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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 10CA2481

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

EDWARD KEVIN DEGREAT,

Respondent.

▲ **COURT USE ONLY** ▲

Case No. 15SC754

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PEOPLE'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains less than 9,500 words.

The brief complies with C.A.R. 28(a).

It contains, under a separate heading, a concise statement of the applicable standard of appellate review and a citation to where the issue was raised and ruled on.

/s/Kevin E. McReynolds

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Whether the court of appeals erred in concluding that the statutory right to use self-defense can apply to justify the taking of services in a robbery.

INTRODUCTION

The court of appeals held that self-defense under section 18-1-704 can justify the taking of cash or services during a robbery. *People v. DeGreat*, 2015 COA 101, ¶¶11-19. In so holding, the court found the nature of the criminal acts irrelevant because *Pickering*[1] provided that self-defense applies to any general intent crime and the legislature had not expressly limited section 18-1-704 to exclude robbery. *Id.* ¶¶11-13.

But *Pickering* did not hold this; the language of section 18-1-704 limits this defense to one's use of physical force; and other jurisdictions have consistently refused to apply self-defense as a justification for robbery except to disarm an aggressor.

Accordingly, this Court should reverse because DeGreat's knowing taking of taxi services was not justified by Colorado's self-defense statute.

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[1] *People v. Pickering*, 276 P.3d 553 (Colo. 2011).

STATEMENT OF THE CASE AND FACTS

Edward DeGreat stabbed a cab driver after not paying his fare. According to DeGreat, the driver became hostile, locked him in the cab and claimed to have called police when DeGreat did not pay. (*See* R. 7/1/10 pp. 1088-93.)[2] DeGreat jumped into the backseat behind the driver and both men got out. (*See id.* pp. 1094-95.)

DeGreat claimed the much smaller driver pushed him when he tried to leave to get money from his apartment. (*See id.* pp. 1096-97; R. 7/2/10 pp. 1194, 1203-04.) While admitting he likely threw the first punch, DeGreat claimed he used his knife in self-defense when stabbing the driver. (*See* R. 7/1/10 pp. pp. 1098-1100; 7/2/10 pp. 1230-31.) The driver ran from his cab and from DeGreat, seeking help for his wounds. (*See* R. 6/28/10 pp. 211-13; 6/29/10 pp. 507, 567-68, 619.) DeGreat later left the scene, avoided his apartment, and was not arrested for several months. (*See* R. 7/2/10 pp. 1103-04, 1112-13, 1117-18.)

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[2] The electronic record in this case consists of a single 1462 page .pdf file. All citations are by date and .pdf page number.

The district attorney charged DeGreat with aggravated robbery, first degree assault, attempted murder, and theft. (*See* PR. Vol. 1 pp. 29-31.) The trial court instructed the jury to consider self-defense with regard to the attempted murder and assault charges based DeGreat's use of physical force during the fight outside the cab, but declined to give a self-defense instruction on the robbery charge because it was contrary to long-standing Colorado law. (*See Id.* pp. 191-201, 203-09 (elemental jury instructions and self-defense instructions)); R. 7/6/10 pp. 1326, 1333); *People v. Laurson*, 15 P.3d 791, 794 (Colo. App. 2010) ("self-defense is not an available defense . . . to aggravated robbery") (citing *People v. Beebe*, 38 Colo. App. 80, 81, 557 P.2d 840, 841 (1976)).

The jury convicted DeGreat of aggravated robbery and second degree assault – reckless, but acquitted him of attempted murder, first degree assault, and theft. (*See* PR. Vol. 1 pp. 218-27 (verdicts)).

Court of Appeals

On appeal, DeGreat claimed that *Beebe* was incorrect and that the self-defense statute applied to his robbery of the driver.

