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 REPLY BRIEF

On Discretionary Review from the District Court of Appeal,

Fourth District, State of Florida

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REPLY ARGUMENT

THE FOURTH DISTRICT IMPROPERLY HELD AN INFORMATION ALLEGING THAT PETITIONER CARRIED A FIREARM DURING THE COMMISSION OF A ROBBERY PROVIDED HIM WITH SUFFICENT NOTICE THAT HE WAS SUBJECT TO ENHANCEMENT UNDER FLORIDA'S 10-20-LIFE LAW WHEN THE STATE WHOLLY OMITTED ANY BASIS FOR THE ENHANCEMENT IN THE CHARGING DOCUMENT.

Jurisdiction.

I. The decision in *Martinez v. State*, 169 So. 3d 170 (Fla. 4th DCA 2015) expressly and directly conflicts with *Arnett v. State*, 128 So. 3d 87 (Fla. 1st DCA 2013), because the controlling facts are the same or similar in both *Martinez* and *Arnett*.

Respondent argues this Court "should dismiss its jurisdiction over this case because *nothing* within the 'four corners' of the Fourth District's opinion expressly and directly conflicts with *Arnett*." [ABR. 6][1] (emphasis added). Specifically, Respondent argues that the cases are factually distinguishable because Petitioner was charged with "carrying" a firearm, while the defendant in *Arnett* was charged with "unlawfully own[ing] or hav[ing] in his care or her care, custody, possession or control a firearm …" [ABR. 6]. This argument fails to appreciate the factual similarities between *Martinez* and *Arnett*, and that conflict jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution can be based on "*the same or closely*

[1] References to Petitioner's Initial Brief on the merits and the Respondent's Answer Brief on the merits are made with the abbreviations "IBR" and "ABR," respectively, followed by the appropriate page number(s).

similar controlling facts." *Plott v. State*, 148 So. 3d 90, 95-96 (Fla. 2014) (Canady, J., dissenting) (emphasis added).

Here, the Respondent only alleges there is an insufficient similar factual basis to retain jurisdiction, [ABR. 6]; however, the factual and legal similarities between *Arnett* and *Martinez* are clear. In these two cases, both defendants filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(a) alleging their respective trial courts illegally imposed a mandatory minimum sentence when the charging document failed to precisely allege the defendants "actually possessed" a firearm in violation of section 775.087(2)(a)1., Florida Statutes. (R. 3-4); *Arnett*, 128 So. 3d at 87. Both motions were denied and appealed to their respective district courts. *Id.* In *Arnett*, the First District held this enhancement was illegal because "actually possessed" was not alleged in the charging document, *Arnett*, 128 So. 3d at 88, while the Fourth District in this case held that such failure to precisely allege the enhancement was not required. *Martinez*, 169 So. 3d at 172. The facts in this case are the same or so closely similar that conflict jurisdiction is appropriate and this Court should retain jurisdiction.

II. **Petitioner cannot waive the illegality of the minimum mandatory sentence imposed by the trial court because the imposition of the sentence is a violation of Petitioner's due process rights.**

Respondent argues that Petitioner waived the imposition of the 10-year minimum mandatory sentence, and further that due process was not violated because

Petitioner voluntarily agreed to have the jury decide the "actual possession" issue. [ABR. 7-9]. However, both arguments misconstrue the issue before this Court. A due process violation cannot be waived, and a juries specific finding a defendant was in "actual possession" of a firearm does not impact the necessity to precisely allege the basis for an enhancement in the charging document. *Infra.* Merits § I.

The importance of an information as the instrument to place a defendant on notice is clear because "*[e]ach count of an informatio*n 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." *Colwell v. State*, 448 So. 2d 540, 541 (Fla. 5th DCA 1984) (quoting *Cochenet v. State,* 445 So.2d 398, (Fla. 5th DCA 1984)); see also *Cox v. State*, 530 So. 2d 464, 466 (Fla. 5th DCA 1988). When an information is defective an objection may be waived, "*unless the information wholly fails to charge a crime*". *Haselden v. State*, 386 So. 2d 624, 624 (Fla. 4th DCA 1980). This is equally the case for enhancement terms under the 10-20-Life Law. *Whitehead v. State*, 884 So. 2d 139 (Fla. 2d DCA 2004).

