IN THE SUPREME COURT OF FLORIDA

CASE No. 86,990

JEFFREY ARTHUR GABER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS OF APPELLANT JEFFREY ARTHUR GABER

Benjamin S. Waxman, Esquire
ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.
Counsel for Appellant/Petitioner
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
(305) 858-9550

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STATEMENT OF THE CASE

Jeffrey Gaber and codefendant Dheraj Persaud were charged by amended information with armed burglary of a dwelling (count I); grand theft of the same firearm giving rise to count I (count II); burglary of a dwelling (counts III, V, VII, IX, X, XII); petit theft (counts IV, VI); grand theft (counts VIII, XI); carrying a concealed weapon (count XIII); and, obstructing an officer without violence (count XIV). (RI-93-7).[1] Mr. Gaber pled not guilty to all counts. (I-51).

Codefendant Persaud filed a pretrial motion to suppress evidence, (SR), which was adopted by Mr. Gaber. (I-63). Mr. Gaber urged that the warrantless stop of the vehicle in which he was a passenger, and his subsequent detention, constituted to a *defacto* arrest, unsupported by probable cause, and in any event, his detention was unsupported by reasonable suspicion. (I-94-103; SR-4). Following a hearing, (II-25-103), the trial court denied the motion. (I-73).

The Defendants' joint jury trial commenced before the Honorable J. Jefferson Overby on July 18, 1994. At the conclusion of the state's case, Mr. Gaber moved for judgments of acquittal. (III-468-78). The court denied these motions. (III-475). At the conclusion of all the evidence, Mr. Gaber renewed, and the court denied, his motion for judgments of acquittal. (III-477-78). On July 19, 1994, the jury returned guilty verdicts on all counts except count XIV (obstructing an officer without violence). (I-78-91).[2]

On August 16, 1994, the court sentenced Mr. Gaber as follows: count I (armed burglary of a dwelling), 157.875 months imprisonment, with a three year minimum mandatory term based upon the firearm, followed by 15 years probation, (I-111-12; III-581); counts III, V, VII, IX, X, XII

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[1]Co-defendant Persaud was not charged in counts XIII and XIV.

[2]Count VIII was submitted to the jury as the reduced charge of petit theft. (I-85; III-469).

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(burglary of a dwelling), 157.87 months imprisonment, followed by 22 months probation, concurrent with the sentence on count I, (I-113-34; III-583-6); counts II and XI (grand theft), five years imprisonment, followed by 22 months probation, concurrent with prior sentences, (I-113-14, 131-2; III-583, 585); counts IV and VIII (petty theft), one year imprisonment, concurrent with all other sentences, (I-117-18, 125-6; III-583, 585); and count XIII (carrying a concealed weapon), one year imprisonment, concurrent with all prior sentences. (I-135-6; III-585).

On appeal, the Third District Court of Appeal rejected Mr. Gaber's arguments that the evidence was legally insufficient to support his convictions, evidence against him should have been suppressed, and his convictions and sentences for armed burglary and grand theft of a firearm violated double jeopardy where the theft of the firearm constituted the basis for enhancing burglary to armed burglary. ***Gaber v. State***, 662 So.2d 422 (Fla. 3d DCA 1995). The court, however, certified conflict regarding this last issue with ***Marrow v. State***, 656 So.2d 579 (Fla. 1st DCA 1995), which held that convictions for both armed burglary and grand theft of a firearm violated double jeopardy. *Id.* at 424. Upon Mr. Gaber's notice to invoke discretionary jurisdiction, this court postponed its decision on jurisdiction and set a briefing schedule.

STATEMENT OF THE FACTS

Suppression Hearing

On January 14, 1994, at about 3:00 a.m., Richard Curran heard a noise that sounded like aluminum shutters banging. (II-26). He looked out his window and saw someone in an unlit area, underneath a house, more than 100 feet away, across the canal. (II-26, 28, 31-33). He was unsure if the person was a renter or owner. (II-26). The person then vanished into the darkness. (II-27). Shortly afterwards Curran looked and saw two figures under the house. (II-27-28). One was

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holding a ladder. Curran could not describe or identify either individual. (II-34). This time, he went to his porch and yelled at the figures. The one with the ladder set it down; the two then vanished into the darkness. (II-28). Curran never saw either individual enter or exit the house or carry any property away. (II-35). He did not see them commit any crime. (II-36). Curran's observation lasted between 15 and 30 seconds. (II-36). He did not see these individuals again. (II-28).

Shortly afterwards, Curran heard a car start and saw a vehicle leave the area with its headlights off. (I-28-29). He did not see the two individuals he saw near the house get into this vehicle. (II-36). He could not see the occupants or anything else inside the vehicle. (II-37). He saw the vehicle travel south but could not see where it went from there. (II-38).

Upon the vehicle's departure, Curran telephoned 911. He reported a possible burglary and described the vehicle as either a white or yellow Camaro or Firebird, heading out towards US1. (II-30, 39). Curran was unable to provide the license number, identify the state of the tag, describe any distinctive features of the car, or advise which direction on US1 it would be traveling. (II-41-43, 45). He could not describe the two figures he had seen. (II-34). He knew nothing about any burglaries in the area. (II-46).

Monroe County Deputy Sheriff Palmeri was at the police station when he received the BOLO. (II-47-48, 51). Palmeri testified that the dispatch advised that two individuals were seen removing a ladder from a residence[3] and then leaving the Port Antigua area in a white Firebird or Camaro type vehicle. (II-51, 63). He was not told there had been a suspected burglary. (II-64). Although he had not personally answered any burglary reports in the area during the previous two

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[3]Mr. Curran never saw the suspects remove the ladder from the house. (II-35).

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weeks, he knew that other officers had. (II-48-50). Familiar with the area, Palmeri set out on US1 for the location where he thought he might find a vehicle having departed the area as reported. (II-52-53). A short while later Palmeri observed a white Firebird traveling northbound in the opposite direction. (II-53; III-366). Palmeri, followed by Sgt. Higgins, made a u-turn and began following the white car. (II-53-54; III-367). The officers could not see into the white vehicle. (II-54, 66-69). Its windows were darkly tinted and their view was obscured by "something soft" filling up the back of the vehicle. (II-67-68). They followed it for approximately two and one-half to three miles during which they observed no traffic or criminal offenses. (II-66; III-384-5). The driver of the vehicle did nothing to elude the police. (II-69-70). After the officers activated their emergency lights, the Firebird pulled over to a motel parking lot. (II-54; III-367, 383-4).

