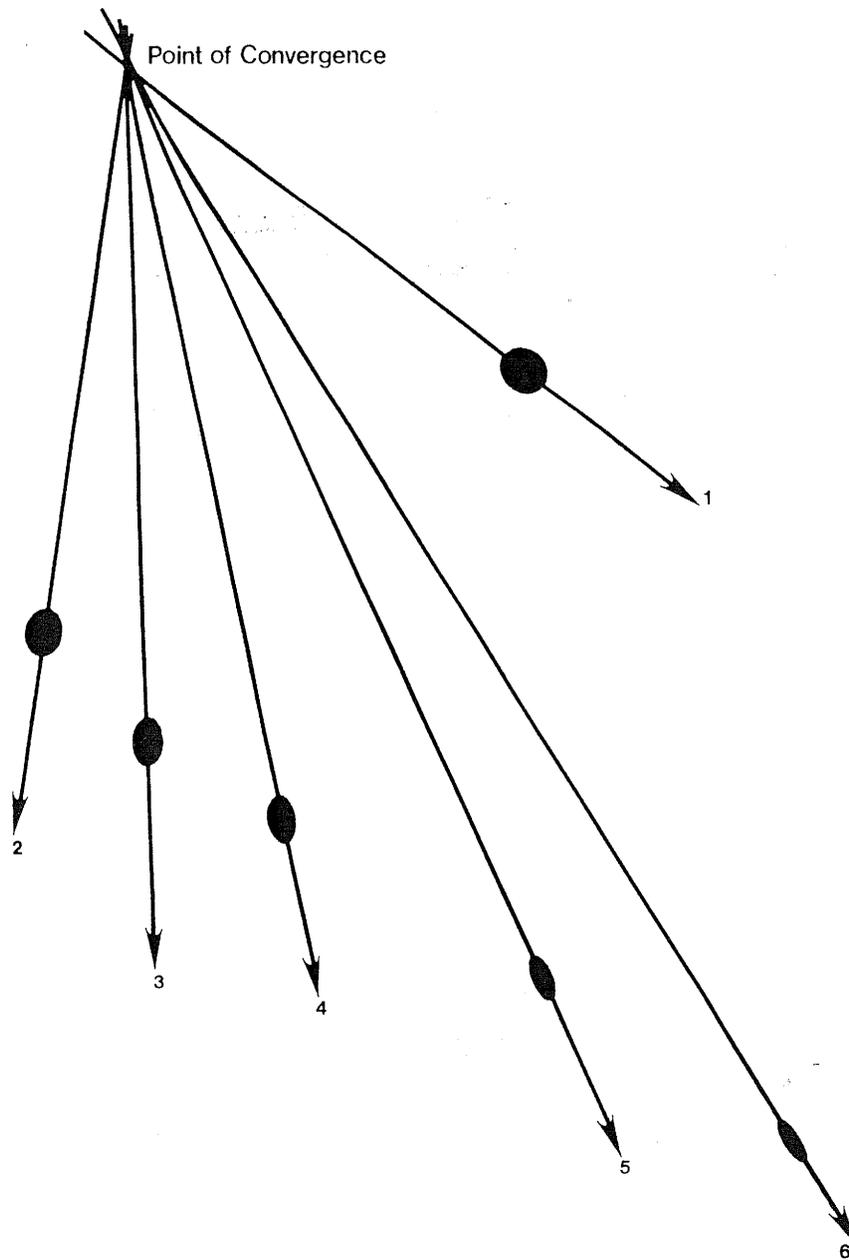


# The Investigation of Homicide in Self Defense

## *Homicide SE Defendendo*

By: John M. Lajoie, CLI



Determination of the point of convergence of bloodstains.

(Printed with permission of Stuart H. James, *Interpretation of Bloodstain Evidence at Crime Scenes*, New York, 1989.)



An abrasion and laceration is obvious under the eye of this defendant charged with first degree murder. Less obvious is severe bruising on his neck which was caused by a strangle-hold. Injuries like these certainly raise the question of self defense and should *always* be visually documented by the defense investigator.

**I**f you took a poll of all the jury eligible people in the United States and asked them if they thought any type of homicide was justifiable or excusable, what percentage of these potential jurors do you think would answer in the affirmative?

You can bet a small fortune that not many would think the killing of one human being by another was justified or excusable no matter *what* the circumstance. And just the thought of an individual who admits killing another human being to be permitted to walk the streets usually sends cold chills up the average, law abiding citizen's backbone. If you're the criminal defense investigator who was just hired to conduct, plan and manage the defense investigation of a defendant charged with first degree murder who says his act was justified by self defense, when he admittedly took another human being's life, many would wholeheartedly agree that you have what appears to be an insurmountable problem. Seemingly, a Mount Everest to climb!

If you have been so hired by defense counsel and have accepted the job and the challenge of investigating the homicide in self defense, it is ultimately your responsibility, as a competent legal investigator, to bring into clear cut focus the true facts that show whether or not the defendant did act in self defense and, if so, that these facts satisfy the self defense element prescribed by law. This is of paramount importance and will mold your attorney-client's defense strategy, investigative plan, trial preparation, jury selection, and the ultimate course of action should the trial go forward.

#### **The Elements: Homicide, murder, manslaughter, self defense defined**

Homicide is the killing of a human being by another human being. Most people associate the word "homicide" with a criminal act because it is commonly linked with murder, and murder is a type of criminal homicide. However, a homicide need not be criminal. There are types of homicide the law does not forbid, and, in some cases, *are not* criminal. One such type is *homicide se defendendo* --- the

homicide in self defense: *the killing of a human being to defend one's own life, body, and in some cases, property, whereby the person killing has no other probable means to escape from an aggressor.*

Any professional investigator who conducts homicide in self defense investigations, needs to have a good working knowledge of the elements of the crime with which the defendant has been charged, usually murder in the first degree, murder in the second degree, or manslaughter. Murder in the first degree is the willful, deliberate, premeditated killing of a human being with malice or aforethought and the taking of a human life during the commission or attempted commission of a felony, be it willful or not. All other types of killing of a human being with malice aforethought are normally deemed to be murder in the second degree. Manslaughter is the unlawful taking of a human life that was not premeditated or deliberate and is absent of malice aforethought.

