IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

LOWER COURT CASE NO. 3D04-1521

ERIC MARTINEZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, Eric Martinez, seeks discretionary review of a decision that (a) is in express and direct conflict with over thirty other decisions on whether it is fundamental error to give an improper self-defense instruction the effect of which is to totally negate the defense of self-defense, and (b) cites to *Sloss v. State*, 31 Fla. L. Weekly D879 (Fla. 5th DCA March 24, 2006), a case that is pending review before this Court (Case No. SC06-916). In this brief, the designation "A." refers to the attached appendix, which contains a conformed copy of the decision of the lower court.

STATEMENT OF THE CASE AND FACTS

Martinez was charged with one count of attempted first degree murder, with an aggravated battery committed during the court of the attempted murder. (A. 1-2). He presented evidence of self-defense which raised a question to be decided by the jury. (A. 45). The jury was instructed on self-defense in accordance with Florida Standard Jury Instruction (Criminal) 3.6(f). (A. 2). Part of the instruction, given without objection, was as follows:

> However, the use of force likely to cause death or great bodily harm is not justifiable if you find:
>
> 1. Eric Martinez was attempting to commit, committing or escaping after the commission of Attempted Murder and/or Aggravated Battery . . .

(A. 3).

On appeal, the Third District agreed that giving this instruction absent an independent forcible felony was error. (A. 3). The court, however, refused to find that it was fundamental error because self-defense wasn't the sole defense, wasn't even the primary theory advanced by trial counsel, and was against the weight of the evidence. (A. 5, 27-46). The opinion also states in passing that self-defense was legally untenable given the jury's finding of attempted premeditated murder. (A. 46).

A motion for rehearing, rehearing en banc, or for certification of conflict or questions of great public importance was denied on July 5, 2006. (A. 59). A notice to invoke this Court's discretionary jurisdiction was filed on August 3, 2006.

SUMMARY OF ARGUMENT

Express and direct conflict jurisdiction exists pursuant to Article V, Section 3(b)(3) of the Florida Constitution as every other court which has considered the same instructional error has concluded that it was fundamental error. Jurisdiction also exists pursuant to *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), as the decision below cites to *Sloss v. State*, 31 Fla. L. Weekly D879 (Fla. 5th DCA March 24, 2006), and that case is pending review before this Court (Case No. SC06-916).

ARGUMENT

I. JURISDICTION EXISTS DUE TO EXPRESS AND DIRECT CONFLICT WITH EVERY OTHER COURT THAT HAS CONSIDERED THIS SAME INSTRUCTIONAL ERROR

Conflict jurisdiction exists under Article V, Section 3(b)(3) of the Florida Constitution when the decision of the court of appeal expressly and directly conflicts with a decision from another court of appeal "on the same question of law." The opinion below, holding that the instructional error here was not fundamental, conflicts with the decisions of every other court that has considered the same instruction and found it to be fundamental error. *Jackson v. State*, 2006 WL 2265431 (Fla. 4th DCA August 9, 2006); *Smith v. State*, 31 Fla. L. Weekly D2010 (Fla. 2d DCA July 28, 2006); *York v. State*, 932 So. 2d 413 (Fla. 2d DCA 2006); *Bertke v. State*, 927 So. 2d 76 (Fla. 5th DCA 2006); *Grier v. State*, 928 So. 2d 368 (Fla. 3d DCA 2006); *Humbert v. State*, 922 So. 2d 997 (Fla. 2d DCA 2006); *Swanson v. State*, 921 So. 2d 852 (Fla. 2d DCA 2006); *Granberry v. State*, 919 So. 2d 699 (Fla. 5th DCA 2006); *Houston v. State*, 919 So. 2d 489 (Fla. 2d DCA 2005); *Newcomb v. State*, 913 So. 2d 1293 (Fla. 2d DCA 2005); *Brown v. State*, 909 So. 2d 975 (Fla. 2d DCA 2005); *Federic v. State*, 909 So. 2d 458 (Fla. 4th DCA 2005); *Bevan v. State*, 908 So. 2d 524 (Fla. 2d DCA 2005); *Craven v. State*, 908 So. 2d 523 (Fla. 4th DCA 2005); *Ortiz v. State*, 905 So. 2d 1016 (Fla. 2d DCA 2005); *Fair v. State*, 902 So. 2d 965 (Fla. 4th DCA 2005); *Estevez v. State*,

