SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari from the Colorado Court of Appeals Case No. 10CA2481	~~DATE FILED: July 28, 2017 4:06 PM~~ FILING ID: B9CD91713AE52 CASE NUMBER: 2015SC754
Petitioner THE PEOPLE OF THE STATE OF COLORADO v. Respondent EDWARD DEGREAT	
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ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

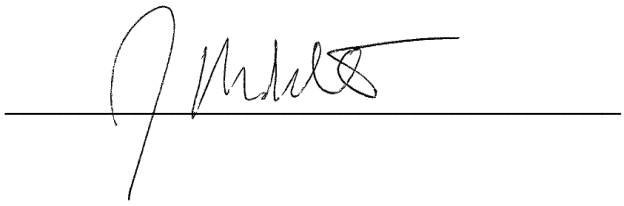
I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules, with the exception of the word count. Specifically, the undersigned certifies that:

The brief does **not** comply with C.A.R. 28(g). This brief contains 11,594 words. A motion requesting that this Court accept the brief in excess of the maximum word count has been filed along with this brief.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

> In response to each issue raised, the Respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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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.

STATEMENT OF THE CASE

Edward DeGreat was charged with attempted second-degree murder (C.R.S. §18-3-103(1); §18-2-101), first-degree assault (C.R.S. §18-3-202(1)(a)), aggravated robbery (C.R.S. §18-4-302(1)), and two counts of violent crime (C.R.S. §§18-1.3-406(2)(a)(I)(A) and (B)). (PR, vol.1, pp. 29-32)

At the conclusion of trial, the jury was instructed on the charged offenses as well as a number of lesser-included offenses, and a lesser non-included offense of theft. (*Id.*, pp. 177-218) The jury acquitted Mr. DeGreat of attempted second-degree murder, first-degree assault, and theft. (*Id.*, pp. 218-237) The jury convicted Mr. DeGreat of aggravated robbery and a misdemeanor reckless assault offense. (*Id.*) The trial court sentenced Mr. DeGreat to a controlling sentence of sixteen years in the Department of Corrections on the aggravated robbery charge. (*Id.*, p. 233). He appealed, and the Court of Appeals reversed in a published decision. *See People v. DeGreat*, 2015 COA 101. This Court subsequently granted the prosecution's petition for certiorari.

STATEMENT OF THE FACTS

At the time of trial, Edward DeGreat was 52 years old. (R. Tr. 7/1/10, p. 1069) He had lived in New Orleans for most of his life but, as a result of Hurricane Katrina, he was evacuated to the Denver area and remained here. (*Id.*, pp. 1069-1075) He had several prior felony convictions, but the last was in 1995. (*Id.*, pp. 1078-1079) In May 2008, he was living in Aurora and working construction jobs. (*Id.*, pp. 1079-1082)

On the night of May 16, 2008, he had been working at a construction site near Colfax Avenue until around 10:30-11:00 P.M. (*Id.*) After work, he ran into two acquaintances – Marissa and Cave – who lived near him in Aurora. (*Id.*, pp. 1084-1086) They decided to share a taxi ride home. Cave then called a cab company. (*Id.*) A cab arrived, driven by Ioan Feier. Mr. DeGreat sat in the front seat, and Marissa and Cave were in the backseat.

Mr. DeGreat testified that the cab driver seemed like a nice guy, and they chatted and everything was normal during the cab ride. (*Id.*, p. 1086) When they arrived at the apartment complex that was their destination, Marissa and Cave left the cab. (*Id.*, pp. 1087-1088) Mr. DeGreat was left to pay the fare, but realized he did not have enough money. (*Id.*, pp. 1088-1092) The fare was a little over fourteen dollars, and Mr. DeGreat only had ten dollars. He offered to give Feier the

ten dollars, and go get the rest of the money from his apartment. (*Id.*) Mr. DeGreat testified that he gave his Colorado identification card to Mr. Feier and told him that he would leave the card with Feier as a guarantee of his return. (*Id.*) He testified that Mr. Feier became angry and refused, locked him in the car, and told him he had called the police. He again told Mr. Feier that he would get the money, but Mr. Feier was agitated and angry about people not paying their fares. (*Id.*) Mr. DeGreat tried to exit the cab, but the doors were locked and the locking mechanisms were removed so that only the driver could unlock the doors. (*Id.*) He testified that he then climbed into the backseat to see if he could get out the back doors, but he could not. (*Id.*) Mr. Feier then got out of the car and, at some point, unlocked the doors. Mr. DeGreat exited the cab, told Mr. Feier "thank you," and said he would go get the money and be right back. (*Id.*, pp. 1092-1099) He said Mr. Feier then began yelling at him, and told him he had called the police and was sick of people not paying for rides in his cab. *Id.* Mr. DeGreat told him he would get the money and began to walk off. Feier grabbed him and pulled him back, and

they started fist fighting.[1] (*Id.*) At some point, Mr. DeGreat felt his chin get cut, and saw something gleaming in Mr. Feier's hand. (*Id.*, pp. 1099-1101) He wasn't sure what it was, but believed it was a weapon. (*Id*). Feier continued to yell at him. (*Id.*) Mr. DeGreat testified that - as a result of growing up and living in the projects in New Orleans, as well as having been previously attacked and robbed in Aurora – he usually carried a knife. (*Id.*, pp. 1106-1111) When Mr. Feier attacked him, he had a small kitchen steak knife in his pocket. In order to defend himself, he drew

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[1]The prosecution claims that Mr. DeGreat "admit[ed] he likely threw the first punch." *See* Opening Brief at 3. However, as demonstrated in the record, Mr. DeGreat repeatedly stated that he did not know who threw the first punch:

> Q Because you're telling this jury you don't even remember who threw the first punch, right?
> A I didn't. Because, man, we was arguing and he hoopin and hollerin', and I said a few things at that time. And next thing I know, we was just connected.
> Q And it could have been you throwing the first punch?
> A Could have been. I can't say if I did. I don't really know.
> Q So you're not telling the jury that he threw the first punch?
> A I can't say. I said I can't remember who threw the first punch. It could have been at the same time. He could have been leaping at me
> while I lept at him. I can't remember. I felt his licks and I know he felt mine. We punching each other. That's all I remember.

R. Tr. 7/2/10, p. 1230. In any event, the fist fight began after Mr. Feier physically grabbed Mr. DeGreat while he was leaving to get the money, knocking him off balance and into the car. R. Tr. 7/1/10, pp. 1096-97.

the knife and began swinging back at Feier. (*Id.*, pp. 1099-1101) The two exchanged several blows, and Mr. DeGreat's knife broke at some point. Feier then ran away. (*Id.*) Mr. DeGreat did not pursue him.

Mr. Feier testified to a somewhat different version of events. He testified that he responded and picked up three people - two men and a woman, including Mr. DeGreat who sat in the front passenger seat. (R. Tr. 6/28/10, pp. 432-434) He drove them to their destination. When they arrived, the two in the backseat got out. (*Id.*, pp. 435-436) He then testified that Mr. DeGreat was in the front seat, but did not have money for the cab fare. (*Id.*, pp. 437-438) Mr. DeGreat wanted to go inside and get money. (*Id.* at 438) Feier testified that he asked Mr. DeGreat for his identification card, so he could identify Mr. DeGreat and also to hold onto while Mr. DeGreat went to get money for the cab fare. (*Id.*, pp. 439-442)

He then claimed that, for some unexplained reason, Mr. DeGreat would not leave the cab to get the money for the fare. (*Id.*, pp. 443-444) Feier claimed that DeGreat refused to leave the cab. (*Id.*) Feier then said Mr. DeGreat became agitated and unexpectedly climbed into the backseat for no apparent reason. (*Id.*, pp. 445-446) At that point, Feier said he got out of the cab because he was afraid. (*Id.*) Feier then said he went to the back door and opened it for Mr. DeGreat. (*Id.*, pp. 447-448) He then claimed Mr. DeGreat got out of the cab and they were

standing outside the cab, when a car pulled up. He claimed he asked the car to call the police, but it drove off. (*Id.*, pp. 448-450) He claimed that Mr. DeGreat then, without warning, struck him in the neck with a sharp object. (*Id.*, pp. 450-454) He said Mr. DeGreat kept striking him, at first with the sharp object and then with his fists. (*Id.*) He tried to fight back and they were exchanging blows. (*Id.*) He said he tried to run away, but that Mr. DeGreat chased him, threatening to kill him, and that they ran around the neighborhood for approximately 20 minutes until Feier ended up at a nearby 7-11 store, where a police officer happened to arrive. (*Id.*, pp. 454-463) He gave the officer Mr. DeGreat's I.D. card. (*Id.*, p. 464) Feier was transported to the hospital briefly for treatment, and then released.

