes, "True political liberty, free speech, social stability and human flourishing all depend upon a robust and durable protection, under the rule of law, of our fundamental right to choose our faith." Nonetheless, in the early 1960s the separation of church and state morphed from prohibition of a state religion to fights over prayer in school and display of religious texts and symbols in public places, Cruz writes. In Texas, an atheist sued the state for removal of the bigger-than-life stone Ten Commandments monuments so common to courthouses in the '50s and '60s. Other religious freedom cases Cruz argued show how much broader the First Amendment is than prohibition on a state-mandated religion. One case called for removal of a large cross that memorialized fallen veterans; another dealt with requiring religious health care providers to give contraception and abortion medications in opposition to their beliefs.

In the next chapter, Cruz calls the issue of school choice, "the defining civil rights struggle of our times." While common today, charter schools and other alternatives to public schools were less well-recognized when the state held a monopoly on education. Does the state or do parents have the responsibility to bring up American children? Cruz explores. Though thin, the margin of victory in the cases he outlines was sufficient to preserve the right to choose how to educate your own children. "Four justices were prepared to strike down ... virtually every other school choice program in America, taking away the educational options and—in a very real sense—the hope of millions of kids," he warns.

"Much that can be said about the natural right to religious liberty can also be said about the natural right to self defense," Cruz compares as he reviews *District of Columbia v. Heller.* The Second Amendment was included in the Bill of Rights so citizens could "properly defend themselves and their families" he asserts. The founding fathers "sought to preclude the citizens of the country they were birthing from ever having to worry about their right to self defense — whether that right applies against a petty thief or a tyrannical government," he stresses.

Cruz authored an amicus brief defining the individual nature of the right to possess firearms. The specific words used in the Bill of Rights, "the right of the people," appear several times in the amendments indicating individual rights, Cruz explains. Authorization of state militias and their activities is considered a "power," a term used in other contexts discussing actions the states are allowed, he explains. If the principle of an individual right applies to copyrights and searches, it must also apply to gun rights. Cruz also explains the role of prefatory clauses in the amendments to establish the context of the amendment.

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Heller had a companion case, *Parker,* in which Cruz gave oral arguments before the D.C. Circuit Court. When appealed to the US Supreme Court, Cruz "took the lead for the states defending the Second Amendment," writing an amicus brief backed by 31 states. The brief that showed "the Second Amendment also bound the state governments because it was 'incorporated' against the states through the Fourteenth Amendment." He explains, "As a general matter, the text of the Bill of Rights applies only against the federal government" but incorporation has been practiced since the Civil War. Sometimes, it is politically unpopular and Cruz remembers the protests from various state attorneys general, when his brief pledged the 31 states presenting it to abide by the Second Amendment.

Because the District of Columbia is under the authority of the federal government, *Heller* didn't ask the court to "address incorporation to resolve the case," Cruz notes, but, "Two years later, in *McDonald v. City of Chicago,* the Court finished the journey that we had urged it to begin in *Heller*. In *McDonald*, the Court rightly concluded that the individual right to keep and bear arms is a fundamental right that is, in turn, incorporated against the states. After *McDonald,* it is not just the District of Columbia, but also all the fifty states and every local government that is prohibited from infringing upon our fundamental individual right to keep and bear arms," he writes.

In another chapter, Cruz casts the abortion issue as a Supreme Court invasion into States' rights with long-lasting, divisive results. "When nine unelected judges ... decree what is and is not acceptable on a policy as personal and far-reaching as abortion, it produces enormous social division." He decries *Roe v. Wade,* writing, "Part of the genius of our Constitution's Framers was establishing a system in which fifty states can enact fifty different standards to reflect the values and policy judgments of their respective citizens." He predicts that if *Roe* was to be overturned, the decision would return to individual states, with the result that some would outlaw abortion while others allowed it.

It is an understatement to comment that the issues Cruz writes about elicit strong opinions. Discussing the Supreme Court decision in *Citizens United,* Cruz cites lie after lie that was put forward about that decision. The fight, he asserts, was whether advertisements for a movie about Hillary Clinton's shortcomings were subject to restrictions on electioneering communications. Instead of freedom to advertise an unfavorable movie with a presidential campaign ongoing, the issues were misrepresented as special interests buying elections and about giving corporations the same rights as individuals. Cruz goes on to give an insider's look at campaign politics, the wealth required to successfully run for office and factors that eliminate many candidates who would be good leaders.

Next Cruz shifts his attention to law enforcement searches, the right against self-incrimination and the death penalty. The latter, he writes, is controversial and "deeply politicized" and he roundly condemns the "gamesmanship that pervades and characterizes so much capital litigation." Capital punishment is an issue for legislatures to decide, he stresses, and calls judicial decisions that override statutory law unconstitutional. "There is a place to deal with the highly contested issues of criminal punishment, and it's not the federal bench."

