IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

vs. **Case No. F14008652**

LAZARO ROSELL,

Defendant.
_____/

SWORN MOTION TO DISMISS COUNT ONE ENHANCEMENT

Defendant Lazaro Rosell, by and through undersigned counsel, hereby files, pursuant to Florida Rule of Criminal Procedure 3.190(c)(4)[1], his sworn motion to dismiss any enhancement sought by the state under Fla. Stat. § 775.087 as to Count One. Defendant Rosell is clearly entitled to relief under the straightforward facts and bright-line law of this case.

FACTS

In the matter *sub judice*, acting on information obtained from a source that *a particular property,* 5984 S.W. 41st St., Miami, Florida was being used to cultivate marijuana, police conducted an on-site investigation of the premises on April 15, 2014. The on-site investigation spawned the execution of two search warrants for two separate residential properties: 5984 S.W. 41st St., Miami Florida (the site of the original investigation) and

[1] "[T]he court may at any time entertain a motion to dismiss on any of the following grounds: (4) There are no material disputed facts and the undisputed facts do not establish a *prima facie* case of guilt against the defendant. The facts on which the motion is based should be alleged specifically and the motion sworn to." Rule 3.190(c)(4) (brackets added).

the second search across the street at 4140 S.W. 60th Court, Miami, Florida, both properties owned by Defendant Rosell. At the 4140 S.W. 60th Court, Miami, Florida location, MDPD Officer M. Grossman discovered a firearm above a wine rack above a refrigerator inside a residence different from the house identified by the original source information. *See* Exhibit A (photo of location where unloaded firearm was discovered). Setting aside the readily apparent fact that one would have to use a chair or a ladder to reach the gun stash of the home, there is ***no good faith basis*** to enhance this case to an "armed trafficking" life felony,[2] even admitting that the police found the requisite amount of marijuana and marijuana plants under cultivation.

LEGAL ARGUMENT

The case information does not and could not possibly plead that the defendant ***carried, displayed, used, threatened to use, or attempted to use any weapon or firearm*** during the commission of the underlying offense. *Please see State of Florida v. Lazaro Rosell,* Information (cover page) (Count One classified as a "**LIFE FELONY**"); ***but see also*** Count One

[2] *Please see* Fla. Stat. § 775.087(1)(a) ("Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant ***carries, displays, uses, threatens to use, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery***, the felony for which the person is charged shall be reclassified as follows: ***In case of a felony of the first degree, to a life felony***.") (emphasis added).

("…and during the commission of the offense, said defendant possessed a firearm or destructive device, in violation of … 775.087, Fla. Stat."). As a general rule, it is a due process violation and therefore fundamental error to convict a defendant of a crime ***not charged*** in the information. *See Crain v. State*, 894 So.2d 59, 69 (Fla.2004). Inescapably, a ***life felony*** enhancement ***could not possibly be pled*** in the information given the facts.

Fla. Stat. § 775.087(1)(a) provides for reclassification of the level of a felony offense where the defendant is convicted of a felony and during commission of the crime the defendant ***carries, displays, uses, threatens to use, or attempts to use any weapon or firearm***. The information lacked a rational factual basis to enhance this marijuana case to a "***life felony***."

In the present case, it is undisputed that defendant did not actually possess, carry, display, use, threaten or attempt to use the firearm found and the police records reflect that defendant did not possess the firearm. There is no case for a felony reclassification pursuant to § 775.087(1).

In *State v. Rodriguez*, 602 So.2d 1270 (Fla.1992), the Florida Supreme Court held that "when a defendant is charged with a felony involving the 'use' of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony." *Id*. at 1272 (*affirming State v. Rodriguez*, 582 So.2d 1189, 1190 (Fla. 3d DCA 1991)); *see also Postell v. State*, 383 So.2d 1159, 1162

(Fla. 3d DCA 1980) ("the enhancement provisions of section 775.087(1), Florida Statutes (1977), ... require that the defendant personally possess the weapon during the commission of the crime involved."); *accord Willingham v. State*, 541 So.2d 1240, 1242 (Fla. 2d DCA 1989) ("A plain reading of section 775.087(1) would be to require proof that [defendant] actually carried or used a firearm during the course of the offense.") (brackets added); *Ngai v. State*, 556 So.2d 1130, 1131 (Fla. 3d DCA 1989).

Indeed, the law is clear that even the second-tier enhancement under § 775.087(2)(a)(1) (10-year mandatory minimum) is inapplicable where the defendant did ***not*** possess the unloaded gun discovered with any intent to use it during the commission of the marijuana offense. *See Green v. State*, 18 So.3d 656, 658, n.2 (Fla. 2d DCA 2009) ("For purposes of imposing a minimum mandatory sentence pursuant to section 775.087(2)(a)(1), 'possession' of a firearm is defined as 'carrying it on the person' or by having it 'within immediate physical reach with ready access with the intent to use the firearm during the commission of the offense.' § 775.087(4)."); *Postell*, 383 So.2d at 1162 & n.7 ("It has been held that the minimum mandatory sentencing provisions of Section 775.087(2), Florida Statutes (1977), are not applicable in the absence of proof that the defendant personally, not vicariously or constructively, possessed the weapon during the commission of the crime involved. We are of the view that the enhancement provisions of Section 775.087(1), Florida Statutes

(1977), *a fortiori* require that the defendant personally possess the weapon during the commission of the crime involved…Section 775.087(1) requires that the defendant carry, display, use, threaten or attempt to use the weapon or firearm; Section 775.087(2) requires that the defendant have in his possession the firearm."). There is insufficient evidence to enhance even under § 775.087(2)(a)(1), and there was never any factual basis upon which to re-classify the offense pursuant to § 775.087(1)(a), where there was no evidence that the defendant carried, displayed, used, threatened to use, or attempted to use ***the gun found above a wine rack above a refrigerator***. *See Knight v. State*, 70 So.3d 674, 675 (Fla. 1st DCA 2011) (Under section 775.087, "a person in possession of a firearm during the commission of a felony of the first degree must have his sentence enhanced to a life felony. Actual possession of a firearm is required for this statute to apply."); *see also Williams v. State*, 997 So.2d 486, 487 (Fla. 2d DCA 2008) ("Section 775.087(2)(a)(1) enhances the sentence of a defendant who actually possessed a firearm during the commission of the crime. But in order for the enhancement to apply, the State must prove actual possession. In this context, 'actual possession' means that the firearm must be carried on the person.") (citations and quotes omitted). There is no evidence that the defendant carried the gun on his person while committing the offense.

CONCLUSION

For the foregoing reasons, defendant Rosell respectfully requests that the Court issue an appropriate Order dismissing that portion of Count One which attempts to reclassify the offense pursuant to Fla. Stat. § 775.087.

Respectfully submitted,

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JURAT

I hereby declare, under penalties of perjury, that I have read the foregoing motion to dismiss and that the facts stated in it are true.

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Lazaro Rosell