IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC06-1597**

ERIC MARTINEZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

ROBERT GODFREY
Assistant Public Defender
Florida Bar No. 0162795

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

INTRODUCTION

Petitioner, Eric Martinez, was the appellant in the district court of appeal and the defendant in the circuit court. Respondent, State of Florida, was the appellee in the district court of appeal and the prosecution in the circuit court. In this brief, the designation "R." refers to the record of appeal from the district court of appeal, the designation "T." refers to the transcript of the trial proceedings, and the designation "A." refers to the attached appendix, which contains a conformed copy of the decision of the lower court. Unless otherwise noted, all emphasis is supplied.

POINT ON APPEAL

Whether the trial court committed fundamental error by instructing the jury on the forcible felony exception to the use of force in self-defense where the defendant was only charged with one forcible felony, he presented evidence sufficient to send the issue of self-defense to the jury, but the instruction negated the defense of self-defense, thus making it easier for the State to obtain a conviction and denying Mr. Martinez his constitutional right to present a complete defense.

STATEMENT OF THE CASE AND FACTS

Mr. Martinez was charged by information with one count of attempted first degree murder with a deadly weapon. The count also alleged that he committed

aggravated battery during the course of the attempted murder. (R. 4-6). There was not a separate charge of aggravated battery. The alleged victim was Rubentania Rijo, Mr. Martinez's girlfriend. Both Mr. Martinez and Ms. Rijo testified at trial.

There was no dispute that Mr. Martinez had stabbed Ms. Rijo several times. The issue for the jury, as defense counsel urged in opening statement, was how much responsibility would be placed on Mr. Martinez. The defense position was that the State's case, at most, would show an aggravated battery, while the "best case scenario is that you find him, not guilty because his reaction was only in self-defense. He will tell you that she stabbed him first, with the scissors. At that point, it escalated." (T. 135-36).[1]

Ms. Rijo testified that she lived with Mr. Martinez as husband and wife. They resided in the house owned by her mother and step-father and had been together about seven months as of August 11, 2003. (T. 145-46, 165, 168, 174). On that night, both she and Mr. Martinez had several drinks at the restaurant/bar where she worked. (T. 174-75). When they arrived home, they began arguing because Ms. Rijo thought Mr. Martinez was too possessive. Ms. Rijo told Mr. Martinez she was going to separate from him. (T. 153, 172). According to Ms.

[1] The opinion below omits this part of defense counsel's opening statement. (A. 29-30). The opinion below also confusingly talks about how self-defense was not "the defense to this case" that was presented **during voir dire**. (A. 28-29). Voir dire, of course, is part of jury selection and not the time or place to argue defenses.

Rijo, Mr. Martinez then went into the bathroom. When he came out, he was crying. The only light in the room came from the television. Mr. Martinez turned the television off and came towards the bed, kneeling down and asking Ms. Rijo not to separate. (T. 154-55, 173). She told him she was leaving, but for him to come to bed and lie down. (T. 155-56). In response, Ms. Rijo testified, he grabbed her by the neck and began choking her. She then felt herself being cut. (T. 156-57). She denied stabbing Mr. Martinez first. (T. 175-76). Ms. Rijo sustained numerous lacerations and puncture wounds. (T. 179-81, 194-98).

Mr. Martinez testified that he had been drinking that night and was drunk by the time he and Ms. Rijo left her place of work. (T. 224-25). Ms. Rijo was arguing with him as they went home, and the argument continued at home. She wanted to know why he had come to her workplace. She initially said she wanted to leave, but then said they would talk about it the next day. (T. 226-27). He lay down and was about to fall asleep when Ms. Rijo came at him with a pair of scissors and he had to defend himself. (T. 228, 244). She went crazy and he was fighting for his life. (T. 248). Mr. Martinez testified that Ms. Rijo "jumped at me. I was fighting for my life." (T. 248). He did not have time to escape. "If I would have time to go outside, I would have, but we went crazy. She was jumping at me. I was also fighting for my life." (T. 248). They struggled and fell and rolled all over. Both were drunk. (T. 228). The alcohol caused the fight to escalate out of

control. (T. 231). He never intended to stab or hurt Ms. Rijo. (T. 228). Mr. Martinez insisted it was "a lie" that he stabbed Ms. Rijo repeatedly, saying again that she attacked him first. (T. 240, 241). He did not know what injuries she suffered because it was dark in the room while they were struggling. (T. 241).

