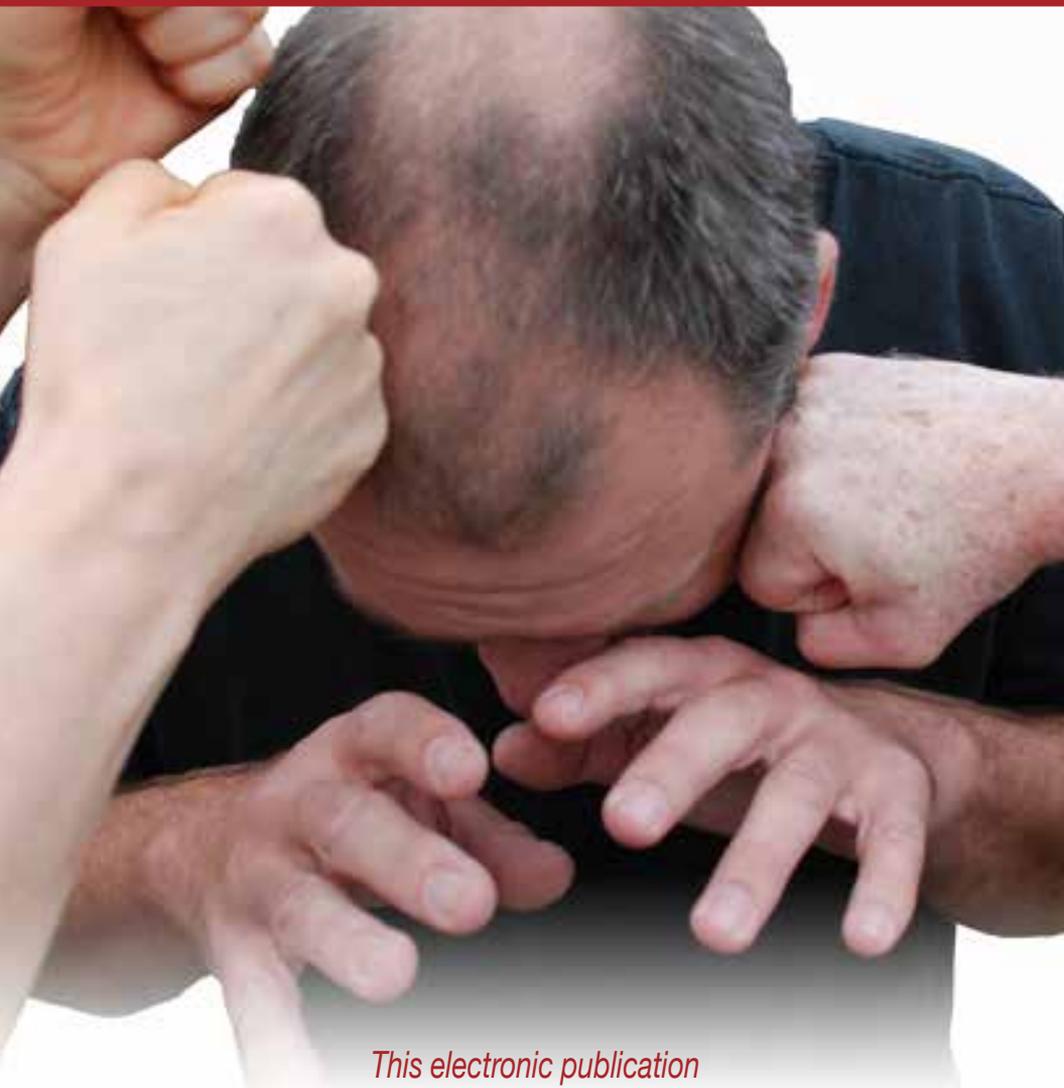


The Three Headed Monster: **Defending a Disparity of Force Shooting**



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The Three Headed Monster: Defending a Disparity of Force Shooting

by Gila Hayes

Western states such as Arizona are generally friendly to ideas of fire-arms and self defense, but we may forget that any state can harbor a city in which the population leans toward liberal social politics and buys in to the flawed theory of gun control for public safety. Anti-self defense attitudes, cloaked in good intentions, can intrude when a self-defense shooting entails factors that are not always clear cut, such as when one man shoots several unarmed assailants and must argue disparity of force as justification for his actions. This is at the heart of an ordeal that ran from late November 2008 through May 2010, in Tucson, Arizona.

Larry Hickey, his wife and young son lived on a cul-de-sac in a modest Tucson neighborhood. Across the street lived three adults – two 30-something sisters and the 26-year old boyfriend of one – along with the women’s two children. The households were only peripherally acquainted through limited contact between Hickey’s seven-year-old son and the two boys, ages 4 and 11, living in the house across the street. Mr. and Mrs. Hickey both had demanding jobs, Mrs. Hickey working shift work in the telemetry room in a local hospital, and Mr. Hickey employed by the Union Pacific Railroad, a job that took him away from home for several days at a time. At 37 years of age, Hickey’s previous employment history included work as a safety trainer for a big chain store and a stint as a corrections officer in a high-risk facility where he dealt with violent behavior.

Hickey owned guns and had a concealed carry permit, having carried a defensive pistol for 14 years. For ten years, he’d been an avid student of defensive weaponcraft. He took classes from local instructors, as well as a number of courses from James Yeager of Tactical Response in Camden, TN. He became one of Yeager’s instructors, and he also taught pre-deployment military personnel about foreign weaponry for a local firm, C & T Enterprises. At the time he ran into trouble, his day job with the Union Pacific Railroad was in temporary hiatus, as he had just been furloughed pending an uptick in economic conditions.

The Incident

On Monday, November 17, 2008, day fades into night as the Hickey family returns home from a bicycle ride. Trying out a headlamp he just mounted on his new bicycle, Larry Hickey remains in the street in front of their home, riding for a little longer while his wife goes into their garage and brings the trashcans to the street for collection. He pedals over to his wife and they stand near the trashcans discussing the dinner menu, how to dispose of some bulky trash and the other minutiae of daily living. The sisters who live across the street are sitting in their garage smoking with the doors open, and one calls out aggressively to Mrs. Hickey, then jumps up and barges across the street to confront her.

On the 15th, the women had argued – not in person, but by cell phone texts that included nasty name-calling. Mrs. Hickey filed a police report alleging telephonic harassment and threats. When the enraged woman rushes up, Hickey gets between the two women to protect his wife. He will later testify that he says, “Hey, no one has to get hurt over this...could you please go back to your side of the street?” though he has to raise his voice to be heard over the woman.

As an older woman who lives nearby drives past, she sees the other sister stride across the street and join the fray in Hickey’s driveway. This neighbor will later testify that the second woman approached with fist raised, and another woman, also driving home on the street, will testify to similar aspects of the fight.

The woman flicks a lit cigarette at Mrs. Hickey and then darts around the garbage cans toward her, saying “I’m going to kill you, bitch,” according to Hickey’s testimony in court.

Hickey pushes his bike away and tries to intercede as he sees one of the neighbor women with a raised fist rushing toward where he thinks his wife stands. He moves between them, trying to intercept her, and the sisters begin hitting him. Blows from both sisters rain down on the crown of his head and his arms as he blocks their fists. Hickey ducks down, and while blocking the blows with his arms, he tries unsuccessfully to activate a remote control to open the garage door so the couple can run to safety. The front door to the Hickey’s home is securely locked, limiting their options.

From his experience and training as a corrections officer, Hickey knows about force options for various situations, and in court will describe his control of the sisters as using “soft hands.”

Nearly two years later, pondering his decisions that night, Hickey wonders if the fight could have been aborted had he initially used more decisive physical force. “I was just trying to block the blows and keep them pushed away from me. I did not want to hit anybody,” he says now. “Looking back, I wish I had been more forceful in trying to discourage them from attacking us. It almost seemed like the fact that I wasn’t hitting them emboldened them. It made them attack more. They claimed that I struck them numerous times. They claimed that I grabbed their hair and beat their faces in but there was no physical evidence of it, no black eyes, no swollen or split lips, nothing.”

Hickey manages to grab the first woman by her arms and push her

Hickey’s new bicycle, its light broken off and fallen to the sidewalk to the right, is seen in evidence photos beneath a trash can of yard debris that had been tipped over on top of it. One of the female assailants alleged that the fight turned physical when Hickey jammed the handlebars into her stomach, but the assailants also claimed the fight took place in the middle of the street.



away. Her feet become tangled and she falls. He pushes away the second woman who is also hitting him and she falls as well. “I got them pushed away and we were trying to get back up the driveway and they were just up like a shot; there was no time at all and they were back and attacking us again,” Hickey recalls.

As the neighbor women renew their attack, screaming at Hickey and hitting him with their fists, Hickey hears the sound of running feet and glass breaking in the street. Through the narrowed field of tunnel vision, Hickey senses only a flash of movement and then feels a staggering impact to the side of his head.

