IN THE SUPREME COURT OF FLORIDA

JOSE MARTINEZ,

Petitioner,

Vs.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: SC15-1620

L.T. Case No.: 4D14-2076

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

On Discretionary Review from the District Court of Appeal, Fourth District, State of Florida

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PRELIMINARY STATEMENT

Petitioner, Jose Martinez, will be referred to herein by name or as "Petitioner." Respondent, State of Florida, will be referred to herein by name or as "Respondent." References to the record on appeal will be designated by reference to the record on appeal page number, as set forth in brackets. The Appendix is cited as "Pet.'s App." All emphases in quoted materials are supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

In August 2000, Respondent charged Petitioner with armed robbery by amended information. [R. 6]. In the amended information, Respondent alleged that on December 17, 1999, Petitioner "*carried* a firearm or other deadly weapon" in violation of sections 812.13(1) and 812.13(2)(a), Florida Statutes. [R. 6]. Notably, the information cited no other statute. *Id.* A jury convicted Petitioner, finding he "actually possess[ed]" a firearm during the commission of the crime. [R. 8]. The trial court sentenced him to twenty-five years with a ten-year minimum mandatory enhancement based on the use of a firearm during the commission of the robbery. [R. 10-12]. Although not expressly charged in the information, this enhancement was based on section 775.087(2), Florida Statutes, also known as Florida's 10-20-Life law (hereinafter "10-20-Life"). [R. 11].

Following his conviction, sentencing, and direct appeal, Petitioner filed a Rule 3.800(a) motion with the trial court to correct an illegal sentence. [R. 1-14]. He argued the trial court illegally imposed a sentence enhancement for actual possession

of a firearm because the information did not charge him with an element of the enhancement and therefore "could not effectively place him on notice that he was being charged with actually … [possessing] a firearm during the course of committing the offense set out in Section 775.087(2)(a)1, Florida Statute (1999)." [R. 3].

Petitioner argued that the information did not "precisely track the statute and the language charging him with actually possessing a firearm in committing the robbery [and was] insufficient to bring him within the statutory requirement to enhance his sentence, thus, the minimum term mandated by '10-20-Life' statute, section 775.087(2), cannot be legally imposed unless the statutory elements are precisely charged in the information." [R. 3-4]. Petitioner argued that "[n]either a jury finding nor inclusion of the appropriate statute number in the information can cure this fatal defect." [R. 4]. The trial court denied the motion, and Petitioner appealed. [R. 16].

The Fourth District affirmed, holding Petitioner received sufficient notice for the enhancement. *Martinez v. State*, 169 So. 3d 170 (Fla. 3d DCA 2015); Pet.'s App. The court found his enhancement was legal because: (1) he received sufficient notice based on the fact he was charged with armed robbery; (2) the jury instruction cured any defective notice; (3) "carried" can be construed as "actual possession"; and (4) he waived the issues by failing to object to the jury instruction, and raise the issue

on direct appeal. *Martinez*, 169 So. 3d at 170-72. Because this holding directly conflicts with *Arnett*, Petitioner appealed to this Court.

In *Arnett*, the State of Florida alleged the defendant, also charged by information, "did unlawfully own or have in this care or her care, custody, possession or control a firearm[.]" *Arnett*, 128 So.3d at 87 n.1. (Fla. 1st DCA 2013). The defendant filed a Rule 3.800(a) motion to correct an illegal sentence. *Arnett*, 128 So.3d at 87. He argued that the three year minimum mandatory sentence imposed for his conviction of a firearm by a convicted felon was illegal because the State of Florida did not charge him with "actual possession" of the firearm under 10-20-Life. *Id.* The First District held the defendant's sentence was illegal because, "the grounds for an enhancement must be clearly charged in the information." *Arnett*, 128 So. 3d at 87 (citing *Young v. State*, 86 So. 3d 541 (Fla. 3d DCA 2012)); *see also Green v. State*, 18 So. 3d 656 (Fla. 2d DCA 2009). The State of Florida argued that any defect was cured because the jury made a specific finding the defendant "actually possessed the firearm." *Arnett*, 128 So. 3d at 88. The First District Court held this did not cure the charging defect. *Id.* (citing *Davis v. State* 884, So. 2d 1058 (Fla. 2d DCA 2004)).

In identifying the direct conflict, the Fourth District Court stated that it, "simply disagree[s] with the First District Court of Appeal that the failure to allege 'actual possession' renders an otherwise legal sentence illegal. It is contrary to our precedent, and we see no reason to deviate from our precedent." *Martinez*, 169 So.

3d at 171. In its opinion, the Fourth cited two cases to establish "our precedent". *Aliteri v. State*, 835 So. 2d 1181, 1185 (Fla. 4th DCA (2002) and *Grant v. State*, 138 So. 3d 1079 (Fla. 4th DCA 2014).

SUMMARY OF THE ARGUMENT

A defendant is entitled to constitutionally sufficient notice of the crime charged and the potential punishment he faces. Respondent illegally enhanced Petitioner's sentence by failing to provide sufficient notice of its intent to seek the 10-20-Life sentencing enhancement and precisely allege the enhancing facts. After the trial court's denial of Petitioner's Rule 3.800(a) motion, the Fourth District erred in affirming the trial court's denial. If the Fourth District had properly applied Florida law—which requires strictly construing the penal code, giving statutory terms their literal meaning, and interpreting any ambiguity in the defendant's favor— it should not have concluded that "carried" can mean a defendant "actually possess[ed]" a firearm under section 775.087, Florida Statutes, and that Petitioner therefore had notice of the possible enhancement because of the implicit nature of the charged offense. The Fourth District misapplied its precedent in reaching its conclusion.

This Court should hold a sentence is illegal when it is based on a 10-20-Life sentencing enhancement not alleged in the information. To impose the enhancement, the State of Florida must allege "actual possession" of a firearm. Without such an

allegation, the sentence is illegal because it deprives a defendant of the requisite notice. "Actual possession", and similar terms enhancing a sentence under 10-20-Life, are elements of a crime and must be alleged in a charging document. The State of Florida must also allege the statutory basis for a 10-20-Life enhancement. Because it failed to do so here, the State of Florida denied Petitioner notice of the firearm enhancement.

