

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**Case Nos. 12 – 6437/6438  
ELECTRONICALLY FILED**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee**

**v.**

**JAFARI T. MOORE,**

**Defendant-Appellant**

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**Appeal from the United States District Court  
For the Eastern District of Kentucky at Lexington  
Criminal Action Nos. 5:08-186, 12-89  
Hon. Joseph M. Hood**

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**AMENDED BRIEF FOR APPELLANT**

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Case Nos. 12-6437/6438

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAFARI T. MOORE,

Defendant-Appellant

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DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST  
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Pursuant to Sixth Circuit Rule 25, Defendant-Appellant Jafari T. Moore makes the following disclosures:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation?

RESPONSE: No.

2. If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

RESPONSE: See the Response above.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

RESPONSE: See Response above.

/s/ Robert L. Abell  
Robert L. Abell  
Counsel for Appellant

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellant respectfully suggests that oral argument would be helpful to the Court in this case and requests that it be granted.

## STATEMENT OF JURISDICTION

This case consolidates appeals from the United States District Court for the Eastern District of Kentucky at Lexington in its cases Nos. 12-89 and 08-186. The district court had jurisdiction over both cases pursuant to 18 U.S.C. § 3231.

Appellant Jafari T. Moore was found guilty by a jury in Case No. 12-89 of a violation of 18 U.S.C. § 922(g)(felon in possession of a firearm) and was sentenced to the maximum term of 10 years imprisonment on November 15, 2012. (Judgment, RE 50, Page ID # 227). The court below revoked Moore's supervised release in Case No. 08-186 the same day, imposing a concurrent 24 month term of imprisonment. (Judgment, RE 96 (08-186), Page ID # 225).<sup>1</sup> Moore timely appealed both judgments. (Notice of Appeal, RE 51, Page ID # 233; Notice of Appeal, RE 97 (No. 08-186), Page ID# 227). The district court judgments are properly appealable to this Court pursuant to 28 U.S.C. § 1291.

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<sup>1</sup> Unless specifically identified as here to a record entry in Case No. 08-186, the RE's cited herein are to the record in Case No. 12-89.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the court below erred in denying appellant's request that the jury be instructed on his defense of justification?
2. Whether the court below erred in excluding evidence tending to show appellant's assailant engaged in reckless and aggressive acts?

## **STATEMENT OF THE CASE**

A jury could properly have found appellant justified in possessing a firearm in Case No. 12-89. However, the court below committed reversible error and denied Moore's request that the jury be instructed as to his defense theory. Subsequently, in accordance with the jury's verdict, the court below revoked appellant's supervised release in Case No. 08-186. These appeals follow.

### **Statement of Facts**

#### **The Indictment and Supervised Release Revocation Petition**

The indictment charged appellant Jafari T. Moore with a single count of violating 18 U.S.C. § 922(g)(1), which prohibits a prior-convicted felon from possessing a firearm. (Indictment, RE 6, Page ID # 11).

#### **Diva's Parking Lot**

The pertinent events in Case No. 12-89 occurred a little after 3 a.m. the morning of March 20, 2012, beginning in the parking lot of a strip club in Lexington, Kentucky known as Diva's. There a confrontation occurred involving Moore, a male African-

American, and another man, James King, a white man. Sharply conflicting testimony was presented at trial regarding this incident.

Moore and a friend, Rico Freeman, worked out a YMCA the evening of March 19, 2012, and then decided to go out on the town. They were driving Freeman's silver Toyota Camry and first picked up Freeman's nephew, Taimarcus Gill, and then a lady friend of Freeman's, Jennifer Bates. The group went first to a bar, Spud's, and then a strip club, Spearmint Rhino, before arriving at Diva's, another strip club about 2 a.m. or so.

James King was at Diva's with his friend, William Layland, and King's cousins, Owen and Susan Lawson. (Tr. vol. II, RE 60, Page ID # 508). King and Layland had driven up from their Orlando, Florida residences a few days earlier to visit the Lawsons, who lived somewhere east of Lexington, and the four had spent, according to Layland, a few days driving four-wheelers and shooting guns. (*Id.*, Page ID # 565). The night of March 19-20, 2012, was King and Layland's second visit to Diva's on this trip to Kentucky, King testified. (*Id.*, Page ID # 513).

All the witnesses agreed that inside Diva's there was no fight, quarrel, dispute or controversy between Moore and King and/or between them or between or among any of the members of their parties. No testimony given at trial would indicate that events in the parking lot were a spill-over of something that started in the club.

Moore did encounter King apparently using a controlled substance in the men's room of Diva's and said something to the effect of "you showing out aint' you." (Tr. vol. II, RE 60, Page ID # 570-71). Unsurprisingly, King gave a different version, claiming that Moore asked him if he was Muslim, citing his beard. (*Id.*, Page ID # 508).

Moore and his group left Diva's at closing time, about 3 a.m. Freeman, Gill and Bates first exited but Moore was close behind them. The four grouped up in the parking lot and began walking toward Freeman's car. Moore recalled that Bates and Freeman were having a disagreement of some sort. (*Id.*, Page ID # 580-81). As he was getting into Freeman's car, Moore noticed a vehicle

with its hood up that appeared to be having trouble starting and walked over to help. (*Id.*, Page ID # 578-79).

