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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,293

PAUL RIDLEY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S 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 below.

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

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

The Petitioner was charge by Information on October 3, 1991 with carrying a concealed firearm in Count I, resisting arrest without violence in Count II, and fleeing a police officer in Count III.

The Petitioner filed a motion to dismiss Count I, carrying a concealed firearm, on November 27, 1991. The State noted that the "facts are the gun was under the driver's seat and the ammunition and the fully loaded clip were under the passenger's seat when the defendant was stopped." (R 5-6). The Petitioner argued that, because the unloaded firearm was under the driver's seat and the ammunition clip was under the passenger seat, he fell within the exception to section 790.25(5): "It is lawful .... to possess a concealed firearm .... within the interior of a private conveyance, without a license if the firearm .... is .... not accessible for immediate use." (R 11). The Petitioner relied on a recent decision out of the Second District Court of Appeal, which holds that an **unloaded gun** is "not readily accessible for immediate use" within the statutory meaning. The trial court dismissed Count I, carrying a concealed weapon, citing Amaya v. State, 580 So. 2d 885 (Fla. 2d DCA 1991).

On direct appeal, the Respondent argued that, under the statutory scheme, a firearm, loaded or unloaded, concealed from public view, but laying under the driver's seat with the fully loaded clip laying under the passenger seat, is "readily accessible for immediate use."

The Fourth District Court of Appeal agreed with the State that this Court's decisions defining "firearm" and "dangerous weapon" lead to the conclusion that an unloaded firearm may indeed be "readily accessible for immediate use" as used in section 790.25(5). The Fourth District Court of Appeal noted that the statue 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 Petitioner herein appeals the decision of the Fourth District Court of Appeal reversing the trial court's dismissal of Count I, carrying a concealed weapon. This brief on the merits by Respondent follows.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's decision must be affirmed. Under the statutory scheme herein under review, a firearm, loaded or unloaded, concealed from the public view, but laying under the driver's seat with the fully loaded clip laying under the passenger seat, is "readily accessible for immediate use." The Legislature is fully capable of defining "use of a firearm" to mean readily accessible for immediate discharge or a **loaded gun**, as it did in Section 790.151, Fla. Stat. However, use of a firearm has never been defined by this Court as only meaning a loaded gun or operational firearm. 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 or no ammunition is available. The Legislature has defined the phrase "readily accessible for immediate use" in terms of accessibility of the firearm, not in terms of operability of the firearm as it did in Section 790.151 and Section 790.221(1), Fla. Stat.

The Petitioner argues that an **unloaded gun** concealed under the driver's seat is not "readily accessible for immediate use" but concedes that this same unloaded gun picked up by the driver one half of a **second** later and pointed at someone is "used" for purposes of the three year minimum mandatory sentence pursuant to section 775.087(2), Fla. Stat. This is tautology at its best. The Petitioner is merely arguing that the unloaded firearm is not "readily accessible" because it is not "used." The Fourth District Court rejected this argument, as should this Court.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT ERRED IN GRANTING PETITIONER'S MOTION TO DISMISS COUNT ONE OF THE INFORMATION ON THE BASIS THAT THE FIREARM IN QUESTION WAS "NOT READILY ACCESSIBLE FOR IMMEDIATE USE: THE FOURTH DISTRICT COURT'S REVERSAL OF THE TRIAL COURT'S RULING MUST BE AFFIRMED

The State appealed to the Fourth District Court of Appeal from the dismissal of Count I of the Information (R 9) charging Petitioner with carrying a concealed firearm in violation of Section 790.01(2), Fla. Stat. (1991). The Fourth District Court of Appeal reversed the trial court's dismissal.

Sub judice, upon a search of Petitioner's car, pursuant to a search incident to a lawful arrest, the police officer discovered a firearm under the driver's seat and a fully loaded clip of ammunition under the passenger's seat. (R 5). The firearm was not encased. Thus, the argument turned to whether an "unloaded" firearm was "readily accessible for immediate use."