As part of his closing statement, defense counsel urged the jury to remember Ms. Rijo's demeanor while testifying, and argued the following:

> You may believe that he acted in self-defense. She started the process. Remember, it took her a very, very long time to answer. She even refused to answer for at least two or three minutes. The question, did you stab Eric first? And she refused to answer it, which suggests to me that she probably did start the process, because she was the one who was angry?
>
> Because, after all, how many times had she told him, I don't want you coming to my place of work. It effects my ability. I mean, after all, she's there. She's trying to hustle drinks. And she's got him standing there, sitting there watching, very uncomfortable for her.
>
> She was unhappy. She was angry. So, it's very likely that she started the process. That she started the process by stabbing him and suddenly things escalated beyond the wildest dreams of anybody.

(T. 289).

The jury was instructed on self-defense as follows:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which Eric Martinez is charged if the injury to Rubentania Rijo resulted from the justifiable use of force likely to cause death or great bodily harm.
>
> The use of force likely to cause death or great bodily harm is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting:
>
> 1. another's attempt to murder him, or

2. any attempt to commit Aggravated Battery upon him, or

3. any attempt to commit Attempted murder in any dwelling house occupied by him.

A person is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent:

1. imminent death or great bodily harm to himself or another, or

2. the imminent commission of Attempted Murder and/or Aggravated Battery against himself or another.

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**; or

2. Eric Martinez initially provoked the use of force against himself . . .

(T. 341-42). The emphasized language concerning aggravated battery was added at the request of the prosecutor during the conference on jury instructions, with defense counsel agreeing to the change. (T. 265). There was no objection to the instruction as read to the jury. (T. 354, A. 2).

The jury found Mr. Martinez guilty as charged, making a specific finding that an aggravated battery was committed during the course of the attempted murder. (R. 18).

On appeal, the Third District acknowledged that Mr. Martinez raised the issue of self-defense when he testified. (A. 39). As self-defense was a defense offered at trial, the Third District also agreed that Mr. Martinez was entitled to a self-defense instruction. (A. 45). The lower court further agreed that the

instruction as given, absent an independent forcible felony, was error. (A. 3). The court, however, declined to find that it was fundamental error because self-defense was not the sole defense, was not even the primary theory advanced by trial counsel, and was against the weight of the evidence. (A. 5, 27-46). The opinion also stated in passing that self-defense was legally untenable given the jury's finding of attempted premeditated murder. (A. 46).

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

The instruction given on justifiable use of deadly force was erroneous as Mr. Martinez was only charged with one forcible felony. All courts that have considered this issue, including the decision below, have concluded that the instruction as given is error because it is circular in logic and negates the defense of self-defense.

The error here was fundamental. Every court which has considered this issue, except for the decision below, has concluded that the instructional error is fundamental. Once a defendant introduces a prima facie case of self-defense, it becomes a jury issue and the State's burden is to disprove self-defense beyond a reasonable doubt. Self-defense is thus an element that the jury must consider in reaching its verdict, and the strength of the self-defense claim is for the jury alone, not an appellate court, to decide. By negating the defense of self-defense, the instructional error here made it easier for the State to obtain a conviction,

regardless of whether self-defense was the only defense, the primary defense, or just one of multiple defenses. By depriving Mr. Martinez of the defense of self-defense, the instructional error also impeded his due process right to present a **complete** defense. That the conviction was for attempted premeditated murder does not change the analysis as there are many instances where an intentional killing may be a valid act of self-defense.

As the instruction below was not objected to, review is for fundamental error.

ARGUMENT

WHERE THE DEFENDANT WAS CHARGED WITH ATTEMPTED MURDER AND NO INDEPENDENT FORCIBLE FELONY, THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY ON THE FORCIBLE FELONY EXCEPTION TO SELF-DEFENSE, THUS IMPROPERLY NEGATING THE DEFENSE OF SELF-DEFENSE

Mr. Martinez was charged with just one crime, attempted first degree murder. The information also alleged that he committed an aggravated battery during the court of the attempted murder.

The disputed factual issue at trial was what went on in the bedroom between Ms. Rijo and Mr. Martinez. They both testified, but presented starkly differing stories as to who and what started the altercation. Mr. Martinez's defense, presented through his testimony, was that he was about to fall asleep when she

jumped him, using scissors to try to stab him. He was unable to escape and had to fight for his life in the dark room.