The Fourth District also erred in holding a special jury instruction finding the enhancing facts, such as actual possession, cures this notice defect. It would cure a constitutional defect for a Sixth Amendment right to a fair and impartial jury trial, but not defective notice. Nor did Petitioner waive his right to object to this illegal sentence, which he may challenge at any time where his due process rights are affected.

ARGUMENT

Issue presented.

I. Where the State of Florida charges Petitioner with armed robbery based on the fact he "carried" a firearm in violation of §§ 812.13(1); 812.13(2)(a), but fails to allege the precise factual basis to enhance the sentence for "actual possession" under 10-20-Life, and fails to cite the legal basis in the information to enhance Petitioner's sentence, did the State of Florida violate Petitioner's due process right to receive constitutionally sufficient notice regarding the enhancement?

Preliminary matters.

i. Jurisdiction. The Fourth District affirmed the trial court's denial of Petitioner's Rule 3.800(a) motion, finding that Petitioner received sufficient notice of the potential enhancement under 10-20-Life. *Martinez*, 169 So. 3d at 172. This holding is in direct conflict with the First District's decision *Arnett,* 128 So.3d at 87. The Florida Supreme Court accepted discretionary jurisdiction to review this decision because it expressly and directly conflicts with a decision of another district court of appeal on the same point of law. Art. V, (b)(3) Fla. Const.; Fla. R. App. P. Rule 9.030(a)(2)(A)(iv),(v).

ii. Standard of review. The standard of review in this matter is *de novo*. *State v. Nuckolls*, 677 So.2d 12 (Fla. 5th DCA 1996) (reviewing the sufficiency of a charging document); *Demps v. State*, 761 So.2d 302 (Fla. 2000) (reviewing whether a sentence exceeds the statutory maximum). An illegal sentence subject to correction under Rule 3.800(a) must be one that no judge under the entire body of sentencing laws could possibly impose under any set of factual circumstances. *Williams v. State*, 957 So. 2d 600 (Fla. 2007).

Merits.

I. Petitioner has a due process right to notice of facts that form the basis of a sentencing enhancement.

Under the Sixth Amendment to the U.S. Constitution, a criminal defendant has a fundamental right to notice of the "nature and cause of the accusation" against

him. U.S. Const., Amend. VI. ("[T]he accused shall enjoy the right … to be informed of the nature and cause of the accusation"); *Lankford v. Idaho*, 500 U.S. 110, 126 (1991) ("Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure."). This right exists in state courts, including in Florida through the Fourteenth Amendment's due process guarantee. U.S. Const., Amend. XIV*; Rogers v. State*, 963 So.2d 328, 332 (Fla. 2d DCA 2007).

This notice requirement entitles a defendant to insist that the charging document apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself from the accusations. *United States v. Cruikshank*, 92 U.S. 542, 544, 558 (1876); *United States v. Simmons*, 96 U.S. 360 (1878); *Bartell v. United States*, 227 U.S. 427 (1913); *Burton v. United States*, 202 U.S. 344 (1906). The charging document must include the facts necessary to bring a case within a statutory definition of an offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 112 (U.S. 2007) (J. Scalia, dissenting) ("Our precedents make clear that the indictment must 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'") (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)). If the language of a statute fully describes a crime, a charging document tracking the statutory phraseology is sufficient. *Potter v. United States*, 155 U.S. 438, 444-46

(1894) (the presence of statutory language "cannot be regarded as mere surplusage; it means something").

The Florida Constitution also provides defendants the right to notice using the same language as the Sixth Amendment.[1] A defendant has a right to due process in sentencing as well as trial. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). This Court explained the dual nature of due process as follows:

> The United States Supreme Court has identified two distinct areas of due process protection: procedural and substantive. *Procedural due process affords notice of a possible government deprivation and a meaningful opportunity to contest it, usually before it is imposed*. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (explaining that the "essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it"). By contrast, substantive due process bars "certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327 (1986)).

State v. Robinson, 873 So. 2d 1205, 1212-1213 (Fla. 2004) (emphasis added). It requires the State of Florida to allege every essential element when charging a crime to provide a defendant with sufficient notice of the allegations against him. Art. I, § 9, Fla. Const. This due process right extends to Petitioner in the case at bar.

[1] Art. I, § 16(a), Fla. Const. ("In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right . . . to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed.").

II. Respondent's failure to precisely allege the factual basis for an enhancement of the 10-20-Life statute deprived Petitioner of his due process right to notice.

In Florida, penal statutes must be strictly construed according to their letter and any ambiguity must be resolved in favor of the person charged with an offense. *State v. Byars*, 823 So. 2d 740, 742 (Fla. 2000) (citing *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991)). This doctrine requires that courts give effect to the language and intent of the Legislature in its interpretations of statutes. *See, e.g., Palm Beach County Canvassing Bd. V. Harris*, 772 So. 2d 1220 (Fla. 2000). In accordance with this doctrine, "[w]ords and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute." *Perkins*, 576 So. 2d at 1312.

To ensure a defendant knows the factual basis for an offense the State of Florida charges and the deprivation it seeks, an information "shall be a plain, concise, and definite written statement of the *essential facts* constituting the *offense charged*." Fla. R. Crim. P. 3.140(b). For an information to be valid the State must "allege each of the essential elements of a crime", *State v. Dye*, 346 So.2d 538, 541 (Fla. 1977), and these statutory elements cannot be inferred. *See State v. Von Deck*, 607 So. 2d 1388, 1389 (Fla. 1992). These allegations are necessary to "fairly apprise a defendant of the offenses which he or she is charged." *Leeman v. State*, 357 So. 2d 703 (Fla. 1978). If an information fails to cite a specific section of a statute the

defendant allegedly violated or omits an essential element of the alleged crime, it is fundamentally defective. *Figueroa v. State*, 84 So. 3d 1158, 1161 (Fla. 2d DCA 2012). However, an information may still stand "(1) where a statutory citation for the crime is given, but all elements are not properly charged, or where the wrong or no statutory citation for the crime is given, but all elements of the crime are properly charged, or (2) where the wrong or no statutory citation is given, but all elements of the crime are properly charged." *State v. Burnette*, 881 So. 2d 693, 695 (Fla. 1st DCA 2004); *see also Castillo v. State*, 929 So. 2d 1180 (Fla. 4th DCA 2006).