Feier had cash on him at the time, but Mr. DeGreat did not try to take money from him. (R. Tr. 6/29/10, p. 547) Feier claimed that, during the time in the cab, he provided an emergency code to dispatch to call 911, but there was no evidence that such a code was ever sent or received. (*Id.*, p. 513) Feier also had an emergency call button in the cab, but did not activate it. (*Id.*) Feier admitted that his cab had formerly been a police car and thus the locks could only be operated from the front. (*Id.*, pp. 524-525) He also admitted that he had removed the locking posts so that he could lock people in the car who did not pay their fare. (*Id.*) He claimed he

did not do that in this instance. (*Id.*) He had 70-80 times where individuals did not pay their fares. (*Id.*, p.442)

Feier gave the police Mr. DeGreat's I.D. card, but police initially could not find Mr. DeGreat. Ultimately, Mr. DeGreat was arrested and charged. (*Id.*, pp. 497-499)

Subsequent to his arrest, Mr. DeGreat called a friend from jail on several occasions. (R. Tr. 6/30/10, pp. 748-770; Exs. 39-45) The friend had a mutual acquaintance with Mr. Feier. Mr. DeGreat told the friend to offer money to Feier to not show up in court. Feier claimed he did receive phone calls offering him $7,000 not to go to court. (R. Tr. 6/29/10, p. 492)

The jury was thus presented with two conflicting versions of events, with each person claiming the other attacked them. Mr. DeGreat's defense was self-defense. The jury acquitted him of all offenses for which self-defense was an affirmative defense. The jury also acquitted him of theft. The jury also rejected any findings of serious bodily injury to Feier. Mr. DeGreat was convicted of aggravated robbery and reckless assault.

SUMMARY OF THE ARGUMENT

Mr. DeGreat’s argument is straightforward. Mr. DeGreat’s trial testimony sufficiently raised the issue of self-defense. When supported by the facts, self-

defense is typically an affirmative defense to specific and general intent offenses involving the use of force against another. *See e.g. Riley v. People*, 266 P.3d 1089, 1093 (Colo. 2011); *People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011); *Sanchez v. People*, 820 P.2d 1103 (Colo. 1991); *People v. Fuller*, 781 P.2d 647 (Colo. 1989); *People v. Taylor*, 230 P.3d 1227, 1231 (Colo. App. 2009) (overruled in part on other grounds in *Pickering, supra*); *People v. Barrus*, 232 P.3d 264, 267-269 (Colo. App. 2009); C.R.S. § 18-1-704.

Robbery and aggravated robbery are general intent offenses involving the use of force and, as such, self-defense should be a legally available affirmative defense to those offenses when raised by the evidence. To the extent it holds otherwise, *People v. Beebe*, 557 P.2d 840 (Colo. App. 1976) is incorrect and incompatible with Colorado law on self-defense. There is no legal reason that a different legal standard should apply to self-defense in relation to robbery offenses than to any other general intent crime involving the use of force against another, such as second-degree murder, where the defense is adequately raised at trial. There is nothing in the self-defense statute or the robbery statutes that indicate a "robbery" exception to self-defense as an affirmative defense. To the contrary, the current self-defense statute only makes an exception for crimes involving

recklessness, criminal negligence, and extreme indifference. *See* C.R.S. § 18-1-704 (4).

The trial court's instructions in this case effectively precluded the jury from considering self-defense *at all* regarding the offense of aggravated robbery. The instructions did not permit consideration of self-defense as either an affirmative defense or an element-negating traverse to aggravated robbery. The court's failure to properly instruct the jury in this case constituted reversible error in violation of Mr. DeGreat's constitutional rights to due process, trial by jury and to a defense, as well as his statutory rights.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY ON SELF-DEFENSE IN RELATION TO THE CHARGE OF AGGRAVATED ROBBERY.

A. Preservation; Standard of Review

Defense counsel tendered an elemental instruction for aggravated robbery that included an element that the offense occurred without the affirmative defense of self-defense. (R. Tr. 7/6/10, pp. 1326-1327; PR, Env. #3) The trial court reviewed and rejected the proposed instruction. The trial court appeared to reject the defense as a matter of law under *Beebe, supra*. Mr. DeGreat agrees with the Attorney General that this case thus involves questions of law and statutory

interpretation, which are reviewed *de novo*. The Court of Appeals agreed that the issue was preserved, and the Attorney General is not contesting preservation of the issue.

Since the issue is preserved, review is for harmless error. Where the prosecution's burden of proof regarding an affirmative defense is lessened, the error cannot be harmless. *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005). "Because a defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof, such error cannot be deemed harmless." *Garcia*, 113 P.3d at 784; *see also Idrogo v. People*, 818 P.2d 752, 756 (Colo. 1991) (trial court's failure to properly instruct a jury on the applicable law of self-defense deprives the defendant of the right to acquittal on that basis); *Lybarger v. People,* 807 P.2d 570, 582–83 (Colo. 1991).

B. Argument

The Due Process and Trial by Jury Clauses guarantee the accused that the prosecution must prove beyond a reasonable doubt every factual element necessary to establish guilt of a charged offense. *See e.g. In re Winship*, 397 U.S. 358, 364 (1970); *Vega v. People*, 893 P.2d 107, 111 (Colo.1995); U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II,§§ 23, 25. In addition, Colorado places the burden on the prosecution to disprove any affirmative defenses. *See* C.R.S. § 18-1-407;

People ex. rel. Juhan v. District Court, 165 Colo. 263, 439 P.2d 741 (1968); *Garcia, supra*; COLO. CONST. art. II, §25; *see also People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989). Failure to properly instruct on an affirmative defense improperly lightens the prosecution's burden of proof, thereby denying the defendant's constitutional right to proof beyond a reasonable doubt on every essential element of the offense. *Garcia, supra.*

This Court has "consistently held that where the record contains any evidence tending to establish the defense of self-defense, the defendant is entitled to have the jury properly instructed with respect to that defense." *See Idrogo v. People*, *supra* at 754. A trial court must tailor self-defense instructions to the particular circumstances of the case in order to adequately apprise the jury of the law of self-defense from the standpoint of the defendant. *See Idrogo*, *supra*; *Cassels v. People*, 92 P.3d 951, 958 (Colo. 2004). Further, an instruction on the defendant's theory "must be given even if the only supporting evidence is highly improbable testimony by the defendant… It is for the jury and not for the court to determine the truth of defendant's theory." *Fuller*, 781 P.2d at 649. Finally, when considering whether a defendant is entitled to a requested instruction bearing on the defense of self-defense, the court must view the evidence in the light most

favorable to the defendant. *Idrogo, supra*; *Mata-Medina v. People,* 71 P.3d 973, 979 (Colo. 2003).

"In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable." *Pickering*, 276 P.3d at 555, citing C.R.S. § 18–1–407 and *Huckleberry*, 768 P.2d at 1238.

