IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HALL,

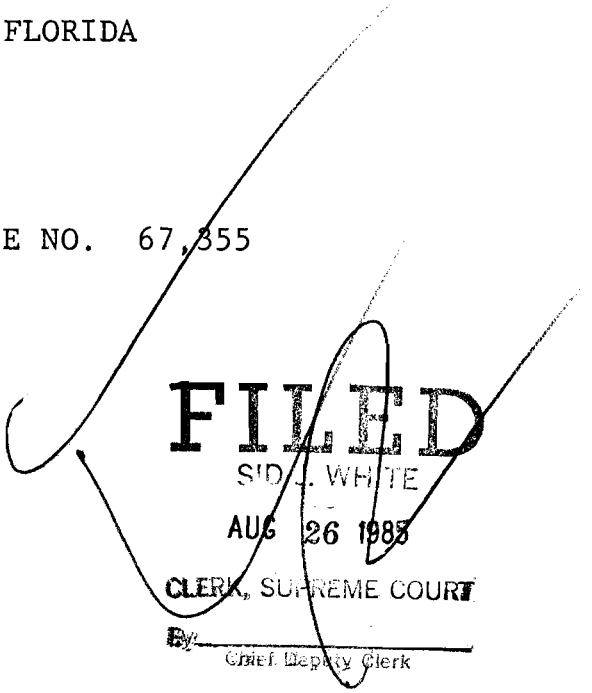
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,355



RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATUTES

PRELIMINARY STATEMENT

Respondent was the Appellee in the court below and prosecution in the trial court. Petitioner was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"IB"	Initial Brief of Petitioner

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in Petitioner's initial brief.

POINT INVOLVED

IN THE WAKE OF STATE v. GIBSON, 452 So.2d 553 (FLA. 1984), MAY AN OFFENSE PROSCRIBED BY SECTION 790.07(2), FLORIDA STATUTES, EVER BE CONSIDERED A LESSER INCLUDED OFFENSE OF THE PROSCRIPTION OF SECTION 812.13 (1) AND (2), FLORIDA STATUTES?

SUMMARY OF ARGUMENT

Use of a firearm during the commission of a felony is not a lesser included offense of robbery while armed, and thus, Petitioner was properly convicted of and sentenced for both crimes. Because the facts of the instant case are identical to the facts in State v. Gibson, 452 So.2d 553 (Fla.1984) the conviction and sentence as to Court II should be affirmed under the authority of Gibson and leave answering the certified question under a case with the appropriate set of facts.

ARGUMENT

IN THE WAKE OF STATE v. GIBSON, 452 So.2d 553 (FLA. 1984), MAY AN OFFENSE, PROSCRIBED BY SECTION 790.07(2), FLORIDA STATUTES, EVER BE CONSIDERED A LESSER INCLUDED OFFENSE OF THE PROSCRIPTION OF SECTION 812.13(1) AND (2), FLORIDA STATUTES?

Petitioner contends that because Count II of the Information (R 177) charged him with unlawful "display, use, threaten to use, or attempt to use a firearm, or carry a concealed firearm," Count II is a lesser included offense of Count I, robbery while armed, and that therefore his conviction and sentence under Count II must be vacated. Respondent disagrees. Because the language in the information simply tracks the language of §790.07(2) Florida Statutes (1983), the case sub judice is undistinguishable and, therefore, controlled by this Court's holding in State v. Gibson, 452 So.2d 553 (Fla. 1984).

In Gibson, this Honorable Court stated:

> The offense of robbery while armed contains, in addition to its other constituent statutory elements, the element that the accused carried a firearm or other deadly weapon. The elements of the crime do not include displaying the weapon or using it in

> perpetrating the robbery. The offense of display or use of a firearm while committing a felony contains as one of its constituent statutory elements that the offender displayed, used, or attempted or threatened to use a firearm during the commission of a felony. It is clear that each of these offenses contains at least one constituent statutory element that the other does not.

452 So.2d at 556, 557. The Court went on to lay the issue to rest by holding:

> [W]e now determine that use or display of a firearm in committing a felony is not a lesser included offense of robbery while armed but, rather, was intended by the legislature as a separate offense to be separately prosecuted and punished even where based on a single act or closely connected group of acts. (Footnote omitted.) Id at 557.

Petitioner argues that in Gibson, this Court stated that §790.07(2) proscribes two distinct offenses, and that because of the way that Count II was alleged, it was a lesser included offense of Count I. In an attempt to rebut Petitioner's arguments, Respondent will point out that this Court in Gibson, 452 So.2d n. 1 at 554-5 and n. 4 at 556 made it very clear that the record was not complete to allow the Court to determine which of the two offenses proscribed by §790.07(2) was the respondent therein charged with and convicted of; but the Court decided Gibson "on the assumption that 'use or display,' etc., [was] the offense in question." Therefore, although the Gibson Court emphasized that under Borges v. State, 415 So.2d 1265

(Fla. 1982) the determination of whether two statutory offenses are the same offense by reason of one being a lesser included offense of the other, is to be made only by examining the statutory elements of the offense rather than the allegations in the charging instrument or the factual elements of the evidentiary proof presented at trial, Respondent feels it is absolutely necessary to refer to the information, the evidence presented at trial, and the jury charge to properly answer the points raised by the Petitioner in his initial brief, and to clearly show this case is identical to, and therefore controlled by Gibson.