Loud voices and Hickey’s struggle to fend off the women have drawn the attention of the boyfriend who had recently arrived home from work, removed his dress shirt, and poured a glass of wine in the house across the street. Hearing the fracas, this man ran across the street, dropping the wine glass enroute, and jumped into the fight, slugging Hickey hard on the left temple. That blow changes Hickey’s decision to try to get through the attack by just blocking the blows. When the other man nails his temple, Hickey’s vision blurs to white, his legs buckle, and he staggers back, nearly passing out. In court, Hickey will testify that when “the new attacker showed up, then it went from scary to terrifying, just like that the whole dynamic just changed in a split second.”

Hickey’s mind flashes back to a video clip his CCW instructor showed, in which a Texas police constable is attacked, disarmed and shot by three smaller assailants during a drug investigation (see [Lunsford murder](#)). While this flashes through his mind, Hickey simultaneously tries to confirm the location of his wife and son to be sure they are not endangered.

The mind can process a lot of things at one time, Hickey later comments, and his mind is racing as he falls backward from the blow to his temple. Trying to shake off the onset of unconsciousness from the impact, Hickey draws his Glock 19 from a Blade-Tech IWB holster. From the retention shooting position, he fires three shots at the attackers pressing up against him, hitting the male in the abdomen and hand, and striking one of the women in the lower leg.

As his attackers back away, Hickey desperately scans the area as he

has been taught, to avoid being blindsided by another attacker. Hickey describes tunnel vision like looking down the tube of the paper towel roll, and he tries to break it up. The man who hit Hickey's temple and one of the women return to their home; the other woman screams loudly that she has been shot. At the same time, Hickey fears that his wife and son may not be safe. It turns out that the 7-year-old boy has opened the front door, and probably witnessed the final portion of the fight. Mrs. Hickey sends him back inside.

The Immediate Aftermath

While trying to dial his cell phone to summon medical aid and police assistance, Hickey goes into his garage and grabs his trauma kit, then closes the garage door behind him as he rushes to the woman's side. He has already removed the magazine from his Glock, shucked the live round out of the chamber, and placed the gun and magazine on his yard's retaining wall.

In the darkness, Hickey cannot see the screaming woman's wound, but he applies a compression bandage where the woman is holding her leg and ankle. Finding blood, he also applies a tourniquet higher up on the leg to stop the blood loss. As he is tending to the woman who a moment earlier was hitting him, he looks up and sees that neighbors have circled around, drawn by the gunshots and screams. Many have dialed their own 9-1-1 emergency calls.

As a female neighbor takes over tending the bleeding woman, an off-duty male police officer draws Hickey away and sits him down. This neighbor ascertains the location of Hickey's gun and in answer to his inqui-



Glass shards and the stain from the wine the male assailant carried from the neighboring home, but dropped half way across the street.

ries, Hickey says, “I shot.” Feeling the blood and sweat running down him, Hickey asks, “Am I bleeding?” But the neighbor tells him, “Don’t say anything; just hang tight.” When police arrive, the neighbor calls out that he has the shooter, and turns Hickey over to responding officers. Worried that he had not taken time to put on gloves before treating the woman’s wounds, Hickey asks if he can wash his hands, but the request is denied. He will not be allowed to wash them for several hours, not until after he is taken to the police station and photographed.

Hickey relates that the first officer on the scene took him to the patrol car and cuffed him. As he is escorted to the patrol car, he is taken past the injured woman lying on the ground. As the officer escorting him asks, “What happened? Did they come across the street?” Hickey responds, “Yes, they ran over here and attacked us.” Not part of a formal interview, those words are forever lost, and appear nowhere in the police reports from that night.

After Hickey sits for some time in the police cruiser, an officer returns and tells him that he is going to take him to the station, where detectives will interview him. While waiting in the car, Hickey thought about the case of Harold Fish, the AZ schoolteacher who was imprisoned after a self-defense shooting. He’d read that as Fish’s memories cleared, he gave statements that contained minor variations, leading the prosecution to accuse him of lying. Worried that he, too, may say the wrong thing, Hickey invokes his right to have an attorney present during questioning when an officer later approaches him and asks if he would like to make a statement. “I was very, very brief,” Hickey relates. “I said, ‘Other than the fact that these people ran over and attacked us, I would rather wait to give a full statement until I have a lawyer present,’ or something to that effect.”

All three attackers recite versions of the incident that differ from the one told by Mrs. Hickey, which will be different from the report eventually given by Larry Hickey when he describes the incident to his attorneys and legal defense team. All but one of the uninvolved witnesses tell similar stories, but most of their recollections begin after the shots were fired, and contribute little to explaining what precipitated the shooting.

“As far as the State was concerned, I was completely silent because there was no record of me making those brief statements. I just said, ‘They

ran over and attacked us,' and I didn't get into any detail beyond that. I was trying to put the responding officers on notice about who was really the aggressors, but it didn't get noticed," he says. To this day, Hickey refuses to believe overlooking his statements was intentional, surmising, "They just got lost in the whole shuffle."

Hickey estimates that he had been handcuffed in the back of the patrol car for about half an hour when the arresting officer transported him to the police substation. "What do I need to do to press charges against these people?" Larry asks, and later he asks the same question of officers at the jail. There, he is told that he must put that question to his lawyer. In the car riding to the substation, the officer explains that Hickey will meet with detectives at the station, but once there, he is placed in an interview room, where he remains for five or six hours. His only human contact comes when he asks for water and a bathroom break.



Hickey unloaded and set aside his Glock 19, seen here beside an evidence marker, after the shooting before rushing in to his garage to grab his trauma kit so he could render first aid to the women who was the first to attack him and his wife.

Eventually, the arresting officer returns and announces that he needs to take Larry to the jail for booking. “What for?” Hickey asks, and the officer responds that he thinks the charge is aggravated assault.

“Well, don’t the detectives want to talk to me?” Hickey asks.

“I guess they got all they needed,” the officer responds.

The end result? Larry Hickey never made a statement to police about what happened in his driveway the night of November 17, 2008. His assailants gave plenty of other statements and though they were at odds with the physical evidence, the State prosecuted Hickey for aggravated assault. “I’m sure it was nothing malicious, but I don’t know. There were hard questions that just were not asked,” Hickey muses.

Later, when Hickey reviewed transcripts from the grand jury hearing at which he was indicted, he was surprised to read statements from the lead detective that did not concur with physical evidence from the shooting scene about which he must surely have known. In this case, the defendant was not allowed to testify to the grand jury, and Hickey found it unnerving to read the unrefuted allegations against him. “When I read this, I thought,



Traffic cones encircle evidence in the Hickey family’s driveway and on the sidewalk in front of their home. The male assailant testified that after he was shot he took cover behind the trash cans before making his way back to their home.

but the evidence was in my driveway, not in the middle of the street! This is kind of a big deal! They're saying I ran out into the middle of the street and we got into mutual combat. That is different from them running 100-plus feet across a street to attack us in our driveway. I said we attempted to retreat and were forced to use deadly force to defend ourselves. That is a big difference."

71 Days in Jail

After waiting for hours to speak with detectives, Hickey was booked and placed in a cell. He told the medical technician taking down his information during booking that he was hit in the head. Most of the marks from the fight were hidden by Hickey's hair, landing as they had on the crown of his head. The blow to the temple left some swelling and Hickey had headaches for about a week after the attack. Later when Hickey reported headaches, the jail doctor made a simple examination of eyes and reflexes, telling him that his symptoms were consistent with a concussion and telling him to watch out for warning signs of complications. He gave him Ibuprofen for the pain.

When the case went to trial, asking the jail doctor to testify was deemed too risky, because when Hickey's attorney interviewed him, his attitude so worried the lawyer that he would not risk calling him to the witness stand. "This guy had some sort of an agenda. In my view, his attitude was that every one lies in the jail so they just give them stuff to shut them up," said the attorney. Although Hickey could have hired a different doctor to testify to the different types of concussions and compare those with Hickey's symptoms, Hickey's lawyer feared that doing so would not end well, since the prosecutor would wonder why Hickey chose not to bring in the jail doctor, and would probably call that doctor on behalf of the prosecution.

On November 18, Hickey attended his arraignment by videoconference. During the hearing, one of the women who attacked him repeated her story that he went crazy and shot them, and so bail was set at \$200,000. With no attorney beyond a public defender who was present to advise all of the prisoners that day, Hickey was charged with a half dozen charges of aggravated assault with a deadly weapon, two for each of the three attackers.

On the outside, Hickey's mother took charge. "I'll tell you who rallied everybody together," Hickey declares. "It is my mother, Callie Anderson.

She is quite a fighter. She left no stone unturned. I probably wouldn't be in the position I am in today if it wasn't for her. It is kind of difficult to work on your case when you have to do it with leg irons on during a once-a-week visit with a lawyer!"

Within 24 hours, Mrs. Anderson obtained an attorney for her son. "I tell him I'd like to make a statement," Hickey recalls. "Obviously, these guys [police investigators] aren't seeing what really happened." This lawyer called the detective sergeant, leaving a voice mail message asking to set up a meeting in which Hickey will make a full statement. The call was never returned. The lawyer also represented Hickey at a bail reduction hearing and the cash bail was cut in half to \$100,000.



