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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

vs.

Case No. 90,609

RODNEY WALTON,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DENISE S. CALEGAN
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0887137
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. RULE 3.702(D) (12) FLORIDA RULES OF CRIMINAL
PROCEDURE MANDATES THAT 25 POINTS BE ACCESSED ON THE
SENTENCING SCORESHEET WHEN DEFENDANT IS CONVICTED OF
CARRYING A CONCEALED FIREARM.

CONCLUSION 5

CERTIFICATE OF SERVICE 6

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<u>Capers v. State</u> , 678 So. 2d 330 (Fla. 1996).....	6
<u>Gonzalez v. State</u> , 585 So. 2d 932 (Fla. 1991).....	5
 <u>Rules/Statutes</u>	
3.702(d) (12).....	4-5

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STATE OF FLORIDA,

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PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, was the prosecution in the trial court, and the Appellant in the district court, and will be referred to herein as "Petitioner" or "the state." Appellee, the Rodney Walton, was the defendant in the trial court, and the Appellee in the district court, and will be referred to herein as "Respondent" or "defendant." Reference to the pleadings will be by volume number followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of case and facts set forth in its initial brief.

SUMMARY OF ARGUMENT

Petitioner relies on the summary of the argument contained in the initial brief.

ARGUMENT

I. RULE 3.702(d)(12) FLORIDA RULES OF CRIMINAL PROCEDURE MANDATES THAT 25 POINTS BE ACCESSED ON THE SENTENCING SCORESHEET WHEN DEFENDANT IS CONVICTED OF CARRYING A CONCEALED FIREARM.

Rule 3.702 (d)(12) Florida Rules of Criminal Procedure is clear on its face, and does apprise ordinary persons of common intelligence that additional points will be accessed for possessing a firearm in the commission of a felony.

Respondent argues that carrying a concealed weapon is exempt from rule 3.702(d)(12) because one can not possess a firearm "while" carrying a concealed weapon. The state contends that one must necessarily possess a firearm during or "while" committing the crime of carrying a conceal weapon. Respondent argues that "while" is a conjunction and therefore requires the conjoining of two separate entities (A.B. at 6). The state agrees that "while" is a conjunction. See Websters New College Dictionary (1995). However, the fact that the word "while" is a conjunction merely means that it connects words, phrases, clauses, or sentences; it does not indicate that by definition "while" must connect two separate acts. See Websters New College Dictionary (1995). "While" is defined as "during the time that" or "at the same time that". See Websters New College Dictionary (1995). Thus, in the instant case, defendant could, and in fact did, commit the felony of carrying a concealed

weapon, during which time he possessed a firearm. It is irrelevant that defendant could not commit the charged felony with out possessing a firearm. The fact that defendant could not commit the felony of carrying a concealed firearm without possessing a firearm does not diminish the fact that "while" defendant was in possession of a firearm, he concealed the firearm thereby committing a felony which is not specifically exempted from rule 3.702(d)(12)¹.

Gonzalez v. State, 585 So. 2d 932 (Fla. 1991), cited by respondent, is distinguishable. In Gonzalez defendant was charged with second-degree murder with a firearm. Id. at 933. He was convicted of the lesser included offense of third-degree murder with a firearm, which is a second-degree felony. Id. This court held that the third-degree murder conviction could not be enhanced to a first-degree felony under section 775.087(1)(b) Florida Statutes (1987), because use of a firearm was an essential element of the crime for which defendant was convicted. Id. Section 775.087(1)(b) Florida Statutes (1987), which is set forth in footnote 2, specifically exempts from enhancement, "a felony in which the use of a weapon or firearm is an essential element." Id. at 934. In the instant case, although rule 3.702(d)(12) specifically exempts certain felonies from application of the rule,

¹ The fact that one must stand up to walk does not mean that one can not walk "while" standing up.

it does not exempt felonies in which the use of a firearm is an essential element. One can only assume that had the legislature intended to prohibit enhancement when use of a firearm was an essential element, it would have specifically exempted these types of felonies when it stated the exceptions to the rule. As stated in the initial brief on the merits, it is a general principle of statutory construction that the mention of one thing implies the exclusion of another. Capers v. State, 678 So. 2d 330, 332 (Fla. 1996).

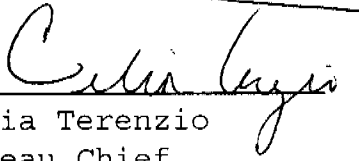
Thus, under the plain meaning of rule 3.702(d)(12) and its corresponding statute, this court must reverse for imposition of the additional points since defendant committed a felony which is not specifically exempted under the rule and at the same time was in possession of a firearm.

CONCLUSION

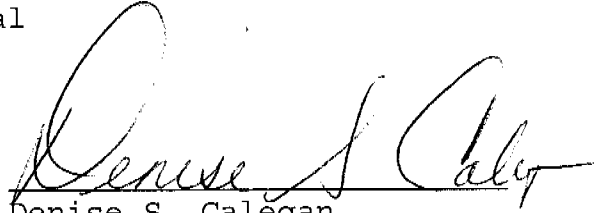
Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court reverse the district court's opinion, and remand to the trial court for resentencing pursuant to a properly prepared scoresheet or withdrawal of defendant's plea.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



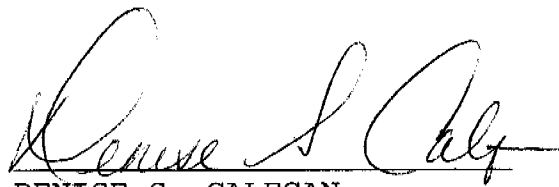
Celia Terenzio
Bureau Chief
Fla. Bar No. 656879



Denise S. Calegan
Assistant Attorney General
Fla. Bar No. 0887137
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Anthony Calvello, 421 Third Street, West Palm Beach, Florida 33401, this 16th day of July, 1997.



DENISE S. CALEGAN
Assistant Attorney General