The court of appeals agreed, finding that section 18-1-704 could justify any general intent crime, regardless of the nature of the criminal acts involved. *See DeGreat*, 2015 COA 101, ¶¶11-13. Starting from this premise, the division analogized this case to the discharge of a firearm in *Taylor*,[3] and therefore held that statutory self-defense could justify a "crime against property" like DeGreat's taking of taxi services. *See id.* ¶¶14-15. In so holding, the court of appeals rejected existing Colorado precedent to the contrary (*Beebe*) because it: (1) had not analyzed the language of the self-defense statute; and (2) could not be reconciled with the "modern" view of self-defense from *Pickering*, which broadly applies this affirmative defense to any and all general intent crimes. *See id.* ¶16 (citing *Pickering*, 276 P.3d at 555); *see also id.* ¶11 ("The affirmative defense of self-defense extends to *any crime* except those requiring a mental state of recklessness, extreme indifference or negligence") (citing §§ 18-1-704(1), -704(4); *Pickering*, 276 at 556) (emphasis added).

[3] *People v. Taylor*, 230 P.3d 1227 (Colo. App. 2009).

This Court granted certiorari to determine whether the court of appeals erred in radically expanding the statutory right to use "physical force" in self-defense to justify DeGreat's taking of taxi services.

SUMMARY OF THE ARGUMENTS

The self-defense statute, section 18-1-704, provides a limited legal justification for the use of "physical force upon another person in order to defend himself . . . from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person . . ." *See* § 18-1-704(1), C.R.S. (2016). Unlike other statutory affirmative defenses, self-defense does not legally justify any criminal conduct (*actus reus*) other than the use of "physical force." *Compare id. with, e.g.,* § 18-1-708, C.R.S. (2016) (duress). Recognizing this distinction, courts nationally have refused to apply self-defense as a justification for robbery except takings that disarmed another. Thus, contrary to the decision below, section 18-1-704 cannot legally justify the taking taxi services, cash, or any other "thing of value" because such takings are separable from one's use of physical force in self-defense.

And even if section 18-1-704(1) could theoretically extend to takings of goods or services other than weapons, the lack of such an instruction in this case would be harmless. Rather than suggesting his actions were justified, DeGreat denied "taking" the taxi services – i.e. committing a robbery – testifying instead that he could not pay as the driver fled after the two fought. Thus, rather than suggesting his taking was justified, DeGreat claimed he never engaged in the *actus reus* of robbery at all and the jury rejected this failure of proof defense.

ARGUMENTS

I. Section 18-1-704 did not justify DeGreat's knowingly taking of a "thing of value."

The primary issue before this Court is whether the court of appeals erred by interpreting section 18-1-704 as providing a legal justification for DeGreat's robbery of taxi services.

Because the General Assembly specifically limited section 18-1-704 to justify the use of "physical force," the court of appeals erred by expanding this affirmative defense to justify separate criminal acts including the taking of property or services in a robbery. As other

courts have recognized, self-defense can only justify physical force used in self-defense – the singular act of using physical force to wrest a weapon from an attacker. *See, e.g., State v. Antwinte*, 607 P.2d 519, 528-29 (Kan. Ct. App. 1980) (recognizing both the general rule barring self-defense as a justification to robbery and that an exception may apply to the taking and retention of a gun until it is safe to return).

A. Standards of review.

The court of appeals found DeGreat preserved this issue by requesting an aggravated robbery instruction that required the prosecution disprove self-defense. *See* 2015 COA 101, ¶10; (*see also* PR. Env. 3, tendered and rejected No. 1; *but cf.* R. 7/6/10 pp. 1326, 1333, 1336-39 (jury instruction conference where Defense counsel did not argue against the denial of this tendered instruction)). For the purposes of addressing the issue on certiorari, the People are not challenging this aspect of the *DeGreat* division's decision.

The question of whether section 18-1-704 could justify the crime of robbery is an issue of statutory interpretation that is reviewed *de novo*.

"In [a reviewing court's] de novo review of a statute, [its] 'fundamental responsibility' is to determine and give effect to the General Assembly's purpose and intent in enacting it." *People v. Hernandez*, 250 P.3d 568, 570-71 (Colo. 2011) (quoting *Alvaredo v. People*, 132 P.3d 1205, 1207 (Colo. 2006)). Because the power to define criminal liability is vested in the General Assembly, courts look first to the plain meaning of the statutory language to determine the legislature's intent. *People v. Manzo*, 144 P.3d 551, 554 (Colo. 2006).

Words and phrases in a statute must be read in context and construed according to their common usage. *See* § 2-4-101, C.R.S. (2016). Where the statutory language is clear and unambiguous, courts apply the provision as written and do not apply rules of statutory construction. *See Specialty Restaurant Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010); *see also* § 2-4-203, C.R.S. (2016) (identifying tools of statutory construction that apply only to ambiguous statutes).