The State of Florida must allege not only the elements of the crime but also the terms which describe the factual basis for a sentencing element, like one under the 10-20-Life statute. A court cannot legally impose the enhancement unless the State of Florida *precisely* charges the statutory terms in the information. *Davis v. State*, 884 So. 2d 1058 (Fla. 2d DCA 2004); *White v. State*, 884 So. 2d 139 (Fla. 2d DCA 2004). Specifically, some of these terms include, "actual possession", "discharging" a firearm, and "causing death or great bodily harm" *See* § 775.087(2)(a)(1)-(3), Fla. Stat. When described by courts, these statutory terms have been called "essential elements" *Robinson*, 873 So. 2d at 335-36 (citing *Jackson v. State*, 852 So. 2d 941, 943 (Fla. 4th DCA 2003); *see also Davis*, 884 So. 2d at 1060, and "essential terms." *Koch v. State*, 874 So. 2d 6060 (Fla. 5th DCA 2004). Although distinguished from elements of a charged crime, *Connolly v. State*, 172 So. 3d 893,

903 (Fla. 3d DCA 2015), their significance to a defendant's sentence are as critical to the underlying charge and go to the core of a defendant's due process rights. *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004). The State's failure to precisely allege the statutory language that describes the conduct that brings a defendant into the reach of the 10-20-Life statute in an information renders a sentence imposing the statutory enhancement an illegal sentence. *See, e.g.*, *Davis*, 884 So. 2d 1058*; Green v. State*, 18 So. 3d 656 (Fla. 2d DCA 2009).

A. The language of penal statutes matter, and must be strictly construed.

For purposes of an enhancement under 10-20-Life, courts have held a person may "use" a firearm without "discharging" it, *Aliteri*, 835 So. 2d at 1185, may "possess" a firearm without "actually possessing" it, *Arnett*, 128 So.3d at 87, and may "carry" a firearm without "actually possessing" it. *Grant*, 138 So.3d at 1079. Because these terms have a particular meaning, which may or may not encompass other conduct, failing to allege the specific statutory term fails to place a defendant on notice of the State of Florida's intention to seek an enhancement. This is equally the case when one analyzes the statutes at issue in this case.

For purposes of 10-20-Life, specifically under section 775.087(2)(a)1., a ten-year mandatory minimum applies when a defendant committed, or attempted to commit, an enumerated felony, (including robbery), and, "during the commission of the offense," the defendant "actually possessed a 'firearm' or 'destructive device' as

those terms are defined in s. 790.001." § 775.087(2)(a)1., Fla. Stat. Under section 812.13(1), robbery is defined as the "taking of money or other property which may be the subject of larceny from the person or custody of another … when in the course of the taking there is the use of force, violence, assault, or putting in fear …". § 812.13(1), Fla. Stat.

A robbery charge can be enhanced to "armed" robbery if the State of Florida can prove beyond a reasonable doubt that "in the course of committing the robbery the offender *carried* a firearm or other deadly weapon, then the robbery is a felony of the first degree *punishable by imprisonment for a term of years not exceeding life imprisonment* or as provided in s. 775.082, s. 775.083, or 775.084". § 812.13(2)(a), Fla. Stat. Under section 812.13(2)(a), "carried" becomes an element of the charged offense to enhance his sentence under this section. *Id.*

Previously, the Fourth District analyzed and discussed the terms "carried" in comparison to "possession". *Grant*, 138 So.3d at 1079. In *Grant*, the Fourth District noted the "significant difference" between the definitions for the use of a firearm under Florida's robbery statute, section 812.13(2)(a), and 10-20-Life, section 775.087(2)(a)1., Florida Statutes. *Id.* at 1085. Specifically, *Grant* noted that under section 812.12(2)(a), "'carried' a firearm … reclassifies robbery into a higher degree of felony, increasing the potential maximum of punishment." *Id.* However, section 775.087(2)(a)1., "subjects defendants convicted of *actually possessing* firearms

during the commission of a robbery to a ten-year mandatory minimum sentence." *Id.* at 1085-86 (emphasis added). Relying on *Arnett*, the Fourth District noted that the "statute's applicability is predicated on the defendant being 'found to have been in *actual* possession of the firearm.'" *Id.* (emphasis maintained) (citing *Arnett*, 128 So. 3d at 87).

The key distinction in *Grant* for finding the term "carried" is not the same as "actual possession" is based on the definition of the word "possession" in section 775.087(4), Florida Statutes. *Id.* at 1086. Under 10-20-Life, section 775.087(4) defines "possession" as the following:

> [f]or purposes of imposition of minimum mandatory sentencing provisions of this section, with respect to a firearm, the term *"possession" is defined as carrying it on the person*. Possession may also be proven by demonstrating that the *defendant had the firearm within immediate physical reach with ready access with the intent to use the firearm during the commission of the offense*, if proven beyond a reasonable doubt.

§ 775.087(4), Fla. Stat. (1999) (emphasis added).

This definition "narrows the type of constructive possession that qualifies for the mandatory minimum sentence." *Grant*, 138 So.3d at 1086. For "carried" to be sufficient, "the State must prove beyond a reasonable doubt not only that the firearm was 'within immediate physical reach with ready access' but that the defendant also had 'the intent to use the firearm during the commission of the offense.' Section 812.13(2)(a) does not require the jury to make any finding about a defendant's intent

to use the firearm in deciding the issue of whether a defendant 'carried' a firearm." *Id.* at 1086. This means that the conduct which subjects a defendant to an enhancement for armed robbery under section 812.13(2)(a), does not necessarily bring a defendant into the realm of an enhancement for 10-20-Life. This was even noted in the Fourth District's opinion in the case at bar.