901 So. 2d 989 (Fla. 4th DCA 2005); *Hardy v. State*, 901 So. 2d 985 (Fla. 4th DCA 2005); *Williams v. State*, 901 So. 2d 899 (Fla. 4th DCA 2005); *Ruiz v. State*, 900 So. 2d 733 (Fla. 4th DCA 2005); *York v. State*, 891 So. 2d 569 (Fla. 2d DCA 2004); *Carter v. State*, 889 So. 2d 937 (Fla. 5th DCA 2004); *Cleveland v. State*, 887 So. 2d 362 (Fla. 5th DCA 2004); *Velazquez v. State*, 884 So. 2d 377 (Fla. 2d DCA 2004); *Bates v. State*, 883 So. 2d 907 (Fla. 2d DCA 2004); *Dunnaway v. State*, 883 So. 2d 876 (Fla. 4th DCA 2004); *Baker v. State*, 877 So. 2d 856 (Fla. 2d DCA 2004); *Zuniga v. State*, 869 So. 2d 1239 (Fla. 2d DCA 2004); *Rich v. State*, 858 So. 2d 1210 (Fla. 4th DCA 2003); *Fair v. Crosby*, 858 So. 2d 1103 (Fla. 4th DCA 2003); *Estevez v. Crosby*, 858 So. 2d 376 (Fla. 4th DCA 2003).

Until this case, the only times this instruction was not found to be fundamental error were when self-defense was totally unsupported by the evidence such that a jury question was not presented. *See Sutton v. State*, 929 So. 2d 1105 (Fla. 4th DCA 2006) ("the jury instruction that was given does not constitute fundamental error if the evidence adduced at trial does not support a self-defense instruction"); *Hickson v. State*, 917 So. 2d 939 (Fla. 4th DCA 2005) and *Hickson v. State*, 873 So. 2d 474 (Fla. 4th DCA 2004); *Thomas v. State*, 918 So. 2d 327 (Fla. 1st DCA 2005). That is not the case here, as the decision of the district court of appeal expressly finds that sufficient evidence was presented to send the question of self-defense to the jury. (A. 45). Nor does the existence of other defenses

negate the fundamental nature of the error. "A defendant has a fundamental right . . . to have the jury properly instructed on **any** legal defense supported by the evidence." *Miller v. State*, 712 So. 2d 451, 453 (Fla. 2d DCA 1998) (emphasis added). To the extent that the opinion below holds otherwise, it is in direct and express conflict with *Miller* on the same question of law.

Express and direct conflict also exists because the decision below refused to find fundamental error even though the error made it easier for the State to convict Mr. Martinez. "A misleading instruction to a jury as to the law concerning a legal defense is fundamental error where it makes a conviction easier for the state." *Hardy v. State*, 901 So. 2d 985 (Fla. 4th DCA 2005) (citing to *Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002)).

While self-defense is an affirmative defense, the burden on defendant is only to produce sufficient evidence to present a jury question, as was done here. Once that happens, the burden is then on the State to disprove self-defense beyond a reasonable doubt. *See Rasley v. State*, 878 So. 2d 473, 476 (Fla. 1st DCA 2004) ("The state is required to prove beyond a reasonable doubt that the defendant did not act in self-defense."); *Fowler v. State*, 921 So. 2d 708, 711 (Fla. 2d DCA 2006) ("when the defendant presents a prima facie case of self-defense, the State's burden included proving beyond a reasonable doubt that the defendant did not act in self-defense") (quotation marks omitted); *Sneed v. State*, 580 So. 2d 169, 170

(Fla. 4th DCA 1991) ("The state must disprove, beyond a reasonable doubt, a defense of self-defense."); *S.D.G. v. State*, 919 So. 2d 704, 705 (Fla. 5th DCA 2006) ("Once Appellant produced evidence supporting her claim of self-defense, the State was required to prove beyond a reasonable doubt that Appellant's actions were not taken in self-defense to sustain a finding of guilt."). The instructional error here meant that the State no longer had to disprove self-defense, thus making a conviction easier. The failure to find fundamental error is thus in express and direct conflict with *Hardy*.

