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Criminal Law - Perfecting the Imperfect Right of Self-Defense

Richard Charles Blanks

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INTRODUCTION

Recently the Supreme Court of North Carolina addressed the issue of the availability of the imperfect right of self-defense in homicide cases. Legal commentators throughout the years have distinguished between a privilege which is perfect and one which is imperfect, although the writers have not used these labels consistently. Today, courts apply the label "perfect" if self-defense, resulting in homicide, entitles the defendant to an acquittal; and "imperfect" if the defense merely reduces the grade of the offense to manslaughter.

In *State v. Norris*, the Supreme Court of North Carolina reaffirmed the imperfect right of self-defense in North Carolina and clarified its meaning. The Court ordered a new trial because the jury instructions seemingly required the jury to find the existence of all the four elements of the perfect right of self-defense before the defendant could derive any benefit from the principles of self-defense. The instructions, given erroneously, deprived the defendant of the benefits of the imperfect right of self-defense. In the unanimous opinion by Mr. Justice Huskins, the Court concluded that the perfect and imperfect rights of self-defense are separate defenses in North Carolina; if either right is applicable, it must be afforded every defendant who can derive any benefit from the critical distinction between perfect and imperfect self-defense.

Although *Norris* does not address directly the issue of denial of due process, the Court ordered a new trial for the defendant because the error in the instructions on self-defense may have

2. See R. Perkins, Criminal Law 1013 et seq. (2d ed. 1969), citing Lambard, Eirenarcha 248 (4th ed. 1599); 3 Coke, Institutes *55; 1 Hale, P.C. *481; 1 Hawk, P.C. c.28, §§ 21, 24 (6th ed. 1788); Foster, Crown Law 273 (3d ed. 1809); W. Blackstone, Commentaries 180, 183-84; 1 East, P.C. 271-72, 279 (1803).
5. Id. at 531, 279 S.E.2d at 573.
caused the jury to convict the defendant of murder instead of voluntary manslaughter. 6 "The chief purpose of a proper charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict." Because the instructions given constituted prejudicial error, the implication arises that the trial court infringed on specific guarantees of fairness, which may have violated the defendant's due process rights. 8

This note will chart the historical development of the imperfect right of self-defense and will emphasize the relevant differences between the perfect and imperfect right of self-defense. By analyzing how other states have implemented the imperfect right of self-defense, this note will indicate how North Carolina trial courts should proceed in implementing this imperfect defense as a result of the Norris decision. Some constitutional implications of the opinion are discussed to provide some insight into the significance of this decision for future trial practice in North Carolina.

THE CASE

On January 20, 1980, the deceased, Donald Norris, while married to the defendant Elsie Norris, was living with Bernice Owens. 9 About eight o'clock that night, the defendant went to the trailer where her husband and Owens were living, knocked and unsuccessfully tried to enter. At six o'clock the next morning, Donald Norris opened the door to see if the defendant had left the premises. The defendant was waiting in her automobile outside the trailer. About 6:30 the deceased went outside the trailer to catch his ride to work. The State's evidence tended to show that the defendant shot Donald Norris as soon as he exited the trailer.

The defendant's evidence tended to show that when Donald Norris exited the trailer, the defendant got out of her car, met Norris on the passenger side and told the deceased she wanted to talk to him because she was out of money. The deceased then cursed the defendant, threatened her, and struck her in the nose with his fists, breaking her nose and knocking her to the ground. A medical examination later that day verified the defendant's nose was broken. The defendant rose from the ground and saw Bernice

6. Id. at 532, 279 S.E.2d at 574.
9. 303 N.C. at 527, 279 S.E.2d at 571.
Owens coming out of the trailer. The defendant had a pistol in her automobile. She reached in the car and grabbed the pistol as Donald Norris came at her. The defendant feared her husband would kill her, and that if the deceased and his girlfriend attacked her, she would not survive. The defendant contended she shot the deceased out of fear for her safety.

At trial, the judge instructed the jury it could find the defendant guilty of murder in the first degree, or murder in the second degree, or voluntary manslaughter, or not guilty. The trial judge instructed the jury that to convict the defendant of first degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant intentionally and "without justification or excuse," and with malice, shot Donald Norris with a deadly weapon. The judge then defined "without justification or excuse" by stating, "Members of the jury, when I say without justification or excuse, I have reference to self-defense, which will be fully explained hereafter." While the quotation appears in that part of the charge dealing with the various elements of murder in the first degree, the expression "without justification or excuse" was used as the equivalent of self-defense throughout the charge, not only with respect to murder in the first degree, but also with respect to murder in the second degree and voluntary manslaughter. The jury found the defendant guilty of murder in the first degree. Upon the jury's recommendation, the defendant received a life sentence.

