IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

JOHN DOBBS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

DCA Case No. 5D07-1057

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

**REPLY BRIEF OF APPELLANT**

He calls me
over a month ago.
at ACI yet still
Claims that I am
at Santa Rosa

Criterior

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SEVENTH JUDICIAL CIRCUIT

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## ARGUMENT

## POINT I

### THE TRIAL COURT ERRED IN DENYING DOBBS' RENEWED MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO REBUT DOBB'S SELF-DEFENSE CLAIM BEYOND A REASONABLE DOUBT.

Appellee acknowledges even with a duty to retreat required by the previous (Meaning State) self-defense law[1], District Courts reversed the jury's guilty verdict in seven cases and substituted a finding of self-defense. (AB 5) Although appellate courts do not readily hand out such substitutions without an excellent reason, the sudden, perilous, escalation of force by multiple assailants, as aggressors against Dobbs, (within) case also necessitates such a finding. also necessitates a reversal. Either established through trial facts or not required by Florida law were; (1) aggression by the victim(s), (2) evidence that the defendant could not retreat, and (3) evidence that the defendant took some effort to ward off the attack or end it without violence. (AB 5-6) Fransicisco Gotay (Gotay), William Troy (Troy) and Anthony Riollano's (Riollano) aggression when they confronted Dobbs is an excessive use of force and unlawful response against Dobbs.

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[1] The self-defense statute prior to the October 1, 2005, enactment of Section 776.013, Florida Statutes (2005)

All charges stem from the initial altercation between Dobbs and Andre Blanco. The initial contact was followed by the use of immediate force against Dobbs by Gotay, Blanco, Troy and Riollano. To rebut Dobb's self-defense claim in each count, Appellee relies on testimony that Dobbs drove through the parking lot, parked near Blanco's car before the fight, and Blanco's belief Dobbs must have initially stabbed him in the face. (AB 6) Whether Dobbs moved his vehicle forty feet from Blanco or not before the fight[2], the physical blood evidence on the Acura and testimony of all state witnesses, except John Blanco, indicate Blanco walked to Dobbs' Acura. Neither Justin Idle or Phillip Westfall saw Dobbs move his vehicle, supporting Dobbs self-defense claim. (T 268, 301, Vol. III) Despite inconsistencies by State witnesses whether Dobbs moved his vehicle before the encounter, Dobbs' Acura was five or six parking spots and one row away from Blanco's car. (T 301, 340, Vol. III) Blanco claimed Dobbs lunged at him with a knife by the Chrysler, but Gotay, Idle and testified Blanco walked toward Dobbs's vehicle. Blanco's movements away from the Club and toward Dobbs is an aggressive movement that cannot be reasonably viewed as a friendly mission.[3] (T

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[2] Justin Idle was nearby when Appellant was at his vehicle and yelled at by Blanco and friends. (T 252-253, 268-269, Vol. III)

[3] Given Blanco's testimony, appellant relies on his trial testimony, but asserts self-defensive force is always preemptive. That is, we employ self-defen-

168, Vol. I; T 203-204, Vol. II; T 254-255, 288, Vol. III; SR; State Exhibit 11)

While Blanco and Dobbs disputed who approached and who hit first, it was not disputed Dobbs knocked Blanco down without further aggression between the two until Blanco returned and began to punch Dobbs. (T 162, 182, Vol. I) A fair reading of Blanco's complete testimony and surrounding facts lead to a reasonable interpretation that Dobbs initially punched, not stabbed, Blanco in the face. Blanco first thought that he was punched; supporting evidence that Westfall observed no blood after Dobbs struck both Blanco and attacked Gotay; Blanco's return to fight Dobbs; Idle observed a group surrounding Dobbs; nobody "realized" they were stabbed until the end and photographs of Dobbs bloody, scraped knuckles. (T 161, 182, Vol. I; SR, Defense Exhibit 9) This evidence, when viewed in a light most favorable to the State, is not competent, substantial evi-

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sive force before the attack we fear has fully materialized. A draws his pistol and points it threateningly at B. B draws his own pistol and fires at A. B's act is one of paradigmatic self-defense. Had A actually fired all of his bullets before B could draw, B's subsequent use of force would not be self-defensive but retaliatory. Self-defense, therefore, is a preemptive action. It is analogous to civil commitment of the dangerous, gun control, "no contact" orders, preemptive military strikes and other practices in which the future dangerousness of others, not their past transgressions, is taken to justify depriving them of life, liberty, or property. Because no one can ever be absolutely certain what will happen if he does not employ preemptive defensive force, he must act on an assessment of probabilities. The "victims" in this case are not "innocent aggressors", such as infants or the insane with a deadly weapon.

dence to rebut Dobbs' claim he initially punched Blanco with a fist.

