

17-7142

CASE NO.: TO BE DETERMINED

IN THE  
SUPREME COURT  
OF  
THE UNITED STATES

ORIGINAL

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| Supreme Court, U.S.<br>FILED<br>DEC 01 2017<br>OFFICE OF THE CLERK |
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ERIC WILEY, - PETITIONER

Vs

JULIE JONES, SECRETARY  
DEPARTMENT OF CORRECTIONS, - RESPONDENT

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PETITION FOR WRIT OF CERTIORARI  
TO THE  
FLORIDA SUPREME COURT

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Eric Wiley DC# 113706  
Columbia Correctional Annex  
216 SE Corrections Way  
Lake City, FL 32025

### QUESTION(S) PRESENTED

1. Must a jury finding be specific as to use of a “deadly weapon”? When the jury verdict was for a “use of a firearm”?
2. Does the State violate a Petitioner’s due process when the state fails to present all essential elements that a charging indictment/information cites?
3. Did the Trial Court Judge lack subject matter jurisdiction to enter the judgment in violation of the Fourteenth Amendment of the United States Constitution?
4. Is Petitioner’s conviction for Count Two fundamentally defective as the State’s evidence did not prove the charged offense?
5. Are Petitioner’s convictions illegal because the weapons and firearm statute is constitutionally void due to its vagueness and in violation to the Fourth and Fourteenth Amendments of the United States Constitution?
6. Do Petitioner’s convictions and sentences for Counts 2, 3, and 4 violate double jeopardy laws under the Fourth and Fourteenth Amendments of the United States Constitution?
7. Did trial court judge commit a fundamental error when the conviction lacked evidence that the Petitioner discharged a firearm during the commission of aggravated battery and/or aggravated assault?

## **LIST OF PARTIES**

All Parties appear in the caption of the case on the cover page.

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**IN THE  
SUPREME COURT  
OF  
THE UNITED STATES**

**PETITION FOR WRIT OF CERTIORARI**

**OPINIONS BELOW**

The opinion of the Florida Supreme Court to review the merits appears at Appendix “A” to the Petition and is unpublished.

**JURISDICTION**

The date on which the Florida Supreme Court decided my case was September 9, 2017.

A copy of that decision appears at Appendix “A”

**CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED**

Petitioner asserts that his Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution is raised as being violated by the State and the Trial Court Judge.

The statutory provisions are cited throughout the grounds properly argued within the Petition for Writ of Certiorari.

### STATEMENT OF THE CASE

On February 1, 2008, this Petitioner was charged by information within the Nineteenth Judicial Circuit Court in and for Martin County, Florida with: Count One – Second-Degree Murder of Dwight Starks; Count Two – Third-Degree Murder of Dwight Starks; Count Three – Aggravated Battery of Aaron Stoudemire with a Firearm; Count Four – Aggravated Assault of Aaron Stoudemire with a Firearm; and Count Five – Possession of a Firearm by a Convicted Felon.

On May 14, 2009, this Petitioner was found guilty by a jury of the above offenses. On July 13, 2009, the Petitioner was sentenced as a Habitual Felony Offender to life in prison on Count One, with a twenty-five (25) year minimum mandatory; fifteen (15) years in prison on Count Three, with a ten (10) year minimum mandatory and five (5) years in prison on Count Four, with a three (3) year minimum mandatory.

On appeal, the Petitioner's conviction for second-degree murder with a firearm (Count One) was reversed and remanded for the Trial Court to sentence the Petitioner on Count Two. See Wiley v State, 60 So.3d 588 (Fla. 4<sup>th</sup> DCA 2011).

On November 2, 2011, this Petitioner was resentenced on Count Two to life in prison with a minimum mandatory. The sentence on Count Two was affirmed on appeal with a mandate issued on May 17, 2013.

On June 26, 2017, this Petitioner submitted for filing a Petition for Writ of Habeas Corpus for filing within the Honorable Supreme Court of Florida.

On September 5, 2017, the Honorable Clerk of the Supreme Court of Florida entered an Order denying Petitioner's Petition for Writ of Habeas Corpus, Case No. SC17-1244 and Petitioner's second Petition was dismissed on September 7, 2017, Case No. SC17-1233.

The Petitioner now seeks to invoke the jurisdiction of the Honorable Supreme Court of the United States.

## REASONS FOR GRANTING THE WRIT

### **I. PETITIONER'S CONVICTIONS FOR COUNTS 3 AND 4 ARE ILLEGAL BECAUSE THE JURY HAD NOT FOUND HIM GUILTY OF AN ESSENTIAL ELEMENT OF THE OFFENSES, IN VIOLATION OF THE 14<sup>TH</sup> AMENDMENT.**

“[T]he United States Constitution requires that criminal convictions must rest upon a determination that the defendant is guilty beyond a reasonable doubt of every element of the crime with which he has been charged.” *Michelson v State*, 805 So.2d 983, 984 (Fla. 4<sup>th</sup> DCA 2001)

In *Sigler v State*, 881 So.2d 14 (Fla. 4<sup>th</sup> DCA 2004), approved in *State v Sigler*, 967 So.2d 835 (Fla. 2007), the Court indicated that “an illegal conviction constitutes a manifest injustice.”