On appeal, the defendant contended that the trial court erred in its charge on self-defense. The Supreme Court of North Carolina concluded that the trial judge added one confusing and erroneous sentence to his charge which led the jury to believe that the phrase "without justification or excuse," an essential element of murder, was the equivalent of self-defense throughout the charge, not only with respect to murder in the first degree, but also murder in the second degree and voluntary manslaughter. The Court

11. 303 N.C. at 531, 279 S.E.2d at 573.
12. Id.
13. Id.
14. Id. at 527, 279 S.E.2d at 571.
15. Id. at 531, 279 S.E.2d at 573. The confusing sentence was, "Members of the jury when I say without justification or excuse, I have reference to self-defense, which will be fully explained hereafter."
held this portion of the charge was in error, because the instructions as given seemingly required the jury to find the existence of all the four elements of the perfect right of self-defense before the defendant could derive any benefit from the principles of self-defense. The Court held this error and required a new trial.

BACKGROUND

Courts apply the label "perfect" to the right of self-defense if the defense, having resulted in homicide, entitles the defendant to an acquittal, and "imperfect" if the defense merely reduces the grade of the offense to manslaughter. To fully understand the intricacies of the issue presented in Norris, a brief analysis of the elements of homicide, the lesser included offenses, and the elements of the perfect right of self-defense is in order.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. For example, a killing resulting from the excessive use of force in the exercise of self-defense is manslaughter. Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without the intention to kill or inflict

16. Id. The four elements of the perfect right of self-defense are: (1) that it appeared to the defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; (2) that the defendant’s belief was reasonable, in that the circumstances as they appeared to the defendant were sufficient to create such a belief in the mind of a person of ordinary firmness; (3) that the defendant was not the aggressor in bringing on the affray; and (4) that the defendant did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

17. Id.

serious bodily injury. The perfect right of self-defense excuses a killing altogether if, at the time of the killing, the four elements were present. First, it appeared to the defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm. Second, the defendant’s belief was reasonable, in that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. Third, the defendant was not the aggressor in bringing on the affray. Fourth, the defendant did not use excessive force, i.e., he did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. The presence of all four elements gives the defendant a perfect right of self-defense and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

If the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm and if the defendant’s belief was reasonable, but the defendant was the aggressor or he used excessive force, the defendant has only an imperfect right of self-defense. Having lost the benefit of perfect self-defense, the defendant is guilty at least of voluntary manslaughter.

Charting the historical content and development of the imperfect right of self-defense is helpful in understanding the right. Reed v. State is considered the leading case on the imperfect

26. See State v. Wynn, 278 N.C. 513, 180 S.E.2d 135 (1971). A person is considered to be an aggressor under this rule whenever he has “wrongfully assaulted or committed a battery upon him or when he has provoked a present difficulty by language or conduct towards another that is calculated and intended to bring it about.”
28. 303 N.C. at 530, 279 S.E.2d at 573.
29. Id. See also State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).
30. Id.
The right of self-defense, the fatal exercise of which does not entitle the user to an acquittal. In Reed, a paramour killed an outraged husband who caught him in an act of adultery. The defendant's explanation was that the husband had attacked him and he was forced to kill to save his own life. Reed's murder conviction was reversed because the erroneous omission of any instruction on manslaughter may have denied Reed the benefits of his imperfect right of self-defense.

The Missouri state courts have had several opportunities to discuss the concept of the imperfect right of self-defense. In State v. Partlow, the Missouri Supreme Court emphasized the "important distinction between one who is at fault in bringing on a quarrel with malice aforethought, and one who provokes an encounter with no intent to kill or injure." The following year, the same court took the sound position that if the defendant started the difficulty with no intent to cause death or great bodily harm, he was guilty only of manslaughter. 37 State v. Gordon reaffirmed Partlow; to determine whether the exercise of self-defense was perfect or imperfect depends upon the intent with which the defendant brought on the quarrel, or willingly entered therein.

