IN THE SUPREME COURT OF FLORIDA



CASE NO. 86,990

JEFFREY ARTHUR GABER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent

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ON APPLICATION FOR DISCRETIONARY REVIEW

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# BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

PAULETTE R. TAYLOR
Assistant Attorney General
Florida Bar Number 0992348
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Ave., Suite N921
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

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## INTRODUCTION

Petitioner, **JEFFREY ARTHUR GABER**, seeks review of a decision of the Third District Court of Appeal affirming his convictions and sentences for, armed burglary, six counts of burglary of a dwelling, three counts of grand theft, including theft of a firearm, two counts of petit theft, carrying a concealed weapon, and resisting an officer without violence. Petitioner was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, **THE STATE OF FLORIDA,** was the appellee in the district court of appeal, and the prosecution in the trial court. In this brief, the parties will be referred to as they stand before this Honorable Court. The symbol "R" refers to the record on appeal, and the symbol "T" refers to the transcript of proceedings in the trial court. All emphasis are supplied unless otherwise indicated. The opinion of the Third District Court of Appeal is reported at *Gaber v. State,* 662 So. 2d 422 (Fla. 3rd DCA 1995).

## STATEMENT OF THE CASE AND FACTS

On January 14, 1994, Defendant and his codefendant, Dheraj Persaud (Persaud), were arrested in connection with the burglary of numerous homes in the Port Antigua area of Islamorada. (R. 1-6, 11-21). The arrests resulted from the stop of the vehicle, owned and driven by Persaud, in which Defendant was a passenger. The subsequent search of the vehicle uncovered numerous household items, including a firearm. The State eventually filed an amended information charging Defendant and Persaud with, one count of armed burglary, in violation of Section 810.02(2), Florida Statutes, (count 1); six counts of burglary of a dwelling in violation of §810.02, Fla. Stat., (counts 3, 5, 7, 9, 10, 12); three counts of grand theft, including theft of a firearm, in violation of §812.014, Fla. Stat., (counts 2, 8, 11); and two counts of petit theft, in violation of §812.014, Fla. Stat., (counts 4, 6). Defendant was also charged with carrying a concealed weapon, in violation of §790.01, Fla. Stat., (count 13); and resisting an officer without violence, in violation of §843.02, Fla Stat., (count 14). (R. 93-97). Defendants entered not guilty pleas and the case proceeded to a joint trial by jury.

Prior to the commencement of trial, the defendants filed a Motion to Suppress Evidence. (R. 63). On July 5, 1994, the trial court conducted a hearing on the motion to suppress. At that hearing, Richard Curran testified that at about 3:00 o'clock in the morning of January 14, 1994, he heard a noise that sounded like "aluminum shutters banging". (T. 26). He looked out his window and saw someone underneath a house across the canal from his house. He did not know whether the person was a tenant or owner of the house. (T. 26).

Nevertheless, he stayed by the window and heard more noises. He looked out his window again and saw two figures across the canal. One person was carrying a ladder. (T. 27-28). Mr. Curran testified that he yelled out to them, and the person carrying the ladder dropped the ladder, and they backed off into the shadows. (T. 28). A short while later, Mr. Curran heard a car engine start up. He looked across the canal and saw a car, possibly a Firebird or a Camero, white or yellow in color, under a street light. The car pulled off without headlights, and headed south on El Capitain Street. (T. 28-29).

Mr. Curran telephoned 911 and related what he had observed. (T. 29). Mr. Curran testified that El Capitain Street leads into U.S. 1, and that he believed that the car probably headed north on U.S. 1. (T. 40). However, he could not describe the two figures that he saw, and could not see the license plate of the car.

Robert Palmeri, a deputy sheriff in Monroe County, testified that he had been working in the Port Antigua area for the two weeks period prior to January 14, 1994. (T. 48). He testified that there are about 100 to 150 homes in the area, and that there had been 20 burglaries reported in that area during that period. (T. 50). He testified further that the area consists of small canal lots, and that there is only one way into and out of the area. (T. 50).

Deputy Palmeri testified that at about 4:00 O'clock in the morning of January 14, 1994, he received a be on the look out (BOLO) dispatch that "[t]wo individuals were seen leaving a residence removing a ladder from the residence and entering a white Firebird Camero type vehicle". (T. 51). Deputy Palmeri was familiar with the area and knew the precise location described in the BOLO. (T. 52). Based on his experience Deputy Palmeri

calculated the approximate location where the suspect vehicle could be located and set off to intercept the vehicle. (T. 52).

At about the location where he calculated that he would intercept the suspect vehicle, Deputy Palmeri observed a white Firebird or Camero type vehicle headed north on U.S. 1. (T. 53). At that time, the deputy did not observe any other cars in the area, and encountered only business traffic, "trucks and such" en route. (T. 53).

Deputy Palmeri testified further that Sergeant Higgins was traveling in another vehicle a short distance behind him. (T. 53). At the time that he observed the suspect vehicle, he tapped his brake lights to alert Sergeant Higgins. (T. 53-54). Both officers made U-turns and headed northbound behind the suspect vehicle. After the turn, Sergeant Higgins was immediately behind the suspect vehicle and Deputy Palmeri was behind Sergeant Higgins's vehicle.

Deputy Palmeri noticed that the windows of the suspect vehicle were tinted such that the interior could not be seen. (T. 54). Sergeant Higgins radioed back to Deputy Palmeri that an object in the rear of the suspect vehicle was obstructing the rear window. (T. 54). That deputy pulled over to the shoulder of the road in an effort to see inside the suspect vehicle. He observed "something bunched-up" in the back of the vehicle. (T. 54).

The officers effectuated a "felony-style" traffic stop. (T. 54). Deputy Palmeri described the "felony-style" traffic stop as:

> [W]e concentrate all the lights to the radio cars into the ... suspect vehicle. At that time we called the subjects out one at a time. For officers safety we had them raise their arms, extend them as high as they can. Usually have them rotate 360 degrees check their waistbands, anything that may be a

threat to our persons. They are then secured and maintained.

(T. 55). The deputy testified that the felony-style stop was employed in this case because the stop was for a suspected burglary. (T. 55). The suspect vehicle was brought to a stop. Deputy Palmeri positioned himself in a squatting position behind the open driver's side door of his vehicle. He had his gun drawn and pointed at the suspect vehicle. (T. 55). Officer Rogers arrived on the scene. (T. 56).

