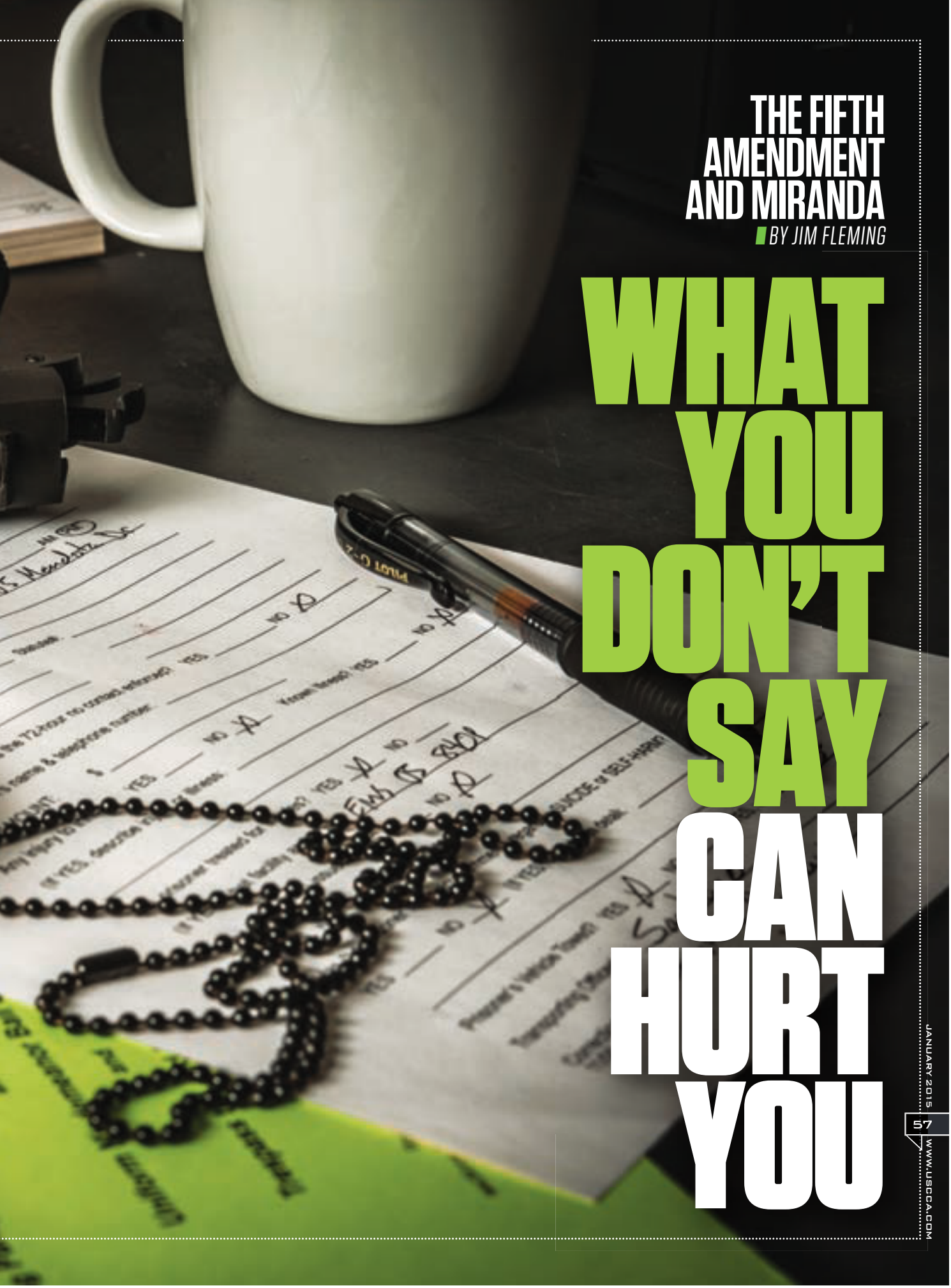
»IN THE IMMEDIATE AFTERMATH OF A SELF-DEFENSE deadly force incident, several things are going to happen. Law enforcement officers will arrive to investigate. Crime scene technicians will arrive to secure the scene, begin photographing that scene, and collect physical evidence. The defender will be taken into custody and transported to a law enforcement facility for questioning. The injured attacker(s) will be transported to a medical facility for treatment, or a deceased attacker will be transported to the local morgue for examination and autopsy. Witnesses to the incident will be identified and questioned.

