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IN THE SUPREME COURT OF FLORIDA

JERMAINE C. JACKSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC14-842

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Jermaine C. Jackson, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to herein as "appellant." The respondent, State of Florida, was the prosecution in the trial court and the Appellee before the Fourth District Court of Appeal. The respondent will be referred to as the "the prosecution" or "the State."

In this brief, the following symbols will be used:

IB = Appellant's Initial Brief on the Merits

R = Record on Appeal

SR = Supplemental Record

T = Trial Transcripts

STATEMENT OF THE CASE AND FACTS

On April 19, 2010, Appellant was arrested for Robbery With A Deadly Weapon While Wearing A Mask (R 3-8). On March 16, 2011, Appellant was charged by Amended Information with armed robbery while in actual possession of a firearm and while wearing a hood, mask or other device (R 2).

On March 24, 2011, the case proceeded to a jury trial (T 1-487). Garson Reveange testified he was robbed at gunpoint while delivering pizza (T 36). Mr. Reveange testified he saw Appellant on April 18, 2010, but did not know him before that (T 43). **Mr. Reveange testified he knows it was Appellant because he didn't cover his head up, just part of his head** (T 44). Mr. Reveange testified **"I can tell exactly who he is"** (T 49). Mr. Reveange testified Appellant was wearing a black or grey long sleeve shirt and some kind of jean shorts (R 50).

Tresia Sutherland testified she was the general manager at Pappa John's (T 67). On April 18, 2010, at 11:47 a.m. they received a telephone call ordering pizza (T 68). The caller gave a phone number of 940-3041 but **caller ID showed the phone call was placed from 940-4931** (T 71). The caller asked to have the pizzas delivered to 1115 North 16th Street (T 71-72). Their computer matched the phone number on the caller ID to a customer named Davis because they had made previous orders with that phone (T 72-73). The address for the previous orders was 1208 Avenue O, Apartment B (T 75).

Sheree Williams testified she lived at 1117 North 16th Court (T 91). She saw someone standing outside who she thought was suspicious (T 101). Ms. Williams later saw the man had a gun and she called the police (T 102). Ms. Williams also saw a Pappa John's car (T 102) and someone lying on the ground (T 104). The man with the gun was wearing a black shirt and some black shorts that could have been jeans (T 104).

Detective James Grecco testified he responded to 1208 Avenue O in Ft. Pierce and spoke with Temeka Davis (T 141). Det. Grecco got the address from Pappa John's as the address given when ordering pizza with that phone number in the past (T 142). Ms. Davis provided Appellant as a suspect (T 142). Det. Grecco spoke with Appellant on April 18, 2010 (T 142-143). In the recorded interview Appellant stated he slept at "Ant's" house (T 147). Appellant claimed he was with "Ant" (T 152). Appellant admitted he had called Temeka and asked her if she had Pappa John's number (T 151).

Temeka Davis testified Appellant called her on April 18, 2010, and asked her to look up the phone number for Pappa John's or Good Fellows on a cell phone he had left at her house (T 160). Ms. Davis testified Appellant was wearing a black hat, gym shorts and a black t-shirt that day (T 162).

Anthony Ellison ("Ant") testified Appellant spent the night at his house and left around 9:30 (T 169-170). Appellant came back close to 11:00 (T 170). Mr.

Ellison had a cell phone with the number 940-4931 (T 170). Appellant asked to use his cell phone and Mr. Ellison gave it to him (T 170). **Appellant left with the cell phone** and came back around 6:00 (T 170-172). Appellant said he ran because the cops were chasing him and he had thrown away the cell phone (T 172). Mr. Ellison later got his cell phone back from Appellant (T 172-173). When Appellant came back later he had some money (T 172-174). **Appellant said he had robbed some pizza man** (T 174).

Detective Justin Rahn testified he interviewed Appellant on April 20, 2010 (T 181-182). The interview was recorded (T 184). Appellant stated he uses his baby mamma's phone or Ant's phone (T 191). Appellant stated he called Temeka and asked her for the phone number for Touch of Brooklyn, (not Pappa John's) and he does not even like Pappa John's (T 193-194). Appellant stated he last saw Ant the morning of the robbery (T 194-195). He and Ant left the apartment together around 10:30, walked around, "smoked the pope" and looked for somebody to buy a bag of weed (T 195).

