ORIGINAL

IN THE SUPREME COURT OF FLORIDA

MICHAEL BROWN,

Petitioner,

v.

CASE NO. 99-00102

STATE OF FLORIDA,

Respondent.
_____ /

PETITIONER'S AMENDED BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

MICHAEL BROWN,

Petitioner,

v. **CASE NO. 99-00102**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S AMENDED BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant in the circuit court for Duval County, where he was convicted of the offenses of armed burglary, grand theft auto and aggravated assault with a firearm. Petitioner was the Appellant in the First District Court of Appeal. He will be referred to in this brief as Petitioner or as Michael Brown.

The record consists of three volumes. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (R.I,1).

The opinion of the District Court is attached as an appendix and will be referred to as "App".

STATEMENT OF FONT SIZE

Undersigned counsel hereby certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionally spaced.

STATEMENT OF THE CASE

By amended information filed August 11, 1998, Petitioner Michael Brown and codefendant Jeffery Joiner were charged with the May 29, 1998, armed burglary of a dwelling (with intent to commit therein the offense of resisting an officer without violence) in contravention of section 810.02(2)(b) and 775.087, Florida Statutes. (R.I,27). In count II, Petitioner and codefendant Joiner were charged with the May 29, 1998, grand theft auto in contravention of section 812.014(2)(c)6., Florida Statutes. (R.I,27). In count III, Petitioner was charged with the May 29, 1998, assault with a deadly weapon in contravention of sections 784.021 and 775.087(2)(a), Florida Statutes. (R.I,27). In count IV, Petitioner was charged with the May 29, 1998, possession of a firearm by a convicted felon, in contravention of section 790.23, Florida Statutes. (R.I,27). By order of the court, count IV was severed for trial. (R.I,50).

A jury trial was held on December 7, 10 and 11, 1998.[1] Petitioner was found guilty as charged on Counts I, II and III. (R.I,99-102; 118). The state filed notice of intent to classify Petitioner as a prison release reoffender, and seeking the enhanced maximum penalty of thirty (30) years imprisonment pursuant to that statute. (R.I,29,150). Petitioner filed a motion to declare section 775.082(8), Florida Statutes, unconstitutional. (R.I,106-

[1] This case was tried with two juries, one for each defendant.

113). The trial court denied the motion. (R.I,152,154). The trial court sentenced Petitioner to a term of life imprisonment on Count I (armed burglary) with a three year minimum mandatory term. (R.I,156). The trial court also sentenced Petitioner to a term of five years on count II (grand theft auto), and five years on count III (aggravated assault with firearm) with a minimum mandatory term of three years. (R.I,156).

On direct appeal to the First District Court of Appeal, Petitioner's conviction and sentence were affirmed in an opinion certifying a question of great importance regarding the constitutionality of the prison release reoffender statute. (App.) Notice of intent to seek discretionary review was filed by Petitioner on December 14, 1999. On December 22, 1999, this Court issued an order postponing decision on jurisdiction and briefing schedule, ordering Petitioner to file his initial brief on the merits on or before January 17, 2000.

STATEMENT OF THE FACTS

At trial, Petitioner essentially conceded that he was guilty of grand theft auto. (R.II,144-45; R.III,316). After the attempted auto theft, Petitioner and codefendant fled from the police. In fleeing, Petitioner and codefendant Joiner ran into the open rear door of an apartment belonging to and occupied by an acquaintance of Petitioner, Ms. Bonnie Sims. Ms. Sims provided the following testimony relevant to the burglary conviction.

Bonnie Sims lived at 5020 Cleveland Arms, apartment 223. On the day of the incident, she lived in apartment 114. (R.III,256). Sims opened the rear door of her apartment in order to hang some clothes. (R.III,257). She then went back inside to talk to her sister-in-law who had just arrived. (R.III,257). Sims testified that she knew Petitioner, Michael Brown, and identified him in the courtroom. (R.III,258,263). Sims also knows Petitioner mother. (R.III,258,263). That morning, Sims first saw Petitioner inside her apartment near the refrigerator, about ten feet inside the back door. (R.III,258). She did not hear a knock, nor did she hear anyone call out her name. (R.III,259). Prior to seeing Petitioner, she had not given him permission to enter the home. (R.III,259). Petitioner then asked Sims if he could go to the restroom. (R.III,259). Sims told him yes, since he was already in the house. (R.III,259,263). Sims noticed that Petitioner was sweating, and asked him if he was running from the police. (R.III,260). Petitioner said he was. (R.III,260). Sims then told

Petitioner to get out of her house. (R.III,260). At this point, Sims had also seen the second man, whom she did not know. (R.III,260). Sims got a hold of her broom and told the two men to get out of her house. According to Sims, "about that time the police got there" and she told the police, "here they is." (R.III,261). The police then came in and told the men to get down on the floor. (R.III,261). According to Sims, the two boys did get down on the floor. The prosecutor asked: "And did the two boys get down on the floor?" (R.I,261). Sims responded: "Yes, the other boy was already on the floor, by the door." (R.III,261). Sims said she did not own a gun. (R.II,262). She recognized the gun, however, as the weapon that the police pulled from under the couch. (R.III,262). Sims said that to her knowledge, Petitioner never used the bathroom in her home. (R.III,263).

On cross-examination, Sims stated that Michael Brown never left her house:

> A: No, he didn't. By the time he come back from out the hallway, the police at the back door and the front door.

(R.III,264).

> Q: Okay. So he didn't run out of your house, did he?
>
> A: No, he didn't.
>
> Q: Back of the hallway part that's where the bathroom is, isn't it, ma'am?
>
> A: Yes.
>
> Q: This happened very quickly, didn't it, ma'am?
>
> A: Yes.

Q: And it was confusing, wasn't it?

A: It was real confusing.

(R.III,265).

Deborah Sims is the sister of Bonnie Sims. (R.III,268). Deborah was at her sister's apartment on the morning of the incident. (R.III,268). Deborah, too, was acquainted with Michael Brown. (R.III,268). When Deborah heard the commotion, she got up from her sister's bed and saw Michael coming down the hallway. Michael Brown went into the bathroom and closed the door behind him. (R.III,269). Michael was only in the bathroom about a second. (R.III,269). Michael then came out and shoved something under some towels in the linen closet. (R.III,270). That is where the police found a cigarette lighter and two bullets. (R.III,270).

Officer Brown was assigned to the Cleveland Arms area. (R.III,214). Brown saw Petitioner Brown and codefendant Joiner as they came through the woods leading to the Cleveland Arms Apartments. (R.III,216). Officer Brown said Michael Brown was wearing some burgundy pants and black shirt, and Jeffrey Joiner was dressed in black pants, black shirt and black shoes also. (R.III,216). Petitioner Brown and Joiner ran through a gate leading to the apartments. (R.III,218). Officer Brown observed the two men run into the back door of an apartment which was already open. (R.III,220,243). Officer Brown kept running around to the front of the apartment. (R.III,220). The front door appeared to have been open as well. (R.III,221). "Just as he got to the front

door, both subjects were headed out." (R.III,221). Joiner was in front and Michael Brown was "stumbling behind." (R.III,222). Officer Brown had his gun out and was yelling "police, stop,". According to Officer Brown, "they hit the brakes and they turn around and run right back in the house." (R.III,222). Officer Brown got his hands on Joiner but Michael Brown ran down the hallway to the back of the apartment. (R.III,222). Officer Brown got Joiner down, then "a few seconds later, a minute later Brown comes back down the hallway." (R.III,222-23). The owner of the apartment was swinging a broom and yelling and screaming "get out of my house....get them out of my house." (R.III,223).