The vehicle, a Cadillac Escalade, was King's. Moore and Layland pushed it into a position where it would be possible to more easily get jumper cables to its battery and get it started. Gill remembered that the vehicle needing a jump had been moved, although he did not see how or by whom. (*Id.*, Page # 423-25).

King agreed that the vehicle was pushed in place but couldn't say who pushed it. (*Id.*, Page # 510-11). Layland ultimately could not say whether the vehicle had been pushed or who had pushed it, if it had been pushed. (*Id.*, Page # 547, 549). King had a number of guns in his Escalade: two shotguns, a rifle and two other pistols. (*Id.*, Page ID # 512).

After Moore and Layland pushed King's Escalade into place, King, who had been in the driver's seat guiding the vehicle, got out of the vehicle and approached Moore, who noticed that King had a pistol tucked in his waistband. (*Id.*, Moore testimony, Page # 581). A prior robbery and shooting victim himself, Moore told King that he did not want to be around the weapon, that he had

no weapon and turned to walk away. (*Id.*). As he was walking away, Moore heard a click, turned around and found that King had the gun aimed at his face. (*Id.*). Moore put his hands up, in an attempt to calm King, and King stated "you thought you were going to get us." (*Id.*). Moore replied that he was simply trying to help and that he had no weapon. (*Id.*). Moore lifted up his shirt to show that he had no weapon and repeated, "I do not have nothing, I do not have nothing." (*Id.* at 581-82).

When Moore lifted up his shirt, King turned his attention to Layland and said to Layland, "oh, he was going to try to get us." (*Id.* at 582). While King's attention was diverted, Moore attempted to disarm him. (*Id.*). King and Moore struggled for control of the gun, and, during the struggle, it was discharged four or five times. (*Id.*). The last shot struck King somehow, perhaps on a richchet, King yelled, dropped the gun and himself dropped to the ground. (*Id.*). Moore began to run off but saw King reaching for the gun. (*Id.*). Fearing that King would shoot him if he left the gun on the ground close to King, Moore grabbed the gun. (*Id.* at 583-84). He ran to and jumped in Freeman's car, which was already in

the process of backing up and leaving. They drove away from Diva's and were stopped about three minutes later. (*Id.* at 586).

Ricky Strode witnessed the struggle between Moore and King. Strode was homeless on March 20, 2012, and was panhandling in the parking lot at Diva's at around closing time. (Ricky Strode testimony, Tr. vol. II, RE 60, Page ID # 476-77). He encountered Moore by chance and asked Moore for money. (*Id.*, Page ID # 477). Moore gave Strode \$2-3 dollars, and the two parted company. (*Id.*). Strode then noticed a black Cadillac Escalade with its hood up, and a couple of men standing around it looking like they needed a jump. (*Id.*, Page ID # 482). He heard Moore holler out, "you guys need some help?" and then saw Moore walk over toward them to help. (*Id.*). Strode watched Moore and another man push the Escalade. (*Id.*, Page ID # 485).

A man (King), who had been sitting in the driver seat of the Escalade, got out and had a pistol tucked in his waistband. (*Id.*, Page ID # 485-6). King was cursing at Moore, and Strode saw and heard Moore throw his hands up and say "I am out of here, I am out of here." (*Id.*, Page ID # 486). King then pulled the pistol out of

his waistband, and Strode thought that he was going to kill Moore. (*Id.*, Page ID # 487-88). Moore and King wrestled and struggled for control of the pistol during which time it was fired three or four times. (*Id.*, Page ID # 488). Strode heard King scream and drop the gun. (*Id.*). He then saw Moore pick up the gun and run and jump into a car that immediately left the scene. (*Id.*, Page ID # 488-89).

King was called by Moore to testify. At a sidebar, counsel and the district judge discussed whether King would be prosecutable as a felon in possession, given an apparent prior felony conviction in Florida and concluded that he could be. (*Id.*, Page ID # 502). Although King apparently had a concealed carry permit issued by Florida, ATF had no record of King applying for or receiving restoration of his federal rights to possess a firearm. (*Id.*, Page ID # 502-03). That King had been issued, nonetheless, a concealed carry permit by Florida raised concerns that it had been fraudulently obtained. (*Id.*, Page ID # 503).

King admitted to committing two felonies in Florida state court in 1998; burglary of a conveyance and possession of burglar tools. (James King testimony, Tr. vol. II, RE 60, Page ID # 507).

King confirmed that, after leaving the club, his vehicle, a black Cadillac Escalade, would not start. (*Id.*, Page ID # 510). It was pushed by someone – he did not know who – into a position where it could receive a jump. (*Id.*, Page ID # 510-11). He believed that he was in the driver seat of the vehicle while it was being pushed. (*Id.*, Page ID # 511).

King testified that jumper cables were hooked up running between his Escalade and the Lawsons' car, and he was bent over trying to see if it was charged when Moore "came up behind me, and removed the weapon from my waistband." (*Id.*, Page ID # 514-15). King claimed that he then felt a burn, heard the noise of a shooting and saw Moore running off firing at him with his own weapon. (*Id.*). According to King, Moore said nothing but just ran up "out of the blue," grabbed his gun, began firing and then ran off with it. (*Id.*, Page ID # 515-16).

