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

REPLY BRIEF OF PETITIONER ON THE MERITS

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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

A. The Instruction Was Error

Despite the unanimous condemnation of the instruction at issue when just one forcible felony is alleged, the State persists in arguing that the instruction as given was correct, and that the forty-plus decisions holding otherwise are incorrect. (State Br. at 8-13). The State is mistaken and, in fact, its argument demonstrates why the instruction was error in this case.

The instruction on the forcible felony exception to self-defense should not be given unless the defendant is alleged to have also committed a separate forcible felony.[1] The reason why giving the instruction when a defendant is charged with a single forcible felony is error was succinctly stated in *Williams v. State*, 937 So. 2d 771 (Fla. 1st DCA 2006):

> [W]here the defendant is charged with a single forcible felony for which the defendant claims self-defense, it constitutes fundamental

[1] The instruction in this case explained that it was a defense if the injuries to Ms. Rijo occurred as a result of the justifiable use of deadly force, but then told the jury that deadly force was not justifiable if Mr. Martinez was attempting to commit, committing or escaping after the commission of Attempted Murder and/or Aggravated Battery. (T. 341-42).

> error to instruct the jury on the forcible felony exception to self-defense because it totally negates the defense by improperly instructing the jury that the very act the defendant seeks to justify as an act of self-defense prevents the same act from being an act of self-defense.

Id. at 773. The instruction is circular and confusing when a separate forcible felony is not alleged. *E.g.*, *Giles v. State*, 831 So. 2d 1263, 1266 (Fla. 4th DCA 2002). Here, once the jury found that Mr. Martinez had committed an aggravated battery, it was precluded by the instruction from considering the self-defense claim. Giving the instruction took consideration of Mr. Martinez's self-defense claim out of the jury's hands altogether. *Sloss v. State*, 2007 WL 2736312 (Fla. 5th DCA September 19, 2007).

In its brief, the State posits that "the Legislature has determined that an individual cannot commit a crime and then claim self defense when the victim or a bystander opposes him." (State Br. at 9). Petitioner does not dispute this assertion, but it has no relevance to this case. In its supporting hypothetical, the State asks this Court to consider a scenario where a defendant is choking and cutting his girlfriend, at which point she grabs a pair of scissors and cuts him and he takes away the scissors and stabs her. (State Br. at 9-10).

That hypothetical is not the defense in this case. Mr. Martinez's testimony was that he was lying down and about to fall asleep when Ms. Rijo came at him with a pair of scissors. (T. 228, 244). He never testified that he initiated the

conflict, so the State's hypothetical is inapposite.[2]

The State writes "if the justification arose before he committed the crime . . . then this exception would not apply and he would be justified in using force." (State Br. at 10). **That** was Mr. Martinez's defense at trial. He was lying down when Ms. Rijo came at him with a pair of scissors and he had to defend himself. (T. 228, 244). She attacked him first. (T. 240-41). She tried to stab him several times. (T. 245). The State, then, **agrees** that, under his version of the events, Mr. Martinez was justified in using deadly force to defend himself. By its own argument, the State has aptly demonstrated the error in the instruction given here as that instruction precluded the jury from considering what the State now acknowledges was a viable claim of self-defense.

The State laments that "One is left to wonder how this instruction can **ever** be properly given." (State Br. at 13 n.3). The answer is simple: The forcible felony exception to self-defense is given "only if the defendant is charged with more than one forcible felony." *In re: Standard Jury Instructions In Criminal Cases (2005-4)*, 930 So. 2d 612, 614 (Fla. 2006); *In re: Standard Jury Instructions*

[2] The other hypothetical posited by the State, involving a convenience store robbery where a customer hits the defendant in the head (State Brief at 9), is also obviously irrelevant to this case.

In Criminal Cases (2006-3), 947 So. 2d 1159, 1162 (Fla. 2007).[3] For example, this Court has found that self-defense is legally unavailable when a defendant kills someone when escaping from the commission of a burglary, *Freeman v. State*, 761 So. 2d 1055, 1064 (Fla. 2000), or from the commission of robbery and attempted sexual battery, *Holland v. State*, 916 So. 2d 750 (2005). In this case, though, there was no independent forcible felony and so giving the instruction was error.

