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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 REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

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/s/Kevin E. McReynolds

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INTRODUCTION

Despite acknowledging this issue presents a question of statutory interpretation (AB pp. 9-10) and the General Assembly's primacy in defining the legal components of criminal liability (*id.* p. 27), DeGreat pointedly ignores the plain text of section 18-1-704(1) and the People's primary legal argument for reversal – that the self-defense statute, unlike other affirmative defense statutes, does not justify any type of criminal act; but only the use of physical force. (OB pp. 10-14.)

Instead of addressing this fundamental distinction, DeGreat asks this Court to override the legislature and rewrite section 18-1-704(1) to instead justify both the use of "physical force *and other reasonable acts*." (AB p. 47) (emphasis added).

This Court should not legislate and should instead credit the General Assembly's decision to limit self-defense to the justified use of physical force. And this distinction, in turn, resolves the current case because robbery requires more than just the use of physical force; it also requires the knowing taking of anything of value from another.

Moreover, even in the rare situations where an act of taking is, in and of itself, a particularized form of using physical force in self-defense (*e.g.* disarmament), DeGreat's testimony belies any such justification here. Thus, the trial court properly refused to extend the incompatible self-defense statute to justify DeGreat's robbery of taxi services.

ARGUMENT

A. By its plain terms, section 18-1-704(1) only justifies crimes of physical force alone.

The power to define criminal liability is vested in the General Assembly. (*See* AB p. 27). Accordingly, courts look first to the plain and ordinary meaning of the statutory language to determine the legislature's intent and the words and phrases in a statute must be read in context and construed according to their common usage. *See, e.g., Whitaker v. People*, 48 P.3d 555, 558 (Colo. 2002); §2-4-101, C.R.S. (2017). Where the statutory language is clear and unambiguous, courts apply the provision as written and do not apply rules of statutory construction. *See, e.g., Specialty Restaurant Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010).

In interpreting statutes, this Court must consider the language of the applicable provisions as a whole to accord a consistent, harmonious and sensible effect. *See A.S. v. People*, 2013 CO 63, ¶10; *Whitaker*, 48 P.3d at 558 ("We must read the statute as a whole, construing each provision consistently and in harmony with the overall statutory design, if possible"). Courts "do not presume the legislature uses language idly, with no intent meaning should be given to it" and interpret a comprehensive legislative scheme in a manner that reconciles potential conflicts between statutes. *See A.S.*, 2013 CO 63, ¶12; *People v. Perry*, 252 P.3d 45, 48 (Colo. App. 2010).

The question before this Court begins and largely ends with the language of the self-defense affirmative defense statute, which provides:

> (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, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

§18-1-704(1), C.R.S. (2017) (emphasis added). By its terms, this affirmative defense does not create a global justification for any type of conduct as it only excuses one's use of physical force. *See id.*

That the General Assembly did not use this language idly is illustrated by the substantially broader justifications it provided through the other statutory affirmative defenses in Part 7 including, for example, the choice-of-evils defense:

> (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. (2017); *see also* §18-1-708, C.R.S. (2017) (duress); §18-1-709, C.R.S. (2017) (entrapment); (OB pp. 11-13).

Thus, as a single part of the comprehensive scheme of statutory affirmative defenses, self-defense provides a justification for a narrower range of conduct. And contrary to DeGreat's apparent belief, the People are not claiming the limits of section 18-1-704(1) are offense-specific to exclude robbery (*see* AB p. 8), but rather the People contend the plain

language of this statute is *conduct-specific* as to what it justifies (*i.e.* the use of physical force on another person).

Recently a division of the court of appeals came to this same conclusion. *See People v. Tardif*, 2017 COA 136, ¶¶29-38. There, the trial court refused to instruct the jury on self-defense as to a charge of conspiracy to commit first degree assault. *Id.* ¶28. The court of appeals affirmed because, by its plain terms, self-defense "can be an affirmative defense only to crimes of physical force [and c]riminal conspiracy is not one of these crimes." *Id.* ¶37; *see also, e.g., McGee v. State*, 95 P.3d 945, 946-47 (Alaska App. 2004) (concluding that self-defense was not a potential defense to a criminal mischief charge, but that necessity was); *People v. Brant*, 916 N.E. 144, 150-55 (Ill. App. 2009) (holding the statutory affirmative defense of defense of a person does not apply to the offense of criminal trespass, but noted "the defense of necessity, broad in language and scope, may be applied to the offense of criminal trespass to a residence in appropriate factual situations").