Matthew Messmer

Two weeks later, during another videoconference from the jail, Hickey spoke with Pima County assistant public defender Matthew Messmer, and was immediately impressed. About ten years out of law school, Messmer impressed Hickey as someone with "fire in his belly," who would fight for Hickey's freedom. "He is really switched on. You could just see the spark when you talked to him," Hickey remembers. He was so impressed by Messmer from their videoconference that he immediately told his family he wanted Messmer to represent him.

During his initial meeting with Messmer, Hickey remembers drawing a little map, diagramming the incident step by step. "Messmer said, 'OK, well, I'll get back to you,'" Hickey recalls. "This was before any statements or any photos had started trickling in," Hickey explains. "I think I saw him a week later and he had started getting reports and photos showing where the evidence was located. I met with him and he said, 'Well, the evidence is starting to come in and you know what? You're telling the truth!'"

"And I said, 'I know,'" Hickey concludes quietly.

Matthew Messmer explains: "I really like my job, and I don't care who the person is, I have a job to do and I fight for every one the same, but there was something about Larry's case. From the first time I saw him on that videoconference, nothing changed about his story, it was always ex-

actly as he said. It was very easy to work on Larry’s case just because he is such a polite person. He was honest from day one; nothing in his story ever changed.”

“When we got the police reports,” Messmer continues, “we compared the evidence that they had with what Larry had, and everything matched up to what the real evidence was. They [the assailants] were all lying. There were different stories, and I remember seeing that this was not all in the middle of the street the way they said. This was all on the edge of the Hickey property.” His voices rises as he adds, “This did not happen on the street! It was all on the Hickey property! It just bewildered us that no one was seeing that besides our team!” he exclaims.

Still, Messmer was frank with Hickey, outlining the challenges they faced defending his shooting. “I told him from Day One, ‘I believe you, but we are going to have to figure out how to get over this hurdle, because there

Inset: The strain and weariness is evident on Hickey’s face in his booking photograph.

Below: The Hickey family in a happier setting.



are a lot of people out there that do not believe you can use a gun even if you are being attacked,” the public defender explains.

Raising Bail

As the Thanksgiving, Christmas and New Year holidays passed, Hickey remained in jail while his family scrambled to raise \$100,000 for bail. With a collapsing housing market, there was little equity in the family’s homes against which to borrow, so Mrs. Anderson arranged private loans. She also reached out to Hickey’s peers – fellow gun owners who communicate on James Yeager’s Tactical Response forum, Get Off The X. “People would offer \$1,000 saying, ‘Just send it back when you’re done,’ and even those who put \$5 in my mother’s hands helped,” Hickey relates. “One individual put us over the top at the very end. He sent my mother a cashier’s check for \$20,000,” he says, awe evident in his voice. “It is humbling, and brings emotion out of me.”

In late November, Armed Citizens’ Network member William Aprill telephoned Network President Marty Hayes to ask if he had heard about the Larry Hickey incident. “Mr. Aprill has a lot of contact with the folks from the training business, Tactical Response, and he related this incident to me,” Hayes recalls. “He wanted to make us aware of this and see if we could help. Unfortunately, Mr. Hickey had not joined the Network, though, interestingly, Tactical Response, which he teaches for, is one of our affiliated training schools to which we give complimentary memberships in exchange for their help promoting Network membership. So I felt a little bit of moral responsibility to see what I could do to help Larry Hickey in his defense.”

Hayes called James Yeager, president of Tactical Response, who confirmed the report. He referred Hayes to Get Off the X on which details and updates in Hickey’s case were being discussed. Topics included both short-term and long-term worries – concerns about obtaining the best possible legal defense for Hickey and the more immediate need of raising bail to get him out of jail.

Hayes points out that, “Typically, with \$100,000 bail, they could raise \$10,000 cash, pay a bondsman and get him released, but the prosecutor requested a cash bail. I guess he thought Larry was a dangerous guy he

couldn't see running loose in the streets of Tucson so they imposed that restriction," Hayes surmises. "Owing to that it took two or three months to raise money to get Larry released. They had to bring in \$100,000 in cash and hand it over to the court. For most people, it is pretty difficult to raise that kind of cash. But they got some loans and worked hard at it and eventually came in with \$100,000 cash."

Since it was not appropriate to draw funds from the Network members' legal defense foundation to help a nonmember, Hayes turned his efforts to raising funds elsewhere. "Larry needed to raise some serious money, so I got involved in that fundraising, not realizing that later I would be as intrinsically involved in the case as I was," he recalls. "I went out to both my students at The Firearms Academy of Seattle and the membership of the Armed Citizens' Legal Defense Network and I explained through email that I was convinced this was a legitimate case of self defense and that this guy was one of us, an armed citizen, and, in fact, he was an instructor. Now he was being railroaded by the system and he was going to be found guilty

Messmer found that a small map Hickey sketched for him while relating the incident coincided accurately with crime scene photos like the one below when the photos became available to him.



unless we did something. I don't know how much money was raised but it was a considerable amount," he notes.

Hayes continues, "In the meantime, the discussion was going on between contributors to the fundraiser about whether this money should be used for bail money or for his legal defense. It was a cordial discussion, but nonetheless there were passionate arguments on both sides. I fell in with the camp that funds raised should be legal defense money not bail money, and I think everybody pretty much agreed with that, and so Larry sat in jail for a few months because the money we had raised was not going to bail him out of jail, it was to fight the legal claim."



Network President Marty Hayes learned about Hickey's plight from a Network member who was also close to the instructors at Tactical Response.

Though Hickey had complete confidence in his public defender, Hayes was deeply concerned whether a public defender's office could put on an adequate defense for such a complicated case. "Usually a public defender would not have enough resources for this kind of case," he explains. "They needed an investigator hot on the trail of this situation, talking to all of the witnesses, getting photographs of the wounds, etcetera, and they didn't have one. This happens all the time. Because many times public defenders don't have the resources to do their own investigation, they may rely on the prosecution's investigation," Hayes continues. "When the train is going down the tracks toward a conviction, the prosecution doesn't always look at all the evidence. They only look at the evidence that tends to help convict the person, as opposed to possibly showing that he was justified."

In the end, some of the money raised was used to put on a mock trial for Hickey's attorneys to test defense strategies before going to court. Additional expenditures covered travel expenses of expert witnesses for

the trial, including Massad Ayoob, plus instructors under whom Hickey had trained and Hayes, who gave testimony to explain the ballistic evidence including bullet trajectories and the retention position from which Hickey fired, to prove the extremely close proximity of Hickey’s attackers at the moment that he drew and fired. This testimony stood in stark contrast to the testimony of Hickey’s assailants. Hayes advised on the case pro bono, accepting only travel expenses, freely contributing his time and expertise.

Hickey Set Free

On January 27, 2009 Hickey was bailed out of jail. Within a week, he went to work full time for a friend who owns a manufacturing business in Tucson, and was later called back to his regular job at the railroad. Under his bail conditions, Hickey was prohibited from coming within a five-mile radius of his assailants (and thus needed to avoid his own home), so the family moved into a spare room offered by one of Hickey’s friends, a retired law enforcement officer who lives on the other side of town.

As the public defender’s office was ramping up to defend Hickey in court, a second public defender, Michael Rosenbluth, joined the team, owing to the seriousness of the charges. Hickey calls both “stellar lawyers,” and praises the efforts of their support staff as well.

Because the Public Defender’s office so rarely deals with self-defense cases, Hickey became immediately immersed in forwarding information from all his prior training, as well as researching principles including justifiable use of deadly force to defend against a mob attack and other disparity of force issues. “I had a completely legitimate self-defense claim owing to disparity of force but we all know that is the toughest thing to show,” he recalls.

Wisely, the defense team reached out to a leading expert on the subject, internationally renowned Massad Ayoob, who advised on Hickey’s case along with Hayes. Neither Ayoob nor Hayes is sure who went to work on the case first, though both remember that in May of 2009, while Ayoob was teaching at Hayes’ school, The Firearms Academy of Seattle, both men participated in a phone conference with Hickey and his lawyers.

“After the phone conference, Massad was on board to serve as an ex-

pert to explain the issues to the jury,” Hayes says. “A problem arose early after he accepted this case, when Massad discovered he had another trial scheduled for the same time, a previous commitment that he couldn’t back out of, so I was basically the pinch hitter. I substituted for Mas and got involved early on as the expert to go down and testify in court,” Hayes recounts, adding that during the preparatory phases Ayoob continued to offer advice though he was not able to participate in the trial.

Instead, Hayes testified, focusing primarily on ballistic evidence. “My role was to look at the ballistic evidence and see if I could make sense of it by comparing it to Larry’s account of the incident versus the other people’s account,” Hayes explains. “When I studied the evidence, I was convinced that Larry’s account was absolutely consistent with the evidence and that the other accounts were not.”

Hayes continues, “My testimony was to counter some of the claims made by the people who had the altercation with Larry. Their first claim was that after Larry shot two people, he turned his gun toward the third and as she was running away, he fired a shot at her. I thought that was pretty ludicrous, based on what I had heard. It just didn’t make sense to me. I got all the discovery including the photographs, looked through it and determined there were three shots fired and those three bullets struck two of the people. There was no way Larry fired at a third person as she was running away,” he says.