As discussed above, Mr. DeGreat testified he acted in self-defense during the altercation with Mr. Feier. The trial court instructed on the affirmative defense of self-defense but limited the applicability of the affirmative defense to the offenses of attempted second-degree murder, first-degree assault, two forms of second-degree assault that required intent, and third-degree assault - knowing. (PR, vol.1, p. 204 (Instruction 23))

The court also instructed the jury that evidence of self-defense could be considered in assessing whether Mr. DeGreat acted negligently or recklessly. (PR, vol.1, p. 209 (Instruction 28)) As a result, the jury was told that self-defense acted as an affirmative defense in relation to some offenses, and that the jury could consider evidence of self-defense in assessing culpability for other offenses. The instructions exempted the charge of aggravated robbery from both categories –

self-defense was not available as an affirmative defense to aggravated robbery, nor was the jury instructed it could consider evidence of self-defense *at all* in assessing culpability for aggravated robbery. To the contrary, the instructions effectively precluded consideration of the evidence of self-defense in relation to the charge of aggravated robbery.

The jury instructions improperly foreclosed self-defense as an affirmative defense for aggravated robbery and, in fact, did not even permit *consideration* of the evidence of self-defense in relation to the charge of aggravated robbery. This constituted reversible error and violated Mr. DeGreat's rights to due process, to a trial by jury and to a defense under the constitutions and Colorado's statutes. U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 23, 25; C.R.S. §§ 18-1-407; 704; 710. This is especially true in a self-defense case, given the defendant's "constitutional right to have a lucid, accurate and comprehensive statement by the court to the jury on the subject of self-defense ...". *Bustamonte v. People*, 157 Colo. 146, 401 P.2d 597, 606 (1965); *Young v. People*, 47 Colo. 352, 107 P.2d 274, 275 (1910).

(1) Self-Defense in Colorado

Colorado has historically afforded its citizens an expansive right to defend themselves from the imminent use or perceived use of unlawful force, in

recognition that the right of self-defense stems from necessity and the instinct of self-preservation. *See Young v. People*, *supra*; *Vigil v. People*, 143 Colo. 328, 334, 353 P.2d 82, 85 (1960) ("The *right* of self-defense is a natural right and is based on the natural law of self-preservation. Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the 'reasonable man' concept." (emphasis original)); COLO. CONST. art. II, § 3.

> The right of self-defense has strong roots in both the history and the law. The basic parameters of the defense, set out by statute, have remained unchanged for some time. Perhaps reflecting this state's frontier history, Colorado does not impose a duty to retreat, even when deadly force is employed; analyzes self-defense from the point of view of the person being attacked; and has created special exemptions from liability for self-defense exercised in the home.

Furman, *Self-Defense in Colorado*, 24 Colo. Law. 2717, 2720 (Dec. 1995).

The affirmative defense of self-defense is codified in C.R.S. § 18-1-704. This Court has stated that, typically, "[s]elf-defense is permissible in all circumstances when there is use or imminent use of unlawful physical force []", subject to statutory exceptions. *Fuller*, 781 P.2d at 649, citing C.R.S. § 18-1-704(1). "Section 18-1-704 (2) contains no language restricting the circumstances in which a non-aggressor may use physical force, including deadly physical force, when such person believes, on reasonable grounds, that such conduct is necessary

to avoid great bodily harm." *People v. Toler*, 9 P.3d 341, 351 (Colo. 2000), quoting *Idrogo, supra* at 756. "*With specifically enumerated exceptions*, the Colorado Criminal Code provides a legal justification for using physical force upon another person if that physical force is used to defend the person using it from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he uses only a degree of force he reasonably believes to be necessary for that purpose." *People v. Opana*, 395 P.3d 757, 759 (Colo. 2017) (emphasis added).

"Thus, under section 18-1-704(2), a person who faces the factual circumstances set forth in 704(2)(a-c) and who reasonably believes that a lesser amount of force is inadequate is entitled to use deadly force in self-defense." *Toler, supra* at 349. "The statute defines two categories of persons who are not justified in using physical force under any circumstances." *Id.* The first category excludes individuals who intentionally provoke the uses of force by another person, in order to cause bodily injury or death to that person, and the second category excludes individuals engaging in "combat by agreement not authorized by law." *Id.*; *see* C.R.S. § 18-1-704 (3)(a-c). The statute includes a third set of individuals – initial aggressors – who must retreat before being permitted to exercise the right to self-defense. *Toler*, *supra* at 350; C.R.S. § 18-1-704 (3)(b).

Consequently,

> section 18–1–704 establishes the rights of four categories of persons with respect to the privilege of using physical force in self-defense: (1) people who with the intent to cause bodily injury or death provoke the use of force against themselves may not claim self-defense; (2) people who engage in unauthorized combat by agreement may not claim self-defense; (3) "initial aggressors," who first "withdraw and communicate," that is, "retreat," may then use physical force in their own defense; and (4) all other persons, i.e., those who do not fall within the first three groups, may use physical force, including deadly physical force, in accordance with sections 18–1–704(1) and (2). See § 18–1–704, 6 C.R.S. (1999).

Toler, 9 P.3d at 350.

This Court's case law also created a category of offenses where defendants were not legally entitled to self-defense as an affirmative defense, even if the defendants otherwise satisfied sections 18-1-704 (1) or (2). In *People v. Fink*, 194 Colo. 516, 574 P.2d 81 (1978), this Court held that a defendant is not entitled to self-defense as an affirmative defense when an element of the crime charged is that the defendant acted in a reckless or criminally negligent manner. This Court held that the mental states of recklessness or criminal negligence were inconsistent with the requirement for self-defense that the defendant act reasonably. Consequently, if the prosecution proves recklessness or criminal negligence beyond a reasonable doubt, it has necessarily established that defendant did not act reasonably in self-defense. Conversely, if the jury believes that the defendant acted reasonably in

self-defense, then the prosecution necessarily has failed to prove the requisite *mens rea* for the offense and acquittal is required. *Id.*; *see also Case v. People*, 774 P.2d 866 (Colo. 1989). In those circumstances, the defense of self-defense operates as an element-negating traverse, rather than an affirmative defense. *See e.g. Pickering*, *supra* at 557. However, even in those circumstances, the defendant must still be allowed to present evidence of self-defense for the jury's consideration in determining whether the prosecution has met its burden of proof on the elements of the charged offense(s). *See Fink, supra*; *Case, supra*; *Pickering, supra*; *see also People v. Roberts*, 983 P.2d 11 (Colo. App. 1998). The Court of Appeals subsequently applied this Court's rationale in *Fink* and *Case, supra*, to conclude that self-defense did not constitute an affirmative defense to extreme indifference murder. *See People v. Fernandez*, 883 P.2d 491, 493-494 (Colo. App. 1994).

Apparently as a result of the line of cases beginning with this Court's *Fink* decision and ending with the Court of Appeals' decision in *People v. Roberts, supra*, and subsequent confusion over how to instruct juries regarding self-defense in relation to offenses involving recklessness, criminal negligence, or extreme indifference, House Bill 03-1148 ("Concerning Restoration of Self-Defense as a Defense in Criminal Cases") was introduced in the 2003 General Assembly. It initially was introduced to restore self-defense as an affirmative defense in all

cases, essentially undoing the *Fink* line of cases entirely. But, as a result of compromise, it ended up codifying portions of those cases with some clarifications and alterations. *See e.g.* House Second Reading, H.B. 1148, 64th General Assembly, 1st Reg. Sess. (Feb. 3, 2003, 10:40-10:54 a.m.); Hearings on H.B. 1148, Senate Judiciary Committee (March 3, 2003, 1:50-2:09 p.m.); Senate Second Reading, H.B. 1148, (March 7, 2003, 10:46-10:50 a.m.); *see also* HB 03-1148, initial Bill Summary ("it is the intent of the general assembly that a person be able to raise self-defense as an affirmative defense in any case regardless of the *mens rea* which is an element of the charged crime."). Ultimately, the bill was intended to clarify that, while self-defense remained an affirmative defense generally to knowing and intentional offenses, it was not an affirmative defense to crimes involving recklessness, criminal negligence, or extreme indifference. *Id.* However, the legislation was also intended to ensure that defendants in cases involving those mental states for which self-defense was not an affirmative defense were still entitled to present evidence of self-defense to the jury and have the jury instructed to consider such evidence of self-defense when assessing guilt on such offenses. *Id.* The jury's consideration of self-defense evidence, even where it did not constitute an affirmative defense, was necessary under *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). *See Pickering, supra* at 556. In addition, the legislature

provided in subsection (4) that it did not apply to strict liability offenses. Notably though, other than strict liability offenses, the legislature did not completely preclude the application of self-defense to any particular crimes or exclude any specific offenses, such as robbery, from the ambit of the statute.