Officer Brown said Petitioner was fumbling with something in his hands as he went down the hallway. (R.III,230). When he came back, he was still fumbling "as if he had something in his hand down by his pants and shirt area." (R.III,231). Slowly, Petitioner obeyed the officer's order to get down, but still fumbled with his hands. (R.III,231). The other officers entered and handcuffed Petitioner near the sofa. (R.III,232). Later, Officer Brown found a couple of live round bullets and cigarette lighter in a closet in the hallway. (R.III,233). Officer Brown also found a small handgun in the house, under the sofa. (R.III,233,237,251). Petitioner admitted to Officer Brown that he took the car, but denied doing any shooting. (R.III,241).

On cross-examination, Officer Brown explained that he confronted Joiner just as he exited the front door, when Joiner was

about one arm's length in front the door. (R.III,245). Petitioner was behind Joiner. (R.III,245). Officer Brown also said that the clothing the two men were wearing was almost identical. (R.III,248). They both had on dark clothes. (R.III,248). Both men had on black shirts, but appellant had burgundy pants which were dark, but a little bit lighter than Joiner's black pants. (R.III,248). Both men are about the same height, although there may be a difference of about two inches. (R.III,248). When they did the show-up, Ms. Griffin was at her house and the suspects were at the roadside in front of her house. (R.III,249).

The auto theft victim, Barbara Griffin, resided at 2683 West 25th Street, in Duval County. (R.II,152). On May 29, 1998, at about 10:00 a.m., Griffin was cooking when she heard an unusual barking from her dog. (R.II,152). Griffin had left her car running in her driveway because it was old and needed to be warmed up. (R.II,153). Griffin then heard her car engine revving or "raised up" as she put it. (R.II,153). Griffin ran to the back door to see someone backing her car out of the driveway. (R.II,153-54). Griffin identified Petitioner as the man she saw taking her car. (R.II,155-56). As Griffin ran out the door, the man jumped out of the car and ran. The car was still rolling backwards, however, and Griffin had to jump into the car to stop it. (R.II,156). Griffin's dog, Roxy, came out and Griffin "put [the] dog on him." (R.II,156). Griffin described her dog as part Rottweiler and part Doberman. (R.II,156). Roxy chased the man down the street as Griffin

followed behind. (R.II,157). The man then ran into a field and jumped a fence. (R.II,157). When Griffin ran into the field she called her dog back. (R.II,157). Griffin said the dog obeyed her command. (R.II,157). Griffin called to the man and said she was going to call the police. (R.II,158). The man ran further down to the other end of the field. (R.II,158).

Griffin then returned home and called the police. (R.II,158). She then came back out and observed the man jump across the fence and proceed over by the church. (R.II,158). By this time, another gentleman had joined the man over by the church. (R.II,158). Griffin returned to the end of the field near her neighbor's house. (R.II,159). Griffin said the man who attempted to steal her car pointed a gun straight at her and fired. (R.II,159). She said the man did not aim at her dog because the dog was in the field. (R.II,159). Griffin stated that she knew which of the two men shot at her "because I remember the clothes and things that he had on, the tee shirt, the different colors and stuff and he was much larger than the other gentlemen was." (R.II,160). Griffin said she had no doubt as to which man fired the gun. (R.II,160). After the firing of the weapon, Griffin said she ran because she thought the man was trying to kill her. (R.II,160). Griffin said she does not wear glasses. (R.II,161).

The police later brought two suspects to Griffin for identification purposes. Griffin said she identified one of the suspects as the man who attempted to steal her car and shot at her.

(R.II,161-62). She could not identify the second suspect. (R.II,162). The police found a shell casing at the scene of the shooting. (R.II,162).

On cross-examination, Griffin stated that she did not see anything in the man's hand, nor a bulge in his clothing, as he ran from her driveway. (R.II,164). Griffin said she heard two or three shots. (R.II,167). Griffin conceded that she was about two city blocks from the two men when one of them fired the shots at her. (R.II,167). Defense counsel suggested that the distance was about 600 feet. (R.II,167). Griffin said the distance was about from her position to "outside the courtroom door." (R.II,167). Defense counsel queried: "That's two city blocks?" (R.II,167). Griffin responded: "Well, I guess, it's about as far as here and outside to the wall cause you could see the church from where I was standing." (R.II,167).

Griffin conceded that both men were dressed in dark clothing. (R.II,169). Both men were wearing black shirts. (R.II,170). Griffin was standing at the end of her driveway talking to a neighbor, Mr. Harris, and pointing to the two men down by the church when the shots were fired. (R.II,171).

Defense counsel asked Griffin about the identification procedure and suggested that the police asked her to identify the individuals from a distance of about 40 feet. Griffin said: "What do you mean by 40 feet? How far is that? (R.II,172). Griffin said the suspects were as close to her as the distance between her and

defense counsel. (R.II,172,173). Griffin got a good look at the suspects at that time, but still was not able to tell whether either of the two men had facial hair "due to the distance." (R.II,173). Griffin said she was 38 years old and did not wear corrective lenses. (R.II,174).

Griffin was also cross-examined by counsel for the codefendant. (R.II,174). Griffin conceded that the first time she saw the codefendant he was way down by the church. (R.II,175). Griffin conceded that from her driveway it is pretty hard to see the church because it is about 700 feet from her home. (R.II,176). And from her neighbor's home, the church is about 500 feet away. (R.II,176).

Carolyn Hill lives at 2724 West 25th Street. (R.II,178). The victim, Griffin, lives about a block and a half from her house. (R.II,178). On the morning of the incident, Hill observed a young man walking up the street wearing a "black shirt and I think gray pants or light colored pants." (R.II,179). The young man was walking slowly and looking into the yards, and looking back toward the direction of Griffin's house. (R.II,181). The young man walked up toward the 20th Street Expressway, where a church is located. (R.II,182). Hill then saw a man running in a nearby field, being chased by a dog. (R.II,182). Hill saw a woman, Ms. Griffin, walk up to the end of the field and holler. (R.II,183). When the man who was running in the field came to the church, he waved to the other man who was walking up the street. (R.II,184). Hill saw the

two men standing in the street directly behind the church. (R.II,185). At that time, Ms. Griffin and another man were standing at the end of the driveway of a nearby house. (R.II,185). Hill then heard a shot which appeared to come from the church area. (R.II,185). Hill did not know which of the two men fired the shot. (R.II,186). Hill then saw the two men run off together. (R.II,187).

The police later brought two men to Hill for identification purposes. (R.II,188). Hill identified the man she saw walking past her house. (R.II,188). As to the second man, Hill said she was able to identify his clothing, but was not certain about the face because of the distance involved. (R.II,189).

On cross-examination, Hill said she could not estimate the distance from her house to the field because she was not familiar with distances. (R.II,189). Hill did not see anything in the hand of the man that was running. (R.II,190). Hill was unable to identify either of the two men in the courtroom. (R.II,190).

