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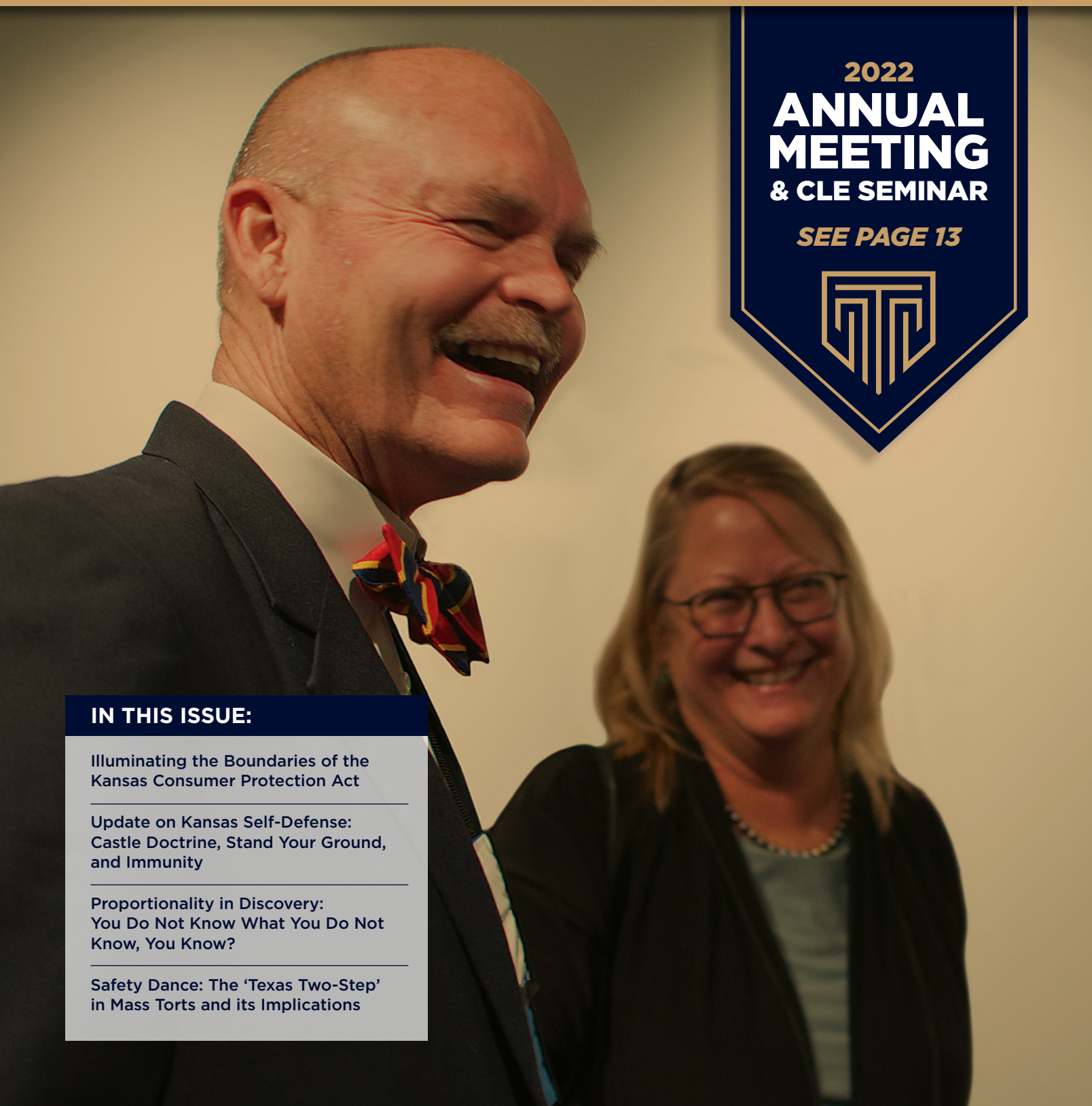

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Update on Kansas Self-Defense: Castle Doctrine, Stand Your Ground, and Immunity

DANIEL E. MONNAT

GINA L. WEHBY

Daniel E. Monnat of Monnat & Spurrier, Chtd., has been a practicing criminal-defense lawyer for the past 46 years in his hometown of Wichita, Kan. His successful jury trials have been featured in the New York Times, the L.A. Times and CBS 48 Hours. Mr. Monnat is currently listed as one of the top 10 Super Lawyers(r) of Kansas and Missouri, and he has been listed in The Best Lawyers(r) in America for over three decades. He is a past two-term president of the Kansas Association of Criminal-Defense Lawyers, a former member of the Board of Directors of the National Association of Criminal Defense Lawyers, an Advocate Eagle member of KTLA and its Journal Editorial Board, and a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the American Board of Criminal Defense Lawyers.

