D.A. 4-7-93 047 12-29

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,174

ERIC ARNAZ ASHLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant respectively below.

In the brief, the parties will be referred to as they appear before this Honorable Court, except that the Respondent may also be referred to as the State.

The following symbols will be used

R. = Record on Appeal

PB = Petitioner's Initial Brief

A = Appendix

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as it appears at pages 1 and 2 of his initial brief to the extent that it represents an accurate, non-argumentative recitation of the proceedings and facts below. However in compliance with Fla. R. App. P. 9.210(c), and for a complete and fair statement of the case and facts, the State hereby submits the following additions, clarifications and modifications to point out areas of disagreement between Petitioner and Respondent as to what actually occurred below.

At the hearing on Petitioner's Motion to Dismiss held by the trial court July 10, 1991, the trial court disagreed with Petitioner's position that because the gun was not loaded it was not readily accessible for immediate use (R. 9-11, 12). However, because the trial court felt bound[1] by the decision of the Second District Court in Amaya v. State, 580 So. 2d 885 (Fla. 2d DCA 1991), the court entered its order granting the motion to dismiss July 12, 1991 (R. 39).

On appeal the Fourth District Court relying on this Court's decisions in Alexander v. State, 477 So. 2d 557 (Fla. 1985); Bentley v. State, 501 So. 2d 600 (Fla. 1987); and Hardee v. State, 516 So. 2d 110 (Fla. 4th DCA 1987), approved, 534 So. 2d 706 (Fla. 1988), agreed with the trial court and the State that an unloaded firearm may indeed be "readily accessible for immediate use" as used in section 790.25(5). Therefore, the

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[1] See, State v. Hayes, 333 So. 2d 51, 52 (Fla. 4th DCA 1976); Pimm v. Pimm, 568 So. 2d 1299 (Fla. 2d DCA 1990).

District Court rejected the second district's analysis in Amaya; reversed the trial court's order granting the motion to dismiss; and noted conflict with Amaya. See, Appendix - Slip Opinion, page 6.

By order of October 15, 1992, this Court accepted jurisdiction over this case. Petitioner filed his brief on the merits with service date of November 12, 1992. Respondent's Brief on the Merits follows.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's decision must be affirmed. Under the statutory scheme here under review, a firearm, loaded or unloaded, concealed from the public view, but laying "on the right front passenger floorboard against the hump of the transmission or console area" (R. 33-34), is "readily accessible for immediate use." Use of a firearm has never been defined by this Court as only meaning a loaded gun. This Court has always recognized that a firearm can be "used" in the legal sense of the word, even though the firearm is not loaded and no ammunition is readily available. The Legislature has defined the phrase "readily accessible for immediate use" in terms of accessibility of the firearm, not in terms of whether the gun is loaded or unloaded.

The Fourth District rejected Petitioner's argument, and so should this Court.

ARGUMENT

POINT ON APPEAL

AN UNLOADED FIREARM IS "READILY ACCESSIBLE FOR IMMEDIATE USE" AS USED IN SECTION 790.25(5), FLORIDA STATUTES.

The record shows that upon a search of Petitioner's car, pursuant to a search incident to a lawful arrest, the police officer discovered a firearm "in the front right passenger floorboard area against the hump of the transmission or console area of the vehicle." (R. 34). Petitioner conceded that the firearm was not encased. Thus, the argument at the hearing on the motion to dismiss turned to whether the "unloaded" firearm was "readily accessible for immediate use."

Section 790.01(2), Fla. Stats. (1989) proscribes the carrying of a concealed firearm. Section 790.25(5), Fla. Stats. (Supp. 1990) provides an exception stating, in pertinent part:

> [I]t is lawful and is not a violation of s. 790.01 to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. ...

Section 790.001, Fla. Stats. (Supp. 1990) defines "firearm" and "readily accessible for immediate use" in the following manner:

> (6) "Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive

> device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a riot; the inciting or encouraging of a riot; or the commission of a murder, an armed robbery, an aggravated assault, an aggravated battery, a burglary, an aircraft piracy, a kidnapping, or a sexual battery.
>
> * * *
>
> (15) "Readily accessible for immediate use" means that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person.