Larry Emanuel is a patrolman in Jacksonville. (R.II,192). Griffin gave the officer a clothing description of the man who attempted to steal the car. (R.II,194). A description of the second man was obtained from Hill. (R.II,194). Emanuel observed two suspects walking near the railroad tracks. (R.II,197-98). The two men saw Emanuel and took off running through a wooded area toward Cleveland Arms Apartments. (R.II,198). Emanuel arrested Petitioner inside an apartment at Cleveland Arms. (R.II,200).

Griffin later took Emanuel to the area around Vernice Street and West 25th Street, where the church is located. (R.III,207). At that location, Emanuel found a spent shell casing from an automatic weapon. (R.III,207).

On cross examination, Emanuel stated that he was about 150 to 175 yards from the two men when he first observed them near the railroad tracks. (R.III,211). The officer's vision was 20/10 with his contact lenses, which he was wearing at the time. (R.III,211). The officer stated that he did not see either of the individuals carrying a weapon, because that was "too far to see a weapon." (R.III,212). After running through the woods, Emanuel met up with Officer Brown. (R.III,212).

Petitioner's counsel moved for judgment of acquittal due to the state's failure to prove a prima facie case as to each element of each offense. (R.III,290). The motion was denied. (R.III,290). Petitioner elected not to testify, and called no witnesses in his defense. (R.III,297). Petitioner renewed his motion for judgment of acquittal which was again denied. (R.III,298).

The trial court sentenced Petitioner to a term of life imprisonment on Count I (armed burglary) with a three year minimum mandatory term. (R.I,156). The trial court also sentenced Petitioner to a term of five years on count II (grand theft auto), and five years on count III (aggravated assault with firearm) with a minimum mandatory term of three years. (R.I,156).

SUMMARY OF ARGUMENT

ISSUE I: In light of this court's recent opinion in Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000), Petitioner's conviction for armed burglary must be reversed. Delgado effectuated a significant change in the interpretation of Florida's burglary statute. Under Delgado, Petitioner cannot be guilty of armed burglary because the uncontroverted evidence showed that he entered the wide-open door of an apartment belonging to someone he knew and was granted permission to use the bathroom by his friend, the occupant. Under no reasonable view of the evidence can Petitioner be found to have the trespassory intent required by Delgado. Id. at S81. Second, when the occupant of the dwelling learned that Petitioner was fleeing the police, she ordered him to leave. Petitioner began to comply with the order to leave and was in the process of exiting the front door when he was confronted by a police officer brandishing his service revolver. This confrontation prompted Petitioner to retreat into the dwelling. Under any reasonable view of these facts, Petitioner's "remaining in" the dwelling cannot be considered "surreptitious" to the occupant as required by Delgado. Id. At S82. Third, under no reasonable view of the facts can Petitioner's entry or "remaining in" the dwelling be considered to have terrorized, shocked or surprised an unknowing occupant as required by Delgado. Id. Petitioner's conviction for armed burglary must be reversed.

Issue II: (In the alternative). Although the trial court

cannot be faulted for failing to anticipate the changes in the elements of burglary effected by this court's opinion in Delgado, Petitioner's conviction for armed burglary must nonetheless be remanded for a new trial due to the erroneous instruction on the elements of burglary in light of Delgado.

Issue III: The trial court committed fundamental error by sentencing Petitioner to an "illegal" sentence of life imprisonment under the prison release reoffender statute for the offense of armed burglary, a first degree felony punishable by life. The statute prescribes a mandatory sentence of thirty years for a "first degree felony." The statute also prescribes a mandatory sentence of life for a "felony punishable by life". The term "first degree felony" includes first degree felonies punishable by life, so the thirty year sentence applies. At the very least, the statute is ambiguous and should be construed in Petitioner's favor because reasonable persons may differ on whether the statute provides a thirty year sentence or a life sentence for a first degree felony punishable by life. The ambiguity in the statute is evidenced by the fact that even the state was confused as to the applicable sentence. In its notice of intent to seek prison release reoffender sentencing, the state indicated its intention "to have the Defendant sentenced to thirty (30) years imprisonment." (R.I,29).

Issue IV: Petitioner's conviction on the charge of burglary is not supported by competent, substantial evidence because the

evidence presented by the state showed that Petitioner had express consent to "remain in" the dwelling of Bonnie Sims. Ms. Sims subsequently withdrew her consent. When Ms. Sims withdrew her consent Petitioner began to exit the dwelling and would have exited the premises but for the fact that his arrest occurred so promptly thereafter that he did not have a reasonable opportunity to leave. Under such a circumstance, the state's evidence was legally insufficient to sustain Petitioner's conviction for burglary.

Issue V: Without objection below, the trial court gave a jury instruction which imposed strict liability on the second element of the offense of burglary of a dwelling, i.e., eliminated the implied statutory requirement that the entering or "remaining in" the dwelling be "knowingly" or "willfully" unauthorized. Such an instruction denied Petitioner his constitutional right to a fair trial. Chicone v. State, 684 So. 2d 736 (Fla. 1996). The giving of such an erroneous instruction constituted fundamental error. Cohen v. State, 125 So. 2d 560 (Fla. 1960); Viveros v. State, 699 So. 2d 822 (Fla. 4th DCA 1997).

Issue VI: Petitioner's conviction on the charge of aggravated assault is not supported by competent, substantial evidence. The victim claimed that she was able to identify Petitioner as the man who shot at her "because I remember the clothes and things that he had on, the tee shirt, the different colors and stuff and he was much larger than the other gentleman was." The victim's identification testimony fails the competent, substantial evidence

test because it is totally illogical and is not supported by a reasonable basis in fact. The facts of the case, even when viewed most favorably to the state, showed that the perpetrator fired upon Ms. Griffin from a distance of nearly 700 feet. It was further shown that the two possible shooters were dressed almost identically. The only difference in their clothes is that Petitioner was wearing dark burgundy pants and the other suspect was wearing black pants. The testimony of the state's witness, Officer Emanuel, acknowledged that the distance of 150 to 175 yards (or 450 to 525 feet), even with his 20/10 corrected vision, was too far to discern whether a suspect was carrying a weapon. Thus, pursuant to the state's conflicting and irreconcilable evidence, Ms. Griffin could not discern from nearly 700 feet whether the suspect was carrying a weapon let alone pointing it at her, and certainly could not tell which of the two suspects fired the weapon. Griffin's testimony was even more illogical where she stated that the larger of the two men fired the shot. This is because the difference in the height of the two suspects was only about two (2) inches, and no one could perceive this distinction at a distance of nearly 700 feet.

Issue VII: Section 775.082(8), Florida Statutes (1997)(prison release reoffender act) violates the separation of powers provision of the Florida Constitution because it delegates to the state attorney, an executive branch official, the power to make the final determination as to what sentence to impose upon a qualifying

offender, an inherently judicial function. Section 775.082(8), Florida Statutes (1997), also violates the single subject rule of the Florida Constitution because its passage in Chapter 97-239, Laws of Florida, was accompanied by numerous other provisions not logically related to the subject matter of prison release reoffenders or the means utilized to achieve enhanced sentencing of prison release reoffenders.

ARGUMENT

ISSUE I -- WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF ARMED BURGLARY?

Given that Petitioner was granted permission to use the bathroom by the occupant of the dwelling, it seems that Petitioner's conviction for burglary must have been based upon an unlawful "remaining in" the dwelling after withdrawal of consent to enter and "remain in" the dwelling. In an abundance of caution, however, Petitioner will address both the unlawful "entry" and "remaining in" prongs of the burglary statute.