The officers effectuated a "felony-style" traffic stop. (II-54). This involved positioning their vehicles to concentrate as much white light into the suspect vehicle as possible, in an effort to blind its occupants and provide cover for the intercepting officers. (II-55; III-370). Deputy Palmeri took cover at his vehicle and held the Firebird at gunpoint. (II-55). Sgt. Higgins pulled codefendant Persaud out from the driver's seat. (II-55). After Palmeri directed the passenger out several times, Mr. Gaber emerged. (II-56). Palmeri and Deputy Rodgers, who had just arrived, approached Mr. Gaber at gunpoint and directed him to place his hands on his head, fingers interlocked. (II-57; III-375). Holding Mr. Gaber at gunpoint, Palmeri grabbed his hands giving Palmeri "control to maintain [Gaber] in one position," (III-375), and asked Gaber if there was anyone else inside the vehicle. (*Id.*)(II-57). Gaber indicated there was not. (II-57). Rodgers opened the passenger door to check for additional occupants. At this point Palmeri could see a number of household items including a television, VCR, and stereo, under a circular futon mattress. (II-58). He also observed

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a switch blade knife lying in the center of the passenger seat in plain view. (II-60; III-378-9). Mr. Gaber and codefendant Persaud were then handcuffed, patted down, read ***Miranda*** warnings, and placed in separate patrol cars. (II-59, 71-72).

Mr. Gaber and codefendant Persaud remained handcuffed, in the back of separate police vehicles, for approximately one hour while Deputy Rodgers responded to the scene of the suspected burglary, interviewed Mr. Curran, discovered signs of forced entry, and radioed back to the arrest scene that there had been a burglary. (II-75-76, 89). Following the defendants' formal arrests, the police sealed the Firebird and towed it to the Monroe County Sheriffs Office where it was thoroughly searched. (II-88-9).

Trial[4]

A police investigation of the area around the house at which Mr. Curran observed the two persons disclosed that five dwellings, including a total of seven residences, had been burglarized. (III-421-34). Two of these dwellings were duplexes. (III-279, 325-7). These seven burglaries were charged in counts I, III, V, VII, IX, X, and XII. (II-93-97).

The six owners of these residences testified at trial. None of them was present at the time of the burglaries. None could say when the burglaries actually occurred - all of them had rented their properties or otherwise had not been there for at least five days to four months prior to discovery of the burglaries. (III-276, 294-6, 299, 329, 348-9, 351). Property had been stolen from several, (III-263-5, 287-8, 314-22, 332-3, 351-6), but not all of the houses. (III-286, 304). The various owners described the items stolen from their properties, (*id.*); several testified that their

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[4]Mr. Curran's suppression hearing testimony was read to the jury. (III-240-262). Deputies Palmeri's and Rodgers's trial testimony mirrored their suppression hearing testimony and proffer. (III-364-90, 400-06).

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property was returned by the police. (III-286-88, 311-22, 326-35, 353-58, 440, 442-48, 457-58). One of these items was a .22 caliber revolver, (III-270-72), which served as the basis for count I (armed burglary) and II (grand theft of a firearm).

None of the property owners knew or could identify Persaud or Gaber; all testified that they never gave either permission to enter their houses. (III-273, 293-4, 306-7, 322-3, 346-7, 355-6). The owners acknowledged that they never saw either defendant on their property and did not know if the defendants had ever been there or taken any of their property. (III-277, 294-6, 308-10, 323-4, 348-9, 358-61).

Police investigation failed to uncover any fingerprint evidence connecting the defendants to the burglaries. (III-425-26, 461, 467). The Firebird was registered to codefendant Persaud. (III-454). No gloves were found in it. (III-463-64). Nothing belonging to either of the defendants were found in the burglarized houses. (III-464). No fingerprints were processed from the knife found in the Firebird (III-464-65). Various other tests that could have connected Mr. Gaber to the burglaries were not conducted. (III-466-67). The lead detective testified that codefendant Persaud indicated that he had picked up Mr. Gaber hitchhiking. (III-418-19).

STATEMENT OF THE ISSUES

I. Whether double jeopardy prohibits separate convictions and sentences for armed burglary and grand theft of a firearm where the defendant's singular act in taking a firearm from within a dwelling constituted the basis for enhancing the offense of burglary to armed burglary?

II. Whether the entirely circumstantial evidence was sufficient to sustain Mr. Gaber's convictions for several burglaries and thefts, where the evidence consisted primarily of his presence, as a passenger, in a vehicle containing the stolen property; and his conviction for possession of a

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concealed weapon, where the evidence consisted of discovery of the weapon, in plain view, on the front passenger seat of the car from which he had just emerged?

III. Whether the trial court erred in denying Mr. Gaber's motion to suppress where the excessive police tactics used to place him in custody constituted a *defacto* arrest and where there was neither reasonable suspicion nor probable cause to stop the car in which he was a passenger and detain him based upon a vague, generalized tip of a possible burglary?

SUMMARY OF THE ARGUMENT

I. This court should reverse Mr. Gaber's conviction and sentence on count XIII for grand theft of a firearm. This conviction was based on the act of taking a firearm from within a dwelling. This act also served as the sole basis for enhancing the burglary charged in count I to armed burglary. This court has repeatedly stated that double jeopardy bars the state from convicting and sentencing a defendant for two offenses involving a firearm that arose out of the same criminal act. Although the offenses of armed burglary and grand theft each requires proof of an element that the other does not, this court's caselaw makes clear that this does not preclude double jeopardy protection. Additionally, this court's caselaw fails to indicate that this prohibition against dual convictions applies only to offenses involving the possession of a firearm, and not ones involving, for instance, the taking of a firearm. Section 775.021(4), Fla. Stats., specifically excludes from its presumption of separate convictions and sentences, lesser offenses whose statutory elements are subsumed by the greater offense. In the instant case, by arming himself with the victim's firearm during the course of the burglary, Mr. Gaber necessarily obtained or used the property of another, the firearm, with the intent to either temporarily or permanently deprive the victim of a right to the property or a benefit therefrom. Thus, the armed burglary encompassed the grand theft of the

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firearm and the latter conviction cannot stand.

II. This court should reverse Mr. Gaber's convictions on all counts because the circumstantial evidence against him was legally insufficient to support them. Regarding Mr. Gaber's burglary and theft convictions on counts I-XII, they rested almost exclusively upon evidence of his presence, as a passenger, in his codefendant's vehicle together with the recently stolen property. The state was required to impermissibly pyramid inferences to support a conclusion that Mr. Gaber participated in these offenses. Moreover, the evidence failed to exclude the reasonable hypothesis of innocence that codefendant Persaud had picked up Mr. Gaber hitchhiking shortly before his arrest and that even if Mr. Gaber were present and knew of the burglaries, he neither committed them nor assisted in their commission and did not intend them to be committed.