This reasoning applies with equal force to robbery because this crime requires two different acts – the use or threatened use of force

and the knowing taking of anything of value from the person of another – and self-defense could only justify the force element. *See, e.g., People v. Beebe*, 38 Colo. App. 80, 81, 557 P.2d 840, 841 (1976) (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); COJI-Crim. 4-3:01 (2016) (robbery).[1]

Accordingly, this Court should defer to the General Assembly's conscious distinction between self-defense and other statutory affirmative defenses to conclude that section 18-1-704(1) can only justify crimes where the conduct is fully defined by one's use of physical force.

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[1] DeGreat suggests a contradiction in the reasoning of *Beebe* which suggested the force and taking elements were "inseparable" while the People's argument is that the facts in this case demonstrate a distinction between them. (AB pp. 29-30.) DeGreat is mistaken.

Instead, *Beebe* merely recognized that both elements are required to prove robbery and self-defense could, at best, justify only part of this crime; making this affirmative defense inapplicable. *Beebe*, 557 P.2d at 841; *cf. Tardif*, 2017 COA 136, ¶¶37-38.

B. The Court should reject DeGreat's efforts to rewrite section 18-1-704(1) based on his misguided focus on *mens rea* and unrelated limitations within the self-defense statute.

As noted, DeGreat's protracted Answer Brief never once engages in any analysis of the fundamental distinction between the limited conduct justified by the use of physical force upon another in self-defense, and the broader full justifications of any type of criminal act in the choice-of-evils, duress, and entrapment statutes.

Nevertheless, DeGreat maintains that self-defense can justify any general intent crime because: (1) Colorado cases have distinguished crimes by their *mens rea* when evaluating the factual question of whether self-defense applies; and (2) the statutory limitations in the other subparts of section 18-1-704 exhaustively and exclusively limit its application as an affirmative defense. (*See* AB pp. 14-22, 27-29, 46-47.)

But neither of these propositions supports DeGreat's ultimate contention that the language of section 18-1-704(1) must be expansively rewritten to justify both a person's use of physical force "and other reasonable acts." (*See id.* p. 47.)

First, Defendant's focus on the historic distinction between crimes that could be justified by self-defense (*e.g.* general intent crimes) and those where this concept applied only as an element-negating traverse (*e.g.* crimes of recklessness or negligence) is irrelevant. The People recognize that this distinction exists and that robbery is a general intent crime which, as far as its *mens rea* elements, falls within the historic scope of the affirmative defense provision.

But the *mens rea* attributes of robbery are not at issue. Instead, the relevant question here is whether the limited conduct that can be legally justified under the self-defense statute applied to all of DeGreat's alleged criminal acts. This is why DeGreat's primary assumption – that section 18-1-704(1) applies to any and all general intent crimes – is a false premise. Every one of the Colorado cases DeGreat relies upon for this proposition involved "crimes of physical force." (*See* AB pp. 14-22 (*citing, e.g., Riley v. People*, 266 P.3d 1089 (Colo. 2011), *People v. Pickering,* 276 P.3d 553 (Colo. 2011), *People v. Toler*, 9 P.3d 341 (Colo. 2000))). Thus, legally, section 18-1-704(1) potentially applied to the crimes in those cases and those courts

properly focused on the factual question of whether the evidence established each of the requirements for this conduct to be justified by self-defense. *See, e.g., Riley*, 266 P.3d at 1092 (attempted murder, assault); *Pickering*, 276 P.3d at 556-57 (second degree murder); *Toler*, 9 P.3d at 343-44 (second degree murder). By contrast, legally, section 18-1-704(1) does not address all of the criminal conduct that must be proven in a robbery charge, and therefore, DeGreat's cited authorities provide no help in answering the question before this Court. *See also Roberts v. People*, 399 P.3d 702, 706 (Colo. 2017) (rejecting another defendant's attempt to interpret *Pickering* as providing a bright-line rule that self-defense applied to all specific intent crimes because *Pickering* did not consider the range of charges to which this affirmative defense applied).

Moreover, to the extent DeGreat's argument could be read to suggest self-defense applies whenever it could justify part of an otherwise criminal act, such an interpretation is contrary to the very concept of affirmative defenses. *See Pickering*, 276 P.3d at 555; *Tardif*, 2017 COA 136, ¶36. Affirmative defenses are not partial responses to

charges that negate some element of a crime, but instead "*admit[] the defendant's commission of the elements of the charged act*, but seek[] to justify, excuse, or mitigate the commission of the act." *Roberts*, 399 P.3d at 705 (citing *Pickering*, 276 P.3d at 555) (emphasis added); *People v. Huckleberry*, 768 P.2d 1235, 1239 (Colo. 1989) ("[T]he essence of an affirmative defense is the admission of the conduct giving rise to the charged offense"); *Tardif*, 2017 CO 136, ¶36 ("[w]hen asserting an affirmative defense, the defendant admits committing *all the elements of the charged offense* but asserts that an affirmative defense justified the otherwise criminal conduct") (emphasis added).

