

Defending Self Defense

An Interview with Attorney Mitch Vilos

by Gila Hayes

Utah trial attorney James "Mitch" Vilos, a Network Affiliated Attorney, is author of one of the best selling books on self-defense laws ever presented to a national audience. In *Self-Defense Laws of All 50 States*, Vilos analyzes the self-defense laws of each state, as well as including a number of chapters of more general information for armed citizens seeking knowledge that will keep them on the right side of the law. A trial attorney of over 30 years experience, and a shooting enthusiast who combines his love of firearms with a passion for defending gun rights and self-defense rights, it is hard to imagine an author better qualified to write on this subject.

Vilos spoke with us recently about issues he raises in his book, as well as other topics of current concern. We switch now to the question and answer format to share with you an enjoyable conversation with this knowledgeable advocate.

eJournal: We've all been told that attorneys would starve if limited to defending innocent people. When you defend the client's decision to use a gun, is the gun owner usually entirely innocent or are there generally complicating factors that cast doubt on their innocence?

Vilos: I approach every case as if the gun owner is completely innocent. Sometimes there are complicating factors that lead to arrest and prosecution but you just have to believe your client and resolve all issues in his favor and go after it with a passion. Thus far, that has led to very good results.

I take every case as if we've got a perfect case and the government is stretching it. I not only do self-defense cases, but I defend gun owners and gun dealers in all kinds of legal matters. In many cases, if people are guilty, they are only guilty because the government says so. Many of the cases I defend involve "malum prohibitum" gun-control laws that are only crimes because the government says so. For example, it's not morally wrong to possess gun accessories without a tax stamp that could be assembled into a machine gun or silencer. But doing so is an ugly federal felony.



Above: James "Mitch" Vilos

Many of these laws are not very well publicized and people accidentally and unknowingly fall into hidden legal traps related to the possession and ownership of guns. When I get a case like that, there are many possible defenses. I may approach it from the standpoint that the statute itself could be unconstitutional because it is so vague.

Other possible defenses include the concept of preemption, where a higher law trumps a law passed by a subordinate governmental body. A state statute can trump a conflicting county or city ordinance. In a state like Utah where self-defense rights are important, oftentimes counties and cities will pass ordinances that conflict with state law, and use these ordinances to prosecute citizens. I always look into that. Then there are state statutes that conflict with Federal law and of course there are Federal statutes that conflict with the Constitution. There are Federal regulations that conflict with Federal statutes.

You have to do that analysis. Some statutes involve elements that are pretty easy for a prosecutor to prove. If that is the case, you look deeper and ask if the statute itself is constitutional. I am always looking for a way to represent my client zealously within the bounds of the law, and protect the right to defend oneself and one's family.

eJournal: In cases where complicating factors, like being under the influence at the time of the incident or a

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concurrent violation of other laws cloud the claim of clear-cut self defense, how can a defense attorney separate the issues to protect the right to self defense?

Vilos: Can you give me an example?

eJournal: Let's say while an armed citizen is intoxicated three large thugs attack him and he defends himself using a gun. The question of whether he should have been carrying a gun while intoxicated is raised. How do you keep that from clouding the question of whether he had the right to defend himself?

Vilos: I think it is the attorney's responsibility to try to separate that and to try to show why some of those factors are irrelevant to the case. While you were giving that example, the first case that came to my mind was that case where someone had moved to New York from the South where it had been legal to possess a handgun without registering it. He kept the handgun in his New York apartment, and when his apartment was broken into, he used the handgun to defend himself and then he was arrested for having an illegal gun in his apartment.

There have been many cases, though not cases that I have had, where felons who are not allowed to have a firearm are attacked and somehow they get ahold of a firearm and defend themselves and family members. They are prosecuted for having firearms. In some of those cases the courts have decided that even though they don't have a right to possess a firearm with respect to the law relating to possession by a felon, those laws can be overcome on a theory similar to self defense called "necessity." We can break the law under some conditions if it is necessary.

If, for example, an earthen dam is down below our property, and if there is horrendous flooding and our whole property is going to be completely inundated, we have a legal defense under the theory of necessity to dig a ditch and let some of that water out of the dam so we can save our property.

The same legal principle could apply in some of these self-defense cases, because self defense, according to Supreme Court Justice Alito who wrote the *McDonald v. Chicago* opinion, is an inalienable or a fundamental right.

The right to defend your life is a right that should take priority over a gun control law that says that you can't have a weapon because of some previous charge. Of course, prosecutors don't always agree with that. It's hard for attorneys in general practice to be able to be



Above: Network President Marty Hayes (left) thumbs through Self-Defense Laws of All 50 States while the authors, Evan Vilos (center) and Mitch Vilos (right), point him to the good parts.

aware of those kinds of potential defenses because they are just so unusual. Unless you do a lot of research into weaponry and self defense you just don't come across those kinds of theories. Focusing my practice on those areas, gives me a strength.

eJournal: In addition, self defense is something for which you have your own personal passion, and I don't think fervor can be replaced by any amount of education.