Mr. Gaber's presence in codefendant Persaud's vehicle with the stolen property failed to support an inference that he knew the property was stolen. The evidence failed to establish Mr. Gaber exercised personal and exclusive possession over this property as required to support an inference of knowledge. Moreover, Mr. Gaber's unrefuted, exculpatory, and reasonable explanation for his proximity to the stolen property precluded any inference of knowledge. Even assuming Mr. Gaber knew about the burglaries, where the evidence established the presence of two persons at the burglary scene but failed to identify Mr. Gaber as the perpetrator, it must be presumed that Mr. Gaber was <u>not</u> the perpetrator. Ultimately, at best, the state, by pyramiding inferences, established Mr. Gaber's knowledge, presence, and flight regarding these offenses. Such evidence, however, is legally insufficient to sustain his convictions.

The evidence was also legally insufficient to support Mr. Gaber's conviction of carrying a concealed weapon. The undisputed evidence established that the knife was discovered in plain view,

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lying in the center of the passenger seat from which Mr. Gaber had just emerged. The officers' failure to observe the knife initially through the car's darkly tinted windows did not render it "concealed." There was no evidence that Mr. Gaber had made any effort to conceal the weapon. Nothing but speculation supports a conclusion that Mr. Gaber had concealed the knife.

III. This court should reverse Mr. Gaber's convictions because they rest upon evidence procured through an illegal search and seizure. The police officers' "felony-style" traffic stop, including focusing spotlights on the vehicle to blind its occupants, training firearms on the vehicle and its occupants, and physically taking custody of its occupants escalated any investigative detention into a *defacto* arrest. These tactics were not warranted by the circumstances. The officers stopped the vehicle based on a vague, generalized tip concerning a possible burglary. The officers expected to encounter only two occupants. There was no indication they were armed or dangerous. Ultimately, they escalated Mr. Gaber's detention into a *defacto* arrest. Because it was unsupported by probable cause, the fruits of the resulting search of the vehicle should have been suppressed.

The officers did not have a founded, reasonable suspicion to stop the Firebird and detain Mr. Gaber. The basis for the stop was a BOLO providing a description of a vehicle and a vague, speculative reference to the occupants' possible involvement in a burglary. The officers observed nothing corroborative of the report prior to the stop. Because the information known to the officers failed to give rise to a reasonable suspicion that the occupants of the Firebird had committed any offense, the stop and detention were illegal and the fruits of the subsequent search should have been suppressed.

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ARGUMENTS AND CITATIONS OF AUTHORITY

I. DOUBLE JEOPARDY PROHIBITS SEPARATE CONVICTIONS AND SENTENCES FOR ARMED BURGLARY AND GRAND THEFT OF A FIREARM WHERE THE DEFENDANT'S SINGULAR ACT IN TAKING A FIREARM FROM WITHIN A DWELLING CONSTITUTED THE BASIS FOR ENHANCING THE OFFENSE OF BURGLARY TO ARMED BURGLARY.

Mr. Gaber received separate convictions and sentences for armed burglary and grand theft of a firearm. (I-109, 111-14). The singular act of taking a firearm from within a dwelling served as the bases for both the grand theft and enhancing the burglary to armed burglary. Upon identical facts, the court in ***Marrow v. State,*** 656 So.2d 579 (Fla. 1st DCA 1995), held that double jeopardy prohibited such dual convictions. The Third District in ***Gaber v. State,*** 662 So.2d 422 (Fla. 3d DCA 1995), disagreed and certified conflict. ***Marrow***, however, is firmly based on this court's precedents and the Third District's reasoning in ***Gaber*** is flawed. Ultimately, the prohibition of such dual convictions is required by a principled application of the relevant double jeopardy jurisprudence. Thus, the decision in ***Marrow*** should be approved and the district court's decision in ***Gaber*** should be disapproved.

A. The Conflict Landscape.

In ***State v. Stearns***, 645 So.2d 417 (Fla. 1994), this court considered the issue,

> whether a defendant who, in the course of one criminal transaction or episode, commits and is convicted of burglary of a structure while armed and grand theft of property found therein may, consistent with double jeopardy principles, also be convicted of carrying a concealed weapon while committing the grand theft.

Id. at 418. The court answered in the negative, approving the district court's decision reversing Stearns' conviction and sentence for carrying a concealed weapon while committing the theft. Even

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though the armed burglary and carrying a concealed weapon while committing a theft offense obviously each required proof of elements which the other did not, this court held that "double jeopardy bars the State from convicting and sentencing [a defendant] for two offenses involving a firearm that arose out of the same criminal episode." *Id.* at 418. This court noted that its decision in ***State v. Brown***, 633 So.2d 1059 (Fla. 1994), "that a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode," also mandated its decision.[5]

In ***Cleveland v. State***, 587 So.2d 1145 (Fla. 1991), this court held that, when a robbery conviction is enhanced because of the use of a firearm, the single act of using the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felony. *Id.* at 1146. In support, this court relied on ***Hall v. State***, 517 So.2d 678 (Fla. 1988), where it ruled that the imposition of convictions for both robbery with a firearm and the display of a firearm during a criminal offense was improper when the convictions arose out of a single act. In response to the contention in one of the opinions under review that ***Hall*** had essentially been repudiated by the 1988 amendment to section 775.021(4), Fla. Stats., this court disagreed and stated that ***Hall*** still controls. *Id.* at 1146. This court noted that Cleveland's attempted robbery conviction had been enhanced from a second-degree felony to a first-degree felony because of the use of the firearm. *Id.* Upon this enhancement, Cleveland had been

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[5]***Stearns*** has been followed in numerous recent district court decisions reversing various firearms offenses on double jeopardy grounds. *E.g.*, ***Maxwell v. State***, No. 94-2953, 21 F.L.W. D118 (Fla. 1st DCA Jan. 4, 1996); ***Brown v. State***, No. 95-669, 21 F.L.W. D10 (Fla. 1st DCA Dec. 18, 1995); ***M.P.C. v. State***, 659 So.2d 1293 (Fla. 5th DCA 1995); ***A.J.H. v. State***, 652 So.2d 1279 (Fla. 1st DCA 1995). In ***M.P. v. State***, 662 So.2d 1359 (Fla. 3d DCA 1995), the court refused to vacate the juvenile's second firearm offense based on a single act and certified conflict with ***A.J.H.*** and ***M.P.C.***. ***M.P.*** is pending in this court under case number 86,968.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

duly punished for the offense of use of a firearm while committing a felony. *Id.*