Gina L. Wehby, of Monnat & Spurrier, Chtd., holds a keen interest and enjoyment in legal research and writing. Ms. Wehby graduated from the University of Kansas with a Bachelor's in Political Science, a minor in global and international studies (concentration: global and political social systems), and departmental honors, scholarships, and awards. She also completed courses in law and health law at Saint Louis University School of Law concurrent with master's level courses in public health, health management, and health policy at Saint Louis University College for Public Health & Social Justice, as well as undergraduate pharmacy, politics, and law courses at Drake University. Ms. Wehby has since returned to her hometown of Wichita where she has collaborated with Mr. Monnat in his criminal defense practice as his paralegal for the past four years.

Introduction

"Self-defense." "Castle doctrine." "Stand your ground." Media, social media, and political headlines often comingle these phrases with little care except to sensationalize and provoke public reaction. But these phrases are not synonymous. These complex concepts and the interplay between them shape federal and state constitutional and statutory laws on justified use of force or deadly force in defense of oneself or a third person – abbreviated in this article as "self-defense." Some states even grant statutory immunity from criminal prosecution and/or civil action for using such force. Rather than attempting to tackle the entire spectrum of self-defense law in this article, the following discussion is limited to recent federal and state laws and court decisions. Particularly, it will focus on self-defense immunity in the State of Kansas.

Recent U.S. Supreme Court decisions proclaim a federal constitutional right to self-defense with a firearm or other deadly force, both at home and in public.

Justifiable self-defense using a firearm or other deadly force is a fundamental right under the common law[1] and the federal constitution.[2] "[L]aw-abiding, responsible citizens"[3] of the United States have an individual, inherent fundamental right codified in the Second[4] and Fourteenth Amendments[5] to the United States Constitution to keep and "wear, bear, or carry"[6] firearms for the "core lawful purpose of self-defense"[7] "in case of confrontation."[8] This federal right exists both in our homes[9] – the common law "castle doctrine"[10] – and in public.[11] It is a "right of the whole people, old and young, men, women and boys, and not militia only."[12]

This federal right "is the very *product* of an interest balancing by the people"[13] and "demands our unqualified deference"[14] free from legislative interest balancing or judicial discretion through means-end scrutiny (*e.g.*, strict scrutiny)[15] because a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[16] This "unqualified command"[17] is subject only to "regulation[s] consistent with this Nation's historical tradition" and the constitutional text itself.[18] For example, out of public safety concerns, federal and state governments have historically and traditionally regulated the types of firearms citizens may possess as well as the use of firearms in "sensitive places" such as schools and government buildings,[19] and the Supreme Court of the United States has upheld such laws.[20] Alternatively, the Supreme Court has struck down state laws that restrict the possession and/or carrying by law-abiding citizens of handguns – "the quintessential [American] self-defense weapon"[21] – both in the home[22] and in public.[23]

However, the U.S. Supreme Court has announced there is no *federal* constitutional right to "stand []our ground" when it is possible for us to retreat to complete safety.[24] Instead, when the accused asserts the affirmative defense of self-defense, the accused's choice whether to retreat or use a less deadly means of defense is a circumstance factored into the reasonableness of his or her self-defense decision.[25]

Many state constitutions and statutes also establish self-defense immunity and affirmative defenses for justified use of force or deadly force.

In addition to our federal constitutional rights to self-defense using a firearm or other deadly force, we may also have *state* constitutional and/or statutory rights to use force or deadly force and stand our ground wherever we may be. Our state's stand your ground laws may even grant us a self-defense immunity and an affirmative defense.[26] According to a recent national review, approximately 30 states have stand your ground laws by statute[27] and another eight states have expanded the scope of the castle doctrine through state court decisions and jury instructions.[28] Despite their prevalence, state self-defense and stand-your-ground laws face pushback and clarion calls for repeal because of their de facto unequal and racially biased applications[29] and potential causal link to an increase in gun violence.[30]

The Kansas Constitution and self-defense statutes embrace castle doctrine, stand your ground, and immunity.

Kansans have a state constitutional "right to keep and bear arms for the defense of self, family, and home . . . ."[31] Enacted in 2010, Kansas also has one of the most robust self-defense statutory schemas in the United States, which embraces castle doctrine, stand your ground, and a grant of immunity.[32] This schema provides a statutory self-defense immunity from "arrest, detention in custody and charging or prosecution"[33] for acts of self-defense.[34] As shown below, the Kansas appellate courts have taken great pains over the past decade to create a framework for analysis of self-defense claims under our state's justified-use-of-force laws.

The prosecutor is the first informal gatekeeper for the Kansas self-defense immunity right.