Because the plain language of section 18-1-704 and other jurisdictions' decisions in similar cases demonstrate self-defense does not justify the taking of anything except to physically disarm an

attacker, the court of appeals erred in expanding self-defense to potentially justify DeGreat's act of robbery.

B. Self-defense is limited to justifying one's use of "physical force," and therefore cannot justify the separate criminal act of taking a "thing of value" other than a weapon.

The court of appeals' decision below is based primarily on the broad premise that "[t]he affirmative defense of *self-defense extends to any crime* except those requiring a mental state of recklessness, extreme indifference, or negligence." *See DeGreat*, 2015 COA 101, ¶11 (citing §§ 18-1-704(1)-704(4); *Pickering*, 276 at 556) (emphasis added)); *see also id.* ¶¶13, 16 (claiming *Pickering* demonstrates a "modern" view of self-defense as a justification for any general intent crime).

But this central premise of *DeGreat* is incorrect because there are innumerable general intent crimes that could never be justified by self-defense. As a single example, forcible rape, like robbery, is a crime where the *actus reus* requires both the use of force and additional criminal acts – sexual penetration without consent. *See* § 18-3-402(4), C.R.S. (2016). Contrary to the *DeGreat* division's broad pronouncement

that self-defense applies to any general intent crime it cannot, under any circumstances, justify the act of sexually penetrating a victim in a sexual assault.

This flaw in the central premise of the court of appeals' decision emanates from that court's fundamental misapprehension of both the limits of section 18-1-704(1) and this Court's decision in *Pickering*.

Section 18-1-704, entitled "Use of physical force in defense of a person" creates an affirmative defense that provides in relevant part:

> (1) . . . a person *is justified in using physical force* upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person . . .

§ 18-1-704(1), C.R.S. (2016) (emphasis added); *accord* § 18-1-704(1), C.R.S. (1973) (using identical language).

This language is substantially more limited in the type of acts it justifies when compared to parallel affirmative defenses like choice of evils, duress, or entrapment:

> (1) . . . *conduct which would otherwise constitute an offense is justifiable and not criminal* when it is necessary as an

> emergency measure to avoid an imminent public or private injury . . .

§ 18-1-702(1) , C.R.S. (2016) (choice of evils) (emphasis added).

> *A person may not be convicted of an offense, other than a class 1 felony, based upon conduct* in which he engaged at the direction of another person because of the use or threatened use of unlawful force upon him . . .

§ 18-1-708, C.R.S. (2016) (duress) (emphasis added).

> *The commission of acts which would otherwise constitute an offense is not criminal* if the defendant engaged in the proscribed conduct because he was induced to do so by a law enforcement official . . .

§ 18-1-709, C.R.S. (2016) (entrapment) (emphasis added).

Thus, while the plain language of choice of evils, duress and entrapment each provide a complete statutory justification for any type of criminal act (even forcible rape), self-defense is expressly limited to justifying only an offender's use of physical force.

This distinction is of central importance here because robbery is not a pure "force" crime, but instead requires two distinct criminal acts: (1) the taking of a thing of value; and (2) the use of force, threats, or intimidation. § 18-4-301(1), C.R.S. (2016) (one commits robbery if he

"takes anything of value from the person or presence of another by the use of force, threats, or intimidation"); *accord* § 18-4-301(1), C.R.S. (1973) (using identical language).

Beebe recognized this distinction and the limited nature of self-defense when it concluded that this defense could not justify the crime of robbery because its *actus reus* required more than simply some form of the use of force. *See Beebe*, 557 P.2d 840, 841 (because "*both* putting in fear and the taking of the property constitute the gist of the offense of robbery . . . the lawfulness of the force used to accomplish the taking is immaterial . . . [and t]herefore, self-defense is not an affirmative defense to the crime of aggravated robbery") (emphasis in original); *accord, e.g., People v. Badena*, 2007 Cal.App. Unpub. LEXIS 1105, 2007 WL 466082 (4th Dist. 2007) ("the act of taking money or property by force or fear is incompatible with self-defense . . ."); *see also, e.g., People v. Costa*, 32 Cal.Rptr. 374, 377 (Cal. App. 1963) ("Self-defense is not, of course, a recognized defense to a charge of robbery"); *Thompson v. State*, 119 So.3d 1007, 1009 (Miss. 2013) ("A self-defense instruction is not applicable to a charge of robbery"); *Dillard v. State*, 931 S.W.2d 689, 697

(Tex. App. 1996) ("Generally, a person committing the offense of robbery has no right of self-defense against his intended victim"); *State v. Lewis*, 233 P.3d 891, 895-96 (Wash. App. 2010) (distinguishing robbery from assault when refusing to apply self-defense to a robbery).