William Layland confirmed that he and King had car trouble when they left Diva's at about 3 a.m. (William Layland testimony, Tr. vol. II, RE 60, Page ID # 546). They had been at the club for about six hours and he was intoxicated. (*Id.*, Page ID # 551-52). When he first saw Moore, the hood to the Escalade was up "and it was either hooked up or we were in the process of doing all that." (*Id.*, Page ID # 552). While he was standing in front of the Escalade, a little bit to the driver side at the front, he saw Moore a few feet from King, reach, grab King's gun from King's waistband, back off, fire some shots, begin running backwards while continuing to fire shots. (*Id.*, Page ID # 553). According to Layland, Moore ran up "out of the blue," grabbed King's gun, began firing away at close range and then ran off. (*Id.*, Page ID # 555-56).

Josh Evans was the bouncer at Diva's. He was escorting a few dancers out of the building to their vehicles after closing when he saw "an individual parked in the back row next to the bushes with his car hood up and his battery was dead." (Josh Evans testimony, Tr. vol. I, RE 59, Page ID # 318). He walked over and

asked what was wrong and if help was needed. (*Id.*, Page ID # 319). Evans directed one of the dancers to pull her vehicle up towards King's truck so they could jump start it. (*Id.*). According to Evans, as King stood in front of his Escalade holding his hood up with Evans standing right next to him, Moore ran up “out of the blue,” grabbed King’s pistol from his waistband, took a few steps back and started firing in the direction of the driver side door. (*Id.*, Page ID # 320-21). Evans then saw Moore run and jump in a car, which drove off. (*Id.*, Page ID # 322). Evans then called the police. (*Id.*).

### **The Stop of Freeman’s Car**

Lexington police officer Raymond Terry received a radio call to look out for a silver Toyota Camry – Freeman's car – and stopped it within a very few minutes only 1 ½ - 2 miles from Diva’s. (Raymond Terry testimony, Tr. I, RE 59, Page ID # 368). Terry directed the occupants, Freeman, Bates, Gill and Moore, out of the car. (*Id.*, Page ID # 355). He found the .40 caliber Springfield pistol that Moore had taken from King on the floor board where Moore had been sitting in the rear seat. Moore did

not make any statements to Terry regarding the gun, according to Terry. (*Id.*, Page ID # at 366). Terry claimed that Moore and his party were asked by someone about the gun, and no one said anything. (*Id.*, Page ID # 355-56).

A conflict in testimony was presented regarding whether Terry asked Moore and the others about the gun or not. Moore testified that nobody asked him anything about the gun, but that he was told that he was being detained for an interview at police headquarters regarding it. (Jafari Moore testimony, Tr. vol. II, RE 60, Page ID # 587-88).

Freeman, Gill, and Bates all testified that they did not have any discussion in the car about the shooting at Diva's before they were stopped. (Tr. vol. II, RE 60, Page ID # 429, 452, 456, 468-70). They all confirmed that it was only a few minutes. (*Id.*) Moore, who moments before had his life threatened, did not say anything about the gun, explaining, "I was still in a state of shock. We did not have a chance to talk about nothing at all." (*Id.*, Page ID # 586). He also acknowledged that he was aware that he, as a

convicted felon, could not lawfully have in his possession a firearm. (*Id.*, Page ID # 604).

### **Moore's Interview at Police Headquarters**

Moore was expecting at police headquarters an opportunity to explain what had happened at Diva's, and how he had come to possess the pistol. (*Id.*, Page ID # 588). But before he had that opportunity he was informed that he was under arrest and would be charged with crimes. (*Id.*, 588-89). Moore was confused and frightened by this development and, as a result, denied being at Diva's or knowledge of the pistol before asserting his right to counsel. (*Id.*, 589-90). He explained to the jury as follows: "I was frustrated at the time because I knew I was getting locked up." (*Id.*, 590).

### **Exclusion of Evidence Regarding King's Assault Charge In Florida**

The defense learned a few days before trial that King was subject of a pending assault charge in Orlando, Florida regarding an incident on March 1, 2012, not quite three weeks prior to the incident at issue in this case. The defense moved for a continuance of the trial to permit opportunity to investigate the charge and

determine its relevancy to Moore's defense. The court below denied the request. (Minute Order, RE 29, Page ID # 114).

After the first day of trial, the government provided to the defense documents it obtained that day regarding King's assault charge. These included witness statements from two people, a Herschel Thomas and a Vedrona Stojanovic, indicating that on March 3, 2012, King had suddenly and without provocation attacked and beaten Thomas with a billiards ball outside an Orlando nightspot. (Tr. vol. II, RE 60, Page ID # 406).<sup>2</sup>(Court Ex. # 1). Based on this information the defense moved for a mistrial, requesting opportunity to subpoena Thomas and Stojanovic so they could testify regarding King's assault charge as part of Moore's defense. (*Id.* at Page ID # 408).