Self-defense "immunity represents a far greater right than any encompassed by an affirmative defense . . . ,"[35] and the prosecutor is the first gatekeeper in this self-defense immunity determination. When making a charging decision,[36] prosecutors informally decide whether the accused's use of force was justified self-defense, and thereby immune. They either decline to prosecute the accused's justified self-defense, or they file criminal charges against the accused alleging an unjustified use of force.[37]

The trial court is the formal gatekeeper for the self-defense immunity right.

If the prosecutor files charges,[38] the accused begins the formal self-defense immunity process by filing an immunity motion.[39] This motion activates the trial court's duty to act in its critical role as a "warrant-like" gatekeeper[40] who halts any prosecution against the accused as soon as the trial court determines, either through an evidentiary immunity hearing or otherwise, that there is no probable cause to believe the accused acted other than in self-defense.[41] The trial court must stop any prosecution of justified self-defense as soon as possible because self-defense immunity in Kansas includes immunity from arrest, detention in custody, charging, criminal prosecution, and civil action.[42] To continue prosecuting justified self-defense causes this immunity to be "effectively lost."[43] This self-defense immunity is so vital that the trial court can even raise the immunity issue *sua sponte* any time before sentence is pronounced.[44]

To make this determination at the immunity hearing, the trial court acts as both finder of fact and finder of law.[45]

Recent Kansas appellate cases charge the trial court with making factual findings on the substantive self-defense issues before deciding the immunity issue.

As the immunity hearing *finder of fact*, the judge is charged with the duty of making distinct factual findings on the record, resolving any conflicts in the evidence.[46] It is insufficient to proper carrying out of the immunity gate-keeping duty for the trial court to merely assert its legal conclusions.[47]

The trial court determines from these factual findings whether there is probable cause to believe the accused's use of force was not justified.

As the immunity hearing *finder of law*, the judge forms legal conclusions supported by these factual findings. The ultimate legal conclusion to be determined is whether the prosecution has shown that a person of ordinary prudence and caution would believe the accused is guilty despite his assertion of self-defense immunity.[48] To do so, the trial court has to delve into substantive self-defense law:

All uses of force and deadly force are subject to a two-part self-defense test.

All uses of force and deadly force are subject to the applicable self-defense test derived directly from the relevant portions of K.S.A. 21-5221 and 21-5222. These statutes include the tests for both use of force[49] and deadly force,[50] but for the sake of brevity the next several paragraphs of this article will be limited to the more commonly at issue two-part test for use of *deadly* force.

For any use of deadly force to be justified it must be directed at the aggressor[51] and, essentially, be proportionate to the anticipated outcome of the aggressor's unlawful use of deadly force.[52]

In early American jurisprudence, the venerable Justice Oliver Wendell Holmes, Jr. explained this balance of interest:

> In order to excuse or to justify the taking of human life, it must appear that the killing was reasonably necessary to protect other interests which for good reasons the law regards as more important, under all the circumstances, than the continued existence of the life in question . . . . In so far as self-defense is concerned, the normal case of another interest is the life of a person other than the one killed. If the protection of that life makes necessary the homicide in question, there can be no doubt that the law must excuse or justify the killing.[53]

Use of deadly force is justified self-defense as determined by a two-part subjective/objective test:

> (1) **The subjective test.** Did the person sincerely and honestly believe it was necessary to use such force because there was imminent danger of death or great bodily harm? and,
>
> (2) **The objective test.** Would a reasonable person in the same circumstances agree the use of deadly force was justified self-defense?[54]

Both parts of the test must be met for use of deadly force to be justified self-defense. Importantly, Kansas law does not require the *actual* infliction of great bodily harm before a person can act in self-defense; they can act to *prevent* imminent harm.[55] This imminent *great bodily harm* can result from as little as a single punch.[56]

Use of deadly force in some circumstances is presumptively objectively reasonable under Kansas castle doctrine.

Kansas codified the castle doctrine under K.S.A. 21-5224. Under this statute entitled "presumptions," albeit with several exceptions,[57] use of deadly force is presumptively reasonable to prevent an aggressor from unlawfully or forcefully entering the accused's dwelling, place of work, or occupied vehicle,[58] or to prevent removal of a person against his will from the same.[59]

Further, using deadly force is not presumptive nor proof positive of an intent to kill.[60] Threatening deadly force by displaying a weapon to create the apprehension that the individual will use deadly force for self-defense does not "constitute use of deadly force."[61] Arming oneself for the purpose of self-defense does not convert the justified use of deadly force into aggravated battery or murder.[62]

There is no duty to retreat or use the least deadly force possible.