Because the self-defense statute justifies only the "use of physical force on another" it cannot, by its own terms, serve as an "affirmative defense" to robbery as it does not justify or even address all the conduct involved in the elements of this crime.

Second, nothing in the language of section 18-1-704 supports DeGreat's apparent claim that the provisions of this statute must be read as the only limits on its application – thereby implicitly suggesting that section 18-1-704(1) can justify both the use of physical force "and

other reasonable acts." (*See* AB pp. 15-16, 18-21, 46-47.) More specifically, DeGreat suggests the specific legislative limitations on self-defense (*e.g.* initial aggressor) and the General Assembly's adoption of self-defense as an element-negating traverse for other crimes (*e.g.* offenses with a *mens rea* of recklessness), must be read as the *only* limitations on 18-1-704(1). (*See id.* p. 22.) Based on this reasoning, DeGreat eventually concludes 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 negligent, and extreme indifference" – regardless of the criminal conduct at issue. (*See id.* p. 46) (emphasis added).

Critically, however, this is merely another variation of Defendant's singular focus on the parts of section 18-1-704 that discuss *mens rea* without regard to the limited conduct the legislature justified under the self-defense statute. The People agree that this affirmative defense is explicitly limited by the statutory conditions in subsections (2) and (3), and expressly inapplicable to crimes with lesser *mens rea* requirements, where the element-negating traverse applies. *See* §18-1-

704.[2] Nevertheless, that General Assembly placed additional restrictions on the affirmative defense in section 18-1-704(1) does not in any way alter the narrow range of conduct that statute clearly and unambiguously addresses: the use "of physical force on another person." §18-1-704(1).

Thus, while 18-1-704(4) is clear that no form of self-defense can justify strict-liability offenses, its availability as to any other offense depends on whether one's use of physical force on another can justify the entire crime charged. As explained in the Opening Brief and again in the next section, the inherent limits of section 18-1-704(1) show that it cannot justify an act of robbery for the alleged taking of anything other than a weapon, including DeGreat's taking of taxi services.

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[2] DeGreat alternatively argues that, if not justifiable as an affirmative defense, this Court should "at the very least" allow DeGreat to claim the element-negating traverse form of self-defense in section 18-1-704(4). (*See* AB 46-47.) The Court should reject this claim because: (1) it is contrary to the plain language of section 18-1-704(4); (2) it is beyond the scope of the question on certiorari; and (3) DeGreat never requested any such instruction and cannot show the trial court plainly erred in not spontaneously adopting this "interpretation" of the self-defense statute.

C. Statutory self-defense could not justify all of DeGreat's conduct.

Based on the plain text of section 18-1-704(1), self-defense does not generally apply to robbery charges because it is not a pure crime of physical force. *See, 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 . . .").[3] As the People noted in the Opening Brief, this is not an absolute rule because, where the taking and use of physical force constitute a unitary act motivated by a need to protect oneself, that act can be justified by self-defense. (*See* OB pp. 8, 19-21); *accord, e.g., State v. Campbell*, 214

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[3] DeGreat ignores the primary reasoning of *Badena* and attempts to reinterpret its alternative harmless analysis as supporting his right to a self-defense instruction. (*See* AB p. 38.) It does not.

Badena found the defendant's claimed right to such a self-defense instruction "fails in the first instance" because of its legal incompatibility with the robbery charge ("the lawfulness of the force used to accomplish the theft is immaterial"). *Id.* at *4. *Badena* additionally found that, even if this defense could apply, the defendant suffered no possible prejudice because the general language in the instructions had not explicitly barred the jury from considering self-defense as to the robbery and his self-defense claims were not supported by the evidence. *Id.* at **5-6.

N.W.2d 195, 197-98 (Iowa 1974) (recognizing self-defense justified the physical taking of a weapon, though this justification could not extend to the defendant's subsequent acts of assault on his formerly-armed adversary). In other words, if a defendant's only conduct is the use of physical force to wrest a weapon from an attacker, all of that conduct could be justified under Colorado's self-defense statute.

Here, however, DeGreat's conduct did not involve any such unitary act of physical force, but separable acts of force and taking, and therefore, his commission of all the elements of robbery cannot be justified by section 18-1-704(1).