The jury instruction given totally deprived Mr. Martinez of the defense of self-defense, the only complete defense to the crime with which he was charged.[2] The instruction improperly told the jury that the very act which Mr. Martinez sought to justify – aggravated battery – itself precluded a finding of justification. Indeed, the jury did make a specific finding that Mr. Martinez committed an aggravated battery in the course of attempting first degree murder. (R. 18). Having found that Mr. Martinez had committed an aggravated battery, the jury was precluded by the instruction from finding that he had acted in self-defense.[3]

Defense counsel did not object to the instruction given. (A. 2). Reversal is

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[2] The decision below asserts that Mr. Martinez's "primary theory of defense was intoxication." (A. 27, 45, 46) (emphasis in original). In fact, it was no defense at all. The jury was instructed that voluntary intoxication "**is not a defense to any offense proscribed by law, including attempted premeditated murder and aggravated battery.**" (T. 332, 345). The other alternative defenses argued, lack of premeditation and lack of intent to kill (A. 27, 46), would serve only to reduce the charge to something other than attempted first degree murder.

[3] The opinion below discusses and relies upon *Sochor v. State*, 619 So. 2d 285 (Fla. 1993) (A. 8-9), but that case is inapposite as it involved the **failure** to instruct on an affirmative defense which "the state did not have to disprove." *Id*. at 290. Similarly, the cases of *Smith v. State*, 521 So. 2d 106 (Fla. 1988), and *Holiday v. State*, 753 So. 2d 1264 (Fla. 2000) (A. 14), are inapposite as those cases involved an erroneous shifting of the burden of proof, not the total deprivation of a defense, like here. Finally, *Cardenas v. State*, 867 So. 2d 384 (Fla. 2004) (discussed at A. 9-12), was decided based on "the unique nature of the DUI statutory scheme," *id*. at 391, and likewise did not involve the deprivation of any defense.

required, then, only if the error was fundamental. For an instructional error to be fundamental,

> the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. In other words, fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict. Thus, for error to meet this standard, it must follow that the error prejudiced the defendant.

Reed v. State, 837 So. 2d 366, 370 (Fla. 2002) (internal quotation marks and citations omitted).

Every other court that has considered the same instruction has found it to be fundamental error. *McJimsey v. State*, 32 Fla. L. Weekly D 1644, 2007 WL 1931355 (Fla. 4th DCA July 5, 2007); *Johnson v. State*, 32 Fla. L. Weekly D1169, 2007 WL 1261438 (Fla. 3d DCA May 2, 2007); *Blanton v. State*, 956 So. 2d 480 (Fla. 5th DCA 2007); *Flynn v. State*, 947 So. 2d 1229 (Fla. 4th DCA 2007); *Slattery v. State*, 32 Fla. L. Weekly D305, 2007 WL 186947 (Fla. 5th DCA January 26, 2007); *Wilson v. State*, 944 So. 2d 1244 (Fla. 2d DCA 2006); *Ortiz v. State*, 942 So. 2d 1013 (Fla. 2d DCA 2006); *Zinnerman v. State*, 942 So. 2d 932 (Fla. 5th DCA 2006); *Barton v. State*, 941 So. 2d 1291 (Fla. 4th DCA 2007); *Williams v. State*, 937 So. 2d 771 (Fla. 1st DCA 2006); *Jackson v. State*, 935 So. 2d 107 (Fla. 4th DCA 2006); *Smith v. State*, 933 So. 2d 1275 (Fla. 2d DCA 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, 1240 (Fla. 2d DCA 2004) ("The self-defense instruction can be likened to an element of the offense for its importance to the defendant."); *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). "As has been

pointed out in all of the cited cases, unless a separate felony is involved, the forcible felony instruction is circular in its logic and negates the defense of self-defense." *Blanton*, 956 So. 2d at 482.[4]

The decision below stands in lonely contrast to the cases cited above, all of which found the instruction to be fundamental error. Until this case, the only time this instruction was not found to be fundamental error was 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 below correctly found that sufficient evidence was presented to send the question of self-defense to the jury. (A. 45; T. 228, 240, 241, 248).