Appellant testified at trial that he does not know the victim and did not rob him (T 261). Appellant testified around April 18, 2010, he was staying with Temeka Davis at 1208 Avenue O in Ft. Pierce (T 262). The address where Appellant was living was five or six blocks from where the robbery occurred (T 262-263). Appellant testified on April 18, 2010, he was wearing a black shirt and blue jean

shorts (T 263). Appellant testified that he told Det. Grecco his goal that morning was to get money to buy weed (T 265). Appellant testified he did not have money to buy weed that morning (T 265). Appellant did call Temeka Davis that morning and he told Det. Grecco he asked for the number of Pappa John's or Good fellows (T 265). Appellant testified that two days later he told Det. Rahn he asked for Touch of Brooklyn and does not even like Pappa John's pizza (T 266). On cross-examination the prosecutor asked Appellant why he needed the number for Pappa John's that morning if Appellant has already eaten breakfast and he didn't have any money (T 276). Appellant testified the number wasn't for him; someone else was looking for some numbers (T 276). The prosecutor asked who the person was that wanted the pizza because Appellant had testified earlier he was with Ant all day (T 277). Appellant answered:

> "And as I stated when I left, I went somewhere for about five minutes. When I left I was supposed – I had planned but they got canceled. During that time momentarily, **I ran into a couple of guys** and they was asking me what's up and they was like, what we doing, what's up, blazae, blazae, they trying to get something to eat, they trying to do this, trying to do that. **And I volunteered to get the numbers for them**. After that I lost contact with them. I went my own way, went back with Ant" (T 277).

Appellant testified he did not mention the two guys in the two interviews with the police because he was not asked (T 277). Appellant testified that he heard the testimony that Ant's phone, 940-4931, was used to order pizza where the pizza man was robbed at gunpoint (T 282). **Appellant admitted he borrowed that**

phone that day and just before the robbery he called Temeka asking her for the number to Pappa John's (T 282). Appellant testified that only thing he could say about his whereabouts from 11:00 to 3:00 that day was he was here and there[1] (T 282).

On March 25, 2011, the jury returned a verdict of Guilty of Robbery, as charged and the jury further found that Appellant actually possessed a "firearm" and was wearing a hood, mask or other device that concealed his identity (R 126; T 487). On July 22, 2011, Appellant was sentenced to life in prison with a 10 year mandatory minimum sentence (R 148-150). On August 17, 2011, Appellant filed a Notice of Appeal (R 154).

SUMMARY OF ARGUMENT

Appellant has no standing to challenge the statute, as he never requested to have the trial court consider a youthful offender treatment. In fact, Appellant requested a 10 year minimum mandatory prison sentence, which the trial court emphatically rejected when it sentenced him to life in prison. Therefore regardless

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[1] Appellant filed a Notice Of Alibi alleging he was with Alexander Hargrove at his residence from 10:30 a.m. to 4:00 p.m. playing video games after deciding not to go fishing, but Mr. Hargrove was not called as a witness and Appellant did not testify to the facts alleged in the Notice Of Alibi (R 32).

[2] Appellant also states "Defendant has reworked his substantive due process claim in response to the Fourth District's opinion" (IB 11). Appellant asked that "If this Court decides it was not sufficiently raised below, he asks the Court to review it for fundamental error" (IB 11). As will be argued in the brief, the Fourth

of whether Appellant was eligible for a YO sentence under either version of the statute, the trial court would not have exercised its discretion to impose that sentence given imposition of a life sentence. Therefore Appellant cannot demonstrate that he was adversely affected by enactment of the 2008 amendment to the statute.

Moreover, because imposition of a YO sentence is not a fundamental right to those who are eligible, the Fourth District properly applied the "rational basis" test in finding §958.04(1)(b), Fla. Stat., to be constitutional. Under that standard, the amendment to the statue does indeed establish a rational basis to a legislature's goal of ensuring that the youthful offender population remains truly "youthful." The amendment also achieves the goal of limiting the population of youthful offenders which was and remains necessary due to the lack of facilities available by DOC (*See* §958.04(4) Fla. Stat. (2007)). Therefore, Appellant cannot establish a lack of rational basis (or unreasonable relationship) to either legitimate state interest.

