IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

VS. CASE NO. 95-02359

SAMMY STEVENS,

Respondent.
_______________________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties will be referred to herein as they stand before this Court. Petitioner was the appellee in the First District Court of Appeal and the plaintiff in the trial court; respondent was the appellant in the First District Court of Appeal and the defendant in the trial court.

References to the record on appeal will be designated "(R ______)" followed by the appropriate page number; references to the transcript of the trial proceedings will designated "(TR __________)" followed by the appropriate page number.

References to petitioner's brief on the merits shall be designed "(PB)" followed by the appropriate page number.

Defense exhibits in evidence at the trial will be designated "(DE)" followed by the appropriate exhibit number.

State exhibits in evidence (unless otherwise noted) at the trial will be designated "(SE)" followed by the appropriate exhibit number.

STATEMENT OF THE CASE

Respondent was originally charged by Information dated September 7, 1993, with violation of Fla. Stat. 812.155(2) in that he unlawfully with intent to defraud First City Acceptance Corporation leased a Corvette automobile (R 1).

On February 28, 1994, respondent filed a lengthy motion to dismiss pursuant to Fla.R.Crim.P. 3.190(c)(4) (R 6-44), the grounds for which were that respondent leased the subject automobile from Visone Corvette in Atlanta, Georgia and, further, that the lease agreement was breached by virtue of the lessor failing to provide liability insurance for the subject vehicle.

On March 15, 1994, petitioner filed a motion to quash the motion to dismiss (R 45-46), which was denied by order of the court (R 47).

On March 17, 1994, petitioner filed an amended information charging respondent in Count I with unlawfully and knowingly obtaining or using or endeavoring to obtain or to use a Corvette, the property of First City Acceptance Corporation with the intent to either temporarily or permanently deprive said owner of the right to said property or benefit therefrom or to appropriate said property for the use of himself or another person not entitled thereto, contrary to §§ 812.014(1)(a) & (b) and 812.014(2)(c)(iv), Fla. Stat.

Respondent was charged in Count II of the amended information with unlawfully and knowingly obtaining or using or endeavoring to obtain or to use United States currency of the value

of $300.00 or more but less than $20,000.00, the property of Visone Corvette, Marietta, Georgia, as owner or custodian with intent to either temporarily or permanently deprive said owner of a right to said property, or a benefit therefrom, or to appropriate said property to the use of himself or another person not entitled thereto, in violation of §§ 812.014(1)(a) & (b) and 812.014(2)(c)(i), Fla. Stat. (R 2-3).

At the close of the state's case, respondent moved for a judgment of acquittal as to both counts and the court granted it as to Count II and denied it as to Count I (TR 278-288).

Respondent's motion for judgment of acquittal as to Count I of the information was renewed at the close of the state's case, and denied (TR 483), renewed by post-verdict motion (R 98-99) and again denied (R 172).

On June 22, 1995, the court withheld adjudication, placed respondent on probation for five years with conditions, including making restitution (R 155). On the next day, respondent **timely** filed his Notice of Appeal (R 178).

On August 12, 1996, the First District Court of Appeal rendered its Opinion reversing respondent's conviction with instructions that he be discharged and certified the following question of great public importance:

> MAY A GROUND FOR JUDGMENT OF ACQUITTAL BE ASSERTED FOR THE FIRST TIME IN A POST-TRIAL MOTION PURSUANT TO RULE 3.380(c)?

STATEMENT OF FACTS

Respondent does not accept petitioner's statement of the facts. It omits facts necessary to a full and complete understanding of the trial proceedings and refers to documents that were not introduced into evidence at trial[1] and, therefore, should not be considered by this Court. Gross v. Hatmaker, 173 So. 2d 158 (Fla. 2nd DCA 1965) (Deposition testimony not introduced cannot be used as part of the appeal record nor even be considered by the Appellate Court.)

Respondent, a 25 year old life resident of Pensacola, had, as a result of his involvement in the wholesale automobile business, developed a fondness for Corvettes automobiles. While looking at "Corvette Trader" magazine (DE 1), he noticed an ad placed by Visone Corvette of Georgia advertising Corvette convertibles from 1974/1975 (TR 383). Visone Corvette leases pre-owned Corvettes from 1953 to the present (TR 13).