Much as I like Cruz, I admit that some of his opinions in *One Vote Away* are very opposite from my own viewpoints, but still, I appreciate the way his clear, concise arguments make me examine my own beliefs. Time to read his book is well spent.

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Editor's Notebook

Friends without Faces

by Gila Hayes

I have a large number of friends whom I have never met face-to-face. Under the current restrictions and anxiety over the pandemic, I likely never will. I found myself commenting on that odd fact recently in phone conversation that morphed into yet another "getting to know you" visit made without face-to-face contact and as a result, lacking the facial expressions and body language on which humans generally rely to identify humor, irony, sarcasm, or "this is deadly serious" emphasis.

The same day I enjoyed that visit, Marty, Vincent and I struggled mightily with questions raised by the exodus of major gun manufacturers from the National Rifle Association Annual Meeting Sept. 3-5, 2021. In years past, this venue has provided many opportunities for face-to-face chats with new and long-standing Network members hailing from all across the country. The following day, the NRA solved the problem for us by canceling their 2021 annual meeting.

Although in years past our NRA contacts have represented but a small fraction of our 19,500 Network family members, I prize the friendly visits, the exchanges of information and experiences shared amongst fellow armed citizens, and perhaps most of all I have drawn strength from the expressions of confidence in the Network and its mission many of you have shared with me at these get-togethers. I have looked in your eyes, shared your smiles, and empathized with your anxiety about the political climate where you live and the likelihood of malicious prosecution after self defense. I would not trade those visits with members for anything.

I am a simple, hard-working person, raised many decades ago in a Wyoming ranching family. I am the antithesis of cultured, sophisticated, or to borrow an analogy, "smooth." I'm not. As a result, I am touched by the kindness consistently expressed by our many members during those rare face-to-face visits and more frequently during phone calls and in the multitude of emails I exchange with our members and potential members. Counting so many of you as my *Friends without Faces,* is a rich blessing that, even after more than a decade, continues to amaze me.

Now we face the continuing uncertainty of COVID-19 and government restrictions, complicated by wildly unreliable and non-factual news reporting on both. Never has it been more difficult to make a fact-based decision! In July, after we were excessively optimistic and announced the Network's participation in the NRA Annual Meeting, I received a heartfelt plea from a member who is a registered nurse. She was extremely concerned that we had invited participation in what she genuinely feared would become a COVID-19 super spreader event.

With the annual meeting, up until August 24th, forging full-speed ahead, it appeared to us for quite some time that Houston would be the venue of the first major gathering of armed citizens to take place since the pandemic. The convention organizers originally predicted attendance averaging 80,000 people. Whether or not that was hyperbole, I will never know. I concluded that member expectations and the value of meeting you face-to-face, with all the benefits of reading facial expressions and having a chance to listen to your experiences and concerns, more than offset dangers of infection, especially in light of uncertainty about veracity of the ever-changing data being trumpeted by the CDC. We resolved to observe reasonable precautions and to attend the meeting.

Two weeks before the NRA Annual Meeting, with the freight for our exhibit, our big box of masks and multiple bottles of hand sanitizer for the booth, already in route, word begin circulating that major gun manufacturers had plans to cancel their exhibits. The exhibit hall was subject to re-organization without large anchor booths around which smaller booths like ours orbit. Without firearms manufacturers, how many members would deal with heavy weekend traffic, parking hassles, travel expenses and yes, the unknown risk of exposure to COVID-19 to attend? How many potential new Network members might we fail to meet if large numbers of folks opted not to come to Houston? In the end, all of the arguments and counter arguments were only a debating exercise.

The elephant in the room – yes, and this is a pachyderm that lurked on the sidelines all along – remains the actions of National Rifle Association Executive Vice President Wayne LaPierre and the NRA Board of Directors' apparent unwillingness or inability to retire him. It is impossible to determine whether concern over the annual meeting being a COVID-19 super spreader event is the entire motivation for so many of the major gun manufacturers to cancel their exhibits at the meeting or if the pandemic provided a smokescreen behind which to quietly cut ties with the NRA while it remains under Wayne LaPierre's governance.

In the Network's situation, we've remained agnostic on the question of whether attending the annual meeting constituted support of the LaPierre regime, focused solely on our desire for face-to-face contact with our faithful Network members and an opportunity to reach out to potential new members. As we face the loss of much of that experience, I feel somewhat bereft.

Not since 2019 have we had the opportunity to talk face-to-face with large numbers of our Network family members, or to share a meal with our Network Advisory Board, or to enjoy chats and share experiences with fellow armed citizens – members or not – from all walks of life. Now, owing to a confluence of factors, we once again have lost an opportunity to enjoy those face-to-face connections. Thank goodness, as underscored by the phone chat I described at the beginning of this column, technology offers so many ways to communicate, even though it lacks the connectedness of face-to-face expression. Let's stay in touch as best we can.

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