

MEMORANDUM¹

TO: Senior Partner
From: 1st Year Associate
Date: September 10, 2002
Re: Sally Grund's Case

QUESTIONS PRESENTED²:

Does a homeowner have a defense to using deadly force upon an intruder under Colo. Rev. Stat. § 18-1-704.5 (2002)?

I. Is a detached garage that is sometimes used for sleeping a “dwelling” under Colo. Rev. Stat. § 18-1-901(3)(g)(2002)?

II. Is it reasonable to believe that an intruder in a homeowner's garage might use any physical force, no matter how slight, against any occupant of the garage if the intruder is facing the homeowner and holding an object in her hand that looks like a knife?

These footnotes are designed to help you understand the parts of this memo. Your memo will not include footnotes.

¹ A memorandum of law is an objective analysis of a legal problem. Your client's facts determine which of the elements of a claim are at issue. You analyze the legal principles that govern your facts and apply those principles to the facts of your case.

Keep in mind that this sample shows only one way to organize and write a memorandum of law. It is not the only way. Our discussions in class and the Wellford samples should give you guidance on alternatives. However, the objective of all memoranda is the same: effectively communicating your analysis and applying it directly to the client's facts.

² The purpose of the questions presented is to pinpoint the issues, both for your benefit and for the reader's. The QP should be phrased in such a way that, even when read alone, they fully reveal the subjects to be addressed by the memo, including both the legal principles and the facts involved. They should not describe people by name; instead describe the relevant characteristics or relationships of people and events.

BRIEF ANSWERS:³

Yes, a homeowner who uses a deadly force against an intruder in her garage can qualify for immunity under § 704.5.

I. Yes, a detached garage can be a dwelling under § 901(3)(g) if it is sometimes used for sleeping. What is at issue is not the configuration of the garage, but rather the manner in which it is used. For purposes of the statutory definition, sleeping in the garage seems to constitute using it for habitation. Furthermore, the usual uses of a residential garage are incidental to and part of the habitation uses of the residence itself, thus the homeowner's garage should qualify as a dwelling.

II. Yes, the homeowner could have reasonably believed that the intruder will use physical force no matter how slight.

A. The words “reasonably believed” in the statute permit the homeowner to use the doctrine of apparent necessity. Under apparent necessity, the homeowner may act upon appearances even if those appearances later prove to be false.

Because the homeowner saw an object that appeared to be a weapon and the

³ The short answers (also sometimes called conclusions) are designed to let the readers know at a glance the results of your research and, therefore, should be quite brief—usually no more than two or three sentences. Nevertheless, they should answer the QP and summarize the reasons for your conclusion or add a necessary qualification to the conclusion.

Here, the short answers start with a “yes” or “no” answer and summarize the reasons. Notice that every numbered QP has a corresponding brief answer. No case names are referenced or cited in the brief answers.

intruder was facing her, she has a strong case for showing she reasonably believed the intruder would use force and she reasonably believed she needed to defend himself. Furthermore, the homeowner has a stronger case than she would under the self-defense statute because § 704.5 requires only that the intruder “might use physical force no matter how slight.”⁴

FACTS:⁵

Our client, Sally Grund, has been arrested in the shooting death of Ashley Agee Hall, an intruder in her garage early in the morning of August 18, 1999. Grund wants to know her options for defenses against the murder charge.⁶

The incident occurred in the Grunds’ garage, which is detached and thirty feet from their house. Grund uses the garage as a place to paint and often sleeps there in the family mini-van when she and her husband have disagreements. The garage contains a sink. Grund also keeps many things in the garage including painting supplies and camping equipment.⁷

⁴ Although the reason and the conclusion can be combined in one sentence, it is often helpful to break apart the reasoning. For example, in conclusion # II. A., the first two sentences provide the applicable rules of law. The next sentence briefly applies the controlling rule to our facts to state the bottom line about the strength of our client’s case. The last sentence clarifies the standard for § 704.5 and could be eliminated if you are tight on space.

⁵ Remember that this is just one acceptable format. However, be flexible because some law offices have different formats (*e.g.*, the statement of facts may precede the questions presented and short answers).

⁶ As a rule, the first information revealed in the statement of facts should be the nature of the case, the relevant dates (the early morning of August 18, 1999), the parties (identify Grund as our client), and the procedural posture (Grund was arrested for murder and wants to examine defenses).

⁷ After the introductory paragraph in the statement of facts, you should provide a description of the relevant facts. A chronological presentation often works, but a topical organization may help readers better grasp the significant

On the night of August 17, Grund was sleeping in the garage because she had argued with her husband earlier that evening. At approximately 12:00 A.M., two local high school students—Ashley Agee and Marilyn Walter—jimmied the side door lock and entered the garage. The girls did not realize Grund was in the garage because they thought their neighbors, the Grunds, were out of town, and they had planned to break into the garage to practice driving the Grunds' mini-van.

Grund woke up when she heard the door of the minivan open. Grund became frightened and pulled out a handgun she kept beside her. She saw a shiny metal object in Ashley's hand and thinking it was a knife of some kind, shot the girl. Grund shot Ashley, killing her instantly. After the shooting, Grund learned that the shiny metal object in Hall's hand was a flashlight.

As you directed, this memo discusses only whether Grund can use an affirmative defense under Colo. Rev. Stat. § 18-1-704.5 (2002).⁸

facts. The second paragraph of this statement of facts starts with a topical organization of the facts relevant to the dwelling issue. Then, it moves on to a chronological presentation.