Finally, the fact that lesser penalties are granted statutorily to youthful offenders does not place an unconstitutional burden on the defendant's rights to plead not guilty and to demand a jury trial. In the instant case, the legislature created the Youthful Offender statute and can enlarge the scope of the people it wishes to include, it can limit the scope of the people it wishes to include or it can

do away with the Youthful Offender statute all together. Appellant has no right to be treated as a Youthful Offender and the legislature does not violate equal protection or due process in narrowing the scope of the people it wishes to include under the statute.

ARGUMENT

PETITIONER HAS FAILED TO SHOW THAT SECTION 958.04(1)(b) OF THE FLORIDA YOUTHFUL OFFENDER ACT VIOLATES EQUAL PROTECTION AND DUE PROCESS GUARANTEES WHERE AGE-ELIGIBLILITY FOR ALTERNATIVE SENTENCING IS DETERMINED BY THE DEFENDANT'S AGE AT THE TIME SENTENCE IS IMPOSED (Restated).

Standard of Review

The Supreme Court reviews a district court's decision regarding the constitutionality of a statute *de novo*. Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n, 114 So.3d 912 (Fla. 2013) citing State v. Sigler, 967 So.2d 835, 841 (Fla. 2007). See also City of Miami v. McGrath, 824 So.2d 143 (Fla. 2002); Kuvin v. City of Coral Gables, 62 So.3d 625 (Fla. 3rd DCA 2010).

Argument

Standing

"[S]tanding is a threshold determination necessary for the maintenance of all actions". Ferreiro v. Philadelphia Indem. Ins. Co., 928 So.2d 374, 378 (Fla. 3rd DCA 2006). Generally, in order to have standing to bring an action the plaintiff

must allege that he has suffered or will suffer a special injury. Alachua Cnty. v. Scharps, 855 So.2nd 195, 198 (Fla. 1st DCA 2003). "A party who is not adversely affected by a statute generally has no standing to argue that the statute is invalid." Sancho v. Smith, 830 So.2d 856, 864 (Fla. 1st DCA 2002).

Although, Appellant contends that the 2008 amendment to §958.04, Fla. Stat., (the Youthful Offender statute), is unconstitutional on its face, he has no standing to challenge the statute, because he failed to even request a Youthful Offender sentence. This dispositive deficiency in his argument is further buttressed by the fact that in response to his request for a 10 year minimum mandatory prison sentence, the trial court imposed a life sentence. Therefore there is no reason to believe the trial court, having rejected Appellant's requested 10 year minimum mandatory sentence, would have exercised its discretion to impose a Youthful Offender sentence. These facts preclude Appellant from demonstrating that he was adversely affected by application of the amended statute.

Appellant, who was 20 years old at the time he committed the armed robbery and 21 years old at time he was sentenced, contends that the 2008 amendment to §958.04, Fla. Stat. made the statute unconstitutional as it resulted in his ineligibility to the benefits of Youthful Offender sentencing. Essentially, Appellant complains that the subsequent non-application of §958.04, Fla. Stat., has adversely affected him. This argument further highlights the fact that Appellant

has no standing to challenge the statute. Appellant cannot attack the statute "as applied" or demonstrate that he was adversely affected by the failure to apply the statue to him at sentencing because he never asked the trial court to sentence him as a youthful offender. Therefore, Appellant has failed to demonstrate that there is any reason to believe the trial court, having rejected his request for a 10 year minimum mandatory sentence, would have exercised its discretion to impose a Youthful Offender sentence regardless of whether he was eligible for such a sentence under the pre-amendment.

