

Aftermath of a Shooting – *Miranda*¹

By Lisa J. Steele

Lisa J. Steele is a criminal defense attorney who represents indigent defendants in the Connecticut and Massachusetts appellate courts. She is a co-chair of the National Association of Criminal Defense Lawyers (NACDL) Forensic Evidence Committee, a director of AWARE, and has lectured and written about self-defense issues for attorneys and the public.

Assume you've just had to use your lawfully-carried firearm in self-defense. The aggressor is on the ground, wounded, perhaps dying. The police ask you to come to the station and make a statement. What do you say, and why?

If you have had a class on the lawful use of deadly force, your instructor probably told you to say as little as possible until you've talked with an attorney. Some of you may have been skeptical thinking "I'll be innocent, what do I have to lose." Sadly, innocence may not help you during a police interrogation.

When you call 911, or when police respond to the scene, your *Miranda* rights have not yet attached; *Miranda* applies to custodial statements. This can start before the officer formally places you under arrest and handcuffs you. If you have any doubts about the situation, ask if you can leave. If the officer says "no, then you are in custody and your *Miranda* rights apply. If you don't ask, your *Miranda* rights would still apply if a reasonable person in your shoes would not think he or she could leave. Of course, you could also ask if you are under arrest, but "can I leave" may be less confrontational and cover a broader range of situations.

If the officer merely asks you to come to the station and has not arrested you, he or she may not have to advise you of your *Miranda* rights. But that doesn't mean that your statement may not lead to your arrest, or your conviction at trial. Before you go to the station, talk with an attorney first. If the police arrest you, talk to an attorney before you talk with them.

Stepping back to the scene or the 911 call for a moment – what should you say?

- Identify yourself.
- Briefly explain what the aggressor did – he threatened you, assaulted you, tried to kidnap or rape you, etc. Do not get into details at this point, you merely want to establish that you were the victim of a crime.
- If the aggressor or his buddies escaped, briefly describe them to the officer.
- If you are wounded or think you might be wounded, ask to go to the hospital.

¹ Copyright 2007, Lisa J. Steele, Bolton, MA. Please contact the author if you want to use this article for training purposes.

This article is not legal advice and does not create an attorney-client relationship between the author and any reader. If you want specific legal advice, you need to hire an attorney.

- If there is any important evidence or witnesses about, point them out to the officer.
- Tell the officer that you want to talk with your lawyer before giving a more complete statement.

Why so brief? Because you are speaking in the immediate aftermath of a very stressful situation. As an instructor may have told you, it is common in self-defense situations for your perceptions and memory to be inaccurate due to psychological and physiological reactions to the stress of the incident. (This is not an essay on psychology, but you may want to look at some of the recommended reading to learn more about this topic.) Thus, you may not perceive or recall key details correctly. If you give specific information like distance, numbers of shots fired, and things you said and did and your answers disagree with the crime scene analysis, then a prosecutor may portray you as a liar. Also, the responding officer may be taking some notes, but he or she is going to also rely on memory when drafting a written report later and may forget things or make good faith mistakes. It is hard to challenge the officer's report later. (Calls to 911 are generally recorded, so there will likely be an accurate record of what you said, and how you said it, later.)

If you are hurt, or even think you might be hurt, or otherwise don't feel well, then ask to be taken to the hospital or for an ambulance to be called. Even if a wound seems minor, you may not be aware of the extent of your injuries given the stress of the incident. Err on the side of caution and ask to go to the hospital if you have any reason to think you are hurt --- particularly if the attacker shot at you, or had a knife or other weapon and was close enough to strike you. However, do not lie to the officer about your condition. If the officer believes that you are exaggerating or lying to buy time or win false sympathy, he or she is going to be very skeptical about anything else you say, including your claim that the aggressor attacked you. A prosecutor may be able to use false or exaggerated claims against you at trial.