Officer Higgins instructed the driver, Persaud, to exit the vehicle. (T. 55). Deputy Palmeri instructed the passenger, Defendant, to exit the vehicle. (T. 56). Defendant did not comply. Deputy Palmeri testified that, with the lights focussed on the suspect vehicle, he was able to see inside the vehicle. (T. 56). He observed Defendant inside making an obscene gesture with his finger and refusing to exit the vehicle as instructed. (T. 56). The deputy testified that he directed Defendant to exit the vehicle three to five times before he finally complied. (T. 56).

The deputy approached Defendant holding him at gun point. (T. 57). He instructed Defendant to place his hands on his head and to interlock his fingers. Defendant complied. The officer then took hold of Defendant's hands and inquired whether there was anyone else inside the vehicle. Defendant replied in the negative. (T. 57). The officer testified that he told Defendant, "the officer [Rogers] was going to open the door, if there was someone in the vehicle and they were armed they were shooting he would be shot first." (T. 57-58). The deputy then instructed Officer Rogers to open the car door. The deputy testified that they opened the car door to check for any armed subjects. (T. 58). Defendant was then placed

in handcuffs. (T. 59).

Once the car door was opened the deputy observed a number of household items, "television, VCR, stereo", under a "futon type of mattress", in the back of the car. (T. 58). The deputy testified that his suspicion was aroused because of his knowledge of prior burglaries in the Port Antigua area, and the information in the BOLO. The deputy advised Defendant of his Miranda rights and conducted a pat down search. The officer found no identification on Defendant, and Defendant did not respond to the officer's questions regarding his identity. (T. 59-60).

Defendant and Persaud were held at that location while Officer Rogers was dispatched to the Port Antigua area. Deputy Palmeri and Sergeant Higgins remained on the scene. Deputy Palmeri observed a "switchblade type knife" on the passenger side seat. (T. 60). Deputy Palmeri testified that while he was observing Defendant seated in the car, aside from the obscene hand gesture, Defendant appeared to be sitting fairly still. (T. 84). He did not see Defendant fidgeting or moving around in his seat. Defendant remained fairly still until he exited the car. (T. 84).

Deputy Palmeri testified that Defendant and Persaud were detained at the scene for about one hour while Officer Rogers interviewed Mr. Curran and determined that he did in fact observe a burglary. (T. 75). The parties stipulated that once the burglary was confirmed, the car was sealed and towed to the Sheriff's compound. (T. 88-89).

The parties also stipulated that Officer Rogers interviewed Mr. Curran, and that Mr. Curran identified the house where he saw the individuals. Officer Rogers inspected the house and observed signs of a forced entry. The officer then called back to the officers at the

scene where the defendants were detained, and confirmed that there had been a burglary. The suspects were then arrested and transported tot he sheriff's office. (T. 89).

At the conclusion of the hearing the court reserved ruling on the motion. (T. 103). On July 17, 1994, the court issued an order denying the motion to suppress. (R. 73). The case proceeded to trial by jury.

At trial, in addition to the evidence presented at the hearing on the motion to suppress, Deputy Rogers testified that Mr. Curran pointed out the house across the canal, 191 El Capitain, where he saw the men with the ladder. (T. 400-405). Deputy Rogers found the front door open, and pry marks around the door frame. He conducted a sweep of the immediate area and found signs of forced entry at four other houses. (T. 405).

Detective Zeigler testified that he was the lead detective assigned to this case. He testified that when he arrived at the scene where the car had been stopped, Officers Palmeri and Higgins each had a suspect in the back of their vehicle. (T. 408). He ordered that the vehicle be sealed and towed to the sheriff's office after he was apprised of the situation. (T. 410). He directed Detective Drennan to process the vehicle and to catalogue everything in the vehicle. (T. 411).

On cross-examination, Detective Zeigler testified that all of the burglarized houses were from the middle to the end of El Capitain, and that he had been on surveillance in the Port Antigua area until about 1:30 in the morning on the January 14, 1994. (T. 417). During his surveillance he did not see a white Firebird vehicle, and he did not see any burglaries being committed. He testified that Persaud told him that Defendant was a hitchhiker. (T. 418-419).

Crime scene technician Drennan testified that he photographed all five houses which were burglarized. He also photographed and catalogued the Firebird, which was registered to Persaud. (T. 420-458). He testified that in three of the burglaries, he observed that forced entry had been made in a similar manner through cuts in the screened in porch areas, (T. 434), and that he found an aluminum extension ladder laying on the ground at 181 El Capitain, the house where Mr. Curran saw the two men, and a second ladder was found at the rear of the house between the house and the canal. (T. 425-428). He further testified about the items found under the futon cushion in the Firebird, (T. 437-458), each matched items missing from the burglarized homes as testified to by the victims.

The State presented six witnesses who own holiday homes on El Capitain Drive in Port Angtigua. Each homeowner testified that on or around January 14, 1994, they were notified that their homes had been burglarized. Joseph Sheaks testified that, in addition to several audio and visual items, and other household items, a .22 caliber revolver was also taken form his home. (T. 270). He testified that the gun was in proper working order. (T. 272). The bullets were kept in the same cabinet as the revolver, and he discovered some of the bullets on the floor. (T. 271). The .22 caliber handgun and shells fitting the handgun were found in the Firebird. (T. 443-458). Mr. Sheaks recovered his property form the sheriff's office. (T. 271).

Also found in the Firebird was a custom Penn International fishing rod and reel, taken form the downstairs apartment owned by Thomas Wooley, (T. 286-288, 457), an emergency light, stereo system, VCR and fishing rods taken from the residence of Kathyrn Feanny, as well as a pillow case matching her bed linens which was removed from her bedroom. (T.

311-322, 442-448, 457). The futon cushion, and a TV, belong to victim Cathy Teal. (T. 326-335, 440, 458). An inscribed blue nylon wallet containing hunting and fishing licenses belonging to victim Barbara Hendry and her daughter were also found in the car. (T. 353-358, 446-448).