Gotay did not see the first punch when he approached and punched Dobbs. (T 203, Vol. II; T 291, Vol. III) Gotay's actions were not peacekeeping efforts to separate Blanco from Dobbs, but an aggressive, unprovoked and unsuccessful attack against Dobbs. Similarly, the only testimony of Troy's involvement was that the group, including Troy, surrounded and took turns striking Dobbs. (T 260-261, 270, 276-277, Vol. III)

The second common factor among the seven cases is that defendant could not retreat. Florida self-defense does not impose a duty to retreat when not engaged in unlawful activity and attacked in a place you have the right to be. Dobbs lacked a realistic opportunity to retreat or decline to participate due to the sudden, quick, repetitive strikes from Gotay, Troy, Riollano and Blanco's return to the fight. In addition, any possible retreat was hindered by Riollano's grip on the back of Dobbs shirt and striking Dobbs on the head. Once released, by Riollano, Dobbs retreated to his vehicle and left.

Although characterized by prosecution as 'one on one' fights, Dobbs was clearly surrounded by four males simultaneously and the "fights" occurred in immediate succession. Appellee argues Dobbs stabbed each victim as they approached in an attempt to "help" the previous victim. (AB 6) None of the four

men, or witnesses, claim they were attacked when they assessed their friend's well being or while attempting to remove their friends from the fight. All admit to attacking Dobbs as Dobbs successfully defend himself against the preceding attackers. Any of these men could have declined to attack the defendant to avoid injury. None of these additional participants who entered the fight knew, or saw blood indicative of, Dobbs having or using a knife as they entered the fight.

Before being surrounded by the group, Dobbs used non-deadly force. By statute and case law, the only type of force that is deadly as a matter of law is discharging a firearm. *Mathis v. State*, 863 So. 2d 464 (Fla. 1st DCA 2004). A deadly weapon, such as a knife, can be used in self-defense without deadly force. *DeLuge v. State*, 710 So. 2d 83 (Fla. 5th DCA 1998) The collective actions by Blanco, Gotay, Troy and Riollano, while unarmed, were unnecessary and the use of unlawful deadly force against Dobbs. In determining whether an unarmed attack constitutes deadly force, consider such facts as "the respective sizes and sex of the assailant and the defendant, the presence of multiple assailants, and the especially violent nature of the unarmed attack. See *Lambert v. State*, 70 Md. App. 83, 93, 519 A. 2d 1340 (1987); *State v. Gaddy*, 81 S.E. 608 (1914) (death or great bodily harm is possible without the use of any weapons by the assailant where the defendant is attacked by more than one assailant). Dobbs was struck in

the head by Riollano and other unidentified assailants, after already receiving multiple cuts and wounds to his face and body, before he used a knife to retaliate. This tends to show that his fear and the threat of great bodily harm was reasonable. (SR, Defense Exhibits 2-9) The collective aggression of four males against Dobbs creates an imminent threat of great bodily harm or death, and under self-defense law, would permit Dobbs to resort to deadly force with no duty to retreat.

While Section 776.012, Florida Statutes (2006), permits one to exercise self-defense on behalf of another, the additional participant's collective actions against Dobbs were not lawful, but aggressive acts that created an uneven uphill battle field for Dobbs. In *K.W.S. v. State*, 924 So. 2d 80 (Fla. 5th DCA 2006), defendant was charged with battery when defendant intervened to defend his younger sister, engaged in a physical dispute with a larger female. Finding no battery, the court found the defendant took minimally intrusive steps in the fight to separate his sister. The actions of Blanco's friends, without seeing who started the fight, to assist and defend Blanco is not reasonable and constitute an illegal and excessive use of force, in response to Dobbs non-deadly force. Following the first strike, Blanco returned after Dobbs, trailed by Gotay, Troy and Riollano. The State failed to present competent, substantial evidence that Dobbs was the aggressor to rebut Dobbs justifiable use of deadly force against the additional perceived

threat of deadly force from Blanco, Gotay, Troy and Riollano.