Vilos: You go after it! You have the gravel in your guts, the spit in your eye, the fire in the belly and you go after anything it takes to defend a gun owner or a gun dealer. Some of the nit-picky violations that the Bureau of Alcohol, Tobacco and Firearms uses to take away gun dealer's licenses can be so ridiculous. As someone who appreciates the gun dealer as a conduit through which the citizen can exercise his right to keep and bear arms, it makes me want to protect these people and preserve their business. I guess I have a tendency to go after these cases with a passion.

In some of these cases, we've made some political moves, too. We had a case where a gun dealer was charged with 19 state felonies. We asked the Legislature to look at the law and even the Democrats felt that the penalties were excessive. The Legislature reduced the crimes from felonies to misdemeanors. So what had been 19 felonies suddenly became 19 misdemeanors!

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eJournal: Were you able to get that legislative decision applied retroactively?

Vilos: Yes! Yes! I guess the prosecutor didn't want to go after it, because that would have been another fight. We are lucky in Utah, for the most part, because a lot of the prosecutors understand the importance of the right to keep and bear arms.

When you give them a good reasons to resolve a case, a lot of times they will see the case the way you do and realize that even though the gun owner or dealer made a mistake, it wasn't as bad as originally thought. We work it out. We try to make it a win-win. The prosecutor gets some retribution and the gun owner doesn't lose his right to keep and bear arms or the dealer doesn't lose his business.

eJournal: Getting back to defending self defense: in your experience with gun-related cases do defendants usually go beyond what the law allows them to do in self defense, perhaps not understanding what is allowed to counter various levels of danger? When an armed self-defense case ends up in court, where have normally law-abiding people gone astray?

Vilos: In our *Utah Gun Laws* book, I changed my first chapter to include a lot of the mistakes that gun owners make. The most serious mistake relates to the law of self defense and I see a lot of those. People don't realize that if they are involved in any way in either provoking, initiating or escalating the conflict they could either totally lose the right to self defense, or they are involved in a situation that is so factually complicated that police almost always arrest and prosecutors almost always prosecute so that it's up to the jury to decide what really happened. I do a lot of those!

If you have a temper and you are carrying a gun, that's a bad combination! Sometimes it starts out as a verbal argument and it escalates. For example, the gun owner rationalizes that during road rage, the other person's car is a deadly weapon so he sticks his gun out the window, deadly weapon for deadly weapon. The next thing you know, he is arrested for brandishing or aggravated assault.

eJournal: What can you, the attorney, do in defending this person who admittedly did go over the line and made some bad decisions? How can you mitigate that?

Vilos: The facts are important. A very thorough investigation into the facts helps. I had a high-profile

client who was at a party where the neighbors complained that the partiers were using parking places that belonged to the neighbors. So this client sent one of his employees out to appease these complaining neighbors. The employee was a little computer geek and the neighbors were football player-types, skinheads, muscle-bound apes.

These goons started beating up on the computer geek. The employer went out and told them to get off of him or he was going to shoot them. He was charged with aggravated assault. When we investigated the case very thoroughly, we found out that the neighbors were really trespassers and that they initiated the conflict. They were so big and strong and there were so many of them, that they could have killed the little guy. Once we gathered all the facts together and presented it to the prosecutor, he dropped the case. It wasn't even a plea bargain. It was a total dismissal.

eJournal: So you got the train stopped before it ever left the station!

Vilos: Good lawyering sometimes happens long before any kind of a hearing, or before charges are brought. That is why I like your organization because you provide your members with funding whereby they can get an attorney immediately. A lot of times, the charges aren't even brought if the attorney investigates the case thoroughly before it hits the news media. Once it gets to the media, the prosecutor may feel like he has to prosecute, like in the Duke lacrosse case.

eJournal: That strategy has been one of our guiding principles in how the Network is set up to serve members. It is nice to hear that your experience parallels our priorities.

Vilos: It is so important to be able to hire and retain an attorney. People don't realize how expensive it can be. If the attorney is going to try a murder or attempted murder case the way we tried the case I wrote about in Chapter 12 where we practiced and rewrote the opening statement 11 times, you are looking at a potential \$250,000 fee by the time the jury decides the case. That does not include the appeal. Look at a case like Mr. Zimmerman's: that could involve a million dollars of the attorney's time.

eJournal: It is hard to know how someone like him can come up with that kind of money. It will be a very bad time for him.