Respondent then placed a telephone call to Visone Corvette to order a convertible that he saw in the magazine however, because it was no longer available, he agreed to purchase a 1973 Corvette Coupe (TR 384).

Respondent's credit was pre-approved over the telephone (TR 385) and he was told that he would be allowed $4,000.00 trade-in for

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[1] PB, 2. Petitioner cites to a pre-trial Motion to Dismiss "R 6-10, Ex. 2" that was never introduced into evidence at trial, specifically at the request of the prosecutor (Vol. 3, 434, 435, et. *seq.),*

his 1986 Chevrolet S-10 extended cab pick up (TR 388). He was also advised that he had to have his own insurance so he called a local insurance broker to get a binder in anticipation of the purchase of the 1973 Corvette (TR 385; DE 2). Wanda Weldone testified that on April 28, 1993, she issued an insurance binder for respondent at 12:30 p.m. for a 1973 Chevrolet Corvette based on a telephone call that respondent was purchasing a car and needed an insurance binder (TR 297-298; DE 2).

On April 23, 1993, respondent and his uncle, Charles Decker, drove to Marietta, Georgia to visit the 60 car showroom of Visone Corvette (TR 13). Upon arriving at the showroom, they were met by salesman Doug Flagle (who did not testify at trial) and the vehicle he had discussed purchasing over the telephone was waiting for him in the showroom (TR 386). However, upon examining this vehicle, respondent noticed that it was not the 1973 coupe that he had agreed to purchase on the telephone and further, it was in very poor condition (TR 387).

Respondent spent approximately six hours at the showroom (TR 387) leaving at 10:00 p.m., two hours past closing time (TR 47, 45). Throughout this time period, the salesman, Doug Flagle, attempted to switch respondent from his desired convertible model to a sedan (TR 387, 388). After respondent finally selected a red 1986 Corvette coupe (TR 17), the manager, Mr. Serrano (who did testify at trial) began renegotiating with respondent on the amount he would be allowed for his trade-in. Although respondent had been told over the

telephone that he would receive $4,000.00 for his Chevrolet pick-up (TR 388), Mr. Serrano valued it at $1,900.00 (TR 391) without the benefit of the NADA blue book (TR 69), which did not agree with respondent's estimate of the value of his trade-in. Nevertheless, respondent did agree to accept that lesser amount for his trade-in.

Respondent then entered into a lease/purchase agreement (SE 1) for a 1986 red Chevrolet coupe with 45,000 miles. The "used vehicle lease agreement (close end) with fixed price purchase option" required an initial payment of $7,000.00 and a lease term of sixty months with payments set at $242.19 per month. Paragraph K of the lease agreement provided for early termination by the lessee and paragraph M gave the lessee the option to purchase the vehicle[2].

Respondent gave Visone two personal checks which were postdated, one for $2,000.00 and a sequentially consecutive second personal check for $5,000.00; the $2,000.00 check was presented for payment on April 27, 1993 and returned for insufficient funds but the second time presented it was paid (TR 113). The $5,000.00 check, which was the subject of Count II of the Information, was presented twice for payment on April 27, 1993 and May 4, 1993 and both times returned for insufficient funds (TR 107).

According to respondent, he requested Mr. Serrano to hold the $5,000.00 check because he had to sell some cars to earn the money to cover the check (TR 399), which could have taken up to 30

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[2] SE 1

days. Respondent's uncle corroborated respondent's version that he told Mr. Serrano to hold one of the checks (TR 323). Mr. Serrano disputed this testimony (TR 19) and did in fact deposit the checks immediately (TR 399). Mr. Serrano did admit that he knew respondent was in the car selling business but denied respondent told him he needed to sell some cars in order to make the $5,000.00 check good (TR 73).

Respondent also testified that one of the reasons for postdating the check was because Mr. Serrano promised to send respondent the glass top to the vehicle (TR 38) which he could not get access to at that time (TR 396-397). This glass top was not forwarded to respondent (TR 77), even though it was written on the lease agreement that it was to be shipped April 24, 1993 (SE 1).