Consequently, where a defendant is charged with a crime involving the use force against another and he claims self-defense, with support in the evidence, he may usually "assert self-defense as affirmative defense to crimes requiring intent, knowledge, or willfulness… He may also present evidence of self-defense as an element-negating traverse to cast doubt on charges that he acted recklessly, with extreme indifference, or in a criminally negligent manner." *Riley*, 266 P.3d at 1093, citing C.R.S. § 18-1-704 and *Pickering*, *supra* at 556.

Further, as a practical matter, even when self-defense is asserted as an affirmative defense it may still function secondarily as an element-negating traverse. If, for instance, a jury rejects the affirmative defense for some reason (perhaps because either the defendant's belief or use of force was unreasonable) it could still find that the defendant's belief that he was acting in self-defense had a bearing upon his culpability for the offense. *See e.g. Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970) ("if in the act of defending himself [defendant] overreacted to a belief that he was in danger from [victim] and the killing resulted

from the application of excessive force, then the exercise of his right of self-defense, lawful in the first instance, became unlawful by reason of the manner in which he defended himself. Under these circumstances the killing would not be legally justified. However, the criminal culpability, assuming the evidence was believed by the jury, would be…" reduced.).

The only cases counsel could locate from this Court addressing whether self-defense was unavailable as a matter of *law* to specific *offenses* were the *Fink/Case* line of cases now codified in subsection (4).[2] And those decisions were not necessarily offense specific, but rather focused upon the mental state(s) required for the particular offenses and found the mental state(s) incompatible with self-defense. However, outside of that context, this Court has not typically engaged in an offense by offense analysis of whether self-defense is legally available as an affirmative defense.[3] The self-defense statute itself contains no exclusions for any

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[2] In a related case, *Sanchez v. People*, 820 P.2d 1103 (Colo. 1991), this Court rejected an argument based upon *Fink, supra*, and held that self-defense *was* an affirmative defense to heat of passion manslaughter.

[3] The Court of Appeals has determined that self-defense is unavailable as a matter of law for robbery offenses, *see Beebe, supra*, and for felony murder offenses, *see People v. Burns*, 686 P.2d 1369 (Colo. App. 1983) and *People v. Renaud*, 942 P.2d 1253 (Colo. App. 1996). The *Beebe* decision is at the core of Mr. DeGreat's case and will be discussed *infra*. The Court of Appeals' determination regarding the inapplicability of self-defense to felony murder has not been specifically addressed by this Court. *See People v. Hickam*, 684 P.2d 228, 231 fn. 1 (Colo. 1984) ("We

specific offenses, other than the limitations contained in subsection (4). Rather, this Court's decisional law regarding applicability of self-defense has generally focused on the factual circumstances of the particular cases involved. In other words, most of this Court's decisional law regarding the availability of self-defense has focused upon whether a particular defendant falls within one of the four categories described in *Toler*, *supra*, (and, if so, which one), and/or whether the jury instructions adequately apprised the jury of relevant self-defense principles. To the

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limit our analysis to whether self-defense can be asserted under the facts of this case. We do not decide the larger issue of whether self-defense can ever be a defense to felony murder."). Obviously, felony murder is not involved in Mr. DeGreat's case and that issue is not presently before this Court. However, it is worth noting some unique features of felony murder that differentiate it generally from other criminal offenses. The first-degree murder statute itself contains a very specific affirmative defense to felony murder. *See* C.R.S. § 18-3-102(2). In *Burns*, the Court of Appeals held that the statutory defense set forth in the first-degree murder statute was the only applicable affirmative defense. It is also worth noting that felony murder does not itself contain any particular mental state. However, to the extent the culpability for felony murder is supplied by the underlying predicate felony, the Court of Appeals has determined that self-defense is applicable to the underlying felony. *See e.g. Burns*, *supra*; *Renaud*, *supra*. And, as this Court has recently stated, if a felony murder defendant is acquitted of the underlying predicate offense for felony murder as a result of an affirmative defense to that predicate offense, then the defendant cannot be convicted of felony murder. *See Doubleday v. People*, 364 P.3d 193 (Colo. 2016). Thus, as a practical matter, even under the Court of Appeals' analysis, self-defense can function as an affirmative defense to felony murder, albeit indirectly, by operating as an affirmative defense to the predicate offense.

extent this Court has precluded the affirmative defense as a matter of law, those decisions are now embodied in subsection (4).

Our current statutory scheme thus generally entitles any person to assert self-defense as an affirmative defense when raised by the evidence at trial with only a few exceptions: those noted in *Toler*, *supra*, and those added by subsection (4). Further, "it is the prosecution's burden to prove an exception to self-defense." *People v. Newell*, 2017 COA 27, ¶ 27. Of course, as with any affirmative defense, self-defense is only available if the evidence at trial contains a "scintilla of evidence" to support the defense. *See e.g. Newell*, *supra* at ¶ 21; C.R.S. §18-1-407. Beyond that, neither this Court's case law nor the statute establishes any rigid parameters regarding self-defense.

In *Roberts v. People*, 2017 CO 76 (June 19, 2017), this Court recently held that its broad language in *Pickering, supra* (and, presumably, *Riley*, *supra*) did not *require* that a defendant receive a self-defense instruction in *all* cases involving specific or general intent offenses, regardless of the circumstances. This Court noted that *Pickering* did not specifically consider the range of cases in which self-defense is an affirmative defense. However, in *Roberts*, this Court did not delineate any particular limitations on self-defense, although it certainly suggested some

may exist, since it found that self-defense was unavailable as an affirmative defense based upon the circumstances of that particular case.[4]

This Court need not address the outer limits of self-defense in Colorado in this case.[5] Mr. DeGreat's case falls within the core class of cases to which self-defense should apply. The offense with which he was charged involved a knowing

[4] It is worth noting that in *Roberts* the jury was still instructed that it could consider the evidence of self-defense in assessing Ms. Roberts' culpability for the offense, unlike the aggravated robbery in Mr. DeGreat's case.

[5] For instance, different jurisdictions take differing approaches regarding whether self-defense is available as a defense to property crimes. The modern approach in states with statutes similar to Colorado appears to trend toward applying self-defense to crimes involving property, as well as crimes against persons. *See e.g. Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002) (noting that historically self-defense was limited to assaultive crimes against persons, but that Texas' modern penal code, based in part on Model Penal Code, placed self-defense in the portion of the code applicable to all offenses. That factor, along with others such as the underlying principles of self-defense, indicated that self-defense could be applied to property crimes when factually appropriate); *see also State v. Arth*, 87 P.3d 1206, 1208-9 (Wash. App. 2004) ("The self-defense statute does not expressly limit its application" to specific crimes, and the "statute's location in the criminal code suggests the Legislature did not intend to limit its application to crimes against persons"); *D.M.L. v. State*, 976 So.2d 670 (Fla. App. 2008) ("the statute does not limit this defense to certain offenses. It does not prohibit the use of this defense against property crimes."). This Court need not resolve any such boundaries in this case, however, as Mr. DeGreat's offense involved use of force against a person.

mental state and the use of force against a person[6], not unlike the offense of second-degree murder this Court used as its example in *Pickering, supra*, and he claimed that the use of physical force[7] was a justified act in self-defense. Consequently, he falls within subsection (1) of the self-defense statute, and is not excluded by subsection (4).

