4-15

IN THE SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA,<br>Appellant,<br><br>vs.<br><br>WILLIE POTTS, JR.,<br>Appellee. | ) | CASE NO. 71,765 |

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# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellee was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, and the Appellant in the District Court of Appeal, Fourth District. Appellant was the Prosecution and Appellee in the lower courts. The parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal.

The symbol "AB" will denote Initial Brief of Appellant.

## STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case to the extent that it is an accurate, non argumentative recitation of the proceedings in the trial court.

## STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts insofar as it is accurate and non argumentative, with the following additions and clarifications:

> 1. The trial court sentenced Appellee to fifteen years incarceration, which was the maximum he could have received under law. Sections 790.07(2), 775.082(3)(c), Fla. Stat. (1985), (R 257, 265).
>
> 2. The sentenced imposed was an upward departure from the recommended guidelines range of 2 1/2-3 1/2 years (R 261).
>
> 3. The trial court departed after finding Appellant to be an habitual offender (R 265, 273, 274).

## SUMMARY OF THE ARGUMENT

First, Section 790.07(2) Florida Statutes (1985) which prohibits carrying a concealed firearm by a person under indictment violates substantive due process. The present statute denies Appellee's right to be presumed innocent and prevents the State from having to carry its burden of proof beyond a reasonable doubt. Because the present statute effectively criminalizes the status of being "under indictment" it is not reasonably related to its intended end - protecting the health and safety of the public. Fifth, Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution.

Second, the trial court erred in sentencing Appellee to fifteen years incarceration. The trial court sentenced Appellee outside the recommended guidelines sentence because it found Appellee to be a habitual offender. This was error. Whitehead v. State, 498 So.2d 863 (Fla. 1986). Additionally, the reasons the trial court used to justify departure from the guidelines were insufficient as a matter of law. Therefore, Appellee must be resentenced within the guidelines. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

POINT I

SECTION 790.07(2) FLORIDA STATUTES (1985) VIOLATES APPELLEE'S SUBSTANTIVE DUE PROCESS RIGHTS AS FOUND IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION

The Fourth District Court of Appeal has held that the statute prohibiting carrying a concealed firearm by a person under indictment is unconstitutional. Potts v. State, 13 F.L.W. 78, 79 (Fla. 4th DCA Dec. 30, 1987) (Appendix). Section 790.-07(2) Florida Statutes (1985) provides:

> Whoever, while committing or attempting to commit any felony or while under indictment, display, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, and § 775.084.

(Emphasis added). The Fourth District reasoned that the challenged statute assumes that individuals "under indictment" present a greater risk to society then other citizens. Potts v. State, supra, 13 F.L.W. at 79. The Fourth District determined that the statute criminalizes the status of being "under indictment". The district court concluded that the statute violates Appellee's substantive due process rights because it is not reasonably related to its intended end-protecting the health and safely of the public:

> Although we agree with the state that there is a legitimate interest in protecting the health and safety of the public, we do not agree that criminalizing the status of being "under indictment" is a reasonably related means to achieve the intended end. Therefore, despite

> the rule that every presumption is to be indulged in favor of the validity of a statute when considering its constitutionality, Griffin v. State, 396 So.2d 152 (Fla. 1981), we conclude that the portions of section 790.07 which prohibit certain activities "while under indictment" are unconstitutional as violative of substantive due process.

Potts v. State, 13 F.L.W. at 79 (Fla. 4th DCA Dec. 30, 1987).

To satisfy due process requirements, a statute or ordinance creating and defining an offense must be a reasonable exercise of power and must not arbitrarily state that certain acts inherently and generally innocent constitute criminal offenses. Blitch v. City of Ocala, 142 Fla. 612, 195 So. 406 (Fla. 1940); Miami Shores Village v. Wm. N. Brockway Post, 156 Fla. 673, 24 So.2d 33 (Fla. 1945); Griffin v. Sharp, 65 So. 751 (Fla. 1953); Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 100 So.2d 67 (Fla. 1st DCA, 1958); City of St. Petersberg v. Calbeck, 114 So.2d 316 (Fla. 2d DCA 1959). The statute must bear a reasonable relation to a permissible legislative objective and cannot be discriminatory, arbitrary, or oppressive. Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974).