The undisputed facts in this case show that the concealed firearm being carried by Petitioner in his car was in a position where he could reach to retrieve it and immediately point it at someone (R. 34), possibly to commit a robbery, or an assault (R. 9-11, 12). Petitioner and the Second District's ruling in Amaya v. State, 580 So.2d 885 (Fla. 2d DCA 1991), erroneously change the focus of the issue by illogically inferring that "readily accessible for immediate use" means that the firearm had to be loaded to be "readily accessible for immediate use."

In his brief, Petitioner argues that the reason for the choice of the word "use," as opposed to "fire," in the statute is because other weapons cannot be fired. That the word "use" must be interpreted based upon the nature of the weapon involved. As examples, he points out that metallic knuckles or a billie would be used by striking, a dirk or knife would be used by slashing or throwing, and a firearm would be used by firing. (PB 8) The State submits, however, that this is where Petitioner's argument

falls apart. It cannot be disputed, that an unloaded gun, like a knife, may be used in a threatening manner in the commission of a crime, such as a robbery or assault, without it ever being fired.

In Bentley v. State, 501 So. 2d 600 (Fla. 1987), the defendant refused to pay an automobile mechanic whom she believed did a poor job of repairing her car. The defendant pulled out of her purse a firearm and threatened to kill the mechanic if he touched her car again. The firearm turned out to be unloaded. Nevertheless, Bentley was convicted of aggravated assault with a firearm. The question to be resolved by this Court in Bentley was whether an **unloaded** firearm, without a showing of available ammunition, was readily available for immediate use, so as to invoke the three year mandatory sentencing provision of §775.087(2), Florida Statutes (1983). This Court answered the certified question from the Fourth District by stating:

> [W]e hold that the display of an unloaded firearm, without proof of readily available ammunition, invokes the three-year minimum mandatory sentence. In *Watson v. State*, 437 So.2d 702 (Fla. 4th DCA 1983), *approved in part, disapproved in part*, 453 So.2d 810 (Fla. 1984), the court found that the legislature did not intend to require a finding that a handgun be operational in order to uphold a conviction of robbery with a firearm because of concerns about the perception of the victim. 437 So.2d at 705. We agree.
>
> In this case, the state need only have proved that the weapon in Mrs. Bentley's possession was designed to or could be readily converted to expel a projectile. *Nash v. State*, 374 So.2d 1090 (Fla. 4th DCA 1979), following *Bass v. State*, 232 So.2d 25 (Fla. 1st DCA 1970). Clearly under this standard, Mrs. Bentley displayed a firearm pursuant to

> section 790.001(6). **Whether the gun in her possession was loaded or whether she had available ammunition was irrelevant.** [Emphasis added.]

501 So.2d at 602.

Then in Hardee v. State, 534 So. 2d 706 (Fla. 1988), where the question was whether the firearm must be loaded for a conviction to stand for armed burglary, this Court once again upheld the Fourth District's decision, stating:

> We reject Hardee's contention that the statutory requirement that the burglar be "armed or arms himself" means that the gun must be ready to fire. A person having possession of a gun during a burglary is subject to a minimum mandatory sentence under section 775.087 regardless of whether the gun was loaded. *Bentley v. State*, 501 So.2d 600 (Fla. 1987). We do not believe that the legislature intended a different construction of section 810.02(2)(b) which enhances the crime of burglary when the defendant "is armed or arms himself" with a gun. There would be many circumstances in which the purpose of the statute would be thwarted if the state was required to prove that the gun was loaded when it was stolen or that the bullets were available to the burglar.