In that case, the jury convicted Sigler of second-degree murder. Pursuant to section 782.04(2), Fla. Stat. (1997), a conviction of second-degree murder requires findings that there was an unlawful killing of a human being, perpetrated by an act that was eminently dangerous to another and evincing a depraved mind, and not perpetrated through with any premeditated intent to cause death. Although the Court found that evidence did not support a finding that the defendant had a depraved mind, the Court found that such a conviction would necessarily not include a finding that any felony was committed during the act that led to the victim's death. Thus, despite the fact that the conviction was reversed, the jury did not find that any felony was committed. See *Id.*

However, the Court found that a conviction for third-degree murder requires an underlying felony and a jury determination of the existence of such a felony. The Court noted that section 782.04(4), Fla. Stat., defines third-degree murder as a murder committed during the perpetration or attempted perpetration of any felony that is not one of the felonies enumerated in the statute. In order for the Court to direct the trial court to enter judgment for third-degree murder, there must be a finding of a felony. Because the jury verdict under the facts of Sigler's case did not include such a finding, the Court found that it could not direct the trial court to enter a judgment for third-degree murder. The Court concluded that any such judgment would be a violation of the defendant's right to a trial by jury in violation of the Sixth Amendment. See Id.

While the Court took note that the jury actually exonerated the defendant of first-degree felony murder charge, which required proof of an underlying felony, the Court reasoned that "[b]ecause the verdict in Sigler's case is general, the Court had no way of ascertaining which element of first-degree murder was not proved beyond a reasonable doubt." See Id. The Court stated that assuming that the "jury could well have based its decision on the failure of the evidence to prove an underlying felony." The Court concluded "a conviction for third-degree felony murder may actually conflict with that precise finding by the jury." See Id. The Court opined that the original jury verdict could in no way be read to include a determination on any predicate felonies and the jury's verdict did not include a determination beyond a reasonable doubt all the elements necessary to prove third-degree murder. See Id.

In the present case, the Court, too, reversed the petitioner's conviction for second-degree murder because the evidence was insufficient to support the conviction, but found sufficient evidence supported the conviction for third-degree murder. See Wiley v State, 60 So.3d at 592. In support of its decision, the Court relied on Sheridan v State, 799 So.2d 223, 225 (Fla. 2d DCA 2001); also Elkin v State, 636 So.2d 570 (Fla. 3d DCA 1994); Garcia v State, 574 So.2d 240, 241 (Fla. 1st DCA 1991); Johnson v State, 423 So.2d 614, 615 (Fla. 1st DCA 1982) (holding that "if an aggravated battery results in death, it can be third-degree murder.")

See Id. at 592.

Therefore, the Petitioner argues that his convictions are also illegal since the jury could not have found the essential element of the offense beyond a reasonable doubt. Petitioner claims that the jury verdict found him guilty of using a firearm, not a deadly weapon<sup>1</sup>, and a firearm is excepted from the definition of a weapon. He contends that under the U.S. Supreme Court decision in Fiore v White, 531 U.S. 225 (2001), the Florida Supreme Court decision in L.B. v State, 700 So.2d 370 (Fla. 1997) should be applied to grant petitioner relief since he was entitled to the benefit of this precedent which was overlooked on direct appeal of his convictions. Although there was evidence indicating that the firearm was used to commit the alleged battery, assault, and/or third-degree murder, at all pertinent times, section 790.001(13), Fla. Stat. (2008), expressly excepted a firearm from the definition of a

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<sup>1</sup> See Washington v Rencuenco, 126 S.Ct. 2546 (2006) (Distinguishing "a deadly weapon" from a "firarm" where jury found defendant guilty of ..."a deadly weapon," which the information charged "a handgun" and the judge found defendant armed with a "firearm") Florida law also distinguishes a deadly weapon from a firearm. Compare §790.001(13), Fla. Stat. with §790.001(6) Fla. Stat.

“weapon”. Thus, any firearm was not a “weapon” as a matter of law under section 790.001(13), the weapon statute. See Id.

### **THE APPLICABLE STATUTE:**

The relevant statutes which the petitioner was charged with and convicted of required the state to prove beyond a reasonable doubt that “a deadly weapon” was used. See § 784.045(1) (a) 2; 784.021(1) (a); 782.04(4), Fla. Stat. 2008. The phrase “deadly weapon” is not defined under these statutes. Therefore, in determining the meaning of that phrase, courts traditionally have turned to Chapter 790, Fla. Stat., entitled “Weapons and Firearms.” Section 790.001 defines the term “weapon” and expressly excepts a “firearm.” However, a weapon itself is defined to include a “deadly weapon.” See Id. See Standard Jury Instructions in Criminal Cases, 665 So.2d 221, 217 (Fla. 1995) “A weapon is a ‘deadly weapon’ if it is used or threatened to be used in a way likely to produce death or great bodily harm.” “A ‘weapon’ is legally defined to mean any object that could be used to cause death or inflict serious bodily harm.” The standard jury instructions definitions depend on the manner in which the object was used. Therefore, the jury in the present case was misled on the meaning of “firearm” when the trial court instructed the jury on “deadly weapon” (Tr. 948-949; 950-951) Under L.B. v State, however, the use of the object is irrelevant; the test is whether the firearm is “a weapon.” See Id. Thus, the trial judge, and not the jury, was required to properly determine, as a matter of law, that the particular firearm is a weapon, and if so, the question whether or not the



weapon involved is to be classified as “deadly” is a factual question to be resolved by the jury under appropriate instructions.