"Possession of a firearm while under indictment" as found in § 790.07(2), Fla. Stat. (1985) infringes upon individual rights and liberties. See Patch Enterprises v. McCall, 447 Supp. 1075 (M.S. Fla. 1978); State v. Walker, 444 So.2d 1137 (Fla. 2d DCA, 1984), affirmed 461 So.2d 108 (Fla. 1984). The legislative infringement of § 790.07(2), Fla. Stat. (1985) is its denial of everyone's right to be presumed innocent. It prevents the state

from having to carry its burden of proof "beyond a reasonable doubt". In essence, the charge convicts Appellee by law before Appellee has been convicted by a Circuit Court or by a jury.

Appellant claims that the controverted statute is expedient to protect the health and safety of the public (AB 9-10). Appellant also claims that an individual "under indictment" pose more of a threat to society than those under indictment (AB 11).

As the Fourth District recognized, the state has mechanisms in place to deal with individuals who pose a greater to society in pending cases. Potts v. State, supra, at 79. Section 907.041 Fla. Stat. (1985); Fla.R.Crim.P. 3.132. Even in such circumstances of greater societal risk, the accused has the opportunity to be heard on the issue of his purported threat to the public. Fla.R.Crim.P. 3.132(c). A number of other safeguards to an accused's constitutional rights are provided:

> ...The person sought to be detained is entitled to representation by counsel, to present witnesses and evidence, and to cross-examine witnesses. The court may admit relevant evidence and testimony under oath without complying with rules of evidence, but evidence secured in violation of the United States Constitution or the Constitution of the State of Florida shall not be admissible. A final order of pretrial detention shall not be based exclusively on hearsay evidence. No testimony by the defendant shall be admissible to prove the guilt of the defendant at any other judicial proceeding, but may be admitted in an action for perjury based upon the defendant's statements made at the pretrial detention hearing, or for impeachment.

Rule 3.132(c), Fla.R.Crim.P.

In contrast, Section 790.07 Fla. Stat. (1985), provides no such protection in criminalizing the status of being "under indictment. As the district court noted:

> Carrying a concealed weapon while not under indictment, prohibited by section 790.01(1), is a first-degree misdemeanor, punishable by a maximum of one year in prison, whereas the instant offense is a second-degree felony, punishable by fifteen years in prison. The instant statute, therefore, in effect criminalizes the activity of "being under indictment" and punishes that offense by up to fourteen years imprisonment. Is an individual "under indictment" who carries a concealed weapon necessarily more dangerous than an individual NOT "under indictment" who carries a concealed weapon? What if an individual is convicted under the instant statue and is sentenced to fifteen years imprisonment and then is later found not guilty of the charges for which he was "under indictment?"

Potts v. State, supra, 13 F.L.W. at 79.

As Appellant concedes (AB 11), an indictment is merely an accusation. Fratello v. State, 496 So.2d 903, 911 (Fla. 4th DCA 1986). In the same vein, preliminary instructions to jurors in criminal cases include the caveat that "...[t]he [information] [indictment] is not evidence and is not to be considered by you as any proof of guilt." Florida Standard Jury Instructions in Criminal Cases 2ded, Preliminary Instruction, p. 3. Moreover there is absolutely no basis in the record for Appellant's personal assertion that "most all" individuals under indictment are accused of capital crimes or of participating in organized crime (AB 12).

In summary, the Fourth District properly held that section 790.07, which it prohibits carrying a concealed firearm by a person under indictment violates the substantive due process rights of Appellee and all others so charged. Based upon the foregoing, the decision of the Fourth District Court of Appeal must be affirmed.