Under Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000), an entry into a dwelling must be executed with "tresspassory intent" in order to satisfy the unlawful entry element of burglary. Id. at S81, citing People v. Hutchinson, 477 N.Y.S.2d 965, 968 (Sup.Ct.1984), aff'd, 503 N.Y.S.2d 702 (App.Div.1986), appeal denied, 498 N.E.2d 156 (N.Y.1986). In the present case, Bonnie Sims had opened the rear door to her apartment in preparation for hanging some clothes. (R.III,257). The door was actually held in

the open position, as opposed to being merely unlocked but closed. (R.III,220,243). Sims is an acquaintance of Petitioner and his mother. (R.III,258,263). Sims was in the living room talking to her sister when Petitioner entered (along with a codefendant) and asked for permission to use the restroom. (R.III,259). Although Sims had not given Petitioner express permission to enter prior to the entry, Sims granted Petitioner permission to use the bathroom. (R.III,259,263). Sims later asked Petitioner if he was running from the police and Petitioner admitted that he was. (R.III,260). Sims told Petitioner and his friend to leave and grabbed a broom, apparently, for emphasis. (R.III,261).

Although Petitioner did not obtain permission to enter the dwelling prior to entering, no reasonable view of the facts could support a finding that Petitioner entered with trespassory intent. This is true for three reasons adduced by the state: (1) Petitioner and his mother were acquaintances of Bonnie Sims; (2) the rear door through which Petitioner entered was actually open as opposed to merely unlocked; and (3) Sims granted Petitioner permission to use the bathroom. When Bonnie Sims granted Petitioner permission to use her bathroom, she ratified his earlier entry into the dwelling, indicating that neither Petitioner's entry nor continuing presence in the apartment was contrary to her wishes. Moreover, Petitioner's entry into the apartment was not done for the purpose of "terrorizing, shocking, or surprising" an "unknowing" occupant, Bonnie Sims. Delgado, 25 Fla. L Weekly at S82. Petitioner's

conduct in entering the apartment was not of the type intended to be punished under Florida's burglary statute. Id. Petitioner's conviction for armed burglary, therefore, may not be premised upon a trespassory "entry" into the apartment of Bonnie Simms.

Petitioner's conviction for armed burglary may not be premised upon an unlawful "remaining in" the dwelling after withdrawal of consent. In Delgado, this court held that the "remaining in" language "applies only in situations where the remaining in was done surreptitiously." Id. at S82. One example of surreptitious "remaining in" is a shoplifter who remains on the store premises after closing. Id. at S81, citing People v. Gaines, 546 N.E.2d 913, 915 (N.Y.1989). Even accepting that Bonnie Sims withdrew her consent for Petitioner to remain in her apartment, no reasonable view of the facts could support a finding that Petitioner's continued "remaining in" was done in a surreptitious or secretive manner. Nor can it be said that Petitioner's "remaining in" was done for the purpose of "terrorizing, shocking, or surprising" an "unknowing" occupant, Bonnie Sims, as required by Delgado. Assuming Petitioner was armed, he never showed a weapon to Bonnie Sims, never forced her to do anything, and didn't even close the door behind him after entering. (R.III,265). Bonnie Sims certainly was not threatened in any manner by Petitioner's presence in her apartment, as evidenced by the fact that she grabbed a broom,

apparently for emphasis, when she told him to leave. (R.III,261).[2] Accordingly, Petitioner's conviction for armed burglary must be reversed.

ISSUE II -- WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSTRUCTING THE JURY ON THE ELEMENTS OF ARMED BURGLARY?

The trial court, through no fault of its own, committed fundamental error in instructing the jury on the elements of burglary, where the jury instructions failed to conform to the new law as pronounced in Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000). The Delgado interpretation of the burglary statute applies to all cases not yet final, including the present case. Smith v. State, 598 So. 2d 1063 (Fla. 1992)(decision of Florida Supreme Court in nonfinal criminal case must be given retrospective application in every case pending on direct review or not yet final). Smith v. State provides that in order to benefit from the change in law, "the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." Smith v. State, 598 So. 2d at 1066. In the present case, no objection was required. State v. Delva, 575 So. 2d 643 (Fla. 1991)(erroneous jury instruction on element of offense constitutes fundamental error).

> A defendant has the right to have a court correctly and intelligently instruct the jury

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[2] It is apparent that Bonnie Sims was not threatened by the presence of the co-defendant in her house, either. Sims testified that after she told the "other boy" to get out of the house he was scared and started to cry. (R.III,266).

> on the essential and material elements of the crime charged and required to be proven by competent evidence. Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953). When an instruction excludes a fundamental and necessary ingredient of law required to substantiate the particular crime, such failure is tantamount to a denial of a fair and impartial trial.

Chicone v. State, 684 So. 2d 736, 744-745 (Fla. 1996); see also Cohen v. State, 125 So. 2d 560, 562 (Fla. 1960)(statute prohibiting publication of any obscene material impliedly requires scienter, i.e., "knowing" material to be obscene; giving of jury instruction eliminating scienter, i.e., "knowing" element, constitutes "fundamental error."); Viveros v. State, 699 So. 2d 822 (Fla. 4th DCA 1997)(inadequate jury instruction on elements of burglary constituted fundamental error); Jones v. State, 666 So. 2d 995 (Fla. 5th DCA 1996); Ward v. State, 655 So. 2d 1290 (Fla. 5th DCA 1995). Because the error is "fundamental," this issue may be raised for the first time on appeal.

Petitioner suggests that Delgado requires a number of changes in the elements of burglary. To prove an unlawful entry, the state must prove: (1) the elements of trespass as set forth in section 810.08, Florida Statutes; and (2) the entry was done with intent to terrorize, shock or surprise an unknowing occupant. To prove an unlawful "remaining in" after withdrawal of consent to enter, the state must prove that the "remaining in" was: (1) surreptitious or secretive; and (2) done with intent to terrorize, shock or surprise an unknowing occupant.

ISSUE III -- WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN SENTENCING PETITIONER TO LIFE IMPRISONMENT FOR A FIRST DEGREE FELONY WHERE THE PRISON RELEASE REOFFENDER STATUTE PROVIDES FOR A SENTENCE OF THIRTY YEARS FOR THE COMMISSION OF A FIRST DEGREE FELONY?

Petitioner was convicted of burglary with a firearm, which is a first degree felony punishable by a term of years not exceeding life. § 810.02(2)(b), Fla. Stat. (1997).[3] The trial court sentenced appellant to life in prison under the prison release reoffender act. (R.I,118,156). This was error. Moreover, this error constituted an "illegal" sentence and "fundamental error" cognizable for the first time on appeal.

Section 775.082, Florida Statutes (1997), the prison release reoffender act, does not contain a specific sentencing provision for a conviction for a first degree felony punishable by life. It does, however, contain a sentencing provision for a conviction for a first degree felony, which would apply in this case, because the term "first degree felony" encompasses first degree felonies punishable by life. See Burdick v. State, 594 So. 2d 267,268 (Fla. 1992)(under habitual offender statute, enhanced sentence for first degree felonies includes enhancement for first degree felonies punishable by life). This is true because the legislature has created only five categories of felonies: (1) capital felony; (2) life felony; (3) felony of the first degree; (4) felony of the

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[3] Notably, the trial court recognized that the crime for which appellant was convicted (armed burglary) was a "first degree felony." (R.I,118,156).

second degree; and (5) felony of the third degree. See Burdick v. State, 594 So. 2d 267,268 (Fla. 1992); § 775.081(1), Fla. Stat. (1997).

