IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC07-1778
	)	
TROY McJIMSEY,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT=S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and the appellant in the Fourth District Court of Appeal. Petitioner was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts supplied by petitioner in its jurisdictional brief.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

This Court should decline to exercise its conflict jurisdiction over the decision of the Fourth District Court of Appeal since it is not in express and direct conflict with the decision of the Third District Court of Appeal. Both courts agree that including the forcible felony exception in the justifiable use of deadly force instruction is error when the defendant is charged solely with attempted first degree murder and no other forcible felony. In addition, both courts agree that if self-defense is the sole defense raised and the improper inclusion of the forcible felony exception negates the defense, the error is fundamental. Although the Third District found the error was not fundamental in *Martinez v. State,* 933 So. 2d 1155

(Fla. 3d DCA 2006) *rev. granted*, 959 So. 2d 717 (Fla. 2007), while the Fourth District found that it was in *McJimsey v. State*, 959 So. 2d 1257 (Fla. 4th DCA 2007), substantial differences in the controlling facts warranted the different outcomes. Accordingly, *McJimsey* is not in express and direct conflict with *Martinez*.

ARGUMENT

POINT ON APPEAL

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW *McJIMSEY v. STATE*, 959 So. 2d 1257 (Fla. 4th DCA 2007), WHERE THE DECISION RENDERED IS NOT IN EXPRESS AND DIRECT CONFLICT WITH *MARTINEZ v. STATE*, 933 So. 2d 1155 (Fla. 3d DCA 2006).

Article V, section 3(b)(3) of the *Florida Constitution* vests this Court with jurisdiction to hear appeals in criminal cases as follows:

> (3) May review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law.

accord Fla. R. App. P. 9.030(a)(2)(A)(iv).

In *Nielson v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960), this Court discussed "conflict jurisdiction" stating:

> the principal situation justifying the invocation of our jurisdiction to review decisions of Courts of Appeal

> because of alleged conflict are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a case disposed of by this Court.

Id. at 734; *accord Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). "The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents." *Kincaid v. World Insurance Co.*, 157 So. 2d 517, 518 (Fla. 1963). Contrary to petitioner's assertion, the decision of the Fourth District Court of Appeal in *McJimsey v. State*, 959 So. 2d 1257 (Fla. 4th DCA 2007) is not in express and direct conflict with that of the Third District Court of Appeal in *Martinez v. State*, 933 So. 2d 1155 (Fla. 3d DCA 2006) *rev. granted*, 959 So. 2d 717 (Fla. 2007).

In *McJimsey*, where the respondent was charged solely with attempted first degree murder and no other forcible felony, the jury instruction addressing the justifiable use of force likely to cause death or great bodily harm included the following caveat:

> However, the use of force likely to cause death or great bodily harm is not justifiable if you find:
>
> 1. Troy A. McJimsey was attempting to commit, committing, or escaping from the commission of armed

> attempted murder in the first degree or attempted murder in the first degree.
>
> Armed attempted murder in the second degree, or attempted second degree murder, aggravated battery, aggravated assault, battery, or assault.

959 So. 2d at 1259-1260.

The Fourth District found error in the inclusion of the forcible felony exception in the justifiable use of deadly force instruction to be error and deemed the error fundamental because it Aforced the jurors to decide ... guilt or innocence in a manner the was patently circular, confusing and had the overall effect of negating the defendant=s sole defense.@ *Id.*[1]

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[1] In *Giles v. State*, 831 So. 2d 1263 (Fla. 4th DCA 2002) the court addressed the forcible felony exception stating:

> The instruction is normally given in situations where the accused is charged with at least two criminal acts, the act or which the accused is claiming self-defense and a separate forcible felony. *See Marshall v. State*, 604 So.2d 799 (Fla.1992)(holding that section 776.041 jury instruction was proper on claim of self-defense to charge of felony murder where underlying felonies were burglary and aggravated battery); *cf. Perkins*, 576 So.2d at 1311. Here, by contrast, Giles committed only one act, the alleged aggravated battery.
>
> The instruction given improperly told the jury that the very act Giles sought to justify itself precluded a finding of justification. Essentially, the jury was instructed that 776.041(1) would apply to preclude a

In *Martinez,* where the defendant was charged solely with attempted first degree murder, the jury instruction addressing the justifiable use of force likely to cause death or great bodily harm included the following caveat:

> 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 an Attempted Murder and/or Aggravated battery....

933 So. 2d at 1157.The Third District found that Agiv[ing] this instruction absent an independent forcible felony [was] error.@ *Id*. The Third District also stated:

> We *acknowledge* that an erroneous instruction regarding an affirmative defense can, under certain circumstances, constitute fundamental error. Additionally, we acknowledge that the giving of the aggressor portion of the self-defense instruction absent an independent forcible felony, can result in fundamental error. Where we disagree with the dissent is that we do not conclude that absent a contemporaneous objection, the instruction given automatically requires a finding that fundamental error has occurred.

Id. at 1162 (emphasis in original).

> self-defense claim, when it is claimed that the acts with which the defendant is charged are themselves committed in appropriate self-defense. Thus, even if the jury found that Giles' act of aggravated battery was committed in self-defense, then the use of force was not justifiable because the act itself is a forcible felony.