In the instant case it is important to note that the information (R 177) simply tracked the statutory language as to each count. As to Count I, the information alleges Petitioner "carried a firearm or other deadly weapon." And as to Count II, also merely tracking the language of the statute, it is alleged that Petitioner "did then and there unlawfully display, use, threaten to use, or attempt to use a firearm, or carry a concealed firearm." The elements of robbery while armed, are (1) a taking of money or other property that may be the subject of larceny; (2) from the person or custody of another; (3) by force, violence, assault, or putting in fear; and (4) that the offender carried a firearm or other deadly weapon in the course of committing the robbery. See Gibson, supra at 556, and §872.13 (1), (2) (a), Fla. Stat. (1983). To support a conviction under Count I the State proved that Petitioner robbed a gas station operator at gun point when Petitioner pulled out a gun and

ordered the operator to fill a bag up with money (R 32-34). Once Petitioner had the money he ran out and disappeared (R 35). As to Count I, the State did not have to prove - - although it in fact did - - that Petitioner displayed or used or threatened to use a firearm.

Under Count II, the State did not have to prove that Petitioner committed a robbery in order to convict him under §790.07(2); but the State must prove more than the fact that the defendant carried a firearm. To support a conviction under §790.07(2) the State can prove the accused committed any felony including aggravated assault when he displayed the firearm, Palmer v. State, 438 So.2d 1 (Fla. 1983), which is usually the case when a person displays a firearm during the commission of a robbery.

Contrary to Petitioner's allegations simply because the information tracked the statutory language that does not mean Petitioner was charged in the alternative with the offenses of §790.07(2), nor does it mean that the entire count must be considered a lesser included offense of Count I. This Court in Gibson already held that the "use, display," etc., offense is not a lesser included offense of robbery. As to the second offense proscribed by §790.07(2), "carrying a concealed firearm" while committing or attempting to commit a felony, is a separate offense which was not involved in Gibson. Gibson, supra, n.4 at 556. Thus, this Honorable Court not having to rule on that portion of §790.07(2) did not do so. Likewise in the instant case, the second offense of §790.07(2) is not

involved in this case, and therefore the conviction and sentence of Petitioner should be summarily affirmed under the authority of Gibson. See State v. Brown, 455 So.2d 356 (Fla. 1984); State v. Charles Baker, 456 So.2d 419 (Fla. 1984); State v. Thomas Baker, 452 So.2d 927 (Fla. 1984); State v. Marshall, 455 So.2d 355 (Fla. 1984).

Petitioner further argues that the jury was "equally empowered [to] find Petitioner guilty of the statutory alternative which was a lesser included offense as it was to find him guilty of the alternative which was not, and the verdict itself provides no clue as to which choice, if any, was ever made." (IB 8). But Petitioner fails to take into account the clear and complete jury instructions given to the jurors by Judge Garrett before the jury retired to deliberate. Without any objection by the defense counsel, the trial judge instructed the jury:

> As to Count II, before you can find the Defendant guilty of a person engaged in a criminal offense, having a weapon, the State must prove the following two elements beyond a reasonable doubt.
>
> One, the Defendant dsiplayed, threatened to use or attempted to use a firearm.
>
> Two, he did so while committing or attempting to commit the felony of robbery, and those elements of robbery are merely defined for you.
> (R 139-140)

It is clear from the quoted passage that the trial judge did not mention any alternative offense under Count II; and that the jury was well aware that finding Petitioner guilty as to Count II meant finding him guilty of the "use or display" of a firearm during the commission of the robbery in violation of §790.07(2). The jury was not forced or asked to make a choice between the two offenses of §790.07(2).

Further, at no time during the trial was any allegation made as to the Petitioner carrying a concealed weapon, as opposed to him using and displaying the firearm during the robbery.

For the above stated reasons, Respondent maintains the case sub judice is controlled by State v. Gibson, supra. The Fourth District Court in its June 12, 1985, Opinion (Appendix I) properly found that Petitioner was convicted of "armed robbery and use and display of a weapon while engaged in a criminal offense" and that "neither crime is a lesser included offense of the other."

As a consequence of this Court's decision in Gibson and the facts of the instant case, this Court must affirm Petitioner's conviction and sentence as to Count II, and decline to answer the certified question awaiting a case wherein a person is charged with both committing a robbery and carrying a concealed firearm while committing or attempting to commit the robbery.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited herein, Respondent would respectfully request this Honorable Court to approve the decision of the Fourth District Court of Appeal which AFFIRMED the conviction and sentence imposed upon Petitioner under both Counts I and II of the information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Answer Brief on the Merits has been sent by courier to ALLEN DeWEESE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 23rd day of August, 1985.

Georgina Jimenez-Orosa
Of Counsel