First City Acceptance Corporation is a finance company in Saugus, Massachusetts (TR 119). They lease used Corvettes and Visone Corvette is a dealership that they deal with on a regular basis for leasing, and they provide financing for deals arranged by Visone Corvette (TR 120). Subsequent to the aforementioned transaction, First City Acceptance Corporation forwarded to Visone a check for $9,331.36, causing ownership of the subject vehicle to be transferred to them (TR 124), which they were to retain during the term of the lease (TR 36).

Since respondent's insurance binder (DE 2) was for a 1973 convertible from which he had been switched, he initialled a form in a box in the lease/purchase agreement (SE 1) which indicated "sponsor

vehicle insurance", requesting Visone to insure the vehicle. This was agreed to by Mr. Flagle although disputed by Mr. Serrano at trial (TR 39). The exact wording of this clause is as follows:

> "Although I am not required to do so, I have elected to fulfill my insurance responsibilities through your sponsored vehicle insurance program. I want you to attempt to arrange for the following minimum insurance coverage to be affected during the lease term and until I return the vehicle." (TR 194).

Mr. Serrano acknowledged that the box initialled by respondent was an option for the creditor, First City Acceptance Corporation, to assist the buyer in obtaining insurance for the vehicle (TR 41). Mr. DeMille, from First City Acceptance Corporation, when asked if respondent's initials indicated that he wanted them to provide insurance, replied "If there is a dollar amount in the field, yes...That's not always the case." (TR 190). No attempt was made by Mr. Serrano to verify respondent's insurance either that night (too late) or at any later date (TR 40, et. seq.).

Ms. Weldone, an insurance agent in Pensacola, Florida, was subsequently called two or three times by First City Acceptance Corporation inquiring as to whether or not she had provided the insurance coverage for the subject vehicle. She was never told that the subject vehicle had been in an accident (TR 302), nor had she been advised by respondent that he had switched to a lease car (TR 306) however she did advise First City Acceptance Corporation that she was not providing insurance coverage (TR 301). Mr. DeMille, who contacted respondent in May or June of 1993 because of his failure to

make timely payments, admitted he was not sure if he told respondent that he was expected to comply with the alleged insurance requirements of the lease agreement (TR 478).

Mr. DeMille was the agent who appeared on behalf of First City Acceptance Corporation and he testified that the $7,000.00 down payment was the property of Visone Corvette and, upon receiving the paperwork, First City Acceptance Corporation wrote Visone a Check for $9,331.36 thus becoming the sole owner of the vehicle (TR 124).

On May 12, 1993, the State of Massachusetts issued a certificate of title to First City Acceptance Corporation showing free and clear title and that First City Acceptance Corporation was the owner of the vehicle (TR 125-126). The vehicle was then registered in the State of Massachusetts notwithstanding that respondent was a Florida resident at the time because Florida leasing law required insurance coverage before it could be registered in the State of Florida. To avoid that, First City Acceptance Corporation registered the vehicle in the State of Massachusetts (TR 126; SE 5). Upon registering the vehicle in Massachusetts, it was insured with USF&G, the insurance carrier for First City Acceptance Corporation's entire fleet (TR 178).

Approximately two weeks after the transaction was consummated, respondent was contacted at home by Mr. DeMille from First City Acceptance Corporation regarding payment for the $5,000.00 check (TR 401). According to respondent, he advised Mr. DeMille that he was still selling vehicles in an attempt to get the money to pay

off the $5,000.00 check and they agreed to wait a while longer (TR 401).

Mr. DeMille then testified that on June 9, 1993, he sent a letter (SE 6) to respondent regarding the monies that were past due and requested that he contact his office regarding this payment (TR 134).

Mr. DeMille testified that in addition to mailing this letter, collection agents would have begun to telephone respondent regarding his failure to make his first lease payment (TR 134). Respondent testified he telephoned First City Acceptance Corporation and spoke to Mr. DeMille after which he sent a Western Union Quick Collect Payment[3] in the amount of $242.19 (TR 403). The payment had the First City Acceptance Corporation account number, city code and state code which respondent got from Mr. DeMille (TR 176, 476-477). Although there was no notation on respondent's account that Mr. DeMille had spoken to respondent, Mr. DeMille admitted that the conversation could have begun between respondent and a female collection agent who could have then referred the call to him. Under these circumstances, he admitted, it was possible he spoke to respondent even though there was no notation on respondent's account (TR 476, 477).

