"I plead the Fifth" – does it mean what you think it means?

Talking points for what "not" to say to the police in the aftermath of a self-defense shooting.

Written by MMSDI Self-Defense Instructor and Attorney, Jim Fleming (July 2013)

I have often talked with our MMSDI (Mid-Minnesota Self Defense, Inc.) students about the dangers of engaging in police investigative interviews in the immediate aftermath of a self-defense, deadly force encounter. The physiological impact of massive amounts of adrenaline, coursing through the circulatory system, coupled with the emotional and psychological impact of such a violent encounter, can leave any individual in a condition which is not at all conducive to logical, rational thought, calm reflection on the nuances created by the questions posed by an experienced professional criminal investigator, or even a clear and accurate recall of events and details which transpired but a short time before such questioning.

Police psychologists from across the country recognize that it takes a human being up to seventy-two hours to come down from the emotional and physiological disorientation resulting from an officer involved shooting incident. That is why department guidelines in the vast majority of departments prevent the questioning of officers involved in deadly force encounters for at least that period of time.

The guidelines adopted by the International Association of Chiefs of Police (IACP) state it this way:

> "4.1. Shootings and other use-of-force incidents can result in heightened physical and emotional reactions for the participants. It is recommended that officers involved in such incidents be given a minimum three days leave, either administrative or through regular days off, in order to marshal their natural coping skills to manage the emotional impact of the incident prior to return to duty or the preparation of a use-of-force or incident report."

To suggest that John or Jane Q. Citizen, suddenly thrust into a fight for their life by a violent criminal attacker, should be required to subject themselves to intensive investigative inquiry immediately after emerging alive from such an incident is patently ridiculous. As a result, we counsel students to politely, but as calmly as possible, advise investigating officers their life had been in danger, that they will answer police questions only in the presence of their attorney, and then - SHUT UP. There are many sound reasons for this advice, too many to go into without losing the focus for this article. But, after thirty years of representing clients charged with all manner of crimes, coupled with a prior decade involved as a law enforcement officer, I have good reasons for giving that advice. I am very serious about it, and I will not be dissuaded from giving it to students at every opportunity.

However, as with all things, the impact of poorly understood legal concepts, and urban legends can distort understanding and pervert human resolve. And in the world of self-defense instruction, such trends tend to flow through the training community on a

regular basis. A popular notion is to advise self-defense students to state they wish to involve their Fifth Amendment Rights or “plead the fifth”, meaning to verbally invoke the protections of the Fifth Amendment to the United States Constitution. The focus of this article is to illustrate, and hopefully educate, the reader as to why the use of that particular language may be a really bad idea.

The Fifth Amendment protects individuals from being forced to incriminate themselves. Incriminating oneself is defined by Black’s law Dictionary as exposing oneself to "an accusation or charge of crime," or as involving oneself "in a criminal prosecution or the danger thereof." The common invocation of the right is often stated as “I respectfully refuse to answer your questions on the grounds that my answers may tend to incriminate me.”

A recent, celebrated example of this occurred when IRS Administrator Lois Lerner invoked the Fifth Amendment during her testimony before the House Oversight and Government Reform Committee during an investigation into alleged IRS misconduct. The debate in that situation is ongoing because after making that statement, Lerner gave a statement professing her innocence, which is being challenged by members of Congress now as a knowing, but implied, waiver of her rights.

The issue comes up because a number of self-defense trainers are currently advising students that they need to “plead the Fifth” in the face of police questioning at the scene of a deadly force encounter. This advice, however, is premised on mis-interpretation of the language taken from a June, 2010 decision handed down by the U.S. Supreme Court, entitled Berghuis v. Thompkins. In this narrow majority (5-4) decision, SCOTUS ruled that unless a suspect unequivocally and verbally states that he is relying on the right to remain silent, his voluntary statements can be used by the State in subsequent criminal proceedings, and the police can continue to talk with, and question him. In other words, merely remaining silent is, on its own, insufficient to imply the suspect has invoked his or her rights. Additionally, a voluntary reply to a question even after a lengthy silence can be construed as implying a waiver of the previously invoked right.

In the Berghuis case, Thompkins was being investigated following the shooting death of another man. During his interrogation, Thompkins did not say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "largely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard." About two hours and 45 minutes into the interrogation, a detective asked him, "Do you believe in God?" Thompkins made eye contact with the detective and said "Yes," as his eyes "welled up with tears." The detective asked him, "Do you pray to God?" Thompkins said "Yes." He then asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes." and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later. Thompkins was convicted at trial, and appealed, seeking among other things to exclude his “confession” to the killing, implied by this exchange.

Are you still interested in fencing with a professional interrogator immediately after a battle to save your life?

The Supreme Court reasoned that, “If an accused makes a statement concerning the right to counsel ‘that is ambiguous or equivocal’ or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her Miranda rights.” Justice Kennedy, speaking for the majority stated, “There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity.” “Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "`right to cut off questioning. He did neither, so he did not invoke his right to remain silent.” The language of the decision is utterly silent on the issue of “pleading the Fifth.”

Look, I am not a big one for dancing carefully around tough issues. Whether we like it or not, we life in a world of realities. For many, confronting them with the reality that they live in a world that can be dangerous, that they can be victimized by violent predatory criminals at any time, in any place and with little or no warning earns us nothing but enmity, contempt and disdain. They force themselves to live in a world of illusion that becomes their reality, until it is stripped from them in the most brutal way possible.

Likewise, the individual who embraces the reality, taking personal responsibility for their own safety, may often be upset by the additional reality that decisions and actions they take in the span of mere seconds, may be examined, picked at, second-guessed and analyzed over the course of months, if not years, after the self-defense incident has ended. At Mid-Minnesota Self Defense, Inc., we train private citizens, (and often cops as well) to prepare for the violent encounter. But, we also train them for the ongoing battle we call “aftermath”. The battle not of guns, knives, clubs or fists. But, the battle of ideas, words, concepts, laws and philosophies that can, and often does, spell the difference between exoneration and conviction.

So, it’s your decision to make. You have survived the encounter. You summon whatever reserves you have left, in the face of immediate police questioning. Do you tell the questioning officer(s) “I wish to remain silent” (and then SHUT UP) Or, do you say, “I refuse to answer your questions on the grounds that my answers may tend to incriminate me in criminal activity.” Because, like it or not, if you make the statement, “I plead the Fifth”, or “I invoke the Fifth,” you will later have the opportunity, sitting at counsel table in a trial, to hear the prosecutor explain to a jury that this is what you meant.