⁸ A statement of facts should include only facts: no conclusions, no legal principles, and no citations to authority. (Note that the reference to § 18-1-704.5 is an exception. When a case involves a statute, a reference to the relevant statute may be necessary for context, but it is not being used to support a legal proposition as it would in a citation sentence.) Include all legally relevant facts, all facts that you mention elsewhere in the memorandum, and any other necessary background facts. Be careful to support any opinions with their source (*e.g.*, Grund thought it was a knife *v.* it appeared to be a knife). Also, eliminate any unnecessary details (*e.g.*, Grund pulled out her loaded .38 caliber from under the cot).

DISCUSSION:⁹

Under section 704.5 of the Code, the “make-my-day” statute, citizens of Colorado have a “right to expect absolute safety within their own homes” and thus may be immune from prosecution for using deadly force against intruders. Colo. Rev. Stat. § 18-1-704.5 (2002). In order for Grund to assert the “make-my-day” affirmative defense, she first must establish, as a threshold issue, that her detached garage qualifies as a “dwelling” as defined by Colo. Rev. Stat. § 18-1-901(3)(g)(2002). Second, she must show that she “reasonably [believed that the intruder] . . . might use any physical force, no matter how slight. . .” as required by § 18-1-704.5(2)(2002). Grund should be able to satisfy these two requirements of the make-my-day affirmative defense.¹⁰

I. The court would likely find that the detached garage was a dwelling.

Ms. Grund will likely be able to establish a defense under Colo. Rev. Stat. § 18-1-704.5 (2002), because Ms. Grund will be able to prove that the shooting occurred in a dwelling. A “dwelling” is a building that is “used, intended to be used, or usually used by a person for habitation.” Colo. Rev. Stat. § 18-1-901(3)(g) (2002).

⁹ The discussion of authority is the body of the memorandum. You have two goals in this section: reporting the law and applying the law to the problem. This discussion begins with an overview or thesis paragraph. The large-scale organization is developed around the elements in the statute. The small-scale organization is based on an “IRAC” formula. IRAC stands for Issue, Rule, Application, and Conclusion. Although you should not apply any writing “rule” mechanically, IRAC is a helpful organizational tool.

¹⁰ The first paragraph of the discussion of authority is the overview or thesis paragraph. The overview and thesis paragraphs provide context and their main objectives are (1) to signal the structure that is to follow and (2) to tell the readers the thesis or bottom-line of the analysis.

By sleeping in the garage, Ms. Grund used it for habitation. Moreover, that Ms. Grund stored her sleeping bag in the garage, painted in the garage, and used a sink located in the garage shows that the garage was intended to be used for habitation.

11

The Colorado Criminal Code defines a dwelling as a "building which is used, intended to be used, or usually used by a person for habitation." Id. Because the disjunctive "or" is used, Grund need only satisfy one of these requirements. Id.

If sleeping constitutes use for habitation, Grund may be able to satisfy all three requirements. On the night of the shooting, Grund actually used her garage because she was sleeping there. Because she keeps a sleeping bag in the garage Grund intended to use it as a dwelling. Finally, since Grund often sleeps in the garage after disagreements with her husband, it seems she usually uses it for habitation.

In the only Colorado case interpreting the term "dwelling" in the context of the "make-my-day" statute, the focus was on the use test for qualification as a dwelling. People v. Cushinberry, 855 P.2d 18, 19 (Colo. Ct. App. 1992). In Cushinberry, a stairwell landing in a common area of an apartment building was not a dwelling because it was not used as part of the defendant's private apartment. Id. Instead, it was "used by other tenants and their guests." Id. In contrast to

¹¹ If a subsection has more than one argument, it is helpful to begin the discussion with an organizational thesis paragraph.

Cushinberry, Grund's garage was not used by others. The Grunds used it for private habitation purposes such as painting, sleeping and storing camping equipment.

If for some reason the garage does not qualify on its own as a dwelling, based on its use for habitation, it still may qualify as a part of Grund's house. In the context of a burglary statute, an attached garage qualified as a dwelling.

People v. Jiminez, 651 P.2d 395, 396 (Colo. 1982). The court in Jiminez reasoned that "at least some of the usual uses of a residential garage, including the storage of household items, are incidental to and part of the residence itself." Id. Therefore, because Grund uses her garage for the storage of household items, such as a sleeping bag and her painting equipment, her use of the garage is incidental to and part of the habitation uses of her residence.

The language of the Colorado statute and both the Jiminez and the Cushinberry decisions focus on use and not physical structure to define a dwelling. Therefore, the fact that Grund's garage is detached should not be a significant distinction.¹² Because Mrs. Grund's use of the garage is for habitation purposes, it should qualify as a dwelling under Colorado statute.

¹² Note how this Application paragraph incorporates the following components: (1) reference to the precedent by name and a statement whether the client's facts are analogous or distinguishable; (2) repetition of key words from the precedent in the context of the client's facts; and (3) a fact-to-fact comparison of the relevant facts in the precedent with the client's relevant facts.

II. The court would likely find that Ms. Grund had a reasonable belief that the intruder would use force because the Ms. Grund believed the intruder to be holding a knife.

(Discussion Omitted)

CONCLUSION:

Because Ms. Grund will likely be able to establish both that her detached garage qualifies as a dwelling and that she reasonably believed that the intruder might use physical force, she will be able to use the affirmative defense of the make-my-day statute. She will therefore be immune from prosecution for the death of Ashley Agee.