It is a well established principle of statutory construction that the legislature is presumed to know the judicial constructions of a law when enacting a new version or amendment to that law. Brannon v. Tampa Tribune, 711 So. 2d 97 (Fla. 1st DCA 1998)(citing Collins Investment Co. v. Metropolitan Dade County, 164 So. 2d 806 (Fla. 1964)). Furthermore, the Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version. Brannon v. Tampa Tribune, 711 So. 2d 97 (Fla. 1st DCA 1998)(citing Deltona Corp. v. Kipnis, 194 So. 2d 295 (Fla. 2d DCA 1966)). In the present case, the legislature should be presumed to have adopted the established judicial construction that the term "first degree felony" includes "first degree felonies punishable by life." This logically leads to the conclusion that the term "felony punishable by life", as used in section 775.082(8)(a)2.a., refers to "life felonies," and must mean something other than "first degree felonies punishable by life." If the legislature did not intend this construction, it would have used the term "first degree felonies punishable by life" in section 775.082(8)(a)2.a., Florida Statutes (prison release reoffender act).

Under the prison release reoffender act the penalty for the commission of a first degree felony is 30 years. §

775.082(8)(a)2.b., Fla. Stat (1997). The penalty for a life felony is life. § 775.082(8)(a)2.a., Fla. Stat (1997). A "first degree felony punishable by life" is not a "life felony." § 775.082(3)(b), Fla. Stat. (1997). Robinson v. State, 642 So. 2d 644 (Fla. 4th DCA 1994); Green v. State, 630 So. 2d 1193 (Fla. 1st DCA 1994); Crabtree v. State, 624 So. 2d 743 (Fla. 5th DCA 1993), rev. denied, 634 So. 2d 623 (Fla. 1994); Sterling v. State, 584 So. 2d 626 (Fla. 2d DCA), rev. denied, 592 So. 2d 682 (1991). Assuming the prison release reoffender act is constitutional, Petitioner should have been sentenced to a term of thirty (30) years under the prison release reoffender act upon his conviction for the first degree felony of armed burglary.

At the very least, the statute is ambiguous and should be construed in appellant's favor because reasonable persons may differ on whether the statute provides a thirty year sentence or a life sentence for a first degree felony punishable by life. The ambiguity in the statute is evidenced by the fact that even the state was confused as to the applicable sentence. In its notice of intent to seek prison release reoffender sentencing, the state indicated its intention "to have the Defendant sentenced to thirty (30) years imprisonment." (R.I,29).

If the court were to find the prison release reoffender act ambiguous, it must be construed in the manner most favorable to the accused. Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991); Lamont v. State, 610 So. 2d 435 (Fla. 1992). Hence, applying the

rule of statutory construction where any ambiguity inures to Petitioner's benefit, Section 775.021(1), Florida Statutes (1997), it is necessary to find that under the prison release reoffender act Petitioner's sentence for armed burglary should be thirty years.

> **ISSUE IV** -- WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF BURGLARY OF A DWELLING?

Standard of Review -- The trial court and the appellate court are equally capable of determining whether it is proper to grant a judgment of acquittal. State v. Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). Appellate courts may not consider the weight of the evidence as a basis for overturning a criminal conviction, but the sufficiency of the evidence is a proper subject of concern on review. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981); State v. Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). The standard of appellate review used to determine the sufficiency of the evidence in a criminal case is the competent, substantial evidence test. Bradford v. State, 460 So. 2d 926 (Fla. 2d DCA 1984), rev. denied, 467 So. 2d 999 (Fla. 1984).

Merits -- The legal definition of "competent, substantial evidence" is articulated as follows:

> Substantial evidence is such evidence as will establish a substantial basis of fact from which one fact at issue can be reasonably inferred, i.e., such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957). To be competent

> the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. Id.

The City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So. 2d 955, 957 (Fla. 4th DCA 1990). Thus, in application, the inconsistent, illogical, or irreconcilable testimony of a witness cannot constitute competent, substantial evidence to support a finding of fact.

In criminal law, it is demonstrated that a witness' conflicting testimony at trial cannot constitute competent, substantial evidence to support a conviction. In Coleman v. State, 592 So. 2d 300 (Fla. 2d DCA 1991), Michael Coleman was convicted of, inter alia, burglary of a dwelling. The principal factual dispute was whether Coleman received permission to enter a dwelling where he flushed some cocaine down a toilet. On direct examination the state's witness, Borrero, denied giving Coleman permission to enter the dwelling. On cross examination, however, Borrero stated that she did give Coleman permission to enter, clarifying that she knew Coleman well enough, and would have given him permission to enter the house. On redirect, Borrero further clarified that her son may have given Coleman actual permission to enter the home. The appellate court determined that Borrero's testimony was "sufficiently ambiguous" on the question of consent and reversed his conviction on that count. Although the Coleman opinion does not use the specific term "competent, substantial evidence," it is

clear that the court found Borrero's conflicting and ambiguous testimony could not constitute competent, substantial evidence.

In Holman v. State, 603 So. 2d 111 (Fla. 4th DCA 1992), the state's witness, victim Robert Vaughan, testified that Holman approached a vehicle along with Raymond Branch and told Branch to "shoot him, shoot him." When confronted with his pretrial deposition, however, Vaughan admitted that he had earlier testified that "it was possible" that Holman actually stated "don't shoot him, don't shoot him." The Holman court, therefore, found Vaughan's testimony legally insufficient to support Holman's convictions for shooting into an occupied vehicle and aggravated battery.

An analogous situation is demonstrated in the well known case of Moore v. State, 485 So. 2d 1279 (Fla. 1986), wherein the Florida Supreme Court held that a witness' prior inconsistent statement is legally insufficient to sustain a conviction where the prior inconsistent statement is the only substantive evidence of guilt.

In the present case, Petitioner's conviction on the charge of burglary is not supported by competent, substantial evidence because the evidence presented by the state showed that Petitioner had express consent to "remain in" the dwelling of Bonnie Sims.[4]

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[4] Under Florida law, the "consent" defense to burglary is an affirmative defense. State v. Hicks, 421 So. 2d 510 (Fla. 1982). A defendant, however, is not required to take the witness stand or to present other witnesses in order to raise such an affirmative defense. The affirmative defense of consent may be raised or established from cross-examination of the state's witnesses, alone. Coleman v. State, 592 So. 2d 300 (Fla. 2d DCA

Bonnie Sims testified that she knew Petitioner, and also knew Petitioner's mother. (R.III,258,263). Deborah Sims, Bonnie's sister, also knew Petitioner Michael Brown. (R.III,268). Both Bonnie Sims and Officer Brown testified that Sims' rear door was already open when Petitioner entered the apartment. (R.III,220,243,257). Upon entering the apartment, Petitioner immediately asked Bonnie Sims for permission to use her bathroom. Sims granted appellant permission to use her bathroom. (R.III,259,263). When Sims granted appellant permission to use her bathroom, such permission reasonably ratified Petitioner's initial entry into the apartment, even though Sims did not give express permission for the entry prior to its occurrence. See Coleman v. State, 592 So. 2d 300 (Fla. 2d DCA 1991)(even though express permission not granted prior to entry, since witness knew defendant well enough and would have given him permission to use bathroom record sufficiently ambiguous, i.e., lack of competent, substantial evidence, to support burglary conviction). Sims' expression of consent to use her bathroom, furthermore, gave Petitioner permission to "remain in" the dwelling.[5]

1991). It stands to reason that the consent defense may be raised by the state's direct examination of its own witnesses. See e.g., McCoy v. State, 723 So. 2d 869 (Fla. 1st DCA 1998) (direct testimony of victim sufficient to establish existence of consent defense). Once the existence of the consent defense has been raised or established, the burden shifts to the state to prove the non-existence of the defense beyond a reasonable doubt. Hansman v. State, 679 So. 2d 1216 (Fla. 4th DCA 1996).