Corroborating respondent's testimony that he sent the aforesaid payment was the testimony of the Western Union record

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[3] DE 6

keeper that was a Quick Collect in the amount of $242.19 was sent to First City Acceptance Corporation on June 10, 1993 (TR 344). Mr. DeMille also acknowledged that $250.00 was sent on respondent's account on June 10, 1993, but it was neither posted nor returned to respondent (TR 186). Respondent's uncontradicted testimony was that he did live continuously at 607 North 63rd Avenue (TR 381), the address shown on the letter mailed by Mr. DeMille[4], and when surveillance was done by a repossession agent looking for the vehicle, the agent noted activity in and around the house and that someone lived in it (TR 238).

Mr. DeMille recalled talking to respondent on or about June 15, 1993, at which time respondent offered to make a $500.00 partial payment toward the $5,000.00 check which had been returned for insufficient funds (TR 169). Respondent's testimony regarding this payment was also corroborated by the Western Union record keeper who testified that a $500.00 Quick Collect' payment was mailed to First City Acceptance Corporation on June 15, 1993.

A computer print out from First City Acceptance Corporation outlining respondent's collection history on account #15155 was introduced into evidence (SE 11, TR 471) and indicated that on June 15, 1993, respondent called and advised First City Acceptance Corporation that he would send $500.00 in good faith for the

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[4] SE 6

[5] DE 7

$5,000.00 check returned for insufficient funds (TR 475). Even though the payment was mailed on June 15, 1993, it was not posted on respondent's account until August 2, 1993 (TR 357) due to a "computer glitch" (TR 475) or for some reason not attributable to respondent (TR 357, 358). Neither Quick Collect payment was returned to respondent because, according to Mr. DeMille, they could not reach him (TR 171).

On May 26, 1993, the subject Corvette vehicle was involved in an automobile accident, after which respondent immediately notified Visone Corvette (TR 401-402). Trooper Darryl Hall of the Florida Highway Patrol testified that on May 26, 1993, he investigated the accident and observed respondent in possession of an insurance binder from USF&G, insuring the subject vehicle (TR 231-232). According to the trooper, the subject Corvette was towed from the scene to Smith Bothers Paint & Body Shop in Pensacola, Florida (TR 230-231) where it sat for several months waiting for an agent from USF&G insurance company to appraise the damage (TR 367). Respondent had learned that USF&G Insurance Company was not providing coverage for the vehicle and reported this to First City Acceptance Corporation (TR 404, 405)and at the same time advised that the leased vehicle was located at Smith Brothers Paint and Body Shop in Pensacola, Florida (TR 438-439). Because Superior Insurance Company, the carrier for the other vehicle in the automobile accident, refused to pay for the damages, repair work on the Corvette was delayed for several months (TR 373). Not until October of 1993 did repair begin

on the vehicle because it was at that time that a court held Superior Insurance Company responsible for payment of the damages to the vehicle (TR 373-374). At no time did respondent instruct Mr. Smith to hide the vehicle or to tell anyone it was not there (TR 376).

On December 7, 1993, Officer Curry set out to locate the subject vehicle and on that same date went to Smith Paint and Body Shop where he found the vehicle in the work area being repaired by mechanics (TR 263-264, 273-274). At that time, the vehicle was not operable (TR 272) and the officer advised the repair shop owner to advise him once the vehicle was repaired (TR 272). By the time of the trial, First City Acceptance Corporation had repossessed the vehicle (TR 173).

SUMMARY OF ARGUMENT

ISSUE I

The decision of the First District Court of Appeal correctly interpreted the plain language of Fla.R.Crim.P. 3.380(c), following a prior decision of the same court. The rule clearly states that a motion for judgment of acquittal made be made or renewed post-verdict. Even if a new ground is asserted post-verdict, there are sufficient safeguards to assure that the state will not be prejudiced and a post-verdict judgment of acquittal will only be granted when required by law. The decision also relied upon existing law for it's interpretation. Accordingly, that decision should be approved.