Your statements to a medical provider like an EMT or the Emergency Room staff about your medical condition are, under most circumstances, privileged. This means that it is hard for the prosecutor to gain access to those records or to ask the medical staff about them, and it is hard for them to be used against you at trial. However, if there is a police officer accompanying you who overhears statements, he or she might be able to testify about them. (You can ask the officer to give you some privacy, but he or she may not be willing to do so if you have been arrested or are in custody.) Again, this is a time for brevity --- stick to your medical needs and don't discuss the incident. While you are there, you might want to try to have any injuries photographed or measured and described in your records. If you are arrested, your wounds will likely have long healed by the time of trial --- a record of your injuries may be important later.

If you are given a *Miranda* warning, this is one way to think about its contents.

Text of Typical <i>Miranda</i> Warning	Meaning
You have the right to remain silent;	Shut up.
anything you say can and will be used	Shut up – very little that you say can be
against you in a court of law;	used in your favor.

you have the right to an attorney;
if you cannot afford one, one will be
provided to you free of charge.

Who will tell you to shut up until he or she
meets with you.
The government will pay someone to tell
you to shut up until they meet with you.

Oddly, four out of five suspects questioned by police routinely waive these rights and agree to answer the investigator's questions. Investigators are taught how to create a rapport with a suspect, offer sympathy, minimize the importance of the *Miranda* right, and persuade suspects to waive their rights and speak with them.

Dr. Saul Kassin, a Psychology Professor at Williams College, has studied police interrogations. In one study of participants who were either innocent or guilty of a mock theft, innocent participants were much more likely to waive their rights, by a margin of 81% to 36%. Of the innocent participants, 72% said they did so because they were innocent and had nothing to hide. Of those guilty participants, 92% of those who waived their rights said they did so because they didn't want to look suspicious. They hoped to lie persuasively and talk their way out of trouble.

Kassin suggests that innocent people have a naïve faith in the power of their innocence to set them free. They may think that investigators will accurately judge their actions and thoughts. Sadly, studies have shown that law enforcement officials are no better than the rest of us at telling truth from lies.

Police officers see a difference between an *interview* – a neutral conversation intended to get information about a crime before an arrest, and an *interrogation* – a post-arrest confrontation intended to gain a confession. In a self-defense situation, you may be arrested at the scene. In a self-defense situation, you will be admitting to intentionally using deadly force against the aggressor. The legal line between lawful self-defense, voluntary manslaughter, and murder can be very thin; much may depend on what you say to police and your words may be dissected by lawyers, judges, and jurors for years to come. In the immediate aftermath of a shooting, you will not be emotionally prepared to give an accurate statement.

Police believe that innocent suspects are more likely to make spontaneous, direct, and forceful denials of guilt (“You’re wrong! I didn’t do it!”) and to react angrily or hostilely to the accusation itself. A “verbal battle” may ensue, and an innocent suspect is expected to prevail. However, even if an investigator believes the suspect may be innocent, one widespread interrogation manual recommends the officer continue for a time with the assumption that the suspect may be guilty to test the sincerity of the suspect’s denials.

This becomes complicated in the self-defense situation because you have used force on another person, and may feel uncertain about your actions. Your instructor may have talked with you about typical psychological reactions to the aftermath of a shooting and about the “Mark of Cain” syndrome. Your feelings of uncertainty, depression, or guilt over harming another person may cause the officers to react to you as if you were guilty of an assault or homicide instead of acting in lawful self-defense.

Once the officers perceive you as guilty of assaulting or killing the victim (the person you think of as the aggressor), they may be biased against any assertion you make that you were acting in lawful self-defense. This bias will color how the officer perceives your body language and words. It will tend to lead him to put more weight on any

statement you make that is consistent with guilt, and less weight on statements that are consistent with innocence. In another study, Kassin found that participants who were interrogated by an investigator who thought they were guilty fidgeted more, and looked more guilty, regardless of whether they were in fact guilty or innocent.