[5] Even if Petitioner lied to Bonnie Sims about his need to "use the bathroom," the consent to "enter" or "remain in"

Ms. Sims suspected, however, that Petitioner might be running from the police. Sims confronted Petitioner, and asked him if he was running from the police. (R.III,260). Petitioner admitted that he was running from the police. (R.III,260). Sims then withdrew her consent and told Petitioner to get out of the house. (R.III,260). According to Sims: "about that time the police got there." (R.III,260). Sims told the police "here they is." (R.III,261). The police then entered and told the two men to get down on the floor. (R.III,261). According to Sims, the two men complied with the order and got down on the floor. (R.III,262). Petitioner Michael Brown never had an opportunity to leave the house. (R.III,264-265). Sims explained that by the time Petitioner came back from the hallway, the police were at the back door and the front door. (R.III,264). Petitioner never ran out of the front door. (R.III,265). Sims stated that this all happened very quickly and was "real confusing." (R.III,265).

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obtained through such a subterfuge is not "unlawful." One Florida court has refused to consider whether an entry obtained by subterfuge is unlawful, assuming such an entry to be consensual. See Thorpe v. State, 559 So. 2d 1285 (Fla. 2d DCA 1990). While the use of deceit may be relevant to prove the third element of intent to commit the offense of resisting an officer without violence, it does not vitiate the consent, nor convert a lawful entry into a burglary. The mere commission of an offense inside a dwelling does not convert a consensual "entry" or "remaining in" into a burglary. Cf. K.P.M. v. State, 446 So. 2d 723 (Fla. 2d DCA 1984)(entry not "consensual" where occupant son permitted friend to enter father's home specifically for purpose of committing theft), with Miller v. State, 713 So. 2d 1008 (Fla. 1998)(mere commission of offense in premises "open to the public" does not constitute burglary, regardless of whether consent to "remain in" withdrawn).

Officer Brown testified that after Petitioner ran in the rear door he immediately ran to the front door believing that other officers would cover the rear door. (R.III,220). Officer Brown said that as soon as he got to the front door, "both subjects were headed out." (R.III,221). This testimony suggests that Petitioner was in the act of complying with Sims' demand to leave the apartment. Officer Brown said Joiner was in front and Petitioner was "stumbling behind." (R.III,222). On cross-examination, Officer Brown explained that he confronted Joiner just as he was exiting the apartment, and that Joiner was only about one arm's length out of the front door. (R.III,245). Since Petitioner was behind Joiner, this testimony suggests that Petitioner never had an opportunity to leave the apartment, corroborating the testimony of Bonnie Sims. Officer Brown also testified that when the suspects saw his gun they turned around and ran back into the house. (R.III,222). Officer Brown arrested Joiner in the living room, and said that Petitioner later came back from the hallway and was arrested near the sofa. (R.III,222-23). There is some ambiguity in the testimony of the state's witnesses, since Bonnie Sims testified that Petitioner came out of the hallway before the police arrived and not after, and that Petitioner complied with the officer's demand to get down on the floor. (R.III,262). For Bonnie Sims' testimony to be consistent with Officer Brown's testimony, it would be necessary for Petitioner to have gone down the hallway twice. Deborah Sims' testified, however, indicates that Petitioner came

down the hallway only once. (R.III,269).

In any event, the circumstances of the case as presented by the state are such to prove that Ms. Sims' withdrawal of consent for appellant to "remain in" the apartment and his subsequent arrest occurred with such rapidity and in the midst of such turmoil, that Petitioner never had an opportunity to vacate the premises in accordance with Ms. Sims wishes. The state, therefore, failed to present legally sufficient evidence to demonstrate that appellant willfully[6] failed to vacate the premises after the withdrawal of consent to "remain in" the dwelling. Petitioner did not "willfully" "remain in" the dwelling but did so upon threat of force, i.e., Officer Brown brandishing a weapon and confronting Petitioner and thereby thwarting Petitioner's intended exit. That is not to say that Officer Brown should have allowed Petitioner to escape, or that Petitioner should have disobeyed the officer's command and exited the dwelling at Sims' insistence. Rather, the focus of the inquiry is whether Petitioner "willfully" intended to "remain in" the dwelling after the withdrawal of consent. He did not. Petitioner did not willfully remain in the dwelling, he was

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[6] This element (affirmative defense), like most elements of all criminal offenses must be presumed to require scienter, or "knowingly" or "willingly" entering or remaining in the dwelling without authorization. See Waites v. State, 702 So. 2d 1373 (Fla. 4th DCA 1997)(noting that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence," and that strict liability crimes are "disfavored," citing Chicone v. State, 684 So. 2d 736, 743 (Fla. 1996)(quoting Dennis v. State, 431 U.S. 494, 500, 95 L.Ed. 1137, 71 S.Ct. 857 (1951)).

forced to "remain in" the dwelling due to the fact of his arrest. That being the case, the state failed to present legally sufficient evidence to rebut Petitioner's defense of consent. Stated alternatively, the record does not contain competent, substantial evidence to support a finding that Petitioner either willfully "entered" or "remained in" the dwelling without consent. The trial court, therefore, erred as a matter of law in denying Petitioner's motion for judgment of acquittal.

Petitioner's conviction is also fundamentally erroneous because of the state's failure to present a prima facie case after Petitioner's consent defense, an affirmative defense, was properly placed in issue. Under the present circumstances, Petitioner's motion for judgment of acquittal which raised, inter alia, the question of the sufficiency of the evidence on the affirmative defense of consent, was sufficient to preserve for appeal the issue raised on appeal. This is true not only because the record as a whole reveals the parties' and the trial court's understanding that the issue of consent was placed before the court, see Jaggers v. State, 536 So. 2d 321, 323 (Fla. 2d DCA 1988), but because the lack of competent, substantial evidence on the issue of consent means that Petitioner was convicted for a crime (burglary) that was not committed. The absence of evidence to prove an essential element or as here, affirmative defense, where the burden has shifted to the state, constitutes fundamental error which can be raised on appeal even if not specifically argued below. Troedel v. State,

462 So. 2d 392 (Fla. 1984); Griffin v. State, 705 So. 2d 572 (Fla. 4th DCA 1998); Burke v. State, 672 So. 2d 829 (Fla. 1st DCA 1995); Brown v. State, 652 So. 2d 877 (Fla. 5th DCA 1995); Harris v. State, 647 So. 2d 206 (Fla. 1st DCA 1994); Valdez v. State, 621 So. 2d 567 (Fla. 3d DCA 1993).