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Vilos: That's why I encourage anyone who carries a weapon for self defense to be a participant in a plan like yours.

eJournal: Well, thank you. Now, turning to another topic from your book, in the *Thumbs Down* analyses, it seemed that a leading problem concerned Armed Defender/Unarmed Assailant or Assailants. Sadly, the examples you cited are not unusual. What is a poor armed citizen to do, give up and be victimized?

Vilos: Later on in the book, in Chapter 11, I talk about the unarmed assailant and perception and reaction time. We used actual examples where the gun owner never showed his gun, but because of his demeanor and where he had his hands, the predators realized that the gun owner was probably armed although they didn't see anything that would allow them to describe a weapon. They got the point and left. That is one way to do it. You only want to escalate force as force is used against you.

You don't want to just go to guns immediately because then you can be charged with attempted murder, aggravated assault, or murder if things go bad. You might be able to avoid the conflict by simply taking a posture like the two guys did in Chapter 11. The predator gets the point that there is probably a safer place to work.

eJournal: Now, suppose that the predator isn't that bright and our armed citizen does need to bring out a gun or even shoot to avoid being harmed. What steps does the defense attorney take to show why it was necessary to use a gun to defend against someone who does not have a knife or a gun?

Vilos: Then you have a situation like Zimmerman's. You hope he is going to have a wound or something like that to show that the person he was defending against was violent, although the law doesn't technically require you to be struck first. That's a tough situation. Fortunately, John Lott's statistics show that if predators believe you are armed, 90% of the time they are going to leave without you firing a shot.

There are other strategies! You can run, you can use a Taser®, you can use pepper spray. There are other options if you have those means with you, but not too many people carry anything other than a concealed handgun now days.

eJournal: You've just made a strong argument for carrying around what some have called layered

defenses, to give greater situational flexibility. I think you make a very good point.

Vilos: There are times that I carry a Taser®. I would much rather get myself out of a situation with a Taser if I can, because the final results are usually not going to be as drastic as if I used a handgun. When you read about civil rights lawsuits and Tasers, most of those are because police are using multiple Tasers and are using them in violation of their police training. I am not aware of any deaths in the use of the C2 (civilian model) Taser.



eJournal: This discussion of alternative means of getting out of conflict also reminds me of a few pages in your book in which you write about how willing you are to apologize to avoid a fight even when not at fault. Seems that is something more of us should practice, too! Still, I have to ask, is there a time for apologies and a time to quit apologizing? As the attorney defending someone who has acted in self defense, would you want them to publicly express sorrow or contrition or might that be misconstrued as trying to ease their guilt?

Vilos: Or worse, as an admission. The apology hopefully comes before the escalation! The distinction is this: usually when you end up with a case involving public outcry for your hide, it is because you've mistaken someone for a career criminal or predator. If the person you believe is threatening you has innocent intent and you apologize, often times that will work to de-escalate.

This is something that we see as we research the cases and as we handle these cases. I have had many aggravated assault cases where the alleged victim really was innocent, but the defendant perceived him as a threat. I think in many of those cases had the client/defendant tried to deescalate by apologizing, it would have turned out better; there would have been no crime.

If the person really is a predator, that's not going to work and at some point you may have to use deadly force. I tell you, even under those circumstances, if you use deadly force against someone who doesn't have a deadly weapon, there is a high probability that you are going to be arrested and prosecuted. That's what we point out in Chapter 7, the *Thumbs Down* factors.

eJournal: That is very instructive. Verbal de-escalation is not something practiced as much as draw and fire, for example, yet perhaps we should give it far greater

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emphasis, so long as it is kept in the right context. Back to apologies, though, during his bond hearing, Zimmerman attempted to express sympathy to Martin's parents, and the media was quick to call it an apology. I wonder if his words won't be used in suggesting that he feels guilty for what he did.

Vilos: Prosecutors will try to use any statement the client makes, whether it is before the prosecution, at the bail hearing or in an immunity or preliminary hearing. It is very dangerous to have your client testify in those types of hearings. Most of the time you don't yet know what all of the evidence is, and your client may say something that can be used against him. I've seen attorneys put the client on the stand and later wished they hadn't.

You always take a chance; it is a big chess game for the attorney from the time he is retained to the time the case is resolved. You only learn through your experience, through trial and error. Some of the decisions you have to make as a trial lawyer are very difficult.

eJournal: In light of your dual experience defending people against criminal charges, but also as a personal injury litigator, can you help us understand how the allegations and arguments differ as a case proceeds through criminal charges and later in civil court when the client is being sued for damages? Are there big differences in how facts are presented and how you counter the allegations?

Vilos: The difference between civil and criminal in Utah is pretty simple now. If the assailant is committing any crime at all, that person doesn't have a right to bring a lawsuit, period. Utah has one of the strongest civil immunity statutes in the nation, bar none.