The Kansas stand-your-ground statute does not require a person who is not an initial aggressor to use the least deadly form of force or to retreat to safety rather than using force.[63] As Supreme Court Justice, Oliver Wendell Holmes, Jr., explained, an individual experiencing a fatal threat to himself, or another person, cannot be expected to choose the action that seems most reasonable to someone viewing a situation after events have terminated:

> [D]etached reflection cannot be demanded in the presence of an uplifted knife . . . .
> . . . .
> ***It is not a condition of immunity*** that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than not to kill him.[64]

Afterall, hindsight is 20-20.

Even if the accused were the initial aggressor – who is normally barred from immunity – the accused may still be entitled to self-defense immunity if the accused has withdrawn from physical contact with the alleged victim and clearly indicated the accused's disengagement to the alleged victim. But, unlike a person acting solely in defense, an initial aggressor who has withdrawn is further required to show that the accused has also "exhausted every reasonable means to escape such danger other than the use of deadly force."[65]

The prosecutor holds both the burden of production and the burden of persuasion in an immunity hearing.

In an immunity hearing, the prosecutor has the burden of production[66] to produce evidence proving there is probable cause the accused's use of force was not justified.

In an immunity hearing for use of deadly force, the prosecution must produce evidence proving there is probable cause to believe: (1) the accused did not sincerely and honestly believe it was necessary to use deadly force in self-defense[67] and/or (2) a reasonable person, knowing the totality of the circumstances, would not believe it was necessary to use deadly force[68] to prevent imminent death or great bodily harm.[69]

That's right. This is not a mere affirmative defense.[70] The prosecutor cannot will away their burden to disprove the accused's self-defense claim by simply charging an offense with a *mens rea* incompatible with self-defense immunity.[71] The onus is on the prosecutor to produce evidence[72] to prove a negative. The prosecution also has the burden of persuasion[73] to prove there is probable cause for a reasonable person to believe the accused *was not* justified in their use of force or deadly force.[74]

The judge can consider any relevant knowledge to determine whether the prosecution has met its probable cause burden of proof.

The *reasonable person* in the self-defense objective standard is one who knows all the accused knew and sees all the accused saw.[75] In Kansas, where relevant, the reasonable person may even be a reasonable person with PTSD[76] or a reasonable child with similar experiences.[77] The cruel and violent nature of the deceased[78] and general evidence of battered person or child syndrome may be admissible.[79] To make the immunity determination, the trial court can consider any relevant knowledge the accused had about the aggressor. These circumstances may include physical movements of the alleged victim, relevant knowledge about the alleged victim, physical characteristics of both the accused and the alleged victim, and prior experiences with the alleged victim.[80]

Recent Kansas Supreme Court opinions explain that the defendant's testimony alone may meet the reasonable person standard of the self-defense test, even if contradictory evidence exists:

> Even if the only evidence supporting the defendant's theory consists of the defendant's own testimony, which may be contradicted by all other witnesses and by physical evidence, the defendant may have met his or her burden of showing that a reasonable person in his or her circumstances would have perceived the use of deadly force as necessary self defense.[81]

Afterall, it is the accused who is in the best position to know all of the relevant facts:

> [T]he accused presumably has a greater knowledge of the existence or nonexistence of the facts which would call into play the protective shield of the statue and, under these circumstances, should be in a better position than the prosecution to establish the existence of those statutory conditions which entitle him to immunity.[82]

The law apparently agrees with golden rules such as the Northern Cheyenne proverb which wisely cautions:

> ***Do not judge your neighbor until you walk two moons in his moccasins***.[83]

As the primary gatekeeper, the trial court, taking the totality of circumstances into account, should not hesitate to find the prosecutor has failed to meet its probable cause burden of non-justification.[84]

Regardless of the trial judge's denial of immunity at the immunity hearing, the accused's fundamental right to self-defense survives.

Even if the trial court declines to preliminarily grant immunity at the immunity hearing, several more opportunities exist for the treasured right of self-defense to prevail.

Immunity and the affirmative defense of self-defense are "clearly distinct concepts."[85] Thus, regardless of the judge's denial of immunity, the jury retains the right to acquit the accused based on the affirmative defense of self-defense. In Kansas, nothing about the immunity hearing judge's faint probable cause finding of non-justification limits the jury's right to determine at trial that the prosecution has failed to meet its burden of non-justification beyond a reasonable doubt. When the accused asserts this affirmative defense, a jury must conduct the same self-defense analysis as the judge did at the immunity hearing – but this time beyond a reasonable doubt.[86]

Given the importance and fundamental nature of the right of self-defense, Kansas courts encourage that it be recognized by the judge throughout the prosecution. Thus, repeating the request for recognition of immunity may be done throughout pretrial proceedings and certainly as part of all trial and post-trial motions for judgment of acquittal.[87]

Conclusion

Despite what recent media, social media, and political headlines might lead us to believe, asserting self-defense immunity or the affirmative defense of self-defense is not an excuse or "get out of jail free card" for the guilty. Law-abiding citizens have an individual, inherent fundamental constitutional right

to use a firearm or other deadly force for self-defense in the home and in public. We may also have state constitutional and statutory rights to self-defense immunity and the affirmative defense of self-defense. But individuals asserting these rights often face behind-the-scenes uphill battles against de facto unequal or racially discriminatory applications, tunnel-visioned government officials, and popular misunderstandings of castle doctrine, stand your ground, and immunity.