In ***Marrow v. State***, 656 So.2d 579 (Fla. 1st DCA 1995), the court considered the defendant's dual convictions and sentences for, *inter alia*, armed burglary and theft of a firearm based on an offense in which he broke into a home and stole a pistol. The theft of the pistol was the basis for the armed burglary conviction. Citing ***Stearns*** and ***Cleveland***, the court held that double jeopardy barred the defendant's grand theft conviction "where the single act of stealing a firearm is the act which converts [the] burglary into an armed burglary." *Id.*

In the opinion below, ***Gaber v. State***, 662 So.2d 422 (Fla. 3d DCA 1995), the court rejected the ***Marrow*** court's interpretation of ***Stearns*** and held, to the contrary, that convictions for armed burglary and grand theft of a firearm, based on the single act of stealing a firearm from a dwelling, do not violate double jeopardy. The court attempted to resolve the question by a simple comparison of the elements of grand theft and armed burglary. It reasoned that because each offense requires proof of an element that the other does not, the offenses must be considered separate for double jeopardy purposes and, thus, double punishment was permitted. *Id.* at 423-24. Attempting to distinguish ***Stearns***, the court reasoned that the vice which this court held violated double jeopardy was enhancing a perpetrator's burglary conviction to armed burglary based on his possession of a firearm and then allowing a second conviction, carrying a concealed weapon while committing a felony, based on his possession of the same firearm. *Id.* at 424. The court reasoned that when the offense that enhances the burglary is the theft of a firearm, and not merely its possession, the result must be different. *Id.*

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

B. Flaws in the Third District's Reasoning.

Clearly, under this court's current double jeopardy jurisprudence, the fact that each of two offenses requires proof of an element that the other does not, does not mean that double jeopardy principles will permit both convictions. Thus, in ***State v. Thompson***, 607 So.2d 422 (Fla. 1992), this court held that double jeopardy principles prohibited dual convictions for fraudulent sale of a counterfeit controlled substance, section 817.563, Fla. Stat., and felony petit theft, section 812.014(2)(d), Fla. Stat., where both charges arose from the same fraudulent sale, though clearly each of these offenses requires proof of an element that the other does not. *Id.* In ***State v. Stearns***, 645 So.2d 417 (Fla. 1994), this court held that double jeopardy prohibited the defendant from being convicted of both armed burglary, section 810.02(1), (2)(b), and carrying a concealed weapon while committing a felony, section 790.07(2), Fla. Stat., though each of these offenses requires proof of an element that the other does not. Likewise, in ***Sirmons v. State***, 634 So.2d 153 (Fla. 1994), this court held that double jeopardy prohibited dual convictions for grand theft of an automobile, section 812.014(2)(c)4, Fla. Stat., and robbery with a weapon, section 812.13(2)(a), Fla. Stat., though each of these offenses clearly requires proof of an element that the other does not. *Accord* ***Johnson v. State***, 597 So.2d 798 (Fla. 1992)(dual convictions for grand theft of cash and grant theft of a firearm, based on the same theft of a purse, prohibited though offenses required proof of separate elements); ***Crawford v. State***, 662 So.2d 1016 (Fla. 5th DCA 1995)(dual convictions for aggravated battery by use of a deadly weapon and first degree burglary based on the battery, prohibited though the offenses required proof of separate elements). Contrary to the court's analysis below, the fact that each of two offenses requires proof of an element that the other does not, does not mean that convictions for the two offenses can stand without violating double jeopardy principles.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

Contrary to the reasoning of the ***Gaber*** court below, nothing in ***Stearns*** suggests something sacred about the possessory aspect of a firearm offense such that double jeopardy would bar a conviction for possession of a firearm where that possession enhanced the burglary to an armed burglary, but not bar a conviction for theft of a firearm where the act of stealing the firearm enhanced the burglary to an armed burglary. Although the ***Stearns*** district court opinion specified that double jeopardy principles prohibit charging, convicting, and sentencing "a defendant for two offenses for the single act of possession of one weapon," ***Stearns***, 626 So.2d at 255 (emphasis added), this court held, in broader terms, that "double jeopardy bars the State from convicting and sentencing [a defendant] for two offenses involving a firearm that arose out of the same criminal episode." *Id.*, 645 So.2d at 418.

In support of its decision, the Third District in ***Gaber***, also asserted, in essence, that a person could be convicted and sentenced for both theft of a firearm and armed burglary because these offenses were meant to address different evils: "Quite simply, in this grand theft charge, the appellant is being punished for taking the weapon with intent to deprive, not for possession of the weapon." *Id.* at 423. Mr. Gaber maintains, to the contrary, that a petit theft, a second degree misdemeanor, is enhanced to grand theft, a third degree felony, when the object of the theft is a firearm, precisely because of the substantial danger implicated by the defendant's possession of the firearm. Thus, the enhancement of a petit theft to grand theft when the object of the theft is a firearm, and the enhancement of burglary to armed burglary for the use of a firearm, are, indeed, intended to address the same evil. Be this as it may, the Third District's reasoning in this regard fails to support its decision because an analysis of the societal evil intended to be addressed by a particular criminal statute is no longer part of Florida's double jeopardy analysis. ***Sirmons v. State***,

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

634 So.2d 153, 154 (Fla. 1994)(Kogan, J., concurring); ***State v. Smith***, 547 So.2d 613, 615-16 (Fla. 1989).

Finally, while the Third District is correct that "if you commit a burglary, and while committing that burglary you steal the original manuscript of Gabriel Garcia Marguez's LOVE IN THE TIME OF CHOLERA, then you can be convicted of burglary and grand theft," it is incorrect that "[i]t logically flows that if you commit a burglary, and while committing that burglary you steal a firearm, then you can be convicted of armed burglary and grand theft." *Id.* at 423. The court's deduction fails to account for the relevant concern of double jeopardy: prohibiting double punishment for the same act. In the court's example, a person can, consistent with double jeopardy principles, be punished for both the act of entering a structure with intent to commit a theft, section 810.02(1), Fla. Stat., and the separate act of obtaining the manuscript with the intent to deprive the owner of its use. Section 812.014(1)(a, b), Fla. Stats. However, this certainly does not mean that one can be punished for both armed burglary and grand theft of a firearm when the act of using or obtaining the firearm constitutes the "arm[ing] himself within such structure" that is punished by the enhancement of burglary to armed burglary.