B. The Error Was Fundamental

The State acknowledges that jury instructions may constitute fundamental error when the error "is pertinent or material to what the jury must consider in order to convict." (State Br. at 14). *See Cardenas v. State*, 867 So. 2d 384, 390-91 (Fla. 2004); *Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002); *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991). As set out in Petitioner's Initial Brief (at 13-14), once evidence of self-defense is presented, it becomes the State's burden to disprove self-defense beyond a reasonable doubt. The State does not dispute this settled law. The issue of self-defense, then, was one that the jury had to consider in order to convict Mr. Martinez.

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[3] The State submits that the district courts have all improperly interpreted Section 776.041, Fla. Stat., the statute upon which the forcible felony excpetion instruction is based (State Br. at 12-13), but the State does not address this Court's authorization of a change in the instructions on both deadly and non-deadly force to comply with those decisions of the district courts.

The State's reliance (State Br. at 16) on *Sochor v. State*, 619 So. 2d 285 (Fla. 1993), is misplaced as that case involved a failure to instruct on a defense, not an erroneous instruction on a defense as here. This Court in *Holiday v. State*, 753 So 2d 1264 (Fla. 2000), specifically held that *Sochor* "does not control the fundamental error question" in cases involving an erroneous instruction. *Id*. at 1269.[4]

The decision in *Holiday* does not assist the State. The issue there involved an instruction on entrapment. The instruction given told the jury that "the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of entrapment." The instruction that should have been given would have additionally told the jury that, if the defendant proved a law enforcement officer induced or encouraged the crime charged, then the State had to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime charged. 753 So. 2d at 1266-68. In deciding whether the instruction was fundamental error, this Court relied upon its decision in *Smith v. State*, 521 So. 2d 106 (Fla. 1988), where the instruction on insanity, like the entrapment instruction in *Holiday*, "failed to accurately explain the shifting burdens of proof involved in

[4] Thus, two other cases cited by the State (State Br. at 17), *Bridges v. State*, 878 So. 2d 483 (Fla. 4th DCA 2004), and *Goode v. State*, 856 So. 2d 1101 (Fla. 1st DCA 2003), are also inapposite as both of those cases also involved a failure to instruct on an affirmative defense.

those affirmative defenses." *Holiday*, 753 So. 2d at 1269.

Thus, in both *Holiday* and *Smith*, the jury was able to consider the affirmative defenses presented, albeit with incomplete instructions on the burden of proof. This Court found no fundamental error in those cases because there was no constitutional infirmity or denial of due process in placing the burden of proof of those defenses on the defendant. *Holiday*, 753 So. 2d at 1270.

This case is different. Because the instruction on the forcible felony exception to self-defense was given, the jury here was totally unable to consider Mr. Martinez's defense of self-defense. *E.g.*, *Sloss*, 2007 WL 2736312 ("giving the instruction takes consideration of [defendant's] self-defense claim out of the jury's hands altogether"); *Bertke v. State*, 927 So. 2d 76, 77 (Fla. 5th DCA 2006) ("If a separate forcible felony is not involved, the giving of the instruction essentially negates the defense of self-defense."). Further, as argued in Petitioner's Initial Brief (at 14-15), the instruction here did deny Mr. Martinez his due process right to present a **complete** defense. The State does not dispute this assertion in its brief.

The State further relies on *Holiday* to argue that "relief is not appropriate where the defense was 'tenuous at best and the facts do not present a compelling demand for relief.'" (State Br. at 18) (quoting *Holiday*, 753 So. 2d at 1270 n.3). The State has taken this Court's footnote completely out of context. The issue in

Holiday, again, was an instruction on entrapment and, under either version of the instruction, the defendant had the burden of proving by a preponderance of the evidence that a law enforcement officer encouraged or induced him to commit the crime charged. Footnote 3 of that opinion reads as follows:

> As an aside, we note that the entrapment defense in this case was tenuous at best and the facts do not present a compelling demand for relief. Taking Holiday's testimony as true, not only had he used drugs prior to encountering the officers, he was the one who suggested receiving a piece of any drug delivered to the officers. Further, Holiday had three prior felony convictions for sale or delivery of cocaine, which is the same offense at issue here. These facts weighed heavily in establishing Holiday's predisposition to commit the crime charged.