Courts have describe the statutory terms authorizing a 10-20-Life enhancement as "essential elements". *Rogers v. State*, 963 So. 2d 328, 335 (Fla. 2d DCA 2007). These terms, and the burden on the State to provide evidence to support these terms, are critically important to identifying the range of a defendant's

sentence. *Rogers*, 963 So. 2d at 328. District courts have long held that a trial court fundamentally errs in imposing a minimum mandatory sentence under section 775.087, Florida Statutes when the information does not allege the precise term triggering the enhancement. *Arnett*, 128 So. 3d at 87; *Young v. State*, 86 So. 3d 541 (Fla. 2d DCA 2012); *Green v. State*, 18 So. 3d 656 (Fla. 2d DCA 2009); *Grant v. State*, 138 So. 3d 1079 (Fla. 4th DCA 2014); *Davis v. State*, 884 So. 2d 1058 (Fla. 2d DCA 2004); *Whitehead*, 884 So. 2d at 139. Failing to cite the precise term for an enhancement under 10-20-Life is as much a due process violation as when there is a complete failure to cite an essential element of a crime. [IBR. 6-24].

The illegality of a sentence from a charging defect because of a due process violation can be raised at any time, and no waiver can be found, except where the defendant has entered a plea to the defective charging document, stipulated to facts which include any missing element, and voluntarily pleaded to a sentence that incorporates the missing element. *Bradley v. State*, 3 So. 3d 1168 (Fla. 2009). Respondent's interpretation of *Bradly* as a basis to demonstrate waiver in this case broadly expands its holding, because waiver does not occur without clear acquiescence and acceptance from Petitioner regarding the disputed facts of the case. Here, Respondent relies on the special interrogatory in the verdict form as a basis for Petitioner's alleged waiver; however, the need for this verdict form demonstrates Petitioner's dispute of these facts, rather than acceptance. [R. 8]. Petitioner cannot

have waived this charging defect because Respondent wholly omitted the factual (and statutory)[2] basis for the 10-20-Life Law enhancement. Nor is there waiver because Petitioner neither plead to, nor stipulated to the omitted facts. Therefore, the Fourth District's holding in *Martinez* should be reversed.

III. The record is adequate and sufficient to decide the merits of this case because the charging document and judgment and sentence are part of the record, and the "tipsy coachman" doctrine does not apply because of Respondent's inability to point to any evidence in the records which supports an alternate legal argument.

Respondent argues there is an insufficient record for this Court to consider the issues on the merits because the trial court found Petitioner failed to satisfy his burden of demonstrating an error on the face of the record[3], and because a sentencing

[2] Petitioner argued the illegality of this sentence is compounded by the fact that "the information failed to even refer to section 775.087(2)(a)1., Florida Statutes." *Martinez*, 169 So. 3d at 174 (Taylor, J., dissenting); [IBR. 25-27]. Respondent does not address this argument, or the various district courts' agreement of the need to properly cite the statutory basis for an enhancement as well. See *Koch v. State*, 874 So. 2d 606, 608 (Fla. 5th DCA 2004); *Inmon v. State*, 932 So. 2d 518, 519-520 (Fla. 4th DCA 2006). The authority cited by Respondent demonstrates this as a significant reason why the Fourth District's decision should be reversed because in each cases relied on by Respondent the statutory basis for the enhancement was cited. *Lane v. State*, 996 So. 2d 226, 227 (Fla. 4th DCA 2008); *Connolly v. State*, 172 So. 3d at 898-99; *Delgado v. State*, 43 So. 3d 132, 134 (Fla. 3d DCA 2010). Or the authority was based on the lower court's decision currently under review before this Court, and the charging document also cited the statutory basis for the enhancement. *Nelson v. State*, 41 Fla. L. Weekly D1129 (Fla. 4th DCA May 11, 2016). Or the authority was completely unrelated to the imposition of a sentencing enhancement at all. *Haselden*, 386 So. 2d at 624; *Tracey v. State*, 130 So. 2d 605 (Fla. 1961) (same).