C. Application of the Relevant Double Jeopardy Jurisprudence

The rationale for vacating Mr. Gaber's grand theft conviction in count II was set forth in ***Sirmons v. State***, 634 So.2d 153 (Fla. 1994), by Justice Kogan in his concurring opinion. This court held that the defendant could not be convicted of grand theft of an automobile, section 812.014(2)(c)4, Fla. Stat., and robbery with a weapon, section 812.13(2)(a), Fla. Stat., where the convictions arose from a single taking of an automobile at knife point. *Id.* at 153-54. In his concurring opinion, Justice Kogan observed that the Legislature's primary disagreement with this

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

court's opinion in ***Carawan v. State***, 515 So.2d 161 (Fla. 1987), expressed through its 1988 amendment to section 775.021(4), Fla. Stat., was only this court's "broad application of the rule of lenity through a 'separate evils' analysis." *Id.* at 154. Justice Kogan explained that the amendment to section 775.021(4) "obviously stopp[ed] a good deal short of throwing Florida into what might be called 'strict Blockburger'[6] approach to multiple punishments law." *Id.* (Footnote omitted).

Section 775.021(4), provides in relevant part:

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

Justice Kogan explained that the last sentence of subsection (a) is simply a reiteration of the Blockburger rule. "Under this rule, the Court may look only to the statutory elements of two or more offenses to see if each contains at least one element the others do not." *Id.* But even if two offenses are determined to be separate under this analysis, and separately punishable, a court must

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[6]***Blockburger v. United States***, 284 U.S. 299, 52 S.Ct. 180 (1932).

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

look to the three exceptions to determine, nonetheless, if the offenses can be separately punished.

With regard to the instant case, it is apparent that exceptions (b)1 (necessarily lesser included offenses) and (b)2 (degrees of the same offense as provided by statute) do not apply. ***Sirmons***, 634 So.2d at 155. Exception (b)3 however, applies. The greater offense of which Mr. Gaber was convicted was armed burglary. Section 810.02(2)(b), Fla. Stat. (I-93). He was specifically charged with arming himself within the structure, with a firearm, with intent to commit theft. (*Id.*) By arming himself with the victim's firearm during the course of this burglary, Mr. Gaber necessarily obtained or used[7] the property of another, to wit: a firearm, with the intent to either temporarily or permanently deprive the other person of a right to the property or a benefit therefrom, thus constituting the theft of the firearm charged in count II. (I-94). *See* ***State v. Weller***, 590 So.2d 923, 925 n. 2 (Fla. 1991)(permissive lesser included offense is one which, by the facts alleged in the accusatory pleading, the lesser offense cannot help but be perpetrated once the greater offense has been). The burglary of which Mr. Gaber was convicted was enhanced from a second degree felony to a first-degree felony because of the taking of the firearm. Upon this enhancement, Gaber had been duly punished for his theft (use or possession) of the firearm. *See* ***Cleveland***. Thus, upon application of section 775.021(4)(b)3, a separate conviction for grand theft of the firearm was not permitted. *See* ***Marrow***.

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[7]"'Obtains or uses' means any manor of [t]aking or exercising control over property." Section 812.012(2)(a), Fla. Stats.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

II. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT MR. GABER'S CONVICTIONS ON ALL COUNTS.[8]

A. The Entirely Circumstantial Evidence, Consisting Primarily of Mr. Gaber's Presence, as a Passenger, in a Vehicle Containing Stolen Property, was Legally Insufficient to Sustain his Convictions for all Burglaries and Thefts Charged in Counts I-XII.

Mr. Gaber's convictions on all of the counts charging some form of burglary or theft (I-XII) rested precariously upon the evidence of his presence, as a passenger, in Dheraj Persaud's vehicle together with the property recently stolen from the various dwellings. There was no identification of Gaber and Persaud as the individuals seen at the sight of the burglaries. (II-34). There was no fingerprint or other scientific evidence linking Mr. Gaber to the burglaries. (III-425-26, 461-67). There were no confessions or admissions implicating Mr. Gaber. Indeed, upon codefendant Persaud's arrest, he indicated to police that he had picked Gaber up hitchhiking shortly before the arrest. (III-418-19). Thus, this case manifestly evokes Florida's circumstantial evidence rule.

1. The Rigors of the Circumstantial Evidence Rule.

In ***Cox v. State***, 555 So.2d 352 (Fla. 1989), this court reiterated that:

> "One accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence." Circumstantial evidence must lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged.' Circumstances that create nothing more than a strong suspicion that the defendant committed

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[8]This court has jurisdiction to review all issues appropriately raised in the court below, as though they originally came to this court on appeal. *E.g.*, ***Feller v. State***, 637 So.2d 911, 914 (Fla. 1994); ***Savoie v. State***, 422 So.2d 308, 312 (Fla. 1982).

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

the crime are not sufficient to support a conviction.

Id. at 353 (citations omitted); *accord* ***Golden v. State***, 629 So.2d 109, 111 (Fla. 1993); ***State v. Law***, 559 So.2d 187, 188-89 (Fla. 1989); ***McArthur v. State***, 351 So.2d 972 (Fla. 1977).

Part and parcel of the circumstantial evidence rule is the prohibition against pyramiding inferences. Reversing a conviction based on circumstantial evidence, the court in ***Keys v. State***, 606 So.2d 669 (Fla. 1st DCA 1992), explained this prohibition:

> Florida courts have long adhered to the rule proscribing the fact-finder from basing an inference upon an inference in order to arrive at a conclusion of fact. The purpose of this rule is to protect against verdicts or judgments based upon speculation. In criminal cases, the rule has been stated thusly: where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction.

Id. at 673 (citations and explanatory parentheticals omitted).

"The state is not required 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." ***Law***, 559 So.2d at 188-89 (citing ***Toole v. State***, 472 So.2d 1174, 1176 (Fla. 1985)). The version of events related by the defense, whether through testimony, cross-examination, or argument, must be believed if the circumstances do not show that version to be false. *See* ***McArthur*** at 976; ***Cowart v. State***, 582 So.2d 90, 91 (Fla. 2d DCA 1991).

The important reasons for the rigors of the circumstantial evidence rule bear repeating:

> The finger of suspicion implicit in circumstantial evidence is a long one and may implicate both the innocent and guilty alike. Persons caught in a web of circumstances may often appear guilty upon first impression, but in fact be entirely innocent as surface appearances are frequently deceiving. A person ought not be convicted of a crime, it is thought, and his freedom taken from him based on such tenuous and ambiguous evidence. To avoid, then, convicting entirely

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

> innocent people based on suspicion and innuendo, the law has long demanded a high standard of proof when reviewing convictions based entirely on circumstantial evidence. Given our long-standing commitment to the ideal of individual freedom, this result seems both fair and reasonable. As has been often stated, "[o]ur responsibility in such circumstances -- human liberty being involved -- is doubly great . . . because '[t]he cloak of liberty and freedom is far too precious a garment to be trampled in the dust of mere inference compounded.'"

