- **Wis. Stat. § 939.48 Self Defense and Defense of Others:**
  (1) A person is **privileged** to threaten or **intentionally use force** against another for the **purpose of preventing** or terminating **what the person reasonably believes to be an unlawful interference** with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. *The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.*
  (1m)(a) In this subsection:
    1. "Dwelling" has the meaning given in s. 895.07(1)(h)[1].
    2. "Place of business" means a business that the actor owns or operates.
  (ar) *If an actor intentionally used force that was intended or likely to cause death or great bodily harm*, the **court may not consider whether the actor had an opportunity to flee or retreat** before he or she used force and **shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm** to himself or herself if the actor makes such a claim under sub. (1) and **either of the following applies**:
    1. The **person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling**, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
    2. The **person against whom the force was used was in the actor's dwelling**, motor vehicle, or place of business **after unlawfully and forcibly entering it**, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.
  (b) The presumption described in par. (ar) does not apply if any of the following applies:
    1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.
    2. The person against whom the force was used was a public safety worker, as defined in s. 941.375(1)(b)[2], who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:
      a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.
      b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.
- **Effective Date:** any incident occurring on or after December 21, 2011.
- **The Wisconsin Legislative Counsel Act Memo regarding 2011 WI Act 94 states as follows:**
  Under **current law *[prior to 12/21/11]***, a person is privileged to threaten or intentionally use force against another to prevent or terminate what the person reasonably believes to be an unlawful interference with his or her person by such other person. In addition, a person is generally privileged to defend a third person from unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from unlawful interference. The actor may intentionally use only such force or threat as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force that is intended or likely to cause death or great bodily harm unless the actor *reasonably believes that such force is necessary to prevent imminent death or great bodily harm* to

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[1] Wis. Stat. § 895.07(1)(h): "'Dwelling' means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements."

[2] Wis. Stat. § 941.375(1)(b): ""Public safety worker" means an emergency medical technician licensed under § 256.15, a first responder certified under s. 256.15 (8), a peace officer, a fire fighter, or a person operating or

himself or herself.

2011 Wisconsin Act 94 creates a **presumption of immunity for criminal actions** involving force that is intended or likely to cause death or great bodily harm. An actor is presumed to have *reasonably believed that the force was necessary to prevent imminent death or great bodily harm* to himself or herself if either of the following applies:

1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business; the actor was present in the dwelling, motor vehicle, or place of business; and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; the actor was present in the dwelling, motor vehicle, or place of business; and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

However, the presumption does not apply if: (a) the actor was engaged in criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time he or she used force; or (b) the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties if the public safety worker identified himself or herself to the actor before force was used by the actor or the actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker. A "public safety worker" is an emergency medical technician, first responder, peace officer, fire fighter, or person operating or staffing an ambulance.

Further, the Act provides that a **court may not consider whether the actor had an opportunity to flee or retreat** before the actor used force.

Available at http://docs.legis.wi.gov/2011/related/lcactmemo/ab69.pdf.

A Pre-Castle Doctrine Amendment case:

- ***State of Wisconsin v. Huggett,*** **2010 WI App 69, 324 Wis. 2d 786, 783 N.W. 2d 675**
  The incident (1/20/08) and filing of charge (5/13/08) predated passage of the WI Castle Doctrine law. The State (Burnett Co.) charged the defendant with 2nd Degree Intentional Homicide (unreasonable self-defense) related to a shooting death at his home in 2008. The defendant shot and killed a man who had forcibly broken into his home, in an apparent attack on the defendant after a cell phone/text message argument. Despite undisputedly acting in self-defense, the Burnett County District Attorney charged the defendant with an intentional criminal homicide, under the theory that he acted unreasonably in defending himself. The DA alleged that the defendant acted in imperfect, or unreasonable, self-defense. The DA asserted that although the defendant may have *actually* believed he was in imminent danger of death or great bodily harm, and *actually* believed that he needed to use deadly force to defend himself, his beliefs were *unreasonable* under the circumstances.