All of the victims further testified that their residences, some of which were split into two separate units, had signs of forced entry, either by forced, jammed or broken door locks or windows or cut screens. (T. 263-265, 280-282, 286, 303-304, 327-331), and that their homes had been ransacked in one way or another. (T. 264-273, 284-291, 303-308, 311-322, 327-346, 351-355). Victims Sheaks and Wooley testified that they had stayed in their respective homes the weekend prior to the burglaries, (T. 276, 282, 294), and Barbara Hendry testified that her house could not have been broken into prior to January 14th because the cleaning people had been there that week and checked the house. (T. 359). Several of the victims had rented their homes over the Christmas-New Years holiday week, (T. 308, 348, 359), and Ronald Kirchman had rented his house up until the time of the burglaries. (T. 308). All of the homes were unoccupied on the night of the burglaries.

While no property was taken from victim Wooley's upstairs apartment unit, the door jam had been forced and "busted out", the cushions were removed from his couch, the weathervane was taken off the wall and placed on the couch, and numerous items were piled onto the dining table. (T. 282-285). Additionally, the comforter and sheets were in disarray, and one of the picture from the wall had been removed and laid on the bed. (T. 285-286).

Similarly, while nothing was missing from 181 El Capitain, the vacation home of Ron Kirchman, his two ladders had been removed from his downstairs utility room, which

was found open but had always been kept locked, (T. 300-303), one of his windows was broken, and the screen to his house was pushed in and bent. (T. 303). The aluminum ladder was found at the doorway to the utility room, (T. 300), and the wooden ladder was found leaning up against the back of the house. (T. 320). Additionally, the ransacked condition of several of the units was similar to each other, in that tissue boxes were torn up in several of the units, and beds, couches, and pictures similarly moved or disturbed. (T. 496-500).

Defendant moved for a judgment of acquittal at the close of the State's case, (T. 468), and again at the close of all the evidence. (T. 475). Defendant argued that the State did not establish the value of the firearm to support a grand theft charge. (T. 468). Defendant also argued, with regards to the counts involving victims who had no property taken, that there was no evidence to establish that he was there. Defendant argued that the presumption which attaches to the possession of recently stolen goods cannot apply because they had no goods from those residences. (T. 470).

The court denied the motion. The court ruled that there was sufficient evidence from which the jury could conclude that the defendants were the individuals that Mr. Curran observed under the house, including the fact that they were found with the loot from the burglaries shortly after. (T. 475). The court also found that because of the similarities with the burglaries, and the fact that the items, in the houses where nothing was taken, had been moved about and stacked, was evidence of an intent to either permanently or temporarily deprive the owners of the property, going beyond mere entry into the premises. (T. 499). The court found that the evidence was sufficient to go to the jury. (T. 499-500).

The jury found Defendant guilty as charged. (T. 266-268, R. 78-91). The court

adjudicated Defendant according to the jury verdict. (R. 109-110). The court imposed sentence of 157.875 months incarceration, with three years mandatory minimum, followed by 15 years probation for the armed burglary conviction; concurrent 157.875 years incarceration followed by 22 months probation for each of the burglary conviction; concurrent five years incarceration followed by 22 months probation for each grand theft conviction; concurrent one year incarceration for each petit theft conviction and; one year for the carrying a concealed firearm conviction. All sentences are to be served concurrently. (T. 581-585, R. 111-137). Defendant appealed his convictions and sentences to the Third District Court of Appeal.

Defendant raised three issues in that appeal. As the first issue, Defendant argued that the evidence adduced at trial was insufficient to sustain his convictions. As the second issue, Defendant argued that the trial court erred when it denied his motion to suppress. And, as the third issue, Defendant argued that the double jeopardy clause prohibits his convictions and sentences for armed burglary and theft of the firearm where the theft of the same firearm gave rise to the armed burglary.

The District Court held that Defendant's dual convictions for armed burglary and grand theft of the firearm did not violate double jeopardy. *Gaber v. State,* 662 So. 2d 422, 424 (Fla. 3rd DCA 1995). In reaching that holding, that court, after comparing the statutory elements for each offense, found that the statutory elements for armed burglary, § 810.02, Fla. Stat. (1993), are separate and distinct from the statutory elements of grand theft, § 812.014(2), Fla. Stat. (1993). Consequently, that court concluded that armed burglary and grand theft of a firearm are completely separate offenses for double jeopardy purposes, and

that Defendant was properly convicted for both offenses. *Id.*

The Third District Court noted that its holding was in conflict with the First District Court of Appeal's holding in *Marrow v. State,* 656 So. 2d 579 (Fla. 1st DCA 1994). In that case, the First District, relying on this Court's holding in *State v. Stearns,* 645 So. 2d 417 (Fla. 1994), held that dual convictions for armed burglary and grand theft of a firearm arising from the same criminal episode violated double jeopardy. The Third District Court expressed its disagreement with the First District Court's interpretation of *Stearns.* The Third District Court opined that *Stearns* holds that multiple convictions for the possession of a single firearm violates double jeopardy. The Third District Court found that *Stearns* is inapplicable to the facts of this case as well as the facts in *Marrow*, because theft of a firearm and armed burglary are not two firearm possession offenses, but a firearm possession offense and a theft offense. *Gaber,* 662 So. 2d at 424.

The District Court further found that Petitioner's first and second issues on appeal, sufficiency of the evidence and trial court error in denying his motion to suppress respectively, were without merit, and consequently, affirmed Defendant's convictions and sentences in all respects, but certified a conflict with the holding in *Marrow. Id.* On December 13, 1995, this Court issued an order postponing the decision on jurisdiction and establishing a briefing schedule.

## QUESTIONS PRESENTED

I

**WHETHER SEPARATE CONVICTIONS FOR GRAND THEFT OF A FIREARM AND ARMED BURGLARY VIOLATE DOUBLE JEOPARDY.**

II

**WHETHER THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTIONS.**

III

**WHETHER THE TRIAL COURT WAS CORRECT WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.**

## SUMMARY OF THE ARGUMENT

The two offenses at issue in this case, armed burglary and grand theft of a firearm, are subject to multiple punishment without violating double jeopardy because the two offenses are completely separate offenses. Grand theft of a firearm is a theft offense while armed burglary is a burglary offense. Each offense requires different elements of proof, consequently, proving a violation of one does not necessarily prove a violation of the other. The fact that the theft of the firearm converted the burglary into armed burglary in this case does not bar dual conviction because such a determination could not be made without an examination of the facts alleged in the information and adduced at trial. The double jeopardy determination must be made without regard to the accusatory pleading or the facts adduced at trial.