State v. Crisp, a leading North Carolina decision, recognizes the principle of perfect self-defense, which excuses a homicide altogether, and imperfect self-defense, which reduces a capital offense to a lesser degree of the crime. Crisp is a classic statement of the doctrine and consequences of the imperfect right of self-defense:

Tersely stated, it is that, if one takes life, though in the defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he com-

32. See R. Perkins, supra note 2, at 1013.
33. 11 Tex. App. at 512.
34. Id. at 522.
35. 90 Mo. 608, 4 S.W. 14 (1886).
36. Id. at 614, 4 S.W. at 20.
37. State v. Hicks, 92 Mo. 431, 4 S.W. 742 (1887); See R. Perkins, supra note 2, at 1015.
38. 191 Mo. 114, 89 S.W. 1025 (1905).
39. Id. at 125, 89 S.W. at 1028.
40. 170 N.C. 785, 87 S.E. 511 (1916).
41. Id. at 792, 87 S.E. at 514.
menced the quarrel, with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.\textsuperscript{42}

Crisp quotes with approval the rationale and result of the \textit{Reed}\textsuperscript{43} and \textit{Partlow}\textsuperscript{44} decisions.\textsuperscript{45}

In the more recent case of \textit{State v. Potter},\textsuperscript{46} the appeal was based upon an alleged error in the jury instructions on self-defense. The Supreme Court of North Carolina identified the four elements which make up the perfect right of self-defense.\textsuperscript{47} However, the Court cautioned that none of the four elements must be found to exist beyond a reasonable doubt, because the State has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.\textsuperscript{48} The Court's caution in \textit{Potter} is consistent with the landmark decision of \textit{Mullaney v. Wilbur},\textsuperscript{49} in which the Supreme Court of the United States concluded that improper jury instructions concerning the placement of burden of proof violate due process.\textsuperscript{50} The burden of disproving self-defense beyond a reasonable doubt is upon the government.\textsuperscript{51} The require-

\begin{itemize}
\item \textsuperscript{42} Id. at 793, 87 S.E. at 515. Accord: \textit{Reed v. State}, 11 Tex. App. 509 (1882). The quote is attributable to Cullen, J., \textit{People v. Fillipelle}, 173 N.Y. 509, 66 N.E. 405 (1903).
\item \textsuperscript{43} 11 Tex. App. 509 (1882).
\item \textsuperscript{44} 90 Mo. 608, 4 S.W. 14 (1886).
\item \textsuperscript{45} 170 N.C. at 793, 87 S.E. at 515.
\item \textsuperscript{46} 295 N.C. 126, 244 S.E.2d 397 (1978).
\item \textsuperscript{47} See the list of these elements on page five of the text and supra note 16.
\item \textsuperscript{48} 295 N.C. at 143, 244 S.E.2d at 408. See also \textit{State v. Hankerson}, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233 (1977).
\item \textsuperscript{49} 421 U.S. 684 (1975).
\item \textsuperscript{50} Id. at 701-4. The \textit{Mullaney} Court held that the due process clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. In the opinion, the Court stated that the requirement of proving a negative is not unique in our system of criminal jurisprudence. Maine itself requires the prosecution to prove the absence of self-defense beyond a reasonable doubt. Satisfying this burden imposes an obligation that, in all practical effect, is identical to the burden involved in negating the heat of passion on sudden provocation. By implication, the Court concluded that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of self-defense when the issue is properly presented in a homicide case.
\item \textsuperscript{51} 421 U.S. 689. See also \textit{State v. Hart}, 44 N.C. App. 479, 483, 261 S.E.2d 250, 253 (1980), which holds that the "burden of disproving self-defense beyond a reasonable doubt is placed upon the State." 
\end{itemize}
ment of proof beyond a reasonable doubt is crucial to our criminal system for cogent reasons. The accused during a criminal prosecution has interests of immense importance at stake, because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by conviction. Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in application of our criminal law. Potter concluded that an accused aggressor, though otherwise acting in self-defense, is guilty at least of voluntary manslaughter. The defendant aggressor loses the benefit of perfect self-defense.

Potter does not define the imperfect right of self-defense because, under the facts of that case, the instruction constituted harmless error. However, the Potter opinion implicitly recognizes the imperfect right of self-defense. A case with facts similar to those of Norris was needed to distinguish the perfect from the imperfect right of self-defense because the facts squarely raised the question and the trial judge departed from the pattern jury instructions. Norris presented the Court a clear opportunity to remove confusion from a substantive area of the law and to clarify jury instructions on self-defense. Because the Supreme Court of North Carolina ordered a new trial for defendant Norris, the Court determined that the trial judge had not given a reasonably clear and accurate statement on the law of self-defense.