It is the criminal defense lawyer's job to break the spell of the courtroom and remind the prosecutor, the court, the jury, and the public what these complex self-defense concepts really mean. In Kansas, the prosecution may have the burden of proof, but wise and proactive criminal defense counsel will not hesitate to ensure that the prosecutor and the court are in possession of exculpatory information that comprises the totality of the circumstances surrounding the accused's justified use of force or deadly force. Doing so before the prosecutor files charges and before the court hears evidence at any immunity hearing may help safeguard the accused's constitutional right to self-defense and prevent his or her Kansas statutory self-defense immunity rights from being "effectively lost."

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1 ***Brown v. United States***, 256 U.S. 335, 340 (1921).

2 *See generally*, ***Dist. of Columbia v. Heller***, 554 U.S. 570 (2008).

3 ***Heller***, 554 U.S. at 635 (2008).

4 *Id*. at 628-29.

5 ***McDonald v. Chicago***, 561 U.S. 742, 791 (2010).

6 ***Heller***, 554 U.S. at 584 (quoting ***Muscarello v. United States***, 524 U.S. 125, 143 (1998) (Ginsburg, J. dissenting)).

7 ***Heller***, 554 U.S. at 630.

8 *Id.* at 592.

9 *Id.* at 635.

10 Castle doctrine dates to early English common law. In the early 17th century, Sir Edward Coke, the Attorney General of England, articulated "*domus sua cuique est tutissimum*" which means "every man's house is his safest refuge." (***Payton v. New York***, 445 U.S. 573, 596-97 n.44 (1980) (citing ***Semayne v. Gersham*** ("***Semayne's Case***"), 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (K.B. 1603)).

11 ***New York State Rifle & Pistol Ass'n, Inc. v. Bruen***, 597 U.S. _, 142 S.Ct. 2111, 2134-35 (2022).

12 ***Heller***, 554 U.S. at 612 (quoting ***Nunn v. State***, 1 Ga. 243 (1846)).

13 ***NY State Rifle & Pistol Ass'n v. Bruen***, 597 U.S. _, 142 S.Ct. at 2131 (quoting ***Heller***, 554 U.S. at 635) (emphasis in original).

14 ***NY State Rifle & Pistol Ass'n v. Bruen***, 597 U.S. _, 142 S.Ct. at 2131.

15 *Id.* at 2128-30.

16 ***Heller***, 554 U.S. at 634.

17 ***NY State Rifle & Pistol Ass'n v. Bruen***, 597 U.S. _, 142 S.Ct. at 2126 (quoting ***Konigsberg v. State Bar of Cal.***, 366 U.S. 36, 50 n.10 (1961)).

18 ***NY State Rifle & Pistol Ass'n v. Bruen***, 597 U.S. _, 142 S.Ct. at 2126.

19 *Id*. at 2133-34.

20 ***Heller***, 554 U.S. at 626-27.

21 *Id*. at 629.

22 *Id*. at 635.

23 ***NY State Rifle & Pistol Ass'n v. Bruen***, 597 U.S. _, 142 S.Ct. at 2156-57.

24 At the time of this writing, legislation is pending in the 117th U.S. Congress that proposes an amendment to Title 18 of the United States Code, creating a national stand-your-ground affirmative defense. *See* Stand Your Ground Act of 2021, H.R. 6248, 117th Cong. §2730 (2021) (referred to the H. Comm. On the Judiciary, Dec. 13, 2021).

25 *See* ***Brown v. United States***, 256 U.S. at 341 (1921) ("Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt.").

26 *See, e.g.*, K.S.A. 21-5231.

27 As of February of 2022, at least twenty-eight states, including Kansas, and Puerto Rico legislate that there is no duty to retreat from an attacker in any place where the accused is lawfully present. At least ten of those states, including Kansas, have "stand his or her ground" language in their justified-use-of-force statutes. At least sixteen states, including Kansas, have a "presumption of reasonableness" or "presumption of fear," shifting the burden of proof to the prosecution to prove a negative. Self Defense and "Stand Your Ground," Nat'l Conference of State Legislatures, ¶¶3-4, 11 (Feb. 9, 2022), accessed online at: https://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.