Petitioner is aware of case law which holds that a "boilerplate" motion for judgment of acquittal is inadequate to preserve for appeal the question of the legal sufficiency of the evidence. See e.g., Cornwell v. State, 425 So. 2d 1189 (Fla. 1st DCA 1983). The rationale for this rule, where applicable, is that the failure to set forth the specific grounds for the motion for judgment of acquittal keeps the state from seeking leave to re-open its case in order to supply the requisite proof if such proof is available to the state. Rains v. State, 671 So. 2d 815 (Fla. 5th DCA 1996)(Griffin, J., dissenting). The rationale underlying the case law holding a "boilerplate" motion insufficient does not exist in the present case, where Petitioner's affirmative defense of consent was presented to the court and thoroughly explored by both parties on direct and cross-examination, and where the relevant witnesses (Bonnie Sims and Officer Brown) were questioned specifically on the subject. The state could not have explored the issue any more thoroughly, nor presented additional witnesses on the subject of consent. Petitioner's motion for judgment of acquittal, therefore, was legally sufficient to preserve the issue for appeal under the authorities cited above. Nor does the

Criminal Appeals Reform Act compel a different result since the matter is recognized to involve fundamental error.

> **ISSUE V** -- WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO INSTRUCT THE JURY THAT THE SECOND "ELEMENT" OF BURGLARY REQUIRES CRIMINAL INTENT OR "KNOWINGLY" OR "WILLFULLY" ENTERING OR REMAINING IN THE DWELLING WITHOUT AUTHORIZATION?

As to the second "element" of the offense of burglary of a dwelling, the trial court, without objection, instructed the jury as follows:

> Michael Brown did not have the permission or consent of Bonnie Sims or anyone authorized to act for her to enter or remain in the structure at the time.

(R.III,341). This "element" of the offense, like most elements of all criminal offenses must be presumed to require scienter, or "knowingly" or "willfully" entering or remaining in the dwelling without "authorization." See Waites v. State, 702 So. 2d 1373 (Fla. 4th DCA 1997)(noting that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence," and that strict liability crimes are "disfavored," citing Chicone v. State, 684 So. 2d 736, 743 (Fla. 1996)(quoting Dennis v. State, 431 U.S. 494, 500, 95 L.Ed. 1137, 71 S.Ct. 857 (1951)).[7] Under the plain terms of the instruction, the

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[7] Compare the statutory elements of burglary to the elements of the offense of trespass in a structure or conveyance, section 810.08, Florida Statutes, which include: (1) willful entry or remaining; (2) in structure or conveyance; (3) without authorization, or; (4) after having been authorized to enter or remain, refusing to comply with order to depart issued by authorized individual. See Jones v. State, 666 So. 2d 960 (Fla. 3d DCA 1996).

jury was not required to determine whether Petitioner "willfully" "remained in" the dwelling without authorization. Rather, the instruction as to this element makes Petitioner strictly liable for entering or "remaining in" without authorization. That is, the jury was instructed that the second element of the offense would be satisfied if Bonnie Sims withdrew her consent to remain in, and Petitioner wished to leave and began to leave, but was prevented from leaving by the lawful exercise of force attendant to his arrest.

It must be remembered that there was some conflict in the state's evidence as to whether Petitioner headed for the bathroom before or after Officer Brown entered the front door. Under the state's theory of prosecution, if Petitioner made his way to the bathroom after Officer Brown entered and after Sims withdrew her consent, then Petitioner would have satisfied the element of "remaining in" the dwelling without consent. On the other hand, if the jury adopted Bonnie Sims contrary testimony that Petitioner went to the bathroom before Officer Brown arrived and was making his way to the front door after she told him to leave when Officer arrived and arrested him, then Petitioner did not "willfully" "remain in" the dwelling without consent.

The problem with the jury instruction is that it unlawfully renders this factual dispute irrelevant. Under the instruction given, Petitioner would be found guilty in either case, the second element would be satisfied since he would strictly liable for his

presence in the dwelling after consent to "remain in" was withdrawn -- even if he attempted to leave but was prevented from doing so by his arrest. Petitioner did not refuse to leave the premises upon order of Bonnie Sims, he was prevented from leaving by his arrest. This legal defense to the charge was foreclosed by the fundamentally erroneous jury instruction.

To the extent that the jury instruction constitutes an interpretation of the statutory offense of burglary of a dwelling, any interpretation of the statute which eliminates the scienter requirement must be found unconstitutional, in that it is tantamount to a denial of a fair and impartial trial. Chicone v. State, 684 So. 2d 736, 744-745 (Fla. 1996). In the present case, the court committed constitutional error by giving a jury instruction which imposes "strict liability" as to the second element of the offense. Although this argument was not raised in the trial court, the error is "fundamental." See Cohen v. State, 125 So. 2d 560, 562 (Fla. 1960)(statute prohibiting publication of any obscene material impliedly requires scienter, i.e., "knowing" material to be obscene; giving of jury instruction eliminating scienter, i.e., "knowing" element, constitutes "fundamental error."); Viveros v. State, 699 So. 2d 822 (Fla. 4th DCA 1997); Jones v. State, 666 So. 2d 995 (Fla. 5th DCA 1996); Ward v. State, 655 So. 2d 1290 (Fla. 5th DCA 1995). Because the error is "fundamental," this issue may be raised for the first time on appeal.

ISSUE VI -- WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF AGGRAVATED ASSAULT?

[NOTE: Petitioner adopts the arguments set forth in ISSUE IV pertaining to the standard of review, analysis of what constitutes competent, substantial evidence, legal sufficiency of the motion for judgment of acquittal, and fundamental error analysis.]

Petitioner's conviction on the charge of aggravated assault is not supported by competent, substantial evidence. The victim claimed that she was able to identify Petitioner as the man who shot at her "because I remember the clothes and things that he had on, the tee shirt, the different colors and stuff and he was much larger than the other gentleman was." (R.II,160). The victim's identification testimony fails the competent, substantial evidence test because it is not reasonably adequate to support the ultimate conclusion that appellant fired a weapon at her, i.e., illogical. DeGroot v. Sheffield. The facts of the case, even when viewed most favorably to the state, showed that the perpetrator fired upon Ms. Griffin from a distance of nearly 700 feet. (R.II,175-176). Victim Griffin conceded this much. (R.II,175-176). It was further shown that the two possible shooters were dressed almost identically. Griffin conceded that both men were dressed in dark clothing. (R.II,169). Both men were wearing black shirts. (R.II,170). The only difference in their clothes is that Petitioner was wearing dark burgundy pants and the other suspect was wearing black pants. Officer Brown said Michael Brown was wearing some burgundy pants

and black shirt, and Jeffrey Joiner was dressed in black pants, black shirt and black shoes also. (R.III,216). The testimony of the state's witness, Officer Emanuel, acknowledged that the distance of 150 to 175 yards (or 450 to 525 feet), even with his 20/10 corrected vision, was too far to discern whether a suspect was carrying a weapon.

Victim Griffin's testimony that Petitioner fired a shot at her is wholly illogical and must be rejected under the competent, substantial evidence test for a number of reasons. First, Griffin's testimony is irreconcilable with Officer's Emanuel's testimony that the distance of 450 to 525 feet is too great to discern whether a person is carrying a firearm, even with his 20/10 corrected vision. Griffin claimed to be able to discern this fact at the distance of approximately 700 feet. Second, the distance involved here is too great even to discern which of the codefendants possessed the weapon at the time it was fired. This is especially true since Griffin conceded that she at one point lost sight of Petitioner when she went in to call the police. (R.II,158). When Griffin exited her house after calling the police, she very well may have confused Petitioner for codefendant Joiner, since the next time she saw the auto theft suspect he had been joined by another man wearing very similar clothing and the two men were approximately 700 feet away, near the church. (R.II,158). As argued by defense counsel, even if the distance was only 500 feet, that is almost the length of two football fields.

