

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1508

LOWER COURT CASE NO. 3D05-1672

STATE OF FLORIDA,

Petitioner,

-vs-

GREGORY JOSEPH JOHNSON,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, State of Florida, was the appellee in the court of appeal and the Respondent, Gregory Joseph Johnson, was the appellant. In this brief, the designation “A.” refers to the attached appendix, which contains a conformed copy of the decision of the lower court. All emphasis is supplied, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Mr. Johnson was convicted of second degree murder and possession of a firearm by a convicted felon. (A. 2). At trial, Mr. Johnson claimed that he acted in self-defense and gained possession of the firearm only during permissible acts of self-defense. (A. 2). The jury was instructed that “the use of force likely to cause death or great bodily harm is not justifiable if you find: 1. [Gregory Joseph Johnson] was attempting to commit, [or] committing . . . [a murder or aggravated battery]” (A. 2).

The Third District reversed the convictions on the basis of *Grier v. State*, 928 So. 2d 368 (Fla. 3d DCA 2006), *review denied*, 952 So. 2d 1191 (Fla. 2007), “which involve[d] an indistinguishable factual situation and the identical question of law,” since the instruction “essentially negated Johnson’s viable claim of self-defense” and so “was fundamentally erroneous.” (A. 2). The Third District noted that other decisions were in “accord,” including *Carter v. State*, 889 So. 2d 937

(Fla. 5th DCA 2004), *review denied*, 903 So. 2d 190 (Fla. 2005). The court also cited with a “*cf.*” the cases of *Blanton v. State*, 956 So. 2d 480 (Fla. 5th DCA 2007); *Slattery v. State*, ___ So. 2d ___, 32 Fla. L. Weekly D305 (Fla. 5th DCA January 26, 2007); and *Zinnerman v. State*, 942 So. 2d 932 (Fla. 5th DCA 2006), all of which certified a question of great public importance to this Court. (A. 2-3). The Third District, though, did not certify any question in this case.

SUMMARY OF ARGUMENT

Jurisdiction should be declined because there is no express and direct conflict with a decision from another district court of appeal. There is also no certified question of great public importance. Finally, there is no pendent jurisdiction pursuant to *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), since none of the cases relied upon by the State are currently pending review in this Court.

ARGUMENT

JURISDICTION SHOULD BE DECLINED AS THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISIONS OF OTHER DISTRICT COURTS OF APPEAL; THERE IS NO CERTIFIED QUESTION; AND NO CASE CITED IN THE OPINION BELOW HAS BEEN ACCEPTED FOR REVIEW BY THIS COURT

The State seeks review through conflict jurisdiction. Such jurisdiction may only be invoked when the decision below “expressly and directly conflicts with a decision of **another** district court of appeal or of the supreme court on the same

question of law.” See Article V, § 3(b)(3), Fla. Const. There is no such express and direct conflict here. The only decision cited in the State’s jurisdictional brief that is arguably in conflict with the decision below is *Martinez v. State*, 933 So. 2d 1155 (Fla. 3d DCA 2006). That case, though, is also from the Third District and so cannot provide a basis for express and direct conflict jurisdiction.

The State also appears to seek review on the basis of a question of great public importance. (Brief of Petitioner on Jurisdiction at 4-5). The constitution is clear, though, that such jurisdiction exists only to review a “decision of a district court of appeal that passed upon a question **certified by it** to be of great public importance. See Article V, § 3(b)(4), Fla. Const. The lower court in this case declined to certify a question. “This Court does not have jurisdiction to review cases that a **party** deems to present an issue of great public importance. This Court may only review questions of great public importance that are certified by a district court of appeal.” *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995) (emphasis in original).

The State appears to also seek review on the basis of *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). Jurisdiction under *Jollie* exists when a district court opinion “**cites as controlling authority a decision that is . . . pending review**” in this Court. *Id.* at 420; see, e.g., *Steadman v. Liberty Mut. Ins. Co.*, 932 So. 2d 1034 (Fla. 2006). None of the cases relied upon by the State in its jurisdictional brief

were cited as “controlling authority” by the Third District. None of the cases cited **in the opinion below** are “pending review” in this Court. Jurisdiction thus does not exist pursuant to *Jollie*.

The only “controlling authority” cited by the Third District was its own decision in *Grier*. (A. 2). Its decision in *Martinez* was not cited to in the opinion below. The cases the State now relies upon, *Blanton*, *Slattery*, and *Zinnerman*, were cited with a signal of *cf.*, which means that the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.” *The Bluebook: A Uniform System of Citation*, § 1.2 at 47 (18th ed. 2005). They were not cited as controlling authority.

Moreover, none of those three cases are presently “pending review.” “A case is not ‘pending review’ merely because a party has filed a notice to invoke the supreme court’s discretionary jurisdiction. The supreme court must have accepted the case for review.” Phillip J. Padovano, *Florida Appellate Practice*, § 3.10 at 71 (2007 ed.). A review of this Court’s docket shows that proceedings in *Blanton*, *Slattery*, and *Zinnerman* have all been stayed pending disposition of *Martinez*. This Court has not accepted any of the three cases for review.

Finally, the State cites to *Carter v. State*, 889 So. 2d 937 (Fla. 5th DCA 2004). The decision in *Carter*, though, granted the same relief as the decision below granted to Mr. Johnson, so there is no conflict between the cases. Nor is any

type of *Jollie* jurisdiction available through *Carter* since this Court declined back in 2005 to accept jurisdiction in that case.

CONCLUSION

For the foregoing reasons, jurisdiction should be declined as the decision below does not expressly and directly conflict with any other decision of another court of appeal or of this Court, no question has been certified, and none of the cases relied upon by the State were cited as controlling authority below or have been accepted for review here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Respondent on Jurisdiction was delivered by hand to Richard Polin, Assistant Attorney General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on August 21, 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).

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