As noted in Judge Taylor's dissent, "An allegation that the defendant carried a firearm does not necessarily mean that he carried it on his person or was otherwise in actual possession of it." *Martinez,* 169 So. 3d at 173 n. 2 (Taylor, J., dissenting). Judge Taylor went on to state, "For example, because the term 'carry' may mean to 'convey' or 'transport,' a person who drives a car with a firearm in the trunk could 'carry' a firearm without actually possessing the firearm under section 775.087". *Id.* Equally, a person may be "carrying" a firearm without having any knowledge of it. *See Barrett v. State,* 983 So.2d 795, 796 (Fla. 4th DCA 2008) (reversing armed burglary conviction where defendant stole a safe with a firearm inside, however, the defendant had no knowledge about the firearm until the completion of the burglary when he opened the safe). In *Grant,* the court correctly noted that to impose both an enhanced sentence for armed robbery, and an enhanced sentence for 10-20-Life, "The jury must make both findings to support the imposition of a ten-year mandatory minimum sentence … [because a] defendant could have a firearm within immediate physical reach with ready access, but lack the intent to use the firearm during the

commission of the offense to satisfy 775.087(2)(a)1." *Id.* at 1086. Respondent's failure to precisely allege its intent to seek this enhancement prevented receiving notice regarding a 10-20-Life enhancement. However, Petitioner did receive constitutionally sufficient notice in at least one way.

B. Petitioner received sufficient notice for an enhancement of armed robbery, not 10-20-Life.

The essential terms describing the conduct within the 10-20-Life statute should be strictly construed and any ambiguity must be resolved in favor of Petitioner. *Byars*, 823 So. 2d at 742. The importance of the information placing a defendant on notice is clear because "[e]ach count of an information stands on its own, [and] is the only vehicle by which the court obtains its jurisdiction and is a limit upon that jurisdiction. To sentence for a crime more serious than the statute under which the crime is charged is fundamental error." *Cox v. State*, 530 So. 2d 464, 466 (Fla. 5th DCA 1988) (quoting *Cochenet v. State*, 445 So.2d 398 (Fla. 5th DCA 1984)). In this case, that means "carry" should not be defined as "actual possession" for purposes of an enhancement under 10-20-Life.

Being charged with an offense which may allow a defendant to be on notice for "actual possession" does not mean that a defendant *is* on notice that the State of Florida is seeking an enhancement under 10-20-Life. This reasoning has long been considered the appropriate interpretation under similar circumstances where the distinction between "actual possession" and "possession" were discussed, *Wallace*

v. State, 929 So. 2d 695, 697 (Fla. 4th DCA 2006), and where it has been interpreted that section 775.087(2) may be imposed only if a defendant has actual, rather than vicarious, possession of a firearm. *Hough v. State*, 448 So. 2d 628, 629 (Fla. 5th DCA 1984). Simply because a defendant is charged with an underlying offense that allows the use of a broad term which encompasses a term which may provide an enhancement does not itself expressly trigger an enhancement. *Grant*, 138 So.3d at 1079.

In the case at bar, the Fourth District held Petitioner was on notice because of the implicit nature of the charged offense being armed robbery. *Martinez*, 169 So. 3d at 172. ("The defendant knew he was charged with armed robbery. He was on notice that his actual possession of a firearm was a factual issue to be submitted to the jury."). However, affirming that holding would be problematic for the State of Florida, defendants, and juries deciding the fate of defendants throughout Florida.

The State of Florida's obligation to allege the specific statutory basis for this enhancement are fundamental to ensuring a defendant receives sufficient constitutional notice for an enhancement because the terms defined in a statute mean something, and are not "mere surplusage." *Potter v. United States*, 155 U.S. 438, 444, 446 (1894). To hold otherwise creates uncertainty and ambiguity for what the State must prove, what the defendant must protect himself against, and what the jury must decide.

Petitioner was admittedly placed on notice of the State's intention to seek an enhanced sentence under section 812.13(2)(a), not section 775.087, Florida Statutes. This intent to seek an enhancement is evidenced by the fact the State of Florida used the specific language of the Robbery statute, *i.e.* "carry" to describe the conduct at issue. [R. 6]; § 812.13(2)(a). Additionally, the State of Florida cited the enhancing portion of the statute for "armed" robbery in the information. *Id.* Alternatively, the complete omission of "actual possession", or a citation to section 775.087 demonstrates the State of Florida's lack of clear intent to enhance Petitioner's sentence under 10-20-Life.

In 1999, when Petitioner was charged with armed robbery, the issue of what "facts" must be submitted to a jury for a potential enhancement were not expressly considered by the U.S. Supreme Court. However, since Petitioner's conviction, the U.S. Supreme Court has made significant progress regarding what courts must consider as "facts" for purposes of sentencing. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000)[2]. These cases explain the fundamental importance of requiring the State

[2] *See, i.e. Blakely v. Washington*, 542 U.S. 296 (2004) (holding the protections of *Apprendi* require that facts which increase a sentence above sentencing guidelines, but below statutory maximums, must be submitted to a jury); *United States v. Booker*, 543 U.S. 220 (2005) (holding that the Sixth Amendment right to jury trial requires that, other than a prior conviction, only facts admitted by a defendant or proved beyond a reasonable doubt to a jury may be used to calculate a sentence, whether the defendant has pleaded guilty or been convicted at trial); *Alleyene v. United States*, 133 S.Ct. 2151 (2013) (any fact that increases the mandatory minimum sentence is an element of the offense which must be submitted to the jury).

of Florida to precisely allege these facts in an information; specifically, the holding of *Alleyne vs. United States*, 133 S.Ct. 2151 (U.S. 2013).

C. Under *Alleyne*, the State of Florida is required to precisely allege the facts providing for an enhancement under 10-20-Life in the information.

Following *Apprendi*, and its progeny, the obligations of what facts must be submitted to a jury, (rather than found by a judge), for sentencing purposes has hardened.[3] In *Alleyne*, one of the most recent cases dealing with this issue, the U.S. Supreme Court held that facts that increase the minimum mandatory of a defendant's sentence must be submitted to a jury. 133 S.Ct. at 2151. *Alleyne's* discussion regarding the definition of "facts" that must be proven and submitted to a jury has importance to the case at bar, and similarly situated defendants.

1. *Alleyne* redefined what "facts" must be submitted to a jury when holding that any fact that increases the mandatory minimum sentence is an element of the offense.