Most defendants who raise the defense of self defense are usually charged with manslaughter or murder in the second degree and may sometimes be, if the presiding police authority and district attorney's office are occasionally overzealous, subjective, and somewhat blind to the true facts, charged with murder in the first degree. Self defense is not easily understood by the authorities when a dead body has been discovered, or they arrive at the scene of an incident only to find someone bleeding to death from a blunt force trauma, a gunshot, or multiple stab wounds. Therefore, the homicide in self defense investigator should have a profound knowledge of the principles of self defense, a superb working knowledge of its elements, and knowledge of what conditions must exist when a homicide in self defense is justified or excused.

Self defense is simply the protection of one's self or one's property against the aggression of another. The *Model Penal Code* as cited from Black's Law Dictionary defines self defense as "the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force."<sup>1</sup>

### **Elements/conditions of self defense**

The three elements of self defense in homicide cases are as follows and are essential to the investigation:

1. The first element is usually referred to as the *Death/Serious Bodily Injury Belief* element. That

is that the defendant *did believe* that he/she was in immediate danger of death and/or serious bodily injury and the only way to save himself/herself was by the use of deadly force.

2. The second element is usually referred to as the *Retreat or Escape* element. That is that the defendant *did everything* in his/her power to retreat and/or escape and had availed himself/herself of all proper means from physical battle prior to his/her use of deadly force.

3. The third element is commonly referred to as the *Reasonable and Necessary* force element. That is that the defendant *used only* the degree of force that was reasonable and necessary given the circumstances of the situation. If the danger ceases, so does the right to use deadly force.

These three elements *must* be met, for all intents and purposes, by the defendant in order for he or she to be found not guilty and criminally excused from the homicide for which they were charged and tried. Keep in mind, however, if self defense is argued by the defendant, that the burden of proving beyond a reasonable doubt that the defendant **did not** act in self defense is placed squarely in the lap of the prosecution. And if the prosecution fails to meet its burden of proof, then the jury must find the defendant not guilty.<sup>2</sup>

Consequently, it is the legal investigator's duty and responsibility to determine the facts and the conditions that gave rise to the incident and subsequent use of deadly force by the defendant and apply them to the elements so that defense counsel can determine if self defense is a viable and logical defense to raise on behalf of the defendant. How is this accomplished? Make no mistake, it's not a walk in the park. But, it can be done if the conditions are right, the investigator is competent, the investigation is comprehensive and, yes---a little bit of luck is involved.

### **The Investigation: Preliminary Stages and Initial Evaluation**

#### ***Defendant contact, interview/statement, evidence***

Prior to conducting the field investigation, the homicide defense investigator should immediately meet with the attorney-client and the defendant, if possible, to obtain the details of the incident; secure all discovery materials that may have been turned over to the defense; document, photograph, and videotape any injuries, bruising, abrasions, lacerations and any other type of wounds or trauma that are alleged to have occurred to the defendant as a result of the incident. If the de-

defendant was hospitalized after the incident, obtain an authorization and consent to release his/her medical records including any toxicology reports which may exist as a result of laboratory testing.

If a recorded statement that is taken from a defendant in a criminal matter by the representing attorney's hired defense investigator is protected under work product provisions and/or by privilege, or quite possibly, by statute, it is highly recommended that a comprehensive statement be taken from the defendant detailing with great specificity the defendant's background and family history, educational, social and medical history,

*"...Trials are won and lost based upon the quality of the scene investigation and the competence of the investigator..."*

criminal history (if any), all the defendant's activities and movements for a 48 hour period prior to the incident, the incident itself and what gave rise to such incident, the occurrences and happenings subsequent to the incident, the arrest and all police and authoritarian contact with the defendant, and whether or not the defendant gave any statements (be they reduced to writing or not) to **anyone**, and if so, to whom were they given and what did they entail? If such a statement is not protected in the presiding jurisdiction, then **don't** take it. Instead, conduct the same interview with the defendant and reduce the details of the interview to extremely detailed notes. Usually, however, such a statement is protected and, if so, **take it** after obtaining permission from the attorney-client. The statement should be immediately transcribed and reviewed by the defendant

for accuracy and possible corrections. *Never*, under any circumstances, should the defendant be allowed to keep a copy of this statement until final disposition of the case is complete.

Additionally, all physical evidence should be collected from the defendant, such as clothing worn at the time of the incident, jewelry, any trace evidence found on the defendant's body (blood, foreign hair, fingernail scrapings, fibers, etc...). This evidence should be properly stored in evidence bags, labeled and described, and a signature chain of custody label also attached and completed. When comparative analysis can be made by a private, certified forensic laboratory, this evidence should be sent to such lab for analysis, if necessary.

#### **The Document Index System**

Once the homicide defense investigator has obtained the initial discovery documents, completed the initial interview and statement with the defendant, gathered any physical evidence from the defendant, and accumulated all news media accounts of the incident, **all** documents should be indexed and tagged in a four category defense investigation file index system in chronological order. The sequential chronology of the index system allows for effective management of the investigation and provides an unfolding picture of how the incident is alleged to have occurred. Indexing is not something new to criminal defense investigators, but is essential when evaluating the evidence. The four recommended index categories are as follows:

1. **POLICE INVESTIGATION:** this index should include all police reports, written statements taken by police investigators, any statement taken from the defendant by police; warrants, affidavits in support of such warrants; and returns with inventory listing; evidence inventory sheets and lists; the victim's autopsy report and toxicology reports; the medical examiner's report of investigation, if it exists; medical records and EMT reports of the deceased; all crime lab reports and evaluations; crime scene sketches and diagrams prepared by police or the prevailing authority; grand jury minutes and/or probable cause hearing transcripts; and any other report or document generated and produced by the police/state investigation.