Defense counsel argued that such testimony from Thomas and Stozanovitch would be relevant to show King's intent in creating fear in Moore of imminent and unlawful use of force as

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<sup>2</sup> The statements of Thomas and Stojanovic were filed in the record as Court Ex. 1; they are attached hereto as Appendix A-1 and Appendix A-2, respectively.

well as to show absence of any mistake by King in misinterpreting Moore's conduct as hostile. (*Id.* at Page ID # 406-07).

The court below denied the motion for a mistrial. (Minute Order, RE 30, Page ID # 115). The trial judge asserted that the evidence sought from the two was not exculpatory, because Moore was unaware of King's unprovoked assault on Thomas when Moore encountered King in the Diva's parking lot. (Tr. vol. II, RE 60, Page ID # 408-411).

Also, prior to King taking the stand, the trial judge ruled that King could not be questioned about the assault charge. (*Id.*, Page ID # 504).

### **Moore's Requested Justification Defense Jury Instruction**

Moore submitted to the court below prior to trial a proposed jury instruction on the justification defense based on this Court's ruling in *United States v. Singleton*, 902 F.2d 471 (6th Cir.), *cert. denied*, 498 U.S. 872 (1990), and its Criminal Pattern Jury Instruction 6.07. (Defendant's Proposed Jury Instructions, RE 31, Page ID# 116-18).

The court below denied Moore's request that the jury be instructed on his justification defense. The trial judge asserted that Moore had not presented sufficient evidence on the fifth element of the defense, explaining that Moore had ample opportunity to explain his possession of the pistol both when initially stopped by Terry and then later when subjected to custodial interrogation at police headquarters. (Tr. vol. II, RE 60, Page ID # 531, 613-614). The judge added that he was finding that Terry asked Moore about the gun and Moore did not speak up. (*Id.*, Page ID # 619-20). As a result of Moore's failure to come forward at these times with his exculpatory explanation regarding his possession of the pistol, the court concluded that he had forfeited his entitlement to have the jury instructed on his justification defense. (*Id.*).

Defense counsel argued on Moore's behalf that there were significant and material factual differences between the facts in this case and those in *Singleton* and it was for the jury to decide whether or not Moore's conduct was reasonable and on understandable either at the traffic stop or at police headquarters

and therefore whether he had fulfilled the elements of the defense. (Page ID # 614-16).

### **The Verdict**

Deprived of the ability to have the jury consider his justification defense, Moore, as a practical matter, had no defense to the charge, and the jury found him guilty. (Verdict, RE 34, Page ID # 122).

### **The Sentencing and Supervised Release Hearing**

Moore appeared, prior to being indicted in federal court, before a Kentucky state grand jury, which declined to find probable cause to support charges of robbery and/or assault against Moore arising from his encounter with King. (Defendant's Supplemental Sentencing Memorandum, Ex. 2, Proffered Indictment Dismissed, RE 46-2, Page ID # 199). The refusal and failure of this fact-finding body to find even probable cause to support charges against King indicated its acceptance, Moore argued, of Moore's testimony and therefore precluded a two-level enhancement for obstruction of justice, a four-level enhancement for stealing a gun from King and warranted application of a two-

level adjustment for acceptable for responsibility. (Defendant's Supplemental Sentencing Memorandum, RE 46, Page ID # 190-94).

The court below overruled all of Moore's objections and arguments, and imposed the maximum sentence of 10 years imprisonment in Case No. 12-89. (Judgment, RE 50, Page ID# 227). Moore's supervised release in Case No. 08-186 was similarly revoked and he was sentenced to a concurrent term of two years imprisonment on it. (Judgment, RE 96 (08-186), Page ID # 225).

### **SUMMARY OF ARGUMENT**

1. Moore has a due process right granting him a meaningful opportunity to present a complete defense. This right includes having the jury instructed on his defense. Moore presented enough evidence to warrant a jury instruction on his justification defense. The court below erred in refusing Moore's request that the jury be instructed on his justification defense. Accordingly, Moore's due process right to a fair trial was violated. Therefore, the judgment in Case No. 12-89 should be reversed and the case remanded for a new trial.

2. The court below erred in denying Moore opportunity to introduce evidence that King had been charged a few weeks before March 20, 2012, with a violent, unprovoked assault outside an Orlando, Florida bar. This evidence is admissible to show King's intent and absence of mistake when he pointed a gun at Moore's head at close range. If the Court reverses the judgment in Case No. 12-89, it should also hold that this evidence is properly admissible on retrial.

3. The supervised release revocation in Case No. 08-186 should be vacated since it is so interdependent with the charge in Case No. 12-89. If the jury on retrial were to accept Moore's justification defense, it would perhaps eliminate any basis on which Moore's supervised release might be revoked.

## **ARGUMENT**

### **POINT 1**

#### **THE COURT BELOW ERRED IN REFUSING TO INSTRUCT THE JURY ON MOORE'S JUSTIFICATION DEFENSE AND DENIED MOORE A FAIR TRIAL.**

A criminal defendant has a due process right to present his defense theory to the charges against him, which includes having

the jury instructed on his defense theory. Moore presented sufficient evidence to require a jury instruction on his justification defense. The court below erred in denying Moore's request that the jury be instructed on his justification defense. That error denied Moore a fair trial, and the judgment of the court below in Case No. 12-89 should be reversed.