(2) *Beebe* is incompatible with Colorado's approach to self-defense.

In denying Mr. DeGreat's request that the jury be instructed that self-defense constituted an affirmative defense to aggravated robbery, the trial court cited

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[6] This Court has specifically recognized that the gravamen of robbery is the assaultive nature of the taking and that the offense is primarily one against the person, not property. *See e.g. People v. Borghesi*, 66 P.3d 93, 100 (Colo. 2003) ("We have stated that the gravamen of the offense of robbery is the violent nature of the taking."); *see also, id.* at 101 ("Not only have we emphasized the violent nature of the taking, but we have also deemphasized the larcenous component of robbery… Thus, our case precedent reflects the common law emphasis on the assaultive nature of the crime, and indicates that our robbery statutes are primarily intended to protect persons and not property."); *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo.1983) ("The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction culminating in the taking of property from the victim's person or presence."). Thus, in Colorado, robbery involves the type of assaultive use of force against a person to which self-defense has classically applied.

[7] It is worth noting that this Court has construed the term force as used in relation to self-defense to "include[] more than actual, applied physical force" and to include compulsion or constraint under threat of physical violence. *See Fuller*, 781 P.2d at 650 fn. 2.

Beebe, supra, and *People v. Laurson*, 15 P.3d 791 (Colo. App. 2010). (PR, Env. #3 (notation on tendered and refused instruction))

In *Beebe*, *supra*, Ms. Beebe was charged with first-degree assault and aggravated robbery. The jury found her guilty of aggravated robbery and second-degree assault. *Beebe*, 38 Colo.App. at 81, 557 P.2d at 841.On appeal, Beebe asserted that the trial court committed plain error by failing to instruct the jury on self-defense with respect to the aggravated robbery count. *Id*. The Court summarily rejected the claim, stating that, "Both the putting in fear and the taking of property constitute the gist of the offense of robbery. … These elements of the offense are inseparable. Self-defense cannot justify the taking of a thing of value from the person or presence of another, and the lawfulness of the force used to accomplish the taking is immaterial. Therefore, self-defense is not an affirmative defense to the crime of aggravated robbery." *Id*.

The decision in *Beebe* is fundamentally flawed. Initially, it is worth noting that the analysis in *Beebe* is sparse, at best. There is no discussion of the underlying facts, and the Court of Appeals does not cite any cases to support its decision that self-defense is unavailable as a matter of law for robbery, or even discuss the self-defense statute then in effect. More fundamentally, however, the decision in *Beebe* is flawed because the court appears to confuse a question of fact

with an issue of law. The analysis in *Beebe* is less than clear, but seems to derive from the *Beebe* division's inability to envisage a factual situation that would give rise to a self-defense claim in relation to a "taking" for robbery. Admittedly, such factual scenarios may be few and far between[8], but factual rarity does not render the defense unavailable as a matter of law. *Beebe* is incompatible with the current case law and statute regarding the affirmative defense of self-defense, and this Court should overrule it.

"[A] defendant who raises an affirmative defense to a general intent crime does not attempt to negate an element of the offense, but rather seeks to justify, excuse, or mitigate it." *Taylor, supra* at 1230. As discussed above, self-defense in Colorado is generally an affirmative defense to specific and general intent offenses – at the very least those specific and general intent offenses involving the use of force. *See e.g. Riley, supra; Pickering, supra; Fuller, supra* (self-defense can be an affirmative defense to resisting arrest); *Sanchez v. People*, 820 P.2d at 1108 (self-defense is a defense to heat of passion manslaughter, "a crime of general rather than specific intent."); *Taylor, supra* at 1231 (overruled in part on other grounds in

[8] Indeed, since *Beebe* in 1976, only two other published appellate decisions in Colorado appear to have addressed the issue of self-defense in relation to robbery or aggravated robbery – Mr. DeGreat's case and the decision in *Laurson, supra*.

Pickering, supra) (self-defense is affirmative defense to knowing illegal discharge of firearm); *People v. Barrus*, 232 P.3d 264, 267-269 (Colo.App.2009) (self-defense can be an affirmative defense to obstructing a police officer).

In addition, the power to define criminal conduct and establish the legal components of criminal liability is vested with the General Assembly. COLO. CONST. art. V, § 1; *see Hendershott v. People*, 653 P.2d 385 (Colo.1982). The General Assembly has the prerogative to formulate and limit affirmative defenses. *Rowe v. People*, 856 P.2d 486 (Colo. 1993). The General Assembly has not precluded self-defense as an affirmative defense to robbery or aggravated robbery, and this Court should not do so. Neither the robbery nor aggravated robbery statutes contain any limitation on the applicability of self-defense. *See* C.R.S. §§ 18-4-301 and 302. Nor does the self-defense statute contain any suggestion that self-defense should not apply to aggravated robbery. *See* C.R.S. § 18-1-704. The self-defense statute explicitly delineates certain circumstances when the affirmative defense is inapplicable, and robbery is not mentioned. As noted by this Court in *Toler*, the focus of self-defense is generally whether the person asserting the defense falls within the category of persons entitled to claim self-defense or within one of the three exclusions. *Toler*, 9 P.3d at 350 ("all other persons, i.e., those who do not fall within the first three groups, may use physical force,

including deadly physical force, in accordance with sections 18–1–704(1) and (2).").

Further, robbery is a general intent offense involving the use of force upon another and does not fall within subsection (4). Thus, section 18-1-704 by its very terms, and as interpreted by this Court, should permit self-defense as an affirmative defense to robbery and aggravated robbery, when factually appropriate.

One of the clearest examples demonstrating the flawed reasoning of *Beebe* that self-defense is unavailable as a matter of law for robbery is the situation where a person being attacked disarms their assailant and takes away their weapon. That is a robbery – taking the property of another through force – yet it would make no sense to hold that self-defense cannot be an affirmative defense and justify such a taking. *See e.g. State v. Smith*, 268 N.C. 167, 170, 150 S.E.2d 194,198 (1966) ("Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery."); *accord State v. Campbell*, 214 N.W.2d 195,197 (Iowa 1974); *Lake v. Moots*, 215 Iowa 126, 244 N.W. 693,696 (1932). Disarming one's assailant by taking their weapon away is a paradigmatic act of self-defense, to hold that such an act cannot be done in self-defense and, in fact, constitutes a class 3 felony offense is untenable. *Beebe's* conclusion that self-defense can never

function, as a matter of law, as a defense to robbery in such circumstances cannot withstand scrutiny. The Attorney General appears to recognize as much.

Rather, a trial court assessing a claim of self-defense in relation to robbery should perform the same analysis it does whenever a defendant asks for the affirmative defense of self-defense. The court should determine if "the record contains any evidence tending to establish the defense of self-defense" in relation to the robbery count and, if so, "the defendant is entitled to have the jury properly instructed with respect to that defense." *See Idrogo*, *supra* at 754. There is no reason to preclude the defense as a matter of law in cases like Mr. DeGreat's where an unusual factual situation gives rise to a self-defense claim in relation to robbery.

(3) The prosecution's arguments, and reliance upon out-of-state authorities, are unavailing.

The Attorney General argues that self-defense should not be permitted as an affirmative defense in Mr. DeGreat's case. The Attorney General makes some case-specific arguments and some offense-specific arguments.