2. **DEFENSE INVESTIGATION:** this index should include all documents generated and produced as a result of the defense investigation. Such an index should include the defendant's statement, if taken; witness statements taken by defense investigators; all

newspaper articles accumulated about the incident; the obituary of the deceased; all medical records and EMT reports of the defendant, if medical treatment was necessary; all reports and data generated by defense background investigations on the deceased and all witnesses; all witness, defendant, and the deceased's criminal record reports obtained, all public records accumulated by the defense in support of the investigation; defense scene sketches and diagrams; evidence inventory lists produced by the defense; all forensic pathology and laboratory reports prepared for the defense; all expert opinion reports from those experts hired by the defense; all defense investigative reports, if generated; and any other document of an evidentiary nature produced or obtained in the course of the defense investigation.

3. DEFENSE INVESTIGATIVE NOTES: this index should contain **all** notes of the defense investigator assigned to the case. The notes should be dated and legible and in chronological order.

4. MISCELLANEOUS: this index should contain any other document, letter, invoice, etc....which does not belong in any of three other three indexes.

The four indexes should be continually updated as the investigation progresses and as documents and further discovery is received and reviewed. All documents, statements, reports, etc..should be immediately forwarded to the attorney-client and periodic meetings for review of the file materials and discussion regarding the course of the investigation should be held with the attorney-client and, when warranted, with the defendant.

### **Initial evaluation**

The initial evaluation of the merits of the case, whether or not the possibility exists that the elements of self defense can be met by the defendant with respect to the defendant's actions, and whether or not his/her use of deadly force was justified can and should be made fairly quickly (usually within 48 hours after receiving the investigation). The evaluation is always done in consultation with the attorney-client after the initial review of the file materials and the defendant's interview and/or statements. Once it has been decided by the defense attorney that the preliminary data gathered shows that the three legal elements of self defense have a reasonable chance of success with respect to the defendant's actions which gave rise to his/her use of deadly force, the self defense investigation can proceed accordingly.

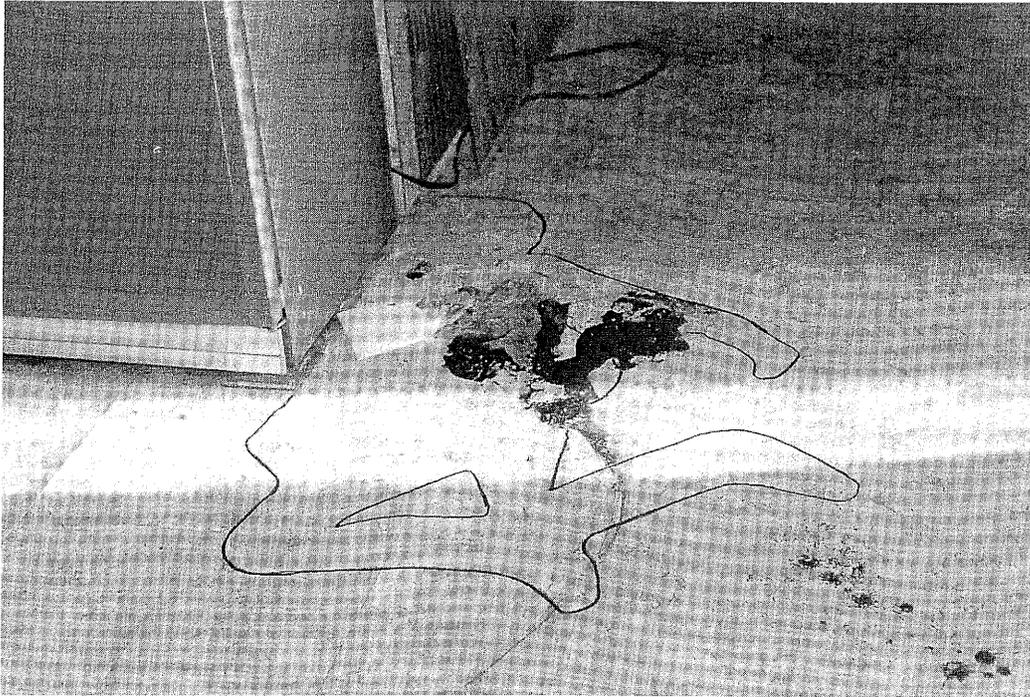
### **Gathering Information: The scene investigation**

After the file material has been thoroughly reviewed and re-reviewed, the defense investigator; preferably accompanied by another investigator; should proceed to the scene of the alleged crime and conduct a comprehensive scene investigation. It cannot be emphasized enough that the scene investigation is absolutely crucial to any homicide investigation and can **make or break** the defense. If access to the scene is denied for any reason, the attorney-client should be notified immediately in order to take appropriate action to obtain access. The scene should be photographed and videotaped before anything is touched. More times than not, however, the scene usually has been cleaned, trampled, weathered (if outside), and sometimes destroyed. Any evidence that might have been overlooked by police detectives is usually contaminated. Nevertheless, the scene should be combed for any physical evidence, especially evidence that is exculpatory. Many times, exculpatory evidence is left behind by biased investigators. All physical evidence gathered at the scene should be appropriately stored, labeled, inventoried and sent out for analysis, if you are directed to do so.

If the scene has been preserved, it can be a gold mine for the homicide defense investigator. Take the necessary time to conduct a thorough scene investigation. All too many times defense investigators have let the preserved scene slip away from them because they rushed through it, assuming the authorities did the job. Do not be fooled by this false sense of security and trust.

As in any alleged crime scene investigation, you must document even the most minute detail. However, this is not just any homicide scene. It is a scene of a justified/excusable homicide from the defense point of view and must be perceived in a different light: **the impossibility of retreat or escape**, the second, and often most difficult, element of self defense to verify.