I usually see the civil cases from the other end. As a personal injury lawyer, I've handled gun cases involving injuries. I'm usually the one bringing the lawsuit, because of excessive use of force or issues like that.

eJournal: Most people don't have much idea how litigation may play out, especially if we don't live in a state with so strong a civil immunity protection as yours.

Vilos: I don't think the evidence is that much different, except that in a criminal case, the prosecutor has to allege that what you did was intentional. In a civil case, if you want to keep the insurance in the case, your allegation had better not be that your defendant acted

intentionally. Once you allege that your defendant acted intentionally, you eliminate any possibility of recovering insurance.

Most insurance policies exclude any criminal intentional acts. When you take a case that involves a suit for damages, if the plaintiff's attorney understands what he is doing he is going to allege that the defendant acted negligently in using excessive force in defending himself and caused serious injuries to the attorney's client who is suing for damages.

eJournal: Of course, so getting into the insurance company's deep pockets is the entire reason for the lawsuit, isn't it?

Vilos: Most criminal defendants don't have a whole lot of money. You can't get blood out of a turnip goes the old saying. So as a plaintiff's attorney, you need to turn to whatever source might possibly reimburse your client for his or her injuries. That's where insurance coverage comes in. But most liability insurance policies have an exclusion that says they won't pay for the intentional acts of their insured. So you have to be careful not to claim the person who injured your client intended to. That's different than the duty of a prosecutor. If he doesn't prove intent, then he cannot get a conviction for a crime, because most serious crimes require criminal intent.

There is one strategy for a criminal defense related to that, though not many criminal defense attorneys know it. Let's say you have a serious injury. We had a case down here—not my case, but I watched it for three days—and in this case, coincidentally, we had a neighborhood watch shooting. A young father, who thought that his daughter was being stalked, went after what turned out to be the neighborhood watch person who had a gun as well. So both of them had guns, and the father won the gunfight and cut the spinal cord of the neighborhood watch volunteer.

The prosecutor brought a case for attempted murder, which is an intentional act. I thought it was a stretch, but the jury did convict him of attempted murder. If I had been defending this case, I would have asked the prosecutor to consider the needs of the victim, who had a very serious medical condition as a result of paralysis. I would try to prevail upon the prosecutor not to allege intent, to try to resolve this case short of a conviction for a serious crime like that. Maybe attempted negligent homicide or something like that, so that the insurance company would come in and cover this guy's injuries. If

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the prosecutor is trying to do something for the victim, why not do something for the victim that will really make a difference?

It is another tool in the quiver of the criminal defense attorney to try to prevail on the prosecutor to back off so the victim can be helped by insurance proceeds.

eJournal: It is a good time to drive home valuable lessons, because at this time, armed citizens are transfixed watching the Zimmerman case in Florida play out. Many think, that could have been me. What kind of advice do you have for gun owners who are asking those kinds of questions. You've already given us a lot of good advice. Do you think of anything else?

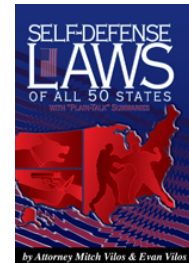
Vilos: Yes, as Clint Eastwood used to say as Inspector Callahan, "A man has to know his limitations." A man needs to know his legal limitations, as well, if he is going to use a weapon to defend himself. Try to deescalate, as we have mentioned, know the law, have the funding to get yourself a criminal defense lawyer, and make sure that you have plenty of homeowners' liability insurance. Many people don't realize that your homeowners' coverage covers you not only on your property but it covers you for negligent acts outside your property that don't involve a vehicle.

eJournal: Any further advice?

Vilos: Follow self-defense cases. We do. In *Self-Defense Laws of all 50 States*, we explain the cases in storybook fashion to illustrate hidden legal traps and other important rules of self defense. It is so hard sometimes to understand the law unless you have a story behind it. The best way for students of the law to remember the rules of law is to remember the stories that illustrate those rules. That is why we've tried to put as many examples as possible into our writings so that people can remember, in a simple way, the stories that illustrate the common hidden legal traps that can take away a defender's freedom and destroy him financially.

We appreciate your organization, and we encourage your members to become or continue to be students of the law.

eJournal: Thank you, Mitch, and I'd like to note that as one of our Affiliated Attorneys, you, too, are a vital part of the Network and our mission. I thank you for that, and also really appreciate the time you took to explain the issues we discussed in this interview



Attorney Mitch Vilos and his son Evan Vilos co-authored Self-Defense Laws of All 50 States, to which we referred several times in the foregoing interview. Network members can save 20% off the regular price of this valuable reference work, by entering the store code on their membership card.

http://www.armedcitizensnetwork.org/books?page=shop_product_details&flypage=flypage.pbv.tabs.tpl&product_id=72&category_id=1 to buy.

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