First, with respect to this case, the Attorney General argues that the taking and the force in this case were separable and therefore self-defense should not be available. Interestingly, the Attorney General's position appears directly contrary, as a matter of law, to *Beebe*, *supra*, upon which the Attorney General relies. It appears that the basic premise for the holding in *Beebe* was the Court's conclusion

that "both the putting in fear and taking of property constitute the gist of the offense of robbery… These elements of the offense are *inseparable*." *Beebe, supra* (emphasis added). Yet, here, the Attorney General is arguing that self-defense should be inapplicable for the opposite reason; that the force and the taking were separable.

More fundamentally, however, the Attorney General misconstrues the facts to form his basic premise. The Attorney General appears to argue that the Court of Appeals in this case erred in holding that self-defense was applicable, as a factual matter, since there was temporal separation between the "taking" and the use of force/self-defense. The Attorney General seems to believe that the "taking" of the taxi services occurred at the moment the cab arrived at the apartment complex (or perhaps earlier) and Mr. DeGreat did not have sufficient funds. This is contrary to the facts of the case, the testimony of Mr. DeGreat, and the findings of the jury. It is clear from Mr. DeGreat's testimony that he intended to pay the fare all along and the only thing that prevented his payment of the fare was the assault by Mr. Feier leading to the physical altercation. Thus, there was evidence from which a jury could have found that Mr. DeGreat intended to pay the fare, but was prevented from doing so as a result of the driver's assault, to which Mr. DeGreat responded in self-defense. Although the fare was never paid due to the assault, such an

alleged "taking" resulted only from Mr. DeGreat's lawful use of force to defend himself from the attack. If Mr. DeGreat had not been forced to physically defend himself, there would have been no "taking" and thus no "robbery." Thus, under the facts here, the use of force and taking were a "singular/inseparable act" and would be subject to self-defense under the Attorney General's own arguments. *See* Opening Brief at 18, 22 n. 5.

As the Court of Appeals recognized, the alleged taking and use of force in self-defense were inextricably intertwined. *See DeGreat, supra* at ¶ 15. The Attorney General prefers an alternate version of facts from those testified to by Mr. DeGreat, but for purposes of assessing this issue the evidence must be viewed in the light most favorable to the defendant, not the prosecution. *See Idrogo, supra*; *Mata-Medina, supra*.

Second, the prosecution argues that Mr. DeGreat denied the "taking" and therefore should be precluded from asserting self-defense. The prosecution's claim is misleading. Mr. DeGreat testified at trial. He admitted being in a physical altercation with the driver and also admitted that he never paid the fare for the cab ride. Thus, he admitted participation in the conduct that was being offered in support of the aggravated robbery offense. However, he claimed he acted justifiably in self-defense. Also, while he did admit to failure to pay the fare, he

disputed the prosecution's characterization of it on cross-examination of it as a "taking":

> [Prosecution]: But you felt bad about taking his money?
> A: I didn't take his money.
> Q: But you didn't pay him his money.
> A: I wanted to pay him. He didn't let me pay him. What was I supposed to do?
> Q: You took his services.
> A: I didn't take it. He provided the services.
> Q: And you didn't pay him for the services?
> A: Right. I tried to pay him, but he didn't want – when I was getting the money out of the wallet he asked for my ID. Why would I give him the money when he asked for the ID? I said, "I got $10."… .

(R. Tr. 7/2/10, pp.1237-1238; *see also* R. Tr. 7/1/10, pp. 1127-29) Thus, Mr. DeGreat was not disputing the conduct or his failure to pay; rather, he understandably did not view what occurred as an affirmative taking since the "taking" alleged here was through inaction in failing to pay.[9]

[9]The question of whether a "taking" for purposes of robbery actually occurred here was recognized in the Court of Appeals' opinion below and is a legitimate one. *Compare United States v. Brazil*, 5 M.J. 509 (A.C.M.R. 1978) (noting that larceny could be proven by establishing "taking, obtaining or withholding" but that the robbery statute only used the word "takes" and therefore holding that defendant who forced taxi cab driver to take him to a destination without paying the fair, was only guilty of "withholding" the fare – not "taking" it – and therefore could only be convicted of larceny and not robbery.), *with State v. Roblow*, 623 So.2d 51, 55 (La. App. 1993) (holding that, where defendant forced a driver to take him to destination at gunpoint, "[w]e agree with the state that the definition of 'anything of value' is broad enough to include the taking of transportation services as it occurred in this case."). Of course, further complicating the issue of "taking" in

Mr. DeGreat's situation is the classic affirmative defense situation where he admitted the underlying conduct but sought to justify it. As this Court recognized in *Huckleberry, supra*:

> the essence of an affirmative defense is the admission of the conduct giving rise to the charged offense. Having acknowledged presence at and participation in the event, the participant in effect justifies the conduct on grounds deemed by law to be sufficient to render the participant exempt from criminal responsibility for the consequences of the conduct.

People v. Huckleberry, 768 P.2d 1235, 1239 (Colo. 1989). As *Huckleberry* further recognized, the prosecution must still establish each element of the offense beyond a reasonable doubt, as well as negate the affirmative defense, in order to establish a defendant's guilt. *Id.*; *see also Pickering, supra*; *Roberts v. People, supra*; C.R.S. § 18-1-407(2) ("If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue *as well as all other elements of the offense*." (emphasis added)).

Mr. DeGreat admitted to both the use of force and the failure to pay the cab fare, which constituted the acts supporting the robbery charge. Although admitting the conduct underlying the robbery charge, he sought to justify his actions as being

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this case is the fact that Mr. DeGreat did not force or threaten Mr. Feier to transport him anywhere. Rather, any alleged "taking" occurred after the services had initially been voluntarily rendered and Mr. DeGreat then failed to pay for them.

in self-defense. Under *Huckleberry* and C.R.S. § 18-1-407, he was entitled to do so while still putting the prosecution to its burden of proof and did not have to agree to the prosecutor's characterization of the act as a "taking" in order to avail himself of the defense.

Additionally, the State's reliance upon out of state cases is inapposite for several reasons.

First, several states have specific statutory provisions that disallow self-defense where the person is in the process of committing a "forcible felony." In *People v. Graves*, 479 N.E.2d 10 (Ill. App. 1985), relied upon by the prosecution, the Illinois court noted that there was a specific Illinois statute precluding self-defense for a "person who is attempting to commit, committing, or escaping after the commission of a forcible felony" which applied in that case. However, the court also noted that there was no evidence that the taking of property was justified by defendant's "need for the defense of his person" and, in the absence of such evidence, failure to instruct the jury on self-defense was not error – thus suggesting that given appropriate facts, self-defense might be available as a defense in spite of the statute. *Graves, supra* at 11-12. A number of states, like Illinois, have statutes specifically precluding self-defense when the defendant is attempting to commit, committing, or escaping from a "forcible felony." Colorado has no such statutory

corollary. However, even the states that have such statutes appear to recognize that, in certain factual circumstance, a jury should still be instructed on self-defense in relation to a robbery. *See e.g. Gregory v. State*, 141 So.3d 651, 654-655 (Fla. App. 2014) (jury should have been instructed on self-defense in relation to robbery and battery); *Graves, supra*.

Second, in many jurisdictions, there could not be a robbery of "services."

> Property (including money) which can be taken by larceny can be taken by robbery; and, conversely, items which cannot be stolen (e.g., labor or services, in most jurisdictions) cannot be the subject of robbery.

W.R. LAFAVE & A.W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW VOL. 3 § 20.3. ROBBERY (2d ed.) (footnotes omitted); *see e.g. United States v. Abeyta*, 12 M.J. 507 (A.C.M.R. 1981) (noting that "[h]istorically, the definition of property that can be the subject of larceny has been limited to tangible items. It does not include services." The Court therefore concluded "taxicab services" could not be the subject of a larceny.); *State v. Bartlett*, 348 P.3d 1240, 1242 (Or. App. 2015) (Where defendant failed to pay cab fare, and tussled with cab driver before fleeing, he could not be convicted of robbery since the taxi ride did not constitute property

for purposes of Oregon's robbery statute. He could, however, be convicted of the separate offense of theft of services.[10]).