Consequently, the defense investigator must make note of every room, wall, window, door, lock, piece of furniture, finite object, fence, obstruction, and so on, and their relative position in relation to where the actual use of deadly force took place. Potential escape routes must be determined. Lighting conditions must be documented. Pay close attention to chalk or tape outlines of the position of the deceased at the scene if they are still visible; this is the start-



*The outline of a homicide victim with blood pool and back spatter clearly visible at the alleged crime scene. The deceased was shot at close range with a 12 gauge shotgun.*

ing point. Meticulously draw the scene sketch/diagram pinpointing the location of the objects and structures mentioned above. Make visual illustration of all physical evidence noted; especially the location of body materials and fluids. Take all relevant measurements, especially the distances from all possible escape routes to the area where the deceased's body was found.

Take close up photographs using a 35mm camera, preferably a Nikon F-3 with a Sunpak sidearm pivoting flash, with a 50mm lens. If macros are necessary, use a 4x attachment to the 50 mm lens. Document and photograph all physical evidence such as body materials, especially blood, urine, tissue and hair; as well as impressions such as newly damaged areas, dents and breaks, palm prints and footprints. Make sure that displaced objects are not overlooked. If the scene is in a disarray, perhaps it is because there was a struggle. Take very detailed notes and make sure you also get close-up video. All photographs should be developed at a reputable photo service provider who will guarantee the safety and security of the film while it is being processed. Once developed, all photographs should be placed in categorical order in an album and numbered. Each photograph should be completely described in a photo sequence sheet. Compare the photos taken at the scene by police detectives with the photos taken during the defense scene investigation. Make note if anything is radically different, especially if the scene was

supposed to have been preserved. The video must also be inventoried, labeled and safely stored.

#### **Need for scene expert and blood pattern analysis**

A well tuned and experienced defense homicide investigator knows that the most important physical evidence at any homicide scene is the presence and the location of body fluid stains, particularly human blood. And if, after meticulous observation and study of these stains, it becomes obvious that there is an inordinate amount of dried blood spatters that seem to refute what adverse witnesses have stated to the authorities about the position of the defendant at the time the incident occurred; or, in the absence of any eyewitnesses, these blood spatters appear to corroborate what the defendant alleges to have occurred with respect to his/her inability to escape due to his/her body position at the time deadly force was used, the defense investigator has a duty to recommend that an expert crime scene reconstructionist and physical evidence examiner be hired to conduct a scientific analysis of the scene, *particularly* an expert who is a qualified bloodstain pattern analyst. Bloodstain analysis can speak reams about the particulars of the incident and has made a huge difference in complicated self defense homicide investigations, as well as other types of incidents.

When a blood source is subjected to a force or impact, the resultant blood droplets may strike the target sur-

face (usually a floor and/or a wall) at various impact angles and lines of directionality. A point of convergence is a common point to which bloodstains can be traced. This may be established at the scene with the use of strings taped to the target surface extending through the long axis of the individual bloodstains.<sup>3</sup> Consequently, the position of the defendant *can* be determined by blood spatters that can be typed to the defendant if he/she sustained an impact that drew blood and/or by the blood spatters of the deceased when analyzed with other forensic evidence, such as the location of the deadly force impact on the body of the deceased and how it was sustained. This kind of scientific evidence can be overwhelmingly powerful for the defense if, for instance, it shows that the defendant was cornered in a room with no means of escape.

With the onslaught of new and exciting forensic techniques such as blood pattern analysis, the importance of the alleged crime scene cannot be over emphasized. Trials are won and lost based upon the quality of the

scene investigation and the competence of the investigator. Some investigators are overwhelmed by the scene. Don't let it be that way ---the defendant's life depends on your behavior. And don't forget to bring latex surgical gloves !!

#### **Witness interviews and statements**

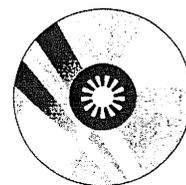
Interviewing witnesses, assessing their credibility, presentation and impression, and taking their statements, is extremely important and should be accomplished as soon as possible after review of all file materials. Most of the homicide defense investigator's time will be consumed by this phase of the investigation, which, arguably, is the most important phase. Preparation is the key to a successful witness interview and statement, so make it a point to adequately prepare prior to the interview. Anyone with any knowledge of the homicide, the defendant, and the deceased should be considered possible witnesses, including police personnel who responded to the scene and conducted the investigation. Medical personnel who responded to the scene and

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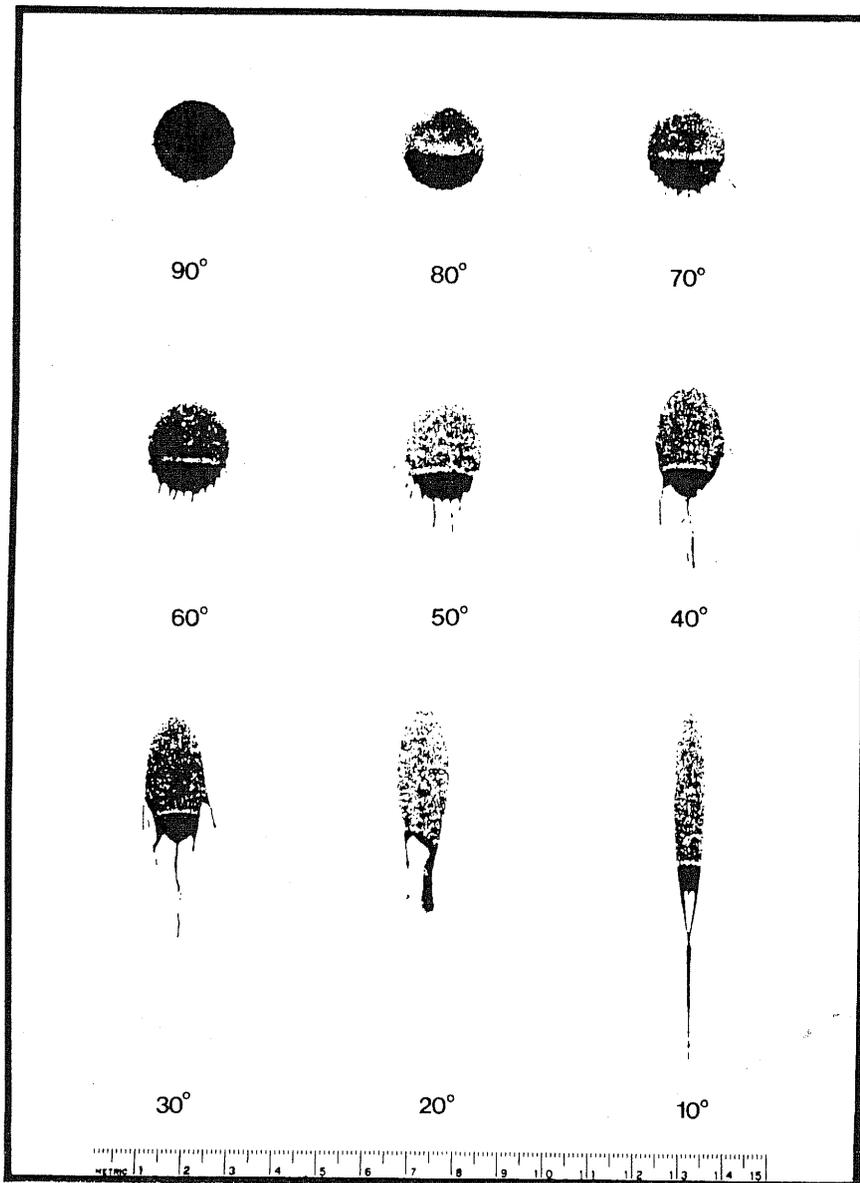
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anyone who subsequently rendered medical care to the deceased and the defendant should also be considered possible witnesses. Family members of the deceased and the defendant are also potential witnesses; but remember, both families are grieving, so be empathetic, polite, yet professional.