The evidence collected by law enforcement will be included in reports, which will provide as detailed a picture as possible of what transpired. These reports and images (these days usually digitally captured) will be delivered to the agency responsible for the prosecution of criminal activity in the jurisdiction in which the incident occurred.

The focus of this article is on the questioning involving the defender and the investigating officers, which will take place either at the scene or at the law enforcement facility. In order to do their job, the investigating officers will want to question the defender as soon as possible about what has occurred in order to ascertain the particulars of the defender's involvement. A large number of articles now appear in publications dedicated to citizens' concealed carry and self-defense, discussing the physiological and psychological impacts of a sudden, deadly encounter. These articles spell out the burdens placed upon the defender—burdens which severely challenge the defender's ability to recall events, actions, words, decisions, feelings, and the like. Students of self-defense are counseled over and over about what to say and when to say it, and left with an uncertain admonition: "Do not give a statement until you are in the presence of your lawyer."



THE FIFTH AMENDMENT AND MIRANDA

BY JIM FLEMING

WHAT YOU DON'T SAY CAN HURT YOU

Recent United States Supreme Court decisions highlight the danger of assuming that citizens need not fear making a statement to the police. After all, we were in the right; we were defending our lives, our loved ones, our homes. But the Fifth Amendment privilege to remain silent, as interpreted by the courts, is a very slippery slope and not one to be traversed without an experienced and knowledgeable attorney at your side. Let me explain.

ABSENT AN EXPLICIT REFUSAL TO SPEAK, "ANYTHING [SAID] CAN AND WILL BE USED AGAINST THE DEFENDANT IN A COURT OF LAW."

Most people have heard of the concept of "pleading the Fifth," or of the Miranda warnings given by the police before engaging in interrogation of a suspect. "But hey," you say, "I'm not a suspect, I'm an innocent citizen who exercised my right to self-defense." Come to grips with something right now: someone has been shot and is now badly injured or dead. The police don't know what happened; all they know is that somebody shot this individual. Right now, they do not know if this constitutes a crime, and until they do, you are a suspect. So, let's explore these two concepts and see how they operate in practice.

"Pleading the Fifth" refers to the refusal by a witness, under oath, to testify in a court proceeding on the basis that the testimony might tend to incriminate the witness in a crime, based on the Fifth Amendment to the Constitution which provides that "No person...shall be compelled to be a witness against himself." This protection is applied in state courts under the 14th Amendment. If you are not sworn as a witness in a court proceeding, technically you cannot "plead the Fifth."

In contrast, your right to remain silent while in police custody still issues from the Fifth Amendment, but was created in a 1966 Supreme Court decision, entitled Miranda v. Arizona. In Miranda, the Court ruled that law enforcement officers are required to administer certain warnings to protect an individual who is in custody and subject to questioning from a violation of the Fifth Amendment right against self-incrimination. These warnings are: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you." The Court also ruled that the admission of an elicited incriminating statement from a suspect not informed of these rights violates the Fifth Amendment as well as the Sixth Amendment right to counsel.

The sanction for failing to give a proper Miranda warning prior to engaging in a custodial interrogation is severe. Because the Fifth Amendment protects a person from being "compelled in a criminal case to be a witness against himself," a court will generally suppress a defendant's statements obtained during such an interrogation at trial. The Miranda Court also ruled that if a suspect says he wants a lawyer, the police must stop interrogation or questioning until an attorney is present.

SEEMS RELATIVELY STRAIGHTFORWARD, DOESN'T IT?

Understand what attorneys who practice in the area of criminal defense know quite well: constitutional interpretation is never "carved in stone," and over the course of time, with different personalities on the Court, interpretations can—and often do—change. To illustrate, in 2000, the Court ruled in United States v. Dickerson that the Miranda decision is a constitutional decision, and that since no constitutional rule is unchangeable, the sort of refinements made by later cases are merely a normal part of constitutional law.

