IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC07-_1778_____

STATE OF FLORIDA,

Petitioner,

vs.

TROY MCJIMSEY,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal ("Fourth District"). (In the opinion of the Fourth District, the Respondent is referred to as "appellant.")

STATEMENT OF THE CASE AND FACTS

The facts of the case as they appear in the opinion of the Fourth District are as follows:

> The victim, described by appellant after his arrest as a "scumbag", was living with appellant's sister in her apartment. Appellant had been staying at the apartment for a few days while his sister and the victim were out of town and, according to appellant, they returned to the apartment drunk. According to the Appellant, after some disagreement, the victim attacked appellant, and they wound up in a bear hug, punching and pulling 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.
>
> The victim corroborated that appellant had been staying at the apartment with the permission of the victim and appellant's sister, and that when they returned they had

> been drinking. The victim told the appellant he could not stay there any longer, and the appellant went from outside the front of the apartment around to the back patio and started drinking beer with a boom box playing loudly. The victim was concerned that the noise would cause appellant's sister, who was renting the apartment, to be evicted. He again told appellant to leave and closed the sliding door. The next thing the victim knew was that he felt stinging in the back of his shoulder, and when the victim turned around appellant stabbed him several times in the abdomen.

McJimsey v. State, 959 So. 2d 1257, 1258-1259 (Fla. 4th DCA 2007). The Respondent was convicted of attempted first degree premeditated murder with a deadly weapon. Id. at 1258. The Fourth District rejected the Respondent's argument that there was insufficient evidence of premeditation. Id. at 1259. However, the Court agreed with the Respondent that "the trial court committed fundamental error when it gave an incorrect self defense jury instruction on the justifiable use of deadly force", and reversed for new trial. Id. at 1258.

> . . . fundamental error occurred when the court, after instructing the jury on self-defense, went on to state:
>
> 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.
>
> We have previously held this instruction, based on section 776.041(1), Florida Statutes (2004), to be fundamental error in *Estevez v. State*, 901 So. 2d 989, 991 (Fla. 4th DCA 2005) under the same circumstances . . .
>
> * * *
>
> In this case, where appellant was charged solely with attempted first degree murder and no other forcible felony, the instruction was erroneous. Our sister courts have also concluded that, in circumstances which are not distinquishable from this case, it is fundamental error to give this instruction . . .

Id. at 1259-1260. The Court then cited decisions from the First, Second, and Third Districts, as well as it own decision in Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002), and reversed for a new trial. McJimsey, 959 So. 2d at 1260.

After the Petitioner's motion for certification of question was denied, the Petitioner invoked the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. and Article V, Section 3(b)3 of the Constitution of the State of Florida.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction. The decision of the Fourth District expressly and directly conflicts with the decision of the Third District in Martinez v. State, 933 So. 2d 1155 (Fla. 3d DCA 2006). In the instant case, the Fourth District held that the erroneous jury instruction on justifiable use of deadly force constituted fundamental error. However, in Martinez, under factual circumstances comparable - - although not identical - - to the instant case, the Court found that "the erroneous instruction did not constitute fundamental error in this case." Id. at 1167.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION SINCE THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH MARTINEZ V. STATE, 933 So. 2d 1155 (Fla. 3d DCA 2006), ON THE SAME QUESTION OF LAW

The Petitioner has invoked the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P,

and Article V, Section 3(b)(3), Constitution of the State of Florida. The decision of the Fourth District is expressly and directly in conflict with the decision of the Third District in Martinez. Accordingly, this Court should accept jurisdiction.

In Martinez, the Court provided a history of the decisions which have addressed the jury instruction in question: "The first case we have found in which the giving of the self-defense instruction absent an independent forcible felony was found to be error, was in Judge Schwartz's dissent in *McGahee v. State*, 600 So. 2d 9 (Fla. 3d DCA 1992)." Id. at 1164. Ten years later:

> . . . the Fourth District reversed a conviction in which this same instruction was given. *Giles v. State*, 831 So. 2d 1263 (Fla. 4th DCA 2002). In *Giles*, which has since become the leading case regarding the specific instruction complained of herein, the Fourth District concluded that it was error to instruct the jury on the forcible felony portion of the self-defense instruction absent an independent forcible felony being charged against the defendant. The Fourth District concluded, as did Judge Schwartz in his dissenting opinion in *McGahee* ten years earlier, that this instruction, absent an independent forcible felony, was confusing . . .
>
> * * *
>
> . . . The following year, in *Rich v. State*, 858 So. 2d 1210 (Fla. 4th DCA 2003), the Fourth District also concluded that the trial court committed fundamental error when

it gave the same instruction . . .

