IN THE SUPREME COURT OF FLORIDA

CASE NO. 15-1585

JOHN CONNOLLY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Connolly v. State,* No. 3D09-280 (Fla. 3d DCA July 29, 2015), on the grounds of direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, paginated separately and identified as "A" followed by the page number.

STATEMENT OF THE CASE AND FACTS

John Connolly was charged, along with three codefendants, with first-degree murder (Count 1), and conspiracy to commit first-degree murder, (Count 2).[1] Because Connolly was not the shooter and he was prosecuted as a principal, it's clear that Count 1 of the indictment did not charge Mr. Connolly with having *carried, displayed, used, threatened to use or attempted to use* a *firearm during the commission of the homicide*, as required by the firearm enhancement statute, section 775.087(1), Florida Statutes:

> . . . JAMES J. BULGER, STEPHEN J. FLEMMI, JOHN V. MARTORANO and JOHN J. CONNOLLY, JR., did unlawfully and feloniously kill a human being, to wit: JOHN B. CALLAHAN, from a premeditated design to effect the death of the person killed or any human being, **by shooting** the said JOHN B. CALLAHAN **with a firearm**, in violation of s. 782.04(1), s. 775.087 and s. 777.011, Florida Statutes, to the evil example of all others in like cases . . .

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[1]The Appellant was acquitted on Count 2.

(Emphasis added).

It was undisputed at trial that the homicide (which occurred on or about August 1 to 3, 1982) was physically perpetrated by codefendant John Martorano when he shot the deceased (John Callahan) in South Florida. It was also undisputed that at the time of the homicide Mr. Connolly was in Boston and there is no evidence as to whether he was even armed.

The State prosecuted Connolly as an aider and abetter based on a meeting he attended in Boston, along with Stephen Flemmi and James Bulger, approximately *three weeks before the homicide*. According to Flemmi, the murder of John Callahan was agreed upon at that meeting. Flemmi also claimed that Connolly, who was then an FBI agent, was in possession of his service weapon while in attendance.

Three weeks later, and 1,200 miles away from Boston, Martorano picked up Callahan outside the Fort Lauderdale International Airport. As soon as Callahan sat down in the front passenger seat of Martorano's van, Martorano shot him in the back of the head and then drove the body to Miami.

At the jury instruction conference, the State requested second-degree murder as a lesser included offense. The trial judge inquired whether second-degree murder would be barred by the statute of limitations if the jury were to find

that Connolly was unarmed. The defense attorney strongly objected to the jury being given second-degree murder, or any other lesser included offenses, as they were all precluded by the statute of limitations. The State incorrectly informed the judge that if Connolly were convicted of second-degree murder, his conviction could be vicariously reclassified due to Martorano's use of the murder weapon (the only charged firearm in Count 1).[2] The State made no mention of Connolly's service weapon. Over defense objection, the court instructed the jury on second-degree murder. Later, the State changed its theory of reclassification. During the State's rebuttal closing argument, the prosecution alleged for the very first time that because Connolly was armed at the Boston meeting, he could be convicted of "armed" second-degree murder.

The Appellant was convicted of second-degree murder and sentenced to forty-years' imprisonment. The main issue on appeal below was whether the second-degree murder conviction was improperly reclassified. Absent the reclassification, Connolly was entitled to a dismissal because unarmed second-degree murder was time-barred by the statute of limitations that was in effect in

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[2]This concept is contradicted by *State v. Rodriguez,* 602 So. 2d 1270 (Fla. 1992), which held that an offense cannot be reclassified based on vicarious possession of the firearm that was used in the commission of the crime and also cannot be predicated on a principal theory.

1982. In a split *en banc* decision, the six-judge majority affirmed the reclassification and four judges dissented.

A notice invoking this Court's discretionary jurisdiction based on conflict was timely filed.

