

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1585

DCA NO. 3D09-280

JOHN CONNOLLY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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**BRIEF OF RESPONDENT ON JURISDICTION**

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

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## TABLE OF CONTENTS

TABLE OF CITATIONS.....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT.....	3

### ARGUMENT

THE LOWER COURT'S OPINION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH ANY DECISION FROM THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL WHERE: (1) PETITIONER'S SECOND DEGREE MURDER CONVICTION WAS PROPERLY RECLASSIFIED BASED ON THE RECORD EVIDENCE OF PETITIONER'S PERSONAL POSSESSION OF A FIREARM DURING THE COMMISSION OF THE HOMICIDE AND NOT ON THE VICARIOUS POSSESSION OF A FIREARM BY A CO-DEFENDANT, (2) PETITIONER FAILED TO OBJECT AND PROPERLY PRESERVE THE ARGUMENT THAT, DUE TO AN ALLEGED DEFICIENCY IN THE INDICTMENT, SECOND DEGREE MURDER COULD NOT BE RECLASSIFIED TO SECOND DEGREE MURDER WITH A FIREARM, AND (3) PETITIONER FAILED TO OBJECT TO THE VERDICT FORM, AND THE JURY'S FINDING PETITIONER GUILTY OF SECOND DEGREE MURDER, WITH A FIREARM, SUFFICIENTLY FOUND THAT PETITIONER PERSONALLY POSSESSED A FIREARM. (REPHRASED).

3

CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11
CERTIFICATE OF COMPLIANCE .....	11

## TABLE OF CITATIONS

CASES	PAGE
<u>Bedford v State</u> , 970 So.2d 935 (Fla. 4 <sup>th</sup> DCA), <u>review denied</u> , 991 So.2d 386 (Fla. 2008) .....	9
<u>Bryant v. State</u> , 744 So.2d 1225 (Fla. 4th DCA 1999) .....	7
<u>Galindez v. State</u> , 955 So.2d 517 (Fla. 2007) .....	10
<u>Green v. State</u> , 18 So.2d 656 (Fla. 2d DCA 2009) .....	7
<u>Mesa v. State</u> , 632 So. 2d 1094 (Fla. 3d DCA 1994) .....	10
<u>Nesbitt v. State</u> , 889 So.2d 801 (Fla. 2004) .....	8
<u>Ray v. State</u> , 403 So.2d 956 (Fla. 1981) .....	3, 6, 7
<u>Rodriguez v. State</u> , 602 So.2d 1270 (Fla. 1992).....	4
<u>State v. Hargrove</u> , 694 So.2d 729 (Fla. 1997) .....	10
<u>State v. Iseley</u> , 944 So.2d 227 (Fla. 2007) .....	10
<u>State v. Overfelt</u> , 457 So.2d 1385, 1387 (Fla. 1984) .....	10
<u>Staten v. State</u> , 519 So.2d 622 (Fla. 1988) .....	5
<u>Stoute v. State</u> , 915 So.2d 1245 (Fla. 4th DCA 2005) .....	9
<u>Tucker v. State</u> , 726 So.2d 768 (Fla. 1999) .....	10

<u>Williams v. State,</u> 517 So. 2d 681 (Fla. 1988) .....	5
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#### **Other Authorities**

Fla. R. App. P. 9.030(a)(2)(A)(iv) .....	4
775.087, Florida Statutes (1981) .....	passum

## **INTRODUCTION**

The Petitioner, John Connolly, was the Appellant in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they stood below, or as the State and Petitioner. All citations to the opinion below, which is incorporated in Petitioner's brief in a separate appendix, shall be referred to herein as "A", followed by the page number.

## **STATEMENT OF THE CASE AND FACTS**

Petitioner and his three co-defendants were charged by Indictment with first degree premeditated murder (Count I) and conspiracy to commit first degree murder (Count II).<sup>1</sup> Petitioner was tried separately, and the jury convicted Petitioner of second degree murder with a firearm, as a lesser included offense of first degree murder. The second degree murder conviction was reclassified from a first degree felony to a life felony, pursuant to section 775.087(1), Florida Statutes (1981), based on the jury's specific finding that Petitioner carried a firearm during the acts he committed as a principal to the murder.