First of all, Miranda applies only to "custodial" questioning sessions. If the suspect is not in custody (or a "functional equivalent"), the warnings are not required. If you are sitting in a small interrogation room, at a table with two investigators who are methodically asking questions of you, are you going to know whether you are legally "in custody?" The Court has ruled that "it depends"—sometimes you are, and sometimes you are not.

The Miranda ruling has also been under revision ever since the day it was announced by the Court. In New York v. Quarles in 1984, the Supreme Court announced a "public safety" exception to Miranda. In Quarles, the Court held that although the defendant was in custody when questioned about the location of a firearm prior to receiving his Miranda warnings, "[w]e conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."

In 1985, in Oregon v. Elstad, the Court

created a "voluntary confession" exception, holding that a confession obtained prior to delivery of Miranda warnings did not taint a subsequent confession, even if the suspect is in custody and Miranda warnings are not provided.

More recently, in 2010, the Court ruled in Berghuis v. Thompkins that criminal defendants who have been "Mirandized" (and who have indicated they understand them and have not already waived them) must explicitly state before an interrogation begins that they wish to be silent and not speak to police. If they speak to police about the incident before invoking the Miranda right to remain silent, or afterward at any point during the interrogation or detention, the words they speak may be used against them.

The police interrogated Thompkins about a drive-by shooting. The investigator read Thompkins his rights and received a verbal confirmation of his understanding. During the interrogation, Thompkins was for the most part silent, answering only a few questions either non-verbally or with simple statements such as "Yeah," "No," or "I don't know." After nearly three hours, the detective asked Thompkins whether he believed in and prayed to God. Then he asked whether Thompkins had asked God for forgiveness for "shooting that boy down." Thompkins replied, "Yes."

At trial, his attorney tried unsuccessfully to suppress Thompkins' incriminating response. The trial court denied the motion, ruling that Thompkins did not invoke his right to remain silent and indeed engaged in limited interactions with the police in response to direct questioning. The Court held that the defendant had the option of remaining silent, saying: "Had he wanted to remain silent, he could have said nothing in response or unambiguously invoked his Miranda rights, ending the interrogation." Thus, having been "Mirandized," a suspect may avow explicitly the invocation of these rights, or, alternatively, simply remain [totally] silent. Absent an explicit refusal to speak, "anything [said] can and will be used against the defendant in a court of law."

Most recently, in Salinas v. Texas, the Court further weakened Miranda by ruling that a suspect had to verbally invoke his right to remain silent, even before being Mirandized, and with no attorney present to counsel him. In Salinas, a shooting left two brothers dead. Salinas had been at the house the night before the shooting, and police invited him down to the station where they talked for an hour. They did not arrest him or read him his Miranda warnings. Salinas agreed to give the police his shotgun for testing. The cops then asked whether the gun would match the shells from the scene of the murder. According to the police, Salinas stopped talking, shuffled his feet, bit his lip, and started to tighten up. The prosecutor described this reaction to the jury, and he was convicted.

On appeal, Salinas argued this violated his Fifth Amendment rights: he had remained silent, and the Supreme Court had previously made clear that prosecutors can't bring up a defendant's refusal to answer the state's questions. However, in Salinas, the Court ruled that since Salinas was "free to leave" and did not assert his right to remain silent, he should somehow have known of his need to affirmatively "invoke" his right to not answer questions. He was silent but was questioned anyway, and his physical reactions to the questions were held to be admissible at trial.

If you are thinking, "Great, but this has nothing to do with me. I'm a citizen, and if I have to shoot somebody in self-defense, I will be innocent of any crime, so why do I care?" then you've missed the point. You will not be taken to police headquarters for a medal ceremony; you will be a suspect, and will be perceived that way by the police, just the way Miranda, Quarles, Elstad, Berghuis, and Thompkins were. Just the way George Zimmerman was.

At this juncture, given the recent rulings by the Court, the only reliable approach that can be recommended is for you to state clearly, "I refuse to answer any questions until my attorney is present." Repeat it if you must. And then, for heaven's sake, shut up! Your helpful explanations, your desire to be cooperative with the authorities, your physical reactions and facial expressions to questions have been ruled admissible in court by the highest court of this land. If you say anything at all, it will be deemed a waiver of your right to remain silent. Equally importantly, you will be questioned by professionals who do this for a living, day in and day out. If you are not feeling uncomfortable now, you certainly should be.