In reaching the contrary conclusion, the *DeGreat* division rejected *Beebe* because: (1) *Beebe* did not expressly analyze the language of section 18-1-704; and (2) its conclusion was incompatible with *Pickering*, which the court of appeals construed as applying self-defense to any general intent crime. 2015 COA 101, ¶16. But neither the language of section 18-1-704 nor *Pickering* support the *DeGreat* division's expansive view of statutory self-defense as a justification for the robbery of cash or services.

First, as already discussed, the plain text of section 18-1-704 only justifies an offender's use of "physical force." Thus where, as here, the use of force is a separable act that does not fully encompass the crime, section 18-1-704(1) cannot justify the offense.

Second, *Pickering* never held that self-defense applies to any and all general intent crimes because that case and its discussion were

expressly limited to pure force crimes – *i.e.* offenses where the criminal act at issue is coextensive with the offender's use of force. *See Pickering*, 276 P.3d at 555-56. Pickering was charged with second degree murder (a force crime) and was convicted of reckless manslaughter (a lesser-included force crime). *See id.* at 554-55. Discussing how the self-defense statute applied to these offenses, this Court explained "[w]ith respect to crimes requiring intent, knowledge or willfulness, *such as second degree murder*, self-defense is an affirmative defense" whereas "[w]ith respect to crimes requiring recklessness, criminal negligence, or extreme indifference, *such as reckless manslaughter*, self-defense is not an affirmative defense, but rather an element-negating transverse." *See id.* at 555-56 (emphasis added). While *Pickering* found self-defense was an affirmative defense to "general intent" force crimes (like second degree murder), that Court never considered, let alone held, that section 18-1-704 would justify criminal acts beyond the mere use of physical force.

In arguing for its expansive view of *Pickering*, the *DeGreat* division also relied upon cases that applied self-defense to offenses

"irrespective of the type of crime." *See* 2015 COA 101, ¶¶13-14. More specifically, *DeGreat* argued the application of self-defense to robbery of taxi services was no different from the *Taylor* division's conclusion that the jury should have been allowed to consider this defense to the crime of illegal discharge of a weapon. *See id.* ¶¶14-15 (*citing Taylor*, 230 P.3d at 1229-31; *citing also, e.g., People v. Mullins*, 209 P.3d 1147, 1151 (Colo. App. 2008) (finding self-defense could apply to inciting or engaging in a riot); *People v. Fuller*, 781 P.2d 647, 650-51 (Colo. 1989) (finding self-defense could apply to resisting arrest)).

Critically, however, every one of these cases involved singular acts of criminal conduct accomplished entirely by the use or advocated use of force. For example, in *Taylor*, the defendant allegedly entered an apartment holding a gun, wrestled with another for control of the gun, and injured a different person when the gun fired. *See* 230 P.3d at 1229. The jury convicted Taylor of illegal discharge of a firearm, which prohibits the knowing discharge of a firearm into a dwelling or occupied structure. *See id.* at 1230. The *Taylor* division reversed because it found this act of using physical force (firing a weapon) could be justified

by self-defense, particularly given the incongruity of instructing juries on self-defense for shooting an attacker (assault) while prohibiting it where one fires a warning shot (discharge of a firearm). *See id.* at 1230-31. Thus, while applying section 18-1-704(1) to a new statute, *Taylor* stands for the unremarkable proposition that an offender's use of physical force – by firing a weapon – can be justified by his need to act in self-defense.