Merits

Appellant makes two constitutional challenges to the 2008 amendment to §958.04(1)(b), Fla. Stat., the Youthful Offender Act. Prior to the 2008 amendment to §958.04(1)(b), Fla. Stat., a defendant could potentially qualify for youthful offender treatment if the felony was committed before the defendant's 21st birthday. After the 2008 amendment, a defendant has to be under the age of 21 years at the time sentence is imposed to potentially qualify. The Fourth District succinctly characterized the challenges as follows[2]:

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[2] Appellant also states "Defendant has reworked his substantive due process claim in response to the Fourth District's opinion" (IB 11). Appellant asked that "If this Court decides it was not sufficiently raised below, he asks the Court to review it for fundamental error" (IB 11). As will be argued in the brief, the Fourth District correctly determined that the issue does not involve any fundamental

> Appellant argues that this amendment violates equal protection in that it impermissibly treats two classes of similarly situated people—those who commit a crime and are sentenced before they turn twenty-one and those who commit a crime before they turn twenty-one but are sentenced after—differently. He also asserts that the amendment violates substantive due process in that it may force a defendant on the brink of turning twenty-one to make concessions in his or her defense strategy in order to try to qualify for a youthful offender status.

Jackson v. State, 137 So.3d 470, 473 (Fla. 4th DCA 2014).

In order to be entitled to relief Appellant must overcome the presumption that the statue is valid. McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998)(explaining that legislative enactments are presumed valid and opponent must demonstrate beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution). He must prove that there is absolutely no conceivable basis whatsoever for upholding the law. McElrath , supra, 707 So.2d at 838-839. See also Brazill v. State, 845 So.2d 282 (Fla. 4th DCA 2003) (same). With these standards on mind, Appellant's claim must fall as they were properly rejected by the Fourth District Court of Appeals. As noted above, in McElrath, supra, and Brazil, supra, legislative enactments are presumed valid and such statues will be construed in a manner to avoid any constitutional conflict (quoting Metropolitan Dade County v. Bridges, 402 So.2d 411, 413-14 (Fla.1981), receded from on other

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rights. The state asserts that the additional arguments are therefore not preserved and no justification exists to overcome the procedural bar.

grounds, Makemson v. Martin County, 491 So.2d 1109, 1115 (Fla.1986)). The court further stated that "[t]he **burden of proof below was on the plaintiff to demonstrate that the statute was not constitutional by negating every conceivable basis for upholding the law**". Id, 707 So.2d at 838-839, citing Gallagher v. Motors Ins. Corp., 605 So.2d 62, 68-69 (Fla.1992).

In rejecting Appellant's argument, the Fourth District noted that the Youthful Offender Act was intended to be another tool or alternative to trial courts when sentencing youthful offenders. As an alternative it is discretionary. In other words the Legislature did not create a fundamental right to eligible defendants. A judge has ultimate discretion to deny youthful offender treatment regardless of the fact that a defendant is eligible. Therefore in addressing Appellant's claims the court used the rational basis test. See also Brazill, supra ,(there is no absolute right conferred by common law, constitution, or otherwise, requiring children to be treated in a special system for juvenile offenders) and Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) (finding that "treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved"). Even Appellant acknowledges that under the Federal Youth Corrections Act (FYCA), in effect from 1950 to 1984, defendants were classified **based on age at the time of conviction** (IB 15). There is little

distinction between a classification based on **age at time of conviction** and a classification based on **age at time of sentencing** and the FYCA was held constitutional on numerous occasions. See United States v. Ballesteros, 691 F.2d 869, 870 (9th Cir.1982).

Additionally, in determining that there is no fundamental right to youthful offender status, the Fourth District noted that other jurisdictions have held that there is no fundamental right to a youthful offender status and have thus employed a rational basis analysis when considering whether a youthful offender statute violates equal protection, citing People v. Perkins, 107 Mich. App. 440, 309 N.W.2d 634, 636 (1981) and People v. Mason, 99 Misc.2d 583, 416 N.Y.S. 2d 981, 984 (N.Y.Sup.Ct. 1979). Jackson, 137 So.3d at 474.