In those states, the robber takes or attempts to take a tangible physical item from the victim, provoking a use of force from the victim to prevent the taking or apprehend the robber, and resulting in the alleged "self-defense" by the robber. Traditionally, self-defense has not been recognized in such circumstances (see discussion, *infra*). Given Colorado's broad definition of "thing of value," robbery can involve services, leading to potentially unique nontraditional robbery factual scenarios such as this one. *See* C.R.S. § 18-1-901(3)(r).

Third, many states' construction and application of their affirmative defense or robbery statutes are simply different from Colorado and, therefore, their decisions are of little value in this discussion. In *State v. Lewis*, 233 P.3d 891

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[10] Several states have thus enacted special "theft of services" statutes that specifically cover services, as opposed to tangible property, separately from their standard theft or larceny and robbery statutes. *See e.g. Bartlett, supra*; *see also* N.J. Stat. Ann. § 2C:20-8. In addition, some states have specifically included services as part of their robbery statute, but required an additional showing related to the taking of services. *See e.g. Williams v. State*, 102 A.3d 814, 817 (Md. App. 2014) ("As codified, 'robbery' retains its common law definition, 'the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear.' ... The statute clarifies that a taking of services may also form the basis of the offense, and that to support a robbery conviction there must be proof of the defendant's intent to deprive the victim of the property or the value thereof. C.L. § 3–401.") (internal citations omitted)).

(Wash. App. 2010), relied upon by the prosecution, the court held that the crime of robbery did not include an element of intent and therefore, under Washington law, self-defense was not applicable under the facts of that case because it was not element-negating. *See Lewis*, *supra* ("The crime of robbery, …, includes no element of intent to inflict bodily injury; rather, it includes actual infliction of bodily injury as an element… Proof of self-defense, therefore, fails to negate a corresponding intent element of the crime of robbery."). The *Lewis* court's holding appears to be specific to Washington's element-negating law of self-defense and the particular statutory elements of robbery, and has no application to Colorado law. Similarly, the prosecution's reliance on *Thompson v. State*, 119 So.3d 1007 (Miss. 2013) is of little assistance. *Thompson* does state that a "self-defense instruction is not applicable to a charge of robbery." *Id.* at 1009. However, further examination of that statement and the cases cited shows that the conclusion was because in Mississippi robbery is a "specific intent" crime, requiring a specific intent to permanently deprive another of the property. *See Johnson v. State*, 29 So.3d 738, 746 (Miss. 2009); *Croft v. State*, 992 So.2d 1151, 1157 (Miss. 2008). Colorado, as the prosecution recognizes in its Opening Brief, does not have such

an intent requirement.[11]

Finally, even where courts apply a general rule that self-defense is usually inapplicable to robbery; many of those courts also acknowledge that self-defense may be applicable to robbery in the right factual circumstances. Thus, they do not preclude it as a defense in all robbery prosecutions as a matter of law. Rather, it is typically an issue of fact, with traditional fact patterns typically not giving rise to a legitimate self-defense claim. That is because, under traditional common law notions of robbery and self-defense, "the act of taking money or property by force or fear is incompatible with self-defense as the person committing the robbery is in such a circumstance the aggressor." *People v. Badena*, No. D046669, 2007 WL 466082, at *5 (Cal. Ct. App. Feb. 14, 2007) (Relied upon by the prosecution. Acknowledging that it was possibility that "under some factual circumstances self-defense could be a defense to robbery…" and finding no error because court did in fact provide a self-defense instruction that covered robbery).

[11] The prosecution's reliance on *Dillard v. State*, 931 S.W.3d 689 (Tex. App. 1996) is even more attenuated. The *Dillard* case involved a sufficiency of the evidence claim where Dillard argued that the evidence "conclusively" showed that he acted in self-defense. The court noted that Texas law (like Colorado) has a provocation exception to self-defense and that the "jury could have reasonably concluded that appellant initiated the assaultive conduct" and, therefore, his sufficiency claim failed. It is unclear from the opinion whether the jury was instructed on self-defense in relation to the robbery, but it appears so.

> Under the common law, a defendant could not avail himself of the defense of self-defense if the necessity for such defense was brought on by a deliberate act of the defendant, such as being the initial aggressor or acting with the purpose of provoking the victim into attacking.

People v. Silva, 987 P.2d 909, 914 (Colo. App. 1999). Colorado has codified those exceptions in section 18-1-704 (3).

As discussed briefly above, under traditional common law notions a robber physically taking tangible property from the person of another would typically be considered an initial aggressor or provoker for self-defense purposes and, therefore, not entitled to such defense. However, in nontraditional scenarios, such as Mr. DeGreat's case, a defendant still may be entitled to assert self-defense to robbery:

> We reject as too broad the State's argument that self-defense is unavailable as a defense to defendant because it cannot excuse commission of a robbery. In support of that position, the State relies principally on out-of-state decisions concerning armed robbery that adopt directly or by implication the principle that one who provokes an assault cannot then escape criminal liability by invoking self-defense […citing *Beebe*, as well as other authorities].
>
> That principle is consistent with New Jersey precedent. ... [But] Its rationale is inapplicable in instances such as this in which defendant contends that he was not the aggressor, and that no weapon, force or threat was utilized by him at the outset.

State v. Villanueva, 862 A.2d 1195, 1202–03 (N.J. App. 2004) (internal citations and footnotes omitted); *see also Com. v. Rogers*, 945 N.E.2d 295, 306–07 (Mass. 2011) ("Generally, in Massachusetts, one who commits an armed robbery cannot assert a claim of self-defense. … The rationale for this rule is that the nature of the underlying felony marks the defendant as the 'initiating and dangerous aggressor.'... The present case, however, may not fit well within that general rule." However, court did not need to resolve issue in that case because the trial court did provide a proper instruction on self-defense in relation to robbery) (internal citations and footnotes omitted); *State v. Celaya*, 660 P.2d 849, 854–55 (Ariz. 1983) ("The general rule in homicide cases is that the plea of self-defense is not available to one who is at fault in provoking the difficulty that resulted in homicide. ... Where it is uncontroverted that the accused was at fault in provoking the difficulty which necessitated the defensive use of force, the court should refuse to instruct on self-defense. … The evidence in this case conflicts as to who provoked the violence." (internal citations omitted). As such, defendant was entitled to an instruction on self-defense in connection with robbery charge, but not felony murder.). Consequently, while there may be a general rule in many states that, as a factual matter under typical circumstances, an alleged robber cannot avail himself of self-defense, those states do not preclude self-defense as a defense to

robbery as a matter of law under all circumstances; instead, they recognize that the defense is still available in appropriate, often unique, factual circumstances. *See also Toomey v. State*, 581 P.2d 1124 (Alaska 1978) (defendant entitled to assert self-defense to robbery where he took car by force from his assailants in order to escape the situation).

The taking of services can give rise to unique factual situations, such as here, where the alleged taking is a failure to pay for the services resulting solely from a defendant's perceived need to act in self-defense. In those circumstances, the defendant is not the initial aggressor and the use of force *in self-defense* actually *precedes* (or is concurrent with) the alleged taking. In such circumstances, self-defense should be available. *See e.g. Villanueva, supra*.

The prosecution's position in this case would permit anyone rendering a service to physically attack their customer for any reason and, if the attack occurred prior to payment for the service, the customer could not use physical force to defend themselves and escape the assault without committing a robbery. This seems an absurd result.