  The defendant and the decedent had only met once prior to the date of incident. The incident happened on January 20th, 2008. That day, the defendant was at his home with his girlfriend (who was 5 months pregnant with the defendant's child at the time), and her 5-year old son. The decedent was the girlfriend's ex-boyfriend; he was the father of her son. Due to a dispute involving the girlfriend, the decedent had called the defendant's cell phone throughout the day; the defendant ignored the calls. In one of the calls, he left a voicemail message threatening the defendant that he was going to send him to the hospital. He also sent text messages to both the defendant and his girlfriend's phones threatening to come over and kick the defendant's ass, and to kick the defendant's door in. In the last text message, the decedent told the defendant that he was going to come over and put him in the hospital after the Packer game ended. The defendant responded to a couple of these messages with sarcastic, unthreatening comments.

After the game, at approximately 10 o'clock p.m., the defendant heard his dog barking. He went upstairs and saw truck headlights pulling up to his house. He turned off all the lights and told his girlfriend to go into the bedroom with her son and call 911. As he was standing in his kitchen, the defendant could see one of the decedent's friends pounding on his front window and he could hear the decedent yelling and pounding on his front door. The defendant went down into his basement, retrieved his .38 caliber pistol, loaded it, and went back upstairs. The door to his home flew open; the decedent broke in. The defendant told him to stop. The decedent started coming toward him, and the defendant fired 2 shots, hitting the decedent in the chest. The decedent stumbled back out the door. The defendant went outside and checked his pulse, and found that he had none. He waited for police to arrive and immediately told them "I shot him, he broke into my house and I thought he was going to kill me."

According to the criminal complaint, the D.A. based his theory in part on the on the allegation that the defendant did not provide warning to his intruder that he was armed, and that he did not shoot to injure rather than kill his intruder. The availability of the castle doctrine exception to the general duty to retreat would have applied perfectly in response to those allegations. The defendant was faced in his home by a man who had forcibly broken in, while shouting threats at him, and came after him after he had broken in. Unfortunately, the castle doctrine exception was not available to the defendant, and he was charged.

The defense's position was that the defendant's belief that he needed to use deadly force to protect himself, his girlfriend, their unborn child, and her 5-year old son, was clearly reasonable. The defense argument was that he acted in perfect self defense under Wisconsin law and was not guilty of any crime. The defense filed a motion to dismiss the criminal complaint for failure to properly allege a crime. That motion was denied by then-Circuit Court Judge Gabelman. His successor-judge in the case, Judge Babbitt, ultimately dismissed the case prior to trial on other grounds. The Count of Appeals upheld that decision.

Opinion available at http://www.wicourts.gov/other/appeals/caopin.jsp?docket_number=2009AP001684

A Post-Castle Doctrine Amendment Case:

- **Slinger Shooting: Washington County DA's No-Prosecution Decision in Shooting Death.**
  The incident (3/3/12) postdated passage of the WI Castle Doctrine law. A Slinger homeowner was confronted by a person unknown to him, on his enclosed porch in the middle of the night, while his wife and two children were in bed. The homeowner shot and killed this person, who turned out to be an unarmed young man who ran into the home from a drinking party next door. The matter was referred to the Washington County District Attorney, who ultimately declined to prosecute the matter.

  The homeowner was aware of a drinking party occurring on the property neighboring his home late at night, and he had already called the police about the situation. He had been met with hostility by people next door in a car when he went out to tell them it was 1 o'clock a.m. He went back inside and went to bed. Just prior to the confrontation, he heard loud bangs coming from the rear of his home. He got up to check whether his doors were locked, and retrieved his firearm from a hallway closet before going to the rear-enclosed porch, where he was confronted with the presence of the decedent.

  The back porch-room was enclosed fully, clearly meeting the definition of "dwelling" in the WI Castle Doctrine amendment. It was more than a mere porch, containing a refrigerator, a freezer, a dresser containing clothing and a hanging clothing rack. The outer doorway entry consisted of two doors to gain access into the room. An intruder's presence in this room was arguably more startling and dramatic than mere presence on an outside porch, patio, or other curtilage.