Petitioner filed a direct appeal in the Third District Court of Appeal. On July 29, 2015, the lower court issued a very lengthy

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<sup>1</sup> Petitioner was acquitted on Count II.

and detailed en banc decision affirming the judgment and sentence.

The majority opinion stated, inter alia, as follows:

**The defendant does not dispute the sufficiency of the evidence relied on by the jury in finding him guilty of second degree murder, nor does he dispute that he carried a firearm on his person during the acts he committed as a principal to the murder. The evidence as to both his participation in the murder and his possession of a firearm during his participation is overwhelming.** Rather, the defendant disputes the legality of the reclassification of the second degree murder from a first degree felony to a life felony even though the reclassification was based on his actual possession of a firearm. The reclassification issue is dispositive, as it is undisputed that the indictment was filed in 2005 and the homicide was committed in 1982. Thus, without the reclassification from a first degree felony to a life felony, the defendant's conviction must be vacated due to the expiration of the four-year statute of limitations for first degree felonies pursuant to the law that was in effect in 1982.1 § 775.15(2) (a), Fla. Stat. (1981).

. . .

As will be detailed herein: (1) the defendant failed to raise an objection to any defect in the charging document and therefore waived his objection to the indictment, and no fundamental error has been demonstrated; (2) his argument regarding the verdict form was also not raised and therefore waived, and it is completely without merit; (3) reclassification of the second degree murder was based on the defendant's personal possession of a firearm during the commission of the homicide, not on the vicarious possession of a firearm by a co-defendant; and (4) there was abundant evidence that the defendant personally carried a firearm during the commission of the homicide.

(A. 2 - 3) (emphasis added).

Petitioner thereafter filed a notice of intent to invoke this Court's discretion in the case at bar.

## **SUMMARY OF THE ARGUMENT**

The Supreme Court of Florida does not have jurisdiction to review the lower court's decision in the instant case. Petitioner's own personal weapon was properly proven and relied upon as the basis for reclassification. The lower court's opinion does not expressly and directly conflict with any law from this Court or the other district courts of appeal. Instead, the subject case is controlled by the Court's opinion in Ray v. State, 403 So.2d 956 (Fla. 1981), as Petitioner's conviction for the reclassified offense of second degree murder with a firearm was not greater in degree and penalty than the premeditated first degree murder with which he was charged.

## **ARGUMENT**

**THE LOWER COURT'S OPINION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH ANY DECISION FROM THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL WHERE: (1) PETITIONER'S SECOND DEGREE MURDER CONVICTION WAS PROPERLY RECLASSIFIED BASED ON THE RECORD EVIDENCE OF PETITIONER'S PERSONAL POSSESSION OF A FIREARM DURING THE COMMISSION OF THE HOMICIDE AND NOT ON THE VICARIOUS POSSESSION OF A FIREARM BY A CO-DEFENDANT, (2) PETITIONER FAILED TO OBJECT AND PROPERLY PRESERVE THE ARGUMENT THAT, DUE TO AN ALLEGED DEFICIENCY IN THE INDICTMENT, SECOND DEGREE MURDER COULD NOT BE RECLASSIFIED TO SECOND DEGREE MURDER WITH A FIREARM, AND (3) PETITIONER FAILED TO OBJECT TO THE VERDICT FORM, AND THE JURY'S FINDING PETITIONER GUILTY OF SECOND DEGREE MURDER, WITH A FIREARM, SUFFICIENTLY FOUND THAT PETITIONER PERSONALLY POSSESSED A FIREARM. (REPHRASED).**

Petitioner asserts that he is seeking discretionary review of

the lower court's decision on "direct conflict of decisions". Thus, it appears that Petitioner is claiming that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The State maintains that the Court is without jurisdiction to review this decision on the grounds set forth in Petitioner's brief, as no such express and direct conflict exists.

**I. IT WAS NOT FUNDAMENTAL ERROR TO CONVICT PETITIONER OF THE RECLASSIFIED OFFENSE OF SECOND DEGREE MURDER WITH A FIREARM WHERE THE RECLASSIFICATION WAS BASED ON PETITIONER'S PERSONAL POSSESSION OF A FIREARM. (REPHRASED).**

The reclassification provision set forth in section 775.087(1), Florida Statutes (1981), provides in pertinent part as follows:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and **during the commission of** such felony the defendant **carries, ... any weapon or firearm, ...**, the felony for which the person is charged shall be reclassified....