A complete list and summary sheet of witnesses should be made containing all their personal and statistical data, their role in the investigation and a brief description of what they did, who they were with, and what they allegedly observed. This witness sheet should be

supplemented and updated as the investigation progresses. The list will aid the defense investigator when conducting the investigation, providing updates to the attorney-client, and preparing for trial.

If there were eyewitnesses to the incident, they are to be considered key witnesses. Keep in mind that not all eyewitnesses may have been interviewed by the investigating authorities. If this is the case, they, as well as other witnesses, must be identified, located, and interviewed. Identification of witnesses can be determined from information contained in the discovery ma-



*Shape of bloodstains relative to decreasing angles of impact of single blood drops falling onto smooth cardboard. (Printed with permission from Stuart James)*

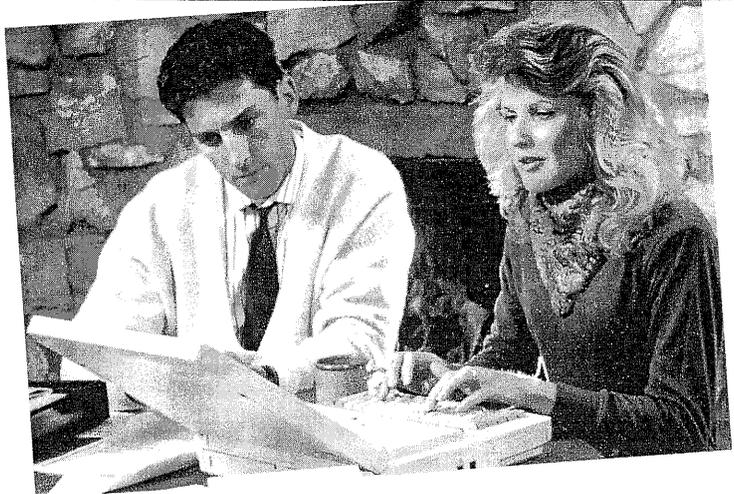
terials, news media accounts, from reporters' notes, through scene area canvasses, by surveillance at or near the scene at roughly the same time of day the incident occurred, and through interviews with witnesses who have already been identified.

The defense investigator should have a definite systematic approach and theory to interviewing any witness, especially eyewitnesses, having knowledge about the incident and having provided statements to the police. The most popular theory and rule of thumb is not to take a statement from a witness who has provided a statement to the police until their police statement(s) has been obtained, reviewed, compared with other statements, highlighted and outlined for inconsistencies, and the observations of the witness contained within the statement have been analyzed with information extracted from the discovery materials, scene investigation, and physical evidence gathered. Do everything necessary to follow the rule, but in some cases it will not be practical nor expedient to do so. In those cases, discuss the matter with defense counsel before any contact is made. Be sure to remember that the defense investigator must always keep in mind the legal elements of self defense as previously discussed and the conditions that must be met in order to satisfy the elements when conducting file reviews prior to interviewing witnesses.

Never assume that the information contained within an existing witness statement taken by police personnel is totally accurate, particularly if the statement is not signed. Most often, these statements have been reduced to typewritten, question and answer or narrative form and are usually done by the police investigator. They almost never contain the exact words of the witness and are sometimes highly suggestive. Audio recorded statements of witnesses by police are not standard practice, but don't rule it out. If they do exist, get copies of the tapes themselves and have them transcribed, if necessary, after listening to the statement. It has been the expe-

rience of many homicide defense investigators that witnesses seldom read the entire police-authored witness statement, if at all, that they are requested to sign after it has been produced. Even though the statement might indicate that the witness read the statement and it is true and correct, don't assume they read it. Witnesses, especially eyewitnesses, are oftentimes emotionally and physically drained from the sequence of events they have experienced and can't wait to leave the police station where witness statements are usually taken. The point is to always be aware of these potential problems in police-authored witness statements and to question the witness with regard to the accuracy of the original statement as to whether or not it is completely true, half

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true, or not at all true; or is it the author's (police) own statement of *what they wanted* the witness to say. Stay alert to this because a potentially damaging statement may be ruled to be spoiled and therefore unusable for impeachment purposes for any one of the above reasons.