The homeowner was confronted by someone already inside his home, and unknown to him. The person was in the porch-room, having already entered through the two outer doors, and the homeowner had already almost walked past him when going to check the locks of the outer doors. The person was off to his right side, almost behind him, an arm's length away. The homeowner yelled statements including "why are you in my home" and "don't move, don't move" when the intruder raised his left arm and stepped toward him. He stepped back against his freezer and then fired one shot. He then put his pistol on the freezer and told his wife to call 911. Police arrived and discovered the decedent, already expired, on the porch. The homeowner gave a statement and provided a blood sample; he had no intoxicant in his system.

Both the District Attorney and the defense concluded that the Wisconsin self defense law predating passage of the WI Castle Doctrine amendment supported the conclusion that the homeowner acted reasonable under the circumstances, and no formal charge was initiated against the homeowner. Below is a portion of the DA's written charging decision:

> First, the Washington County District Attorney's Office concludes that under the law of self defense which exists in Wisconsin (independent of the Castle Doctrine) that there is a basis to conclude that the homeowner reasonably believed that the force he utilized against [the decedent] was necessary to prevent imminent death or great bodily harm to himself; and he therefore acted lawfully in self defense when he shot [the decedent].
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> Second, our office concludes that no reasonable jury could convict the homeowner of any crime for his actions on March 3, 2012. A prosecutor has an ethical obligation to only charge an individual with a crime that he or she believes could be proven by admissible evidence beyond a reasonable doubt at trial. Since no reasonable jury could convict the homeowner of any crime for his actions on March 3, 2012, it would not be ethical for our office to file any charges against the homeowner.
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> Third, our office concludes that the Castle Doctrine would apply in this case. Therefore, if the homeowner had been charged in this case and a trial ensured, the homeowner would have been entitled to the presumption of the Castle Doctrine – specifically the presumption that he "reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself" when he shot [the decedent]. In this case, our office concludes that this presumption – that the homeowner exercised "reasonable force" – is a valid presumption under the facts of this case. Therefore, in this case, the homeowner acted lawfully [sic] self defense when he shot [the decedent].
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> Fourth, our office concludes that there are no facts in this case which would overcome the presumption that the homeowner acted reasonably when he shot [the decedent].
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> Fifth, a prosecutor has an ethical obligation to only charge an individual with a crime that he or she believes could be proven by admissible evidence beyond a reasonable doubt at trial. Since there are no facts in this case which would overcome the presumption that the homeowner acted reasonably when he shot [the decedent], no reasonable jury could convict the homeowner of any crime for his actions on March 3, 2012. Therefore, it would not be ethical for our office to file any charges against the homeowner.

District Attorney's Written Decision available at http://media.jsonline.com/documents/slingerreport.pdf

One of the issues requiring analysis during the investigation and charging process in the Slinger case was whether the intruder had *forcibly* entered the home, within the meaning of that term as used in the WI Castle Doctrine amendment. Ultimately, both sides agreed that the force required for unobstructed entry to a home, and no more, was sufficient to meet the requirement of forcible entry by an intruder contemplated by the new law. Below is an excerpt from the defense's analysis of that issue:

Forcible Entry
Wis. Stat. §939.48(1m)(ar), references an intruder's "unlawful and forcible entry" as the event giving rise to that statute's presumptive reasonableness concerning the actions of a person who uses force when confronted with that intrusion. "Forcible" is not defined further in that statute.

1) Wisconsin Jury Instructions – Robbery Use of Force; and False Imprisonment

The jury instruction on Robbery by Use or Threat of Force, JI # 1479, (Wis. Stat. § 943.32(1)(a) and (b)) defines forcibly as follows: "Forcibly means that the defendant [actually used force against _(name)_ with the intent to overcome or prevent his physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [threatened the imminent use of force against __(name)_ with the intent to compel _(name)__ to submit to the taking or carrying away of the property. 'Imminent' means 'near at hand' or 'on the point of happening'".