Similarly, in *Mullins*, a division of the court of appeals held that section 18-1-704(1) could justify an offender's use of physical force through a less obvious medium – other people. *See* 209 P.3d at 1150. There, the defendant and others went to a park to confront a family that included people who had beaten Mullins earlier. *See id.* at 1148. Mullins was allegedly surrounded when he threw the first punch, leading to a melee between the groups. *See id.* at 1148-49. The jury convicted Mullins of inciting and engaging in a riot, which is defined as "a public disturbance . . . which by tumultuous and violent conduct creates a grave danger of damage or injury to property or persons." *See id.* at 1149-50. The *Mullins* division reversed because, though self-

defense would not negate the *mens rea* of these crimes, the urging and participating in a riot (*i.e.* violent conduct/use of force) could be justified by self-defense as these acts preceded directly from an apparent need to defend oneself. *See id.* at 1150-51. Thus, like *Taylor*, the division in *Mullins* merely found that self-defense could justify a unitary criminal act involving the use/advocated use of physical force.

Fuller, the only cited decision issued by this Court, is even less helpful because it addressed an obvious use of physical force crime. *See* 781 P.2d at 649-51. There, a defendant involved in a standoff with police officers resisted arrest and swatted at the officer's weapons. The jury convicted Fuller of resisting arrest and attempting to disarm a peace officer, offenses that prohibit (1) using or threatening the use of physical force to prevent to an arrest, and (2) attempting to remove an officer's weapon. *See id.* at 649 (citing §§ 18-8-103, 18-8-116, C.R.S. (1986)). This Court held that self-defense could legally justify an offender's use of force in resisting arrest/attempting to disarm when the evidence shows "that officers displayed weapons and were commanded to discharge them in the course of effecting an arrest and that such

conduct was unreasonable or excessive under the circumstances." *See id.* at 650-51. Thus, *Fuller* adds nothing to the current analysis as it merely applied self-defense to crimes that fall directly within its statutory terms – an offender's use of physical force.

Thus, even reading these cases in the broadest possible way, *Taylor*, *Mullins*, and *Fuller* merely applied statutory self-defense where an act of using physical force was the direct response to a defendant's fear for his own safety. Far from suggesting self-defense could generally apply to robberies of cash, goods, or services, *Taylor et al.* coincide, at least in principle, with the only situations where self-defense has been applied to robbery charges – the physical taking of a weapon (the "disarmament cases").

To date, the only scenario where courts have found acts robbery justified by self-defense principles is where the taking disarms another of a weapon. *See, e.g., State v. Campbell*, 214 N.W.2d 195, 197 (Iowa 1974); *Antwinte*, 607 P.2d at 528-29; *State v. Smith*, 150 S.E.2d 194, 198 (N.C. 1966) (". . . if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery"). While consistent with

the "natural right" concept that a one can disarm an attacker in self-defense,[4] the reasoning in these cases consistently focuses on the offender's lack of intent to steal (*animus furandi*) because common law robbery is an aggravated form of larceny. *See, e.g., Smith*, 150 S.E.2d at 198 ("In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery") (internal citations omitted); *Jones v. Commonwealth*, 1 S.E.2d 300, 301-02 (Vir. 1939) (reversing robbery conviction for the taking of a firearm from a police officer involved in a struggle because an "act done with sole intent to prevent injury to another" is lacking of intent to permanently deprive); *see also Rex v. Holloway*, 5 C. & P. 524, 172 Eng. Rep. 1082 (1833) (holding a poacher

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[4] *See* Darrel A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. Rev. 887, 943 (2011) ("The right to self-defense includes a right to disarm another"); Michael Green, *Why Private Arms Possession? Nine Theories of the Second Amendment*, 84 Notre Dame L. Rev. 131, 158 (2008) (applying Lockean concepts of natural rights and autonomy in finding a right to disarm another in self-defense).

who took a gun from a gamekeeper may have done so out of a belief it would be used against him, and if so, this taking would not be a felony for lack of intent to steal).

Given this reasoning, the disarmament cases do not squarely apply to robbery charges in Colorado – including those involving the taking of a weapon – because "larceny" and intent to permanently deprive are not elements of robbery in this jurisdiction. *See People v. Moseley*, 566 P.2d 331, 335 (Colo. 1977). As this Court recognized forty years ago, "robbery under section 18-4-301 requires no specific intent to permanently deprive the owner of the use or benefit of his property. As a result . . . [t]o the extent that prior case decisions may be inconsistent with this holding, they are expressly overruled").