534 So.2d at 708.

In the case at bar, under the same rationale used in Bentley and Hardee, since there is no dispute that Petitioner was carrying a concealed firearm, pursuant to section 790.001(6), in the car he was driving, whether the gun in his possession was loaded or whether he had available ammunition is irrelevant. This case is a perfect example of circumstances in which the purpose of the statute would be thwarted if "readily accessible for immediate use" is interpreted to mean that the firearm must

be loaded. Under the facts of this particular case, it would have taken a split second for the Petitioner to pick the gun off the floor of the car and point it at a person. This action would have constituted "use" of the gun in the commission of a felony.

As held by the Fourth District, the clear language of the Statutes now under review provides that (1) a firearm does not have to be loaded in order to be "readily accessible for immediate use"; and (2) as pointed out by the trial court, the firearm, although not containing any bullets, was readily accessible to Appellant for immediate use in the commission of an "assault" or a "robbery" (R. 9-11, 12). The definition of a firearm is "any weapon ... which will, **is designed to, or may readily be converted** to expel a projectile by the action of an explosive; **the frame** or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. ..." §790.001(6), Fla. Stats. (Supp. 1990). Neither §790.001(6), defining "firearm", nor §790.001(15) defining "readily accessible for immediate use" speak in terms of whether the firearm is loaded or unloaded. Rather the statute addresses the issue of carrying of the "frame" of a firearm which may be converted to expel a projectile. Thus, a firearm is anything that "may" be converted to expel a projectile, but need not be so converted when first ceased. Cf., Dampier v. State, 596 So. 2d 515 (Fla. 2d DCA 1992) (A weapon "may readily be made operable" within the meaning of Statute 790.221(1) where oil had to be left on the weapon for several days in order to make the short-barreled shotgun operable.)

Further, it must be noted that when the legislature intended to make a difference between a "loaded" and "unloaded" firearm as one of the lawful uses or exceptions in §790.25, Fla. Stats. (Supp. 1990), it clearly so specified. See §790.25(3)(m), Fla. Stat. (Supp. 1990).

The State thus submits that the Fourth District correctly held that the Amaya decision, and consequently the "4(c)" motion herein, were wrongly decided. This Court in Alexander v. State, 477 So.2d 557 (Fla. 1985), conducted a thorough analysis of section 790.25(5). Alexander first notes that the "legislature has declared that the objectives of Chapter 790 are 'to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property ...." 477 So. 2d at 559. Turning to the particular language of section 790.25(5), the Court held:

> We agree with the state that by using the 'or is otherwise' phrase the legislature clearly indicated that the primary requirement is that the firearm not be 'readily accessible for immediate use.' The prohibition against carrying a concealed weapon that is readily accessible for immediate use is reasonably related to the legislative purposes of promoting firearms safety and preventing the use of firearms in crimes.
> [Emphasis in original]

Id. at 559-60. Once again, there is no mention in Alexander that the gun must be operable or loaded in order to be readily accessible for immediate use. Thus the use of the phrase "or is otherwise not readily accessible for immediate use" clearly

indicates the concern of the legislature in preventing the "accessibility" of the firearm for "immediate use" in a crime. The focus of the statute is the ease in which the firearm is retrievable. Whether the gun is loaded or not is irrelevant. A gun cannot be more readily accessible than one that is laying on the floor of an automobile. Such a gun can be "used" in the commission of a crime (i.e., robbery, assault) whether or not that gun is loaded. As the Second District pointed out in State v. Swoveland, 413 So. 2d 166, 167 (Fla. 2d DCA 1982), the legislature intended that the handgun user have some difficulty accessing the handgun for quick use.

In the case at bar, the fact that the firearm was laying "in the front right passenger floorboard area against the hump of the transmission or console area of the vehicle" (R. 34) clearly shows that, as believed by the trial court (R. 9-11, 12), the firearm was "readily accessible for immediate use" in the commission of a crime (i.e., robbery, assault). Where a weapon can be easily retrieved, it is readily accessible. Cates v. State, 408 So.2d 797 (Fla. 1982); State v. Butler, 325 So.2d 55 (Fla. 1976). The question is whether the firearm can be used. Petitioner and the Amaya Court take the position that the firearm could not be used because since it was unloaded it would not fire. However, as pointed out by the trial court (R. 9-11, 12), a firearm can be used in a robbery without firing. Or the Petitioner could have used the gun to commit an assault against someone by simply pointing the gun at a person. For example, Appellant could have pointed the gun at the officer as the