ISSUE II

Respondent first requests this Court to decline to exercise it's discretionary jurisdiction to hear this issue. Secondly, in the alternative, respondent submits that the decision of the First District Court of Appeal was correct in it's interpretation of §3 of Fla. Stat. 812.014, which provides for a defense to the crime of theft when the charge involves a leased vehicle. This is a matter of public policy deemed by the legislature to be necessary to protect the citizens of the State of Florida and petitioner must accept it,

ARGUMENT ON ISSUE I

MAY A GROUND FOR JUDGMENT OF ACQUITTAL BE ASSERTED FOR THE FIRST TIME IN A POST-TRIAL MOTION PURSUANT TO RULE 3.380(c)? (Certified Question)

At the hearing on May 31, 1994, the trial court, commenting that he had seen the motion and was "interested in the argument in response to that because of the assertion that there's a provision relating to lease property or automobiles that wasn't brought to my attention at the motion for judgment of acquittal at the trial," (R-110). The court then agreed to hear arguments on the motion. Respondent's attorney presented the Court with the Jones[6] case, claiming that this case seemed to be on point regarding the issue as to whether it should have been raised during the trial. (id) The trial court then agreed to review his notes and case law before ruling. (R-114).

Approximately one year later, on June 22, 1995, rather than find any sort of waiver, the trial court found that the facts of this case removed it from the protection of §3, Fla. Stat. 812.014 because while he was at the dealership in Atlanta, Georgia (TR 11 et. *seq.)* Respondent wrote a personal check for which there was insufficient funds. (R-140, 141) Respondent's attorney pointed out at the time that this "crime", if it occurred, occurred in Georgia, outside the

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[6] Jones v. State, 590 so. 2d 982 (Fla. 1st DCA 1991), disawwroved on other grounds, State v. Jenninqs, 666 So. 2d 131 (Fla. 1995)

jurisdiction of the trial court (id). (This argument was made during the trial; TR 284-285).

Accordingly, because the trial judge considered the motion for judgment of acquittal on the merits, any attempt by petitioner to a claim of waiver on appeal is without merit. Savoie v. State, 422 So. 2d 308 (Fla. 1982). In Savoie, the trial judge heard a motion to suppress on the merits then denied it both on the merits and on the ground of waiver because the motion was not timely under Fla.R.Crim.P. 3.190(h)(4). The District Court of Appeal affirmed the trial court's finding of waiver and, based on conflict, this Court accepted jurisdiction and rejected the District Court of Appeal's holding of waiver, stating:

> "The trial judge considered the motion on the merits, and we find that this renders the waiver issue moot." Savoie, at p. 310.

The plain language of the Rule is that a motion for judgment of acquittal may be made or renewed post-verdict and under the plain language of the Rule the procedure employed below was correct. Nevertheless, because the Rule contains the phrase "made or renewed" there is, of course, concern that a ground not asserted during the trial in the motion for judgment of acquittal could be asserted post-trial, which could be prejudicial to the State.

In other words, if the ground for acquittal was raised during the trial rather than post-verdict, the State would have an opportunity to "cure" any omission or flaw in the presentation of their case. Even though this claim that it could have been cured if

raised during the trial was not raised before the trial court (R 111-114, 138-139) nor was it raised in the First District Court of Appeal, it will be briefed because of the importance of the issue,

The reason there can be no claim in the instant case that the flaw could have been corrected (cured) by the State at trial is because it merely involved the interpretation of a statute. The facts, i.e., the letter introduced into evidence as SE 6, obviously could not have been changed (cured). In Jones v. State, 590 So. 2d 982 (Fla. 1st DCA 1991), disapproved on other urounds, State v. Jenninas, 666 So. 2d 131 (Fla. 1995) relied upon by the First District Court of Appeal below it was the same rationale: The new basis for the post-verdict motion for judgment of acquittal involved the interpretation of a decision and the facts there could not have been changed (cured). The Defendant in Jones, had been convicted of tampering with evidence for throwing away what ostensibly was contraband drugs during a tussle with a police officer. Although the motion for judgment of acquittal filed during the trial only alleged general terms, the motion when renewed and heard at sentencing relied specifically on Boice v. State, 560 So. 2d 1383 (Fla. 2nd DCA 1990), disapproved in Dart, State v. Jenninas, 666 So. 2d 131 (Fla. 1995), a case which had been decided approximately 18 months prior thereto. Although the holding in Boice was disapproved by the Florida Supreme Court several years later, it continued to be good law until overruled by this Court. Stanfield v. State, 384 So. 2d 141, 143 (Fla. 1980). Boice held that tossing away a bag of drugs in the