Section 790.01(2), Fla. Stat. (1991) proscribes the carrying of a concealed firearm. Section 790.25(5), Fla. Stat. (1991) provides an exception stating, in its 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. Stat. (1991) defines "readily accessible

for immediate use" in the following manner:

> (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, i.e. immediately use it. The trial court's order granting dismissal erroneously changed the focus of the issue by illogically inferring that "readily accessible for immediate use" means that the firearm had to be loaded. In other words that a firearm could not be "used" if it was not loaded and, therefore, could not be "readily accessible" if it was not loaded. As the Fourth District stated in State v. Ashley, 601 So. 2d 1230 (Fla. 4th DCA 1992), "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." The Fourth District rejected this interpretation.

A reading of the Statutes now under review, clearly shows that (1) a firearm does not have to be loaded in order to be "readily accessible for immediate use"; and (2) "use" of a firearm does not require that the firearm be loaded. The definition of a firearm is "any weapon ... which ... may readily be converted to expel a projectile...." Section 790.001(6), Fla. Stat. (1991). Thus. a firearm is anything that "may" be converted to expel a projectile

but need not be so converted when first ceased. Compare Dampier v. State, 586 So. 2d 515 (Fla. 2nd 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.)

"Readily accessible for immediate use" is defined as if it were one word. In place of this phrase on can impose the definition given by the Legislature. The subsection would then read as follows:

> [I]t is lawful ... to possess a concealed firearm ... if the firearm ... is securely encased or is otherwise not **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 focus of the statute is the ease in which the firearm is retrievable. Whether it is loaded or not is irrelevant. As the legislature pointed out too many children have been killed or seriously injured by negligently stored firearms which can be easily reached by children. Section 790.173, Fla. Stat. (1991). Stories abound about deaths from firearms which were supposedly empty. A gun cannot be more readily accessible than one that is laying on the floor of an automobile. Such a gun can be "used" at any time with tragic results whether or not that gun is loaded or unloaded. For example, who is going to argue with a gunman whether or not the gun he is holding is loaded or unloaded before complying with the gunman's demands? As the Second District Court of Appeal pointed out in Swoveland the legislature intended that the handgun

user have some difficulty accessing the handgun for quick use. State v. Swoveland, 413 So. 2d 166, 167 (Fla. 2nd DCA 1982). Surely it requires no "lapse of time" or "pause for thought" to pick up a handgun situated under the defendant's seat and "use" it in the legal sense of the word.

The Florida Legislature did not define the term "use" because it intended that the phrase "readily accessible for immediate use" to be defined as a whole and not in a piecemeal fashion as the Petitioner and the Second District Court in Amaya so desires. Nevertheless, if one were to excise the term "use" from the phrase for definitional purposes, the question becomes: What does "use" mean when the term is used in conjunction with a firearm? Is an unloaded firearm readily available for immediate "use" without a showing of available ammunition so as to invoke the three year mandatory sentencing provisions of Sections, 775.087(2), Fla. Stat. (1991). This is the question certified to this Court in Bentley v. State, 501 So. 2d 600 (Fla. 1987).

In Bentley, 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 threaten to kill the mechanic if he touched her car again. The firearm turned out to be unloaded. Nevertheless, the defendant was convicted of aggravated assault with a firearm and sentenced to serve a mandatory three year prison term pursuant to section 775.087(2), Fla. Stat. In affirming the sentence this Court stated:

> [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.

In Hardee v. State, 534 So.2d 706 (Fla. 1988) the question was whether the firearm must be loaded for a conviction to stand for armed burglary, This Court upheld the Fourth District Court'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.