The rationale for ordering a new trial if an erroneous instruction is given is based on the desire of the courts to ensure that every defendant receives a fair trial. The provisions of the Bill of Rights, applicable to the states through the Due Process Clause of the Fourteenth Amendment, contain basic guarantees of a fair trial. Due process of law requires that proceedings shall be fair;

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53. Id.
54. Id. at 364.
55. 295 N.C. at 144, 244 S.E.2d at 409.
56. Id.
57. Id. at 146, 244 S.E.2d at 410.
58. Id. at 144-46, 244 S.E.2d at 408-10.
60. 303 N.C. at 530, 279 S.E.2d at 572-73.
63. Included among these rights is the right to counsel, right to a speedy and
however, fairness is a relative and not an absolute concept. Applied to criminal trials, the denial of due process is a "failure to achieve that fundamental fairness essential to the very concept of justice." To declare a denial of due process, the court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.

The North Carolina Constitution provides the defendant in a criminal case with guarantees of a fair trial similar to those of the federal constitution. The state constitution provides that "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land." "Law of the land" is equivalent to "due process of law." All courtroom procedure must be consistent with the fundamental principles of liberty and justice. Because the instructions in Norris constituted prejudicial error, the implication arises that the trial court may have violated the defendant's due process rights under both the federal and state constitutions.

ANALYSIS

In *State v. Norris,* the Supreme Court of North Carolina, in a unanimous decision, clarified the meaning of the imperfect right of self-defense in homicide cases in North Carolina. The Court held that the trial judge erred in his charge, because the instructions as given seemingly required the jury to find the existence of all four elements of the perfect right of self-defense before the defendant could derive any benefit from the imperfect right of self-defense. The trial judge erroneously added one sentence to his charge which may have led the jury to believe throughout the charge that the phrase "without justification or excuse," an essential element of murder, was the equivalent of "self-defense."

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66. Id.
72. Id. at 531, 279 S.E.2d at 573.
73. Id.
Court held this error required a new trial. 74

The rule is well established that the charge of a court must be read as a whole and is to be construed in the manner in which the judge presented it to the jury. 75 The charge must be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. 76 "If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." 77 Because the charge in Norris was erroneous as measured by the above standards, the trial court did not clearly and fairly present the correct law of self-defense in homicide cases in North Carolina. 78

Norris has several implications for proper jury instructions in future North Carolina murder trials. "The chief purpose of a proper charge is to give a clear instruction which applies the law to the evidence so that the jury can understand the case and reach a correct verdict." 79 The trial judge has wide discretion in presenting the issues to the jury, so long as he charges the applicable principles of law correctly, 80 and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proved. 81

If the charge contains a full and fair summary of the evidence and the contentions of the parties, together with an accurate statement and explanation of the applicable principles of law, the defendant's assignment of error to the charge will be overruled. 82 "If there are conflicting instructions upon a material point, a new trial must be ordered because the jury is not presumed to be able to distinguish between a correct and an incorrect charge." 83 Trial courts have a duty to instruct the jury adequately on the law of self-defense as it applies to the facts of the case. 84 An instruction

74. Id. at 532, 279 S.E.2d at 574.
75. State v. Wilson, 176 N.C. 751, 97 S.E. 496 (1918).
78. Id.
80. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).
84. Byrd v. State, 142 Ga. 633, 83 S.E. 513 (1914). Evidence, however slight and however improbable, which would justify an instruction on self-defense, re-
on self-defense must be an accurate and reasonably clear state-
ment of the law of self-defense.65 Because the Supreme Court of
North Carolina ordered a new trial for defendant Norris, the Court
determined that the trial judge had not given a reasonably clear
and accurate statement on the law of self-defense in North
Carolina.