presence of an arresting officer did not constitute tampering with evidence and, although the trial judge in Jones, disagreed with the **Boice** decision and denied the motion, on appeal the First District Court of Appeal reversed the conviction with instructions for the trial court to enter judgment of acquittal. In Jones, as in the instant case, the omission could not have been cured by the State so there was no prejudice. In the former, it was the interpretation of a court decision; in the latter it was the interpretation of a statute. It is not a novel concept for the law to provide for the possibility of controlling authority being overlooked.

For example, **Fla.R.App.P. 9.210(g)** provides for notice of supplemental authority when a party discovers a statute, etc. after having served his last brief, **Fla.R.App.P.** 9.330 allows the filing of a petition for rehearing, as was done in the instant case below, when an appellate court overlooks or misapprehends a point of law. To claim that a trial judge would grant a post-verdict motion for judgment of acquittal on a newly asserted ground that, if made during the trial could have been cured, is to have little faith in the trial judges of this State.

This Court has long since recognized the trial judge's important function when ruling on post-trial motions:

> "When the judge, who must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, concludes that the verdict is against the manifest weight of the evidence, it is his duty to grant the new trial..."

Cloud v. Fallis, 110 So. 2d 669, 673 (Fla. 1959; cites omitted). There is therefore no reason to believe that a trial judge would not recognize an unfair burden on the State.

The State also claims that affirmance of the decision of the First District Court of Appeal will result in "perpetual retrials" for defendants (PB 11). However, the opposite is true. If in fact the ground asserted in the post-trial motion for judgment of acquittal was a valid basis for granting the motion had it been asserted at trial, it would render trial counsel ineffective for not raising it during the trial. This would, of course, result in endless delays and expense and cost to the State and the court by later filed motions under Fla.R.Crim.P. 3.850. See: Vento v. State, 621 So. 2d 493 (Fla. 4th DCA 1993), (failure to preserve for appeal issue of improper identification); Kellev v. State, 637 So. 2d 972 (Fla. 1st DCA 1994) (failure to timely file a motion to allow judicial review of evidentiary weight); State v. Billue, 497 So. 2d 712 (Fla. 4th DCA 1986) (failure to timely file post-trial motions).

This Court is keenly aware of the problems which could result from a holding of waiver. In Savoie v. State, trial counsel neglected to file a motion to suppress evidence pre-trial but rather raised it and had it heard during the trial. This Court noted that a pre-trial hearing on a motion to suppress is conducive to an orderly process of trial by obviating the need to interrupt the trial and, more importantly, that when a motion to suppress is heard during a trial it forecloses the state from appealing the ruling. But,

noting that the rule does not require all motions to suppress to be heard before trial this court recognized the "discretionary authority to entertain either a motion to suppress or an objection to the introduction of certain evidence made during the course of the trial." (P 311). The same sort of discretion by a trial judge is necessary in situations arising under rule 3.380(c), when it involves a post-verdict motion for judgment of acquittal on grounds not raised during the trial. Why? "This discretionary authority is necessary in order to avoid the sixth amendment ramifications which might result from the application of an absolute waiver rule against a defendant whose counsel failed to comply with the requirements of rule 3.190(h)." Savoie, p. 311-312. The exact same rationale applies in the instant case.

Finally, if petitioner is still concerned that the trial court would exercise it's discretion in an arbitrary and capricious manner, it can look to Fla, Stat. 924.07(1)(j), which permits the state to appeal a post-verdict judgment of acquittal.