Petitioner would draw this Court away from the intent of Bentley and Hardee by pointing out that these cases involved the three minimum mandatory statute. However, to invoke the three minimum mandatory statute a firearm must be "used." In Bentley and Hardee this Court has held that a firearm is "used" in the commission of a crime or in the legal sense of the word whether or not the firearm is loaded or unloaded or whether or not there is ammunition available "because of concerns about the perception of the victim." In the instant case, it would have taken a split second for the Petitioner to pick the gun off the floor of the vehicle and point it at a person and he would have "used" the firearm in the commission of a felony. Nevertheless, this same firearm is not "readily accessible for use" according to Petitioner April 3, 1992) and the Amaya court because it is not loaded. If operability is not the determining factor in defining a firearm, State v. Altman, 432 So. 2d 156 (Fla. 3rd DCA 1983); Machado v. State, 363 So. 2d 1132 (Fla. 3rd DCA 1978); Section 790.001(6) (a firearm is anything that "may readily be converted to expel a projectile"), and operability is not the determining factor in whether a firearm is use for purposes of the three year mandatory sentence, Bentley, supra, then it is clear that operability is not a factor in determining whether the firearm is "accessible" for immediate use. Compare, Miller v. State, supra. 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 as it did later in the same Section. See Section 790.151, Fla. Stat. (1991). As noted by the Fourth District Court in Ashley, "The statute says 'used,' not 'fired.' In short, the plain language of the stgaute does not require that the firearm be loaded in order to be 'readily accessible for immediate use.'"

Whether or not the Petitioner intended to use the firearm in question is also irrelevant. The statute talks about the "accessibility" of the firearm for "immediate use." Intent is not a requirement of the statute. The statute's only concerned is about a firearm being in a place which is in close proximity to the defendant and is carried in such a manner that it can be retrieved and "used" quickly.

The import of the statute is to promote firearm safety and to prevent the use of firearms in crimes, Alexander v. State, 477 So.2d 557 (Fla. 1985). 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).

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 consideration was Section 790.25(5), Fla. Stat. (1985) and the definitions of "readily accessible for immediate use" and "securely encased" found in Section 790.001, Fla. Stat. (1985). The court found that the sheathed knife discovered within the closed console

was not "readily accessible for immediate use." However, the court also found that the firearm found underneath the car seat was a concealed weapon and "readily accessible for immediate use" 508 So. 2d at 786. The knife was in a "closed console," [i.e. securely encased] and, therefore, not "readily accessible for immediate use." The firearm was underneath the seat of the car [i.e. it was not securely encased] and, therefore, it was "readily accessible for immediate use." The Gomez case deals with the term "accessibility" of the firearm, not the "immediate use" of the firearm. It was assumed that if the firearm was accessible then it could be used immediately.

In State v. Swoveland, 413 So. 2d 166 (Fla. 2nd DCA 1982) the police officer testified that the firearm found in the defendant's vehicle was in a holster in an upright position, barrel facing the floorboard, leaning up against the frame of the driver's seat. 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. The Swoveland court compared the instant case with a similar case also out of the Second District Court of Appeal 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 Second District Court's case the Swoveland court stated that the action of unsnapping the strap and removing the firearm from the holster "requir[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 Swoveland court then found that the "gun in the case before us was more **accessible for quick use,** unimpeded by the factors which would cause the slight delay of its use." 413 So. 2d at 167. Again the Swoveland court was dealing with the term "readily accessible for immediate use." It found that the legislature, in carving out its exception to the concealed gun laws, required that the firearm be carried in such a way that "some lapse of time and pause for thought" was needed in order to retrieve and use the gun. The Second District Court in Swoveland defined "readily accessible for immediate use" as "more accessible for quick use, unimpeded by factors which would cause a slight delay of the weapon's use." 413 So. 2d at 167. Swoveland does not address whether or not the weapon was loaded or unloaded because it is irrelevant.

Amaya v. State, 580 So. 2d 885 (Fla. 2nd DCA 1991) was also decided by the Second District Court of Appeal but by a different panel altogether. This panel ruled that Section 790.25(5) "contemplates an operable firearm" meaning a loaded firearm. This ruling is not based on any case law or analysis beyond the fact that the statute itself requires a liberal construction. The Amaya court completely overlooks past precedent even from its own district.

To further confuse the issue the Second District Court of Appeal recently decided Miller v. State, 17 Fla.Law Weekly D872

(Fla. 2nd DCA April 3, 1992). In that case the Second District Court determined that a defendant violates the dictates of Section 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. In that case the weapon was so rusty that it took several days of applying penetrating oil to unlock the frozen mechanisms to make the shot gun operable. Nevertheless, the shot gun met the requirements of Section 790.221(1) where, according to the Second District Court of Appeal, the term "may readily be made operable" is defined as "involv[ing] no special knowledge or great expense." Even though this took several days. This same court is holding in Amaya that a firearm is not "readily accessible for immediate use" because it is not loaded even though it would take a split second to "use" the gun and only a second to load the gun.