When the defense investigator is prepared to meet and interview the witness, serious consideration should be given as to the venue. It is almost always better for the witness to be interviewed out of their own environments and surroundings. The homicide scene is the best location to conduct the interview if it is available, accessible, and provides an environment free from any major distractions. But many times it is not. If the scene is not a likely location to conduct the interview, make every attempt to bring the witness into the defense investigator's (or a neutral) environment. If the witness is reluctant to provide an interview at any other location other than their home or workplace, by all means assent to their request. Don't do anything that will agitate the witness and thereby decrease the odds of establishing a friendly rapport. In fact, when initial contact has been made with the witness, the defense investigator should be friendly yet professional and show a sincere interest in the witness and the witnesses family, house, occupation and employer, hobbies, etc.....Additionally, provide the witness with full identification and a business card. Treat all witnesses with respect, no matter what the circumstance; don't talk down to them; educate them about the situation within reasonable bounds, disclosing as little information as possible, and **above all, do not lie to them !**

The primary purpose of a witness interview is to determine if the individual made pertinent observations and has relevant, material, and useful information to provide. The secondary purpose flows from the first and that is to obtain a defense witness statement *if and only if* the witness does have relevant, material, and useful information to provide; information that will help bring into focus the true facts and conditions of the incident, corroborates or seemingly corroborates the defendant's position on self defense, and brings the defense team closer or to a point where the three legal elements of self defense are met and the conditions at the time of the incident justified the use of deadly force by the defendant.

During the witness interview, five primary concerns must be addressed by the defense investigator and those are what the witness observed through the five human

senses: *sight; hearing; smell; taste; touch*. Do not take the direct approach when initially interviewing the witness. Use the indirect, conversational method and let the witness talk freely about their observations. They are much more likely to provide information when they are being treated friendly, than if they think they are being interrogated. If the witness stops talking before finishing the story, for no apparent reason, use filler encouragement and prompts like "Wow, I certainly appreciate you sharing this important information with me, but did the screaming end at that point? What happened next?" The "and what happened next?" question is one of the most powerful open-ended questions an investigator can employ during the indirect interview to prompt continued conversation of the witness. Take very detailed notes on the content of the witness's observations if the witness is not intimidated by the note taking. It might be a good idea to ask the witness if note taking would be a distraction. More times than not, the witness will allow it.

After the initial conversation has concluded, the witness should be asked if they mind answering some questions. After permission is given, the defense investigator must extract as much information as possible about the sequence of events that led to the incident and about the specifics of the incident itself, keeping the three

***"Keep in mind...if self defense is argued by the defendant that the burden of proving beyond a reasonable doubt that the defendant did not act in self defense is placed squarely in the lap of the prosecution..."***

legal elements of self defense in mind. Some examples of the essential directed question categories that should be asked about are as follows: the physical disparity between the defendant and the deceased; whether or not any threats or arguments occurred and when; physical contact by either person and who initiated the contact if it was made; the physical movements of all individuals and the time it took to make the movements; alcohol and drug use; aggressive behavior and aggressive actions by anyone including the defendant and the deceased; a description of the scene with reference to possible escape routes, location of structures, objects and other persons (photographs and diagrams may be employed and the witness asked to make notations or references on them for visual illustration); description of any weapons, if used, and the complete circumstances of their use; the positions of the defendant and the deceased at all times, especially at the time deadly force was used; all attempts by anyone to avoid physical battle; all conversations, especially any statements made by the defendant and the deceased at the scene which could have been overheard, that could potentially be admissible evidence due to the exceptions in the hearsay evidence rule; lighting and weather conditions; location of the witnesses at the scene and obstructed views; all observations that have significance with respect to conditions warranting the use of deadly force; the general reputation and moral character of the defendant, the deceased, and any key witnesses within the community; prior incidents, threats, assaults, criminal acts, and aggressive or passive behavior of the defendant and the deceased; and, of course, the details and circumstances of how witness statements were taken by police and whether or not they were reviewed, read, and signed by the witness.

It is important to realize that questions will be derived, and should be asked, based upon the responses of the witness. It is imperative that the defense investigator take detailed notes and does not rush the directed interview. It may take hours to complete, so be sure the witness is made aware of the time requirements and is agreeable to them. If it is noted that the responses of the witness are inconsistent with their statement given to police, question them about it in an inconspicuous manner or, depending upon the established rapport with the witness, call them on it and ask them to explain the change. Above all, try to make the exchange as least adversarial as possible.

During the interview, the defense investigator must evaluate the witness for bias and/or prejudice, accu-

racy of recall, interest or lack of interest, frankness or lack of frankness, and any sympathy and/or empathy towards the defendant and the deceased. The investigator must assess the conduct and demeanor, attitude, and character and appearance of the witness in order to form an impression that will ultimately determine if the witness is favorable or unfavorable to the defense.

Based upon the results of the interview, and the evaluation and impression of the witness, the defense investigator may or may not decide to take a formal signed, handwritten statement or recorded interview statement. Whichever method is employed, be sure the statement includes all personal, statistical, occupational and employment data, and, where the witness is a police officer or an expert, include their qualifications as such. The decision to take a statement should be based on whether or not the witness is able to provide relevant, material, and useful information and facts about the incident before, while, or after it occurred. If so, take the statement. If not, make notes and document the information in your file. If the witness refuses to give any kind of interview and/or statement for a variety of possible reasons, it should be duly noted and the attorney-client should be informed. If a witness alleges to know nothing about the incident, a negative statement should be attempted. The negative statement should be a prepared, typewritten, "fill in the blanks" form so that the individual believes such a statement is a matter of routine.<sup>4</sup>

The defense investigator should make every attempt to interview and take statements from police personnel who responded to the incident and conducted any part of the subsequent police investigation. Additionally, any person who rendered medical assistance to either the defendant or the deceased should be contacted and interviewed. Don't be surprised, however, if phone calls are not returned and there is an obvious lack of cooperation. Nevertheless, at all times respect the duty, ethics, and confidentiality issues of police and medical individuals involved and never contact them when they are at home or otherwise not on the job. Sometimes, a sympathetic police officer, EMT, nurse or doctor will provide an interview, almost always "off the record," which will provide valuable information. It is the truly rare occasion when a statement is obtained.