The decision of the First District Court of Appeal correctly relied upon the Jones, decision and a decision of a district court of appeal represents "The law of Florida unless and until they are overruled by this Court." Stanfield v. State, 384 So. 2d 141, 143 (Fla. 1980). The procedural issue which is the subject of this appeal was neither considered nor discussed by this Court in State v. Jenninus, 666 So. 2d 131 (Fla. 1995) which disappproved the holding of Jones on the merits.

Even if this Court does not agree with the decision of the First District Court of Appeal below, respondent should still be entitled to the same relief because he relied upon controlling law at the time of his conviction and just as the legislature is barred from passing an ex post *facto* law, so too is "'a state supreme court...barred from achieving precisely the same result by judicial construction.'" State v. Snyder, 673 So. 2d 9, 11 (Fla. 1996).

There is no reason to believe that any trial judge in this State would grant a post-verdict judgment of acquittal on a new basis if the State would have been able to cure the flaw if it had been made during the trial.

Accordingly and for the reasons set out above, this Court should approve the decision of the First District Court of Appeal below.

ARGUMENT ON ISSUE II

DID THE DISTRICT COURT ERR IN HOLDING THAT THE POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED?

Respondent recognizes that this Court has the discretion to consider issues other than that upon which jurisdiction is based but would respectfully request this Court to refuse to consider issue II raised in petitioner's brief.

Petitioner's argument under issue II is nothing more than an attack upon the statute claiming the decision of the First District Court of Appeal "completely disregarded the elements of theft" (5812.014, Fla. Stat.)[7]. Petitioner refuses to acknowledge that the legislature enacted a defense to the crime of theft, as pointed out by the First District Court of Appeal. That is no different than, e.g., Fla. Stat. 777.201 which codifies the defense of entrapment, or Fla. Stat. 782.02 which codifies the defense of justifiable use of deadly force. As the District Court of Appeal noted below, the state may easily avoid the defense under 53 of 812.014 by proving beyond a reasonable doubt that the statute was complied with; so too, may the state avoid the defense of entrapment by proving beyond a reasonable doubt that the subject was predisposed to commit the crime or, in a homicide case, that the use of deadly force was not justifiable.

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[7] PB 13

Petitioner also overlooks the long established principle of law that an affirmative defense clearly may be raised in the state's case. For example, in Weaver v. State, 370 So. 2d 1189 (Fla. 4th DCA 1979), the defendant was convicted for possession of heroin and after the presentation of the evidence by the state, the defendant rested and presented no evidence whatsoever. Notwithstanding, he requested a jury charge on the theory of entrapment which was denied by the trial court. Reversing, the District Court of Appeal held:

> "The facts outlined above, even though they were presented on cross-examination in the State's case, constitute adequate evidence of entrapment to present this issue as one for jury consideration." (at p. 1191).

Furthermore, just because the accused relies upon an affirmative defense at trial "...does not mean that the ultimate burden of proof shifts to the defendant." Wright v. State, 442 So. 2d 1058, 1060 (Fla. 1st DCA 1983), rev. denied, 450 So. 2d 489 (Fla. 1984).

The letter, which was introduced as SE 6, does not comply with Fla. Stat. 812.014(3).

> 6/09/93
>
> SAMMY STEVENS
> 607 N 63RD. AVE.
> PENSACOLA, FLORIDA 32506
>
> "RIGHTS OF DEFAULTING DEBTOR UNDER MASSACHUSETTS LAW."
>
> DEAR SAMMY STEVENS;
>
> You are in Default of your Lease Agreement!

> You may cure your Default of your Corvette Lease by paying to FIRST CITY ACCEPTANCE CORP., THE DOLLAR AMOUNT BELOW, ON OR BEFORE THE DATE BELOW, if you pay this amount within the time allowed, you are no longer in Default and may continue with your Lease as though no Default has occurred. If you do not cure your Default by the date stated below, we at FIRST CITY ACCEPTANCE CORP., will take possession of our collateral.
>
> If FIRST CITY ACCEPTANCE CORP., takes possession of our collateral, you may get it back by paying the full amount of your accelerated unpaid balance and any reasonable expenses incurred by FIRST CITY ACCEPTANCE CORP., if you make this required payment within twenty (20) days after we take possession.
>
> $ 242.19 DUE BY 6/29/93
>
> Sincerely yours,
>
> COLLECTIONS DEPARTMENT
> FIRST CITY ACCEPTANCE CORP
> LOAN# 15155
> CC/FILE