The State is asking this Court to interpret the concealed weapon exception the Legislature enunciated in Section 790.25(5) to effectuate the stated purpose of the legislature -- as did the Fourth District.

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, 1382-1383 (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 (1984). To understand just exactly what the legislature intended

the entire section must be reviewed. Section 790.25(5) states:

> (5) ....it 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. (emphasize added)

Section 790.001(16), Fla. Stat. (1991) defines "securely encased" in the following manner:

> (16) "Securely encased" means in a glove compartment, whether or not locked; snapped in a holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access.

The words "securely encased" is followed by the conjunctive "or otherwise not readily accessible for immediate use." The "or is otherwise" refers back to "securely encased." The Legislature is describing the manner in which firearms may be lawfully carried by the public in a safe and secure method 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 at which one can reach that firearm.

Under the principal 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.

The Petitioner and the Amaya court base 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..." Section 790.25(5), Fla. Stat. (1991). When construing the statute liberally one must go back to what you are 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 definition of "readily accessible for use"). As the Swoveland court points out, the legislature required that a firearm be carried in such a way that "some lapse of time and pause for thought" was needed in order to retrieve and use the gun. This provision must be liberally construed for a person may carry the firearm in her purse, or in a bag, or in a shoe bag or in some kind of container not specifically enumerated in the statute or contemplated by the drafters. Any other interpretation would lead to an absurd or unreasonable result and would render Section 790.25(5) meaningless. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

The declared policy of the legislature is to promote firearm

safety and to prevent the use of firearms in crime without prohibiting the lawful use of firearms in defense of life, home, and property, the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes. In section 790.25(5), after setting forth the exception to the concealed weapon rule, the legislature re-states, "Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon **on the person.** Again going back to the definition of "readily accessible for immediate use" the legislature defined the term as follows:

> (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.**

A firearm is concealed **on a person** whether it is loaded or unloaded. In taking the clear mandate of the legislature that it is not authorizing the carrying of a concealed weapon **on the person** [Section 790.25(5)] and considering the definition of "readily accessible for immediate use" as meaning a firearm "carried 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 meaning of the legislature becomes very 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 on the person or situated so near the person as to be so easily and quickly retrievable 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 v. State, 501 So. 2d 602. The concern is about accessibility.

The last sentence of section 790.25(5) requires that this subsection be "liberally construed" in favor of lawful use, ownership and possession of firearms. However, the lawful use, ownership and possession of a firearm does NOT include carrying that firearm in a concealed fashion either on the person or so near to the person that it is considered on the person. To define "liberally construed" as modifying "immediate use" and then defining that as a loaded weapon would be to distort the intent of the legislature. The whole purpose of the statute would be thwarted if "liberally construed" were to be defined as a loaded weapon. This would necessitate the redefining of "use of a firearm" as it presently is defined in Bentley and Hardee.

If the legislature had meant that "immediate use" required the handgun to be loaded it could have said so. For example, in Section 790.151 the legislature stated as follows:

> 790.151 Using a firearm while under the influence of alcoholic beverages, chemical substances, or controlled substances; penalties---
>
> (1) As used in ss. 790.151 - 790.157, to "use a firearm" means to discharge a firearm or to have a firearm readily accessible for immediate discharge.
>
> (2) For the purposes of this section,

> "readily accessible for immediate discharge" means loaded and in a person's hand.

In this subsection the legislature defined to "use a firearm" to mean to discharge a firearm or to have a firearm readily accessible for immediate discharge; i.e. loaded and in a person's hand. However, this definition of to "use a firearm" is limited to only a few subsections and not to the whole statute. Thus, to "use a firearm" for those sections not specifically mentioned; such as, the concealed weapon exception found in Section 790.25(5), **does not mean** to discharge a firearm or to have a firearm readily accessible for immediate discharge; i.e. loaded and in a person's hand. As the Fourth District Court in noted in Ashley, "The statute says 'used,' not 'fired.'"