The defense investigator should always include in any witness statement taken all facts, knowledge and information obtained during the indirect and direct witness interview. Repeat the strong, supportive factual

observations of the favorable witness, particularly those which support or satisfy the legal elements of self defense. Emphasize the exaggerations of the unfavorable witness's observations so that, in the end, the witness becomes totally void of credibility.<sup>5</sup> All statements should be completely reviewed, read, and corrected by the witness, if necessary. The witness should initial every correction, sign every page, and affix their signature and the date, time and location of where the statement was taken at the end of the statement below a sentence written by the witness that they have read the entire statement and testify that it is true and correct. The statement should then be copied, indexed in the defense investigation index, and the copy should be sent to the attorney-client.

The homicide defense investigator should not be intimidated by the interview and statement taking process because its importance is too indigenous to the success of the investigation and the assurance that justice prevails. As in every phase of the self defense investigation, be mindful of the legal elements of self defense and apply the facts gathered through the comprehensive witness interview and statement procedure to determine if the conditions existed that will satisfy the elements.

### **Background investigations**

Background investigations can reveal a wealth of information that may be admissible evidence in order to impeach the credibility of a witness or show a pattern of aggressive and/or violent behavior by the deceased. Obtaining this information, if it exists, is also an essential part of the overall self defense investigation. Background investigation should be conducted on all adverse witnesses to attack their character--- that is their reputation for truth and veracity within their own community by the people who are likely to have observed and formed an opinion about the witness. Similarly, information on favorable witnesses should also be gathered to determine their reputation and to assess their credibility. But there is no other background investigation more helpful to the successful defense of the defendant than that investigation of the deceased's background. It is an ugly assignment. No one relishes the opportunity to dig up dirt on an individual who recently died as a result of homicide. Most people find it repulsive, to say the least. Nevertheless, the defense investigator has a duty to the defendant to do all within their means to gather the information necessary in an attempt to prove that the deceased was an individual with a violent history and a pattern of aggressive con-

duct and behavior. If the information reveals no history of aggression or violence, it can be dealt with by the attorney-client accordingly. But if it does, it's powerful evidence and would most certainly be beneficial to the defense strategy.

Background information can be accumulated by searching public records, obtaining criminal, military, educational, vocational, medical, psychological and any other relevant records that may exist on the witness and the deceased and evaluating each record. Friends, family members, associates, fellow employees, supervisors and anyone having knowledge about the deceased should be interviewed, and if appropriate, statements taken. If information is obtained and leads developed that the deceased was trained in the art of war, martial arts, hunting, or any other type of aggressive activity or hobby, be sure to properly document it, so it can be proven. Use the subpoena sparingly as the prosecution will be alerted. Instead, don't hesitate to use the state and federal Freedom of Information Acts (FOIA) to obtain the desired records, if the custodian of such records ignores oral requests. And don't be afraid to appeal any denial of a FOIA written request or a non-responsive custodial denial for fear of a reprisal or otherwise. In short, don't stop until the background questions are satisfactorily answered and all relevant, material, and useful information has been obtained so that all physical, personal, vocational, social, criminal, habitual, and any other personality traits of witnesses and the deceased have been uncovered and assessed.

### **The Autopsy Report And Photographs And Other Medical Records**

The autopsy report and photographs of the deceased generated by the presiding medical examiner's office are critical in the defense evaluation of the cause, mode, and manner of death because important forensic pathological, toxicological, and investigatory information is revealed. The sole purpose of the autopsy is to discover the cause, mode and manner of death of the deceased and for the medical examiner, typically a forensic pathologist, to render a medical opinion after post-mortem examination. For example: cause of death - Exsanguination (loss of blood); mode of death - multiple stab wounds; manner of death - homicide. An autopsy is a forensic external and internal medical examination of a human body after death and is mandated by law in all cases of alleged homicide. It is a postmortem medical *investigation* by a qualified medical expert that allows the medical examiner's office to make scientific medical conclusions based upon the

evidence obtained during the examination. The cause, mode, and manner of death is detected during and after the actual autopsy examination after a review of all sample testing, if testing was completed, and preliminary information about the conditions of incident and scene are revealed to the medical examiner by the investigating authorities. Photographs are almost always taken of the deceased before, during, and after the autopsy and visually documents the internal and external injuries and wounds of the deceased, especially the fatal wound(s).

Besides determining the cause, mode, and manner of death, an autopsy usually can and does reveal the following important investigatory information: type of weapon used; which wound(s) was the fatal wound and how it was inflicted; survival time after the deadly force was used; the direction of the force applied; the positions of the deceased, and at times the defendant, at the time deadly force was applied; antemortem and post-mortem injuries; blood alcohol and drug levels at the time the examination was performed; signs of a

struggle; defense wounds; foreign matter (including foreign blood and other physical evidence) in and upon the body of the deceased; estimated time of death; weight, height, and muscular build of the deceased; a description of the deceased's clothing and any physical evidence on them; as well as other descriptive medical information.

All information contained in the autopsy report should be reviewed along with the photographs by the defense investigator, once again, keeping in mind the three legal elements of self defense. Particular attention should be paid to that information and evidence that tends to show violent or aggressive behavior and conduct of the deceased before and at the time the deadly force was inflicted, such as: signs of a struggle; blood and other foreign matter or physical evidence that has been tested and determined to be that of the defendant; evidence revealing the proximity of the positions of the defendant and deceased at the time deadly force was used; evidence that could show the deceased was an aggressive individual such as tattoos of snakes, ani-

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mals known for aggressive behavior, skull and crossbones, weapons, etc....and clothing and jewelry that associates the deceased with any cult or gang known for violence and aggression; and, especially, blood alcohol level (BAL) and/or blood drug level (BDL) that is documented as positive in the deceased's postmortem toxicology report. Concerning positive BAL's and BDL's, be aware that if the remaining blood of the deceased has been diluted by the introduction of saline solution and /or units of foreign blood by paramedics and/or hospital personnel in attempts to save the deceased's life, the deceased's blood serum is proportionally diluted and may significantly reduce the postmortem BAL and /or BDL positive finding, since it is the blood serum that is tested to determine the existence of alcohol and drugs in blood. In which case, it can reasonably be concluded that the deceased's BAL and/or BDL level was higher at and before the time of the deadly force. Since the use of certain drugs and /or alcohol can cause a person to become aggressive, assaultive and, at times, violent, serious consideration should be given as to whether it would be beneficial to hire experts to evaluate and opine on the deceased's BAL and /or BDL at the time of the incident and what effects, if any, did it have on the deceased's physical and psychological condition at the time of the incident? The same holds true if the defendant required blood and/or saline due to injuries sustained in the incident and subsequently tested positive for alcohol and/or drugs.