Id. The Court then cataloged a number of decisions which followed Giles and Rich v. State, 858 So. 2d 1210 (Fla. 4th DCA 2003), which "all concluded that either fundamental or reversible error was committed when the instant instruction operated to negate the defendant's **sole defense** . . ." Martinez, 933 So. 2d at 1165 (emphasis in original). Thereafter, the Court concluded that "the appellate courts have consistently found fundamental error in those cases where the erroneous instruction negates the defendant's **sole defense** to the crime charged." Id. at 1166 (emphasis in original). Finally, the Court concluded that the error was not fundamental in the case under review since self-defense was not the defendant's only defense. Id.

The Martinez Court then conducted a close factual review of the case which reveals that several significant facts are similar to those of the instant case:

1. In Martinez, the defendant testified that he had an argument with the victim right before a physical struggle began, Id. at 1170; in the instant case, the Respondent testified that he had a "disagreement" with the victim (whom he described as a "scumbag"), McJimsey, 959 So. 2d at 1258;

2. In Martinez, the victim suffered numerous stabbing

wounds, including a wound to her back, Id. at 1167, 1169-1170; in the instant case, the victim was stabbed in the back of his shoulder, and, when he turned around, the Respondent "stabbed him several times in the abdomen", McJimsey, 959 So. 2d at 1259;

3. In each case, the juries found that the accused had a premeditated intent to kill; Martinez, 959 So. 2d at 1175; McJimsey, 959 So. 2d at 1258.

There are, of course, some factual differences in the cases: in Martinez, the victim was the defendant's girlfriend, id. at 1257, while in the instant case, the victim lived with the Respondent's sister. McJimsey, 959 So. 2d at 1258. (Notably, the defendants in each case and the victims were cohabitants when the crimes occurred). Furthermore, the Petitioner acknowledges that the Martinez defendant did not rely upon the theory of self-defense to the extent that the Respondent may have: "While the defendant raised the issue of self-defense when he testified, this was never the thrust of his defense." Id. at 1172. However, this difference is not significant enough to extinguish a basis for conflict review under Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. C.f., Hardee v. State, 534 So. 2d 706 (Fla. 1988)(when there is a fair implication of conflict, there is a basis for conflict jurisdiction).

In each case, the erroneous jury instruction did not

constitute fundamental error, which is defined by this Court as error which must "reach down into the validity of the trial itself to the extent that that a verdict of guilty could not have been obtained without the assistance of the alleged error." Farina v. State, 937 So. 2d 612, 629 (Fla. 2006), quoting, Harrell v. State, 894 So. 2d 935, 941 (Fla. 2005). Fundamental error must be applied only "rarely". Id.

In Martinez, the jury instruction error was not fundamental, in part, because the defense was "legally untenable based upon the jury's finding that this was a premeditated attempt to murder the victim." Id. at 1175. "A finding of premeditated intent to kill totally *negates* a finding of self-defense. Based upon the jury's finding of premeditation, the self-defense instruction was meaningless in this case and the erroneous instruction clearly did not contribute to the defendant's conviction." Id. (emphasis in original).

Likewise, the jury in the instant case found that the Respondent acted with premeditation in his attempt to murder the victim with a deadly weapon. McJimsey, 959 So. 2d at 1258. The Fourth District found that there was sufficient evidence to support this finding: "In a light most favorable to the state, the evidence reflected that the victim was first stabbed from behind and then, as he turned around to protect himself, was

stabbed several times in the abdomen. Although appellant testified that the victim had bashed his head against the floor and appellant was only attempting to defend himself, the alleged bashing occurred in the foyer by the front door. Rather than avail himself of the opportunity to leave, the appellant went back into the living room area in order to get his knife and then stabbed the victim from behind." Id. at 1259.

Since both juries rejected any claims of self-defense, and since there are substantial factual similarities between these cases, a fair application of Martinez to the instant case would result in the conclusion that the jury instruction error was not fundamental. Consequently, the decisions are in conflict. C.f., Hardee. This Court has accepted review of Martinez. Martinez v. State, 959 So. 2d 717 (Fla. 2007)(table). Review should be accepted in the instant case as well.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court accept discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished by mail to David John McPherrin, Esq., Office of the Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401 on September 24, 2006.

_____
DANIEL P. HYNDMAN

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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DANIEL P. HYNDMAN