Petitioner argues that the decision below is in conflict with Rodriguez v. State, 602 So.2d 1270 (Fla. 1992), which he cites for the proposition that a firearm reclassification cannot be based on vicarious possession of the murder weapon by a co-defendant. Contrary to Petitioner's argument, **reclassification in the case at bar was based on the record evidence of Petitioner's personal possession of**

his own firearm during the planning of the homicide, not on the vicarious possession of a firearm by a co-defendant.<sup>2</sup> Petitioner's soliciting, planning, and aiding and abetting the murder and cover up occurred "during the commission of" the murder, in pursuance with section 775.087(1). Acts of aiding and abetting occur "during the commission of" the offense. Staten v. State, 519 So.2d 622 (Fla. 1988).

The Merriam-Webster Dictionary defines "during" as "at some time in the course of (something)." (emphasis added). The evidence presented in this case clearly established that Petitioner carried a firearm "at some time in the course of" committing the subject murder. The issue presented to this Court in Williams v. State, 517 So. 2d 681 (Fla. 1988), was whether the three-year mandatory minimum imposed pursuant to section 775.087(2), which contains the same "during the commission of" phrase", applies to a burglary conviction if the defendant was not in possession of a firearm when he initiated the burglary, but only acquired the firearm after entering the premises. Finding no evidence that the legislature intended any distinction based upon the timing of the perpetrator's possession, Williams approved the imposition of the mandatory minimum sentence. In doing so, the Court rejected the defendant's argument that the

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<sup>2</sup> Contrary to Petitioner's statement at p. 3 of his brief, reclassification was **never** based on vicarious possession by a co-defendant and the lower court's decision found that the record clearly established that Petitioner had actual knowledge that reclassification would be based on his own personal possession, but never objected to such until after trial. (A. 11-12, 19-22, 32, 65-67).

portion of section 775.087(2), providing "during the commission of" was intended only to prevent persons from arming themselves prior to a crime and not during it as well. Instead, the Court held that the intent of the mandatory minimum provision, "clearly **was to discourage the possession of a firearm at any time during the course of a criminal endeavor.**" Id. at 682. (emphasis added). In the instant case, Petitioner's acts in planning the murder are properly considered part of the commission of the offense.

**II. IT WAS NOT FUNDAMENTAL ERROR TO CONVICT PETITIONER OF THE RECLASSIFIED OFFENSE OF SECOND DEGREE WITH A FIREARM WHERE THE RECLASSIFIED OFFENSE IS LESSER IN DEGREE AND PENALTY THAN THE CHARGED OFFENSE. (REPHARSED) .**

Petitioner failed to preserve the argument that second degree murder could not be reclassified to the lesser included offense of second degree murder with a firearm based on a deficiency in the charging document. (A. 11-12). Thus, any defect or deficiency as to Count I of the indictment was waived, and does not constitute fundamental error.

The lower court's decision is not in direct and express conflict with any Florida law. Instead, the subject matter is controlled by Ray v. State, 403 So.2d 956 (Fla. 1981). Ray specifically held that a mere objection to the giving of lesser included offense instructions does not sufficiently preserve an argument that the lesser included offense instruction is beyond the scope of the charging

document. Ray went on to hold that "it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action." Id. at 961. In the subject case, Petitioner's conviction for the reclassified offense of second degree murder with a firearm, which is a life felony, was not greater in degree and penalty than the premeditated first degree murder that he was charged with, which was a capital felony. Thus, pursuant to Ray, the reclassification did not constitute fundamental error.