Character Assassination

In addition to the struggle to match up limited evidence with all the different stories being told, Attorney Messmer faced several more hurdles. The first was prejudice about men fighting women. Messmer admits, “Even in our own office, we were very divided. A lot of people couldn’t get over the fact that Larry shot one female. That [reaction] just dumbfounded us: the aggressor coming toward you doesn’t have anything to do with gender,” he exclaims. “What we knew from talking to Marty [Hayes] and Ayoob was that this is a disparity of force situation. Being able to convince the jury that this was a disparity of force situation was really the key. We had to make them see that these people were acting in concert and that they were one force. I think it was always hard for some people to grasp that concept.”

In addition, the defense team needed to counter the picture that Hickey’s accusers painted of him as a crazed gun nut. Initially, hoping to discourage prosecution, the defense team disclosed all the information they had about firearms classes he had completed. “From day one we wanted to avoid trial, so we disclosed all of Larry’s training, that he’s an instructor who has taught all these people, he has been training all these years, and he knows when it is proper and when it is not. We disclosed all that to the prosecutor,” Messmer stresses.

They learned early on that they would have to take care to explain how Hickey’s training led to tactical decisions he made during the attack. In an effort to find the best strategies for Hickey’s defense, Messmer, Rosenbluth and their team hired a Phoenix firm that puts on mock trials in which attorneys practice their presentations and watch the reactions of a test jury to their arguments. “The practice jury said that Larry had too much training and he should have known better. So how much we were going to get into [his training] was always very difficult to figure out because it was absolutely important to show Larry as this person that isn’t just out there with a gun and doesn’t know how to handle it.”



Hayes worked from crime scene photos like this one, plus a series of photos taken by family members of the assailants to document wounds. This was all obtained from the State as part of the discovery used in the trials. From these Hayes was asked to postulate details like the locations of the attackers when Hickey shot two of them.

Even if the defense had chosen to give only cursory mention to Hickey's training, the prosecutor would have forced their hand at trial. He harped endlessly on the various shooting classes Hickey had completed. "It worked to our advantage in both trials because we disclosed all that to the prosecutor from Day One," Messmer states. "In trial, the prosecutor went overboard with that and he really disgusted the jury because he wasted their time," Messmer explains, relating how, like a broken record, the prosecutor asked each expert and material witness about each class Hickey had completed, what it covered, challenging why a private citizen would need that knowledge.

Messmer believes the jury eventually thought, "Get to the point. We know that!" He adds, "It made the prosecution look bad because Larry was getting training and doing his job and they were attacking him for that. It blew up on them in the first trial, and they went back to it and it blew again in the second trial. We knew they were going to bring it up, but it actually helped us out."

Hard Evidence

Having prepared to confront these and other issues, on September 30, 2009 Larry Hickey, represented by Matthew Messmer and Michael Rosenbluth, went to trial in the Superior Court of the State of Arizona in and for the County of Pima, defending his case before the Honorable Judge Teresa Godoy. On the other side of the aisle sat the deputy county attorney, Daniel Nicolini.

On the third day of the first trial, Network President Marty Hayes presented ballistic evidence, identifying the most likely bullet trajectories and explaining how that proved that Hickey's attackers were right on top of him when he fired from the retention position. Using a Crimson Trace aiming laser on a plastic molding of a gun, he demonstrated how the bullets traveled at trajectories that would have made the wounds only if the attackers were extremely close.

These wounds, he testified, were consistent with shooting a handgun from what is sometimes called a retention position. He gave the history of the technique and then explained that it exists for use in circumstances under which it is impossible to bring the gun to eye level and use the sights to take aim.

Messmer clarified that the shooting method would be for use “...when the attacker is right on top of you?” and Hayes concurred, “Absolutely, yes.”

“...In close proximity?” Messmer pressed. “Yes,” Hayes averred.

Hayes later explains that the court recognized his expertise because, “In order to be considered an expert or give expert testimony and expert opinion in court, the court requires that the individual have gained a knowl-

edge of the specific discipline you are testifying to considerably beyond the average layman’s knowledge of that discipline and that is done through formal training, formal education or simply hands-on experience. Because I’ve had all three, I met the criteria of a ballistics expert very easily and the judge allowed me to give that testimony.”

Still, Nicolini challenged Hayes’ testimony, asking if he was a forensic pathologist or had medical experience. Did the prosecutor’s aspersions diminish the effect of his testimony? “Not that I saw, because I’d never claimed to be a pathologist or doctor. He was trying to discredit me as much as possible, but it didn’t seem to bother the jury. It was just basically smoke and mirrors to try to



Hayes reenacts his testimony, in which he showed bullet trajectories using a fake gun equipped with a laser. White arrow indicates position of aiming laser’s dot and thus the bullet trajectory of the first shot, which struck the female.

attack the credibility of the witness somehow and that is all he could do, I guess,” Hayes suggests.

There was considerable difficulty conclusively establishing the assailant’s exact location because gunshot residue swabs were not taken, nor were stippling patterns recorded from the abdomen of the male, exculpatory evidence that could have scientifically proven how close the attackers were when Hickey fired. Instead, the lack of evidence created a situation in which Hickey’s sole testimony had to be weighed against the stories of all three attackers. This made Hayes’ interpretation of the available evidence all the more crucial. He had to work from crime scene photos, depositions and statements to police and a set of photos made by family members of the persons who were shot.

Did he have sufficient detail to draw conclusions? “You are never 100% sure, and you never say you are in court, but you say there is a very high probability based on what you saw to testify in court to what you believe occurred,” he says now.

In addition, Hayes had to give his testimony out of the regular trial sequence, because he, too, had a prior commitment and was only available to testify on the third day of the trial while the prosecution was still presenting their case. He testified, after which he departed.

The next day Dr. Julie Wynne, the physician who treated the male assailant, was called to describe the gunshot injuries and her treatment of them. Attorney



After fielding unexpected questions during the first trial about Hickey’s Glock 19, Hayes coached the defense in strategies to preempt further suggestions that the Glock 19 was unsafe. Here it is shown next to an evidence marker atop the retaining wall on which Hickey placed it after the shooting.

Rosenbluth asked if she observed any stippling on the man's torso, but her answers were inconclusive. Driving home afterwards, the physician felt concerned about her answers and decided to look in her patient's files to verify her accuracy. Opening the files, she discovered photographs taken prior to his treatment.

"Instead of blowing it off, she called the prosecutor that night and told him, 'I have photos that I don't think you ever saw and I think you guys need to see them. I think they could answer that question about ranges and things of that nature,'" Messmer relates.

"It was an honest error, I think, on the prosecutor's part," Messmer estimates. "I don't think he even knew they had the photos. The prosecutor has done numerous cases where people have gone to the hospital, and we have never seen photos like this before. Now we see them all the time because we know to ask for them."

Messmer and the rest of Hickey's defense team found the late introduction of the photographs surprising, as well. "That was really a unique situation. I've been doing this for nine years; my legal assistant has been doing it for 18 years, and Mike Rosenbluth has been doing this for 18 years and that is the first time any of us has seen anything like that happen," he recounts.

The newly discovered pictures were brought into court after Hayes testified to his best estimates of how close the male assailant was standing when he was shot. "I testified to the best of my ability based on the physical damage done to the hand and the lack of photographs of all the wounds on his body. There were three gunshot wounds to his body: two in the torso, one in the hand."

Did the new photos change his opinion? "Yes, we later found out through looking at these photographs that I was probably off base on how the male assailant's hand was struck by a bullet," he confirms. By the time the photos were discovered, Hayes had returned home. He recalls, "I was already back home when I got the phone call and a frantic email from the defense saying, 'Have you ever seen these pictures? What do you think of these?' I was just livid that I was never given this information to begin with."

Before he left the witness stand, Hayes also testified how easily a person armed with a handgun can be disarmed, and gave the jury a demon-

stration. During cross examination, Nicolini learned that Hickey was not trained by Marty Hayes, and also learned that Hayes was giving his expert testimony in this case at no charge. When asked why, Hayes answered, “Because throughout my career I have seen people who are being wrongfully prosecuted. I have looked at the evidence and I decided this is simply wrong. If those people don’t have the financial resources to hire experts then they still need this type of credible witness, so over the years I’ve done a few of these without being paid.”

Hickey was not a Network member, Hayes explained, and Nicolini asked if the Network’s “objective ... [is] to challenge prosecution where self defense is claimed by the shooter?” Hayes responded, “I would say that the mission of the organization is to help people who are being wrongfully prosecuted.”

The Prosecutor’s Theory

Material experts who testified on Hickey’s behalf include several instructors, ranging from the man who taught an early Arizona concealed handgun licensing class Hickey took, to his mentor, James Yeager, from whom he took many classes and for whom he eventually went on to become an adjunct instructor. Initially, Nicolini grilled Hickey about the concepts and principles Yeager taught him, using notes and handouts from classes, and later he went over the same material with the instructor himself, discussing avoidance, de-escalation, gunfight tactics and many of Yeager’s similes, acronyms and catchy phrases – tools that the instructor used to help students remember important principles.