Thus, the principles of due process enunciated in *Fiore* require that petitioner receive the benefit of the Court’s clarification of the law in *L.B.*, which was overlooked. *Fiore* holds that constitutional principles of due process are violated when a state convicts and incarcerates an individual for conduct that the state’s “criminal statute, as properly interpreted, does not prohibit.” 531 U.S. at 228. At issue in *Fiore* was an opinion of the Pennsylvania Supreme Court that for the first time established that a criminal statute, as properly interpreted, did not prohibit the defendant’s conduct at the time of the conviction. See *Id.* In those circumstances, the U.S. Supreme Court explained that the state Supreme Court had issued a clarification of the law that applied to that defendant. The Court explained:

This Court’s precedents make clear that *Fiore’s* conviction and continued incarceration on this charge violate the due process. We have held that the due process clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. In this case, failure to possess a permit is a basic element of the crime of which *Fiore* was convicted

The simple, inevitable conclusion is that *Fiore’s* conviction fails to satisfy the Federal Constitution’s demands.

See *Id.* at 228-29. (emphasis supplied) (citations omitted).

*L.B.* was the first statement by the Supreme Court of Florida as to what constitutes a “firearm.” As in *Fiore*, the Florida Supreme Court’s statement of the

law in *L.B.* also correctly stated the law well before the Petitioner's conviction became final. Further, like the Pennsylvania Supreme Court's clarification of its law in *Fiore*, the "weapon" statute as "properly interpreted," *Fiore*, 531 U.S. at 228, places Petitioner's conviction outside the scope of that statute.

In *Fiore's* terms, the *L.B.* court issued a "clarification" of the law of what constitutes a "firearm," under section 790.001(13). Thus, as in *Fiore*, the Petitioner's "continued incarceration" on these charges violates due process because the essential element of using a "deadly weapon" in order to be convicted of aggravated battery and aggravated assault, and thus, third-degree murder does not exist in the Petitioner's case.

Since it is abundantly clear that Petitioner's convictions are illegal, as a matter of law, this Court could review the petition as a matter of grace, and correct a manifest injustice. One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted in according to due process, which includes a 'reasonable opportunity to be heard.'

## **II. PETITIONER'S CONVICTION FOR COUNT TWO IS ILLEGAL BECAUSE THE STATE FAILED TO CHARGE AN UNDERLYING FELONY, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.**

Due process of law requires the state to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art. 1, § 9, Fla. Const.; U.S. Const. amendments 6; 14.

There is a denial of due process when there is a conviction on a charge not made in the information or indictment. See Thornhill v Alabama, 310 U.S. 88 (1940); DeJonge v Oregon, 299 U.S. 353 (1937). For an information to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. See Rosin v Anderson, 155 Fla. 673, 21So.2d 143, 144 (1945).

Generally, if an information or indictment fails to completely charge a crime under the laws of the state, the defect can be raised at any time, including in a *habeas corpus* proceeding under this Court's original jurisdiction. See Florida v Gray, 435 So.2d 818 (Fla. 1983). However, "where a defendant waits until after the state rests its case to challenge the propriety of an indictment or information, the defendant is required to show not that the indictment or information is technically defective but that it is so fundamentally defective it cannot support a judgment of conviction." Ford v State, 802 So.2d 1121, 1130 (Fla. 2001).

Therefore, the petitioner argues that the information charging him with third-degree murder with a weapon or firearm was void for failure to specify the state would pursue a conviction of the underlying offenses under a "deadly weapon" theory, which resulted in the failure to sufficiently charge an underlying felony. Furthermore, the petitioner claims the information was void for failure to include an allegation as to the manner in which the underlying felonies occurred. The petitioner contends that these failures resulted in the denial of the right to be informed of the nature and cause of the accusation.

Section 782.04(4), Fla. Stat. (2008), means:

The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, [any felony] other than those enumerated in the statute.

(Emphasis added).

Thus, under Florida law, a conviction for third-degree murder requires an [underlying felony] § 782.04(4), Fla. Stat. In count two of the information, the state charged the petitioner with third-degree murder with a weapon or firearm, in violation of §§ 782.04(4) and 775.087. The state specifically alleged under oath that the petitioner unlawfully, and while engaged in the perpetration of, or attempt to perpetrate the felonies of aggravated battery and/or aggravated assault, kill and murder [victim], a human being, and during the commission of the offense, the petitioner carried and discharged a firearm resulting in the death of [victim]...