## ARGUMENT

### I

### MULTIPLE CONVICTIONS AND SENTENCES FOR ARMED BURGLARY AND GRAND THEFT OF A FIREARM DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE THEFT OF THE FIREARM PROVIDES THE BASIS FOR THE ARMED BURGLARY CONVICTION.

Defendant was charged with, *inter alia*, armed burglary in violation of sections 812.02 and 775.087, Florida Statutes and grand theft of the firearm which gave rise to the armed burglary conviction, in violation of § 812.014, Fla. Stat. (R. 93-94). At trial, Joseph Sheaks testified that, in addition to several audio-visual and other household items, a .22 caliber revolver was also taken from his home. (T. 270). He testified that the gun was in proper working order and that bullets for the gun were kept in the same cabinet as the revolver. (T. 272). The .22 caliber handgun and shells fitting the handgun were found in the Firebird. Defendant was convicted and sentenced for grand theft of the firearm and armed burglary.

On appeal to the Third District Court of Appeal, Petitioner argued, *inter alia,* that his dual convictions for armed burglary and grand theft of a firearm violated double jeopardy principles because the burglary was enhanced to armed burglary based on the theft of the firearm. The Third District, after comparing the statutory elements of each offense, found that grand theft of the firearm and armed burglary are completely separate offenses. Consequently, it held that Petitioner's dual convictions do not violate double jeopardy. That

court however, noted that its holding was contrary to the First District Court's holding in *Marrow v. State,* 656 So. 2d 279 (Fla. 1st DCA 1995).

A.

THE FIRST DISTRICT COURT OF APPEAL'S RELIANCE ON *CLEVELAND V. STATE,* 587 SO. 2D 1145 (1991) AND *STATE V. STEARNS* 645 SO. 2D 417 (FLA. 1994), WAS MISPLACED

In *Marrow*, the First District Court of Appeal, on facts identical to those in the instant case, vacated the conviction for grand theft of the firearm. That court, relying on this Court's holding in *State v. Stearns,* 645 So. 2d 417 (Fla. 1994) and *Cleveland v. State,* 587 So. 2d 1145 (Fla. 1991), held that double jeopardy bars dual convictions for armed burglary and grand theft of the firearm where the single act of stealing the firearm is the act which converted the burglary into armed burglary. *Marrow, supra.* The Third District Court, however, in disagreeing with the *Marrow* rationale, found that theft of a firearm is a theft offense and not a firearm possession offense. Consequently, the Third District certified a conflict with the First District's holding in *Marrow.*

The First District Court of Appeal's reliance on *Cleveland v. State, supra* and *State v. Stearns, supra,* was misplaced. In *Cleveland,* this Court held that a conviction under section 790.07(2)[1], Fla. Stat. for use of a firearm during the commission of a robbery

[1]Section 790.07(2), Fla. Stat. (1993), provides:
Whoever, while committing or attempting to commit any felony, displays, uses, threatens, or attempts to use any firearm or carries a

jeopardy where the robbery conviction was enhanced because of the use of the same firearm during the commission of the same robbery. *Cleveland,* 587 So. 2d at 1146. In reaching this holding, this Court observed:

> It should be noted that Cleveland's attempted robbery conviction was enhanced from a second-degree felony to a first-degree felony because of the use of the firearm. *Upon this enhancement Cleveland was punished for all the elements contained in section 790.07(2)* and appropriately punished.

*Id.* The holding in *Cleveland* was obviously based on a finding that the elements of section 790.07(2) were subsumed within the greater offense.

Similarly, in *Stearns,* this Court, relying on *State v. Brown,* 633 So. 2d 1059 (Fla. 1994), held that double jeopardy bars a separate conviction for carrying a concealed weapon while committing a felony under section 790.07(2), where the defendant was also convicted of armed burglary and grand theft arising from the same criminal episode. This Court reasoned that since the burglary was enhanced to armed burglary because the defendant possessed the firearm, the defendant could not, consistent with double jeopardy, also be convicted of a second possession offense, to wit: carrying a concealed weapon while committing the felony. *Stearns,* 645 So. 2d at 418.[2] In *Brown, supra,* this Court found no

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> concealed firearm is guilty of a felony of the second degree, ....

[2]Respondent notes that *Stearns* has been severely criticized by the First District Court of Appeal, *See, Brown v. State,* 21 Fla. L. Weekly D10 (Fla. 1st DCA Dec. 18, 1995).However, some courts have blindly applied *Stearns to* clearly distinguishable facts, and produced some questionable results. *See, e.g., Maxwell v. State,* 21 Fla. L. Weekly D118 (Fla. 1st DCA Jan. 4,

distinction in the statutory elements of armed robbery and the use of a firearm during the commission of a felony, section 790.07(2). *Brown,* 633 So. 2d at 1061.

*Cleveland*, *Stearns* and *Brown* are irrelevant to the instant case, and to *Marrow*, because in those cases, this Court utilized the statutory elements test[3] and found that the elements of section 790.07(2) are subsumed in the greater offense where the underlying felony is enhanced based on the possession of the firearm. Neither Petitioner nor the defendant in *Marrow* were charged under section 790.07(2). Petitioner was charged under sections 810.02 and 812.014. And, as will be discussed in greater detail infra, the statutory elements of sections 810.02 and 812.014 are completely separate and distinct. Consequently, *Marrow* was wrongly decided, and *Cleveland, Stearns* and *Brown* are inapplicable to this case.

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1996)(multiple convictions and sentences for carrying a concealed firearm, possession of a short-barreled shotgun, and possession of a firearm by a convicted felon arising from single act violates double jeopardy); *A.J.H. v. State,* 652 So. 2d 1279 (Fla. 1st DCA 1995)(multiple adjudications of delinquency for unlawful possession of a firearm by a minor, carrying a concealed firearm, and possession of a firearm by one previously found to have committed a delinquent act that would have been a felony if committed by an adult based on single possession of firearm violates double jeopardy); *M.P.C. v. State,* 659 So. 2d 1293 (Fla. 5th DCA 1995)(same); *But see, M.P. v. State,* 662 So. 2d 1359 (Fla. 3rd DCA 1995), *rev. pending,* Case. No. 86, 968(multiple adjudications for carrying a concealed weapon and possession of a firearm by a minor arising from single incident do not violate double jeopardy).