Joans v. State, 466 So.2d 301, 326 (Fla. 3d DCA)(Hubbart, J., dissenting), *rev.denied*, 478 So.2d 53 (Fla. 1985).

Applying these general principles, it is clear that the evidence was legally insufficient to support Mr. Gaber's burglary and theft convictions. To get from its evidence of Mr. Gaber's presence, as a passenger, in Persaud's vehicle with the stolen property, to Mr. Gaber's burglary and theft convictions, the state was required to pyramid inference upon inference. First the state was required to rely on an inference that Mr. Gaber knew the property in the vehicle was stolen. From here, it had to rely on an inference that Mr. Gaber was one of the two persons observed at the scene of the burglaries. It was then required to rely on an inference that Mr. Gaber was the figure holding the ladder or otherwise assisted Persaud or another to commit the burglaries. Finally, the state had to rely on an inference that Mr. Gaber provided any such assistance with the intent that these crimes be committed. *See, e.g.*, ***Staten v. State***, 519 So.2d 622, 624 (Fla. 1988). Such pyramiding of inferences, however, was impermissible. *E.g.*, ***Keys***; ***Collins v. State***, 438 So.2d 1036, 1038 (Fla. 3d DCA 1983). Moreover, the state failed to introduce any evidence demonstrating that the version of events related by the defense, that Persaud picked up Mr. Gaber hitchhiking shortly before his arrest or, alternatively, Mr. Gaber was present and even knew of the burglaries but neither assisted nor intended them to be committed, was false. *See, e.g.*, ***McArthur***. Assuming, *arguendo*, that the evidence was susceptible of an inference that Mr. Gaber was present at the scene of the burglaries

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

and assisted Persaud with the intent that they be committed, the evidence also gives rise to an inference consistent with Mr. Gaber's hypothesis of innocence. *See, e.g.*, ***Fowler v. State***, 492 So.2d 1344, 1347-48 (Fla. 1st DCA 1986). Thus, the evidence failed to sustain Mr. Gaber's burglary and theft convictions.

2. No Permissible Inference of Knowledge from Possession of Recently Stolen Property.

a. Mr. Gaber Did Not "Possess" the Recently Stolen Property.

Although it is true that possession of recently stolen property may give rise to an inference that the possessor knew or should have known that the property had been stolen, section 812.022, Fla. Stats., this inference only arises upon "proof of possession." ***FWB v. State***, 538 So.2d 969, 970 (Fla. 1st DCA 1989). "In order for possession to obviate the need for the state to prove knowledge and intent, essential elements of the crime, the possession must be *exclusive*. ***Walton v. State***, 404 So.2d 776, 777 (Fla. 1st DCA 1981), *rev.denied*, 412 So.2d 471 ([Fla.] 1982)(original emphasis); ***Chamberland v. State***, 429 So.2d 842, 843 (Fla. 4th DCA 1983). Mere proximity to contraband, without more, is legally insufficient to prove possession. ***Pena v. State***, 465 So.2d 1386, 1388 (Fla. 2d DCA 1985)." *Id.* As Justice Shaw stated in ***Walton v. State***, 404 So.2d 776 (Fla. 1st DCA 1981), *rev.denied*, 412 So.2d 471 (Fla. 1982):

> The state has attempted to obviate its burden of proof by its reliance upon the rule that possession of recently stolen goods carries with it the inference that the possessor is the guilty taker. The position taken by the State ignores the restrictive nature of the rule. *The inference of guilty taking that accompanies the possession of recently stolen goods is limited by the further requirement that possession be personal, that it involve a distinct and conscious assertion of possession by the accused, and that possession must be exclusive.*

Id. At 777 (citations omitted)(emphasis added); *accord* ***K.V. v. State***, 516 So.2d 1087 (Fla. 2d DCA

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

1987); ***King v. State***, 431 So.2d 272 (Fla. 5th DCA 1983); ***Chamberland v. State***, 429 So.2d 842, 843 (Fla. 4th DCA 1983)(to give rise to inference of knowledge, possession must constitute a conscious and substantial possession, as distinguished from a mere involuntary or superficial possession, must be personal, involve a distinct and conscious assertion of possession by the accused, and must be exclusive); *but see* ***Scobee v. State***, 488 So.2d 595, 598-99 (Fla. 1st DCA 1986)("exclusive" possession may be joint with coperpetrator where perpetrators proven to have been at the scene of the crime).

Numerous cases make clear that an inference of knowledge arising from possession of recently stolen property does not apply to a mere passenger in a vehicle driven by another. Accordingly, in ***Howard v. State***, 552 So.2d 316 (Fla. 2d DCA 1989), the court reversed the defendant's probation violation, based on his alleged participation in a burglary, for insufficient evidence. The evidence established that two men were observed removing property from a motel. *Id.* at 317. Police arrived as a vehicle containing the two men was leaving the parking lot. *Id.* The car was stopped and found to contain items that had been taken from the motel. Three of its occupants fled at the approach of the police but the defendant, a passenger in the backseat, did not. The witness who observed the men removing the property could not identify the defendant. The court concluded that the evidence proved, at best, the defendant's presence but was insufficient to establish his active participation in any crime. *Id.*

Likewise, in ***P.L.C. v. State***, 458 So.2d 800 (Fla. 3d DCA 1984), the court reversed the juvenile's delinquency adjudication for burglary and theft. The evidence established that the victims left their purses in their unlocked car and, 15 to 20 minutes later, discovered them missing. At the same time, officers observed a vehicle in which the juvenile was a passenger run a stop sign within

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

a block or two of the victims' vehicle. *Id.* at 801. The vehicle fled several miles from the police and upon skidding off the road, the occupants jumped out and fled. The juvenile was apprehended in the area. Two of the three purses were discovered in the car. The third was found in the possession of one of the other occupants. The court noted that "[b]eing a passenger in a vehicle containing stolen goods is not, by itself, sufficient to give rise to the inference of knowledge that the goods are stolen." *Id.* The juvenile's presence in the vehicle "fail[ed] to preclude the reasonable hypothesis that he entered the car after the purses were stolen and was unaware of either their presence or their stolen nature." *Id.*[9]

In the instant case, the evidence failed to establish that Mr. Gaber "possessed" any of the recently stolen property to support an inference that he knew it was stolen. There was no "personal" possession. He did not, in any way, distinctly or consciously assert possession over the property. Likewise, any possession was not exclusive. As in ***Howard*** and ***P.L.C.***, Mr. Gaber's mere proximity to the stolen property was insufficient to establish possession or give rise to any inference of knowledge.

b. Mr. Gaber Had an Unrefuted, Exculpatory, Reasonable Explanation for His Proximity to the Stolen Property.