[3] The trial court incorrectly found Petitioner was on notice because he "carried" a firearm and the "*information properly cited to the applicable statute*[.]" [R. 16]

or trial transcript is not part of the record. [ABR. 9] (citing R. 16). However, there is a sufficient record to decide the issue on the merits because the issue is whether "the grounds for enhancement" are "clearly charged in the information." *Arnett*, 128 So. 3d at 88; see also, *Young*, 86 So. 3d at 541; *Green*, 18 So. 3d at 656. This Court can decide this issue based on the record before it.

This Court has previously determined that various sentences are cognizable under a Florida Rule of Criminal Procedure 3.800(a) motion without the need for trial and sentencing transcripts. See, e.g., *Carter v. State*, 786 So.2d 1173, 1180-81 (Fla. 2001) (habitual offender sentence may be correctable as an illegal sentence where the habitual offender statute in effect at the time of sentencing did not permit habitualization for life felonies); *Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998) (sentence illegal where it has been unconstitutionally enhanced in violation of the double jeopardy clause). This Court has required sentencing and trial transcripts, but only when the illegality alleged must be demonstrated by the transcripts. *Williams v. State*, 957 So. 2d 600, 604 (Fla. 2007) (dispute between the oral pronouncement at sentencing and the written sentence require a sentencing transcript to determine the illegality of a sentence under Florida Rule of Criminal Procedure 3.800(a)); see

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(emphasis added). This is factually inaccurate as the statutory basis was not cited in the charging document. Regardless, the basis for the trial court's denial was on the record before it, not a lack of the record.

also *Stokes v. State*, 91 So. 3d 159 (Fla. 5th DCA 2012) (same); *Dabbs v. State*, 115 So. 3d 418 (Fla. 2d DCA 2013) (same).

The illegality at issue is clearly demonstrated based on the record before this Court. The record contains the information charging Petitioner, [R. 6], the verdict form, [R. 8], and the judgment and sentence demonstrating defendant received an enhancement pursuant to the 10-20-Life Law. [R. 10-12]. Neither the trial court nor the Fourth District ever considered an incomplete record as a basis for denial, nor should this Court.

Additionally, Respondent erroneously argues the Fourth District's decision should be affirmed under the "tipsy coachman" doctrine because Petitioner "did not provide the trial court with a copy of the sentencing transcript." [ABR. 9-10]. An appellate court may apply the "tipsy coachman" doctrine to affirm a lower court's holding when the lower court reached the correct result despite using incorrect reasoning. See *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999). This doctrine may only apply when there is evidence in the record which would support an alternate legal argument for affirmance. *Ray v. State*, 40 So. 3d 95 (Fla. 4th DCA 2010). However, any argument that may be made in support of an order must have a foundation in the record. *Robertson v. State*, 829 So. 2d 901 (Fla. 2002). Otherwise, the alternative theory will not save the order on review. *State Farm Fire & Cas. Co. v. Levine*, 837 So. 2d 363 (Fla. 2002).

Here, the "tipsy coachman" doctrine does not apply, because Respondent's argument is that a *lack* of record evidence requires affirmance. Respondent argues it "is entirely possible" that the transcripts would show that Petitioner was on actual notice of this enhancement. [ABR. 10]. However, "entirely possible" does not provide a foundation for an alternate legal argument in the record. *Robertson,* 829 So. 2d 901; *Levine,* 837 So. 2d at 363. As such, the "tipsy coachman" doctrine is inapplicable.

The Fourth District's decision in *Martinez* should be reversed because Petitioner has sufficiently met his burden of demonstrating the illegality of the sentence based on the record before this Court, and the Respondent has failed to point to an alternate legal theory to support the "tipsy coachman" doctrine.

Merits.

I. This Court should strictly construe the enhancement terms in the 10-20-Life Law, because affirming the Fourth District's decision in *Martinez* would be an abrogation of Legislative powers.

The core of Petitioner's argument is that failing to allege the precise factual basis for a 10-20-Life enhancement in the charging document is a clear due process violation. [IBR. 11-15]. In the alternative, Petitioner also argues reversal is appropriate because to accept Respondent's interpretation of "carry" to include "actually possessed" would be in contravention of long held principals of statutory construction and an abrogation of Legislative powers. [IBR. 11-15].