officer approached the car, and the officer would have been justified in shooting Petitioner. The position taken by Amaya and Petitioner would impose the additional requirement that the officer in such a situation first ask the assailant if there are bullets in the firearm. If operability is not the determining factor in defining a firearm, State v. Altman, 432 So.2d 159 (Fla. 3d DCA 1983); Machado v. State, 363 So.2d 1132 (Fla. 3d DCA 1978), then it is clear that operability is not a factor in determining whether the firearm is "accessible" for immediate use. It would seem that if the legislature intended that the firearm be capable of discharging in order to constitute use it would have specifically said so.

In State v. Gomez, 508 So.2d 784 (Fla. 5th DCA 1987), the police discovered a firearm underneath the driver's seat of a car which the defendant was driving. A sheathed knife was found in the closed console between the front seats. The statutes under review there was §790.25(5), Fla. Stat. (1985), and the definitions of "readily accessible for immediate use" and "securely encased" found in §790.001. The Gomez court found that the sheathed knife found within the console was not "readily accessible for immediate use." However, the court found that the firearm, found underneath the car seat, was a concealed weapon and was "readily accessible for immediate use," even though the police officer had to spend a few seconds to grasp the weapon reaching under the front seat. 508 So. 2d at 786. The reasoning was that the knife was "securely enclosed" in the closed console; therefore, not "readily accessible for immediate use." The

firearm, underneath the seat of the car, was not securely encased, therefore, it was "readily accessible for immediate use." In Gomez, the court interpreted the term "accessibility" of the firearm. It can be assumed that if the firearm was accessible then it is "readily accessible for immediate use."

Likewise in State v. Swoveland, 413 So.2d 166 (Fla. 2d DCA 1982), the police officer testified that the firearm found in the defendant's car was in a holster in an upright position, barrel facing the floorboard, leaning up against the frame of the driver's seat. The court found the gun was readily accessible for immediate use even though the firearm was in a holster, because the leather strap was not snapped across the hammer but, rather, was behind the cylinder. "The gun was in a position where the driver could easily take it out by the butt and drop the holster quickly without even unsnapping it." Id., at 167. The Swoveland court compared the facts before it with a similar case it had previously decided where the gun was securely encased because the leather strap was snapped over the hammer and the gun could not be fired until after the strap was unsnapped and the gun removed from the holster. In commenting on the earlier case, the Swoveland court stated that the action of unsnapping the strap and removing the firearm from the holster "require[d] some lapse of time and pause for thought -- events the legislature anticipated in carving out this exception to the proscription of the concealed gun law." 413 So. 2d at 167. The court stated that the "gun ... was more **accessible for quick use**, unimpeded by the factors which would cause the slight delay of its use." Id.

at 167. Swoveland does not address whether the weapon was loaded, because that fact is irrelevant.

In Dampier, supra, the weapon was so rusty that it took several days of applying penetrating oil to unlock the frozen mechanism to make the shotgun operable. The Second District, however, held that the shotgun met the requirements of §790.221(1). Section 790.221(1) defines the term "may readily be made operable" as "involv[ing] no special knowledge or great expense." The Dampier Court held that a defendant violates the dictates of §790.221(1) if he is carrying a short barreled shotgun that is not operable, but may be made operable with a relative lack of difficulty. The Second District found that the shotgun in Dampier met the requirements of the statute, even though it took several days to make the shotgun operable by soaking it in oil. In the case at bar, the firearm was laying "in the front right passenger floorboard area against the hump of the transmission or console area of the vehicle." The firearm was clearly "readily accessible for immediate use" (R. 9-11, 12).

The State is asking this Court to affirm the Fourth District's interpretation of the concealed weapon exception in §790.25(5) to effectuate the stated purpose of the statute, as this Court did in Alexander.