## POINT II

THE TRIAL COURT ERRED IN SENTENCING APPELLEE TO FIFTEEN YEARS

At the outset, Appellee continues to maintain that the decision of the Fourth District Court of Appeal must be affirmed. Assuming arguendo a contrary determination by this Honorable Court, Appellee contends that his challenge to his sentence, presented on appeal below should be considered by this Court State v. Dye, 346 So.2d 538 (Fla. 1977)

Appellee was sentenced to fifteen years incarceration, which was the maximum Appellee could have received under law, § 790.07(2), § 775.082(3)(c), Fla. Stat. (1985) (R 257, 265). It was an upward departure from the sentencing guidelines recommended range of 2 1/2 - 3 1/2 years (R 261). The trial court departed from the recommended guidelines range after finding Appellee to be an habitual offender (R 265, 273, 274).

The habitual offender statute is not an exemption from the sentencing guidelines. As this Court recognized in Whitehead v. State, 498 So.2d 863 (Fla. 1986), habitual offender status is not an adequate reason to depart from the sentencing guidelines. Therefore, this Court must remand for resentencing.

The trial court added that Appellee would have received a fifteen year sentence anyway, even if he had not been found to be a Habitual Felony Offender (R 273; 230). In its sentencing order, the trial court listed the following reasons:

> 1. Defendant had a juvenile record involving numerous juvenile dispositions that would have been convictions, had they been committed by adults. Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984).
>
> 2. This Court finds that the defendant is an immoral person who should be segregated from society. He testified that he was well aware of the fact that he was a convicted felon and should not have had the gun in his possession. Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984).
>
> 3. The Defendant was on parole and violated his parole at the time of this offense.
>
> 4. The recommended sentence under the guidelines would be inadequate for rehabilitation for deterrance to the defendant and others. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984).

R 273.

Reason (1) cannot be supported by the record. Defense counsel objected to the previous juvenile convictions referred to in the pre-sentence investigation and moved to strike these references (R 201). Additionally, the pre-sentence investigation preparer was not present at the time of the sentencing hearing to be cross-examined.Clear and convincing reasons (the juvenile convictions) were not credible and proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523 (Fla. 1986). Where the defendant challenges the truth of prior offenses, the State must provide corroboration. Camp v. State, 501 So.2d 81, 83 (Fla. 1st DCA 1987).

Reason (2) claims Appellee is an "immoral person" who must be segregated from society (R 273). This reason has been held to be impermissible. Young v. State, 12 F.L.W. (Fla. 1st DCA 1984), affirmed State v. Young, 476 So.2d 161 (Fla. 1985).

Reason (3) refers to Appellee's parole status and violation at the time of this offense (R 273). Since Appellee's legal status at the time of offense was scored to determine Appellee's recommended guidelines range (R 261), it cannot be considered as a ground for departure. Williams v. State, 492 So.2d 1308 (Fla. 1986); State v. Mischler, 488 So.2d 523 (Fla. 1986); Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Mooney v. State, 12 F.L.W. 2823 (Fla. 1st DCA 1987).

Reason (4) bases departure on the inadequacy of the recommended guidelines sentence to deter or rehabilitate (R 273). Rehabilitation and deterrance are not valid grounds for departure. Scott v. State, 12 F.L.W. 296 (Fla. 1987); Williams v. State, 492 So.2d 1308 (Fla. 1986); Baldwin v. State, 494 So.2d 403 (Fla. 4th DCA 1986).

In summary, none of the foregoing justifies departure from the guidelines. Therefore, this cause must be remanded to the district court to direct the trial court to sentence Appellee within the recommended guidelines range. Shull v. Dugger, 515 So.2d 748 (Fla. 1987). In the alternative, should the court find any grounds to be permissible, this case must be remanded for resentencing. Albritton v. State, 476 So.2d 158 (Fla. 1985).

## CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Appellee respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LEE ROSENTHAL, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 21st day of March, 1988.

Of Counsel