Two additional states, South Carolina and Wisconsin, have also held that there is no fundamental right to youthful offender treatment. See State v. Johnson, 276 S.C. 444, 279 S.E.2d 606 (S.C. 1981) ("The statutory right to **youthful offender treatment is simply not a fundamental right"**) and Hilber v. State, 89 Wis.2d 49, 277 N.W.2d 839 (1979) ("Hilber and Mayes argue that the statutory right to youthful offender treatment is 'fundamental,' but their arguments are not convincing and are not supported by any authority. Indeed, differences in the treatment of criminal offenders have been viewed as being subject to the rational basis test. Marshall v. United States, 414 U.S. 417, 421, 94 S.Ct. 700, 38 L.Ed.2d

618 (1974); McGinnis v. Royster, 410 U.S. 263, 270, 276, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973); United States ex rel. McGill v. Schubin, 475 F.2d 1257 (2d Cir. 1973). **We conclude that no 'fundamental right' is here affected**"). See also State v. Mohi, 901 P.2d 991, 1010, fn 6 (Utah, 1995) ("It is noted, however, that the right to be treated as a juvenile has never been considered the type of fundamental right which has traditionally triggered a heightened level of scrutiny. See also Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir.1977), cert. denied, 434 U.S. 1088, 98 S.Ct. 1285, 55 L.Ed.2d 794 (1978); State v. Anderson, 108 Idaho 454, 700 P.2d 76, 79 (App.1985)); People v. Mason, 99 Misc.2d 583, 586, 416 N.Y.S.2d 981, 984 (Sup.Ct.1979); People v. Williams, 100 Misc.2d 183, 186, 418 N.Y.S.2d 737, 740 (County Ct.1979); Jahnke v. State, 692 P.2d 911, 928–29 (Wyo. 1984), overruled on other grounds by Vaughn v. State, 962 P.2d 149, 151 (Wyo. 1998); see also State v. Cain, 381 So.2d 1361, 1363 (Fla.1980) (holding that a juvenile offender has no right "to be specially treated as a juvenile delinquent instead of a criminal offender")"). See also Bendler v. Percy, 481 F.Supp 813 (D.C. Wis., 1979)(rejecting constitutional challenge to state's focus on date a person is charged rather that the date of the crime in deciding whether to try person as a juvenile); People v. Mason, 99 Misc.2d 583, 416 N.Y.S.2d 981 (N.Y.Supp., 1979)(determining that rational basis test was the proper test to decide equal protection challenge to statute which made only certain juveniles eligible for

youthful treatment status); and also People v. Robert Z., 134 Misc.2d 555, 511 N.Y.S.2d 473 (N.Y.Co.Ct. 1986) (There is no constitutional right to youthful offender treatment. Such treatment is entirely "a gratuitous creature of the Legislature, subject to such conditions as the Legislature may impose without violating constitutional guarantees" (citations omitted)). **If there is no fundamental right for a child to be treated as a juvenile, then certainly there is no fundamental right for a 20 year old at the time of the crime or anyone else to be treated as a youthful offender.** "[W]e see nothing in the constitution or any of the cases to suggest that a person under the age of eighteen has a right to juvenile treatment." U.S. v. Rombom, 421 F.Supp. 1295, 1300 (D.C.N.Y. 1976).

Under the rational basis test, Appellant must establish that there is no reasonable nexus between the law and the intended purpose. Additionally, "[u]nder the rational basis test it is not necessary to inquire whether the statutory classification effects a permissible goal in the best possible manner, as some degree of imprecision or inequality is permitted. See Acton[3]; Khoury[4]. The rational basis test merely requires a reasonable relationship between the statutory classification and a legitimate legislative objective. Id. **And the party challenging**

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[3] Acton v. Ft. Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983).

[4] Khoury v. Carvel Homes South, Inc., 403 So.2d 1043 (Fla. 1st DCA 1981), *rev. denied*, 412 So.2d 467 (Fla. 1982).

the statute has the burden to demonstrate that there is no rational basis for the statutory classification." Ciancio v. North Dunedin Baptist Church, 616 So.2d 61, 62-63 (Fla. 1st DCA 1993) citing Florida High School Activities Association, Inc. v. Thomas, 434 So.2d 306 (Fla.1983). It is well-settled that "a classification neither involving fundamental rights nor proceeding along suspect lines… cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. City of Fort Lauderdale v. Gonzalez, 134 So.3d 1119 (Fla. 4th DCA 2014), quoting Heller v. Doe, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

With these principles in mind, Appellant has failed to meet his burden. In applying the rational basis test, the Fourth District explained:

> Limiting inclusion into a youthful offender program by the offender's age at the time of sentencing could serve to ensure that the population in such a program truly remains "youthful." This is all that is needed to establish a rational basis. Accordingly, Appellant's equal protection argument fails.