In the alternative, Appellee's sole argument against reduction of the second degree murder conviction to manslaughter was a lack of preservation, tacitly conceding the merit of Appellant's argument on this point. Because there was insufficient evidence to establish ill will, hatred, spite or evil intent, this Honorable Court should substitute a manslaughter adjudication for second degree murder despite the lack of preservation. In *McDaniel v. State*, 620 So. 2d 1308 (Fla. 4th DCA 1993), the court cited prior opinions[4] to reduce the second degree murder conviction to manslaughter when the State failed to present a prima facie case of second degree murder. A conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law. *K.A.N. v. State*, 582 So. 2d 57, 59 (Fla. 1st DCA 1991) In *Atkins v. State*, 959 So. 2d 1267 (Fla. 5th DCA 2007), this Honorable Court found it to be fundamental error when it the State's evidence did not prove each of the essential elements of the charged violation, resisting an office without violence.

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[4] *Borders v. State*, 433 So. 2d 1325 (Fla. 3d DCA 1983), *Pierce v. State*, 376 So. 2d 417 (Fla. 3d DCA 1979), *cert denied*, 386 So. 2d 640 (Fla. 1980).

## POINT II

THE TRIAL COURT ERRED TO GIVE, OVER DEFENSE COUNSEL'S OBJECTION, THE INITIAL PROVOCATION JURY INSTRUCTION AND FUNDAMENTALLY ERRED TO MISSTATE THE LAW OF SELF-DEFENSE AND NEGATE APPELLANT'S ONLY DEFENSE.

In a similar issue, the Fourth District Court in *McWhorter v. State*, - - So. 2d - - , 32 Fla. L. Weekly D2921 (Fla. 4th DCA Dec. 12, 2007), recently compared the issued and outdated standard self-defense jury instruction for "necessity to avoid deadly force" against the right to "stand your ground", without retreat under existing self-defense law. Dobbs respectfully requests this Honorable Court to follow the same reasoning employed to remand for a new instruction in *McWhorter*. McWhorter appealed a battery conviction that occurred November, 19, 2005. Like the present facts, the testimony was disputed between the defendant and two state witnesses who started the fight. The trial court granted McWhorter's request for a self-defense instruction, based on testimony that he was attacked by the alleged victim Archibald and struck Archibald to retaliate in self-defense. Archibald and McWhorter's ex-girlfriend encountered McWhorter in a parking lot when the bars closed. Both testified McWhorter confronted them and punched Archibald multiple times.

The lower court in *McWhorter* refused to issue a "duty to retreat" instruction, but read, over defense counsel's objection, the following jury instruction, "the defendant cannot justify the use of force likely to cause great bodily harm **unless he used every reasonable means within his power consistent to his own safety to avoid the danger** before resorting to that source." (Emphasis added) Even though the instruction did not use the word "retreat," the concept was encompassed by the erroneous and misleading instruction the court utilized.

Like Dobbs, McWhorter argued an instruction that required he use every reasonable means within his power to avoid the danger, misstated current self-defense law and negated his only defense. The Fourth District Court agreed that the given language would lead the jury to believe that the appellant had to use "every reasonable means within his power to avoid the danger" before he could resort to the use of force likely to cause great bodily harm. With conflict between the instructions for no duty to retreat and an obligation to avoid the danger, the court found the instruction requiring use of reasonable means to avoid the danger misstated the current self-defense law set forth in Section 776.013(3), Florida Statutes (2005), reversed the conviction and remanded for a new trial. While the issued instruction was objected to in *McWhorter*, this identical misstatement of the

law is fundamental error and deprives Dobbs of his right to a fair trial with a jury properly instructed.