Assuming, *arguendo*, sufficient possession to give rise to a reasonable inference of knowledge, such an inference is unreasonable and cannot stand in the face of a reasonable, unrefuted explanation of the possession. *E.g.*, ***M.M. v. State***, 547 So.2d 139, 139-40 (Fla. 1st DCA 1989);

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[9]Rejecting codefendant Persaud's argument that the evidence was legally insufficient to support his convictions, the court in ***Persaud v. State***, 659 So.2d 1191 (Fla. 3d DCA 1995), distinguished ***P.L.C.*** because Persaud (unlike Mr. Gaber) was the owner and driver of the vehicle containing the stolen property. *Id.* at 1192.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

E.L.S. v. State, 547 So.2d 298, 299 (Fla. 3d DCA 1989); § 812.022, Fla. Stats. Thus, in ***M.M.***, the court reversed the juvenile's delinquency adjudication for theft where he was stopped driving a motorcycle that was recently stolen. The juvenile's explanation was that he had borrowed the motorcycle from a friend. Even though the owner of the motorcycle denied that this "friend" had had access to the motorcycle, *id.* at 140 n. 1, this explanation was found to be "not unreasonable, and was unrefuted and exculpatory," thereby precluding a finding of guilt.

Similarly, in ***E.L.S. v. State***, 547 So.2d 298 (Fla. 3d DCA 1989), the court reversed the juvenile's delinquency adjudication for theft because it was "not supported by the record." *Id.* at 299. The evidence had established that the juvenile was a passenger in a stolen truck the appearance of which, apparently, clearly indicated it was stolen. The juvenile's unrefuted explanation, that the driver of the truck told him it belonged to his uncle from whom it had recently been stolen and to whom it had been returned, precluded any conviction. In a specially concurring opinion, a portion of which was quoted by this court in ***State v. G.C.***, 572 So.2d 1380, 1382 (Fla. 1991), Chief Judge Schwartz indicated he would reverse "on a much broader ground," in that one's status as a passenger, as opposed to a driver, involves none of the conduct proscribed by section 812.014(1), Fla. Stat.:

> [W]ithout other evidence of separate criminal conduct -- such as aiding and abetting the theft itself or being an accessory after the fact of the crime -- a passenger may not be found guilty of an offense related to a vehicle, even if *arguendo* and unlike the present case, he is perfectly aware that it has been stolen.
>
> Thus, I would hold that a hitchhiker or joy rider like ***E.L.S.*** who merely gets into or stays in a car, even knowing that it has been stolen by the driver, is simply not guilty of any statutory crime.

Id. at 299-300.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
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DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

In the instant case, as the juveniles in ***M.M.*** and ***E.L.S.***, Mr. Gaber presented an unrefuted, exculpatory, and not unreasonable explanation for his presence in codefendant Persaud's vehicle. He elicited from one of the arresting officers that Persaud stated he had picked up Gaber hitchhiking. (III-418-19). This evidence was similar to the testimony of the driver of the vehicle containing the stolen property in ***Howard v. State***, 552 So.2d 316 (Fla. 2d DCA 1989), that he had "picked up" the defendant prior to the vehicle being stopped by police and that the defendant did not know about the burglary. *Id.* at 317. The evidence in ***Howard*** failed to support the defendant's conviction for burglary. Likewise, particularly in light of the unrebutted, exculpatory and reasonable explanation for Mr. Gaber's presence in the vehicle here, his convictions for burglary and theft must be reversed.

3. The Evidence Precludes an Inference that Mr. Gaber Committed, or Aided and Abetted the Commission of, the Burglaries and Thefts.

Even assuming, *arguendo*, Mr. Gaber knew the property in Persaud's vehicle was stolen, this does not constitute the commission of any offense. *E.g.*, ***State v. G.C.***, 572 So.2d 1380, 1382 (Fla. 1991); ***E.L.S.***, 547 So.2d at 299 (Schwartz, C. J., specially concurring). The state was still required to prove that Mr. Gaber either committed the burglaries and the thefts, or aided and abetted another to commit these offenses. Even to prove a defendant acted as an aider and abetter, the state must establish both that the individual aided and abetted in the commission of the crime and had the requisite specific intent to participate in it. *E.g.*, ***Valdez v. State***, 504 So.2d 9, 10 (Fla. 2d DCA 1986); ***J.L.B. v. State***, 396 So.2d 761, 762 (Fla. 3d DCA 1981). Where the state's evidence is circumstantial, proof of presence, even with knowledge, is legally insufficient. *E.g.*, ***In re: A.R.***, 460 So.2d 1024, 1025 (Fla. 4th DCA 1984); ***G.C. v. State***, 407 So.2d 639, 640 (Fla. 3d DCA 1981). Presence, together with flight, are also insufficient to establish participation. *E.g.*, ***C.P.P. v. State***,

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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479 So.2d 858, 859 (Fla. 1st DCA 1985); ***J.W. v. State***, 467 So.2d 796, 797 (Fla. 3d DCA 1985).

To sustain Mr. Gaber's convictions, the state's evidence was required to support, at least, an inference that Mr. Gaber was one of the two individuals Richard Curran observed across the canal, (III-243, 249), and further that he was the one (assisting by) holding the ladder. Such a conclusion is impermissible since it can only be reached by pyramiding inferences. Additionally, governing caselaw establishes that in situations where two or more individuals are present but there is no witness or other evidence to identify the actual perpetrator, it must be presumed that the defendant was not the perpetrator.

In ***J.L.B. v. State***, 396 So.2d 761 (Fla. 3d DCA 1981), the victim observed two juveniles approach her car. One of the boys - she could not say which one - grabbed her necklace after which both boys fled. Reversing the juvenile's delinquency adjudication, the court held: "Since no one could identify the one juvenile who took the jewelry, *it must of course be assumed that it was not the present appellant*." *Id.* (citations omitted)(emphasis added).

In ***J.W. v. State***, 467 So.2d 796 (Fla. 3d DCA 1985), the court concluded that the evidence was legally insufficient to support the juvenile's delinquency adjudication for criminal mischief, burglary, and possession of burglary tools. The evidence established that the appellant and another individual were observed standing next to the victim's car. *Id.* at 797. Both were by the vehicle when the driver's window was smashed after which one individual was observed leaning into the car while the other was looking toward the house. When the occupants of a nearby house came out, the appellant and the other person ran away. No one could identify which individual had broken the window or leaned into the car. Relying on ***J.L.B.***, the court held: "Since no one at the hearing could identify who broke the window or leaned into the window, it must be assumed it was not the

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appellant." *Id.* Thus, because there was no evidence of the juvenile's participation, his delinquency adjudication had to be reversed. *Accord* ***S.G. v. State***, 591 So.2d 294, 295 (Fla. 3d DCA 1991)(robbery adjudication reversed where defendant was one of a group of 10 boys only one of whom took the victim's jewelry, since "victim was unable to ascertain which of the boys took the jewelry"); ***W.J. v. State***, 406 So.2d 60 (Fla. 3d DCA 1981)(victim unable to identify W.J. as one of the two boys in the vicinity who actually grabbed her necklace and there was no showing that W.J. committed any act which aided or assisted the other boy); ***L.S. v. State***, 391 So.2d 329 (Fla. 3d DCA 1980)(evidence insufficient to prove "defendant was the unseen person who pushed the victim" or that defendant was an aider and abettor).