But though the disarmament cases are facially inapplicable to Colorado's robbery statute, they nevertheless provide useful guidance in understanding the limits of self-defense as a justification for crimes that

require more than the use of force – where the taking of the weapon is coextensive to the use of physical force "to prevent injury to another."[5]

This conception of self-defense is reflected in a pair of decisions that rejected attempts to extend the disarmament justification to robberies of items other than weapons. *See Booker v. State*, 278 S.E.2d 745 (Ga. App. 1981); *People v. Graves*, 479 N.E.2d 10 (Ill. App. 1985).

In *Booker*, the defendants were convicted of robbery for taking marijuana, a gun, and cash from a dealer. *See* 278 S.E.2d at 746-47. The defendants allegedly went to the house because the victim had sold them adulterated marijuana they wanted replaced. *See id.* at 746. When she refused and threatened them, one of the defendants grabbed her while the other took the pistol, cash, and bag of marijuana the victim had on a nearby counter. *See id.* The defendants admitted taking the items, but claimed their actions were justified by self-

[5] Limiting self-defense to singular/inseparable acts of using physical force to grapple a weapon from an attacker was also discussed in one of the seminal disarmament cases, *Campbell*, 214 N.W.2d at 197-98. After recognizing self-defense justified the physical taking of the weapon, the court found it could not extend to the defendant's subsequent acts of assault on his formerly-armed adversary. *See id.*

defense. *See id.* at 746-47. The *Booker* court rejected this claim because, even assuming Georgia's self-defense statute applied "thereby justifying the use of force in defense of themselves, this would apply only to the taking of the pistol" and the separate taking of the cash could not be justified by this defense. *See id.* at 747.

Similarly, in *Graves*, the defendant was charged with robbery for taking a ring, keys, and cash from the victim at knifepoint. *See* 479 N.E.2d at 10-11. Graves denied taking the property and claimed he only used a knife in self-defense and discarded it before leaving the victim's apartment. *See id.* at 11. The trial court refused to instruct the jury on self-defense and the court of appeals affirmed because: (1) generally, self-defense cannot justify the crime of robbery;[6] and (2) there was no basis for extending the taking of a weapon exception because "there was no evidence that [] the taking of [the victim's] property . . . was the product of defendant's fear for his own safety." *Id.* at 11-12. In

[6] On this ground, *Graves* relied on Colorado's *Beebe* decision and an Illinois statutory limitation making self-defense unavailable "to a person who is attempting to commit, committing, or escaping after the commission of a forcible felony." *See Graves*, 479 N.E.2d at 11-12.

so holding, the court distinguished this case from cases involving the taking of a weapon because the Graves' taking and the use of physical force were separable acts, rather than a coterminous use of physical force to disarm that could itself be justified by self-defense. *Id.*

This same reasoning applies to the present case because, as in *Booker* and *Graves*, DeGreat's taking of taxi services, unlike an act of disarmament, is a separable act rather than a particularized means of using physical force out of a need for self-protection. This reiterates the limited nature of statutory self-defense and its inapplicability to acts beyond those that could potentially criminalize one's use of physical force in self-defense. Section 18-1-704 simply does not apply to the criminal act of taking of cash or services in this case, which was not in itself an act of using "physical force" to protect against an imminent threat. By contrast, though incompatible with DeGreat's testimony (*see infra* Argument I.C.), the statutory "choice of evils" defense could justify the robbery of cash or services where the defendant's taking was necessary "to avoid an imminent public or private injury." *See* § 18-1-

702(1).[7] Thus, as the legislature already created a statutory affirmative defense to address any type of criminal acts done out of true necessity, the court of appeals erred by rewriting the limited statutory text of section 18-1-704(1) into a legal justification for DeGreat's forcible taking of taxi services.

Accordingly, this Court should reverse the *DeGreat* division's unwarranted expansion of self-defense as a justification for the robbery of taxi services.

C. DeGreat's testimony and the jury's verdicts demonstrate that the lack of a self-defense instruction was harmless.

Even assuming *arguendo* that self-defense could legally justify the forcible taking of items other than weapons, any error in failing to give this unprecedented instruction was harmless in light of DeGreat's testimony and the jury's verdicts.