In *Alleyne*, the U.S. Supreme Court considered a sentence imposed under a federal statute providing for a five-year mandatory minimum if the defendant used or carried a firearm while committing a "crime of violence," and a seven-year mandatory minimum if the defendant "brandished" a firearm. 133 S.Ct. at 2155-56. In interpreting *Apprendi* and its progeny, the U.S. Supreme Court considered whether facts that create a mandatory minimum constitute facts that must be

[3] *Supra*, note 2.

submitted to a jury, or can be found by a judge. *Id.* The U.S. Supreme Court was revisiting its decision in *Harris v. United States*, which held that facts that enhance a minimum mandatory were not considered elements of a charged crime, and did not need to be submitted to a jury for the minimum mandatory to be imposed. 536 U.S. 545 (2002).

In *Alleyne*, the Court held that any fact, other than a prior conviction[4], that increases the mandatory minimum sentence is an "element" and must be submitted to the jury to ensure a defendant's Sixth Amendment right to a jury trial is upheld. 133 S.Ct. at 2155-56. Specifically, the Supreme Court held, "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' *of the charged offense*." *Alleyne*, 133 S.Ct. at 2158. In deciding *Alleyne*, the U.S. Supreme Court expressly reversed its prior holding in *Harris*.

In *Apprendi*, and the subsequent cases including *Alleyne*, the issue before the Court was not whether the facts that must be found by a jury rather than a judge need to be charged in an indictment; rather, the issue was whether these facts need to be submitted to a jury. *Apprendi*, 530 U.S. at 477, n. 3. ("*Apprendi* has not here asserted

[4] In *Almendarez-Torres v. United States*, 523 U.S. 224 (U.S. 1998), decided prior to *Apprendi*, the U.S. Supreme Court held that prior convictions are not "facts" that need to be charged in a charging document, or proven to a jury for an enhancement of a defendant's sentence. *Apprendi* and its progeny have upheld this decision.

a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment . . . We thus do not address the indictment question separately today.") However, the Court noted that state prosecutors should charge information relating to sentence enhancements in indictments. *Id.* at 476. In *Jones v. United States*, 526 U.S. 227 (1999), the U.S. Supreme Court "noted that 'under the Due process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243, n. 6).

The Supreme Court's discussion in *Alleyne* reviewing the prior precedent for its holding leaves no doubt that historically, "widely recognized principles follow[ ] a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment." *Alleyne*, 133 S. Ct. 2151 (2013). Justice Thomas explained:

> This rule "enabled [the defendant] to determine the species of offence" with which he was charged "in order that he may prepare his defence accordingly ... and that there may be no doubt as to the judgment which should be given, if the defendant be convicted." *Archbold* 44 (emphasis added). As the Court noted in *Apprendi*, "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment

> flowed from the invariable linkage of punishment with crime." 530 U.S., at 478, 120 S. Ct. 2348.

Alleyne, 133 S.Ct. at 2160 (emphasis in original).

Recognizing the notice component of due process and citing *Apprendi*, the Court observed, "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." *Alleyne*, 133 S. Ct. at 2161 (citing *Apprendi*, 530 U.S., at 478-479, 120 S.Ct. 2348).

The Second District has previously discussed this very issue in the context of the *Harris* decision. *Rogers v. State*, 963 So.2d 328 (Fla. 2d DCA 2007). As discussed below, the Second District noted the need for "symmetry" between the facts alleged, and the facts proven at trial. *Id.*

2. The need for "symmetry" between the charging document and jury findings demonstrate why failing to provide notice of facts that can enhance a defendant's sentence is illegal.

The Second District has previously discussed the issue of "symmetry" between the facts alleged in a charging document and the facts found by a jury for purposes of ensuring a constitutionally sound sentence. *Rogers*, 963 So. 2d at 328. In this context, symmetry means the requirement that a charging document must contain every element of the alleged offense, and that these same facts alleged must be submitted to a jury. *Id.*

At issue in *Rogers* was the defendant's objection that the information did not allege certain essential facts that the trial court allowed to be included on the verdict form and in the sentencing scoresheet. *Rogers*, 963 So. 2d at 328. The Second District noted that, "the conclusion that a fact should be treated as an element which must be found by the jury suggests that the same fact should be treated as an element to be alleged in the charging instrument in order to satisfy the notice guarantee of the Sixth Amendment." *Rogers*, 963 So. 2d 328 at 334; (citing *United States v. Jackson*, 327 F.3d 273, 285 (4th Cir. 2003)). Just a few lines later the court cited *Harris* for the proposition that some facts, notably facts that create a minimum mandatory, are facts that do not need to be found by a jury and thus would not need to be specifically alleged in a charging document. *Rogers*, 963 So. 2d at 334 (citing *Harris*, 536 U.S. at 568) (stating that facts increasing a defendant's minimum sentence "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt")). However, *Rogers* was decided prior to *Alleyne*, and in citing *Harris*, which was overturned by *Alleyne*, the very reasoning outlined in *Rogers* for why these facts need not be alleged in the charging document has been overturned.

Since *Alleyne* overturned *Harris*, "facts" that increase a minimum mandatory now constitute elements. A defendant's constitutional right to due process requires a symmetry because these facts should be charged in the information for the purpose

of an enhancement. As such, the Second District's prior discussion of a symmetry between the charging document and verdict form has great significance when viewing the notice issue before the Court, and how this Court should view the term "actual possession" for an enhancements under 10-20-Life. If the symmetry logic applies, "actual possession" is indeed a "fact" that must be charged in an information.