Appellee argues the initial aggressor instructions are appropriate, but does not consider Dobbs and Washington's testimony and the right to self-defense. The defendant is entitled to jury instructions on his theory of self-defense when there is any evidence tending to support it. *Spence v. State*, 678 So. 2d 459 (Fla. 4th DCA 1996).

The instructions given negate Dobbs' ability to claim or reassert his right of self-defense against multiple attackers. Appellee ignores the improper intermingling of "initial provocation" jury instructions in counts two, three and four. This permitted jurors to transfer the alleged initial aggression by Dobbs to be an initial aggressor in all other counts. The initial aggressor instructions for Gotay, Troy and Holiday deprives Appellant from asserting self-defense against these subsequent attackers. (AB 13) It was error to issue the aggressor instruction for an alleged act toward Blanco rather than the actual victim in that count. Like the modified initial aggressor instruction that resulted in a new trial in *Byrd v. State*, 858 So. 2d 343 (Fla. 1st DCA 2003), the improper use of a vague phrase "initially provoked" at the outset of the aggressor instruction in counts involving Gotay, Troy and Holiday improperly shifted jurors focus from Dobbs behavior in

his altercations with each individual victim to Dobbs behavior in the initial provocation. (R 330, 332, 334, 336, 338, 340, 343, 344, Vol. II)

In *Wilson v. State*, - - So. 2d - -, 2008 WL 373214 (Fla. 4th DCA February 13, 2008), Wilson claimed self-defense and victims claimed Wilson was the aggressor. The court reversed and remanded, based on improper initial aggressor instruction, Wilson's convictions for aggravated battery with a deadly weapon and misdemeanor battery. The District Court found including both victims in the initial aggressor instruction issued was fundamental error as it negated Wilson's only defense. The District Court instructed that on remand, the correct initial aggressor self-defense instruction should make it clear that self-defense could apply to each victim irrespective of the other. Under the same concept, this court should remand with these instructions.

The undisputed, aggressive acts by Gotay, Troy, Riollano, along with Blanco's re-approach to Dobbs is an unlawful retaliation and excessive force. It is lawful to defend oneself against unlawful or excessive force. *Jackson v. State*, 463 So. 2d 372 (Fla. 5th DCA 1985); Section 776.012 Florida Statutes (2006). Blanco and Westfall testified Dobbs struck the first blow and thus, became an aggressor, albeit at a non-deadly level. Dobbs initially responded to Blanco with fists, and jurors were instructed if Dobbs was not engaged in unlawful activity and

in a place he had the right to be, he has the right to stand his ground and respond, with appropriate force, in self-defense. However, jurors were also instructed that if the appellant were the aggressor with Blanco, he would not be entitled to claim self-defense against subsequent attack without using every reasonable means to avoid the danger. Appellant does not dispute this common law principle in an encounter involving two people with equal force. *King v. State*, 44 So. 2d 941 (Fla. 1907); *Cannon v. State*, 464 So. 2d 149 (Fla. 5th DCA 1985).

Regardless of who is the initial aggressor, the instruction does not allow Dobbs to exercise self-defense and protect himself from an increase in force by the sudden and perilous presence of multiple assailants. Under these facts, Dobbs contends the initial aggressor instruction poses two problems. First, the "initial aggressor" must exhaust every reasonable means to avoid the danger before he can reassert his right to self-defense. Using every means to escape is akin to a duty to retreat and such a requirement, when facing with multiple assailants posing an imminent threat of death or great bodily harm, no prior contact before they attacked, is fundamentally unfair. In addition, this requirement does not comply with the legislative intent. Section 776.013(3), Florida Statutes (2006), which states in the statutory pre-amble:

> "Whereas, no person or victim of crime should be re-

> quired to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack".

The collective use of deadly force from Gotay, Troy and Riollano, after initial contact in which Blanco was knocked to the pavement, is not justified when none of the three saw the punch. Regardless, they all confronted Dobbs in an aggressive manner because Blanco fell to the pavement. Their combined actions created an unlawful and excessive use of force against Dobbs, in response to Dobbs alleged use of non-deadly force.

