

# Defense Genres

1. It never happened
  - Mistake, setup
2. It happened, but I didn't do it
  - Mis-id, alibi, setup
3. It happened, I did it, but it wasn't a crime
  - Self-defense, accident
4. It happened, I did it, it was a crime, but not this crime
  - Lesser offenses
5. It happened, I did it, it was a crime, but I'm not responsible
  - Insanity
6. It happened, it was the crime charged, I'm responsible, but who cares
  - Jury nullification

# Categories of Issues

1. What are the rules of the defense?
2. What do I have to show to get an instruction?
3. Even if I can meet the rules and get an instruction, is it the best theory of defense?
4. Are there any procedural pitfalls?
5. What evidence issues do I need to be ready for?
6. What variations in the standard instructions should I ask for?

# What Defense?

- Your client, Joe, is charged with assault with a deadly weapon inflicting serious injury. He tells you that:
  - He told his neighbor, Bill, to get out of his yard
  - Bill refused
  - Joe took out his gun, pointed it at Bill, and said get moving
  - Bill made a sudden move, as if to go for a weapon
  - Joe shot him in the leg
  - Bill turned out to be unarmed

# Three Steps

- What interests was Joe trying to protect?
- Was Joe allowed to use deadly force or only non-deadly force?
  - When did Joe first use deadly force?
- Did Joe meet the four requirements for defensive force defenses?

# Procedural Issues?

None

# Evidence Issues

- In Joe's case, which of the following is admissible? Did Joe have to know of any of these things beforehand?
  - People in the neighborhood think Bill is a violent guy with a quick temper
  - Bill has shot people before
  - Bill has been convicted of felony assault
  - Bill threatened to get Joe before the incident

# Fruitful Possibilities

- Opinion and reputation
  - Knowledge generally not necessary
  - If known, shows apprehension
  - If unknown, shows v's character
  - Rebuttal ltd to victim's character
- Prior bad acts and convictions
  - Knowledge usually necessary
  - If known, shows apprehension
  - If unknown, may be admissible for impeachment or under 404(b)
- Threats
  - If known, shows apprehension
  - If unknown, shows victim's intent or corroborates known threats

# Getting Instructions

- Evidence considered in light most favorable to you!
  - Reverse of nonsuit
- Instruction required if there is “any” evidence of self-defense
  - Reality may not be as rosy as legal standard
  - But, it’s still the lowest threshold for any affirmative defense

# Vary the Pattern (but not too much)

- Submit written request
- You have the right to substance of a requested instruction if supported by the evidence and a correct statement of law
  - Ex., relevance of victim's violent nature or prior violence
- You have the right to have portions of the pattern omitted that are not at issue in the case
  - Ex., aggressor part

# Mental Health Issues

- Capacity
  - Waivers/consents during investigation (ex., *Miranda*)
  - Competency to proceed to trial
  - Waiver of trial rights (ex., right to counsel, guilty pleas)
- Sentencing
- Complete defenses
  - Insanity, involuntary intoxication, unconsciousness
- Partial defenses
  - Voluntary intoxication, diminished capacity

# What Defense?

- Your client, Mary, is charged with assault with a deadly weapon with intent to kill. She tells you:
  - Her boyfriend, Bob, had been beating the stuffing out of her
  - She couldn't take it any more
  - When he feel asleep, she took his gun and shot at his head from nearly point blank range
  - She missed, and he woke up and took the gun (he then beat her senseless, again)

# Effect of Defense

- Diminished capacity “negates” the “specific intent” element of any crime
  - First-degree p & d murder
  - Assaults w/ intent to kill
  - Kidnapping
  - Burglary and felony b & e
  - Larceny and robbery
  - Any attempt
- Defense usually reduces crime to lesser degree
- You can “negate” intent without raising diminished capacity specifically

# Procedural Issues

- Apply *ex parte* for expert funds
- Give notice of intent to use expert testimony
- State may get discovery
  - Reciprocal discovery of testifying expert's materials if you've made discovery request re state's experts
  - State may get testifying expert's materials at trial even if you haven't asked
  - Court can order pre-trial psych. exam of client
- Get client's records from 3d parties (schools, etc.)

# Evidence Issues

- Which of the following can your expert testify to:
  - Mary was not able to think clearly or plan her actions
  - Mary was not able to form the intent to kill
  - Mary told me that she did not intend to kill Bob
  - Mary's actions were consistent with battered woman's syndrome

# Instructions

- Reverse nonsuit standard (like self-defense)
- Mid-level threshold
  - More than “any”
  - Less than “utterly incapable”
- Even if you don’t get instruction, state still has burden to show specific intent
- Elaborate on pattern
  - “Lack of mental capacity” to form specific intent misses the mark