According to DeGreat, his dispute with the driver began when they arrived at his apartment complex and he did not have enough money to pay the fare. (TR 7/1/10 pp. 1088-90.) DeGreat claimed the driver locked him in the cab and said he had called the police, prompting DeGreat to climb into the backseat behind the driver to try

to get out that door. (*See id.* pp. 1090-91.)[4] This caused the driver to get out of the cab and then he unlocked the back door to let DeGreat out. (*See id.* pp. 1091-94.)

DeGreat said the cabbie demanded that he stay by the cab to wait for the police. (*See id.* p. 1096.) Rather than wait and let the police sort this out, DeGreat instead began to walk away, supposedly to go to get the money he owed. (*See id.* pp. 1096; 7/2/10 pp. 1203-04.) This act of leaving without paying effectively completed his knowing "taking," albeit without DeGreat having used any force at that point. (*See* TR 7/1/10 p. 1128 (DeGreat admitting that not paying at the end of a cab ride is "ripping them off")); *see also People v. Delgado*, 2016 COA 174, ¶¶2-11 (discussing a single "taking" that was the basis for both robbery and theft from a person charges, and that these statutes differ as to

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[4] The evidence at trial showed the driver had no way to lock DeGreat in the front seat as he claimed. (*See* TR 6/29/10 pp. 524-25; 7/6/10 p. 1378; PR. Env. 1 Exhibit 18 (showing lock post in place to allow manual unlocking of the front passenger door)).

whether this taking is accomplished "by the use of force" or by means "other than the use of force").[5]

The much larger DeGreat claimed the 145 pound driver pushed him to the ground to keep him from leaving and the two became involved in a fist fight. (*See* TR 7/1/10 pp. 1096-98; 6/29/10 p. 529; 7/2/10 p. 1194.)[6] DeGreat claimed the cabbie began cutting him with something that "gleamed," leading DeGreat to pull his knife and stab the driver, who then fled the scene. (*See* TR 7/1/10 pp. 1099-1100; *but see* 6/30/10 p. 856-71; 7/1/10 p. 1006.)

Under these circumstances, DeGreat's conduct was not limited to the use of physical force upon another person, but additionally involved

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[5] DeGreat claimed he intended to return to pay for the taxi services. (*See* TR 7/1/10 pp. 1096-97.) This is irrelevant as to whether his conduct involved a "taking," but is instead probative only of whether he had the intent to permanently deprive required by the theft statute. That intent requirement is not an element of robbery.

[6] Like the trespasser in *Toler*, DeGreat was not in the same position as an innocent person because the driver had a right to use force against him to prevent DeGreat's apparent act of theft. *See Toler*, 9 P.3d at 353-54; §18-1-707(7), C.R.S. (2017) (private right to use force to effectuate citizen's arrest or to prevent the escape of one who committed an offense in citizen's presence).

his knowing taking of services from the victim – an act that is not, in and of itself, motivated by his need to defend himself. This is precisely why courts have found self-defense inapplicable in similar cases involving the taking of anything of value *other* than a weapon. *See People v. Graves*, 479 N.E.2d 10, 11-12 (Ill. App. 1985) (holding self-defense could not justify the robbery of cash and jewelry and refusing to extend the reasoning from disarmament cases because "there was no evidence that [] the taking of [the victim's] property . . . was the product of defendant's fear for his own safety"); *see also Booker v. State*, 278 S.E.2d 745 (Ga. App. 1981) (refusing to extend statutory self-defense as a justification for the robbery of cash, even if it could be applied to the defendant's relating taking of a pistol from a nearby countertop).[7]

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[7] DeGreat attempts to distinguish *Graves* by selectively citing an isolated part of its reasoning. (AB pp. 34-35) (claiming *Graves* is irrelevant because it applied an Illinois statute that precluded self-defense claims for forcible felonies). The People admitted as much in the Opening Brief, while noting that *Graves* further concluded that this defense did not apply because of the fundamental conflict between the *conduct* involved in the robbery and the defendant's supposed need to act in self-defense. (*See* OB pp. 22-23.)

And it is no answer to suggest DeGreat's varying and sometimes self-contradictory testimony made these elements too muddled because, under any reading of his testimony DeGreat's conduct was not limited to his use of physical force upon another person and those additional acts were *not* motivated by his need to defend himself against imminent harm. *See Booker*, 278 S.E.2d at 747; *Graves*, 479 N.E.2d at 11-12.