They do not say that they did not see that punch they specifically state they did not see the first punch

Secondly, even if Dobbs were the initial aggressor at a nondeadly level, the attacks from Gotay, Troy and Riollano that followed escalated the fight to deadly force and Dobbs should still be entitled to invoke self-defense against the unlawful force by aggressors without a duty to retreat. As W. LaFave and A. Scott, Criminal Law (2d ed. 1986), points out at 459:

If I through the first punch that amounts to self defense and at the most Simple battery

> "It is generally said that one who is the aggressor in an encounter with another - i.e., one who brings about the difficulty with another - may not avail himself of the defense of self-defense. Ordinarily this is certainly a correct statement, since the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force.; and the force defended against must be unlawful force, for self-defense. Nevertheless, there are two situations in which an aggressor may justifiably defend himself. (1) A nondeadly aggressor (i.e., one who begins an encounter, using only his fists or some

> nondeadly weapon) who is met with deadly force in defense may justifiably defend himself against the deadly attack. This is so because the aggressor's victim, by using deadly force against nondeadly aggression, uses unlawful force."

*See Watkins v. State*, 555 So. 2d 1087 (1989). Contrary to Appellee's assertion that the facts support Dobbs was the initial aggressor, the defendant is entitled to jury instructions on his theory of self-defense when there is any evidence tending to support it. *Spence v. State*, 678 So. 2d 459 (Fla. 4th DCA 1996). (AB 14) Dobbs testified he was not the aggressor and responded with non-deadly force after Blanco struck him in the ear, then responded with non-deadly force in self-defense until faced with deadly force from multiple assailants, Gotay, Troy, and Holiday.

There is no standard jury instruction in Florida to explain the individual's right to defend himself against deadly force from multiple assailants by using deadly force, even if he was the initial aggressor. This court has the opportunity to provide lower courts with needed guidance on the proper method to address a self-defense claim when a defendant faces multiple assailants acting in an aggressive manner.

While other states have self-defense statutes which provide the right to stand your ground, Appellant submits the following cases from other states for this

Honorable Courts consideration as to aggressors and interveners. In *People v. Quach*, 116 Cal. App. 4th 294 (2004), the Fourth District California Court of Appeals wrote where the original aggressor is only guilty, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. However, if the victim uses such force, the aggressor's right of self-defense arises. The court stated a corollary to the general rule regarding mutual combatants or initial aggressors "when a defendant engages in a simple assault and his opponent responds with deadly force so sudden and perilous that the person cannot withdraw, a defendant may immediately use deadly force in self-defense."

Another similar factual scenario involved *Corbin v. State*, 614 So. 2d 1329 (1992), where the Maryland Court of Special Appeals addressed interveners, like Gotay, Troy and Riollano, who enter and assist the aggressor in a fight. Citing relevant cases from outside jurisdictions, the court held a defendant who is under attack by an aggressor using deadly force, may defend with deadly force against an intervener who comes to aggressor's assistance, even if intervener does not use deadly force.

Based on the arguments contained in the initial brief and in this reply, Appellant respectfully requests this Honorable Court find fundamental error was committed and the need to exhaust every reasonable means to avoid danger misstates the current self-defense law, conflicts with Dobbs' right to stand his

ground and meet force with force, and negates his only defense.

## CONCLUSION

Based on legal arguments and authority contained in the initial brief and herein, undersigned counsel respectfully request this Honorable Court vacate the judgment and sentence for second degree murder, two counts of aggravated battery, aggravated assault and release Dobbs from custody. If this Honorable Court does not deem it proper to grant the initial relief requested, Dobbs request this court vacate the judgements and sentences entered below and remand to the trial court for a new trial with instructions. In the alternative, undersigned counsel respectfully requests this Honorable Court reduce the second degree murder conviction to manslaughter and remand to be resentenced.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Mr. John Dobbs, Inmate # C-00618, K1-1202, Santa Rosa Correctional Institution, 5850 East Milton Road, Milton, Florida 32583-7914, on this 27th day of February 2008.

KEVIN R. HOLTZ
Assistant Public Defender

## CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is 14 point TIMES NEW ROMAN, a font that is proportionately spaced.

KEVIN R. HOLTZ
Assistant Public Defender