In this situation, the nature of an interrogation may work against you. One of the more popular police interrogation training manuals advises officers to respond aggressively to a subject's denial of guilt. During questioning, an officer might try to minimize the seriousness of the incident, perhaps suggesting that you shot the victim by accident ("the gun just went off"). You might even agree --- some police officers don't recall firing shots in self-defense situations. Or you may feel guilty or be in denial and not be emotionally ready to admit that you intentionally shot someone. However, when an examination of your firearm shows it to be in perfect working order, the prosecutor may suggest that you lied to the police and that nothing else you say should be trusted. In the alternative, an officer might suggest that you were provoked, or minimize the seriousness of the incident, suggesting that the aggressor was a bad man --- anyone might have shot him. Agree, and you may find the prosecutor using your statement to suggest that you had malice or prejudice towards the aggressor, or were acting as a vigilante, and were not acting in lawful self defense.

"My state of mind was that I hadn't done anything wrong and I felt that only a criminal really needed an attorney, and this was all going to come out in the wash."

--- Peter Reilly

Most people think that it would be difficult, or impossible, to persuade a person to confess to something he or she didn't do. Sadly, this is untrue. Mr. Reilly, the young man quoted above, waived his *Miranda* rights and was subjected to hours of intensive questioning. He falsely confessed to murdering his own mother and was convicted of that crime. Later evidence showed that he could not have possibly been the murderer. After hours of interrogation, five young men falsely confessed to brutally beating and raping a young woman in the Central Park Jogger case from 1989 --- the true culprit remained at large, raping and killing other women before being arrested and convicted in an unrelated case. Thirteen years later, the true culprit confessed, and was matched by DNA to the original assault.

Studies show that the mind does not work like a videotape. We are constantly editing our own memories, to fill in gaps, create consistent narratives, and incorporate after-acquired information. This can pose a particular problem in a self-defense situation. As noted above, studies have shown that police officers involved in self-defense situations have perception errors and memory gaps. After the incident, your mind will try to fill in those gaps, and reconcile those errors, and you are unlikely to be aware of the process.

Kassin and others also suggest that false confessions are more likely if there are gaps in the suspect's memory. He or she may be more willing to agree with police suggestions about what happened in those gaps. Because of the known risk of perception and memory distortions in a self-defense situation, you may be at a higher risk of

agreeing to something that did not, in fact, occur. This does not bode well for you in an interrogation.

In sum:

- A defender in a self-defense situation is at risk for perception and memory errors caused by the stress of the incident and may not accurately recall what occurred.
- In the immediate aftermath of a self-defense situation, the defender may not be emotionally or intellectually ready to give an accurate statement about what he or she recalls.
- Police can presume that innocent suspects are guilty, which will color their view of the suspect's actions and statements.
- Innocent suspects frequently waive their *Miranda* rights, trusting in the power of their innocence.
- When the innocent suspect denies guilt, officers may employ techniques designed to elicit a confession, like lying about evidence, or suggesting it was an accident or the aggressor deserved to be harmed.
- The innocent suspect may agree to these ploys, perhaps due to perception and memory errors caused by the stress of the incident, and falsely undermine their claim of self-defense.

The Interrogation

If you do waive your *Miranda* rights and give a statement, you should be aware of the following:

If you are in Massachusetts or New Hampshire, it is likely that your interrogation will be tape recorded, if not video recorded. In other states, some departments record interrogations, others do not. A recording may help you because it will capture your tone of voice and (if video) your body language. It will also capture everything that was said, not just a summary of the statement. If you do waive your rights, then ask that your statement be recorded from the moment your statement starts until the very end. (If you have hired an attorney, he or she can ask the police about hiring someone to record the statement if they do not have the equipment or personnel.) Your statement will likely be written down, and you will be asked to sign it. Read it very carefully and make certain it accurately includes everything you told police.

If you are outside of Massachusetts, your interrogation might not be recorded. Ask about this. It is also possible that the officer will not write a statement for you to sign and will instead later write a report that will be used in court. Do not agree to this --- you should see and agree to any summary of what you said to the investigator. Otherwise, it will be your word against the interrogator's notes, and you will generally lose that contest.