Thus, the introductory phrase of the footnote shows that it is dicta. Further, the body of the footnote shows that this Court was not discussing fundamental error but was questioning whether Holiday had met his initial burden of proof, regardless of which version of the entrapment instruction was given. Here, there is no dispute that Mr. Martinez met his burden of introducing evidence of self-defense. *See* Petitioner's Initial Brief at 15 n.7. Indeed, the court below acknowledged that there was sufficient evidence of self-defense to enable the matter to go to the jury. *Martinez v. State*, 933 So. 2d 1155, 1172, 1175 (Fla. 3d DCA 2006) (A. 39, 45).

The State's last argument is that the erroneous instruction had no effect on the trial. In making this argument, the State provides its view of the strength of the

defense of self-defense, much like the court below did. (State Br. at 18-22). This analysis is fatally flawed, however, as it is not fundamental error analysis; it is harmless error analysis.

The State asserts that "there simply was no credible evidence to support the Defendant's theory of self-defense." (State Br. at 18). Credibility, though, is for a jury to decide, not a trial or appellate court. *E.g.*, *Rasley v. State*, 878 So. 2d 473, 476 (Fla. 1st DCA 2004) (an appellate court, in reviewing a record in a case of self-defense, must heed the rule that the question self-defense is one of fact for the jury to decide); *Upshaw v. State*, 871 So. 2d 1015, 1017 (Fla. 2d DCA 2004) ("It is for the jury, not the court, to determine what weight to give the defendant's evidence."); *Goode v. State*, 856 So. 2d 1101, 1104 (Fla. 1st DCA 2003) ("weighing the evidence . . . is a task for the jury"); *Rockerman v. State*, 773 So. 2d 602, 603 (Fla. 1st DCA 2000) ("Weighing the evidence is the province of the jury.").

The State appears to be relying on the lower court's determination that an examination of the entire record is required to determine if the error was fundamental. *See Martinez*, 933 So. 2d at 1162 (A. 15). The lower court erred, however, by examining the record for the purpose of making its own assessment of the strength of the defense of self-defense, and then rejecting the error as non-fundamental on the basis of its assessment of that defense.

A proper examination of the record in cases involving this instructional error should look at just two matters: (1) Was the issue of self-defense raised? (2) Was there evidence to support that defense? If the answer to both questions is yes, then the error was fundamental.

Thus, for example, *Hickson v. State*, 873 So. 2d 474 (Fla. 4th DCA 2004), involved a claim of ineffective assistance of trial counsel for failing to raise the issue about this instruction. The court granted a belated appeal on this issue, noting that "the fundamental nature of the error can be determined only after review of the entire record on appeal." *Id*. at 475. When the case came back before the Fourth District on the belated appeal, the court affirmed the conviction, holding that "after a review of the entire record on appeal . . . [w]e find that the failure of Hickson's counsel to object to an erroneous jury instruction at trial did not amount to fundamental error **because Hickson was not entitled to the self-defense instruction at trial.**" *Hickson v. State*, 917 So. 2d 939, 940 (Fla. 4th DCA 2005) (emphasis added).

In *Barnes v. State*, 932 So. 2d 589 (Fla. 5th DCA 2006), the petitioner sought a belated appeal due to the failure of his original appellate counsel to argue that the instruction on the forcible felony exception constituted fundamental error. *Id*. at 590. The Fifth District "grant[ed] petitioner a belated appeal as a review of the entire record may yet demonstrate that the erroneous jury instruction did not

amount to fundamental error." *Id*. at 591. In support of its ruling, the Fifth District cited to *Hickson*, 917 So. 2d 939, for the proposition that the instruction would not amount to fundamental error if appellant was not entitled to receive the self-defense instruction at trial. *Id*.