SUMMARY OF THE ARGUMENT

The majority decision is in conflict with three areas of well established Florida law. First, John Connolly's possession of an unrelated weapon in Boston three weeks before codefendant John Martorano murdered the victim in South Florida cannot sustain a conviction for armed second-degree murder as a matter of law. It is fundamental error to convict a defendant for a crime where the evidence is legally insufficient. Secondly, it is also fundamental error to reclassify an offense where the charging document failed to allege the defendant's personal possession of a firearm. Here, Count 1 only charged the murder weapon which was undisputedly possessed by Martorano, who was the sole shooter. Lastly, the jury failed to make a specific finding that Connolly personally possessed a firearm during the commission of the homicide. As such, the reclassification of the murder conviction was not supported by the verdict.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY CONFLICTS WITH ESTABLISHED FLORIDA LAW BECAUSE: (1) THE RECLASSIFICATION OF THE SECOND-DEGREE MURDER CONVICTION WAS UNSUPPORTED BY THE EVIDENCE AS A MATTER OF LAW, (2) THE INDICTMENT DID NOT CHARGE THE DEFENDANT WITH POSSESSION OF A FIREARM DURING THE COMMISSION OF THE HOMICIDE, AND (3) THE JURY DID NOT SPECIFICALLY FIND THAT THE DEFENDANT PERSONALLY POSSESSED A FIREARM.

In order to justify the enhancement of Connolly's second-degree murder conviction, the majority decision rewrote more than three decades of case law interpreting the firearm enhancement statute, section 775.087(1), Florida Statutes, and departed from basic principles of criminal jurisprudence. In so doing, the majority decision is in direct conflict with three areas of established Florida law.

1. It is fundamental error to convict someone for a crime that they did not commit as a matter of law.

First and foremost, the majority's holding that Connolly failed to preserve the reclassification issue is wrong because it ignores one of the most basic principles of criminal jurisprudence, *viz.*, that it is fundamental error to convict someone for a crime that is unsupported by the evidence as a matter of law. Here, Connolly did not, as a matter of law, commit the crime of *armed* second-degree murder.

The plain and unambiguous language of section 775.087(1) requires that the firearm in question be personally possessed by the defendant during the actual commission of the crime. This means that the predicate weapon must be temporally and geographically contiguous with the perpetration of the crime (in this case, Callahan's killing). Furthermore, in *State v. Rodriguez,* 602 So. 2d 1270 (Fla. 1992), this Court explained that a firearm reclassification cannot be based on a principal theory. Thus Connolly's coincidental possession of am unrelated firearm three weeks before the murder while acting as an aider and abetter, and 1,200 miles removed from the scene of the killing, cannot sustain a conviction for *armed* second-degree murder.

This Court has held that, "an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved. Such complete failure of the evidence meets the requirements of fundamental error – i.e., an error that reaches to the foundation of the case and is equal to a denial of due process." *F.B. v. State,* 852 So. 2d 226, 230 (Fla. 2003); *see also, Troedel v. State,* 462 So. 2d 392, 399 (Fla. 1984) ("[A] conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error."); *Vance v. State,* 472 So. 2d 734 (Fla. 1985); *Andre v. State,* 13 So. 3d 103 (Fla. 4th DCA 2009) (it was fundamental error to convict defendant of aggravated

false imprisonment where there was no evidence that child's confinement was against the consent of parent); *Rodriguez v. State,* 964 So. 2d 833, 836 n. 1 (Fla. 2d DCA 2007) ("It is [ ] fundamental error to convict a defendant when the State has failed to prove an element that is essential to the commission of the crime."); *Alvarez v. State,* 963 So. 2d 757, 764-65 (Fla. 3d DCA 2007) (fundamental error to convict the defendant of carjacking when the victim was unaware of the theft, which was an element of the offense); *Otero v. State,* 807 So. 2d 666, 667-68 (Fla. 4th DCA 2001) (where the State's "theory of culpability under the burglary statute was legally" unsustainable, it was fundamental error to convict defendant of burglary).

