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COMMENTARY

Amendments to Pa. Law Change Self-Defense Landscape

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On June 28, Gov. Tom Corbett signed into law Pennsylvania's first legislative reform to the law of self-defense since 18 Pa. C.S.A. § 505 was enacted in 1972. House Bill 20 of the 2011 session, which became effective Aug. 27, modified 18 Pa. C.S.A. § 505, which, for more than 35 years, was the codification of common-law self-defense.

Under the 1972 version of § 505, in order to secure a self-defense jury instruction the facts had to establish that the slayer was the non-aggressor; possessed a reasonable fear of imminent death; and did not violate a duty to retreat. The new law renounces a mere codification of the common-law defense and substantively changes the self-defense landscape in four major ways.

First, § 505 now includes a legal presumption that an occupant, aware that someone is entering or attempting to enter his or her home or occupied vehicle, reasonably believes that he or she is under threat of death, serious bodily injury, kidnapping or rape. Second, the law eliminates the duty to engage in safe retreat before using deadly force when an actor is attacked with deadly force in a public place. Third, § 505 prevents application of a self-defense claim to a slayer possessing an illegal weapon or in situations where the initial conflict between actors is "related to" illegal activity. Fourth, the law grants civil immunity to anyone who lawfully exercises his or her right to self-defense under the new laws.

In order to appreciate the importance of these changes, one must understand the unusual nature of a self-defense claim. Self-defense is an affirmative defense, but unlike most affirmative defenses, it is unique in that no burden shifts to the defendant. In the course of a murder prosecution, where either side introduces into evidence self-defense facts, the commonwealth has to disprove an element of the self-defense claim in order to preclude a jury instruction on the issue.

The new § 505 contains three different self-defense predicates for the prosecutor to address: (i) the actor has a right to be in the place where he was attacked (regardless of provocation); (ii) the actor believes deadly force is immediately necessary to protect against death, serious bodily injury, and kidnapping or sexual intercourse by force or threat; and (iii) the person against whom the force is used displays or otherwise uses a firearm or an object readily apparent to be a firearm.

The first change is the new § 505(b)(2.1), which creates the legal presumption that deadly force is always justified against an individual breaking into your home. In many types of home invasion murders, this new presumption may automatically curtail a prosecutor's ability to charge the slayer protecting his home, regardless of the type of threat faced.

In contrast, prior to Aug. 27, each individual aspect of the crime scene was evaluated to determine if the slayer's fear of death or serious bodily injury was reasonable. The new presumption may be rebuttable through proof that such a belief is unreasonable. However, in those cases that go to trial, § 505(b)(2.1) eliminates one of the hardest obstacles a defendant claiming self-defense had: demonstrating that the defendant not only had a subjective fear, but that it was objectively reasonable.

The second major change is that § 505(b)(2.3) eliminates the duty to safely retreat when in a public place. Throughout our legal history, Pennsylvania has recognized the "castle doctrine," which excused any duty to retreat when the slayer was attacked within a specially designated place. However, this was true only within a residence or workplace; if attacked outside the home or workplace, there was a duty to retreat prior to using deadly force. Notably, this was a special rule that applied only to deadly force; there has never been an obligation to retreat prior to using commensurate violence short of deadly force, i.e., no obligation to retreat from a fistfight. Under the new law, a slayer has no obligation to retreat in public when faced with deadly force and may use deadly force to protect himself or herself.

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This monumental repudiation of decades of judicial precedent will create many problems. The "no retreat" provision removes the clearest impediment to a self-defense claim. Previously, if the prosecution could prove there was a safe and available alternative to using deadly force, namely the actor could have safely fled the scene or not utilized deadly force, the fact finder, judge or jury, would not receive a self-defense instruction. Legislatively eliminating this clear common-law rule and providing legal permission to stay, fight and possibly kill, will create more, not fewer, legal disputes over the propriety of a self-defense jury instruction. The self-defense jury instruction may now have to be given in many circumstances where precedent applying the old law clearly established it would have been unavailable.