Therefore, the state's theory of prosecution was that the petitioner perpetrated or attempted to perpetrate the underlying offenses of aggravated assault and/or aggravated battery. However, the fatal omission in this charging document is "deadly weapon," an essential element required in order to constitute a felony under the aggravated assault and aggravated battery statutes. Furthermore, the state failed to sufficiently allege the means by which these underlying felonies occurred. Thus, the allegations charging these underlying felonies were legally inadequate, as a matter of law, to charge a crime under the laws of Florida, thereby

rendering the information so fundamentally defective that it cannot support a judgment of conviction.

#### THE SIXTH AMENDMENT:

The key to the manifest injustice hinges on understanding the Sixth Article of the Constitution of the United States. The discussion begins with the text as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state, and district wherein the crime shall have been committed. Which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

(Emphasis Added).

The key words in the emphasized portions are ALL and SHALL. "ALL" implies that there is more than one criminal jurisdiction. "SHALL" makes the enjoyment of the right to be informed mandatory. The information or indictment must state the nature and cause in plain language that is understood by the accused.

Pursuant to Florida law, see § 784.045(1)(a)2; 784.021(1)(a), Fla. Stat. (2008), "deadly weapon" is an essential element of the underlying felonies that must be alleged in order for the information to completely charge a crime under the laws of the state. Thus, the Petitioner alleges that the state's failure to include an element

essential to the crime renders the information so defective that it will not support a judgment of conviction, especially inasmuch as the state failed to even cite § 784.045(1) (a) 2; 784.021(1) (a), Fla. Stat. (2008) referencing a specific section of the criminal code which sufficiently details all the elements of the offense. This is so, because the Petitioner was only charged with carrying and discharging a firearm in Count Two, not a deadly weapon. Wiley v State, 60 So.3d at 589.

Although Count Two of this information is titled “weapon or firearm,” once again, Florida law, as interpreted by the Florida Supreme Court, excepted a “firearm” from the definition of “weapon,” and accordingly the Petitioner could have only been convicted of such. See Fulcher v State, 766 So.2d 243 (Fla. 4<sup>th</sup> DCA 2000) (due process is violated where one is convicted of a crime where the indictment and information wholly omits to allege one or more of the essential elements of the crime).

**III. PETITIONER'S CONVICTIONS ARE ILLEGAL  
BECAUSE THE CIRCUIT COURT LACKED SUBJECT  
MATTER JURISDICTION TO ENTER THE  
JUDGMENT, IN VIOLATION OF THE FOURTEENTH  
AMENDMENT.**

The issue of subject matter jurisdiction is one of fundamental error and may be raised for the first time at any point. See Waggy v State, 935 So.2d 511, 523 (Fla. 1<sup>st</sup> DCA 2006). Moreover, the doctrine of waiver cannot be effective when the court lacks jurisdiction over the case itself. See Harrel v State, 721 So.2d 1185 (Fla. 5<sup>th</sup> DCA 1998). When a court lacks subject matter jurisdiction, it has no power to

decide a case and any judgment entered is absolutely null and void, can be set aside, and stricken from the record on motion at any time.

Nonetheless, it is clear in Lovett v Lovett, 112 So. 768, 776 (Fla. 1927), that a pleading defect could be “jurisdictional” and permitted it to be raised for the time on appeal after the litigants had proceeded through trial without mentioning it. While it did not explicitly hold the pleading defect resulted in a failure of subject matter jurisdiction, it treated the procedural jurisdiction issue as if it were subject matter jurisdiction. The same result could have been reached (and probably would have) by declaring the error “fundamental” but the opinion went out of its way to characterize the error as “jurisdictional” in excusing its untimely assertion. Id. Lovett was thus read by this Court to mean that a court lacked subject matter jurisdiction if its jurisdiction had not been properly “invoked.” See Lockwood v Pierce, 730 So.2d 1281, 1283 (Fla. 4<sup>th</sup> DCA 1999).

Therefore, the Petitioner contends that the trial court exceeded its jurisdiction by the State’s failure to charge a felony in the information charging counts two, three, and four. Specifically, the state failed to charge that the alleged offenses by the Petitioner was made with a “deadly weapon,” an essential element for these counts. See § 784.045(1) (a) 2; 784.021(1) (a); 782.04(4), Fla. Stat. Since a conviction cannot rest upon such an information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time before trial, after trial, on appeal, or by Habeas Corpus. State v Gray, 435 So.2d at 818; See also State v Lanier, 771 So.2d 617 (Fla. 4<sup>th</sup> DCA 2004).

Although the missing element is not an overt act done in pursuance of the crimes in this case (since the firearm is not a weapon, as a matter of law), it is nonetheless essential in this state information because it established the court's jurisdiction. See Pope v State, 268 So.2d 173, 175 (Fla. 2<sup>nd</sup> DCA 1972) (explaining that an allegation of a felony "is essential to the invocation of the jurisdiction of a felony court over the charge since the allegations of the accusatory writ are precisely the basis in the first instances upon which the court's jurisdiction over the subject matter is predicated"); see also State v Vazquez, 450 So.2d 203 (Fla. 1984) (Subject matter jurisdiction is determined by the charge made in an indictment or information."); State v Anderson, 537 So.2d 1393 (Fla. 1989) (A criminal prosecution presupposes the existence of a valid charging document and such accusatory pleading in some form is an essential requisite of jurisdiction.)