Jackson, 137 So.3d at 475. The court's determination was proper.

With regards to substantive due process the court explained that the Youthful Offender Act does **not** control the trial rights of a defendant. Jackson, 137 So.3d at 476. Those rights and the exercise of them are completely controlled by a defendant. If a defendant chooses to make eligibility for youthful offender

treatment the prime focus of the case ahead of any particular trial right, that is a strategic decision he or she is entitled to make. Therefore the indirect impact the Youthful Offender Act has on trial rights does not violate substantive due process. There is nothing in the state or federal constitution that suggests a person has a right to youthful offender treatment. In fact, even if a person qualifies under the statute, such treatment is totally discretionary with the trial court. The fact that lesser penalties are granted statutorily to youthful offenders does not place an unconstitutional burden on the defendant's rights to plead not guilty and to demand a jury trial. *See* United States v. Rombom, 421 F.Supp. 129, 1299 (S.D.N.Y 1996)(rejecting claim that §5032 of the Federal Juvenile Delinquency Act was unconstitutional as it affected trial rights because the waiver of those rights for a beneficial option is constitutionally permissible) Rombom, 421 F.Supp. at 1299.

None of the cases cited by Appellant warrant a different result. For instance the only cases cited by Appellant that involve a Youthful Offender designation are Dorszynski v. United States, 418 U.S. 424 (1974), United States v. Carter, 225 F.Supp. 566, 568 (D.D.C. 1964), United States v. Lowery, 726 F.2d 474 (9th Cir. 1983) and Holloway v. United States, 951 A.2d 59 (D.C. Cir. 2008). All other cases cited by Appellant apply only generally to the instant case.

In Dorszynski v. United States, the Court granted certiorari to resolve a conflict concerning whether in sentencing a youthful offender to adult sanctions, a

federal district court was required to first make an explicit finding supported by reasons on the record that the offender would not benefit from treatment under the Act. The Court concluded that while an express finding of no benefit must be made on the record, the Act does not require that it be accompanied by supporting reasons. The decision is not relevant to the issue in the instant case.

In United States v. Carter, the defendant was 21 years old at the date of the jury verdict of guilty and was 22 years old at the time the pre-sentence report was completed and he was sentenced. The issue was whether the defendant was under 22 years at the time of "conviction". The court held that under the FYCA a conviction occurred at the time of the return of the verdict by the jury. The decision is not relevant to the issue in the instant case.

In United States v. Lowery, the defendant was sentenced under the Federal Youth Corrections Act (FYCA) to an indeterminate sentence as provided by the FYCA although the maximum sentence for an adult guilty of the same felony would be shorter. The defendant alleged a denial of equal protection and due process and that his sentence was limited by what an adult could receive for the same offense. The court noted that "**Indeed, in one of our recent decisions we concluded that constitutional challenges to YCA sentences 'have been frequently raised and uniformly rejected**.' United States v. Ballesteros, 691 F.2d 869, 870 (9th Cir.1982)." Lowery, 726 F.2d at 478. The court held that arbitrarily

limiting the duration of a YCA sentence to the maximum period of penal incarceration that could be imposed on an adult convicted of the same felony would unduly interfere with the policy of the YCA. The court affirmed the denial of his motion for correction and reduction of sentence. The holding in Lowery is not relevant to the instant case other than the court's observation that constitutional challenges to the YCA sentences have been uniformly rejected, citing U.S. v. Ballesteros.