Alarming, out of context advice from instructors to “always cheat; always win,” and the axiom that one should treat every one else in a polite manner while simultaneously having a plan to kill them painted an inaccurate picture about Hickey’s outlook on life. Nicolini harvested these quotes from the training notes and handouts, and made much hay with them, especially during his closing arguments in which he described Hickey in highly inflammatory terms.

The prosecutor told the jury not to consider the case from Hickey’s viewpoint, from “what was going on in his paranoid mind,” but to apply the reasonable person standard. “This is not a case of self defense, this is not

a case of defending a third person, even if you accept his version of how it went down,” urged Nicolini.

“He is lying about how it happened. And you know why he is lying? First of all, he ...has got the same motivation to lie about these facts that any criminal defendant has in this situation, he does not want to be convicted. But I think Larry Hickey has an additional motivation in this case, he wants to be vindicated, he wants somebody to say, yes, Larry, you exercised your Second Amendment rights to defend yourself and your family like a good American. And you know something else? The same reason why four of his gun instructors have come in here to testify, the people who taught him to use guns, and when to use guns and taught him that aggressive mindset, like Jim Yeager, they want to be vindicated, too. But there is no vindication for Mr. Hickey in this case. It didn’t happen as he said it happened,” the prosecutor alleged.

“Larry brought a gun to a fist fight and used it to shoot two unarmed people, and even if you believed his version of facts, I submit that you must convict him of these charges, because the thing is, he was trigger happy. He was a gun-toting, trigger-happy guy, who pulled out his gun in a situation where it absolutely was not required,” reads the transcript of parts of Nicolini’s closing.

“Reading the transcripts later, I realized this trial was not just about Larry Hickey and his actions,” explains Hayes. “This was the Pima County Prosecutor’s Office putting the concept of the armed lifestyle on trial because Nicolini attacked



Above: A burnt-down cigarette butt found at the crime scene corroborated Hickey’s testimony that the second sister flicked a burning cigarette at his wife.



The woman who attacked Hickey made much of two hair bands found in Hickey's driveway, saying that they were pulled loose when he grabbed her hair and hit her in the face. Their location in Hickey's driveway was just one more piece of evidence conflicting with the plaintiffs' report that he met them in the middle of the street and shot them.

the whole concept of taking training, carrying a gun 24/7. He tried to paint the picture that anybody who would do that is really out of whack with society. There was a lot of discussion in his closing about the type of training that Larry took. Nicolini called Larry a liar; he called him a wannabe cop, a wannabe soldier. Frankly, I think it was demeaning to jurisprudence to see a prosecutor go to those extremes to try to get a conviction when there was nothing in the evidence or record to support his allegations," Hayes notes. "He went overboard."

Messmer reports that he closed out his part of the trial hammering home the fact that, "Larry was never the aggressor. I took the jury step by step through what he did to defuse the situation, to deescalate and try to do everything possible to avoid pulling that gun.

"And then I attacked the prosecution's ridiculous attack about too much training," Messmer continues. "How is it possible for

someone to have too much training? I alluded to similar circumstances that you wouldn't want a doctor to avoid going to training and learning the newest medical procedures, you wouldn't want your lawyer to not keep up on his legal education, and that Larry wasn't just going out there to learn this to be some Rambo. He was actually using this to be an instructor for our troops.

"I think that hit home," Messmer relates. As the last point in both cases, he described the attackers as a three-headed monster. In trial transcripts from the first trial, Messmer is quoted as describing the male assailant's entry into the fight, "Now he [Hickey] is not only dealing with two women, but is he dealing with three people attacking him...this monster, this three-headed, six-fisted, six-footed that can stomp you when you fall down monster,"

and he adds that the male, a young man in excellent physical condition, is throwing hammer punches to Hickey's head.

"What happens if Larry goes down and they get to his wife?" Messmer says he asked the jury. "We know his kid is somewhere around the area, he is coming out, he is looking. We know he was out sometime shortly after that. Not only are they possibly going to beat up the wife, but if Larry goes down and he's knocked out and his gun comes out, then they have a free gun in the hands of these attackers."

Hung Jury

The first trial against Larry Hickey for multiple counts of aggravated assault with a deadly weapon started on September 29 and concluded with closing arguments on October 7, 2009. When the jury returned, nine voted to acquit and three to convict. They were unable to come to a unanimous decision, and the case closed with a hung jury. Had the jury agreed to convict him, Hickey would have faced a 45-year jail sentence, provided that the convictions on the various charges ran concurrently.

Messmer explains that after trial some of the jurors agreed to talk about the case with the defense team. "The feeling we got was that they just would not come off the fact that three individuals did not have a weapon, and that it was gun versus no gun. They felt that even though these people probably were the attackers, Larry probably didn't have a right to use his gun at that point in time."

Hayes admits that he was not surprised when he received two emails from Matthew Messmer, the first telling him that the trial had ended with a hung jury, and the second that the State intended to retry Hickey.

Hayes remembers his reaction: "Well, I said, that makes sense because there were really two stories being told. While we had the physical evidence to back up Larry's version of the events, they had more witnesses to tell the other story." He says that the jurors had to weigh conflicting information between what the physical evidence showed and what the eyewitnesses said. "The eyewitnesses were also the individuals who Larry shot and they were, frankly, kind of a sympathetic group. There was a lot of evidence on both sides and it didn't surprise me there was a hung jury."

When Messmer emailed a second time, he asked if Hayes would consider helping with a second trial. “He asked, ‘Are you up for it again?’” Hayes remembers. “I said, ‘Darned right, we are. Let’s lock and load.’”

Two scant weeks passed between the end of the first trial and the State’s announcement that it intended to try Hickey a second time. Though the State dropped several of the charges, if his attorneys did not prevail this time, Hickey estimates that he would have faced a sentence of approximately 30 years. Offered the option of pleading guilty to two felonies, Hickey would have probably served two years in jail, expecting a reduced sentence for good behavior.

“At no time did I ever personally entertain accepting a plea,” Hickey exclaims. “Counsel told me about the risks [of a second trial], but I was pretty adamant with them. The attorney has to do his due diligence, though, so they told me things like the conviction rate for this county attorney’s office was like 92% and on retrials it is like 95%. Then, you don’t know what kind of a jury you’ll get and the State now knows your testimony, so they will be more prepared.

“They let me know that I had a tougher fight ahead. It worried me,” Hickey admits. Still, he elected to go back to trial, noting that although the shorter sentence might be easier to contemplate, “It is not justice, so we turned down the plea offer.”

New Trial Strategy

Messmer immediately vowed that in the second trial he would not simply present a re-do of the original arguments, and Hayes offered him an innovative solution. “I said, ‘Let me run this idea by you.’ I told Messmer that Massad Ayoob could testify to everything I testified to in the first trial, plus talk about weapons retention issues and disparity of force issues to a greater degree. We began planning to have Massad serve in the role that I had in the first trial. Then I volunteered to go to Tucson to serve as defense consultant to help sort out some of the issues as they came up in court.”

Ayoob, who had consulted during preparation for the first trial, joined the second defense effort enthusiastically. “I’m not sure there were things that I testified to that Marty could not have handled,” Ayoob interjects mod-



Network Advisory Board Member Massad Ayoob advised on the first trial and testified at the second.

estly. “However, the strategy was to have on the defense team someone who was analogous in their role to the lead investigator who was working at the prosecution table. There you have someone who is deeply familiar with proper protocols for shooting investigations, crime scene reconstruction, bullet trajectories and angles who can advise the prosecutor how to best establish his case in front of the jury.

“Marty fulfilled that role for the defense team. It is rare that a defense team has that and I think it was absolutely critical. The second time around, it allowed a stronger defense to be established.” Ayoob notes that he gave testimony about how students are taught to recognize the lethal threat of

disparity of force. He told the jury how in Hickey’s situation, the male assailant’s blind side attack in conjunction with the ongoing attack by the two females tipped the balance creating a deadly situation in which Hickey’s decision to shoot was justified.

Civil Lawsuit

Before and during the first trial, Hickey’s homeowners insurance began receiving demand letters from Hickey’s assailants wanting to tap into his insurance to cover their medical bills and collect damages. Expecting to be acquitted at trial, Hickey directed his insurance company to deny the demands.

Within 30 days after the end of the first trial, his assailants had filed a civil lawsuit for monetary damages. Hickey asked his insurer to obtain a civil attorney for him. Like his insurer, Hickey came to view the settlement as purely a business decision, recognizing that in a civil case, the plaintiffs need only convince a majority of the jurors that their argument is more likely

valid than not, unlike the criminal case in which the standards of proof are considerably higher. Recognizing that a loss in civil court could cost more than the \$100,000 limit of his insurance, Hickey acquiesced, a settlement was reached and the \$100,000 apportioned primarily to the two who were shot in the fracas, although all three had attempted to collect. In attempting to get money from Hickey’s insurer, the assailants made a number of depositions, which proved useful later. Messmer calls those depositions ammunition for the defense, “because once again, they changed their story.”