**IV. PETITIONER'S CONVICTION FOR COUNT TWO IS  
FUNDAMENTALLY ERRONEOUS BECAUSE THE  
FACTS AFFIRMATIVELY PROVEN BY THE STATE DO  
NOT CONSTITUTE THE CHARGED OFFENSE AS A  
MATTER OF LAW.**

The Petitioner also argues that his conviction for third-degree murder with a weapon or firearm is illegal because the evidence fails to show that this offense was committed at all. The Petitioner's claims that the record affirmatively demonstrate that a firearm was used in the commission of the alleged offense and the jury verdict made a specific finding that a firearm was used. The Petitioner contends, however, that under Florida law, a firearm is excepted from the definition of "weapon," an essential element in order to support a conviction for the underlying



felonies, and, thus, a conviction for third-degree murder. Accordingly, the Petitioner's conviction and continued incarceration on this charge violate due process of law.

"[T]he U.S. Constitution requires that criminal convictions must rest upon a determination that the defendant is guilty beyond a reasonable doubt of every element of the crime with which he was charged." *Michelson v State, supra*. See *In re Winship*, 397 U.S. 358, 364 (1970). The standard protects three interests. First it protects the defendant's liberty interest. *Id.* at 363. Second, it protects the defendant from the stigma of conviction. *Id.* Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. *Id.* at 363 – 364. In his concurring opinion, Justice Harlan noted that the standard is founded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan J., concurring).

The Petitioner moved for a judgment of acquittal as to counts one and two, arguing that the state failed to negate that the death of Starks was an accident. (Tr 810 – 811) The trial court denied the motion. (*Id.*) On appeal, the Petitioner argued that the trial court erred in denying his motion for judgment of acquittal because the state failed to establish that the killing was not accidental or that Petitioner acted with a depraved mind. The court agreed and reversed the conviction for second-degree murder. However, the court found no error in Petitioner's remaining convictions. See *Wiley v State, supra*.

The Petitioner acknowledges that in moving for a judgment of acquittal, the specific contention raised here was not advanced at trial, but argues that where the evidence is insufficient to establish that a crime was committed at all, this constitutes fundamental error and need not be preserved for appellate review. See F.B. v State, 852 So.2d 226, 230 (Fla. 2003) (stating that “argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved” for appellate review because “[s]uch complete failure of the evidence meets the requirements of fundamental error.”) Thus, if the Petitioner is convicted of a crime where the evidence does not demonstrate that a crime has been committed at all, this constitutes fundamental error, an error that “goes to the foundation of the case and is equal to a denial of due process.” Young v State, 141 So.3d 161 (Fla. 2013).

Furthermore, this Court has held that fundamental error and manifest injustice result when a defendant is convicted of an offense for which the defendant could not have been convicted as a matter of law. See Silverstein v State, 985 So.2d 635 (Fla. 4<sup>th</sup> DCA 2008) (holding that a manifest injustice includes convicting a defendant “for an offense for which he could not have been convicted”); see also Sigler v State, *supra*.

In Sigler, once again, this Court noted that a conviction for third-degree murder requires an underlying felony and a jury determination of the existence of such a felony, citing § 782.04(4), Fla. Stat. The Court held that in order for it to direct the trial court to enter judgment for third-degree murder, there must be a

finding of a felony. Id. Because the jury verdict did not include such a finding, the court found that it could not direct the trial court to enter a judgment for third-degree murder. Id.

Therefore, the Petitioner submits that the jury verdict in his case did not find him guilty of an underlying felony either. Specifically, the state's theory of the case was that the Petitioner perpetrated or attempted to perpetrate an aggravated battery and/or an aggravated assault. As previously shown, these underlying offenses can only be made with "a deadly weapon." See § 784.045(1) (a) 2; 784.021(1) (a), Fla. Stat. 2008. However, proof of this element essential to the underlying felonies is lacking. Again, the jury verdict specifically found the Petitioner guilty of committing the alleged offenses with a "firearm." Under Florida law, as interpreted L.B. v State, supra, section 790.001(13), Fla. Stat., expressly excepted a "firearm" from the definition of a "weapon" as a matter of law under section 790.001(13), the weapon statute, and therefore, could not constitute a "deadly weapon," notwithstanding the manner in which the "firearm" was allegedly used.

[W]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment or information." See Long v State, 92 So.2d 259, 260 (Fla. 1957); see also Lewis v State, 53 So.2d 707, 708 (Fla. 1951) ("No principle of criminal law is better settled than that the state must prove the allegations set up in the information or indictment.")

In the case at bar, that principle had no application here. Although the state charged “deadly weapon” only under counts three and four, the jury verdict nonetheless could not have included such a finding, an essential element of the underlying felonies. Thus, Petitioner’s conviction for third-degree murder is illegal, as a matter of law, in violation of due process.