The rationale for ordering a new trial because of an erroneous
instruction is based upon the court's duty to ensure that every de-
fendant receives a fair trial.66 "Due process of law requires that
proceedings shall be fair."67 In addition to due process considera-
tions, the North Carolina Constitution provides that every defen-
dant is entitled to a jury trial in all criminal proceedings.68 This
constitutional guarantee requires proper jury instructions to be
given in a clear and accurate manner to ensure that the defendant
receives every benefit to which he is entitled.69 Although Norris
does not address the constitutional issue of due process, the Court
ordered a new trial for the defendant because the error in the
charge on self-defense may have caused the jury to convict the de-
fendant of murder rather than of voluntary manslaughter.70 Be-
cause the Norris instructions constituted prejudicial error, the
Court could have determined that the trial court had failed to pro-
vide that "fundamental fairness essential to the very concept of
justice."

Although the doctrine and consequences of the imperfect right
of self-defense were enunciated as far back of 1916,72 the Supreme
Court of North Carolina had not made a comprehensive attempt to
set out the elements of the defense until Norris. Reaffirming the
explanation of an earlier decision,73 the Court stated that the
phrase "without justification or excuse" as an element of murder in

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Larkin, 250 Mo. 218, 157 S.W. 600 (1913).
87. Buchalter v. New York, 319 U.S. 427, 429 (1943); Snyder v. Massachu-
88. N.C. CONST. art. 1, § 24.
89. State v. Mundy, 265 N.C. 528, 114 S.E.2d 572 (1965).
90. 303 N.C. at 532, 279 S.E.2d at 574.
93. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Baldwin,
152 N.C. 822, 68 S.E. 148 (1910).
the first or second degree means the absence of either of the first two elements of self-defense; i.e., the defendant did not believe it was necessary to kill the victim to save herself from death or great bodily harm or her belief under the circumstances as they appeared to her at that time was unreasonable. 94

The error in the Norris instructions, specifically the trial court's equating "without justification or excuse" with "self-defense," is that the instructions seemingly required the jury to find the existence of all four elements of the perfect right of self-defense before the defendant could derive any benefit from the principles of self-defense. 95 The Court concluded this was prejudicial error because the charge deprived the defendant of the benefits flowing from her imperfect right of self-defense should the jury find that (1) it appeared to her and she believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and (2) her belief was reasonable because the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but (3) without the intent to kill Donald Norris or inflict serious bodily injury upon him, she commenced the quarrel and was the aggressor, or (4) she used more force than was necessary or reasonably appeared to her to be necessary under the circumstances to protect herself from death or great bodily harm. 96 Should the jury make these findings, the defendant would be guilty of voluntary manslaughter only. 97

Defendant objected to the trial court's failure to charge the jury on self-defense, both as a perfect and an imperfect defense. 98 The trial court refused to so charge the jury, apparently believing that it had adequately addressed the issue within the body of the charge. Indeed, examining the charge as a whole, the trial court did present the basic principle when the judge charged:

If the State proves beyond a reasonable doubt that the defendant was otherwise acting in self-defense and used excessive force, or was the aggressor, though she had no murderous intent when she entered the fight, the defendant would be guilty of voluntary

94. 303 N.C. at 531, 279 S.E.2d at 573.
95. Id.
96. Id. at 531-32, 279 S.E.2d at 573-74.
97. Id.
98. Record, State v. Norris, Buncombe Superior Court, Buncombe County at 193.
manslaughter.99

The effectiveness of this portion of the charge was diminished because the judge did not use the label "imperfect self-defense" when he charged the applicable principles of law. Although Norris does not make the use of specific labels an absolute requirement, Norris does make it clear that when a judge does use these labels, he is giving the jury every opportunity to understand and recognize the critical distinctions between the separate defenses.100

The placement of the phrase "without justification or excuse" in the Norris charge was problematic because the judge equated the phrase "without justification or excuse" with self-defense early in the charge.101 Many paragraphs later in his charge, the judge announced the four requisite elements of perfect self-defense.102 This irregular placement easily could have misled the jurors into thinking that anytime the judge used the phrase "without justification or excuse," it was synonymous with the term self-defense, which required the jury to find the existence of all four elements of the only type of self-defense on which they had been instructed, before the defendant could derive any benefit from the principles of self-defense.103 Therefore, under this erroneous instruction, the jury could have found that the defendant had a reasonable belief in the necessity of the use of force to protect herself and that the defendant was not the aggressor but that the defendant used excessive force.104 Because of the misleading nature of the instructions, the jury may not have perceived any alternative to finding the defendant guilty of murder simply because all of the four elements had not been met.105 The jury would have discovered themselves in a similar quandry if they had found that the defendant was the aggressor, but that she had not used excessive force.106 Because this error in the charge on self-defense in Norris may have caused the jury to convict the defendant of murder instead of voluntary manslaughter, a new trial was required.107