The officers can lie to you in order to get a confession. They can tell you about non-existent witnesses or non-existent forensics evidence and test results. In most cases, lies will not make your confession invalid. If you believe them, you may say things that aren't true, in hopes of explaining non-existent information. Don't fall for this ploy.

If you do not waive your rights, you need to clearly say that you want an attorney. If you only refer to an attorney, or make a statement that is ambiguous or equivocal, then police do not have to stop questioning you. Thus, remarks like "I think I would like

to talk to a lawyer”, “should I be telling you, or should I talk to an attorney?”, or “It's beginning to sound like I need a lawyer”, or “I guess I'll have to have a lawyer for this” have been held to be insufficient to stop questioning. Clearly say that you want to talk to an attorney and do not answer questions about the incident until you do so. Remember that you can stop asking questions and ask for an attorney at any time during the statement.

Some trainers will advise you to get a good night's sleep before making a statement. Some researchers suggest that sleep will help clear some of the stress hormones and help you process your memories. Indeed, some police departments do not ask their officers for a detailed statement within 24 hours of an officer-involved shooting. Other psychologists warn that memory decreases over time, with the greatest loss within the first nine hours. During that time, your mind may try to put your experience into a consistent narrative, filling in any gaps with logical inferences and information you might glean from the police or others, even if these inferences and after-acquired information is not true and conflict with the crime scene evidence and bystander statements. Because the experts disagree in this area, you should discuss the timing of your statement with your attorney.

If you are offered the opportunity to take the polygraph test, think carefully. There are conflicting studies of the polygraph's ability to accurately distinguish lies from the truth. If you do take the test, a favorable result might persuade police not to charge you, but the result cannot be admitted at trial as evidence of your innocence. Likewise, an unfavorable result cannot be admitted at trial, but it may persuade police to pursue your case. Unfavorable statements that you make during the exam may be used against you at trial. You need to think very hard about the risk you will be taking, and should talk with an attorney before doing so.

Further Reading:

- Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004) (recorded confessions)
Commonwealth v. Mendes, 406 Mass. 201, 212 (1989) (inadmissibility of polygraph)
Connery, *CONVICTING THE INNOCENT* (1996)
Department of Justice, FBI, *VIOLENT ENCOUNTERS: A STUDY OF FELONIOUS ASSAULTS ON OUR NATION'S LAW ENFORCEMENT OFFICERS* (2006)
Davis v. United States, 512 U.S. 452 (2004) (ambiguous requests for counsel)
Forrest, Wadkins, and Miller, *The role of preexisting stress on false confessions*, 3 *JOURNAL OF CREDIBILITY ASSESSMENT AND WITNESS PSYCHOLOGY* 23 (2002)
Frazier v. Cupp, 394 U.S. 731, 739 (1969) (police can lie to obtain confession); see *Commonwealth v. Selby*, 420 Mass. 656, 663 (1995) ("nonexistent incriminatory information" is not enough to make a confession involuntary).
Inbau, et als., *CRIMINAL INTERROGATION AND CONFESSIONS* (4th Ed. 2001) (a leading manual used by police investigators)
Kassin, *On the psychology of confession: Does innocence put innocents at risk?*, 60 *AMERICAN PSYCHOLOGIST* 215 (2005)
Kassin & Fong, *"I'm Innocent!": Effects of training on judgments of truth and deception in the interrogation room*, 23 *LAW & HUMAN BEHAVIOR* 499 (1999).
Kassin, Goldstein, & Savitsky, *Behavioral confirmation in the interrogation room: On the dangers of presuming guilt*, 27 *LAW & HUMAN BEHAVIOR* 187 (2003)

Kassin & Norwick, *Why People Waive their Miranda rights: The power of innocence*, 28
LAW & HUMAN BEHAVIOR 211 (2004)
Leo, *Miranda's Revenge: Police interrogations as a confidence game*, 30 LAW & SOCIETY
REVIEW 259 (1996)