28 *Id.* at ¶5.

29 *See generally*, Nat'l Task Force on Stand Your Ground Laws: Final Report and Recommendations, Am. Bar. Ass'n (2015), accessed online at: https://www.americanbar.org/content/dam/aba/administrative/diversity/SYG_Report_Book.pdf; Alexa R. Yakubovich, Michelle Degli Esposti, Brittany C. L. Lange, G. J. Melendez-Torres, Alpa Parmer, Douglas J. Wiebe, and David K. Humphreys, *Effects of Laws Expanding Civilian Rights to Use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review*, 111 Am. Jur. Public Health (1st ed. 2021), accessed online at: https://pubmed.ncbi.nlm.nih.gov/33621113/.

30 *See, e.g.*, ***NY State Rifle & Pistol Ass'n v. Bruen***, 597 U.S. _, 142 S.Ct. at 2163-68 (Breyer, J., dissenting); Michelle Degli Esposti, PhD; Douglas J. Wiebe, PhD; Antonio Gasparrini, PhD; and David K. Humphreys, PhD, *Analysis of 'Stand Your Ground' Self-defense Laws and Statewide Rates of Homicides and Firearm* Homicides, 5 JAMA Network Open 1, 9 (2022), accessed online at: https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789154 ("This cohort study found that the staggered adoption of SYG laws in US states was associated with increases in homicide and firearm homicide rates across the US."); *See also* Guns in Public: Stand Your Ground, Giffords Law Center to Prevent Gun Violence (2022), accessed online at: https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/#:~:text=Stand%20your%20ground%20laws%20allow,of%20violence%20in%20everyday%20conflicts.

31 K.S.A. Const. Bill of Rights, § 4 (2010); *Cf.* ***Heller***, 554 U.S. at 635 (The Second Amendment and its state constitutional counterpart are "the very *product* of an interest balancing by the people . . . it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

32 *See* K.S.A. 21-5222, *et seq.*; K.S.A. 21-5230, *et seq.*

33 K.S.A. 21-5231(a).

34 *See* K.S.A. 21-5220, *et seq.*

35 ***State v. Hardy***, 305 Kan. 1001, 1010 (2017) (citing ***Bunn v. State***, 667 S.E.2d 605 (Ga. 2008)); *See also* ***State v. Collins***, 56 Kan.App.2d 140, 149.

36 "The prosecutor has more control over life, liberty, and reputation than any other person in America." ***State v. Sherman***, 305 Kan. 88, 92 (2016) (quoting Robert H. Jackson, U.S. Attorney Gen., *The Federal Prosecutor, Address Before the Second Annual Conference of the United States Attorneys* (Apr. 1, 1940)). The prosecution has "the power to investigate and to determine who shall be prosecuted and what crimes shall be charged." ***State v. Williamson***, 253 Kan. 163, 165 (1993) (citing ***State v. Dedman***, 230 Kan. 793, 798 (1982)).

37 "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, ***and by exercising discretion to not pursue criminal charges in appropriate* circumstances.**" Std. 3.1-2 (emphasis added); Std. 3-4.1, *et* seq., Crim. Justice Stds for the Prosecution Function, Am. Bar Ass'n (4th ed. 2017).

38 *See* K.S.A. 21-5231(c) ("A prosecutor may commence a criminal prosecution upon a determination of probable cause.").

39 ***State v. Collins,*** 311 Kan. 418, 424 (2020) (citing ***Hardy,*** 305 Kan. at 1011 (2017)).

40 ***Hardy,*** 305 Kan. at 1010, 1011.

41 ***Collins,*** 311 Kan. at 424. An evidentiary hearing on immunity is appropriate

to determine whether there is probable cause to believe the accused's use of deadly force was not justified. *See* ***State v. Ultreras,*** 296 Kan. 828 (2013); ***State v. Dukes***, 59 Kan.App.2d 367, 375 (2021).

42 *See* K.S.A. 21-5222, 21-5231(a).

43 ***Hardy***, 305 Kan. at 1009 (citing ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985)).

44 ***State v. Barlow,*** 303 Kan. 804, 817-19 (2016); ***Hardy,*** 305 Kan. at 1010 (citing ***Bunn v. State,*** 667 S.E.2d 605 (Ga. 2008)).

45 ***Collins***, 311 Kan. at 425 (citing ***Hardy***, 305 Kan. at 1012).

46 ***State v. Thomas***, 311 Kan. 403, 407, 409 (2020).

47 *Id.* at 414.

48 ***State v. Dukes***, 59 Kan.App.2d 367, 375 (2021).