99. Id. at 181.
100. 303 N.C. at 530-32, 279 S.E.2d at 572-73.
102. Id. at 179-80.
103. 303 N.C. at 531, 279 S.E.2d at 573.
104. Id. Excessive force means that the defendant used more force than was necessary to protect himself from death or great bodily harm.
105. Id.
106. Id.
107. Id. at 532, 279 S.E.2d at 574.
A well settled principle of constitutional law dictates that if a court can reach a decision on any issue other than a constitutional one, the court will avoid the constitutional issue.\textsuperscript{108} The Norris court did not base its decision expressly on constitutional principles because ordering a new trial due to erroneous jury instructions affords the relief requested without the necessity of deciding a constitutional issue.

Norris raises another constitutional issue which the Court did not address. The Court did not address the issue of the proper placement of the burden of proof when self-defense is properly raised.\textsuperscript{109} If the evidence tends to indicate that the defendant acted in self-defense in taking the life of the deceased, the trial court has the duty to instruct the jury adequately on the law of self-defense as it is applicable to the facts of the case.\textsuperscript{110} An instruction on self-defense must be an accurate and reasonably clear statement of the law of self-defense.\textsuperscript{111}

A trial judge must make the state's burden clear by instructing the jury that to find malice, it must be convinced beyond a reasonable doubt that the accused did not kill in the exercise of imperfect self-defense.\textsuperscript{112} When first degree murder is charged and some evidence of self-defense is offered, the burden is upon the state to prove the absence of self-defense beyond a reasonable doubt.\textsuperscript{113} The United States Supreme Court, in numerous opinions,\textsuperscript{114} has stated that the state has the burden to prove beyond a reasonable doubt the defendant did not act in self-defense.\textsuperscript{115} The Court has proclaimed that "it is the duty of the government to establish guilt beyond a reasonable doubt. This notion, basic in our law, is a requirement and a safeguard of due process of law."\textsuperscript{116}

If the state fails entirely to carry its burden, a verdict of not guilty must follow, because self-defense is a complete defense.\textsuperscript{117} If


\textsuperscript{109} See \textit{supra} text accompanying notes 15-17.

\textsuperscript{110} Byrd v. State, 142 Ga. 633, 83 S.E. 513 (1914).

\textsuperscript{111} Newman v. State, 58 Tex. Crim. 443, 126 S.W. 578 (1910).

\textsuperscript{112} State v. Powell, 84 N.J. 305, 419 A.2d 406 (1980).


\textsuperscript{115} \textit{Id}.

\textsuperscript{116} Leland v. Oregon, 343 U.S. 790, 795 (1952).

\textsuperscript{117} State v. Ramey, 273 N.C. 325, 330, 150 S.E.2d 56 (1968); State v. Street,
the state fails to carry its burden of showing the absence of apprehension on the part of the defendant of death or serious bodily harm at the hands of the person slain, or having failed on that point, that such apprehension was not reasonable and no murderous intent is shown, the offense is no greater than manslaughter.118 A thorough reading of the entire Norris charge119 indicates that the trial court did not charge the jury that it should not find the defendant guilty of first degree murder if the State had failed to prove beyond a reasonable doubt the absence of at least one of the first two elements of self-defense, i.e., the necessity of the act and the reasonableness of the belief.

In Norris, the trial court defined "without justification or excuse" as "self-defense which will be fully explained hereafter."120 The trial court did not tell the jury that the phrase "without justification or excuse," when used in the definition of first degree murder related only to the first two elements of self-defense, i.e., necessity and reasonableness of the belief.121 The trial court failed to inform the jury of the judicial interpretation of "without justification or excuse." When charging on self-defense in North Carolina, the trial judge must correctly define the term self-defense.122 The Norris charge did not clearly and properly place the burden of proof on the prosecution to prove that the defendant did not act in self-defense.123

The trial court also charged that if the jury did not find the defendant guilty of first degree murder, the jury "must" determine whether the defendant was guilty of any lesser included offenses.124 The trial court did not condition its mandate upon a jury determination that the State had proved the absence of self-defense beyond a reasonable doubt. The mandate was erroneous because it failed to treat self-defense as a complete defense.125 The instruction may have led the jury to erroneously conclude that self-defense was not a complete defense to any offense charged or lesser

120. 303 N.C. at 531, 279 S.E.2d at 573.
121. Id.
included offense.