**V. PETITIONER’S CONVICTIONS ARE ILLEGAL  
BECAUSE THE WEAPONS AND FIREARMS STATUTE  
IS CONSTITUTIONALLY VOID FOR VAGUENESS, AS  
APPLIED TO OFFENSES UNDER § 784.021, 784.045,  
AND 782.04(4), FLORIDA STATUTE.**

This Petitioner argues that he correctly argued that pursuant to Section 790.001(13), clearly provides in pertinent part:

“Weapon” means any dirk, metallic knuckles, slingshot, Billie, tear gas gun, chemical weapon or device or other deadly weapon [except a firearm] or a common pocketknife.

§ 790.001(13), Fla. Stat. (2008) (Emphasis Added). Under the State Florida law, as interpreted in *L.B. v State*, that provision [expressly excepted] a “firearm” from the definition of a “weapon” as a matter of law under section 790.001(13), the weapon statute.

However, according to the First, second, and Third District Courts of Appeal, “a firearm [may] constitute a deadly weapon in some contexts.” See *Baldwin v State*, 857 So.2d 249 (Fla. 2<sup>nd</sup> DCA 2003) (and cases cited therein); see also *Greer V State*, 804 So.2d 620 (Fla. 3<sup>rd</sup> DCA 2002). Although these decisions seem somewhat uncertain, they clearly indicate that the exception under Florida law applies to

certain felonies, in violation of due process and so the honorable Supreme Court of the United States Justice's have the proper jurisdiction to address the issue, since the honorable Clerk of the Supreme Court of Florida refused to grant jurisdiction.

Because it appears that the sister District Courts of Appeal implicitly interprets the statute to mean that the exception under § 790.001(13), applies to certain felonies, the statute appears to be either ambiguous or susceptible to differing interpretations, even after the clarification in L.B. v State, and therefore, should be construed most favorably to Petitioner pursuant to § 775.021(1) Fla. Stat., and in doing so, prohibit his convictions for a deadly weapon consistent with the jury verdict. See Baldwin v State, *supra*, (holding that "where a firearm was not a weapon pursuant to § 790.001(2) (13) (1999), it was fundamental error to convict defendant of carrying a concealed weapon...when, in fact, defendant possessed a firearm.") Section 775.021 provides in pertinent part:

1). The provision of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorably to the accused.

The First, Second, and Third District Courts of Appeal have implicitly interpreted the exception under § 790.001(13) to apply to certain crimes. They do so based upon the premise that, in giving the definition, the Florida Legislature has failed to show a clear and specific intent to provide the exception to a specific offense. However, these interpretations represent a departure from the essential requirements of the law. See L.B. v State. According to the Florida Supreme Court, the Legislature intended the exception to apply to any offense that does not provide

a definition of weapon. See § 790.001 titled "Definitions" (As used in this chapter, except where the context otherwise requires :)...If that is correct, then the rule of lenity would indeed apply. Petitioner argues that the State Courts have continually violated Petitioners Fourth; Fifth and Fourteenth Amendment of the United States Constitution.

Therefore, the clear Florida Legislative intent reflected in the statute provides an "exception to firearms" notwithstanding the type of offense the firearm is used in commission of. Accordingly, it is incongruous that the Florida Legislature would intend for the exception to apply to certain offenses containing its own definition of a weapon.

Thus, because the differing interpretation of the meaning of weapon and firearm provision appear to be ambiguous, the rule of lenity codified under section 775.021 dictate that any ambiguity "be construed most favorable to the accused," since the stated interpretations suggests that the criminal statute in question is constitutionally void for vagueness because it is obvious that the States Courts must necessarily guess at its meaning and differ as to its application. Compare Baldwin v State, supra, wherein the Second District applied the exception for the offense under § 790.01 to cases cited by Baldwin wherein those courts declined to apply the exception to the facts of a case that never made it a subject matter. Thus, the statute is indeed vague either as to what persons fall within the scope of the statute or what conduct is forbidden, in violation of due process.

On the other hand, if § 790.001(13) is reasonably definite as to persons and conduct within its scope, the sister state courts should not have concluded that “we recognize that [in other contexts] a firearm [may] constitute a deadly weapon. For example, it is well settled that a firearm is a deadly weapon within the meaning of § 784.045, Fla. Stat., the aggravated assault statute...” (Emphasis added), see Baldwin v State, *supra*, but nevertheless holds that under § 790.235, Fla. Stat., the firearm is excepted from the definition of weapon. Under these circumstances, the conclusion that the exception under § 790.001(13), applies to certain offenses, but not to other, is not clear.

The language, with respect to the definition of weapon, appears to be ambiguous and the rule of lenity codified in § 775.021, dictates that the ambiguity “be construed most favorable to the accused.” See § 775.021(1), Fla. Stat. Unfortunately, the issue was obviously not completely settled in L.B. See also Rodriguez v State, 701 So.2d 1194 (Fla. 2<sup>nd</sup> DCA 1997); Willimas v State, 10 So.3d 1172 (Fla. 3<sup>rd</sup> DCA 2009).