The statute shifts the focus from a defendant's credibility to a simple application of the facts to the law.

Self-defense case law establishes the historical importance of a fact-based qualitative analysis. Judicial opinions are replete with extensive thoughtful discussions of the many different circumstances in which a self-defense claim was made and the appropriateness of the related jury instruction. In the past, although a prosecutor could always exercise discretion and decline prosecution, if a prosecution proceeded to a jury trial, an actor's peers were responsible for analyzing the facts to affirm or repudiate the morality of the slaying and whether it legitimately occurred in self-defense.

Under the new law, there now may be fewer prosecutions in circumstances where the homicide investigators confirm a "no-retreat" claim in a deadly weapon fight that results in death. In essence, the judicial decision process to hold a slayer accountable will rest with the police or prosecutors when they decline to charge a slayer with murder rather than let a jury of one's peers evaluate the evidence.

From a moral perspective, the above-mentioned common-law elements were crucial to that jury analysis because we, as a society, condemn individuals who promote violence. A person who starts or continues a conflict, which can be avoided through retreat but results in a slaying of another, is certainly promoting violence. These societal and moral considerations are eliminated under the new law and replaced with more basic requirements that focus on the legal positioning of the actors, rather than the subjective thoughts of the slayer.

This easing of the self-defense boundary implicates the broader philosophical question of state-sanctioned violence that leads to death. Unquestionably, this law will serve to expand the number of slayings that fall within permissible self-defense. This concern was loudly voiced by Pennsylvania's district attorneys, who opposed an earlier version of the bill that was passed in 2010 by both the House of Representatives and the Senate. These prosecutors believed the law would not only encourage unnecessary violence, but also protect individuals who should rightfully be prosecuted, such as drug dealers or other criminals involved in a turf war. Then-Gov. Edward G. Rendell, a former district attorney himself, refused to sign the bill, reasoning that the self-defense law was adequately inclusive as it stood.

The third substantial change to § 505 encompasses two requirements that in any case invoking § 505(b)(2.3) (cases outside the home and a refusal to retreat), the underlying conflict must be unrelated to criminal activity and the actor invoking self-defense must not have possessed an illegal weapon. These modifications address the coalition of district attorneys' concerns. The definition of criminal activity was originally drafted to require a proximate cause analysis, but in the version that passed it was simplified to define "criminal activity" as criminal activity that is not part of the self-defense and is "related to the confrontation between an actor and the person against whom force is used." "Criminal activity" also creates a bar to invoking the legal presumption of the right to use deadly force within the home or an occupied structure that is discussed above.

The final major change is that the new bill has also created civil immunity for any individual who operated under the new § 505. Section 8340.2 of the judicial code now provides broad civil protection for any member of the public who can satisfy the meager requirements of § 505. The new provision also provides attorney fees for any actor who fits into this category who is forced to defend a lawsuit and prevails.

The cumulative changes to Section 505 are significant for a more practical purpose. The legal presumption issue increases investigatory burdens for police and prosecutors. In many self-defense cases, it is realistic to expect that there will be only one live fact witness at the time of trial: the defendant. The new self-defense statute shifts the focus of the case from a defendant's credibility to a simple application of the facts to the law to ascertain if the new statutory requirements for an excused killing were met.

This shift requires police investigators to properly and completely accumulate the evidence, contemplate the new law, and, in the heat of the moment, conclude whether a suspect should be arrested and charged with murder or not. The consequences of their decision will include thousands of dollars in investigatory expenses, legal fees and potentially unwarranted pretrial incarceration. Conversely, if it factually appears that a slayer acted in self-defense, which the law suggests should be an easy conclusion to reach, then no charges should be brought.

However, when have the police been hired, trained or commanded to investigate facts to exonerate an alleged murderer? Will police departments' "arrest and charge now but investigate later" crime solving capabilities be able to adequately manage and investigate the potential number of homicides the law will bring? In light of the many competing interests the new law has created, all in the name of the right to carry and bear arms, only one thought springs to mind: "If it isn't broken, don't fix it." •