In Holloway v. United States, the issue was when a young adult becomes too old to be sentenced under the Youth Rehabilitation Act, D.C.Code § 24-901 *et seq.* (2001 and Supp. 2007) ("YRA" or "Youth Act"). The court stated that plainly, the special provision of the Act are available in the sentencing of a person less than twenty-two years of age at the time of sentencing, but the Act was unclear as to whether it also applied to persons who were less that twenty-two years of age at the time of conviction, but had reach their twenty-second birthday before sentencing. The court stated that the meaning of the statute was not clear. The Act defined "Conviction" to mean a person less than 22 years convicted of a crime other than murder, first degree murder that constitutes a crime of terrorism, and second degree murder that constitutes a crime of terrorism. The court used the rule of lenity to help resolve ambiguity in the criminal statute and held that the defendant was less than 22 at time of the conviction and reversed and remanded to the trial

court to consider a YRA sentence. Holloway is of little instruction in the instant case other than to show that age at time of conviction is another common cutoff date for determination of youthful offender treatment. As discussed above, there is little difference in using **age at time of conviction** and **age at time of sentence** in determining eligibility for youthful offender treatment.

Appellant's claim that that the age-at-sentencing classification violates equal protection and that Florida disfavors the age-at-sentence classification (IB 11-13) is without merit. Appellant's claim that the FYCA disfavored that age-at-sentencing classification (IB 16) is likewise without merit. None of the cases cited by Appellant establish Appellant's claims.

Appellant contends "Chapter 958 creates a liberty interest even though youthful offender sentencing is discretionary citing State v. Johnson, 616 So.2d 1, 3 (Fla. 1993) and Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (IB 20-21). But Johnson involved a defendant who was sentenced as a habitual violent felony offender and the issue was whether the amendment to the habitual felony offender statute violated the single subject rule of the State Constitution and is therefore distinguishable from the instant case. In Wilkinson the defendant brought a class action against prison officials in Ohio under §1983 alleging the state's policy governing placement in the supermax prison did not afford procedural due process and is therefore distinguishable. Likewise, Morrissey v. Brewer, 408 U.S. 471,

484 (1972) cited by Appellant, (IB 21), involved revocation of parole and is distinguishable.

Appellant states that "A hallmark characteristic of substantive due process violations is that the government action automatically and illogically deprives a person of liberty or property" citing Bearden v. Georgia, 461 U.S. 660 (1983) and Del Valle v. State, 80 So.3d 999 (Fla. 2011) (IB 21). But Bearden and Del Valle both involved whether the Fourteenth Amendment prohibited a State from revoking an indigent defendant's probation for failure to pay a fine and restitution and are distinguishable from the instant case.

Appellant claims "There is no safety valve, also known as due process. Section 958.04(1)(b), Florida Statutes, arbitrarily and unreasonably excludes defendants from eligibility for youthful offender sentencing on the day they turn 21 years old, regardless of their youth when the offense was committed or their potential for rehabilitation" (IB 23). Appellant cites Rochester v. State, 140 So.3d 973, 975 (Fla. 2014), State v. Wooten, 782 So.2d 408 (Fla. 2nd DCA 2001) and State v. Salgado, 948 So.2d 12 (Fla. 3rd DCA 2006) (IB 22) none of which support Appellant's conclusion.

Appellant further contends that "Section 958.04(1)(b) needlessly encroaches upon fundamental rights expressly guaranteed in the Bill of Rights and the Florida Declaration of Rights. Its sentencing deadline offends equal protection guarantees

because otherwise eligible defendants do not share the same burdens and liabilities. It offends substantive due process because it operates with complete disregard for the rights of the accused" (IB 24). Appellant cites Dep't of Law Enforcement v. Real Property, 588 So.2d 957, 960 (Fla. 1991), United States v. Jackson, 390 U.S. 570, 583 (1968), and Traylor v. State, 596 So.2d 957, 962 (Fla. 1992) as authority. None of these cases involve youthful offender treatment and are distinguishable.

Appellant claims "The Fourth District imposed an overly restrictive standard when it required the defendant to disprove 'any conceivable state of facts or plausible reason to justify' the age-at sentencing classification. 137 So.3d at 474-5. It may have overlooked McCall[5], published just two-weeks earlier, which held a statute fails rationality review if it is 'arbitrary or capriciously imposed…'" (IB 32). However, McCall involved a patient who died after giving birth in an air force base hospital and the application of a statutory cap on wrongful death noneconomic damages. The Florida Supreme Court held that the statutory cap violates the right to equal protection under the state constitution. The Court in McCall stated:

> Because these alleged classifications do not involve a protected class or a fundamental right, McCall's equal protection claim must be analyzed using the rational basis test.