Furthermore, if "readily accessible for immediate use" meant that a firearm had to be loaded then why did the legislature in Section 790.151 use the phrase "readily accessible for immediate discharge." If the legislature meant that a firearm had to be loaded to violate the concealed weapon exception then the legislature would have used the term "discharge" as it did in Section 790.151. Or it would have defined "readily accessible for immediate use" as a loaded gun as it did in section 790.151. In addition section 790.151(2) shows that the legislature is perfectly capable of defining the word "use" as meaning a loaded firearm. However, the legislature and this Court are perfectly aware of the fact that a gun may be "used" effectively without being loaded. Consequently, the legislature defined the words "readily accessible

for immediate use" in terms of how easily and quickly a gun can be retrieved **as if on the person.**

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, an interpretation not given in the statute itself.

One cannot separate the concept of a gun laying under the driver's seat from one held in the hands of the driver a split second later. Too often guns that are thought to be empty are found to be loaded -- at the expense of the victim's life. Contrary to the Petitioner's assertion, firearm safety is not served by allowing a firearm to lay under the seat of the driver. That gun is readily accessible by the driver quickly and can be used in an aggravated assault with a firearm (Bentley, supra) or armed burglary (Hardee, supra) or any number of other crimes. Moreover, there is nothing in the statute that requires the State to prove that the defendant had the specific intent to use the firearm so concealed.

The Petitioner argues that an **unloaded gun** concealed under the driver's seat is not "readily accessible for immediate use" but concedes that this same unloaded gun picked up by the driver one

half of a **second** later and pointed at someone is "used" for purposes of the three year minimum mandatory sentence pursuant to section 775.087(2), Fla. Stat. This is tautology at its best. The Petitioner is merely arguing that the unloaded firearm is not "readily accessible for immediate use" because it is not "used." In other words, the **unloaded firearm** is not used because it is not used. The Fourth District Court rejected this argument, as should this Court.

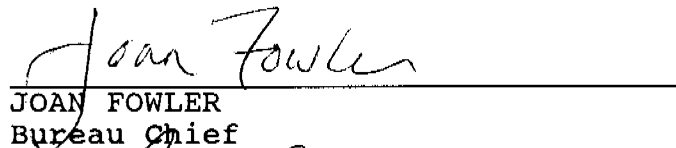
The use of the phrase "or is otherwise not readily accessible for immediate use" clearly indicates the concern of the legislature in preventing the "accessibility" of the firearm for "immediate use" in a crime, Alexander v. State, 477 So. 2d 557, 559-560 (Fla. 1985) whether that crime be of the accidental type as in the case of the child or of a more purposeful type. Since the aim of the statute is to promote firearm safety, and prevent 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 would urge this Court to affirm the Fourth District Court's reversal of the trial court's dismissal of Count I of the Information, carrying a concealed weapon.

CONCLUSION

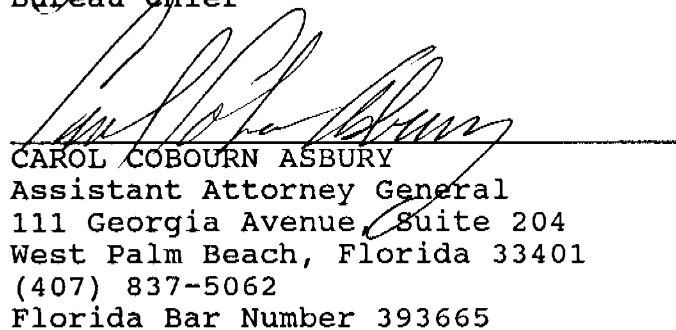
Based on the foregoing arguments and the authorities cited therein, the Respondent, the State of Florida, respectfully requests this Court affirm the Fourth District Court of Appeal's decision.

Respectfully Submitted,

ROBERT A. BUTTERWORTH



JOAN FOWLER
Bureau Chief



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/courier to ELLEN MORRIS, Assistant Public Defender, Fifteenth Judicial Circuit, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida 33401 this 14th day of December, 1992.