The lower court's passing reference to self-defense "also" being legally untenable (as the conviction for attempted premeditated first degree murder negated a finding of self-defense) appears to be dicta. To the extent that it is a holding of the court, it is in express and direct conflict with this Court's decisions in *Stockton v. State*, 544 So. 2d 1006 (Fla. 1989); *Garcia v. State*, 552 So. 2d 202 (Fla. 1989); and *Rojas v. State*, 552 So. 2d 914 (Fla. 1989), all of which rejected a similar argument concerning the failure to properly reinstruct the jury on justifiable and excusable homicide.

Jurisdiction should thus be accepted on the basis of express and direct conflict as the opinion below (a) is contrary to thirty other opinions from other courts of appeal regarding the fundamental nature of the instructional error; (b) is contrary to other decisions which recognize the right to proper instructions on any

legal theory; (c) is contrary to other decisions which recognize that a misleading instruction which makes it easier for the State to obtain a conviction is fundamental error; and (d) is contrary to holdings of this Court to the extent that it finds the conviction for attempted premeditated first degree murder totally negated the fundamentally erroneous nature of the erroneous instruction on self-defense.

II. JURISDICTION EXISTS PURSUANT TO ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION AND *JOLLIE V. STATE*, 405 So. 2d 418 (Fla. 1981), AS THE DECISION BELOW CITES TO *SLOSS v. STATE*, 31 Fla. L. Weekly D879 (Fla. 5th DCA March 24, 2006), AND THAT CASE IS PENDING REVIEW IN THIS COURT (CASE NO. SC06-916)

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court has jurisdiction to review a decision of a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In *State v. Jollie*, 405 So. 2d 418 (Fla. 1981), this Court held that "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction." *Id*. at 420. That holding was affirmed in *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988).

Since then, this Court has accepted jurisdiction in numerous cases where the lower court issued a decision with citation to a case or cases that were pending

review in this Court. It does not have to be a per curiam decision. *See, e.g.*, *Liberty Mut. Ins. Co. v. Steadman*, 895 So. 2d 434 (Fla. 2d DCA 2005), and *Steadman v. Liberty Mut. Ins. Co.*, 31 Fla. L. Weekly S316 (Fla. May 18, 2006); *Bryan v. State*, 862 So. 2d 822 (Fla. 5th DCA 2003), and *Bryan v. State*, 905 So. 2d 120 (Fla. 2005); *Cote v. State*, 841 So. 2d 488 (Fla. 2d DCA 2003), and *State v. Cote*, 913 So. 2d 544 (Fla. 2005); *McMillon v. State*, 745 So. 2d 566 (Fla. 5th DCCA 1999), and *McMillon v. State*, 813 So. 2d 56 (Fla. 2002). As this Court explained in *Wingfield v. State*, 799 So. 2d 1022 (Fla. 2001), the decision in *Jollie* stands for the proposition that "a district court decision which cites as controlling authority a decision that is either pending review in or has been reversed by this Court constitutes prima facie express conflict and allows this Court to exercise its jurisdiction." 799 So. 2d at 1024.

In *Sloss v. State*, 31 Fla. L. Weekly D879 (Fla. 5th DCA 2006), the court certified as a question of great public importance "Does fundamental error occur when an erroneous jury instruction relates only to an affirmative defense and not to an essential element of the crime?" The decision of the district court of appeal in the instant case discusses the distinction between errors that relate to the elements of the crime charged and those that relate to an affirmative defense and cites to *Sloss* (albeit with an incorrect citation). (A. 7-13, 17-18). In fact, the opinion even asserts that the certified question in *Sloss* is "fundamentally flawed" and it suggests

how the question "should properly be stated." (A. 17-18). For this reason also, then, jurisdiction should be accepted pursuant to *Jollie*.

CONCLUSION

Jurisdiction should be accepted based on the two reasons discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on Jurisdiction was delivered by hand to Richard L. Polin, Assistant Attorney General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on August 11, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

_____
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