Well settled rules of statutory construction requires that a statute's terms be construed according to their plain meaning. State v. Ross, 447 So. 2d 1380, 1382-3 (Fla. 4th DCA 1989). It is equally an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable or

ridiculous conclusion or a result obviously not designed by the legislature will not be adopted. Drury v. Harding, 461 So. 2d 104 (Fla. 1984).

The words "securely encased" in §790.25(5) are followed by the conjunctive "or otherwise not readily accessible for immediate use." The "or is otherwise" refers back to "securely encased." The Legislature is clearly describing the manner in which firearms may be lawfully carried by the public in a safe and secure manner, and is conspicuously **not** describing operability of a firearm. The definition of "readily accessible for immediate use" provided by the statute relates to the ability of a person to obtain or make use of the firearm. Again, it conspicuously does **not** describe the operability of the firearm, but the ease with which one can reach that firearm.

Under the principle of statutory construction of "ejusdem generis" where general words or principles, when appearing in conjunction with particular classes of things, will not be considered broadly, but will be limited to the meaning of the more particular and specific words, it is clear that the legislative intent was to limit the term "readily accessible for immediate use" to "securely encased." Even the plain meaning of the words relate to the way in which the firearm may be reached for ready use.

Petitioner and the Amaya court based their argument on the statute's requirement that "[t]his subsection shall be liberally construed in favor of the lawful use, ownership and possession of firearms and other weapons, including lawful self-defense ...."

§790.25(5). When construing the statute liberally one must go back to what one is construing and the definitions therein. The Amaya court was construing "use" but failed to consider the conjunctive "or is otherwise not," which refers back to the "securely encased." According to the statute, the ability to obtain or make use of the firearm must not be as easy or as quickly obtained as if the firearm was carried on the person. [See the definition of "readily accessible for use" in §790.001(6).] In other words, the person must open some kind of container to get at the firearm. This provision must be liberally construed for a person may carry the firearm in a purse, in a bag, in a shoe bag, in a snapped holster, or any kind of container not specifically enumerated in the statute or contemplated by the drafters. Any other interpretation would lead to an absurd and unreasonable result and would render §790.25(5) meaningless, as the court did in Amaya.

The declared policy of the legislature is to promote firearm safety and to prevent the use of firearms in crimes without prohibiting the lawful use of firearms in defense of life, home and property or other lawful purpose. In taking the plain wording of the statute that it is not authorizing the carrying of a concealed weapon **on the person**, or so close to the person that the firearm can be "retrieved and used as easily and quickly as if carried **on the person**," the intent of the Legislature becomes clear. The Legislature is referring to the accessibility of the firearm **not** the operability of the firearm. In other words, a person may carry a concealed firearm within the interior of a

private conveyance if it is securely encased or the firearm is not so close to the person as to be so easily and quickly retrieved and used as if carried on the person. Operability of the firearm is not relevant "because of the concerns about the perception of the victim." Bentley. The concern is about accessibility.

If "readily accessible for immediate use" meant that a firearm had to be loaded, then the Legislature would have used the term "discharge" as it did in §790.151. In addition §790.151(2) shows that the Legislature is capable of defining the word "use" as meaning a "loaded firearm." However, everyone is painfully aware that an unloaded gun may be "used" effectively to commit a felony. Consequently, the Legislature defined the words "readily accessible for immediate use" in terms of how easily and quickly the gun could be retrieved "as if on the person."

Since the aim of the Statute is to promote firearms safety, and preventing the use of firearms in crimes, whether the firearm is loaded or unloaded, by prescribing the manner in which firearms may be lawfully carried by the public in a safe and secure method, the State submits that this Court should **AFFIRM** the opinion of the Fourth District, rejecting the Second District's ruling in Amaya, and reversing the trial court's order granting the defendant's motion to dismiss.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court **AFFIRM** the opinion of the District Court of Appeal, Fourth District, filed June 10, 1992, rejecting the Second District's ruling in Amaya, reversing the trial court's order granting the defendant's motion to dismiss, and reversing and remanding the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on the Merits" has been furnished by U.S. Mail to: MICHAEL H. TARKOFF, ESQUIRE, Counsel for Petitioner, 2601 South Bayshore Drive, Suite 1400, Coconut Grove, Florida 33133, this 4th day December, 1992.