The trial court followed prior practice when it instructed the jury as it did. The trial judge followed the North Carolina Pattern Jury Instructions\textsuperscript{126} verbatim in his charge, except that he added to his charge one confusing sentence not present in the pattern instructions. The sentence added equated "without justification or excuse" with "self-defense." The Supreme Court of North Carolina held the addition of this sentence constituted prejudicial error.\textsuperscript{127} Norris should provide the trial courts with new guidance in handling the sensitive area of jury instructions.

At the least, Norris stands as a warning to trial judges to ensure that the distinction between the perfect and imperfect right of self-defense is not overlooked or underemphasized in their jury instructions. Other state courts have taken a more progressive view than Norris towards implementing the imperfect right of self-defense in homicide cases. The Supreme Court of New Jersey recently noted that if a self-defense instruction is appropriate in a prosecution for murder, an instruction on imperfect self-defense and manslaughter is necessarily appropriate as well.\textsuperscript{128} The rationale for the New Jersey rule is that if a trial court decides the evidence is sufficient to warrant charging the jury on self-defense, the court should conclude that the very same evidence could be used to support an imperfect self-defense charge.\textsuperscript{129} Although Norris does not explicitly impose such a requirement on the North Carolina trial courts, the distinctions between the defenses could be emphasized more clearly by providing the jury with separate instructions and qualifications on each defense. To appropriately raise the issue of imperfect self-defense, the defendant need only show the slightest amount of evidence to justify this instruction.\textsuperscript{130}

If the facts of a case indicate the possibility that the killing is manslaughter based upon an imperfect exercise of self-defense, there is no reason why the trial judge should not be obliged, even without a request being made, to charge on the imperfect right of self-defense.\textsuperscript{131} The New Jersey Supreme Court questioned whether it is proper for the trial court to omit such a charge simply because defense counsel requests that it not be given, even if the

\begin{itemize}
\item \textsuperscript{126} N.C.P.I. Crim. 206.10 (May, 1980).
\item \textsuperscript{127} 303 N.C. at 532, 279 S.E.2d at 574.
\item \textsuperscript{128} State v. Powell, 84 N.J. 305, 310, 419 A.2d 406, 412 n.12 (1980).
\item \textsuperscript{129} Id. at 310, 419 A.2d at 413.
\item \textsuperscript{130} People v. Hall, 25 Ill. App. 922, 324 N.E.2d 50, 57 (1975).
\item \textsuperscript{131} State v. Powell, 84 N.J. 305, 310, 419 A.2d 406, 412 n.12 (1980).
\end{itemize}
prosecutor concurs in that request. Powell indicates public policy demands a charge of imperfect self-defense should be afforded every defendant even in the absence of any request. Norris does not require defense counsel to request an imperfect self-defense charge because the defendant is entitled "to the benefits flowing from her imperfect right of self-defense." No mention is made in Norris that defense counsel must specifically request an imperfect self-defense charge in order for the defendant to avail herself of the benefits of imperfect self-defense.

To justify an instruction on self-defense, the defendant's use of his evidence to support a manslaughter instruction based upon imperfect self-defense need only be plausible. Therefore, whenever any plausible evidence is presented justifying a self-defense instruction, an instruction on perfect and imperfect self-defense is required. There is no basis for differentiating between perfect and imperfect self-defense because the same evidence that caused the trial judge to instruct on perfect self-defense justifies an instruction on an unreasonable exercise of self-defense, i.e., imperfect self-defense. Although the language in Norris is not as explicit as the language in Powell, Norris does require that the defendant receive all the benefits of the imperfect right of self-defense. For the defendant to receive the benefits of imperfect self-defense, the jury must be correctly charged on the elements of the imperfect right of self-defense. Only when the trial judge presents the jury with a correct analysis of both types of defense can the defendant be assured of receiving every benefit to which he is entitled.