A defendant in a criminal trial has the right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1983); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). A necessary corollary of this holding is the rule that a defendant in a criminal trial has the right, under appropriate circumstances, to have the jury instructed on his or her defense, for the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions. *Taylor v. Withrow*, 288 F.3d 846, 851-852 (6th Cir. 2002), *cert. denied*, 537 U.S. 1007 (2002).

A defendant needs merely to present some evidence, even if it is weak or of doubtful credibility, to be entitled to a jury

instruction on his defense. *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993); *United States v. Plummer*, 789 F.2d 435, 438 (6th Cir. 1986). A defendant is entitled to a jury instruction as to any recognized defense for which there exists evidence sufficient for a reasonable juror to find in his or her favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988). In a criminal case it is reversible error for a trial judge to refuse to present adequately a defendant's theory of defense. *United States v. Blane*, 375 F.2d 249 (6th Cir.), *cert. denied*, 389 U.S. 835, *rehearing denied*, 389 U.S. 998 (1967).

This Court recognizes justification as a defense to a felon-in-possession charge. *United States v. Singleton*, 902 F.2d 471 (6th Cir.), *cert. denied*, 498 U.S. 872 (1990); *United States v. Newcomb*, 6 F.3d 1129 (6th Cir. 1993). The justification defense has the following elements: (1) the defendant reasonably believed there was an unlawful and present, imminent, and impending threat of death or serious bodily injury to himself or to another; (2) the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to

choose the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law; (4) a causal relationship could be anticipated between the criminal conduct of possessing the firearm and avoiding the threatened harm; and, (5) the defendant did not maintain the illegal conduct any longer than absolutely necessary. These are incorporated into this Circuit's Pattern Jury Instruction 6.07, which Moore, in turn, incorporated into his requested jury instructions. (Defendant's Proposed Jury Instructions, RE 31, Page ID # 116-18).

The applicable standard of review is *de novo*. Whether a criminal defendant has presented a prima facie case supporting an affirmative defense is a question of law and reviewed *de novo*. *United States v. Johnson*, 416 F.3d 464, 468 (6<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1191 (2006). Beyond that this Court reviews the jury charge as a whole to determine whether it fairly and adequately submits the issues and law to the jury; reversible error occurs where an accurate instruction is refused, and the defendant's theory of defense is not otherwise covered in the

instructions. *United States v. Riffe*, 28 F.3d 565, 569 (6<sup>th</sup> Cir. 1994).

The analysis of three cases, *Newcomb*, *United States v. Clark*, 485 Fed.Appx. 816 (6<sup>th</sup> Cir. 2012), and *Singleton* itself demonstrate two important factors: (1) the jury has a role in considering the subsidiary fact issues which would either support or unravel the justification defense or one or more of its elements; and, (2) this role is particularly important when the pertinent events occurred within a short duration of time. *Newcomb* and *Clark* provide strong and direct support for Moore's requested jury instruction as to his justification defense.

In *Newcomb*, the defendant, along with two others, was implored to go out and look for a young man, a Louis Benson, whose mother feared was going to harm a third party. The three found Benson, and the defendant obtained from him a sawed-off shotgun and four shells. 6 F.3d at 1131.

The testimony offered at trial varied substantially from there. A police officer testified that he saw two men and one woman standing at an alley's entrance. *Id.* at 1130-31. In his

patrol car, the police officer followed the three into the alley and saw a man, who turned out to be Newcomb, stick what proved to be a sawed-off shotgun under the cushion of an abandoned couch. *Id.* at 1131. When the police officer patted Newcomb down, the four shells were found in his right coat pocket. *Id.*

Newcomb and other defense witnesses testified that Newcomb briefly obtained possession of the sawed-off shotgun from Benson, unloaded it, gave it back to Benson, who then “headed back down the alley, and discarded the now-useless gun by putting it in the couch.” *Id.* Benson then uttered some additional threats toward the unknown third-party, Newcomb gave chase to Benson, but gave it up and returned to join the others at the head of the alley. *Id.* Then, “according to the defense, ... the police arrived and arrested Newcomb.” *Id.*

Newcomb, like Moore, requested a justification defense jury instruction at trial, which the district court denied.

This Court held that the district court committed reversible error in refusing to instruct the jury on Newcomb’s proffered justification defense. First, as most pertinent here, the Court

rejected the government's argument that "Newcomb could have called the police" or had someone else disarm Benson, asserting that "a reasonable jury could find those suggested alternatives implausible and unreasonable, if it concluded that Newcomb was faced with an emergency situation." *Id.* at 1137. The Court distinguished cases where "the defendant's illegal conduct spanned over a long period of time," again emphasizing the jury's role in assessing the reasonableness of Newcomb's actions and conduct:

... there was evidence that the emergency situation unfolded rapidly, almost spontaneously, and that Newcomb's criminal conduct lasted for mere minutes. According to the defendant's evidence, Louis Benson was running with a gun to an unknown location, in order to shoot someone. Under such circumstances, a jury could conclude that if Newcomb had stopped to call the police, he would have lost track of Benson, and the call would have been futile. Furthermore, it would be reasonable to conclude that there was a crisis situation that simply did not allow Newcomb the luxury of choosing from among several alternative courses of action, some of which would not have required him to perform an illegal act.

