

IN THE SUPREME COURT OF FLORIDA

CASE NO.
Lower Tribunal No. 3D05-1672

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH GREGORY JOHNSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL	
CONCLUSION	6
CERTIFICATE OF SERVICE	6
CERTIFICATE REGARDING FONT SIZE AND TYPE	7

TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
Blanton v. State, 956 So. 2d 480 (Fla. 5 th DCA 2007)	4
Blanton v. State, SC07-231	4
Carter v. State, 889 So. 2d 937 (Fla. 5 th DCA 2004)	2,3
Jollie v. State, 405 So. 2d 418 (Fla. 1981)	3
Martinez v. State, 933 So. 2d 1155 (Fla. 3d DCA 2006)	2-4
Martinez v. State, SC06-1597	2,3
Slattery v. State, 32 Fla. L. Weekly D305 (Fla. 5 th DCA 2007)	4
Slattery v. State, SC07-231	4
Zinnerman v. State, 942 So. 2d 932 (Fla. 5 th DCA 2006)	4
Zinnerman v. State, SC06-2326	4

STATEMENT OF THE CASE AND FACTS

Gregory Joseph Johnson was convicted of second degree murder and possession of a firearm by a convicted felony. (App. 2).¹ At trial, Johnson claimed that the killing was committed in self defense. Id. The jury instruction on the forcible felony exception to self-defense read as follows:

However, 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]"

(App. 2). The lower court reversed the conviction for second degree murder because the quoted jury instruction "essentially negated Johnson's viable claim of self-defense," and "was fundamentally erroneous." (App. 2).

As authority for that conclusion, the lower court cited several other District Court of Appeal decisions, including, inter alia, Carter v. State, 889 So. 2d 937 (Fla. 5th DCA 2004), review denied, 903 So. 2d 190 (Fla. 2005); Blanton v. State, ___ So. 2d ___ (Fla. 5th DCA Case no. 5D05-3786, opinion filed, March 9, 2007), 32 Fla. L. Weekly D670 (certifying question); Slattery v. State, ___ So. 2d ___ (Fla. 5th DCA Case no. 5D05-4408, opinion filed, January 26, 2007), 32 Fla. L. Weekly D305 (same); and Zinnerman v. State, 942 So. 2d 932 (Fla. 5th DCA 2006) (same).

¹ App. refers to the Appendix to this Brief.

On July 10, 2007, the lower Court denied the State's motion for rehearing and/or certified question.

SUMMARY OF ARGUMENT

The issue regarding whether the erroneous instruction on the forcible felony exception to self-defense constitutes fundamental error is currently pending before this Court in Martinez v. State, SC06-1597, where this Court has granted review based on Martinez's alleged conflict between the Third District's decision in Martinez and many other district court of appeal decisions, including, inter alia, Carter v. State, 889 So. 2d 937 (Fla. 5th DCA 2004). As this Court currently has before it a conflict, for which review has been granted, between Martinez and Carter, the current case necessarily implicates the same conflict.

Furthermore, the Fifth District has certified questions of great public importance in three cases cited in the lower court's opinion. This Court has stayed review of those three cases pending disposition of Martinez. The certified questions which are at issue in those three cases which have been stayed pending disposition of Martinez are relevant to the instant case and the disposition of those certified questions on the merits by this Court would likely be dispositive and controlling in the instant case as well.

ARGUMENT

THE DECISION OF THE LOWER COURT INVOLVES A CONFLICT BETWEEN DISTRICT COURTS OF APPEAL AS TO WHICH THIS COURT HAS ALREADY ACCEPTED JURISDICTION, THUS CREATING JURISDICTION IN THE INSTANT CASE.

When a district court of appeal decision cites as authority a decision that is pending review in the Supreme Court that establishes prima facie grounds for conflict jurisdiction. *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981). "Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it." *Id.*

This Court has accepted jurisdiction and established a briefing schedule on the merits and has set a date for oral argument in the case on *Eric Martinez v. State*, SC06-1597, in which discretionary review has been sought and obtained by Martinez of the Third District's decision in *Martinez v. State*, 933 So. 2d 1155 (Fla. 3d DCA 2006). That case involves the question of whether the erroneous instruction on the forcible felony exception to self-defense constitutes fundamental error. In that case, the Office of the Public Defender, on behalf of Martinez, and the same office as is counsel for the Respondent herein, argued in its jurisdictional brief, that conflict existed between the Third District's *Martinez* decision and the Fifth District's decision in *Carter v. State*, 889 So. 2d 937 (Fla. 5th DCA 2004), inter alia.

As this Court has already accepted jurisdiction in *Martinez* on the basis of the Public Defender's contention that the Third District's decision therein conflicts with *Carter*, and the decision of the lower tribunal in the instant case cites *Carter*, it necessarily follows, under *Jollie*, that the same express and direct conflict which forms the basis for this Court's jurisdiction in *Martinez* exists in the instant case and forms the basis for conflict jurisdiction in this case.

Furthermore, the Third District's decision herein cites three Fifth District decisions in which the Fifth District certified to this Court a question of great public importance: *Slattery v. State*, 32 Fla. L. Weekly D305 (Fla. 5th DCA 2007); *Zinnerman v. State*, 942 So. 2d 932 (Fla. 5th DCA 2006); *Blanton v. State*, 956 So. 2d 480 (Fla. 5th DCA 2007). In each of those cases, the Fifth District certified the question of whether an erroneous jury instruction which relates only to an affirmative defense, as opposed to an essential element of the offense, constitutes fundamental error. Although this Court has not currently accepted jurisdiction in those three cases, this Court has stayed the disposition of those three cases pending this Court's disposition of *Martinez*. See, *Blanton v. State*, SC07-815; *Slattery v. State*, SC07-231; *Zinnerman v. State*, SC06-2326. It therefore appears likely that the disposition of *Martinez* will control those three cases from the Fifth District.

Although the lower court in the instant case did not certify the same question, it is clear from the lower court's opinion that the same question as was certified by the Fifth District does exist in the instant case.

For the above-stated reasons, this Court should grant discretionary review in the instant case and stay disposition of this case pending disposition of the *Martinez* case.

CONCLUSION

Based on the foregoing, this Court should grant discretionary review and stay further disposition of this case pending this Court's review of *Martinez*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was mailed this ___ day of August, 2007 to ROBERT GODFREY, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction was typed in Courier New, 12-point font, in accordance with the Florida Rules of Appellate Procedure.

RICHARD L.POLIN