[3]*Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

## B

## PETITIONER'S SEPARATE CONVICTIONS AND SENTENCES FOR ARMED BURGLARY AND THEFT OF THE FIREARM WHICH GAVE RISE TO THE ARMED BURGLARY CONVICTION DO NOT VIOLATE DOUBLE JEOPARDY.

Petitioner contends that since the burglary was enhanced to armed burglary because of the taking of the firearm, the theft cannot, consistent with double jeopardy principles, also be enhanced to grand theft based on the single act of stealing the firearm because the taking of the firearm is subsumed within the armed burglary. Respondent responds that grand theft of a firearm and armed burglary are two entirely separate offenses and that convictions for both do not violate double jeopardy.

Section 775.02(4), Florida Statutes (1993) provides, in relevant parts:

> (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; .... For purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction .... Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Petitioner was convicted of armed burglary and grand theft of a firearm in violation of sections 810.02, and 812.014, Florida Statutes (1993) respectively. In applying subsection (a) above to the instant facts, it is readily apparent that the two offenses are completely separate, as the Third District found.

Section 810.02 provides, in relevant parts:

> (1) "Burglary" means entering or remaining in a structure ... with the intent to commit an offense therein, ....
>
> (2) Burglary is a felony of the first degree, ... if in the course of committing the offense, the offender:
>
> ....
>
> (b) Is armed, or arms himself within such structure ... with explosives or a dangerous weapon.

By its plain language, proving a violation of section 810.02 requires proof that the offender entered into a structure with the intent to commit an offense therein. The offense is reclassified to a first degree felony if in the course of committing the burglary the defendant is armed or arms himself once inside the structure.

Section 812.014 provides, in relevant parts:

> (1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit therefrom.
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.
> (2)
> ....
> (c) It is grand theft of the third degree and a felony of the third degree, ..., if the property stolen is:

....

3. A firearm

> Subsection 812.014(1), Florida Statutes(1989), defines the crime of theft, and subsection 812.014(2) sets the degree of the crime committed under subsection (1). We conclude that the value of the goods or the taking of a firearm merely defines the degree of the felony and does not constitute separate crimes.

*Johnson v. State*, 597 So. 2d 789, 799 (Fla. 1992).

By its plain language, proving a violation of section 812.014 requires proof that the offender obtained or attempted to obtain or used the property of another with the intent to either temporarily or permanently deprive the owner of the use of, or benefit from, the property.

In comparing the two statutes, it is readily apparent that the statutory elements are entirely different, and that proof of one does not require proof of the other. Armed burglary requires proof that the offender was armed when he entered the structure, or that he armed himself once inside the structure. It does not require that the weapon be a firearm, or that the offender intend to commit a theft, or that the offender commit a theft in order to arm himself. On the other hand, theft requires a taking with intent to temporarily or permanently deprive. Obviously, a theft can be committed without also committing a burglary. Likewise, a burglary can be committed without a theft. Consequently, the Third District correctly found that by his conviction for grand theft of the firearm, Petitioner was being punished for the taking of the firearm with the intent to deprive, and not for the possession of the weapon. *Gaber v. State,* 622 So. 2d at 424.

## C.

GRAND THEFT OF A FIREARM IS NOT A LESSER-INCLUDED OFFENSE OF ARMED BURGLARY EVEN WHERE THE THEFT OF THE FIREARM IS USED TO ENHANCE THE BURGLARY TO ARMED BURGLARY.

Petitioner takes issue with the District Court's holding because, Petitioner argues, the Third District erred when it relied solely on the statutory elements, in concluding that the dual convictions do not violate double jeopardy, without considering the exceptions under section 775.021(b). Petitioner claims that section 775.021(b)(3) prohibits dual convictions because it was the singular act of taking the one firearm which gave rise to the two convictions. *See,* Brief of Petitioner, p. 16-17. Petitioner, relying on Justice Kogan's concurring opinion in *Sirmons v. State,* 634 So. 2d 153 (Fla. 1994), argues that the elements of grand theft of the firearm, the lesser offense, are subsumed by the greater offense, armed burglary. Petitioner argues:

> The greater offense of which Mr. Gaber[Petitioner] was convicted was armed burglary. Section 810.02(2)(b), Fla. Stat. []. He was specifically charged with arming himself within the structure, with a firearm, with intent to commit theft. (*Id.*). By arming himself with the victim's firearm during the course of the burglary, Mr. Gaber necessarily obtained or used [footnote omitted] the property of another, to wit: a firearm, with intent to either temporarily or permanently deprive the other person of a right to the property or a benefit therefrom, thus constituting the theft of the firearm charged in count II.

*See,* Brief of Petitioner, p. 17. Petitioner essentially argues that because it was the single act of stealing the firearm which gave rise to the armed burglary conviction, he necessarily

committed the theft in committing the armed burglary. Therefore, Petitioner argues, the grand theft of the firearm is a lesser included offense of the armed burglary conviction. The flaw in Petitioner's argument is obvious.

First, "[a]n offense is a lesser-included offense for purposes of section 775.021(4) only if the greater offense *necessarily* includes the lesser offense". *State v. McCloud*, 577 So. 2d 939, 941 (Fla.1991).(Emphasis in original). As argued above, armed burglary and theft of a firearm are completely separate offenses requiring completely separate elements; they share no common element. Therefore, Petitioner's argument, that the theft of the firearm is subsumed within the armed burglary is obviously erroneous.

Secondly, Petitioner relies on the facts alleged in the information and the proof adduced at trial to support his claim that both offenses involved the singular act of taking the firearm. However,"section 775.021(4)(a) specifically states that 'offenses are separate if each offense requires proof of an element that the other does not, *without regard to the accusatory pleading or the proof adduced at trial.'" State v. McCloud, supra* (Emphasis in original). Section 775.021(4)(a) specifically limits the court to examining only the elements of the offenses charged and not the facts alleged in the information or the evidence adduced at trial in determining whether double jeopardy is implicated.

Thirdly, Petitioner's argument, that dual convictions for the singular act of taking the firearm violates double jeopardy, is contrary to the explicit language of section 775.021(4) and prior decisions by this Court. Section 775.021(4)(a) states, "[w]hoever, in the course of one criminal transaction or episode, commits an *act* or acts which constitute one or more separate criminal offenses, ... shall be sentenced separately for each criminal offense...."

