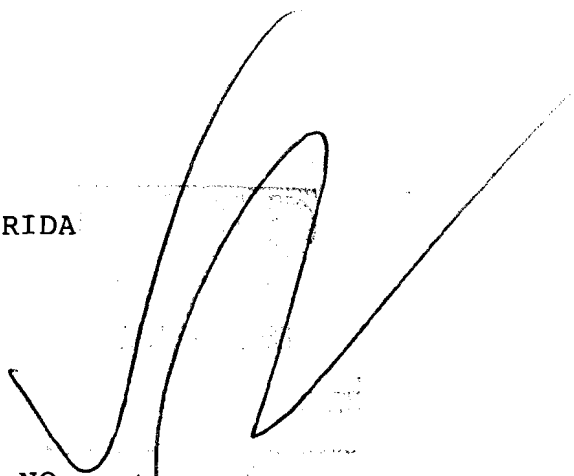


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IN THE SUPREME COURT OF FLORIDA

JOHN E. HARDEE,  
Petitioner,  
v.  
STATE OF FLORIDA,  
Respondent.

CASE NO.  
DCA Case No. 4-86-0796

PETITIONER'S BRIEF ON JURISDICTION

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State v. Rodriguez, 402 So.2d 86  
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OTHER AUTHORITIES

Florida Statutes (1985)

Section 775.087(2)

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Section 810.02(2)(b)

4

PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellee and the prosecution, respectively, in those lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to the appendix which includes the decision of the district court of appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of armed burglary pursuant to Section 810.02(2)(b), Florida Statutes on evidence that he and his companion burglarized a house, that during the burglary the companion stole a gun without Petitioner's knowledge, and that after the burglary, some bullets were found in Petitioner's apartment which were not shown to fit the stolen gun. Based on these facts, the Fourth District Court of Appeal decided that even if the gun stolen by Petitioner's companion was not loaded, Petitioner's conviction for armed burglary would be upheld. The district court's opinion was rendered on December 9, 1987, and Petitioner timely noticed his intention to invoke the jurisdiction of this Court on December 29, 1987.

### SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal has decided in the present case that theft of a gun -- even an unloaded one for which the defendant has no ammunition -- may support conviction for armed burglary. This decision expressly and directly conflicts with decisions of other district courts of appeal requiring proof that the stolen gun was loaded or the defendant had access to ammunition fitting it in order for an armed burglary conviction to lie. Thus, this Court has jurisdiction to entertain the present case and resolve the conflict among the district courts.

## ARGUMENT

### POINT INVOLVED

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AS TO WHETHER THE STATE MUST PROVE THAT A GUN STOLEN DURING A BURGLARY WAS LOADED OR THE DEFENDANT HAD AMMUNITION WHICH FIT IT IN ORDER TO SUPPORT A CONVICTION FOR ARMED BURGLARY.

In the decision of the Fourth District Court of Appeal below, it was held that proof that a gun stolen during a burglary was loaded at the time or that the thief had access to bullets fitting the gun was not necessary to support a conviction for armed burglary pursuant to Section 810.02(2)(b), Florida Statutes (1985). In so holding, the district court directly and expressly conflicted with a long line of cases from other district courts of appeal which require that a mere showing that a gun has been stolen is insufficient, standing alone, to prove that a burglary was committed while "armed." Sanders v. State, 352 So.2d 1187 (Fla. 1st DCA 1977). Instead, in order to sustain a conviction for armed burglary, the state must prove either that the gun was loaded when stolen, State v. Rodriguez, 402 So.2d 86 (Fla. 3d DCA 1981); or that the defendant also had in his possession, contemporaneously with the gun, ammunition which rendered him capable of loading it. Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981).

The Fourth District Court of Appeal relied for its holding in the instant case on this Court's decision in Bentley v. State, 501 So.2d 600 (Fla. 1987). Bentley determined that no proof that the gun used in an aggravated assault is loaded is required in

order to trigger the operation of the three year mandatory minimum sentence for use of a firearm during a felony under section 775.087(2), Florida Statutes. But unlike Section 810.02(2)(b), which requires that a defendant be "armed" with a dangerous weapon, Section 775.087(2) is invoked where a defendant merely has "in his possession" a firearm. Because of this patent and significant difference in definitions, this Court specifically refused to extend Bentley to the armed burglary situation present in the instant case. Bentley, 501 So.2d at 602.

The conflict between the instant decision of the Fourth District Court of Appeal and the decisions of the other district courts cited, *supra*, is clear. Moreover, because the issue raised in the present case has never been directly addressed by this Court, other than dicta impliedly approving Sanders in Bentley, an express discussion of the matter by this Court, together with resolution of the conflict engendered by the district court's decision below, will finally set to rest the apparent confusion which now exists in this state as to the appropriate burden of proof to be met in prosecutions for armed burglary.




CONCLUSION

This court may and should exercise its discretion to review the decision of the district court of appeal.

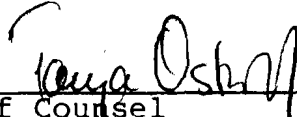
Respectfully submitted,

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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 6<sup>th</sup> day of January, 1988.

  
\_\_\_\_\_  
Of Counsel