Rather than suggesting his taking of taxi services was justified by his need to protect himself, DeGreat's testimony instead shows he believed he never committed any taking at all. To explicate this point, it is important to recognize that virtually every robbery hypothetical in this context will ultimately fall within one of three possible scenarios:

1. The taking of a weapon by using physical force upon another, where the act of taking itself is justified and indistinguishable from the physical act of self-defense;
2. The taking of anything else, which occurs where the defendant uses force and then flees the scene, where the taking is justified by the choice-of-evils defense; or

3. The defendant's use of force causes the other person to flee, where defendant effectively claims he committed no taking by force at all (*i.e.* DeGreat's version of events).

Unlike the taking of a weapon, a taking accomplished when the defendant uses force to escape cannot be justified under the plain terms of section 18-1-704(1) because that conduct is not limited to an act of using "physical force upon another." It would, however, be potentially justifiable under the choice-of-evils defense as being otherwise criminal conduct that is reasonably necessary to avoid an imminent injury. *See* §18-1-702(1); *see also* 2 Wayne R. LaFave, Substantive Criminal Law, §10.4(a), n. 2 (2d ed. 2003) (updated October 2017) (discussing an example in which B, fleeing from A's attack, steals C's car: "It is doubtless true that B is justified in taking C's car, so he is not guilty of larceny thereof, but his defense is necessity rather than self-defense").[8]

[8] Choice-of-evils would also apply to disarmament scenarios other than where one physically grabs a weapon from the person of an attacker. For example, if a gun was dropped during a fight, one could justifiably "take" it out of a need to avoid imminent injury, though that act would not itself qualify as the "use of physical force on another person" as would be required to be justified by statutory self-defense.

Indeed, the existence of the broader statutory choice-of-evils defense is precisely why this Court should ignore DeGreat's hyperbolic claims of the supposed need to rewrite the self-defense statute to apply to any robbery where it is claimed. (*See* AB p. 41 (suggesting the People's position would allow service providers to attack customers with impunity because "the customer could not use physical force to defend themselves *and escape the assault without committing a robbery*")) (emphasis added). Thus, because the General Assembly already addressed such issues through the choice-of-evils defense, this line of argument lacks merit and does not require this Court to amend the text of section 18-1-704(1) according to DeGreat's design.

Ultimately, neither of these affirmative defenses applied in this case because the trial court properly refused to extend self-defense to justify conduct beyond the use of physical force on another person and DeGreat never even suggested his alleged taking could be justified by the choice-of-evils. Rather than suggesting justification, DeGreat denied having knowingly taken the taxi services and insisted he would have paid the fare if the driver had not fled the scene after the two men

fought. Because the driver fled, DeGreat claimed he did nothing and never committed the *actus reus* of robbery or theft. Thus, no account of events suggests that DeGreat was justified in stealing the taxi services, but rather, raised an issue as to whether DeGreat took them at all. Accordingly, no evidence supported justifying this alleged criminal act out of a need to defend against imminent physical force.

Given this record, the robbery charge before the jury did not turn on whether DeGreat used force against the driver, but whether he did so to effectuate his knowing taking of taxi services. (*See* Vol. p. 200 (instruction requiring proof that DeGreat "knowingly took anything of value, from the person or presence of another, *by means of force,* threats, or intimidation") (emphasis added). The jury had all the instructions needed to resolve this question and did so, by finding DeGreat guilty beyond a reasonable doubt.[9]

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[9] In arguing prejudice, DeGreat makes much of the fact that the jury acquitted on the attempted murder and first degree assault charges for which he received affirmative defense instructions. (*See* AB p. 45). In context, however, these verdicts do not suggest the jurors credited his self-defense story as their verdicts also showed: (1) they did not believe

Accordingly, this Court should reverse because: (1) statutory self-defense did not apply to the entirety of DeGreat's conduct, and therefore this affirmative defense could not justify his taking of taxi services; and (2) any mistake in failing to give this unprecedented instruction was harmless because the jury considered and rejected DeGreat's claims that he did not take the taxi services at issue.

CONCLUSION

For these reasons, this Court should reverse.

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DeGreat inflicted serious bodily injury (undermining the murder/first degree assault charges); and (2) they rejected self-defense as an element negating traverse as to second degree assault – reckless. (*See* Vol. pp. 221-24.) Thus, the jurors merely concluded that the minor injuries DeGreat inflicted on the driver did not suggest he had any intent to kill or maim, not that his actions were reasonable or justified.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S REPLY BRIEF** upon **JASON MIDDLETON** and all parties herein via Colorado Courts E-filing System (CCES) on November 15, 2017.

/s/ Tiffiny Kallina