Nevertheless, Petitioner argues that the reclassification was fundamental error because he was not, and could not be, charged with personal possession of a second unrelated firearm during the commission of the murder. Petitioner appears to be claiming express and direct conflict with Green v. State, 18 So.2d 656 (Fla. 2d DCA 2009) and Bryant v. State, 744 So.2d 1225 (Fla. 4th DCA 1999), which were cited for the proposition that it is fundamental error to reclassify an offense or impose a minimum mandatory sentence under section 775.087 where the indictment or information does not charge the defendant with personal possession of a firearm. The subject opinion is not in direct and express conflict with these cases. In

Bryant the defendant was charged with attempted first degree murder and convicted of the lesser included offense of attempted second degree murder. The information did not allege that the offense was committed with a firearm and, by special verdict, the jury determined that the defendant used a firearm in the commission of the offense. The second district court held that it was fundamental error to impose a three year minimum mandatory sentence pursuant to 775.087(2) where the charging document made no reference to 775.087. The subject case is distinguishable, as, in indication to other notice, 775.087 was referenced in the heading and body of Count I of the Indictment. (A. 4, 11). See also Nesbitt v. State, 889 So.2d 801 (Fla. 2004).

The facts of the instant case are also clearly distinguishable from Green, which involved a finding of fundamental error for reclassifying the offense pursuant to section 775.087(1) based on a jury finding of "actual possession" of a firearm, which pertains to section 775.087(2), where "actual possession" was not charged, in addition to which there was no evidence that Green carried, displayed, or used a weapon as required for section 775.087(1). As acknowledged in the lower court's opinion herein, Petitioner did not dispute that he carried a firearm during the acts he committed as a principal, or the sufficiency of the evidence finding him guilty of second degree murder. In fact, the lower court found that there was "overwhelming" evidence that Petitioner carried a firearm on his

person during the acts he committed as a principal to the murder. (A. 2-3). Additionally, based on Petitioner's specific request, the jury was instructed that the State must prove that Petitioner "carried a firearm" during the act. (A. 27). Ray. Lastly, Petitioner also cited to Bedford v State, 970 So.2d 935 (Fla. 4<sup>th</sup> DCA), review denied, 991 So.2d 386 (Fla. 2008), along with several other cases, for the general proposition that it is a due process violation for a defendant to be convicted of an offense he was not charged with. Bedford, acknowledged this proposition, but then stated that "[e]ven to this proposition there are exceptions" and cited to Ray.

**III. THE VERDICT FORM SPECIFICALLY REQUIRED THE JURY TO FIND THAT PETITIONER CARRIED A FIREAM AND WAS SUFFICIENT TO AUTHORIZE RECLASSIFICATION. (REPHRASED).**

The verdict form specifically required the jury to find that Petitioner carried a firearm in order to convict him of second degree murder where Petitioner expressly requested that the jury instruction require that, as element of the offense, the State must prove that he "carried a firearm" during the act. Thus, the verdict, which indicated that the State proved the firearm element beyond a reasonable doubt, sufficiently supported the firearm reclassification. (A. 27, 30). Stoute v. State, 915 So.2d 1245 (Fla. 4th DCA 2005) (jury instruction making possession of a firearm an element of the crime satisfied the requirement that the jury make a factual finding of use of a firearm to support reclassification when the jury

also returned a verdict on the lesser included offense of guilty of attempted second degree murder "with a firearm"); State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984); State v. Hargrove, 694 So.2d 729 (Fla. 1997), Tucker v. State, 726 So.2d 768 (Fla. 1999), citing Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986); Mesa v. State, 632 So. 2d 1094 (Fla. 3d DCA 1994); State v. Iseley, 944 So.2d 227 (Fla. 2007).

To the extent that Overfelt and its progeny treated an insufficient verdict as reversible error, the State would note that those cases were decided prior to Galindez v. State, 955 So.2d 517 (Fla. 2007), which held that if a verdict form is insufficient under Overfelt, the error is subject to the harmless error analysis. Id. at 522-523. Pursuant to Galindez, any perceived error in the subject verdict form would be harmless, as the lower court's opinion clearly found that there was overwhelming and indisputable evidence that Petitioner carried a firearm on his person during the acts he committed as a principal to the murder. (A. 2-3, 35).

#### **CONCLUSION**

As indicated by the foregoing facts, authorities and reasoning, the lower court's opinion does not expressly and directly conflict with any Florida case law. Thus, the Respondent respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was provided electronically to Manuel Alvarez, Assistant Public Defender, at [MAlvarez@pdmiami.com](mailto:MAlvarez@pdmiami.com), [AppellateDefender@pdmiami.com](mailto:AppellateDefender@pdmiami.com) on this 28th day of October, 2015.

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#### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief was typed in font Courier New, 12 point, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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