To claim monetary damages against homeowners insurance, the trio had to change their stories about where the altercation occurred, from the middle of the street to its actual location, the Hickey family driveway. “That is the problem with having to keep your stories straight,” Hickey says, speaking carefully and trying not to sound accusatory.

When police interviewed his assailants, not one admitted to striking Hickey, and they made odd accusations that he didn’t say a word to them,



Even small things like empty shell cases ejected from a semi-automatic pistol can fill in gaps in a crime report, if they are discovered and their location put into perspective with the rest of the scene.

only laughed and started shooting. The original female assailant continued with that story through the first trial, but in depositions for the civil case she said that Hickey asked them to return to their home, but she chose not to because she wanted the argument resolved.

In addition, although he had told investigating police officers that he had not hit Hickey, the male assailant testified in both criminal trials that he had hit Hickey in the head. Hickey recalls that testimony: “In my mind, that was like a ‘Matlock moment,’ an “AH, HA!” like in the TV show Matlock. On TV, that is where the judge says, “Case dismissed!” Well, that does not happen in real

life! But the jurors hear it and they see this individual squirm on the stand when they are made to read their own testimony. The jury is not stupid, thankfully.”

The State Tries Again

Messmer resolved that his defense strategy in the second criminal trial would be much more than a do-over of the first. “I think the prosecutor just thought we were going to do a replay and have the same opening and same closing,” he suggests. “We really had to go back and learn this stuff even better. On the second trial it was more important to keep Marty Hayes involved and his suggestion was absolutely great.”

Freed of the ordinary trial restrictions through which witnesses are commonly sequestered, Hayes would be free to be in the courtroom all throughout the trial, and, from that broader view, advise on trial strategy. Hayes cites an example of a red herring the prosecutor introduced into the first trial that his advice to the defense helped them avoid in the second. “In the first trial, Nicolini was all concerned about the gun that Larry used. It was a standard Glock 19 loaded with a combination of Silvertip ammunition and some other miscellaneous ammo that was at the bottom of the mag. He was trying to paint the picture of this gun being inherently dangerous, reckless, unsafe, saying ‘It doesn’t have a safety on it, does it?’ I thought it was kind of a weird that he was attacking the gun as much as he was, so I just simply answered the questions as honestly as I could and didn’t give him any ammunition to work with.”

Hayes continues, “In the second trial, I made it clear to the defense team that you need to establish ahead of time what guns the local police use because they all use .40 caliber Glocks which are generally more powerful than 9mm. So in the second trial, we established through a detective’s testimony that their gun was a .40 caliber Glock and guess what? Nicolini knew what we had done and he never made the gun an issue in the second trial.”

Seated in the courtroom directly behind the defense team, Hayes watched, listened and did his best to judge how testimony was being received and what the prosecution had up its sleeve. When something concerned him, he would jot a brief message on a sticky note that he handed

to Messmer’s paralegal, Jacqueline Britt, who in turn passed it on up to Messmer or Rosenbluth at the defense table with Hickey. “We tried to do it as discreetly as possible so as not to be disruptive,” Hayes recalls, noting that neither prosecutor nor judge challenged the activity and he believes the jury was all but unaware of it.

“When the prosecution was giving their case, I would be looking into how to cross examine their witnesses and look for discrepancies between their testimony and what I knew about the case,” Hayes describes. “Understand that 90 to 95% of the time Messmer or Rosenbluth knew that and were already on top of it. I told them, ‘I don’t know what is in your mind, so I’m going to keep sending these notes,’ and they said, ‘Just keep sending them.’ Occasionally, I would bring up something they hadn’t thought about and we would get that into the cross examination or the direct examination for some of the defense witnesses,” he remembers.

“I can’t believe that we had such luck!” Messmer enthuses. “In addition to Mike [Rosenbluth], we have my legal assistant, Jackie, we have Larry working the trial, but now we also have Marty who is right behind us and has a different viewpoint and who can tell us what is going on with the firearms. That, too, was very important. We delved into the specifics about the uniqueness of self-defense law even more than in the first trial.”

Messmer drew on testimony from Ayoob, as well as bringing out testimony from material witnesses Richard Batory, James Yeager and police sergeant Brian Kowalski, who had been Hickey’s instructors. They testified to information upon which Hickey acted when he defended himself and his family. Messmer suggests that in the first trial they expected Hickey’s extensive training to speak for itself. “In the second trial we needed to ask, ‘What was this class about? Why did you take that class? Why was that useful?’” he explains.

Hayes Gets a Speaking Role

Unfortunately, Kowalski fell seriously ill right before he was scheduled to testify, and all parties involved agreed that his testimony from the first trial would suffice. Using transcripts from the earlier trial as scripts, the judge, prosecutor and a “reader” played the roles. Hayes was selected to read Kowalski’s words, with several odd moments resulting.

The first came when the prosecutor had asked Kowalski to comment on Hayes' testimony in the first trial, which had preceded Kowalski's. The police sergeant responds in glowing terms, which caused Hayes to chuckle, and the prosecutor to break off from his script and ask, "He is talking about you, isn't he?" After that, the court did its best to move on with the testimony. It was going fine until they reached a point in the policeman's testimony in which he gave demonstrative testimony in addition to his spoken words.

Hayes tells the story: "In that first trial, Nicolini had asked Kowalski to demonstrate a retention firing position. Apparently, Kowalski got up and showed the jury what that meant. Because this was demonstrative testimony and not verbal testimony, we were kind of stuck. Knowing me from the first trial, the judge said, 'Well, I think Mr. Hayes is qualified to demonstrate that.' So I got up in front of the jury and demonstrated some of this demonstrative evidence even though I'd never been sworn in as a witness," Hayes marvels.

"Frankly, I think that would have been an appealable issue if they had



Ayoob used crime scene photos to establish how far into Hickey's drive way the woman was shot, as well as the distance from the altercation to the gargage door he kept closed.

wanted to appeal it, though I don't think it would have gone anywhere because it didn't really affect the outcome of the case and it did not prejudice either side," he estimates. "That was a surreal moment. Afterwards, I went back and sat behind the defense and started passing notes again," Hayes concludes.

Ayoob's Expert Testimony

Of course most of the trial was deadly serious. The expert testimony of Massad Ayoob clarified the very real threat of death or crippling injury Hickey faced on November 17, 2008 when he was set upon by the two sisters and the boyfriend. "We had to explain to the jury that there were multiple issues going on," Ayoob begins. One issue he clarified was Hickey's fast decision when his strategy changed from fending off the blows to drawing and firing his Glock pistol, explaining how the addition of the young man changed the threat to Hickey.

When the young man jumped in to the fight, the circumstances changed "from two females – two fairly good sized, and one very athletic female – against one medium-sized male," he explains. "Now we had not only the tilt-



Ayoob's testimony included making the point that all of the blood from the woman's copiously bleeding leg wound was in Hickey's driveway, despite testimony that she gave stating that after being shot in the street, she hopped five or six steps to the sidewalk where she collapsed.

ing of the balance by the very aggressive, buffed-out young male, but with that we had the blind side attack of the sucker punch to the head that Larry with his medical training realized was very close to rendering him unconscious as he sees flashes of white light.”

The danger of passing out introduced an additional justification beyond disparity of force and disparity in numbers, Ayooob continues. He explains that disparity of force occurs when an able bodied person attacks a disabled person. That applies even if the disability occurs during the fight. Applying those definitions to Hickey’s situation, Ayooob explains, “Larry knows that in a moment he will pass out. There is absolutely no reason to believe that someone who would join in a three-to-one attack and who would throw a sucker punch from an unseen angle would suddenly turn into the Marquis of Queensberry, as the prosecution said, and let it go at the single punch and say, ‘Ah, ha! I have taught you to be a gentleman.’ That was one of the prosecution’s more ludicrous points,” he chuckles grimly.

“I explained that once he was down, he would be helpless,” says Ayooob. “A reasonable and prudent person in his situation, knowing what he knew, could expect to be stomped to death or horribly crippled. There was no reason to believe these people who would commit such an aberrant, violent three-against-one assault would suddenly turn charitable, merciful, normal and benevolent,” Ayooob recounts.

“We had to also explain that Larry knew what they did not: that if they continued to maul him when he was down that they were very like to find a loaded Glock 19 that he was legally carrying, his wife was not only within the line of physical attack, but also in the line of fire if they got that gun away from him and he had reason to believe that his little boy was threatened, as well. All those things came together in his mind,” Ayooob says.

Ayooob’s testimony also showed the jury how Hickey’s assailants changed their stories from their initial statements, to testimony in the first trial, to depositions for the civil case, to the testimony the jury had heard in this, the second trial. He points out that they had changed their testimony about sequences of events, their locations and what they were doing. “One of the State’s witness’ testimony about where she was when she was shot was inconsistent with the angle of the gunshot wound and was actually, physically impossible. We used a Ring’s Blue Gun with a Crimson Trace

laser and that proved to be very effective evidence,” Ayooob remembers.