The Third District acknowledged that it the erroneous inclusion of the forcible felony exception to the justifiable use of deadly force instruction negated the defendant=s sole defense of self-defense, thereby depriving him of a fair trial, it would find the error fundamental. *Id*. at 1158 & 1162-1166. Although determining that the improper instruction could constitute fundamental error, the Third District concluded that the case before it did not present fundamental error because:

> self-defense was not the defendant's sole defense; it was not his primary defense; it was a defense unsupported by the evidence; and because the jury found that the defendant had a premeditated intent to kill, there is not a reasonable possibility that the erroneous portion of the self-defense instruction which was given, contributed to the defendant's conviction, denied the defendant due process of law, or denied the defendant his right to a fair trial.

Id. at 1175.[2]

[2] Because it earlier said that it most likely would have agreed that fundamental error occurred if the erroneous instruction had negated the defendant=s sole defense of self-defense, 933 So. 2d at 1158, its statement that the jury=s finding that Martinez acted with premeditation made it unlikely that the erroneous instruction contributed to the verdict, is confusing. Claims of self defense are in the nature of an admission and avoidance, *Keyes v. State*, 804 So. 2d 373, 375 (Fla. 4th DCA 2001), *viz*, I did it but I did so to protect myself, *Dwyer v. State*, 743 So. 2d 46, 49 (Fla. 5th DCA 1999)(Harris, J., dissenting). Premeditation, which can be formed moments before the act, is a fully-formed conscious purpose to kill. *Green v. State*, 715 So. 2d 940, 943-944 (Fla. 1998). One fearing death at the hands of another, and who believes that his very survival can only be assured by killing his attacker, may well have a fully-formed conscious purpose to kill when acting in self-defense. If the Third District intended to suggest that self-defense is not

McJimsey did not announce a rule of law that was in conflict with the rule of law announced in *Martinez*. Both district courts agree that including the forcible felony exception in the instruction covering the justifiable use of deadly force is error when the defendant is charged solely with attempted first degree murder and no other forcible felony and that the error is fundamental if it negates the defendant=s sole defense of self-defense. Accordingly, no express and direct conflict exists regarding the rule of law announced in the cases.

The controlling facts in *McJimsey* and *Martinez* were not substantially the same and, as a result, the different outcomes in the cases do not give rise to express and direct conflict. In *McJimsey*, although the alleged victim, who admitted to drinking before the altercation, testified to an unprovoked knife attack, the respondent testified that:

> after some disagreement, the victim attacked appellant and they wound up in a bear hug, punching and pulling

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available, as a matter of law, as a defense to first and attempted first degree premeditated murder it was mistaken. *See Young v. State,* 739 So. 2d 553, 560 (Fla. 1999). If the Third District meant that a jury=s finding that a defendant acted with premeditation indicated that it rejected a claim of self-defense, it failed to appreciate that the rejection may have been based upon an erroneous instruction, not the facts presented at trial. Regardless of why the Third District inserted the tatement in its opinion, since it determined that erroneous instruction did not negate Martinez=s sole defense, the statement was not necessary to the decision rendering it *dicta*. *See generally Ciongoli v. State*, 337 So. 2d 780, 781 (Fla. 1976)(*dicta* will not support conflict jurisdiction).

> each other's hair. The altercation stopped temporarily, but the victim soon resumed attacking appellant in the foyer at the front door, banging appellant's head on the tile floor. Appellant admitted that he then went into the living area, grabbed his knife from a table and stabbed the victim in self-defense.

959 So. 2d at 1258.

Moreover, the sole defense raised by McJimsey was self-defense. *Id.* at 1260.

A review of the decision in *Martinez* reflects not only that self-defense was neither the sole nor primary defense, but also that any claim by the defendant that he was attacked by the victim, making it necessary for him to resort to deadly force, was incredible, as shown through his own testimony on direct and cross-examination. 939 So. 2d at 1167-1175.[3] Although Martinez initially testified that the victim attacked him with a razor, when cross-examination exposed discrepancies in his account, the razor became a pair of scissors and when pressed the defendant claimed the victims injuries were self-inflicted, not the result of him defending himself. *Id.* at 1170-1171. As the Third District stated:

> We conclude, therefore, that self-defense or justifiable use of deadly force was not the defendant's sole defense, it was not his primary defense, it was not a serious defense based on the facts, and certainly was not a Afeature@ of defense counsel's closing argument. Even

[3] The alleged victim testified to a wholly unprovoked attack. 939 So. 2d at 1169.

> the defendant, himself, never claimed that he stabbed the victim defending himself from force likely to cause great bodily harm. He claimed, instead, that the victim's injuries were self-inflicted and accidental. Not once did he admit to using any deadly force himself, or claim that he had to use deadly force to defend himself.

933 So. 2d at 1174.

Appellee=s recognition that some factual differences exist between *McJimsey* and *Martinez* is understated. Day and night could not be any more different. Any claim that the holding in *Martinez*, based upon similarity of facts, required the Fourth District in *McJimsey* to find an absence of fundamental error is misplaced. The stark contrast in facts caused application of the same rule of law to produce different outcomes. Accordingly, application of the same rule of law to reach different results did not give rise to express and direct conflict.

CONCLUSION

Petitioner has failed to demonstrate the existence of express and direct conflict and, as a result, this Court should deny the petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Respondent's Brief on Jurisdiction has been furnished by courier to Mr. Daniel P. Hyndman, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 this 2nd day of October, 2007.

_____
David John McPherrin

CERTIFICATE OF FONT SIZE

In accordance with *Florida Rule of Appellate Procedure* 9.210, petitioner hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

_____
David John McPherrin