Georgina Jiménez-Chozas
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,174

ERIC ARNAZ ASHLEY,

Petitioner,

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STATE OF FLORIDA

Respondent.

APPENDIX TO

BRIEF OF RESPONDENT'S BRIEF ON THE MERITS

OPINION ISSUED BY THE 4TH DCA JUNE 10, 1992

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

STATE OF FLORIDA,

Appellant,

v.

ERIC ARNAZ ASHLEY,

Appellee.

CASE NO. 91-2135.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed June 10, 1992

Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge.

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Robert J. Becerra of Raskin & Raskin, P.A., Miami, for appellee.

POLEN, J.

The state appeals from an order of the circuit court which dismissed count I of a five-count information. We reverse.

Defendant Eric Ashley was stopped for speeding and the police subsequently found an unloaded firearm in his car. Count I of the information charged that he unlawfully and knowingly carried on or about his person a concealed firearm, contrary to section 790.01(2), Florida Statutes (1989). Ashley filed a sworn motion to dismiss, arguing that he fell within section 790.25(5), which states that it is not a violation of section 790.01 to possess a concealed firearm within the interior of a private

conveyance if the firearm "is securely encased or is otherwise not readily accessible for immediate use."

According to Ashley, the firearm found in his car was not readily accessible for immediate use because it was unloaded. Ashley relied on a recent second district case, Amaya v. State, 580 So.2d 885 (Fla. 2d DCA 1991), in which that court held that an unloaded firearm is not readily accessible for immediate use. The circuit court, relying on Amaya, granted the motion to dismiss. The court noted that no cases from the fourth district had addressed this issue, but pointed out that a circuit court "wheresoever situate in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district." See State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976).

In Amaya, as in this case, the defendant was charged with carrying a concealed weapon in violation of section 790.01(2). Amaya, like the defendant here, contended that he fell within the section 790.25(5) exception because the firearm was not loaded. According to the Amaya court:

> We must agree with that contention. We cannot agree with the state's argument that the statutory exception was not applicable because a firearm need not be operable in order to be accessible for immediate use, e.g., for use in pointing it at someone in a threatening manner. Section 790.25(5), we conclude, contemplates an operable firearm. In reaching this conclusion, we are persuaded by that section's additional language that "[t]his subsection shall be liberally construed in favor of . . . lawful use . . . ." We also cannot agree with the state's argument that the statutory exception was not applicable because the firearm could have been loaded and become operable. That exception requires that the firearm be "readily accessible for immediate use."

580 So. 2d at 886 (emphasis added).

The Amaya court's interpretation of 790.25(5) necessarily means that a firearm can only be "readily accessible for immediate use" when it is both loaded and capable of being fired. For the reasons that follow, we reject the second district's interpretation of the statute.

While section 790.25(5) clearly states that "[t]his subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons," Amaya is the first and only case we have found to specifically address this particular language. By setting down a bright-line rule that an unloaded gun can never be "readily accessible for immediate use," we believe the Amaya court interpreted the statute too liberally.

The Amaya court failed to address section 790.001(15), which actually defines "readily accessible for immediate use," as meaning "that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person." (Emphasis supplied.) The statute says "used," not "fired". In short, the plain language of the statute does not require that the firearm be loaded in order to be "readily accessible for immediate use."

The Amaya court also failed to offer any case law support for its interpretation of section 790.25(5). There are no citations to any of the other cases interpreting the statute. For example, in Alexander v. State, 477 So.2d 557 (Fla. 1985),

the Florida Supreme Court conducted a thorough analysis of section 790.25(5). The court first noted that the "legislature has declared that the objectives of Chapter 790 are 'to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property . . . ." 477 So.2d at 559. Turning to the particular language of section 790.25(5), the court held:

> We agree with the state that by using the 'or is otherwise' phrase the legislature clearly indicated that the primary requirement is that the firearm not be 'readily accessible for immediate use.' The prohibition against carrying a concealed weapon that is readily accessible for immediate use is reasonably related to the legislative purposes of promoting firearms safety and preventing the use of firearms in crimes.