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[7] As discussed in the next section, DeGreat's own version of events did not admit and seek to justify this robbery under such an affirmative defense, but instead claimed that he never committed the taking at all.

Rather than justifying his taking of taxi services, DeGreat denied he committed any robbery and instead claimed he would have paid the fare had the driver let him. (*See* R. 7/1/10 pp. 1128-29, 1131-32, 1161-62; 7/2/10 pp. 1237-39.) Relating his latest version of events, DeGreat testified that he did not have the money to pay the fare when the taxi arrived at his apartment complex and the victim became angry, locked the cab, and told DeGreat he had called the police. (*See* R. 7/1/10 pp. 1088-91.) DeGreat climbed into the backseat to try the back door, causing the driver to get out of the cab and then unlock the door for DeGreat. (*See id.* pp. 1091-95; 7/2/10 pp. 1202-03.) The driver insisted DeGreat stay to wait for the police and, when DeGreat tried to leave to supposedly get the money he owed, the driver grabbed his shirt and threw DeGreat to the ground. (*See id.* R. 7/1/10 pp. 1096-97; 7/2/10 pp. 1203-04.)[8] Though admitting he may have thrown the first punch,

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[8] Though not raised at trial, the driver had a right to use force to prevent DeGreat from stealing from him under section 18-1-707(7). Like an employee stopping a shoplifter, such force is not "unlawful" and provides another reason DeGreat should not have received a self-defense instruction. *See, e.g., People v. Boyd*, 2015 Cal. App. Unpub.

DeGreat said the two began fist fighting and then he used his knife, which caused the driver to run away, abandoning his cab. (*See id.* pp. 1098-1100; 7/2/10 pp. 1230-31.) Throughout his testimony DeGreat insisted he had not taken anything and wanted to pay the fare. (*See* R. 7/1/10 pp. 1128-29, 1131-32, 1161-62; 7/2/10 pp. 1237-39.)

Thus, DeGreat did not claim he was justified in taking taxi services from the driver (*i.e.* an affirmative defense), he denied committing any taking at all.[9] This "no taking" defense is the only

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LEXIS 3992, **13-14 (2d Dist. 2015) (finding a defendant was not entitled to a self-defense instruction on a robbery charge where she used force against a store employee, though the trial court had given such an instruction as to the separate assault charge); *Commonwealth v. Hansley*, 24 A.3d 410, 420-21 (Pa. Super. 2011) (upholding the denial of a self-defense instruction where the defendant used force against an employee who had grabbed him after catching defendant shoplifting).

[9] In addition to other problems with giving a self-defense instruction, DeGreat's denial of committing the taking is inconsistent with the very concept of an affirmative defense – that applies where one admits but seeks to justify criminal conduct. *See, e.g., People v. Fontes*, 89 P.3d 484, 486 (Colo. App. 2003) ("A defendant who asserts an affirmative defense admits the doing of the charged act, but seeks to justify the act on grounds deemed by law to be sufficient to avoid criminal responsibility"); *see also People v. Taylor*, 2012 COA 91, ¶35 (adhering to the principle that one may not assert an affirmative defense, such as entrapment, while denying the crime itself).

interpretation of DeGreat's testimony because the *driver* fled the scene after the fight. By contrast, had DeGreat testified that he had fled, thereby admittedly completing the knowing taking of services, he could have argued that this act was justified by the "choice of evils" statute. This is a doctrinally important distinction because DeGreat's "no taking" claim did not require any additional instructions as the burden of proof and elemental instructions provided the jury with all it needed to assess whether it believed DeGreat knowingly took the services and thereby committed a robbery. By finding DeGreat guilty of aggravated robbery beyond a reasonable doubt, the jury rejected his testimony.

Accordingly, in light of DeGreat's own testimony, the lack of an affirmative defense instruction would harmless as such an instruction was irrelevant and could not justify a criminal act that DeGreat denied committing.

CONCLUSION

For these reasons, this Court should reverse the decision below.

CYNTHIA H. COFFMAN

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S OPENING BRIEF** upon **JASON MIDDLETON** and all parties herein, via Colorado Courts E-filing System on March 20, 2017.

/s/ Tiffiny Kallina