Ayooob takes a deep breath and resumes his narrative, “I think it is another classic example of why certain things need to be articulated at the scene, as I have taught for 30 years. The other side is saying you’ve done all these horrible things and manipulating the story at will. Here, they said first, ‘It happened in the street,’ because they realized, ‘Wait a minute, we did attack him on his own property. We can’t let that come out,’ so they said, ‘He came out and met us in the street.’

“Really?” Ayooob wonders. “Why are the blood stains on his property?”

The woman testified that after Hickey shot her in the lower leg she hopped up on to the Hickey driveway. “By some magic no blood dripped from the massive, hemorrhaging gun shot,” Ayooob interjects sarcastically.

“That was one of the things that I explained on the stand: that it would be virtually impossible for that particular wound that was bleeding copiously not to have bled and have left bloodstains on the street,” Ayooob recounts. “When they did their civil suit, in deposition the same witnesses said under oath, ‘Did I say it happened on the street? Oh, no, it happened on his property,’ because the homeowners liability policy won’t cover something that happens on a public street,” he adds.

“So essentially what you have is these witnesses who blatantly, totally changed their story to whatever served them in whatever setting they were in, criminal or civil. Messmer and his team had to meet it and I believe they met it successfully,” he concludes.

Appealable Issues

Had things gone disastrously wrong and the jury voted to convict Hickey, both Ayooob and Hayes identify issues they believe would have been grounds for an appeal for a new trial.

Ayooob points out, “The judge ignored case law from right there in Arizona, fairly fresh case law in the Harold Fish case, that said that the jury had the right to know anything about the assailant that would cause them to be particularly dangerous even if it was not known to the defendant when they shot them. Now that is a very welcome turnaround from Federal rule

of evidence 404B that says prior bad acts by the opponent unless known to you cannot be used in your defense for harming that opponent.”

Ayoob continues, “For whatever reason, the judge chose not to go that way and the jury never knew that one of those substantial-sized women was athletic and spent a good deal of time working out in a Brazilian jujitsu dojo and had put on her Facebook page prior to the incident that she ‘loved to grapple.’ But at trial, she’s presented as a helpless June Cleaver in a cocktail dress being attacked by the savage, crazed mercenary gun nut, when in fact she was one of the ones who initiated the attack on Hickey who was attempting throughout to be the peacemaker,” Ayoob says.

“The prosecutor won that one,” Ayoob accounts. “I think had Hickey been convicted, we would have won on appeal, but it was an uphill fight. That has always been one of the curses of this: attacked by someone with a long, violent history, unless the other side opens the door by blatantly saying you can’t believe that someone as nice as the one who was harmed could have attacked this defendant. This prosecutor was wise enough that he did not; he did that by innuendo, but not by statement, so that particular door did not open.”

Also kept out of the trial was the videotape of the murder of Constable Lunsford by three considerably smaller suspects during a car search for drugs. “I think we all thought that was an appealable issue that could have set Larry free if he had been convicted,” Hayes estimates. “There certainly was case law applicable, but the judge felt the video was too graphic and too prejudicial. Well, this was a prejudicial case, in which he was being accused with three counts of aggravated assault. And this was in front of him, and I think the jury should have seen it. That was a setback.”

Hayes muses further, “Having said that, I think that Messmer’s closing argument was the pivotal point in the second trial. I remember a lot of passion, and the fact that Messmer really believed that he had a truly innocent individual, which was not the norm for a public defender. He had a lot of passion in his voice when discussing it. In fact, at one point, he had to take a break because he was getting too involved with the argument. He took a break and then he came back and finished up his closing. To me that was the biggest part of the case,” he submits.

Jury Hung Again

On May 25, 2010, when the second trial came to an end, eight members of the jury voted to acquit, two to convict and two were unable to reach a decision. This jury was quite different than the first. The State had used all of its challenges to disallow any jury picks that admitted to owning guns, had licenses to carry, or had prior police, military or correctional work experience, Hickey remembers. “Usually the prosecution wants the law-abiding types, cops, people with a sense of right or wrong. Those were the people I wanted on my jury,” Hickey comments. This time the State assiduously avoided those types of people, and the jury included a mix of retired folks and citizens who Hayes characterizes as being “antsy, because they just wanted to get back to their jobs.”

Messmer relates, “On the second trial, we had a juror that was a lawyer. In hindsight we shouldn’t have picked him, because lawyers over analyze everything. He’s one of the ones who voted against us and we were absolutely shocked. And he said, ‘Hey, I went in there and I said, ‘No you can’t use a weapon even if there are three on one, if they don’t have a weapon,’” explains Messmer.

Lessons Learned

While Messmer will be the first to say he learned a lot in preparing Larry Hickey’s defenses, he stresses that attorneys need to know more about self defense and the law. “I’m glad you are doing this article. I really do think that the lawyers need to be educated about it because it is different when you read on a page what the law is, but when you see this kind of training that Larry had, the kind of perspective that Marty and Ayoob had about this case, it is a totally different thing than what we are used to.”

“We certainly would have talked to people around here, but the knowledge that was available to us through Marty and Ayoob was outstanding and made us able to attack the case and gave us ideas that I don’t know as lawyers that we would have picked up, because we don’t always know how to start,” Messmer admits. “It gave us better arguments because we were not thinking as lawyers, we were more taking our law and applying it to actual firearms and that kind of self-defense training. I don’t know that we would have gotten that on our own.”

After recounting his ordeal from beginning to end, Hickey emphasizes that he no longer believes that a trial is about right and wrong, crime and justice. “It seems to be about winning and losing,” he muses. For example, he cites how a judge arbitrarily controls what evidence to allow in to the trial, and what to keep out.

“People need to understand how it works,” Hickey says. “You think you are going to be able to present this evidence and that evidence and everyone will be able to see it clearly. Well, the judge decides what evidence you are going to present.”

Because during the fight, Hickey’s mind had flashed to the video in which three small people kill a large “line-backer sized” police officer. Hickey and his defense wanted to show the jury the video. The judge would not allow it, though she did allow Hickey to talk about it. “I think the judge was a very fair individual, but that was just a decision that she made.”

The defense also wanted to present material from the Arizona Department of Public Safety’s required Concealed Handgun Licensing curriculum that specifically addressed disparity of force when attacked by multiple assailants who are unarmed, but were prevented from doing so.

The Missing Evidence



An IWB holster from Blade Tech similar to the one lost in mis-logged evidence, though this example holds a S&W M&P, not a Glock.

The outcome in a case like Hickey’s can also hinge on how the police handle the evidence. Hickey relates that at one point during his first trial, he overheard prosecution members talking about the manner in which Hickey had carried his Glock that night. Something he heard made him worried that the prosecution intended to allege that before the shooting Hickey had his gun tucked in his waistband without a holster, something that would be consistent with running into the house and grabbing a gun. Concerned, he mentioned it to his lawyers, who casually asked the detective who was sitting at the next table if the prosecution had brought Hickey’s holster with them. The detective responded, “There was no holster; he didn’t have a holster.”

Hickey remembers that by good fortune, the officer who arrested him was due to testify next. Since in court it is not a good idea to ask a question to which you do not know the answer, Hickey's attorney ran through a series of questions starting by asking if the witness took the defendant into custody, whether he gave him a cursory pat down before putting him in the patrol car, and what, if anything the pat down produced.

The officer answered that yes, he took a holster off Hickey and that he put it in evidence. "That holster could never be found, not that we needed it, because the guy admitted to taking it," Hickey recounts. It was later found after the State released Hickey's firearm. When Hickey went to pick up the gun, the clerk asked offhandedly if he wanted "this other stuff." Hickey asked what it was and the woman gave him some shoes, socks and the missing holster. Further inquiry showed a minor error in the number under which that evidence was logged. Those things just fell through the cracks, Hickey explains.

Hickey characterizes the error as, "Not a huge deal, but if it had gone the other way and the prosecutor was able to convince the jury that I was lying and that I was not carrying a firearm in a holster – that I just went in and stuffed a gun in my pants and went out looking for trouble – that makes me wonder."

Throughout a lengthy interview with Hickey, at no time does he express malice or anger toward law enforcement or the criminal justice system. If pushed, he will acknowledge that the system failed him, especially in the early days of his incarceration, but in admitting that, his tone of voice remains even and dispassionate.

"All of the officers that testified were great," he says. "They got up there and they told the truth about what they observed, their experiences, my demeanor when they responded. I mean, they were great. I don't think there was anything malicious about this prosecution," he concludes.

Reality

Hickey wants other armed citizens to know, though, that real life bears little resemblance to TV or movie dramas. During classes, roundtable discussions, and on Internet forums, people converse about what might hap-

pen. “Very rarely, is it about your neighbors attacking you,” Hickey points out. “It is about a tattooed gang banger who is robbing the liquor store or the bank. People don’t think about your neighbors coming over to kill you or seriously injure you or your family,” he stresses. “People think you are going to save the day and people are going to hoist you up on their shoulders and it is not always like that.”

“Still, this is the best system we’ve got,” he adds. “You get your chance in court.”