Subsection (b) states, "[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or *transaction* ...." Clearly, section 775.021(4) contemplates the very factual situation presented in the instant case; the violation of multiple statutes by a single act. Additionally, in *McCloud, supra,* this Court affirmed dual convictions for the single act of possessing the same quantum of cocaine.

In that case, the defendant was charged with possession and sale of cocaine. *McCloud,* 577 So. 2d at 940. On appeal, the defendant argued that his dual convictions for possession and sale of cocaine violated double jeopardy because both offenses were based on his possession of the same quantum of cocaine. This Court, in finding that a sale could occur without possession, found that possession is not a lesser-included offense in the sale of cocaine. *Id.* This Court reasoned that because section 775.021(4) precludes the court from examining the facts of the particular case, it could not determine whether the defendant was in fact charged with possession and sale of the same quantum of cocaine. *Id. See also, State v. Crisel,* 586 So. 2d 58 (Fla. 1991), *State v. V.A.A.* 577 So. 2d 941 (Fla. 1991). Thus, the fact that Petitioner's singular act of stealing the firearm violated two separate statutes does not bar separate convictions for each violation.

Consequently, because armed burglary and grand theft of a firearm are completely separate offenses, Petitioner's separate convictions and sentences for each offense do not violate double jeopardy.

## II

## THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUSTAIN PETITIONER'S MULTIPLE CONVICTIONS.

As the second point on appeal, Petitioner argues that the evidence was insufficient to sustain his multiple convictions for burglary, theft and carrying a concealed weapon. Respondent would initially note that the instant case is before this Court pursuant to the limited certification of conflict between the lower courts of appeal. Although this Court does have the inherent power to exercise its discretion to consider issues beyond the scope of certified questions, *See, Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994), there is no reason for this Court to entertain the question regarding the sufficiency of the evidence in this case. There is nothing particularly compelling about the question in this case, therefore, there is no reason to question the ability of the District Court of Appeal to resolve it in a reliable and final manner. Nevertheless, insofar as Petitioner has presented the issue herein, and Respondent cannot determine with any degree of certainty whether this Court will ultimately undertake to resolve it, Respondent is thereby compelled to respond to the issue.

### A

### THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUSTAIN PETITIONER'S MULTIPLE CONVICTIONS FOR BURGLARY AND THEFT.

Petitioner claims that the evidence adduced at trial was insufficient to sustain his convictions for the various burglaries and thefts where he was a passenger in the vehicle that was owned and driven by his codefendant. Petitioner argues that because the State relied

solely on circumstantial evidence, and because he had an explanation for his presence in the vehicle, the evidence was insufficient to sustain his convictions. Petitioner's argument is without merit.

The evidence adduced at trial established that at around 3:00 a.m. Mr. Curran saw two individuals, one carrying a ladder, at a house across the canal from his house. (T. 26). He called out to them and the person carrying the ladder dropped it and they backed off into the shadows. (T. 28). Shortly thereafter, Mr. Curran observed a white or yellow Firebird or Camero pull out of the area without its headlights on. (T. 28-29). Based on the time, distance, and speed, and direction, Officer Palmeri estimated where he could intercept the car. (T. 52). The officer encountered a white Firebird headed north on U.S. I at precisely the location he estimated. (T. 53). There were no other cars in the area, and the officer encountered only commercial vehicles en route to the location. (T. 53). Petitioner was the only passenger in the car, and the car was filled with loot from the burglarized homes. Detective Zeigler testified that he had been on surveillance in the area of the burglarized homes until about 1:30 that same morning and that no burglaries had occurred during that time. (T. 417). He testified further, that Persaud told him that Petitioner was a hitchhiker. (T. 418-419).

This evidence was clearly sufficient to establish that Petitioner was one of the two individuals that Mr. Curran observed obviously preparing to enter the house across the canal. The fact that both individuals backed off into the shadows when Mr. Curran called out to them is evidence that the individuals were acting in concert. Additionally, because Deputy Plameri encountered the white Camero at the precise location where he calculated it would

be, the evidence was sufficient to establish that it was the same car that Mr. Curran saw leaving the scene. And, because there were two people in the car, considering the time of morning, and the remoteness of the location, the evidence was sufficient to establish that they were the same two individuals that Mr. Curran saw just minutes before.

Thus, the evidence established that Petitioner was one of two individuals seen carrying a ladder outside a house at 3:00 a.m., that he backed off into the shadows when Mr. Curran called out to them, and that the house, together with four other houses in that immediate area, had been burglarized. The evidence also established that Petitioner was found shortly thereafter in joint possession of the items stolen from the burglarized homes. This evidence clearly rebuts Petitioner's claim that there was no evidence that he knew of or assisted in the crimes. *See, Scobee v. State,* 488 So. 2d 595 (Fla. 1st DCA 1986), *Palmer v. State,* 323 So. 2d 612 (Fla. 1st DCA 1975).

Because the evidence was sufficient to establish that Petitioner actively participated in the burglaries, Petitioner's reliance on *Howard v. State,* 552 So. 2d 316 (Fla. 2nd DCA 1989), and the other cases cited by Petitioner for the proposition that possession of the stolen items cannot be inferred from his mere presence as a passenger in the car, is misplaced. Petitioner was not only seen at the scene of the crime, he was observed actively participating in the crime. Petitioner backed off into the shadows when Mr. Curran called out. This obviously suspicious conduct was observed during the commission of a crime, and was evidence that Petitioner had knowledge of the crime and was participating in the crime.

Petitioner argues also, that the evidence was insufficient to rebut his "reasonable hypothesis of innocence", that he was a mere hitchhiker.

> The question of whether the evidence fails to exclude all reasonable hypothesis on innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse a judgment based upon a verdict returned by the jury.

*Heiney v. State,* 447 So. 2d 210, 212 (Fla.), *cert. denied,* 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed. 2d 237 (1984). As argued above, the evidence was sufficient to support the jury verdict.