(R.III,331). Third, Griffin's identification testimony is wholly illogical and internally inconsistent where she testified that she could identify Petitioner from 700 feet as pointing a weapon at her and firing, yet she conceded that from the distance of about forty (40) feet she could not tell whether either of suspects had facial hair because the distance was too great -- "due to the distance." (R.II,173). As noted in closing argument, Petitioner had a mustache on the day he was arrested, as indicated by the state's exhibit. (R.II,332). Finally, Griffin's identification testimony was even more illogical where she stated that the larger of the two men fired the shot. Officer Brown testified that, at most, the difference in the height of the codefendants is two inches. (R.III,248). It is wholly illogical to believe the Griffin could discern, from approximately 700 feet, a two inch difference in the height of two suspects, and rely on that a basis of identification. DeGroot v. Sheffield. The trial court, therefore, erred in denying appellant's motion for judgment of acquittal of the charge of aggravated assault.

ISSUE VII -- WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN FINDING SECTION 775.082(8), THE PRISON RELEASE REOFFENDER STATUTE, CONSTITUTIONAL?

[NOTE: The issue and arguments raised here have been previously presented to this court in Woods v. State, case no. 95,281, orally argued on November 3, 1999, and still pending before this court.]

The Prison Release Reoffender Act (PRRA) is unconstitutional

in two respects. First, it violates the separate of powers provision of the Florida Constitution. Art. III, § 3, Fla. Const. Second, it violates the single subject restriction of the Florida Constitution. Art. III, § 6, Fla. Const.

The PRRA, section 775.082(8), Florida Statutes (1997), as construed in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), review granted, 740 So. 2d 529 (Fla. 1999), violates the separation of powers provision because it delegates legislative authority to establish penalties for crimes, and judicial authority to impose sentences, to the state attorney as an official of the executive branch. The act provides that the state attorney, upon a showing that an offender qualifies as a prison release reoffender, shall have the discretion to determine whether the offender shall be subject to the mandatory sentencing provisions of the act upon consideration of certain subjective criteria including the wishes of the victim and "other extenuating circumstances" which preclude "just prosecution" of the offender. § 775.082(8)(d)1.c. & d., Fla. Stat. (1997). The legislature cannot delegate to the state attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby prohibit the court from performing its inherent judicial function of imposing sentence. The legislature may enact mandatory sentences. See e.g., O'Donnell v. State, 326 So. 2d 4 (Fla. 1975) (finding thirty year minimum mandatory sentence for kidnaping constitutional). The state attorney enjoys virtually unlimited discretion in making charging

decisions. State v. Bloom, 497 So. 2d 2 (Fla. 1986). But the power to impose sentence within the limits provided by law is traditionally vested in the judiciary. Smith v. State, 537 So. 2d 982, 986 (Fla. 1989). Florida's habitual offender law, section 775.084, Florida Statutes, does not offend the separation of powers principle. Although the state attorney may seek habitual offender sentencing, the trial judge retains discretion to find such enhanced sentencing not necessary for the protection of the public. Seabrook v. State, 629 So. 2d 129, 130 (Fla. 1993). Similarly, in State v. Benitez, 395 So. 2d 514 (Fla. 1981), the mandatory sentence provided for drug trafficking was accompanied by an "escape valve" which could only be triggered by initiative of the state attorney. In Benitez, the statute did not violate the separation of powers provision because it vested in the prosecutor only the narrow authority to determine whether a defendant had provided substantial assistance, an area particularly within the knowledge of the prosecutor. In addition, the separation of powers clause was not offended because the trial court retained the final discretion on what sentence to impose. Id. The PRRA is different, however. When the state attorney makes the decision to charge an offender as a prison release offender, the state attorney also makes the final determination as to the sentence to be imposed. The legislature has no authority to delegate to the executive branch an inherent judicial power. Gough v. State ex rel. Sauls, 55 So.2d 111,116 (Fla. 1951) (legislature without authority to

delegate to Avon Park City Council power to determine legality of validity of votes cast). In the present case, the decision of the state attorney to charge a defendant as a prison release reoffender also constituted a decision by the state attorney as to what sentence to impose. In this respect, the PRRA violates the separation of powers principle.

In the alternative, Petitioner notes that the Second and Fourth District Courts of Appeal have found the PRRA constitutional, but have interpreted the PRRA to retain sentencing discretion in the trial court. In State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999), and State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), review granted, 741 So. 2d 1137 (Fla. 1999), the district courts held that the trial court retained the discretion to apply the statutory exceptions even where the state attorney seeks enhanced sentencing and (impliedly) rejects the statutory exceptions. In the alternative, Petitioner suggests that this court adopt the rationale of the Second and Fourth District Courts of Appeal finding the PRRA constitutional.

Next, the PRRA also violates the single subject requirement of the Florida Constitution. Art. III, § 6, Fla. Const. The legislation challenged in this case was passed as Chapter 97-239, Laws of Florida. In addition to creating the PRRA, Chapter 97-239 amended or created sections 944.705, 947.141, 948.06, 948.01, and 958.14, Florida Statutes (1997). These provisions concern matters

ranging from whether a youthful offender shall be committed to the custody of the department, to when court may place a defendant on probation or in community control if the person is a substance abuser. §§ 948.01, 958.14, Fla. Stat. (1997). Other subjects include expanding the category of persons authorized to arrest a probationer or person on community control for violation. § 948.06, Fla. Stat. (1997). The only other portion of Chapter 97-239 that relates to the subject of release reoffenders is section 944.705, Florida Statutes (1997), requiring notification of inmates of the consequences of the Act for the commission of criminal activity within three years of release from prison.

The statute at issue violates the single subject requirement because provisions dealing with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release are matters that are not reasonably related to a specific mandatory punishment provision for persons convicted of certain crimes within three years of release from prison. If the single subject rule means only that "crime" is a subject, then the legislation can pass constitutional muster, but that is not the rationale utilized by the supreme court. The proper manner of review is to consider the purpose of the various provisions and the means provided to accomplish those goals. When so viewed it is apparent that several subjects are contained in the legislation. See Bunnell v. State, 453 So. 2d 808 (Fla. 1994); State v. Johnson, 616 So. 2d 1 (Fla. 1993); Burch v. State, 558 So. 2d 1

(Fla. 1990); Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981); Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998).

CONCLUSION

In light of the argument and authority presented in ISSUE I, Petitioner requests that the court reverse his conviction for armed burglary and remand for resentencing. On ISSUE II, appellant requests that the court reverse his conviction for armed burglary and remand for a new trial on that charge. On ISSUE III, Petitioner requests that the court vacate appellant's sentence and remand for resentencing. On ISSUE IV, Petitioner requests that the court reverse his conviction for armed burglary and remand for resentencing. On ISSUE V, Petitioner requests that the court reverse his conviction for armed burglary and remand for a new trial on the charge of armed burglary. On ISSUE VI, Petitioner requests that the court reverse his conviction for aggravated assault and remand for resentencing. On ISSUE VII, Petitioner requests that the court vacate his sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Daniel A. David, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to Appellant, on this 25th day of February, 2000.

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