IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 65,638

LEWIS ABAYOMI TEAGUE,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	
ISSUE I	6
THE LOWER COURT SHOULD BE REVERSED BECAUSE THE STATE'S TRAVERSE PLACED MATERIAL FACTS IN ISSUE.	
ISSUE II	9
THE QUESTION CERTIFIED BY THE FIRST DISTRICT CANNOT BE ANSWERED AS A QUESTION OF LAW BECAUSE WHETHER A WEAPON IS CONCEALED IS A FACTUAL QUESTION WHOSE ANSWER DEPENDS ON THE FACTS AND CIRCUMSTANCES OF A PARTICULAR CASE.	
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

CASES	PAGE
Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)	11
Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)	12
Ensor v. State, 403 So.2d 349 (Fla. 1981)	3, 4, 7, 9, 10, 11, 12
Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)	11
Savoie v. State, 422 So.2d 308 (Fla. 1982)	6
State v. Hunwick, 446 So.2d 214 (Fla. 4th DCA 1984)	7
State v. Oberholtzer, 411 So.2d 376 (Fla. 4th DCA), review denied, 419 So.2d 1199 (Fla. 1982)	7
United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)	11
OTHER	
Chapter 790, Fla. Stat.	2
§790.001(2), Fla. Stat.	7
§790.01(2), Fla. Stat.	5
Fla.R.Crim.P. 3.190(c)(4)	2
Bristow, Police Officer Shootings--A Tactical Evaluation, 54 J. crim L.C. & P.S.93 (1963)	11

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Lewis Abayomi Teague was the defendant in the Circuit Court of Duval County, and the appellee in the District Court of Appeal, First District. The State of Florida was the prosecuting authority and the appellant, respectively. The parties will be referred to as they appear before this Court.

Citations to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

In an information filed by the State Attorney of the Fourth Judicial Circuit, Respondent was charged with the offense of carrying a concealed firearm, contrary to Chapter 790, Florida Statutes. Prior to trial, Respondent filed a Motion to Dismiss pursuant to Fla.R.Crim.P. 3.190(c)(4) (R 13), which was traversed by the State (R 15). Subsequent to a hearing on the motion, the trial court entered a written order granting the motion (R 18), and speedy trial was tolled and the State appealed to the First District Court of Appeal. The First District subsequently affirmed the trial court's granting of the Motion to Dismiss in an opinion which has not yet been reported. A copy of the opinion has been included in the appendix to this brief.

At the hearing on the Motion to Dismiss, no testimony or other evidence was introduced and the parties relied upon their arguments and the facts as alleged in the motion and traverse. According to the facts alleged by Respondent, he was stopped by Officer Leaptrot of the Duval County Sheriffs Office approximately 9:35 p.m. on the evening of June 18, 1983, for the offense of driving his automobile without headlights. Respondent stopped his vehicle, exited it, and approached Officer Leaptrot who was standing between Respondent's vehicle and the police vehicle. The officer requested that Respondent produce his drivers license, and Respondent approached the left rear door of his vehicle, opened it, and retrieved a pair of pants in which his license was located.

According to Respondent, Officer Leaptrot saw in open view at that time on the front seat of Respondent's vehicle, a carbine rifle. In its traverse, the State disagreed with this fact and alleged in paragraph one (R 15) that only the muzzle end of the rifle was visible from Officer Leaptrot's position outside the opened door of the automobile. According to Respondent, the officer's "sole alleged probable cause for arresting and charging the defendant with carrying a concealed firearm was the fact that the defendant had tinted windows in his vehicle." (R 13) However, in its traverse, the State alleged that the loaded rifle was on the front seat of Respondent's vehicle but that it could not be seen from outside the vehicle unless the doors were opened or the windows rolled down. The State also alleged that the windows of the vehicle were so darkly tinted that Officer Leaptrot was unable to see the inside of the vehicle (R 15).

The State also disputed whether the rifle was within the sight of another person and cited Ensor v. State, 403 So.2d 349, 354 (Fla. 1981). The State concluded by asserting in its traverse that whether a partially concealed firearm seen by a police officer was a concealed firearm was a question of fact which must be determined by the jury. The State's last paragraph of its traverse asserted that "[t]here are material facts in dispute which establish a prima facie case of guilty." (R 16) The trial court granted the motion and explained in its order that since the muzzle of the weapon was seen once the door was opened, the muzzle had to be within "the ordinary sight of another person . . . ." (R 18)