6 F.3d at 1137.

Similarly, the Court rejected the government's argument that "Newcomb possessed the ammunition for too long to entitle

him to the justification defense.” *Id.* at 1138. The Court noted the defense testimony indicated that Newcomb “possessed the ammunition for what at most amounted to a few minutes before the arrival of the police” and that “the emergency situation had only ended moments before, with the departure of [Benson].” *Id.* This would allow “a jury to conclude” that Newcomb possessed the weapon only for the duration of the emergency situation. *Id.*

There is no indication that the defendant in *Newcomb* immediately offered an explanation for his conduct to the police officer in the alley. Nevertheless, this Court ruled that the fifth element of the *Singleton* test did not bar the defendant’s entitlement to a justification defense. This ruling is directly at odds with the court below’s reasoning here. According to the court below, Newcomb would not be entitled to the jury instruction because he failed to timely and fully explain to police how he came to possess and firearm. If Newcomb was entitled to have the jury instructed on his justification defense, then Moore was also, and the court below committed reversible error in denying his request.

In *United States v. Clark*, 485 Fed.Appx. 816 (6th Cir. 2012), a dispute started in a Paris, Tennessee nightclub when the defendant's female companion was groped by another male patron. As the confrontation escalated, the club owner succeeded in evacuating the club, sending the defendant and his antagonist, who apparently was accompanied by a group of supporters, out into the parking lot. 485 Fed.Appx. at 817. Two shots were fired at the defendant in the parking lot, and he succeeded in running back inside the club, where he obtained a gun from the club's DJ. *Id.*

The defendant, Clark, again exited the club, armed this time, but police arrived before anything else happened. One of the police officers was aware of an outstanding warrant for Clark and arrested him. While being arrested Clark told the police he had the gun. *Id.* at 818. Clark had two prior felony convictions and was charged with being a felon in possession of a firearm. Like Moore, Clark offered a justification defense, and his requested instruction was similarly denied.

This Court reversed Clark's conviction based on the district court's refusal to instruct on the justification defense. First and significant to the case at bar, the Court emphasized the jury's role in assessing the reasonableness of Clark's conduct in accepting the gun from the DJ:

... a jury could reasonably conclude that a person running from a gun-wielding assailant could harbor a reasonable belief that accepting a gun for his defense would serve to protect him from the assailant. Ultimately, whether Clark could have anticipated a direct causal relationship between accepting the gun and surviving the trip to his car is a matter for the jury. He need only present "some evidence" that he could have reasonably anticipated such a relationship. Either brandishing the weapon or firing it in his own defense if again confronted by the man who had shot at him could have helped Clark avoid being shot at again. Refusing the gun would have eliminated the possibility of using the gun to help him get safely to his car, and accepting it could reasonably be anticipated to aid the chance of his survival.

485 Fed.Appx. at 820.

Second, as to whether Clark possessed the weapon longer than necessary (the fifth factor), the Court rejected the district court's assertion that Clark could have gotten rid of the gun sooner, either by handing it to a friend or throwing it in the bushes, finding the point fitting for a jury to resolve: "a jury could

reasonably conclude that while Clark did have an opportunity to safely dispose of the weapon sooner than he did, he presented a prima facie case that between the moments when the danger ended by the arrival of the police and when he alerted the police to his possession of the gun, he had no such opportunity." *Id.*

*Singleton* contrasts starkly with *Newcomb*, *Clark* and this case. In *Singleton*, the defendant disarmed a third party and then left the location where he had been threatened with the gun. The defendant then drove to his girlfriend's house, where he loitered about for some hours, having left the gun in his car. 902 F.2d at 472. The defendant, despite some hours opportunity to do so, did not alert the police and even failed to report timely his whereabouts to the halfway-house where he was living and late reporting. *Id.* In these circumstances, the defendant having some hours to deliberate on his actions and being so unconcerned about the weapon's presence that he left it unattended in a car, this Court ruled that he was not entitled to a jury instruction on his justification defense.

*Singleton* is most obviously distinguishable by the amount of time that passed between the defendant obtaining possession of the gun and being arrested. In this case, in *Newcomb* and in *Clark*, there are only a few minutes involved. Furthermore, the defendant was not only far removed by time from the danger in *Singleton*; he was also far removed by place, having retreated to his girlfriend's residence. Accordingly, the rationale applied to deny the defendant in *Singleton* a jury instruction on his justification defense does not apply to this case.

Moore presented evidence sufficient to require that his requested justification defense instruction be given the jury. First, there was testimony from Moore and Strode that King threatened Moore in the parking lot for no apparent reason by pointing a gun at his face at close range. Second, Moore did not do anything to place himself in a situation where he might be forced to choose criminal conduct; there was no reason for Moore to believe there was any animus between him and King and Moore was simply trying to help get King's vehicle started. Third, a jury could reasonably conclude that Moore had no reasonable alternative to

taking possession of the gun: King had pointed it at his head at close range for no reason whatsoever only seconds before, and the gun had been discharged in a struggle between the two. Fourth, certainly a causal relationship could be found between Moore taking the gun and avoiding the possibility that King shoot him with it as he fled. In any event, no dispute was raised by the government in the court below as to Moore's proof on these elements. Indeed, the court below specified that it was only the fifth element – the length of time that Moore possessed the gun that was at issue. (Tr. vol. II, RE 60, Page ID # 613-14).