Additionally, the majority's skewed interpretation of section 775.087(1) cannot be allowed to stand. The majority has essentially held that 775.087(1) "refers to any weapon – charged or not – in the possession of a co-defendant, no matter how remote in time and geographical location from the actual charged crime." (A. 69). This construction gives rise to patently absurd results, as illustrated by the hypothetical situations posed in Judge Emas' concurring dissent (A. 115-17).

2. <u>It is fundamental error to reclassify an offense where the indictment did not charge the defendant with personal possession of a firearm during the commission of the felony.</u>

The majority incorrectly characterizes the failure to charge Connolly with possession of a firearm as a mere "technical deficiency" in Count 1, and thus subject to waiver (A. 10-26). The majority's decision that the reclassification issue was not preserved directly conflicts with Florida law because it was fundamental error to reclassify the conviction where Connolly was not charged (and could not be charged) with personal possession of a second, unrelated firearm during the "commission" of the murder. The only firearm alleged in Count 1 was the gun that Martorano used to shoot Callahan; Connolly's FBI sidearm is not mentioned (even inferentially) in Count 1.

Where the indictment, or information does not charge the defendant with personal possession of a firearm, the reclassification of an offense, or the imposition of a mandatory minimum under 775.087, is fundamental error. *See Green v. State,* 18 So. 3d 656 (Fla. 2d DCA 2009); *Bryant v. State,* 744 So. 2d 1225 (Fla. 4th DCA 1999). This is based on the due process principle that a defendant cannot be convicted for an offense with which he was not charged. *See, Crain v. State,* 894 So. 2d 59 (Fla. 2004); *Johnson v. State*, 981 So. 2d 680 (Fla. 2d DCA 2008); *Bedford v. State,* 970 So. 2d 935 (Fla. 4th DCA), *review denied,* 991 So. 2d 386 (Fla. 2008); *Rogers v. State,* 963 So. 2d 328 (Fla. 2d DCA), *review denied,* 969 So. 2d 1015 (Fla. 2007); *Perley v. State,* 947 So. 2d 672

(Fla. 4th DCA 2007); *McClenithan v. State,* 855 So. 2d 675 (Fla. 2d DCA 2003); *Mauldin v. State,* 696 So. 2d 801 (Fla. 2d DCA 1997); *Akins v. State,* 691 So. 2d 587 (Fla.1st DCA 1997); *Brennan v. State,* 651 So. 2d 244 (Fla.3d DCA 1995); *State v. Gray,* 435 So. 2d 816 (Fla. 1983).

3. The verdict form did not make a specific finding that Mr. Connolly personally possessed a firearm during the commission of the homicide.

Not only were the grounds for reclassification unsupported by the facts and not charged in Count 1 of the indictment, it was also unsupported by the verdict. Here, the verdict form simply stated, "Guilty of second-degree murder, **with a firearm**, as a lesser included offense of first-degree murder." (A. 30, 77). As Judge Suarez's dissent points out, "[t]he words, 'with a firearm' in the verdict form are not decisive to reclassification because 'with a firearm' merely duplicates the language of the indictment, and refers only to the manner in which Callahan was killed." (A. 96-97). As such, the majority's holding on this issue is in direct conflict with Florida law that precludes enhancement in the absence of a specific determination by the jury that the defendant personally carried, or used a firearm. *See State v. Overfelt,* 457 So. 2d 1385 (1984); *Streeter v. State,* 416 So. 2d 1203 (Fla. 3d DCA 1982); *Thompson v. State,* 862 So. 2d 955 (Fla. 2d DCA 2004); *Alumsa v. State,* 939 So. 2d 1081 (Fla 4th DCA 2006) (where defendant and

codefendant were charged with armed kidnapping and jury verdict did not specify that Alumsa personally possessed weapon, Alumsa's conviction could not be reclassified)

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, and emailed to CrimAppMIA@MyFloridaLegal.com, on this 1st day of September, 2015. Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: AppellateDefender@pdmiami.com, (Primary E-Mail address); MAlvarez@pdmiami.com, (Secondary E-Mail address).

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CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

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