In its appeal to the First District, the State argued alternatively that the trial court's order granting the motion to dismiss should be reversed because the State had filed a traverse which stated that there were material facts in dispute or under Ensor, supra, a question of fact remained for the jury to decide. The First District rejected both arguments although the Court was split in its decision. The majority concluded that the State's traverse was insufficient to cause the motion to be denied because it did not controvert a specific material fact. See Judge Wigginton's opinion at 2. Concerning the legal issue, Judge Wigginton found that the concealed weapons statute should not be applied to the facts of Respondent's case because Respondent had made no effort to conceal his weapon (other than the fact that it was inside a vehicle which had darkly tinted windows). See Judge Wigginton's opinion at 3. Judge Smith filed a specially concurring opinion in which he stated his concern that the issue might be controlled by Ensor, supra, but that it was his belief that the issue should not be decided on a case by case basis by the trier of fact but instead the issue should be a question of law. See slip opinion at 8. Judge Nimmons dissented and wrote that whether a person carried a concealed weapon in an opaque container or whether a person drove around in an opaque vehicle carrying a weapon presented the same danger to society and police officers and that the law should be equally applicable in both situations as decided by a trier of fact. All three judges concurred in

the following certified question:

> Does the carrying of a firearm by the occupant of a motor vehicle having tinted window glass which prevents the firearm from being visible within the ordinary sight of persons outside the vehicle, although the firearm is otherwise in clear view and unconcealed, constitute the offense of carrying a concealed firearm under Section 790.01(2), Florida Statutes?

ARGUMENT

ISSUE I

THE LOWER COURT SHOULD BE REVERSED BECAUSE THE STATE'S TRAVERSE PLACED MATERIAL FACTS IN ISSUE.

As was argued in the First District but rejected by that court, the State contends that the Motion to Dismiss should have been summarily denied by the trial court because the State filed a traverse which placed material facts in issue. Before proceeding to the merits of this argument, however, the State asserts that the Court has jurisdiction to consider this issue even though it is not the precise question certified to the Court. This is because the question of the legal sufficiency of the State's traverse was briefed by both parties in the First District and was squarely addressed by the lead opinion which rejected the State's argument. See Savoie v. State, 422 So.2d 308, 312 (Fla. 1982), in which the Court noted that it was discretionary with the Court whether to consider issues other than those upon which jurisdiction was based. The Court explained that its discretion would be exercised "only when these other issues have been properly briefed and argued and are dispositive of the case." Id. Obviously, if the Motion to Dismiss had been denied because of the State's traverse, the issue would be dispositive of the case. Therefore, the State urges this Court to exercise its discretion and rule upon whether the State's traverse was legally sufficient to cause the Motion to Dismiss

to be summarily denied by the trial court.

It cannot be disputed that a Fla.R.Crim.P. 3.190(c)(4) motion to dismiss must be denied if the State files a sworn traverse "which with specificity denies a material fact or facts contained in the motion to dismiss." State v. Hunwick, 446 So.2d 214, 215 (Fla. 4th DCA 1984). See also State v. Oberholtzer, 411 So.2d 376 (Fla. 4th DCA), review denied, 419 So.2d 1199 (Fla. 1982). As Respondent argued in the First District, "[t]he thrust of Appellee's motion to dismiss was that the rifle was lying on the front seat of Appellee's vehicle, was not covered or concealed in any way, and was in plain view for any person to see who looked inside the vehicle." (Brief of Appellee at 5, emphasis in original). However, contrary to what the First District found, the State's traverse alleged that the weapon "could not be seen from outside of the vehicle unless the doors were opened or the windows rolled down," and that "[t]he windows of said vehicle were so darkly tinted that Officer Leaptrot was completely unable to see the inside of the vehicle." (R 15) Finally, should there be any doubt about whether the traverse denied with specificity a material fact, the State's traverse alleged that "[d]ue to the degree of tinting on said car windows, said rifle was 'concealed from the ordinary sight of another person,' i.e. Officer Leaptrot." (R 15) The State even went so far to cite in its traverse §790.001(2), Fla. Stat., and Ensor v. State, 403 So.2d 349, 354 (Fla. 1981) while explaining that Ensor defined ordinary sight as

"the casual and ordinary observation of another in the normal associations of life." (R 15)

Thus, the Motion to Dismiss alleged that the weapon was not concealed while the State's traverse clearly alleged that it was--whether the weapon was concealed was the ultimate question of fact to be resolved by the jury. The State submits that by deciding this question of fact as a question of law, the trial court committed reversible error which was compounded by the First District's failure to find that the State's traverse disputed a material fact in issue. Copies of the briefs filed by the parties in the First District, as well as the State's motion for rehearing and rehearing en banc, have been appended to this brief to support the State's argument that the issue was fully briefed and argued in the First District. The State respectfully requests the Court to find that the First District erred when it ruled that the State's traverse did not controvert a material fact alleged in the Motion to Dismiss.

ISSUE II

THE QUESTION CERTIFIED BY THE FIRST DISTRICT CANNOT BE ANSWERED AS A QUESTION OF LAW BECAUSE WHETHER A WEAPON IS CONCEALED IS A FACTUAL QUESTION WHOSE ANSWER DEPENDS ON THE FACTS AND CIRCUMSTANCES OF A PARTICULAR CASE.