A jury could reasonably find that Moore did not maintain possession of the gun longer than necessary, given the circumstances. Moore's possession of the gun lasted perhaps three minutes. As with the defendant in *Clark*, it could be said that Moore had time and opportunity to either give the gun to a friend or throw it from the car as it drove away. But also as with the defendant in *Clark*, a jury could properly view both of these alternatives as implausible or unreasonable. It would be reasonable for a jury to find that Moore, in reality, had no such

opportunity, given the short duration of time in the traumatic event that immediately preceded his possession.

The court below's rationale that Moore was disqualified from the justification defense, because he did not acknowledge and explain at the time of the traffic stopped or later at the police station finds no support in the case law. This conduct by Moore had nothing whatsoever to do with his continued possession of the gun, which ceased at the inception of the traffic stop. There is no indication in *Singleton* or any other authority that the appellate counsel has been able to locate stating or holding that a prerequisite for a defendant to present a justification defense is that he render a full recitation to police of the pertinent circumstances upon his arrest. Here, the court below has strayed far afield, seizing upon an omission that arguably weakens Moore's defense, because it makes him vulnerable to an allegation of post hoc fabrication, but it does not and cannot disqualify him completely from having his defense considered by the jury, as this Court has repeatedly noted, Moore's theory of defense must be presented to the jury even if of doubtful credibility.

The court below pointedly noted that Moore had not claimed ownership of the gun at the time of the traffic stop, stating that it was making a finding adverse to Moore that Terry had asked about the gun and Moore had not been forthcoming. (Tr. vol. II, RE 60, Page ID # 619). Moore testified directly that Terry did not ask about the gun at the traffic stop. (*Id.*, Page ID # 587-88). The court below has no role in making findings of fact determinative of whether Moore may present his justification defense. Since Moore need only present some evidence in that may be of doubtful credibility, this conflict is no basis to properly preclude the justification jury instruction, especially since Moore was not required to offer an explanation to police in order to have his defense considered by the jury.

There is no basis for the court to conclude that Moore's justification defense was adequately presented in the jury instructions actually given the jury. In fact, Moore's defense counsel was cautioned that any reference to justification in summation would lead to rulings in further instructions favoring

the government in that regard. (Tr. vol. II, RE 60, Page ID # 625-26).

The court below denied Moore a fair trial by refusing to instruct the jury as to justification. There was sufficient evidence presented by Moore regarding the factors as identified by this Court in its *Singleton* decision. Accordingly, the judgment of the court below in Case No. 12-89 should be reversed and the case remanded for new trial.

## POINT 2

### **THE COURT BELOW ABUSED ITS DISCRETION BY PREVENING MOORE FROM PRESENTING EVIDENCE THAT JAMES KING WAS CHARGED IN FLORIDA ARISING FROM AN UNPROVOKED ATTACK OUTSIDE A NIGHT SPOT.**

The jury heard two sharply contrasting versions of what transpired in the parking lot at Diva's: the testimony of Moore and Strode that King without provocation pulled the pistol from his waistband, pointed it at Moore's head and threatened Moore's life, while King, Evans and Layland testified that Moore for no apparent reason or provocation came up "out of the blue," grabbed

King's weapon from his waistband and began firing the weapon as he retreated to Freeman's car.

Moore sought to introduce evidence to help the jury resolve this conflict: evidence that King on March 1, 2012, in Orlando, Florida had attacked and injured a man without provocation outside a nightclub, conduct resulting in a felony assault charge against King. But the court below refused to allow Moore opportunity to subpoena either of two witnesses that could testify about the incident and barred Moore from questioning King about the incident.

The court below's rationale was in two parts. First that Moore was unaware of King's felony assault charge at the time King threatened him by pointing a gun at his head at close range in Diva's parking lot. Second, since it remained only a charge, it was not usable as impeachment evidence.

The evidentiary rulings of the court below as to this issue are reviewed for abuse of discretion. *United States v. Schreane*, 331 F.3d 548, 564 (6th Cir.), *cert. denied*, 540 U.S. 973 (2003).

The evidence regarding King's assault charge in Orlando is what this Court has characterized as "reverse 404(b)" evidence, that is evidence of a prior bad act by King, a witness, not Moore, the defendant. *See United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004). It is subject to the standard 404(b) evidence analysis. *Id.* This approach has been criticized, indeed even by District Judge Rosen's concurrence in *Lucas*, 357 F.3d at 610-615, by Judge Martin in his concurrence in *Wynne v. Renico*, 606 F.3d 867, 872, 875 (6th Cir. 2010)(Martin, J., concurring), and is at odds with a large number of its sister circuits. 357 F.2d at 612 (collecting cases). Nevertheless, *Lucas* is the controlling precedent. According we turn to the relevant analysis under Fed.R.Evid. 404(b).