477 So.2d at 559-60 (emphasis in original).

Once again, there is no mention in Alexander that the gun must be operable or loaded in order to be readily accessible for immediate use. In fact, none of the cases interpreting the statute before Amaya have required that a gun be loaded in order for it to be considered "readily accessible for immediate use."

We also note that the statutory definition of firearm indicates that an unloaded weapon is still considered a firearm: "'Firearm' means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive." § 790.001(6), Fla. Stat. (Supp. 1990) (emphasis supplied). The Florida Supreme Court has squarely addressed the issue of whether an unloaded gun fits the definition of firearm under section 790.001(6). In Bentley v.

tate, 501 So.2d 600 Fla. 1987), the defendant challenged her conviction and mandat y minimum sentence for aggravated assault with a firearm. She eged that because her gun was unloaded it did not fit the sta ory definition of firearm. The court rejected her argument pting that her weapon "was designed, or might readily have be onverted, to expel a projectile despite the fact that the gun her possession was unloaded." According to the court:

> In this case, the state need only have proved that the weapon in Mrs. Bentley's possession was designed to or could be readily converted to expel a projectile. Nash v. State, 374 So.2d 1090 (Fla. 4th DCA 1979), following Bass v. State, 232 So.2d 25 (Fla. 1st DCA 1970). Clearly, under this standard, Mrs. Bentley displayed a firearm pursuant to section 790.001(6). Whether the gun in her possession was loaded or whether she had available ammunition is irrelevant.

501 So.2d at 602.

In Hardee v. State, 516 So.2d 110 (Fla. 4th DCA 1987), approved, 534 So.2d 706 (Fla. 1988), the defendant challenged his conviction for burglary of a dwelling while armed, contending that only a loaded gun constitutes a dangerous weapon for application of section 810.02(2)(b). This court rejected his argument and extended the Bentley analysis to the particular circumstances of this case:

> In a slightly different context the supreme court has determined that whether a firearm is empty or loaded is not material to the issue of whether a person convicted of burglary had in possession a firearm for purposes of imposing a mandatory minimum sentence of three years' incarceration. Bentley v. State, 501 So.2d 600 (Fla. 1987). There is no logical distinction to be made between that application and its relevance here.

Id. at 111.

The decision in Alexander construing section 790.25(5), along with the decisions in Bentley and Hardee defining "firearm" and "dangerous weapon," lead us to conclude that an unloaded firearm may indeed be "readily accessible for immediate use" as used in section 790.25(5). We therefore reject the second district's analysis in Amaya.

The order granting the defendant's motion to dismiss, which relied on Amaya, is therefore reversed. We note conflict with Amaya.

REVERSED and REMANDED for proceedings consistent herewith.

GUNTHER, J., concurs.
DELL, J., dissents with opinion.

DELL, J., dissenting.

I respectfully dissent. I agree with the Second District Court of Appeal's decision in Amaya v. State, 580 So.2d 885 (Fla. 2d DCA 1991). With all due respect, I think that the majority in interpreting section 790.25(5), Florida Statutes (1989), misplaces its reliance upon cases involving convictions which require mandatory minimum sentences for use of a firearm. Bentley v. State, 501 So.2d 600 (Fla. 1987), a conviction for aggravated assault with a firearm; Hardee v. State, 516 So.2d 110 (Fla. 4th DCA 1987), approved, 534 So.2d 706 (Fla. 1988), a conviction for burglary of a dwelling with a firearm. In so doing, I believe that the majority has ignored the legislature's directive that "[t]his subsection [790.25(5)] shall be liberally construed in favor of the lawful use, ownership, and possession of firearms...." §790.25(5), Fla.Stat. (1989).