According to the letter, respondent had until June 29, 1993, to "cure" his "Default" by sending a payment of $242.19. This was, in effect, a conditional demand at best. Nevertheless, the uncontradicted evidence was that respondent did in fact make a payment of $242.19 on June 10, 1993[8] (TR 344). Due to what appears to be a problem on the part of First City Acceptance Corporation, the payment did not appear on respondent's account until August 2, 1993. Therefore, respondent met the requirement by timely forwarding the payment.

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[8] DE 6

Secondly, this was a conditional demand rather than a demand and therefore on that basis does not qualify under Fla. Stat. 812.014(3).

According to the undisputed testimony of Mr. DeMille, a copy of the subject letter was sent by regular mail to respondent, and not returned, indicating proper delivery (TR 136, 137). As to the copy sent by certified mail, there was no evidence at trial of a return receipt, signed or unsigned, as required by the statute:

> "...when the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect." Starr Time, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995).

Petitioner's criticism should be directed at the legislature, who decided as a matter of public policy that a certain group of citizens of the State of Florida, i.e., lessees of rental cars, should not be convicted of a felony unless certain pre-conditions are met; perhaps because of the uneven position of the parties, which often results in frustration and despair when a lone citizen has to deal with a powerful bureaucracy. This case is a perfect example. The undisputed facts from impartial witnesses show:

(a) Respondent sent two payments[9] to the lessor's finance company, which Mr. DeMille acknowledged that for some unknown reason were not posted to respondent's account (TR 186, 357, 358), through no fault of respondent.

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[9] DE 6, DE 7

(b) Clearly there was a mix-up on the insurance coverage as SE 1 showed that respondent requested lessor to provide insurance (TR 194) and the leased vehicle was titled in Massachusetts because Florida law required insurance coverage before it could be registered in Florida (TR 126)(SE S), corroborating respondent's position. At the time of the automobile accident, respondent had in his possession an insurance binder from USF&G, the insurance carrier of the lessor (TR 231-232).

(c) Repair on the vehicle was delayed until a lawsuit decided which insurance carrier would be responsible for payment for the damages. It was only after a court order was rendered holding Superior Insurance Company, the insurance company of the other automobile in the accident, liable for payment of the damages that the repair shop had begun to repair (TR 373-374).

It is not unusual or uncommon for the legislature to determine that, as a matter of public policy, certain groups of citizens would be exempt from civil or criminal prosecution under certain conditions. For example, Fla. Stat. 812.015(3)(c) protects a merchant or his employee from being sued or arrested for false arrest, false imprisonment or unlawful detention if he detains a suspected shoplifter; Fla. Stat. 790.25(3)(m) exempts from the concealed weapon law any citizen of this state who carries a concealed weapon, under certain conditions, to or from a place of repair; Fla. Stat. 777.013 exempts from prosecution as an accessory after the fact any close relative of the fugitive, as defined in this statute.

The above are examples of some of the public policy decisions made by the legislature based on good common sense and the

need to protect certain citizens under certain conditions. This case is such an example. And in this case, as in all of the above cases, it makes no difference if the evidence proving the exception or exemption is presented during the state's case or the defense case; the burden of proof remains on the state and the defendant would be entitled to a judgment of acquittal, pre-verdict or post-verdict.

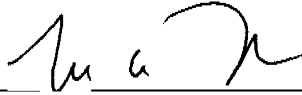
Accordingly, the decision of the First District Court of Appeal was correct in reversing the trial court's erroneous interpretation of Fla. Stat. 812.014(3).

CONCLUSION

Respondent respectfully requests this Court to answer the certified question in the affirmative and to thereafter approve the decision of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James Rogers and Mark C. Menser, Assistant Attorney Generals, The Capitol, Tallahassee, FL 32399-1050 by regular U.S. Mail on this the 31st day of October, 1996.



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