As this Court noted when discussing the issue of upward departures in violation of *Apprendi* and *Blakely*, such enhancements "are unconstitutionally enhanced" and "patently fail to comport with constitutional limitations, and consequently, the sentences are illegal under rule 3.800(a)." *Plott v. State*, 148 So. 3d 90, 95 (Fla. 2014). This illustrates the significance of the elements found in the 10-20-Life enhancement and the need to have these specifically alleged by Respondent in the information. Because the "facts" at issue, *i.e.* whether the Petitioner "actually possessed" versus "carried" a firearm, "constitutes an 'element' or 'ingredient' of the charged offense", *Alleyne*, 133 S.Ct. at 2158, these facts constitute an essential "element" of the charged offense which must be specifically alleged in the information for a legal sentence. *Plott*, 148 So. 3d at 95. Finding *Alleyne* applies in the context of 10-20-Life is consistent with prior holdings distinguishing *Alleyne's* non-application to Florida recidivist enhancement statutes as well. *See Hunter v. State*, 174 So. 3d 1011 (Fla. 1st DCA 2015) (citing *Williams*

v. State, 143 So. 3d 423, 424 (Fla. 1st DCA 2014), *rev. denied*, 157 So. 3d 1052 (Fla. 2014) (holding *Alleyne* does not apply to the Prison Releasee Reoffender sentencing or to Habitual Violent Felony Offender sentencing).

The logic which requires Respondent to submit and prove facts to a jury for an enhancement to protect a defendant's Sixth Amendment right to receive a fair jury trial, equally requires that these same facts be precisely alleged by Respondent in the charging document to provide sufficient notice of the potential sentence a defendant faces prior to trial or the entry of a guilty plea.

D. Affirming the Fourth District's decision would create a lack of uniformity and uncertainty for the State of Florida, Defendants, and Juries.

The State of Florida's obligation to allege the precise statutory basis for this enhancement are fundamental to ensuring a defendant receives sufficient constitutional notice for an enhancement because the terms defined in a statute mean something, and are not "mere surplusage." *Potter*, 155 U.S. at 446 (1894). To hold otherwise creates uncertainty and ambiguity for what the State must prove, what the defendant must protect himself against, and what the jury must decide.

If *Martinez* is affirmed, are similarly situated defendants charged with one of the enumerated offenses under section 775.087 implicitly on notice of a potential enhancement under 10-20-Life? Should all defendants similarly situated now be on notice that "carry" means "actual possession"? If a defendant is charged with

"carrying" a "firearm" can his sentence be enhanced for "actually possessing" a "machine gun"? § 775.087(3)(a)1., Fla. Stat. (authorizing a 15 year mandatory minimum). These terms mean something, and failing to adhere to their meaning, or expanding their definitions to include conduct more expansive than described, violates a defendant's due process right to notice.

III. Respondent's failure to cite the statutory basis for an enhancement further deprived Petitioner of sufficient notice.

An information's mere reference to section 775.087(2), without specifying the applicable subsection used as a basis for the enhancement, does not afford legally sufficient notice to a defendant of the State of Florida's intent to seek an enhancement under 10-20-Life. *Koch*, 874 So. 2d at 608 (concluding that "more than a reference to the number of the statute [section 775.087(2)(a) 2] is required to properly put a person on notice of this lengthy enhancement statute's applicability . . . ."). Interestingly, the Fourth District has come to this same conclusion. *Inmon v. State*, 932 So. 2d 518, 519-520 (Fla. 4th DCA 2006).

10-20-Life is a comprehensive sentencing statute that provides a myriad of potential enhancements to a defendant's sentence based on the alleged conduct of a defendant. *Inmon*, 932 So. 2d at 519-520. Previously, failing to cite the statutory basis for an enhancement under 10-20-Life has been deemed not a sufficient reason to allege a lack of notice. *Bryant v. State*, 386 So. 2d 237 (Fla. 1980). However, over the years, Florida's sentencing scheme, including 10-20-Life, has become more

complex, and courts have noted the need to plead the statutory basis for an enhancement precisely as well as the factual basis. *Koch v. State*, 874 So. 2d 606 (Fla. 5th DCA 2004). At least one court noted the drafters of section 775.087, Florida Statutes should "receive a prize" for the ambiguity it created regarding the "possession" requirements of the statute. *Johnson v. State*, 855 So. 2d 218 (Fla. 5th DCA) (J., Griffin, concurring) ("In my time, I have seen some odd statute drafting, but what section 775.087 does with 'possession' of a firearm, in general, and 'possession of a firearm by a felon', in particular, should get a prize.").

In *Inmon*, the State of Florida sought to enhance a defendant's sentence under 10-20-Life. *Id.* The information merely referenced section 775.087(2) to seek a 20 year minimum mandatory enhancement for discharging a firearm. *Id.* However, the Fourth District reversed this enhancement because

> "[s]ection 775.087 is a comprehensive sentencing enactment on the subject of weapons involved in the commission of felonies … [and *[t]he general reference to subdivision (2) of section 775.087 is not specific enough to give the accused notice of a possible enhancement* of 20 years, because this subdivision contains a lesser alternative. *If the state desires to give an accused notice of an enhancement possible within subsection (2) of section 775.087 by a mere reference to the statute itself, then it should state the particular sub-subdivision applicable.* In this instance, the State should have referred to section 775.087(2)(a)2, Florida Statutes (2005). Its failure to do so renders the notice insufficient.

Inmon, 932 So. 2d at 519-520.

Here, the State of Florida failed to cite *any* statutory basis for an enhancement under 10-20-Life in the information, let alone a specific subsection for a specific enhancement. [R. 6]. Even in looking at the statutes that were charged, namely, sections 812.13(1), and 812.13(2)(a), neither discuss an enhancement under 10-20-Life. (referring only to sections 775.082, s. 775.083, or 775.084).

To compound the issue, the State of Florida did not even use the statutory language in the information under the specific subsection of the enhancement as a basis to enhance under 10-20-Life. Respondent seeks an enhancement under a statute that it failed to specifically allege the factual basis, and also failed to wholly cite in the information. The only facts cited specifically relate to the underlying charge, as well as the statutory basis for this charge. [R. 6]. In no other section of the information, or in the text of the statute, is there any reference based on its text that the State of Florida could seek an enhancement based on section 775.087, Florida Statutes. [R. 6]. This is the definition of constitutionally deficient notice.