In Florida, penal statutes must be strictly construed. *State v. Byars*, 823 So. 2d 740, 742 (Fla. 2000). When interpreting a statute, the first consideration of statutory construction is that the language in the statute is given its plain and ordinary meaning. *State v. Bodden*, 877 So. 2d 680 (Fla. 2004). If not defined in a statute, a court may refer to a dictionary to ascertain the plain and ordinary meaning that the legislature intended to ascribe to a term. *L.B. v. State*, 700 So. 2d 370 (Fla. 1997). However, where the language of the statute is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the statute. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000). A court cannot construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. *Velez v. Miami-Dade County Police Dept.*, 934 So. 2d 1162 (Fla. 2006). To do so would be an abrogation of legislative power. *Holly v. Auld*, 450 So. 2d 217 (Fla.1984). In this case, Respondent is requesting this Court to extend and modify the express terms of an unambiguous statute by affirming the Fourth District's decision in *Martinez*.

Under the robbery statute, a defendant may receive an enhanced sentence when "in the course of committing the robbery the offender *carried* a firearm or other deadly weapon[.]" § 812.13(2)(a), Fla. Stat. (1999) (emphasis added). The word "carry" is not defined in the statute; however, this Court has held "[t]he word

'carry' is ordinarily understood to mean 'to hold or have on one's person[.]'" (ABR. 12-13) (citing *State v. Burris*, 875 So. 2d 408, 411 (Fla. 2004) (quoting *Burris v. State*, 825 So. 2d 1034 (Fla. 5th DCA 2002)). Respondent argues that the definition as identified in the robbery statute of "carry" is sufficient to place a defendant on notice for a 10-20-Life enhancement; however, there is a significant difference.

Under the 10-20-Life Law, a defendant can receive an enhancement if the defendant "actually possessed a 'firearm'." 775.087(2)(a)1., Fla. Stat. (1999). "Actually" is not defined in the statute; however, in relying on its dictionary definition, "actual" is defined as "Existing in fact; real." *Black's Law Dictionary*, 40 (9th ed. 2009). Within the 10-20-Life Law "possession" is expressly 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). Thus, under the 10-20-Life Law, "actually possessed" a firearm means that the defendant did "in fact" … "carry [a firearm] on the person [or] had the firearm within immediate physical reach with ready access with the intent to use the firearm during the commission of the offense." 775.087(4), Fla. Stat. (1999).

"Carry", even within the ordinary definition of "to hold or have on one's person" under the robbery statute, does not by definition include "actually"

possessing a firearm. When courts have applied these terms, under the robbery statute, "carry on the person" has been interpreted to mean a defendant may receive an enhanced sentence for armed robbery if a codefendant was armed during a robbery under the theory that he is vicariously armed. *Williams v. State*, 479 So. 2d 227 (Fla. 3d DCA 1985). Alternatively, where a defendant was not in actual possession of a firearm, a court may not impose a 10-20-Life enhancement for a codefendant's "actual possession" of a firearm. *Freeny v. State*, 621 So. 2d 505, 506 (Fla. 5th DCA 1993). As such, under the robbery statute, when *another* person "carries" a firearm a defendant can receive an enhanced sentence under the armed robbery statute, but cannot receive an enhancement based on the 10-20-Life Law. *Demps v. State*, 649 So.2d 938, 939 (Fla. 5th DCA 1995).

Although Respondent notes section 775.087(4) includes the word "carry" in its definition of "possession", [ARB. 13], the use of the term "carry" in the robbery statute is more expansive than the use under the 10-20-Life Law. *Grant*, 138 So.3d at 1086-87. Under the robbery statute "carry" can include constructive possession, whereas "possession" in the 10-20-Life Law cannot. The Fourth District's decision in *Grant*, and Judge Taylor's dissent in the Fourth District's *Martinez* decision, makes this clear. [IBR. 11-15].

The reasons why this Court should reverse the Fourth District's decision in *Martinez* are similar to the reasoning in *Burris*. In *Burris*, the case Respondent

primarily relies on, the State requested that this Court read "carry" in the robbery statute more expansively; nevertheless, this Court stated, "we must resist the temptation to so expand the statute. To construe a statute in a way that would extend or modify its express terms would be an inappropriate abrogation of legislative powers." *Burris*, 875 So. 2d 413-414 (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)) (emphasis added). This Court has previously declined to "add words to section 812.13(2)(a) in order to obtain a result beyond the statute's plain language". *Burris*, 875 So. 2d at 414 n. 2 (citing *Overstreet v. State*, 629 So.2d 125 (Fla. 1993)). This Court should do so again in this case.