49 K.S.A. 21-5221(a); 21-5222(a).

50 K.S.A. 21-5221(b); 21-5222(a)-(b).

51 ***State v. Betts***, 316 Kan. 191, 514 P.3d 341, 343, 347-48 (Kan. 2022) (holding self-defense immunity only applies to justified use of force against an aggressor, not to use of force resulting in unintended injury to innocent bystanders).

52 ***State v. Qualls,*** 309 Kan. 553, 557 (2019) (citing ***State v. Knox,*** 301 Kan. 671, 678 (2015)) (Under K.S.A. 21-5222, "deadly force can be justified ***only to the extent*** a person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm.") (emphasis added); ***Collins,*** 56 Kan.App.2d at 154 (citing ***State v. Marks,*** 226 Kan. 704, 712 (1979)) ("a person cannot use greater force than is reasonably necessary to resist the attack . . . .").

53 ***Brown v. United States***, 256 U.S. 335, 340 (1921).

54 K.S.A. 21-5222(a), (b).

55 *See* ***Collins,*** 56 Kan.App.2d at 154 (citing ***State v. Marks,*** 226 Kan. 704, 712 (1979)) ("a person cannot use greater force than is reasonably necessary to ***resist*** the attack.") (emphasis added); *Cf.* ***Heller***, 554 U.S. at 592 ("***in case*** of confrontation") (emphasis added).

56 ***State v. Hobbs,*** 301 Kan. 203 (2015). In the right circumstances, a single punch can be "more than slight, trivial, minor, or moderate harm . . . which is likely to be sustained by simple battery." ***Collins,*** 56 Kan.App.2d at 152 (citing ***State v. Green,*** 280 Kan. 758, 765 (2006)).

57 K.S.A. 21-5224(a)-(b).

58 K.S.A. 21-5224(a)(1)(A).

59 K.S.A. 21-5224(a)(1)(B).

60 *See* ***State v. Deal,*** 293 Kan. 872, 880 (2012) ("Although the ***firing of the gun*** and the swinging of the bat were intentional, voluntary acts, each voluntary act resulted in an ***unintentional killing*** because the actors ***did not have the conscious objective to kill or a conscious awareness*** that their actions would result in the killing of a human being.") (emphasis added).

61 ***State v. Dukes***, 59 Kan.App.2d at 377 (2021) (citing K.S.A. 2020 Supp. 21-5221(a)(2)).

62 ***Gourko v. United States***, 153 U.S. 183, 191 (1894).

63 K.S.A. 21-5230; *See also* K.S.A. 21-5222(c).

64 ***Brown,*** 256 U.S. at 343 (emphasis added).

65 K.S.A. 21-5226(c). "When the defendant communicates a withdrawal, he loses his status as the aggressor." ***State v. Humphery***, 1999 WL 35814164, No. 79,270 (Kan. Ct. App. Sept. 24, 1999) (unpublished) (citing ***State v. Rutter***, 252 Kan. 739, 749 (1993)).

66 Also termed "burden of going forward with evidence," the "burden of production" is the burden of producing evidence, satisfactory to the judge, of a particular fact in issue. McCormick on Evidence §336: 692. It is the party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict. Black's Law Dict. (11th ed. 2019), burden of production.

67 ***Collins,*** 56 Kan.App.2d at 147 (citing ***State v. Walters,*** 284 Kan. 1, 16 (2007)).

68 Despite our appellate courts' intermittent, lackadaisical use of "necessary to kill" from the self-defense statute as it existed before 2010, the Kansas Court of Appeals expressly recognized in an unpublished opinion the need for a parallel modification of the self-defense test. ***State v. Nguyen,*** 2015 WL 1782585, No. 110,773, 346 P.3d 1112, (Kan. Ct. App. Apr. 10, 2015) (unpublished).

69 ***Hardy,*** 305 Kan. at 1012; ***Haygood,*** 308 Kan. 1387, 1405 (2018) (citing ***State v. McCollough,*** 293 Kan. 970, 975, 270 P.3d 1142 (2012)); ***State v. Macomber,*** 309 Kan. 907, 916 (2019) (citing cases).

70 ***Hardy,*** 305 Kan. at 1009 (citing ***State v. Evans,*** 51 Kan.App.2d 1043, 1062-64 (2015) (Arnold-Burger, K., dissenting), *rev'd,* 305 Kan. 1072 (2017) (applying ***Hardy,*** 305 Kan. 1001 (2017))); ***Hardy,*** 305 Kan. at 1010 (citing ***Bunn v. State,*** 667 S.E.2d 605 (Ga. 2008)) ("the Kansas Supreme Court held "immunity represents a far greater right than any encompassed by an affirmative defense . . . .").