IV. Rule 3.800(a) is designed to protect defendants from illegal sentences of this kind.

The purpose of Rule 3.800(a) is to correct an illegal sentence. What constitutes an illegal sentence has not always been well-defined. *See Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998); *State v. Mancino*, 714 So. 2d 429 (Fla. 1998); *Bover v. State*, 732 So. 2d 1187 (Fla. 3d DCA 1999). This Court not long ago struggled with coming to terms with a definition of what constitutes an illegal sentence. "We

continue to refine our definition of 'illegal sentence' in an attempt to strike the proper balance between concerns for finality and concerns for fundamental fairness in sentencing … we conclude that it would be more helpful to provide a predictive description of the types of sentencing errors that may be corrected as illegal, rather than relying on a somewhat elusive definition of 'illegal sentence.'" *See Carter v. State*, 786 So. 2d 1173, 1178-1181 (Fla. 2001). Currently, an illegal sentence is one which no judge under the entire body of sentencing law could possibly impose under any set of factual circumstances. *William*, 957 So. 2d at 600. Pursuant to this definition, "the illegality must be of a fundamental nature." *Wright v. State*, 911 So. 2d 81, 84 (Fla. 2005) (citing *Carter*, 786 So. 2d at 1178).

This "fundamental nature" does not necessarily mean "fundament error." *Durant v. State*, 177 So. 3d 995, 996-997 (Fla. 5th DCA 2015). In *Maddox v. State*, this Court held that fundamental errors are those that are "serious" and that "[i]n determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence." 760 So. 2d 89, 99 (Fla. 2000) (citing *Bain v. State*, 730 So. 2d 296, 304-05 (Fla. 2d DCA 1999)). This Court continued by stating that, "the class of errors that constitute[s] an 'illegal' sentence that can be raised for the first time in a postconviction motion decades after a sentence becomes final is a narrower class of

errors than those termed 'fundamental' errors that can be raised on direct appeal even though unpreserved." *Id.* at 100 n.8.

In *Wright*, this Court discussed examples of sentencing errors of a fundamental nature that are illegal under the rule and explained:

> While it is not the only evil of illegality contemplated by rule 3.800, we noted in *Davis* that it was this fundamental concern to *correct a sentence in excess of the legal maximum that provided the primary example for the rule's policy of providing unlimited time to challenge a wrongful imprisonment*.

Wright, 911 So. 2d at 84 (citing *Davis*, 661 So. 2d at 1196) (emphasis added). The very issue before this Court is whether a sentence in excess of the legal maximum, *i.e.* a ten year mandatory minimum, may be imposed when a defendant does not receive notice of the enhancement in the charging document.

Previously, this Court held an illegal sentence under Rule 3.800(a) occurs in multiple ways. Specifically, these illegal sentences occur when: (1) when there is an upward departures in violation of *Apprendi* and *Blakely*, *Plott*, 148 So. 3d at 95; (2) when on the face of the record a defendant is sentenced as a habitual offender improperly, *Mack v. State*, 823 So. 2d 746, 751 (Fla. 2002); (3) where the requisite predicate felonies essential to qualify a defendant for an enhanced sentence as a habitual felon do not exists as a matter of law, *Bover*, 797 So. 2d at 1247; (4) where the habitual offender statute in effect at the time of the crime prohibited a court from imposing an enhanced habitual offender status, *Carter*, 786 So. 2d at 1180; (5) where

a defendant does not receive credit for time served, *Mancino*, 714 So. 2d at 433; or (6) where it can be determined that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause. *Hopping*, 708 So. 2d at 265. The issue before this Court fits squarely in with this prior precedent.

The case at bar presents this Court with an illegal sentence because it is evident from the record the Respondent failed to precisely allege the statutory basis describing the factual finding required to enhance a defendant's sentence, and a trial court still imposed this enhancement. *See Arnett*, 128 So.3d at 87. No judge under the entire body of sentencing law could possibly impose a sentencing enhancement when a defendant has not received proper notice of the Respondent's intention to enhance a sentence because of Respondent's failure to allege the specific factual basis as described in the applicable enhancing statute. Additionally, where Respondent fails to cite the statutory basis for the enhancement, this compounds the lack of notice issue and makes any sentence imposed illegal.

V. Petitioner did not waive the enhancement under 10-20-Life.

The Fourth District contends a defendant can "waive the failure to precisely charge grounds for a mandatory minimum under the 10-20-Life law." *Martinez*, 169 So. 3d at 172 (citing *Bradley*, 3 So. 3d at 1171). Specifically, the Fourth District held that Petitioner waived any challenge to the illegality of the sentence because he did not challenge the sufficiency of the allegations in the information, the special

interrogatory used at trial, the imposition of the mandatory minimum at sentencing, nor the imposition of the mandatory minimum in his direct appeal. *Martinez*, 169 So. 3d at 172. However, this broadly expands the holding of *Bradley*.

In *Bradley*, a defendant challenged the legality of his sentence under a Rule 3.800(a) motion arguing the information failed to allege he discharged a firearm. *Id.* The defendant entered a plea with the understanding he was stipulating to the facts alleged in the charging affidavit, and he voluntarily agreed to enter a plea based on his understanding he would receive a twenty year mandatory minimum sentence to avoid a life term. *Id.* Additionally, he stipulated to the factual basis for the sentence. *Id.* In reviewing the plea agreement, and the factual stipulations, this Court was satisfied the defendant understood the nature and consequences of the plea. *Id.* This Court held, "a defendant's plea may constitute an express waiver of a defective charging document when he stipulates to facts which include any missing element and voluntarily pleads to a sentence that incorporates the missing element." *Bradley*, 3 So. 3d at 1171. *Bradley* is distinguishable from the case at bar.

Here, Petitioner went to trial and was convicted of armed robbery. [R. 6]. At no time did he stipulate to the factual basis of the sentence, nor did he voluntarily waive any fact that would place him subject to an enhancement under 10-20-Life. *Id.* While the Fourth District held Petitioner waived his sentence, such a holding broadly expands *Bradley* beyond what this Court previously held. A sentence can be

deemed illegal under rule 3.800(a) if it violates statutory or constitutional provisions and the illegality is of a fundamental nature. *Wright*, 911 So.2d at 84; *Hopping*, 708 So.2d at 263. Here, the fundamental nature of the violation deems this sentence one that may be remedied under Rule 3.800(a), and is illegal, allowing a defendant to bring an appeal regarding the illegality of his sentence at any point.