"Evidence of other . . . acts is not admissible . . . to show action in conformity therewith." Fed. R. Evid. 404(b). [6] There are, however, certain identified exceptions, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* When evidence is offered to prove an exception, "the rule does not require that the evidence be excluded. No mechanical solution is offered. The

determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." See Fed. R. Evid. 404, Advisory Comm. Notes, Note to Subdivision (b) (1972 Proposed Rules).

The evidence was admissible, as defense counsel argued to no avail to the court below, to show King's intent and absence of any mistake on his part when he drew his gun and pointed it at Moore's head at close range. Moore obviously was compelled to decide what course of action to take in the Diva's parking lot; those decisions, if the court below had permitted the jury to consider Moore's justification defense, would have been subjected to a reasonableness assessment by the jury. Evidence supporting a finding that King intended to put Moore in fear – a finding furthered by evidence of the pending assault charges – would support a jury's finding that Moore's conduct was reasonable. It would be a jury's prerogative to determine that not every gun-wielding assailant in a bar's parking lot at 3 a.m. justifies a felon

taking possession of a gun. But when confronted with a gun-wielding assailant, who has on a prior occasion engaged in serious violence outside a night spot for no reason, a jury could rightly view Moore's taking action to resist and disarm King as Moore reasonable. It is true that Moore did not know at the time that King had been charged with assault in Orlando, an ignorance that proves how unquestionably reasonable were his actions. Evidence of the assault charge was relevant to help establish a central elements of Moore's defense, and the court below abused its discretion in excluding it.

The evidence of King's assault charge in Florida also illustrates the illogic of the *Lucas* decision and its application here. First, the evidence would certainly be helpful to a jury and deciding what happened in the parking lot: did King pull his gun suddenly without provocation and point it at Moore's head, an extreme threat of violence; or did Moore ran up suddenly "out of the blue," grabbed Kings gun and began firing away? A jury would certainly find helpful evidence showing King's hair-trigger for sudden violence.

Second, the *Lucas* rationale is that "reverse 404(b)" evidence should be excluded generally so as to protect the good names of third parties, who are not charged with crimes. *Lucas*, 357 F.3d at 612 (Rosen, D.J., concurring). There is little if any merit for affording King such protection and consideration here. King, as defense counsel, the prosecutor in the court below acknowledged, could not lawfully possess the gun he pointed at Moore's head at close range. (Tr. vol. II, RE 60, Page ID # 502). Furthermore, there were well-founded suspicion shared that King fraudulently obtained the Florida concealed carry permit, since he had not sought or obtained restoration of his gun rights from ATF. (*Id.*, Page ID # 502-03). And yet King and Layland had traveled up I-75 with a not-small arsenal only two and a half weeks after King had been charged with a felony assault arising from an unprovoked attack outside in Orlando, Florida bar. That King was not and has not been charged by the United States government would see more than ample solicitude for his interests; it need not extend to deprive the jury of essential and helpful evidence to assess the events in this parking lot between two men, neither of whom could

lawfully possess a firearm, one being a white man, King, who was not and who remains uncharged, and Moore, an African-American man, who solely and only has been compelled to answer for his conduct. Accordingly, it was an abuse of discretion for the court below to deny Moore opportunity to present this evidence.

The harm inflicted by the court below's error is material only if this Court rules that Moore should have been allowed to present fully his justification defense to the jury. If the Court rules that the court below committed reversible error in denying Moore's requested justification jury instruction, it should also rule that on retrial the trial court should permit introduction of evidence regarding King's assault charge in Florida for the reasons stated above.

### **POINT 3**

#### **THE COURT SHOULD ALSO VACATE THE SUPERVISED RELEASE REVOCATION IN CASE NO. 08-186.**

The supervised release revocation in Case No. 08-186 is almost if not entirely dependent upon Moore being guilty of being a felon in possession in Case No. 12-89. If the jury accepts Moore's

justification defense on retrial, it leaves little if any basis to revoke his supervised release. Accordingly, if the Court rules that the court below committed reversible error in denying Moore's request for a jury instruction on his justification defense and remands for a new trial, it should also vacate the supervised release revocation in Case No. 08-186.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the judgment in Case No. 12-89 and remand for a new trial with directions that evidence regarding King's assault charge be admitted on retrial. The Court should also vacate the supervised release revocation judgment in Case No. 08-186.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 21st day of March 2013, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell  
COUNSEL FOR APPELLANT

**CERTIFICATION OF COMPLIANCE  
PURSUANT TO FRAP 32(a)(7)(B)**

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 7,907 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

/s/ Robert L. Abell  
COUNSEL FOR APPELLANT

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Case Nos. 12-6437/6438

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAFARI T. MOORE,

Defendant-Appellant

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Appeal from the United States District Court  
For the Eastern District of Kentucky at Lexington  
Criminal Action Nos. 5:08-186, 12-89  
Hon. Joseph M. Hood

-----  
DESIGNATION OF DISTRICT COURT DOCUMENTS  
PURSUANT TO 6 CIR. R. 30  
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### **Counsel's Certification**

I hereby certify that the foregoing documents are included in the district court's electronic record.

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