**VI. Petitioner’s convictions and sentences for counts 2, 3, and 4 violates the prohibition against double jeopardy under the Fifth Amendment.**

The Petitioner argues that under the Florida law, the Appellate Courts had “the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice,” as previously noted. See Muehleman v State, 3 So.3d 1149,

1165 (Fla. 2009). Because Petitioner's state convictions and sentences using proof of the same firearm violate double jeopardy principles and amounts to illegal convictions and sentences, the Petitioner requests the honorable Supreme Court of the United States Justice's should reconsider the point of law and correct the manifest of injustice.

The violation of prohibition against double jeopardy is a fundamental error that permits review of claim by the appellate court or the Supreme Court of Florida Justice's as to both Petitioner's State convictions and sentences, rather than just sentences, even if the defendant does not raise double jeopardy argument before trial court, as by itself, silence does not demonstrate a free and knowing waiver of double jeopardy claim either as to conviction or as to sentence, the Petitioner directs the honorable Courts attention to the ruling in Benton v Maryland 395 U.S. 784, 794-96 (1969).

"A double jeopardy claim based upon disputed facts presents a pure question of law and is reviewed *de novo*." Pizzo v State, 945 So.2d 1203, 1206 (Fla. 2006).

In the present case, Petitioner was convicted and sentenced for third-degree murder, aggravated battery with a firearm, aggravated assault with a firearm, and possession of a firearm by convicted felon. See Wiley v State, 60 So.3d 588 (Fla. 4<sup>th</sup> DCA 2011). Petitioner's convictions arose out of the same incident and Petitioner was sentenced as a habitual felony offender and under 10/20/Life Statute to mandatory minimum terms based upon the convictions involving the same firearm.



On appeal, the convictions and sentences were affirmed by the Florida District Court of Appeal.

However, as found in Baldwin, *supra*, the court that construed a firearm to constitute a deadly weapon for certain offenses, the First District in Webb v State, So.2d 944 (Fla. 1<sup>st</sup> DCA 1982), noted that defendant's conviction for third-degree felony murder was predicated on an aggravated battery by use of a deadly weapon, a firearm. Because a firearm was part of the proof of the underlying crime, which was an enhanced penalty offense, the court held that enhancement of the sentence for use of a firearm, under another statute was improper. Id.

Likewise, Florida District State Courts of Appeal have held that when robbery is enhanced due to use of a firearm, the use of the same firearm cannot form the basis of a separate conviction for use of a firearm while committing a felony. Perez v State, 528 So.2d 129 (Fla. 3<sup>rd</sup> DCA 1988) Holding that "display of firearm conviction was cumulative punishment when the same act of using a weapon was basis of enhancement of attempted first-degree murder and robbery convictions."

In Lago v State, 975 So.2d 613 (Fla. 3<sup>rd</sup> DCA 2008), the honorable Third District of Appeal Justice's found that this Petitioner's state conviction and sentence for robbery with a firearm and unlawful possession of the same firearm while engaged in a criminal offense violated double jeopardy. In granting relief, the court found also that the law of the case doctrine does not preclude the court from correcting the error. Id. Although the Petitioner appealed the conviction and

sentence, the court treated the appeal as a Petition for Writ of Habeas Corpus and it granted the same, citing Ross v State, 901 So.2d 252 (Fla. 4<sup>th</sup> DCA 2005) (Habeas corpus relief granted despite law of case doctrine, where manifest injustice had occurred.)

In the case at bar, the record undisputedly reflect that the enhancement or reclassification of the convictions, too, were predicated on the same firearm, which was also used for enhancement purposes under the habitual felony offender and 10/20/Life Statutes. Because these offenses were not sufficiently distinct in time and place, the precedents addressing the issue applies, and thus, Petitioner's convictions and sentences constitute a manifest injustice that cannot be permitted to stand and this Petitioner asserts that the honorable Supreme Court of the United States should enter an order granting the relief being sought.

**VII. FUNDAMENTAL ERROR AND MANIFEST INJUSTICE RESULTED WHEN THE TRIAL COURT IMPOSED THE 10/20/LIFE SENTENCE, SINCE THERE IS NO EVIDENCE THAT THE PETITIONER DISCHARGED A FIREARM DURING THE COURSE OF THE COMMISSION OF AGGRAVATED BATTERY AND/OR AGGRAVATED ASSAULT.**

This Petitioner strongly argues that the honorable Supreme Court of the United States Justice's have the legal jurisdiction to address the unpreserved claims of fundamental error committed by a trial court. The Lower State Tribunal Court pursuant to the following case laws (Croom v State, 36 So.3d 707, 709 (Fla. 1<sup>st</sup> DCA 2010); see also Galzon v State, 980 So. 2d 1038, 1043 (Fla. 2008) (Holding

courts are required to exercise their discretion “very guardedly” finding fundamental error only in “rare cases” where the interest of justice compels them to do so.) possessed the discretion to rule on Petitioner’s claims but refused to accept jurisdiction.

The Petitioner in this case argued the concerns which section 775.087, Fla. Stat. (2008) - - commonly known as the 10/20/Life Statute, more specifically section 775.087(2)(a)(3), which provides that Petitioner’s who discharge a firearm during the commission of certain enumerated crimes, including murder, and inflict death or great bodily harm as the result of the discharge shall be sentenced to a “minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.”