Two cases cited in annotations to Wis. Stat. § 943.32(1), Robbery, are helpful in determining the definition of forcibly:

Whitaker v. State (1978) 265 N.W.2d 575, 83 Wis.2d 368: (Evidence of physical violence is not required to establish a forcible taking)

Walton v. State (1974) 218 N.W.2d 309, 64 Wis.2d 3: (The force which will support a robbery conviction is not to be confounded with violence). (In *Walton*, the defendant's robbery conviction was upheld where the defendant snatched the victim's purse from her person without ever touching the victim. The Court held that "under any reasonable view of the evidence, force was used against the victim with intent to overcome physical resistance." *Id.* at 44. In other words, no showing of actual force is required to prove robbery by use of force.)

Additionally, the jury instruction for False Imprisonment, JI 1275, is also relevant to what constitutes "forcibly" in the criminal code. That instruction requires that the State prove that the victim was confined or restrained. The meaning of confined or restrained is explained as follows: "Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (victim) of freedom of movement, or compelled her to remain where she did not wish to remain, then victim was confined or restrained. *The use of physical force is not required. One may be confined or restrained by acts or words or both.* JI 1275, emphasis added.

Although "forcibly" is not contained in the definition of false imprisonment, the broad definition and lack of any requirement that physical force be used to confine or restrain a person is relevant to the present charging decision.

2) Common Definition of "Forcibly"

The American Heritage Dictionary defines "forcibly" as "effected against resistance through the use of force."

The same dictionary defines "force" as "the capacity to do work or cause physical change; energy, strength, or active power", also referencing subsequent definitions including "power made operative against resistance; exertion".

Obviously, the common English definition of "forcibly" is quite broad, referencing the noun "force". The definition of "force" is also quite broad, including the capacity to do work or cause physical change, like the work or capacity utilized to open a door. It makes sense that the range of actions that can fit into the category of force is so broad, logically spanning from the simple force required to move an object to exertions of great strength or power. In the present matter, the decedent obviously exerted the amount of force

necessary to open the two doors – an outer storm door and an inner wooden door – leading into the rear porch-room of the home.

3) Language from Wis. Stat. § 939.48(1m)(ar) - Castle Doctrine

(ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:

1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.

2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

Inclusion of the "forcibly" language in the Castle Doctrine law should not cause one to interpret the statute and define that word any less broadly than referenced above: as including the broad range of force required to either open a door or window, to move an object, or to break and enter. To do so would be an illogical endeavor, because different people, police, and prosecutors would inevitably draw the line defining "force" in different ways, leading to unconstitutionally vague applications of the law. For example, if we read into the statute a definition of "forcibly" that requires an overpowering of someone or something, how would we then consistently define that term? As requiring a break-in? Or the shoving open of a jammed door? A broken window? A picked or jammed lock? Lifting of a large manual garage entrance door? Or a heavy window? Entry by threat of force? Or intimidation? Or Stealth?

Additionally, it is illogical that the Legislature intended to afford a home dweller the presumption that (s)he acted reasonably in using force when presented with an unlawful intruder who forcibly shoved open a door and entered the dwelling, but not against one who climbed through an unlocked window, or door. The law would not logically require the person in the home, faced with an unlawful entry, to determine at that moment the amount of force the intruder used to unlawfully enter the dwelling before deciding whether to use force to defend self and home.

The law obviously affords people confronted with unlawful entry into their homes the presumption of reasonable use of force in response, without distinction as to method or mode of entry. This was the exact situation that clearly confronted our client in the present matter.

As date of this presentation, there is not yet a WI pattern jury instruction for a claim of self defense under the Castle Doctrine amendment. The change in the law does appear to be as much a deterrent for charging as it is a litigation defense. It is uncertain, given the mandatory presumption mandatory presumption of reasonableness in the defendant's favor if the predicate facts are met, how often trial litigation will ensue under the Castle Doctrine amendment to WI self defense law.

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