**B.**

THE EVIDENCE WAS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR CARRYING A CONCEALED WEAPON

Petitioner argues that the evidence was insufficient to support his conviction for carrying a concealed weapon where the knife was in plain view on the car seat. Deputy Palmeri testified that once the car was stopped, they concentrated all the lights onto the car and was then able to see into the car. (T. 56). He observed Petitioner inside the car making an obscene gesture with his finger. Petitioner refused to exit the car as directed. The deputy testified that while he was observing Petitioner seated in the car, aside from the obscene gesture, Petitioner appeared to be sitting fairly still. (T. 84). He did not see Petitioner fidgeting or moving around in his seat. Petitioner remained fairly still until he exited the car. (T. 84). Once Petitioner exited the car, the deputy observed the knife on the passenger seat. This evidence was clearly sufficient to establish that Petitioner had been sitting on the knife. Even momentary concealment is sufficient to violate the statute. *See, Gunn v. State,* 641 So. 2d 462 (Fla. 4th DCA 1994). Consequently, the fact that Petitioner was sitting on the knife

is clear evidence of concealment. Additionally, the fact that the officers observed the knife on the seat does not preclude a finding of concealment. *See, Ensor v. State,* 403 So. 2d 349 (Fla. 1981), *State v. Strachan,* 549 So. 2d 235 (Fla. 3rd DCA 1989).

## III

## THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE.

Petitioner argues that the trial court erred when it denied his motion to suppress evidence because the officers' use of the "felony-style" traffic stop amounted to an arrest which was not supported by probable cause and because the officers' did not have reasonable suspicion to make the initial stop of the vehicle. Petitioner filed a motion to suppress the evidence obtained from the post arrest search of the vehicle. (R. 63). The trial court conducted a hearing on that motion. At that hearing, Richard Curran testified that at about 3:00 o'clock in the morning of January 14, 1994, he heard a noise that sounded like "aluminum shutters banging". (T. 26). He looked out his window and saw someone underneath a house across the canal from his house. He did not know whether the person was a tenant or owner of the house. (T. 26). Nevertheless, he stayed by the window and heard more noises. He looked out his window again and saw two figures across the canal. One person was carrying a ladder. (T. 27-28). Mr. Curran testified that he yelled out to them, and the person carrying the ladder dropped the ladder, and they backed off into the shadows. (T. 28). A short while later, Mr. Curran heard a car engine start up. He looked across the canal and saw a car, possibly a Firebird or a Camero, white or yellow in color, under a street light. The car pulled off without headlights, and headed south on El Capitain Street. (T. 28-29).

Mr. Curran telephoned 911 and related what he had observed. (T. 29). Mr. Curran testified that El Capitain Street leads into U.S. 1, and that he believed that the car probably headed north on U.S. 1. (T. 40). However, he could not describe the two figures that he saw, and could not see the license plate of the car.

Robert Palmeri, a deputy sheriff in Monroe County, testified that he had been working in the Port Antigua area for the two weeks period prior to January 14, 1994. (T. 48). He testified that there are about 100 to 150 homes in the area, and that there had been 20 burglaries reported in that area during that period. (T. 50). He testified further that the area consists of small canal lots, and that there is only one way into and out of the area. (T. 50).

Deputy Palmeri testified that at about 4:00 O'clock in the morning of January 14, 1994, he received a BOLO dispatch that "[t]wo individuals were seen leaving a residence removing a ladder from the residence and entering a white Firebird Camero type vehicle". (T. 51). Deputy Palmeri was familiar with the area and knew the precise location described in the BOLO. (T. 52). Based on his experience Deputy Palmeri calculated the approximate location where the suspect vehicle could be located and set off to intercept the vehicle. (T. 52).

At about the location where he calculated that he would intercept the suspect vehicle, Deputy Palmeri observed a white Firebird or Camero type vehicle headed north on U.S. 1. (T. 53). At that time, the deputy did not observe any other cars in the area, and encountered only business traffic, "trucks and such" en route. (T. 53).

Deputy Palmeri testified further that Sergeant Higgins was traveling in another

vehicle a short distance behind him. (T. 53). At the time that he observed the suspect vehicle, he tapped his brake lights to alert Sergeant Higgins. (T. 53-54). Both officers made U-turns and headed northbound behind the suspect vehicle. After the turn, Sergeant Higgins was immediately behind the suspect vehicle and Deputy Palmeri was behind Sergeant Higgins's vehicle.

Deputy Palmeri noticed that the windows of the suspect vehicle were tinted such that the interior could not be seen. (T. 54). Sergeant Higgins radioed back to Deputy Palmeri that an object in the rear of the suspect vehicle was obstructing the rear window. (T. 54). That deputy pulled over to the shoulder of the road in an effort to see inside the suspect vehicle. He observed "something bunched-up" in the back of the vehicle. (T. 54).

The officers effectuated a "felony-style" traffic stop. (T. 54). Deputy Palmeri described the "felony-style" traffic stop as:

> [W]e concentrate all the lights to the radio cars into the ... suspect vehicle. At that time we called the subjects out one at a time. For officers safety we had them raise their arms, extend them as high as they can. Usually have them rotate 360 degrees check their waistbands, anything that may be a threat to our persons. They are then secured and maintained.

(T. 55). The deputy testified that the felony-style stop was employed in this case because the stop was for a suspected burglary. (T. 55). The suspect vehicle was brought to a stop. Deputy Palmeri positioned himself in a squatting position behind the open driver's side door of his vehicle. He had his gun drawn and pointed at the suspect vehicle. (T. 55). Officer Rogers arrived on the scene. (T. 56).

Officer Higgins instructed the driver, Persaud, to exit the vehicle. (T. 55). Deputy

Palmeri instructed the passenger, Defendant, to exit the vehicle. (T. 56). Defendant did not comply. Deputy Palmeri testified that, with the lights focussed on the suspect vehicle, he was able to see inside the vehicle. (T. 56). He observed Defendant inside making an obscene gesture with his finger and refusing to exit the vehicle as instructed. (T. 56). The deputy testified that he directed Defendant to exit the vehicle three to five times before he finally complied. (T. 56).

The deputy approached Defendant holding him at gun point. (T. 57). He instructed Defendant to place his hands on his head and to interlock his fingers. Defendant complied. The officer then took hold of Defendant's hands and inquired whether there was anyone else inside the vehicle. Defendant replied in the negative. (T. 57). The officer testified that he told Defendant, "the officer [Rogers] was going to open the door, if there was someone in the vehicle and they were armed they were shooting he would be shot first." (T. 57-58). The deputy then instructed Officer Rogers to open the car door. The deputy testified that they opened the car door to check for any armed subjects. (T. 58). Defendant was then placed in handcuffs. (T. 59).