71 ***State v. Betts***, 316 Kan. 191, 514 P.3d at 345, 347 (Kan. 2022).

72 *See* ***Ultreras,*** 296 Kan. 828, 843-44 (2013); ***Dukes,*** 59 Kan.App.2d at 372 (citing ***State v. Phillips,*** 312 Kan. 643, 655-56, 479 P.3d 176, 189 (Kan. 2021)) ("[T]he State must 'come forward with evidence' to show probable cause 'that the defendant's use of force was not statutorily justified.'").

73 The "burden of persuasion," sometimes less accurately referred to as the "burden of proof," is the burden of persuading the trier of fact that the alleged fact is true. McCormick on Evidence § 336: 692. It is a party's duty to convince the fact-finder to view the facts in a way that favors that party. Black's Law Dict. (11th ed. 2019), burden of persuasion.

74 The Kansas Court of Appeals held that while probable cause is a low threshold for the State to meet, it is not enough in the use-of-force immunity context for the State to prove there is "probable cause that a reasonable person would believe the accused's use of deadly force ***may not have been*** justified." ***Dukes,*** 59 Kan.App.2d at 374 (emphasis added). The ***Dukes*** court expressly "disagree[d]" with the State's two arguments attempting to equate these two phrases— ***"may not have been"*** and ***"was not."*** *Ibid.* The difference between ***"may not have been"*** and ***"was not"*** is not "semantic at best" as the State asserted. *Ibid.*

75 ***State v. Janes,*** 850 P.2d 495, 504 (Wash. 1993); *Cf.* ***State v. Hadley,*** 55 Kan.App.2d 141, 150 (2017) (citing ***State v. Abbott,*** 277 Kan. 161, 164 (2004)) (discussing probable cause determination in the context of search and seizure law); *See also* ***Ha v. State,*** 892 P.2d 184, 196 (Alaska Ct. App. 1995).

76 ***State v. Hundley,*** 236 Kan. 461, 479 (1985) ("The objective test is how a reasonably prudent battered wife would perceive Carl's demeanor."); ***State v. Stewart,*** 243 Kan. 639 (1988) (citing ***State v. Hodges,*** 239 Kan. 63 (1986)).

77 ***In re Matthews,*** 433 B.R. 732 (Bankr. E.D. Wis. 2010), *aff'd sub nom.* (for children, "the reasonableness of children's beliefs is judged in relation to children of like age, intelligence and experiences."); *see also* ***J.D.B. v. North Carolina,*** 564 U.S. 261, 274 (2011) (finding that age, if known to interrogator, is a relevant factor to consider in determining whether a juvenile is in custody for ***Miranda*** purposes) (where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults.").

78 *See* ***Hundley,*** 236 Kan. at 464, 466.

79 *See, e.g.*, ***State v. MacLennan,*** 702 N.W.2d 219, 234 (Minn. 2005); ***Smith v. State,*** 486 S.E.2d 819 (Ga. 1997); ***Janes,*** 850 P.2d 495, 503 (Wash. 1993).

80 ***People v. Goetz,*** 497 N.E.2d 41, 52 (N.Y. 1986) ("Subway Vigilante" case); *See* ***State v. Badgett,*** 167 N.W.2d 680, 688 (Iowa 1969); ***Rodriguez v. State,*** 710 S.W.2d 60, 60-62 (Tex. Ct. App., *en banc,* 1986); ***People v. Brady,*** 22 Cal. App. 5th 1008, 1017 (2018) (referencing ***People v. Humphrey,*** 13 Cal. 4th 1073 (1996)); ***People v. Sotelo-Urena,*** 4 Cal. App. 5th 732 (2016)).

81 ***Qualls,*** 309 Kan. 553, 557-58 (2019) (citing ***Haygood,*** 308 Kan. at 1405-06 (2018)).

82 ***State v. Guenther,*** 740 P.2d 971, 980 (Colo. 1987).

83 *See, e.g.*, Indian Country Today, *Wisdom,* Indi J Public Media (Sept. 13, 2018) (Indigenous peoples multimedia news), accessed online at: https://indiancountrytoday.com/archive/wisdom.

84 *See* ***State v. Barlow,*** 303 Kan. 804, 817-19 (2016); ***Hardy,*** 305 Kan. 1001, 1010 (citing ***Bunn v. State,*** 667 S.E.2d 605 (Ga. 2008)).

85 ***Hardy***, 305 Kan. at 1009.

86 *See* K.S.A 21-5108(c); ***State v. Staten***, 304 Kan. 957 (2016); ***State v. Haygood***, 308 Kan. 1387 (2018); ***State v. Macomber***, 309 Kan. 479 (2019).

87 *See* ***State v. Barlow,*** 303 Kan. 804, 817-19 (2016).