The Petitioner was charged with, among other things, third-degree murder with a weapon or firearm. The state specifically alleged that the Petitioner did unlawfully, and while engaged in the perpetration of, or attempt to perpetrate the felonies of aggravated assault or aggravated battery, kill, murder Levi Dwight Starks... and during the commission of the offense, the Petitioner carried and discharged a firearm resulting in the death of Levi Dwight Starks... According to the facts of this case, during the course of committing aggravated assault and/or aggravated battery on Aaron Stoudemire, the Petitioner allegedly discharged a firearm that subsequently resulted in the death of Starks. On May 14, 2009, the Petitioner was found guilty by a jury. The trial court entered a judgment and

sentenced the Petitioner under Florida's 10/20/Life statute, imposing a life sentence with a 25 year mandatory minimum.

This Petitioner argues that the statutory provision at issue in this case involved the situation where the Petitioner discharged a firearm that resulted in death or great bodily harm, and provides in pertinent part:

Any person who is convicted of a [felony] or an attempt to commit a [felony] listed in sub-subparagraphs (a) 1. A-9; regardless of whether the use of a weapon is an element of the [felony], and [during the course of the commission of the felony] such person discharged a "firearm" or "destructive device" as defined in § 790.001 and as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced...

775.087(2) (a) (3), Fla. Stat. (emphasis added).

[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning... the statute must be given its plain and obvious meaning. Further the State Court held that it was without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. A related principle is that when a court interprets a statute, it must give full effect to [all] statutory provisions. Courts should avoid readings that would render part of the statute meaningless. Velez v Miami-Dade County Police Dept., 934 So.2d 1162, 1164-65 (Fla. 2006) (quotation marks and citations omitted.)

There is certainly nothing ambiguous about the statutory language in subsection (2) (a) (3), which provides that a person who [discharges a firearm during

the course of the commission of a felony] causing death or great bodily harm shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison. 775.087(2) (a) (3), Fla. Stat. (emphasis added). Therefore, the Petitioner contends that under the facts and circumstances of this case, the trial court was without discretion to impose a mandatory minimum of life in prison. Consequently, the Supreme Court of the United States Justices should conclude that the Petitioner was improperly sentenced under the 10/20/Life Statute.

Once again, the State of Florida charged that during the commission of the murder, the Petitioner carried and discharged a firearm...and the jury verdict is consistent with the allegations in this count, even though it is the intent of the legislature to apply the 10/20/Life Statute to Petitioner's who discharge a firearm..."during the course of the commission of the felony" convicted of and the facts in this case indicate that the murder of one victim that the information and verdict refers occurred subsequent to discharging the firearm and aggravated battery and/or aggravated assault on the other victim that occurred contemporaneously. Thus, at sentencing, the trial court judge found that during the commission of the aggravated battery, the petitioner discharged the firearm to justify imposing the 10/20/Life Statute.

Nonetheless, such sentence-elevating facts must be found by a jury, not a judge, and established beyond a reasonable doubt, and this was circumvented by the Lower Trial Court Judge. When a judge inflicts punishment that the jury's

verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority. Blakely v Washington, 542 U.S. 296, 303-04 (2004). Although the Supreme Court of the United States Justice’s have held that a claim of *Apprendi error* must be preserved for review and expressly rejected the assertion that such error is fundamental. The Supreme Court of the United States Justice’s has held that “argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved” for appellate review because “[s]uch complete failure of the evidence meets the requirements of fundamental error, the subject of this claim. Thus, if the Petitioner is convicted of a crime in the State Court where the evidence does not demonstrate that a crime has been committed at all, this constitutes a fundamental error, an error that “goes to the foundation of the case and is equal to a denial of due process.” Young v State, 141 So.3d 161 (Fla. 2013). Accordingly, the Petitioner was not subject to section 775.087(2) (a) (3) of the 10/20/Life Statute.

As the honorable Supreme Court of the United States Justice’s have held, “where the state court finds that a manifest injustice has occurred, it is the responsibility of that court to correct the injustice if it can.” In Baker v State, 878 So.2d 1236, 1246 (Fla. 2004) the Supreme Court of Florida Justice’s addressed this identical point of law by stating in part the following:

“The writ of habeas corpus “is enshrined in our constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many

centuries. This Court will, of course, remain alert to claims of manifest injustice as will all Florida Courts”

Also, the honorable Fourth District Court of Appeal Justice’s in Jamason v State, 447 So.2d 842, 895 (Fla. 4<sup>th</sup> DCA 1983) as well addressed this identical point of law by stating in part the following:

“If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice”) (quoting Anglin v Mayo, 88 So.2d 918, 919 (Fla. 1956)); see also Prince v State, supra.”

The honorable Supreme Court of the United States Justice’s have the proper jurisdiction to grant this Petitioner the relief being requested on this Certiorari.

### Conclusion

**WHEREFORE**, based on the foregoing argument and authorities cited herein, the Petitioner respectfully requests that this Honorable Court issue an order granting the relief being requested.

Respectfully Submitted,

Eric Weleg