“We learn from other’s use of force experiences, and you can learn a lot of court stuff from this one. I want to help people avoid the situation I found myself in and avoid the court fight,” he emphasizes.

Messmer notes that his defense of Larry Hickey will stand out in his mind as different from other cases in his career. “I thought we did a really good job because we had a great team. Leading up to it, I was absolutely scared for Larry, and worried whether we were going to do the right thing. Once we got to trial, I had no doubts about what we were doing. I knew we were doing it right,” he remembers.

“Sometimes, athletes talk about being in the zone,” the attorney compares. “I felt during these trials that I was in the zone and that the team we had was in the zone. During the closing, I had no doubt that I was able to reach the jury. At least they were listening, and I could tell, doing this as long as I’ve done it, that I was reaching them.”

Messmer feels pride and satisfaction in the outcome of the two trials. “I think, no matter what, no matter how many good cases that I do in the future, because of the uniqueness of this case and all the hard work and the job that we did and especially the resources that were provided to us, this one definitely will go down in memory as one of my better cases, one of my personal accomplishments,” he allows.

“I would have liked to walk out of there with a jury victory but we still got the victory, so I’m going to hang it up [as noteworthy] because Larry walked away free and he was absolutely innocent,” the attorney concludes.

About a month elapsed before the State decided not to take Hickey to trial a third time. “It took two trials, but all my charges were dismissed

with prejudice which means they could never come back again. I can't help but think that the same State that dismissed my charges would not have a problem if I had taken a plea and would be sitting in jail today. To me, that is scary," Hickey comments. As soon as the dismissal was announced, Hickey's attackers had him served with an injunction against harassment, essentially a restraining order that precluded him from owning firearms or coming within a specified distance of them. "We chose the better part of valor and didn't move back into our home right away," he explains. "We knew that as soon as I showed up, this individual would call the police and the police would have to make a decision and that decision would probably be that I would have to go to jail." He hired a civil attorney, and they requested a hearing. "I knew I had to fight this because it was just ridiculous and had no basis in fact. The woman's statement in the injunction was that back in November 2008 in an argument Mr. Hickey shot me, and she also made



Hickey seen demonstrating racking the slide and clearing the chamber on a semi-automatic handgun as part of a lesson about foreign weaponry he teaches pre-deployment Marines.

something up about how my wife would park outside of her house and stare at her, so the judge rubber stamped it,” he explains.

On June 14, 2010, following a 2 ½ hour hearing before a city court magistrate, the plaintiff’s injunction was quashed. The magistrate took pains to consider all the facts before removing the injunction, retiring to his chambers at one point to consult with Judge Godoy who had officiated at the two previous trials. Oddly, during the hearing, the plaintiff told the magistrate that she really didn’t have any problems with Hickey, and that he was welcome to come over to her house to have a soda if he liked so long as he didn’t bring a gun along. She stated that she wanted the injunction to prevent Hickey from possessing firearms. The magistrate decided in Hickey’s favor. With that decision, Hickey was finally able to return to his home, free of the threat to his freedom and way of life, a black cloud he had lived under since the night of November 17, 2008.

“As an instructor, I teach a lot of foreign weapons classes for a local company that is contracted to teach the military,” Hickey explains. “My hearing was on Monday, June 14th, and I had orders to be at Camp Pendleton to teach Marines on Monday and Tuesday the 14th and 15th. I didn’t get to teach on Monday, but as soon as the judge quashed the order that I couldn’t own firearm, I drove to Oceanside, CA, and taught the next day.”

Hickey and his family have now returned to live in their home up the driveway from the place the attack occurred. Though there have been no further problems, Hickey keeps surveillance cameras turned on. He installed the cameras after his home was burgled when he was compelled in court to identify guns he owned.

The sister who owned the house across the street, her son and that woman’s live-in boyfriend are their neighbors. The male assailant who was involved with the other sister, has moved away. The second sister and her son visit their previous home frequently.

The Network is indebted to Larry Hickey, Matthew Messmer, Massad Ayoob and Marty Hayes for hours of interviews and fact checking that went into compiling the story told here. Without their help, twists and turns comprising this story would not have been available in such detail.

A few words about the Armed Citizens' Legal Defense Network, Inc.

This electronically-published booklet is provided free of charge by the Armed Citizens' Legal Defense Network, Inc. to increase knowledge among gun-owning Americans about the criminal justice system with which they will likely interact if they ever have to shoot in self defense.

Founded in 2008, the Network is a membership organization comprised of gun owners, firearms instructors and attorneys who are also gun owners. Awareness of cases in which citizens who legitimately used guns in self defense were prosecuted raises concerns among Network members that they, too, could be caught up by a relentless legal system so bent upon prosecuting any gun use that it cannot recognize victims who, with no remaining options, used a gun to prevent death or irreparable injury at the hands of a violent criminal.

Too often the gun owner lacks the financial resources for a vigorous legal defense, or may lack a clear understanding of their laws and legal system. These gun owners may make mistakes or fail to take actions to protect their legal rights during the aftermath of a self-defense shooting. Too often, they are bankrupted or even incarcerated during or following protracted litigation.

The Network takes steps to prevent such errors with educational initiatives like this booklet, as well as a series of educational DVDs sent to all Network members. A portion of membership dues funds the Legal Defense Fund in which monies are set aside for the defense of Network members. For further details, we invite you to read the information on the back cover of this booklet or visit the Network website at www.armedcitizensnetwork.org.

Armed Citizens' LEGAL DEFENSE NETWORK, INC.



How to join

Print this application form and FAX it to 1-360-978-6102 (if you are using a VISA/MC), or mail it to P.O. Box 400, Onalaska, WA, 98570 with your check for \$135 for a 1-year membership (add \$60 each for additional memberships for others in your household—must reside at same address) or a 3-year membership for \$295. If you have any questions, please call 360-978-5200.

When your application is accepted, you will receive a comprehensive book and eight DVDs concerning the lawful use of deadly force for self-defense. Additionally, you will become immediately eligible to have any future case of self-defense reviewed by one of our Network experts at no charge, and may apply for a grant of financial assistance for any litigated self-defense cases initiated after membership application (please read <http://www.armedcitizensnetwork.org>). You will also receive a membership card with your user name and password for areas of the Network web site restricted to members only.

We look forward to your participation in the Network as part of a family of armed citizens who passionately care about the right to armed self-defense, and want to protect themselves from the legal nightmare that sometimes accompanies a lawful act of self-defense.

APPLICATION FOR INDIVIDUAL MEMBERSHIP

Full Name _____

Mailing Address _____

City _____

State _____ Zip _____

Phone _____ - _____ - _____

Email _____

How did you hear about the Network? _____

APPLICANT'S STATEMENT:

With my signature, I hereby attest that under the laws of the United States of America, I am not legally prohibited from possessing firearms, that I am 18 years of age or older, and that I legally reside in the United States. I understand that any grant of benefits is limited to lawful acts of self defense with no additional criminal charges (unlawful possession of concealed handgun, for example) associated with the incident.

Applicant's Signature

Please Print Name

(1) Additional Household Member Applicant's Signature

Please Print Name

(2) Additional Household Member Applicant's Signature

Please Print Name

---- MEMBERSHIP FEES ----

\$135.00 1-Year Individual Membership

\$295.00 3-Year Individual Membership

\$60 Each Additional Household Resident per year

Name(s) _____

Charge my card Check enclosed

CREDIT CARD CHARGE AUTHORIZATION

I, _____ hereby
(Clearly print name as it appears on credit card)

authorize Armed Citizens' Legal Defense Network, Inc. to
charge \$ _____
on my VISA or MasterCard (circle one)

_____/_____/_____
Account Number

Expiration Date ____/____

CVV Code ____ 3 digits on back of card

Full billing address for credit card account:

(Street Address or Box Number)

(City)

(State and Zip Code)

(Signature authorizing charge)

Please mail to the Armed Citizens' Legal Defense Network, Inc.,
P O Box 400, Onalaska, WA 98570 or fax to 360-978-6102.

Do You Worry About the Aftermath of a Self-Defense Shooting?

The information in this booklet, provided by the Armed Citizens' Legal Defense Network, Inc. introduces gun owners to legal realities of which they should be aware before trouble strikes.

The Network's mission is to prevent miscarriages of justice through—

- Educating members about the legalities of using deadly force for self defense and how to interact with the criminal justice system after a shooting.
- Providing an initial fee deposit of up to \$10,000 to the member's attorney if the member has been involved in a self-defense incident—paid to get the legal defense immediately underway, with representation during questioning, and arranging for an independent investigation of the incident.
- Funding from a separate our Legal Defense Fund to provide grants of financial assistance for members facing unmeritorious prosecution or civil action after a self-defense shooting.
- Publishing a monthly journal online with columns and features focused on topics of interest to armed citizens.
- Creating a nationwide network of attorneys and legal experts which the member can draw upon in the event of a self-defense shooting.

If you possess a gun for defense of self and family,
we urge you to join the Network.

For more information, visit www.armedcitizensnetwork.org, call 360-978-5200
or write to P. O. Box 400, Onalaska, WA 98570