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[5] Estate of McCall v. U.S., 134 So.3d 894 (Fla. 2014).

> Under a 'rational basis' standard of review a court should inquire only whether **it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose**[:]"
>
> **The burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack**. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained.
>
> Fla. High Sch. Activities Ass'n v. Thomas, 434 So.2d 306, 308 (Fla.1983); see also Westerheide v. State, 831 So.2d 93, 112 (Fla.2002). It is not the judiciary's task under the rational basis standard "to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." Loxahatchee River Envtl. Control Dist. v. Sch. Bd. of Palm Beach Cnty., 496 So.2d 930, 938 (Fla. 4th DCA 1986).

McCall, 134 So.3d at 927. The Fourth District did not overlook McCall and did apply the correct burden upon Appellant.

Appellant request heightened scrutiny claiming "The age-at-sentencing classification also implicates rights that are constitutionally guaranteed" (IB 32) citing Mitchell v. Moore, 786 So.2d 521, 527 (Fla. 2001) and United States v. Virginia, 518 U.S. 515, 533 (1996) . Mitchell involved the Prisoner Indigency Statute violating an inmate's constitutional right to access to the courts and is distinguishable. U.S. v. Virginia involved maintaining a military college exclusively for males and is distinguishable. Appellant has not shown the Fourth District improperly applied the rational basis test.

Appellant's argument that the classification was not amended to ensure that the DOC's youthful offender population remains youthful (IB 33-35) is without merit. The fact that other legislation exist that requires separate institutions for juveniles and separate institutions for inmates under the age of 25 does not affect the Legislature's intent in the Youthful Offender Act to ensure the "youthfulness" of the youthful offender program.

Appellant claims that the amended classification was meant to align the age-restriction for judicial disposition with the DOC's age-restriction (IB 35). Appellant states the purpose of the amendment was to "tighten this particular criterion" (IB 36) and that "…it appears that the Legislature adopted the DOC's request to restrict judicial sentencing to defendants who are 'younger than 21 years old at the time sentence is imposed' for the simple reason that the DOC does not provide youthful offender services to inmates who are 25 and older" (IB 38). Appellant's argument simply provides an additional rational basis to support the Legislature's action to "tighten this particular criterion" by amending the statute in 2008.

Appellant's argument that the classification fails to promote its purpose (IB 38) is without merit. As stated previously, the statute must be sustained if "any state of facts reasonably may be conceived to justify it", not just the reason deduced by Appellant. See Gallagher v. Motors Ins. Corp., 605 So.2d 62 (Fla.

1992). Again, under the rational basis test it is not necessary to inquire whether the statutory classification effects a permissible goal in the best possible manner, as some degree of imprecision or inequality is permitted; the rational basis test merely requires a reasonable relationship between the statutory classification and a legitimate legislative objective. Ciancio v. North Dunedin Baptist Church, 616 So. 2d 61, 62 (Fla. 1st DCA 1993).

Appellant's claim that "Mr. Jackson was arbitrarily and unreasonably excluded from youthful offender sentencing" (IB 43) is without merit as discussed above. Appellant's claim that the predecessor statute should be revived is contrary to the Legislature's intent and without merit. Appellant's claim that "Defendant must be resentenced before another judge where his sentence is based on arbitrary considerations" is likewise without merit, beyond the scope of this Court's review and should be denied.

None of the cases case cited by Appellant holds that a defendant has a fundamental right to be treated as a youthful offender or that age is a suspect classification. There is a rational basis for the legislature using age at time of sentencing in determining youthful offender eligibility. The Federal Youth Corrections Act used age at time of conviction and was held to be constitutional. The arguments made by Appellant apply equally to age at time of conviction and

age at time of sentencing. Appellant has failed to negate every conceivable basis for upholding the law and the decision below should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court affirm the Fourth District's opinion in Jackson because it properly holds that §958.04(1)(b), Fla. Stat., is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via email (appeals@pd15.state.fl.us) to Nan Ellen Foley, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on December 29, 2014.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

/s/ Allen R. Geesey
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