All medical records must be obtained from all medical providers who treated the deceased and the defendant after the incident. These records should be reviewed by the defense investigator to determine if the blood was diluted and to further review the extent of the injuries sustained by the deceased and, especially, the defendant. The defendant's medical records may show and prove that the deceased had inflicted serious bodily injury on the defendant, prior to the use of deadly force, that could have caused death. This would help to satisfy the conditional requirement of the first legal element of self defense: that the defendant believed he/she was in imminent danger of death or serious bodily injury and which justified the use of deadly force.

It should be mentioned that the competent homicide defense investigator should have a fair amount of knowledge in basic human anatomy and physiology, forensic pathology, serology, and toxicology so that review of the autopsy report, and any medical record and laboratory report, is easily understood from an investi-

gatory standpoint and eases consultation with any experts hired by the attorney-client.

### **Follow-up Investigation, Reporting, and Pre-Trial Preparation and Support**

Once the self defense homicide investigation has been satisfactorily investigated (it's never completed until the jury begins deliberations, a plea arrangement has been made, excepted, heard, and disposed, or the charges have been dismissed), follow up investigation may be necessary as the trial approaches, assuming it will go forward. The defense investigator will need to follow up with witnesses, take supplementary statements, gather all relevant documents and additional police reports, should they become available; obtain all expert reports, update the file indexes, update the witness summary sheet, consult with experts, continually meet with the attorney-client to provide verbal updates and turn over any defense discovery documents; perhaps meet with the defendant from time to time for further clarifications; update file note; etc....

Reporting is a matter to be ultimately decided by the attorney-client. The rule of thumb for the knowledgeable defense homicide investigator is **not** to provide a written report unless the attorney-client requests it. Most homicide defense attorneys would much rather receive verbal updates and have meetings to discuss the defense investigation rather than receiving a written report that might be discoverable and have to be turned over to the prosecution. Nevertheless, all relevant materials obtained during the course of the investigation should be turned over to the attorney-client. In fact, it is wise to let the attorney review all file indexes and take what he/she wants. If the attorney-client wants a written report, prepare a narrative TO/FROM report that separates the investigation into several, perhaps many, categories. Keep time sequence in mind and stick only to the facts. Opinions are not needed in the factual defense homicide report. Impressions on witnesses interviewed can be contained in the witness summary sheets.

Release no file materials or any information to anyone other than the attorney-client and to whom he/she directs. If a subpoena is received by the defense investigator to produce the defense investigatory file, notify the attorney-client immediately so it can be dealt with in a manner which the legal system may dictate. Under **NO** circumstance is the professional, legal defense investigator to violate, in any way, the confidences of the attorney-client and those of the defendant.

When and if the homicide trial becomes imminent, the attorney-client may request help with the pretrial preparation. The defense investigator should completely support the defense attorney with this pretrial work which could include arranging transportation for witnesses to drawing complex charts and diagrams for potential exhibit. The prosecution's witness list should be combed and any "surprise" witness contacted and interviewed. All witnesses expected to testify for the defense should be re-interviewed, made to feel at ease, and encouraged to make a neat appearance, review their previous statements and put their best foot forward when testifying. Let the attorney-client "prep" the witness, if that is their choice. Never even suggest how the witness should testify. If they ask, *tell them to tell the truth.*

## The Decision

In the event of a trial, the jury will decide whether or not the defendant was justified in the use of deadly force in the act of self defense. The jury *should* be made up of a good cross section of average American citizens; some of which are those same citizen's who think the killing of one human being by another could never be justified. How are they convinced? It is the competent, well oiled homicide defense investigator who can make the difference. If the self defense legal elements are met by the facts uncovered during the defense investigation, it should be an easy decision for them.

No homicide investigation is easy for the legal investigator. In fact, in my opinion, the investigation of homicides are the most complicated and difficult to conduct as there are so many twists and turns along the road and due to the human fact that there are never any winners when the life of another human being has been lost. Be persistent in your search for the truth and put it all together. Climb that mountain, even if you need an oxygen mask to get to the top!

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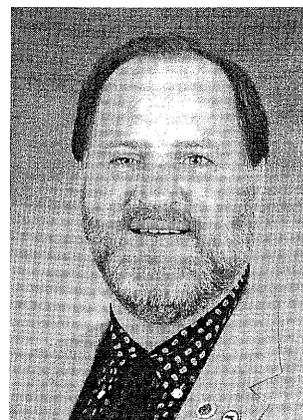
<sup>1</sup>Model Penal Code, Section 3.04, as cited from Blacks Law Dictionary, Sixth Edition (West Publishing Company, 5th Reprint, 1995) p. 947

<sup>2</sup>Commonwealth v. Edmonds, 305 Mass. 496. Commonwealth v. Shaffer, 367 Mass. 508. Commonwealth v. Kendrick, 351 Mass.203

<sup>3</sup>Stuart H. James and William G. Eckert, M.D. Interpretation of Bloodstain Evidence at Crime Scenes. New York: Elsevier Science Publishing Company, Inc., 1989), pp. 23-24.

<sup>4</sup>Anthony M. Golec, CLI, Techniques of Legal Investigation, Third Edition (Illinois: Charles C. Thomas Publisher 1995) pp. 112-144

<sup>5</sup>*Ibid.*, p. 104



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