In *Ortiz v. State*, 905 So. 2d 1016 (Fla. 2d DCA 2005), the issue was also whether appellate counsel was ineffective for failing to argue that the instruction on justifiable use of force was fundamental error. The court granted an appeal on the matter, saying that "A determination as to whether the justifiable use of deadly force instruction constituted fundamental error requires a full review of the record on appeal." *Id*. at 1017. When the case came back before the Second District on the appeal it had granted, the court found the error was fundamental. In doing so, the court "expressly reject[ed] the State's argument that the error was not fundamental because, as a matter of law, Mr. Ortiz was not entitled to an instruction on self-defense." *Ortiz v. State*, 942 So. 2d 1013, 1014 (Fla. 2d DCA 2006). Although the Second District characterized the theory of self-defense and the evidence supporting it as "debatable," the defendant's testimony in support of self-defense entitled him to "a legally adequate instruction on self-defense" and so fundamental error existed and a new trial was required. *Id*. at 1015.

In *Sutton v. State*, 929 So. 2d 1105 (Fla. 4th DCA 2006) (cited in State Br. at 19), the court held that the instruction at issue here "does not constitute

fundamental error if the evidence adduced at trial does not support a self-defense instruction." *Id*. at 1107. The court then examined the record and determined that "there was no evidence" to support self-defense and so "Sutton was not entitled to an instruction on the use of deadly force in self-defense." *Id*.

No appellate court faced with this instructional error, other than the one below, has examined the record for the purpose of making its own assessment of the **strength** of the defense of self-defense. The lower court, and the State in its brief, err in attempting to make that evaluation. Mr. Martinez presented sufficient evidence of self-defense for the matter to go to the jury, self-defense was argued in both opening statement (T. 135-36) and closing (T. 289), and the jury was instructed on self-defense. It was fundamental error, then, to improperly instruct the jury in a manner that effectively took the question of self-defense out of the jury's hands.

The State claims that the erroneous instruction "did not relate to a significant factor." (State Br. at 19). Self-defense, though, was the only defense that could possibly enable Mr. Martinez to walk out of the courtroom a free man. Liberty is a significant factor for any criminal defendant.

The State also, somewhat incredulously, claims that the erroneous instruction "did not completely deprive" Mr. Martinez of the defense of self-defense because "the jury was specifically instructed that if it had a reasonable

doubt as to whether the Defendant was justified in the use of deadly force it should find him not guilty." (State Br. at 19-20). Not surprisingly, the State makes no attempt to explain how it thinks a jury could follow the instructions that were given and still find Mr. Martinez not guilty on the basis of self-defense. His testimony acknowledged that he had stabbed Ms. Rios and the instruction told the jury that the use of deadly force was not justifiable if Mr. Martinez was committing an aggravated battery. (T. 341-42). It was, as every other court that has considered this issue has recognized, impossible for a jury that conscientiously followed instructions to find self-defense where the defendant had, in effect, conceded that he committed a forcible felony. His assertion that the forcible felony was necessarily committed in self-defense was not something the jury could give effect to under the instruction that was given.

The State decries the lenient standard for entitlement to a self-defense instruction, claiming that "this standard itself opens the door for affirmative defenses with little realistic chance for success (as was the case here)." (State Br. at 21). Once again, the State seeks to usurp the role of the jury. The fact that a defendant is entitled to an instruction on self-defense once any evidence of self-defense is presented is a recognition of the basic principle that, in this country, an accused is entitled to be tried by a jury of his or her peers, and to have juries decide issues of fact, not judges. Mr. Martinez was deprived of this basic right by the

faulty instruction given here.

The record in this case shows that evidence of self-defense was produced and it was a disputed issue for the jury to decide. The issue of self-defense was thus pertinent or material to what the jury should have had to consider in order to convict since the burden was on the State to disprove self-defense beyond a reasonable doubt. The erroneous instruction took the issue of self-defense out of the jury's hands, depriving Mr. Martinez of the only defense that could free him. Fundamental error occurred, and it should now be corrected by awarding Mr. Martinez a new trial at which a properly instructed jury can consider his defense of self-defense.

CONCLUSION

For the foregoing reasons, as well as those stated in the initial brief, the decision below should be quashed and the case remanded for a new trial before a properly instructed jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply 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 September 25, 2007.

_____
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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).

_____
Robert Godfrey
Assistant Public Defender