Once the car door was opened the deputy observed a number of household items, "television, VCR, stereo", under a "futon type of mattress", in the back of the car. (T. 58). The deputy testified that his suspicion was aroused because of his knowledge of prior burglaries in the Port Antigua area, and the information in the BOLO. The deputy advised Defendant of his Miranda rights and conducted a pat down search. The officer found no identification on Defendant, and Defendant did not respond to the officer's questions regarding his identity. (T. 59-60).

Defendant and Persaud were held at that location while Officer Rogers was dispatched to the Port Antigua area. Deputy Palmeri and Sergeant Higgins remained on the scene.

Deputy Palmeri testified that Defendant and Persaud were detained at the scene for about one hour while Officer Rogers interviewed Mr. Curran and determined that he did in fact observe a burglary. (T. 75).

The parties stipulated that Officer Rogers interviewed Mr. Curran, and that Mr. Curran identified the house where he saw the individuals. Officer Rogers inspected the house and observed signs of a forced entry. The officer then called back to the officers at the scene where the defendants were detained, and confirmed that there had been a burglary. The suspects were then arrested and transported to the sheriff's office. (T. 89). The parties stipulated that once the burglary was confirmed, the car was sealed and towed to the Sheriff's compound. (T. 88-89).

At the conclusion of the hearing the court denied the motion. The ruling of a trial court on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence, and reasonable inferences and deductions therefrom, in a manner most favorable to sustaining the trial court's ruling. *Johnson v. State,* 438 So. 2d 774 (Fla. 1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed. 2d 724 (1984). The trial court's finding that the stop of the vehicle is clearly supported by the evidence.

**A.**

THE INVESTIGATORY STOP WAS NOT AN ARREST EVEN THOUGH THE OFFICERS HAD GUNS DRAWN, HANDCUFFED THE SUSPECTS AND PLACED THEM IN THE POLICE CAR.

Petitioner however, argues that the initial stop amounted to an arrest which was not supported by probable cause. Respondent maintains that the fact that the police officers shone the lights into the car, held guns on the suspects, handcuffed the suspects and placed them in the patrol car did not convert the investigatory stop into an arrest.

> Whether there has been an arrest turns on whether there has been an imposition of custody, and this is a determination made after examining both the objective circumstances and the subjective feeling those circumstances are likely to evoke. [citation omitted]. Among the circumstances courts consider when making this decision are: the officer's intent in stopping the citizen; the impression conveyed to the citizen as to whether he was in custody or only briefly detained for questioning; the length of the stop; the questions, if any asked; and the extent of the search, if any, made.

*United States v. White*, 648 F.2d 29, 33-34 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 924, 102 S.Ct. 424, 70 L.Ed. 2d 233 (1981).

On the facts of the instant case, the stop did not amount to an arrest. First, the officers did not intend to arrest Petitioner at the time of the stop. This is evidenced by the fact that another officer was dispatched to interview Mr. Curran and to investigate the house where he saw the individuals. Secondly, there was no testimony that any questions were put to the suspects while they were waiting for information from the investigation. Thirdly, aside from the pat down search for weapons, no search was conducted at the scene. Fourthly, Petitioner was only held long enough for the officer to investigate the information provided

by Mr. Curran. Finally, the Petitioner could not have been under the impression that he had been arrested because, although he was handcuffed and placed in the police car, he was not searched or questioned. Additionally, the fact that the officers shone the light into the car and had their guns drawn, considering that it was 4:00 a.m. in a deserted area and that it was a suspected residential burglary, did not elevate the stop into an arrest. *See e.g., Carroll v. State,* 636 So. 2d 1316 (Fla. 1994); *State v. Ruiz,* 526 So. 2d 170 (Fla. 3rd DCA 1988), *rev. denied,* 534 So. 2d 401 (Fla. 1988), *rev. denied,* 109 S.Ct. 872, 488 U.S. 1044, 102 L.Ed. 2d 995 (1989); *State v. Lewis,* 518 So. 2d 406 (Fla. 3rd DCA 1988); *United States v. Bull,* 565 F.2d 869 (4th Cir. 1977), *cert. denied,* 435 U.S. 946, 98 S.Ct. 1531, 55 L.Ed. 2d 545 (1978).

**B.**

THE OFFICERS HAD REASONABLE SUSPICION TO JUSTIFY THE INVESTIGATORY STOP OF THE VEHICLE

Petitioner next argues that the initial stop of the car was not supported by reasonable suspicion. The reasonable suspicion which will justify an investigatory stop is determined on the basis of the totality of the circumstances as viewed by an experienced police officer. *Kehoe v. State,* 521 So. 2d 1094 (Fla. 1988). Each case must be examined in light of its own unique set of facts as well as the cumulative impact of the circumstances perceived by the officer. *Willis v. State,* 584 So. 2d 41, (Fla. 3rd DCA) *rev. denied,* 595 So. 2d 559 (Fla. 1991). Factors to be considered include the time of day and day of week, location, the appearance and manner of operation of any motor vehicle involved and anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge. *State v.*

*Kibbee,* 513 So. 2d 256 (Fla. 2nd DCA 1987).

Based on the totality of the circumstances in this case, including the fact that 20 burglaries had occurred in the area in the preceding two weeks; the information contained in the BOLO; the fact that the rear of the car was obstructed; that the car matched the description given by the eyewitness; that the car was in fact located at exactly the place where the officer estimated; that it was 4:00 a.m.; and that the area was quite deserted and remote, the officers were certainly justified in making the investigatory stop of the car. Indeed, under these facts, the officers would have failed to do their job competently if they did not stop the car. *Peterson v. State,* 503 So. 2d 1336 (Fla. 1st DCA 1987). Consequently the trial court was correct in denying the motion to suppress.

## CONCLUSION

Based upon the foregoing, this Court should approve the decision of the lower Court.

Respectfully Submitted,

ROBERT A. BUTTER WORTH
Attorney General

P.R. Taylor

PAULETTE R. TAYLOR
Assistant Attorney General
Florida Bar Number 0992348
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Ave., Suite N921
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was furnished by mail to, BENJAMIN S. WAXMAN, Esq., Robbins, Tunkey, Ross, Amsel, Raben & Waxman, P.A., 2250 Southwest Third Avenue, Fourth Floor, Miami, Florida 33129, on this 27th day of March 1996.

P.R. Taylor

PAULETTE R. TAYLOR
Assistant Attorney General