VI. The failure to provide sufficient notice cannot be cured with a jury instruction.

Over thirty years ago, this Court held that for 10-20-Life to be lawfully imposed, a jury must make a factual findings which support the enhancement. *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984). This court required a "clear jury finding" to ensure a defendant received his constitutionally protected right to a fair and impartial jury. *State v. Iseley*, 944 So. 2d 227, 230-231 (Fla. 2006). This Court held this requirement well before the U.S. Supreme Court squarely addressed this issue. *See Apprendi*, 530 U.S. at 466.[5] As stated by this Court in *Iseley*, this "clear jury finding" can be demonstrated either by a specific question or special verdict form, or the inclusion of a reference to a firearm in identifying the specific crime for which the defendant is found guilty. 944 So. 2d 230-32. However, a special jury instruction does not cure a defective notice.

[5] *Supra*, note 2.

A jury instruction cures a Sixth Amendment violation regarding a defendant's right to a jury wherein the specific facts to enhance a defendant's sentence must be found by a jury, not a judge. *Apprendi*, 530 U.S. at 466. Regardless of the State's special jury instruction, this does not afford Petitioner the *notice* of its intent to seek these enhancements prior to trial. Notice in this context refers to a defendant's right to be informed of the "nature and cause of the accusation" against him. U.S. Const., Amend. VI; *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than the notice of the specific charge, and a chance to be heard in a trial on the issues raised by that charge, if desired[.]"). Several Florida courts have also held a jury finding is insufficient to cure this defect. *See Davis*, 884 So. 2d at 1058; *Rogers*, 875 So. 2d at 771; *Dukes v. State*, 866 So. 2d 775, 776 (Fla. 1st DCA), *review dismissed*, 868 So. 2d 523 (Fla. 2004).

Here, although the jury found Petitioner "actually possessed" a firearm during the commission of the armed robbery, Petitioner was never charged in the information with "actual possession" of the firearm. [R. 6]. The State of Florida's failure to properly notice Petitioner of this enhancement in the information cannot be cured based on a special jury instruction.

VII. The Fourth District's cited precedent for its holding merits reversal.

In identifying the direct conflict with the First District, the Fourth District stated that it, "simply disagree[s] with the First District Court of Appeal that the

failure to allege 'actual possession' renders an otherwise legal sentence illegal. It is contrary to our precedent, and we see no reason to deviate from our precedent." *Martinez*, 169 So. 3d 172. In its opinion, the Fourth District cited two cases to establish its precedent that it did not intend to deviate from in denying Petitioner's Rule 3.800(a) motion. These cases are *Aliteri*, 835 So. 2d at 1185 and *Grant*, 138 So. 3d at 1079, and according to the case at bar hold "that an information alleging a defendant 'carried' a firearm during an offense provides sufficient notice to sustain a mandatory minimum for 'actual possession' of a firearm." *Martinez*, 169 So. 3d 172 (citing *Aliteri*, 835 So. 2d at 1185 and *Grant*, 138 So. 3d at 1079). In reviewing these cases, neither actually support the Fourth District's position. Additionally, as it pertains to discussion of sufficient notice, both cases discuss the exact reasons why reversal is appropriate.

When reviewing *Aliteri*, not once in the opinion is the word "carried" ever used. Rather, the issue was whether a defendant who was charged with "use" of a firearm, and found to have "discharged" the firearm by the jury, could receive a 20 year minimum mandatory sentence under 10-20-Life. *Id.* at 1183. The Fourth District held it could not enhance a sentence because the State of Florida failed to allege the specific factual finding of "discharge." *Id.* However, the Fourth District did allow an enhanced sentence for a three year mandatory minimum because it found that the term "use" of a firearm, (as charged in the information), was sufficient

notice for a three year enhancement for the "possession of a firearm by a convicted felon." *Id.* Thus, the Fourth District's reliance on *Aliteri* as a basis to hold that "carried" is equivalent to "actual possession" is misplaced. Equally, its reliance on *Grant* is problematic for its holding.

In *Grant*, the Fourth District squarely sides with the position that "carried" and "actual possession" mean two very different things. 138 So. 3d at 1079. The Fourth District Court in fact concedes that *Grant* held the "legal requirements for carrying a firearm were not equivalent to the statutory requirement that a defendant be found in 'actual' possession for purposes of sentencing." *Martinez*, 169 So. 3d at 172. However, the Fourth District Court distinguished *Grant* because there was not a jury finding that the defendant "actually possessed" a firearm thus making the sentence illegal. As discussed previously, this jury finding issue has no impact on whether a defendant receives sufficient notice. However, when focused on the notice issue as discussed in *Grant*, beyond the fact that the Fourth District clearly acknowledges its own precedent sides explicitly with the argument put forth by Petitioner, *Grant* specifically cites *Arnett* for the very holding and reasoning argued by Petitioner for the purposes of explaining why "carried" cannot mean "actually possessed". *Id.* at 1079 (citing *Arnett* 128 So. 3d at 87)).

Grant cites *Arnett* for the holding that the application of section 775.087(2), "is predicated on the defendant being found to have been in 'actual possession of the

firearm.'" *Id.* at 1079 (citing *Arnett* 128 So. 3d at 87)). *Grant* continued by citing *Arnett* for the very proposition at the core of this case: To "enhance a defendant's sentence under Section 775.087(2), the grounds for enhancement must be clearly charged in the information." *Id.* (citing *Arnett*, 128 So. 3d at 88)).

The Fourth District's basis for affirming the trial court's denial of Petitioner's Rule 3.800(a) motion was based on its own precedent. However, its own precedent does not even support this holding, and relies on the very case it is in conflict with to demonstrate its position. Additionally, the Fourth District cites *Artileri* for a position that is factually distinguishable since the cases does not even discuss the comparison between "carried" and "actual possession." As such, reliance on the precedent cited by the Fourth District to support its holding merits reversal.

Conclusion

Petitioner requests this Court hold that Respondent's failure to precisely allege the factual basis for the enhancement under 10-20-Life violated Petitioner's due process right to notice. As such, such a sentence is illegal and cannot stand, and the Fourth District's decision should be reversed and Petitioner's sentence is illegal and must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 11th day of April 2016.

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