The First District has certified the question of whether a weapon can ever be concealed when it is lying in open view inside a vehicle which has tinted windows. The State submits that this question cannot be answered as a question of law because the answer is a factual determination which must be made by the trier of fact depending upon the facts and circumstances of a particular case. The State further submits that this conclusion is the only one that can be reached in light of this Court's prior opinion in Ensor v. State, supra.

In that case, the Court quite correctly noted that the legal question of whether a weapon was concealed was not subject to determination by "absolute standards." Id. at 403 So.2d 354. The Court went on to explain that in all cases, "common sense must prevail." Id. at 403 So.2d 355. The Court concluded its analysis with the following language which is directly on point to the facts of this case:

> The critical question turns on whether an individual, standing near a person with a firearm or beside a vehicle in which a person with a firearm is seated, may by ordinary observation know the questioned object to be a firearm. The ultimate decision must rest upon the trier of fact under the circumstances of each case. (Emphasis added).

Id.

The State submits that in light of the above statement of law which was taken directly from the Court's recent opinion in Ensor, supra, the First District's decision must be reversed. This is because a person standing outside a vehicle which has darkly tinted windows, as did Respondent's vehicle in this case, cannot see "by ordinary observation" a firearm sitting on the front seat of the vehicle. Of course, if the windows of the vehicle are only lightly tinted, it might be possible to see a firearm on the front seat--but isn't this a question of fact not a question of law? Judge Wigginton seemed persuaded by the fact that since the Legislature has allowed some degree of window tinting, it did not seem fair that a person could be convicted of carrying a concealed weapon in a vehicle which was lawfully tinted. See slip opinion at 3. However, the State submits that fairness is not the issue. Rather, the issue is whether Respondent violated the concealed weapons statute by placing himself inside a vehicle from which the arresting officer could not see a firearm which was readily accessible to Respondent.

Judge Smith, on the other hand, although recognizing that Ensor probably controlled, seemed persuaded by his belief that a citizen should not have to guess at what a trier of fact would find when considering whether a weapon inside a tinted vehicle could be concealed. However, this reasoning misses the mark because the Legislature has already seen fit to enact a concealed weapons statute which

is directly applicable to weapons carried in vehicles.

Judge Nimmons in dissent stated it best--he remarked that no one disputed that someone carrying a weapon in an opaque container could be found guilty of carrying a concealed weapon, and he asked "[w]hy should it be any different simply because he carries the firearm on the front seat of his automobile which he has chosen to equip with darkly-tinted windshields?" See slip opinion at 9.

In addition to the fact that this case should be controlled by Ensor, supra, the State submits that a weighty policy consideration mandates the applicability of the proscriptions of the concealed weapons statute to factual situations like those in Respondent's case. In Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331, 337 (1977), the Court noted that an officer approaching a stopped automobile is confronted with an "inordinate risk." The Supreme Court noted that "a significant percentage of murders of police officers occurs when the officers are making traffic stops." Id., quoting from United States v. Robinson, 414 U.S. 218, 234, n. 5, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). See also Bristow, Police Officer Shootings--A Tactical Evaluation. 54 J. crim L.C. & P.S.93 (1963); Adams v. Williams, 407 U.S. 143, 148, n. 3, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). As noted by Judge Nimmons in dissent, approximately thirty percent of police shootings occurred when a police officer approached a suspect seated in an automobile. Slip opinion at 10.

The State further submits that the Court should not be persuaded by Respondent's expected argument that the rule of lenity should be applied because it is not clear whether the Legislature intended to make the concealed weapons statute applicable to vehicles with tinted windows. See Judge Smith's specially concurring opinion at page 7 of the slip opinion. This is because the rule of lenity should not be applied when statutes are not ambiguous. Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

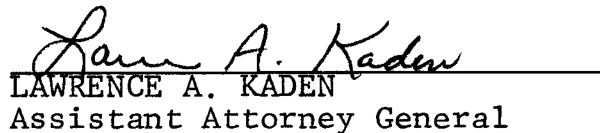
Similarly, the Court should not be persuaded by hypotheticals involving factual situations not before the Court. For example, could a person be convicted of possession of a concealed weapon if the weapon is in open view in a vehicle which is elevated because of large tires? The answer to these questions would depend on the facts and circumstances of each case--just as the Court held in Ensor, supra.

CONCLUSION

The State of Florida respectfully requests the Court to hold that the certified question cannot be answered as a question of law because whether a weapon is concealed depends on the facts and circumstances of a particular case. In ruling that way, the State also respectfully urges the Court to note that the State's traverse did place a material fact in dispute and that the Motion to Dismiss should have been summarily denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Harold C. Arnold, 437 E. Monroe Street, Suite One, Jacksonville, Florida, 32202, on this 13th day of August, 1984.

LAWRENCE A. KADEN

OF COUNSEL