Jurors must have a clear understanding of the relevant differences between the perfect and imperfect right of self-defense so that they can make an informed decision when choosing between a murder or a manslaughter verdict. At least one state court, in conjunction with its State Bar Committee, has implemented a separate jury instruction for the benefit of any defendant who claims

132. Id. at 310, 419 A.2d at 413.
133. Id.
134. 303 N.C. at 531, 279 S.E.2d at 573.
136. Id.
137. Id.
138. 303 N.C. at 531, 279 S.E.2d at 573.
139. Id. at 532, 279 S.E.2d at 574.
140. Id. at 531, 279 S.E.2d at 574.
imperfect self-defense. That instruction makes careful use of the label "imperfect" so the jury will be able to contrast that instruction with the instruction for the "perfect" right of self-defense. Under this practice, a defendant is entitled to an instruction applying the imperfect right of self-defense to those who provoke or bring on the difficulty unlawfully or wrongfully. The North Carolina Pattern Jury Instructions do not reflect, as of this writing, the new requirement of clarifying the imperfect right of self-defense. The applicable instructions on first degree murder, which the trial judge used in Norris, were replaced in May, 1980, a year before Norris. Norris implies that the pattern jury instructions should be reworded to reflect the relevant differences between the perfect and imperfect right of self-defense in a clear and unconfusing manner.

The federal courts have recognized that "competent" counsel would investigate the possibility of manslaughter on a theory of imperfect self-defense. Although a defendant may have been unreasonable in using deadly force in self-defense, his right to imperfect self-defense, upon proper jury instructions, may justify no more than a manslaughter conviction.

Other states have gone beyond the dictates of Norris. The manslaughter provisions of two of the latest comprehensive crimi-

142. Id.
143. The previous first degree murder instruction also did not contain a reference to the imperfect right of self-defense. Although Norris does not explicitly require that the instruction be reworked, the gist of the decision is that the present instructions do not clearly reflect the state of the law when imperfect self-defense is properly asserted. By charging appropriately on both of these separate defenses, the defendant will then receive every benefit to which he is entitled flowing from his imperfect right of self-defense.
144. Norris was decided in July, 1981.
145. 303 N.C. at 531, 279 S.E.2d at 573.
147. Id.
nal codes, those of Illinois\textsuperscript{148} and Wisconsin,\textsuperscript{149} recognize the existence of the imperfect right of self-defense in their statutory provisions on voluntary manslaughter. These recent state codifications indicate a progressive trend toward the effective implementation of the imperfect right of self-defense. The North Carolina statutes do not, as yet, reflect this progressive trend.\textsuperscript{150} Norris should provide some much needed guidance in this critical area of the law of self-defense and help to ensure that every defendant receives the benefits flowing from the principles of self-defense to which he is entitled.\textsuperscript{151}

**CONCLUSION**

Norris clarifies the existence of the imperfect right of self-defense in homicide cases in North Carolina. The trial court in a homicide prosecution erred in using the expression “without justification or excuse” as the equivalent of “self-defense” throughout the charge. The instructions seemingly required the jury to find the existence of all four elements which make up the defendant's perfect right of self-defense before she could derive any benefit from the principles of self-defense. The instructions erroneously deprived the defendant of the benefits flowing from her imperfect right of self-defense should the jury find that (1) it appeared to her and she believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and (2) her belief was reasonable because the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but (3) without the intent to kill the deceased or inflict serious bodily harm upon him, she commenced the quarrel and was the aggressor, or (4) she used more force than

\textsuperscript{148} ILL. REV. STAT. Ch. 38, § 9-2 (Cum. Supp. 1979):
Voluntary Manslaughter: (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 6 of this Code (self-defense), but his belief is unreasonable.

\textsuperscript{149} WIS. STAT. § 940.05 (Cum. Supp. 1979):
Manslaughter: Whoever causes the death of another human being under any of the following circumstances may be imprisoned not more than ten years: . . . (2) Unnecessarily, in the exercise of his privilege of self-defense.

\textsuperscript{150} N.C. GEN. STAT. §§ 14-18 (1979).

\textsuperscript{151} 303 N.C. at 531, 279 S.E.2d at 573.
was necessary or reasonably appeared necessary under the circumstances to protect herself from death or great bodily harm. If the facts indicate the possibility that the crime was manslaughter based upon imperfect self-defense, the trial judge is required, even without any request being made by the defense attorney, to instruct the jury on imperfect self-defense. The burden is now upon trial judges to see that jurors understand the critical distinction between the perfect and imperfect right of self-defense in order to ensure that a defendant receives every benefit of the imperfect right of self-defense to which he is entitled.

Richard Charles Blanks