Here, the information charging Petitioner alleged that, during the commission of the robbery, the defendant "carried a firearm or other deadly weapon." [R. 4]. It did not allege that he "actually possessed" a firearm, or that he carried a firearm on his person, or alleged any other facts that fell within the statutory definition of actual possession. Respondent requests this Court to extend and modify the express terms of the 10-20-Life Law to include "carry" as a sufficient basis for enhancement under the 10-20-Life Law, which, in essence, allows the State to seek an enhancement under both the robbery statute and the 10-20-Life Law; thereby, increasing both the floor and the ceiling of a defendant's potential exposure without precisely alleging the factual (or in this case statutory) basis. This is an abrogation of legislative power as the 10-20-Life Law is unambiguous and the statute must be strictly construed

without an extension of its express terms. Therefore, the Fourth District's holding in *Martinez* should be reversed.

II. A jury finding Petitioner "actually possessed" a firearm does not cure the notice defect because it is a different due process issue altogether.

Respondent argues that Petitioner does not cite any case holding "that a defendant cannot be sentenced under the 10-20-Life Law where (1) the charging document alleged he 'carried' a firearm during a robbery instead of claiming he 'actually possessed' one, and (2) the jury's verdict specifically found that the defendant 'actually possessed'" a firearm. [RAB. 11-12]. However, whether a 10-20-Life enhancement is properly charged by the State, and whether the State proved the factual basis of that enhancement, are two separate due process issues. *Whitehead*, 884 So. 2d at 139.

The issue before this Court relates to notice, while a jury finding relates to ensuring a defendant receives his constitutionally protected right to a jury trial. *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984); *State v. Iseley*, 944 So. 2d 227 (Fla. 2006); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (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." (quoting *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999)) (emphasis added); [IBR 19-20].

A special jury instruction does not cure a defective notice wherein the factual basis for a 10-20-Life enhancement is not "precisely" alleged in the charging document. *Davis*, 884 So. 2d at 1061 ("Neither a jury finding nor inclusion of the appropriate statute number can cure this fatal defect."). Because a jury specifically found Petitioner "actually possessed" a firearm does not resolve the deficient notice in the charging document. Therefore, the Fourth District's decision in *Martinez* should be reversed.

III. Public policy considerations require reversal of the Fourth District's decision in *Martinez*.

The State's contention that "any purportedly deficient notice in this case would be remedied if appellant had actual notice of the State's intent to seek an enhancement under Florida's 10-20-Life Law" is problematic for several reasons. [RAB. 14-15]. Allowing the State to "notice" a defendant by informing him or her at some point (either orally or in writing) during a pretrial, trial, or at a sentencing hearing provides greater uncertainty and ambiguity for what the State must prove, what defendants must protect against, and what a jury must decide. [IBR 24-25]. Respondent's argument is antithetical to the public policies of ensuring defendants'

receive due process,[4] and for providing for judicial economy. Requiring the State to allege the 10-20-Life Law enhancement terms precisely ensures certainty for both the State and defendants, and limits the need to litigate issues over whether a defendant received "actual" notice, or whether the notice was sufficiently "precise."

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, reverse the lower court's decision, and vacate the ten year minimum-mandatory imposed by the trial court.

Respectfully submitted,

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[4] Respondent states that Petitioner's argument regarding "symmetry" between the facts alleged in a charging document and the facts found by a jury (IBR. 17-24) were not presented to the lower courts and cannot be raised for the first time on appeal. [RAB. note 1]. However, Petitioner attempted to address this issue in his Motion for Rehearing And/Or Rehearing En Banc (June 19, 2015), which the court denied. *Martinez*, 169 So. 3d at 170, *reh'g denied* (July 29, 2015). Additionally, an appellate court can consider an issue not presented to the lower court when it is a question of fundamental error. *State v. Jones*, 377 So.2d 1163 (Fla.1979). More importantly, Petitioner has always asserted a due process violation, this is additional reasoning for the illegality of the sentence based on the alleged due process violation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 27th day of June 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBYCERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

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