The Attorney General posits a number of scenarios that do not involve any facts sufficient to raise self-defense and then extrapolates from his specific *factual* examples that particular *offenses* should not have self-defense available as a matter

of law. His conclusions are incorrect, and appear to conflate a factual question with a legal one. His examples may illustrate that self-defense is factually unavailable for those offenses in those particular situations; however, that does not mean there may not be other factual circumstances, even if exceedingly rare, in which self-defense could arise. Some offenses are such that, by their nature, they will rarely, if ever, be committed as part of a justified use of force in self-defense and, therefore, self-defense will rarely or never be a defense in those cases because the basic foundational requirements of section 18-1-704(1) will not be met. However, that should not mean that self-defense can never be available, as a matter of law, for that particular offense if some truly unique factual scenario arises in which the self-defense statute could be satisfied.

Factual rarity should not mandate legal unavailability for a particular offense. This case is a perfect example. The overwhelming majority of robbery offenses will not have any legitimate factual claim to self-defense, given the nature of robbery. However, that should not preclude defendants from being able to properly assert the defense in those appropriate rare cases, such as disarming their attacker or unique factual circumstances such as are involved here.

The prosecution fails to provide persuasive legal reasons why *Beebe* should be followed or why robbery offenses should be treated differently in relation to

self-defense than any other general intent crime involving the use of force against persons. Robbery offenses simply should not be treated any differently. When the evidence appropriately raises the issue of self-defense in relation to a robbery offense, as it did here, then a defendant should receive that defense as an affirmative defense and the jury should be instructed accordingly.

(4) The Court of Appeals correctly determined that Mr. DeGreat was entitled to self-defense as an affirmative defense under the facts of this case.

The Court of Appeals engaged in a straightforward application of the law to the facts in this case and determined that the jury should have been instructed on self-defense as an affirmative defense under the circumstances of this case. *See DeGreat, supra*. The Court of Appeals in this case correctly applied existing Colorado law regarding self-defense to the facts of this case. *Id.*[12] Where a forcible

[12] The Attorney General complains that the Court of Appeals "found the nature of the criminal acts irrelevant." *See* Opening Brief, p.2. That is incorrect. The Court of Appeals analyzed the facts, noted that the trial court instructed on self-defense regarding other offenses, and concluded that self-defense was appropriate under the facts here because the "robbery was intertwined with the assault" and that Degreat's failure to pay was "entangled" with his acts in self-defense. *See DeGreat* at ¶ 15. In addition, the Attorney General claims that the Court of Appeals held that "statutory self-defense could justify a 'crime against property' like DeGreat's taking of taxi services." *See* Opening Brief, p. 5. This is also incorrect. The Court of Appeals merely noted that the division in *Taylor* did not accept the prosecution's argument in *Taylor* that the crime involved there was against property, not persons. *See DeGreat, supra* at ¶ 14. Indeed, as discussed *supra* at n.

taking results from an individual's reasonable self-defense response to an assailant, then the affirmative defense of self-defense should be available. The holding in *Beebe* would require individuals to forego their lawful right to self-defense to protect themselves from harm for fear of being prosecuted for a "robbery" that is merely incidental to the act of self-defense.

Mr. DeGreat testified that he intended to pay the cab fare. If he had not been forced to physically defend himself from Mr. Feier, there would have been no "taking" in this case and thus no robbery.[13] Under such circumstances, the holding in *Beebe* forced Mr. DeGreat to choose between acting in self-defense for his protection and being charged with a robbery. As a division of the Court of Appeals noted:

> To hold that an individual cannot act in self-defense for fear of incurring a charge of criminal damaging or another related charge when the action behind the charge is so intertwined with the attack necessitating self-defense would be to produce an inane legal paradox; it would be illogical, for example, to hold that an individual may be innocent of assault or an even more significant charge due to self-defense, but nonetheless guilty of criminal damaging because property

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6, this Court has construed robbery as primarily a crime against persons, not property.

[13] Significantly, the jury acquitted Mr. DeGreat of theft. Since there was no dispute that the cab fare was never paid, the only apparent legal basis for the jury's acquittal of the theft charge would have been a conclusion that Mr. DeGreat *did not intend* to permanently deprive Mr. Feier of the property.

> was necessarily damaged in the course of doing that which the law allows.

Taylor, 230 P.3d at 1231, quoting *State v. Henley,* 740 N.E.2d 1113, 1116 (Ohio App. 2000); *see also Toler, supra* (holding that trespassers do not forfeit their right to self-defense merely by the act of trespassing.).

Mr. DeGreat was acquitted of attempted second-degree murder and the assault counts to which self-defense applied as an affirmative defense. *See e.g. Taylor, supra* at 1231 ("The acquittal verdicts on all charges where the self-defense instruction had been given strongly suggest that the jury concluded the prosecution had failed to prove defendant did not act in self-defense."). Yet, the same use of force that apparently resulted in his acquittal of those offenses on self-defense grounds resulted in his conviction for aggravated robbery. That is the very inane legal result the courts in *Henley* and *Taylor* were seeking to avoid.

Lastly, as discussed above, since the time *Beebe* was decided, the General Assembly has added subsection (4) to the self-defense statute. In addition to the affirmative defense instruction, the trial court here presented the jury with an instruction under subsection (4) for certain offenses, but neither instruction applied to aggravated robbery. It is Mr. DeGreat's position that the jury in his case should have been instructed that self-defense constituted an affirmative defense to aggravated robbery; but, at the very least, the jury should have been instructed that

it could consider the evidence of self-defense in assessing culpability for aggravated robbery. *See also, e.g. People v. Roberts*, 983 P.2d 11 (Colo. App.1998); *Idrogo*, *supra*; *Martin v. Ohio*, *supra*. However, the instructions in this case specified certain offenses to which self-defense applied as an affirmative defense, and certain other types of offenses in which it was not an affirmative defense but in which it could still be considered. Aggravated robbery did not fall within either category under the instructions and, thus, the jury was provided no vehicle for consideration of self-defense in relation to the charge of aggravated robbery. Consequently, the jury was effectively precluded from considering the relevant self-defense evidence in relation to the charge of aggravated robbery, in violation of due process of law and Mr. DeGreat's right to present a defense. *E.g.*, *Martin v. Ohio*, *supra*; U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 16, 18, 25.

Mr. DeGreat believes that section 18-1-704 (4) should be construed to mean self-defense is not available as an affirmative defense only for offenses involving recklessness, criminal negligence, and extreme indifference. *See e.g. Pickering, supra*. However, if this Court concludes that this is a "case in which the defendant is not entitled to a jury instruction on self-defense as an affirmative defense…" under section 18-1-704 (4), then, at the very least, Mr. DeGreat should have

received an instruction that the jury could consider the evidence of self-defense in assessing the elements of the offense.

The law of self-defense recognizes that a person may employ physical force and other reasonable acts to defend himself and others. *See* C.R.S. §18-1-704. Mr. DeGreat, like any other person, was justified in defending himself against an unprovoked violent attack from Mr. Feier. Viewing the self-defense evidence in the light most favorable to Mr. DeGreat, *see Idrogo*, *supra*; *Cassels*, 92 P.3d at 958. *Mata-Medina*, 71 P.3d at 979, the trial court should have instructed the jury that self-defense constituted an affirmative defense under the circumstances here. At the very least, the trial court should have informed the jury that it could properly consider the evidence of self-defense in assessing Mr. DeGreat's culpability for the offense. It is constitutionally imperative that the jury be permitted to consider and decide whether an accused should be guilty of aggravated robbery where, as here, the alleged "taking" results from acting in self-defense and is "intertwined with the attack necessitating self-defense." *See Idrogo, supra*; *Roberts, supra*; U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 23, 25; C.R.S. §§ 18-1-407; 18-1-704; 18-1-710.

CONCLUSION

For the foregoing reasons, the Court of Appeals should be affirmed.

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CERTIFICATE OF SERVICE

I certify that, on July 28, 2017, a copy of this Answer Brief was electronically served through Colorado Court E-Filing on Kevin E. McReynolds of the Attorney General's Office.