The decision below does not cite to any case where evidence of self-defense was presented but the instructional error at issue was found to not be fundamental

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[4] The standard jury instructions on justifiable use of deadly force and non-deadly force have recently been amended to include a direction that the forcible felony exception instruction is to be given only if the defendant is charged with more than one forcible felony. *See In re: Standard Jury Instructions In Criminal Cases (2005-4)*, 930 So. 2d 612, 614 (Fla. 2006); *In re: Standard Jury Instructions In Criminal Cases (2006-3)*, 947 So. 2d 1159, 1162 (Fla. 2007).

error because of the existence of other defenses. In fact, no court that has considered this issue has adopted the fundamental error analysis put forward by the panel majority. *See Flynn*, 947 So. 2d at 1230 (calling Third District's opinion "a lengthy and somewhat novel discussion regarding the application of fundamental error analysis to the forcible felony exception instruction" and "declin[ing] to decide whether we agree with the fundamental error analysis employed in *Martinez*"); *Williams*, 937 So. 2d at 774 ("we need not decide whether we agree with all of the *Martinez* majority's discussion regarding fundamental error"); *Smith v. State*, 933 So. 2d at 1277 ("we do not need to decide whether we agree with all of the discussion presented in *Martinez* regarding fundamental error").

The lower court erred in holding that fundamental error occurs only when self-defense is the sole defense. 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). If a legal defense is supported by the evidence, then it necessarily must be considered by the jury. Fundamental error occurs when an omission is pertinent or material to what a jury must consider in order to convict. *Battle v. State*, 911 So. 2d 85, 89 (Fla. 2005). "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*, 901 So. 2d at 986 (citing to *Reed*, 837 So. 2d at 369).

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.[5] Once any evidence of self-defense is presented, it becomes the State's burden to disprove self-defense beyond a reasonable doubt. *See Rasley*, 878 So. 2d 473, 476 (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 includes 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 issue of self-defense, then, was one that a properly instructed jury would necessarily have had to consider when reaching a verdict. Thus, regardless of

[5] In contrast, with the affirmative defense of insanity, "defendant has the burden of proving the defense of insanity by clear and convincing evidence," and with the affirmative defense of entrapment, "the defendant must prove . . . by the greater weight of the evidence that a law enforcement officer or agent induced or encouraged the crime charged." Fla. Standard Jury Instructions in Criminal Cases, 3.6(a) and 3.6(j).

whether self-defense was the "sole defense," *Grier*, 928 So. 2d at 370, the "primary defense," *Flynn*, 947 So. 2d at 1230, or just one of multiple defenses, *Bates*, 883 So. 2d 907[6], the instructional error here made obtaining a conviction easier as it meant that the State no longer had to meet its burden of disproving self-defense.

The instructional error also violated Mr. Martinez's due process right to present a **complete** defense.

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.

California v. Trombetta, 467 U.S. 479, 485 (1984). "[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." *Bradley v. Duncan*, 315 F. 3d 1091, 1099 (9th Cir. 2002) (internal quotation marks omitted). Thus, the "fundamental constitutional right" to present a complete defense "includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault

[6] Bates was charged with aggravated assault but convicted of the lesser included offense of improper exhibition of a firearm, so there were obviously other defenses asserted in addition to self-defense.

was not justified." *State v. Anderson*, 631 A. 2d 1149, 1153 (Conn. 1993); *see also, Miller*, 712 So. 2d at 453 ("fundamental right . . . to have the jury properly instructed on **any** legal defense supported by the evidence."). The existence of "other" defenses, then, does not negate the fundamental nature of the instructional error committed here as that error deprived Mr. Martinez of his ability, protected by the constitution, to present a complete defense.

The opinion below dismissively states that self-defense was not "much of a serious defense in this case" and "was not a serious defense based on the facts." (A. 38, 44). Mr. Martinez presented ample evidence of self-defense, though,[7] and the law is settled that an accused is entitled to have the jury instructed on self-defense once evidence of self-defense is adduced. *Gregory v. State*, 937 So. 2d 180, 182 (Fla. 4th DCA 2007); *Stewart v. State*, 672 So. 2d 865, 867 (Fla. 2d DCA 1996) (once any "evidence of self-defense is adduced, as it was in this case, self-defense becomes an issue for the jury to determine."); *Kilgore v. State*, 271 So. 2d 148, 152 (Fla. 2d DCA 1972) (If Any evidence of a substantial character is

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[7] "She came at me with a razor. . . . I had to defend myself from her. (T. 228).
"She was the one that attacked me first." (T. 240).
"She attacked me." (T. 241).
"She swung at me, several stabs." (T. 245).
"[S]he went crazy. She . . . jumped at me. I was fighting for my life." (T. 248).
"If I would have time to go outside, I would have, but we went crazy. She was jumping at me. I was also fighting for my life." (T. 248).

adduced . . . the element of self-defense becomes an issue, and the jury, as the trier of the facts, should be duly charged as to the law thereon, because it is the jury's function to determine that issue."). Further, as *Reed* makes clear, the lower court's opinion of the facts is simply not relevant to the determination of whether fundamental error occurred. "[W]hether the evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecutor's argument are not germane to whether the error is fundamental." *Reed*, 837 So. 2d at 369.

"The question of self-defense is one of fact, and is one for the jury to decide where the facts are disputed." *Dias v. State*, 812 So. 2d 487, 491 (Fla. 4th DCA 2002). An appellate court must adhere to this proposition. *Rasley v. State*, 878 So. at 476. There was ample evidence here, in the form of Mr. Martinez's testimony, from which a jury could conclude that he acted in self-defense. The proper issue before the Third District, then, was the jury instruction, not its assessment of the reasonableness of Mr. Martinez's claim of self-defense. The error here totally deprived Mr. Martinez of the defense of self-defense, making a conviction easier to obtain, and so was fundamental error regardless of the lower court's view of the strength of the defense of self-defense.

The last basis of the holding below was that "Self-defense was also legally untenable based upon the jury's finding that this was a premeditated attempt to

murder the victim." (A. 45, 46). According to the lower court, "A finding of a premeditated intent to kill totally negates a finding of self-defense." (A. 46) (emphasis in original). This analysis is flawed both factually and legally. Of particular note, *McJimsey* and *Zinnerman* each involved charges and convictions of attempted premeditated first degree murder, just like here. Neither case, though, saw fit to even mention, much less adopt, the discussion of fundamental error found in the decision below.

From a factual viewpoint, it is easy to imagine a scenario where an intentional killing is done in self-defense. "Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of that act." *Pearce v. State*, 880 So. 2d 561, 572 (Fla. 2004). Cornered by an implacable, life-threatening attacker, one could reflect on one's options and decide upon the necessity of killing the attacker in order to survive, thus satisfying the requirements of both premeditation and self-defense.

From a legal viewpoint, this Court has already rejected a similar argument concerning the need to properly instruct the jury on justifiable and excusable homicide as part of a manslaughter instruction. In *Stockton v. State*, 529 So. 2d 739 (Fla. 1st DCA 1988), the defendant was tried on a charge of second degree

murder. During deliberations, the jury asked for a reinstruction on second degree and third degree murder. The trial court reinstructed on second degree murder, third degree murder and manslaughter, but refused to reinstruct on justifiable and excusable homicide. *Id*. at 741. On appeal, the First District held that "the jury's request for reinstruction as to the distinction between second degree and third degree murder indicates that it had determined that the killing was neither justifiable nor excusable homicide [and so] in these circumstances the court's refusal to further instruct the jury on justifiable and excusable homicide does not constitute reversible error." *Id*.

This Court quashed the opinion of the First District, saying "We reject the state's contention that the refusal to include justifiable and excusable homicide in the reinstruction, in this case, was not error because the jury's request demonstrates that it had already determined the homicide was unlawful." *Stockton v. State*, 544 So. 2d 1006, 1008 (Fla. 1989).[8] The similar contention made in the decision below – that the finding of premeditation negated any possibility of finding self-defense – should likewise be rejected as both factually and legally unsound.

The record below shows that there was evidence of self-defense presented

[8] The same result was reached in *Garcia v. State*, 535 So. 2d 290 (Fla. 3d DCA 1988), *quashed Garcia v. State*, 552 So. 2d 202 (Fla. 1989); and *Rojas v. State*, 535 So. 2d 674 (Fla. 5th DCA 1988), *quashed Rojas v. State*, 552 So. 2d 914 (Fla. 1989).

by Mr. Martinez. The burden, then, should have been on the State to disprove self-defense beyond a reasonable doubt, and a properly instructed jury would necessarily have had to consider whether the State met that burden in reaching its verdict. The instructional error, though, totally deprived Mr. Martinez of his defense of self-defense and meant that the State did not have to carry any burden of disproving the defense and that the jury did not have to consider the issue. The instruction was thus fundamental error as it was pertinent and material to what the jury had to consider in reaching a verdict, made obtaining a conviction easier, and deprived Mr. Martinez of his right to present a complete defense.

CONCLUSION

For the foregoing reasons, the decision below should be quashed and the case remanded for a new trial before a properly instructed jury.

Respectfully submitted,

BENNETT H. BRUMMER

Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 545-1958

By: _____
Robert Godfrey
Assistant Public Defender
Florida Bar No. 0162795

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Initial Brief on the Merits was mailed to Kristen L. Davenport, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, on August 9, 2007.

_____
Robert Godfrey
Assistant Public Defender
Florida Bar No. 0162795

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).

_____
Robert Godfrey
Assistant Public Defender