In the instant case, application of this doctrine regarding the participation of persons who are present but cannot be identified as offense participants precludes any inference that Mr. Gaber was the individual holding the ladder, or that he assisted in committing the burglaries and thefts in any other way. First, it is impermissible to stack the inference that Mr. Gaber was the individual carrying the ladder, upon the inference that he was present at the scene of the burglaries. *See* ***Collins v. State***, 438 So.2d 1036, 1038 (Fla. 2d DCA 1983)(circumstantial evidence lacked the conclusive nature to support the conviction where inferences had to be combined and pyramided). Second, because Mr. Curran was unable to identify either Mr. Gaber or codefendant Persaud and, thus, could not identify who was carrying the ladder, it must be presumed that it was <u>not</u> Mr. Gaber. *E.g.*, ***J.L.B.***; ***J.W.***. Even an inference that Mr. Gaber was present, knew codefendant Persaud or someone else was burglarizing the houses, and fled once Mr. Curran called out, would not be legally sufficient to sustain Mr. Gaber's burglary and theft convictions. *See, e.g.,* ***C.P.P. v. State***, 479 So.2d 858, 859 (Fla. 1st DCA 1985); ***Jackson v. State***, 436 So.2d 1085, 1086 (Fla. 3d DCA 1983); ***A.Y.G. v. State***,

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414 So.2d 1158 (Fla. 3d DCA 1982).

4. Evidence of Knowledge, Presence, and Flight are Insufficient to Sustain Mr. Gaber's Convictions.

Although, in evaluating the sufficiency of the evidence, each case is unique and must be judged by its own facts, several other cases with facts similar to those of the instant case provide a valuable comparison. In ***C.P.P. v. State***, 479 So.2d 858 (Fla. 1st DCA 1985), the evidence established that a store was burglarized resulting in the theft of approximately $2,000.00 worth of merchandise; the defendant was present in an automobile at the store while two companions left the car, with the known intent to burglarize the store; the companions returned several hours later placing four or five bags in the trunk; and another person remained in the car as a lookout. *Id.* at 859. The court reversed the juvenile's delinquency adjudication for burglary and grand theft. Noting that knowledge, presence at the scene of the offense and flight are insufficient to establish participation, the court concluded that the state had failed to eliminate the hypothesis that the defendant simply did not participate in the commission of the crimes.

In ***Locket v. State***, 262 So.2d 253 (Fla. 4th DCA 1972), the court reversed the defendant's conviction for burglary of a dwelling. The evidence established that the defendant had been seated in the driver's seat of a car while an unidentified youth was seen walking from the side door of a nearby house to the car carrying a television set and two shotguns, and loading them into the car. *Id.* at 254. When an eyewitness left to report the matter to the police, the car was driven away. Shortly afterwards, based on a BOLO, a police officer located the car, with the defendant driving, along with a male and two female companions. It was later established that the home in question had been burglarized and the television and guns stolen. Reversing the defendant's conviction, the court stated: "The circumstances of appellant sitting in his car parked outside the [burglarized]

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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residence while stolen personal property [was] being loaded into the car is unquestionably consistent with guilt. Yet, it is not wholly inconsistent with a reasonable hypothesis other than guilt . . . ." *Id.* at 254.

In ***Jackson v. State***, 436 So.2d 1085 (Fla. 3d DCA 1983), evidence established that "(a) the victim of a purse snatching, committed by a person other than the defendant, saw Jackson emerging from an automobile which the victim had followed from the vicinity of the scene of the robbery; (b) the spoils of the robbery were found in the automobile occupied by Jackson and the perpetrator of the robbery; and (c) Jackson fled from the scene of the robbery . . . ." *Id.* at 1086. Reversing the defendant's conviction, the court held: "[Such evidence,] even if arguably supporting inferences that Jackson had driven the perpetrator to and from the scene and had after-the-fact knowledge of the robbery, is sufficient to prove that Jackson knew before hand of his companion's intentions, much less that he had a prior intention to participate in the offense, and manifestly does not support Jackson's conviction for aiding and abetting in the commission of the robbery." *Id.*

Finally, in ***A.Y.G. v. State***, 414 So.2d 1158 (Fla. 3d DCA 1982), the court reversed the juvenile's delinquency adjudication for burglary. The evidence established that A.Y.G. was seen in a vehicle parked behind a shopping center at four o'clock in the morning while two other juveniles were observed hurriedly exiting the burglarized store, dropping items as they ran toward A.Y.G.'s automobile. *Id.* at 1158. Upon entering the vehicle, they told A.Y.G. to drive away. When observing officers gave pursuit, A.Y.G. fled and eventually crashed. The court held:

> Since there is no evidence that the juvenile actually entered the store, she may only be adjudicated of delinquency for burglary as an aider and abettor. It is well established that to be convicted as an aider and abettor, the state must show an intent to participate in the perpetration of the crime. . . .

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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> Evidence that the defendant was present at the scene of the crime and drove the "getaway" car at the request of the perpetrator of the burglary does not exclude the reasonable inference that the defendant had no knowledge of the crime until after it occurred; thus, she did not have the requisite intent.

Id. at 1159 (citations omitted).

The circumstantial evidence in the instant case was far more frail than the evidence in these cases. Mr. Gaber did not drive a "getaway" car. Unlike these cases, there is no direct evidence of Mr. Gaber's presence at the scene of the burglaries; it is only an inference that supports such a conclusion. Likewise, there is no evidence of his participation; such a conclusion would require piling an inference upon an inference. At best, even assuming Mr. Gaber's knowledge of the commission of the crimes, his presence, and his flight,[10] this evidence failed to establish his participation or intent to commit any crime. This evidence failed to exclude the reasonable hypotheses of innocence that Persaud picked up Mr. Gaber hitchhiking shortly before their arrest or that, though Mr. Gaber was present at the scene of the burglaries, he was a passive, knowing observer and did nothing to participate. For these reasons, Mr. Gaber's burglary and theft convictions must be reversed.

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[10]Any inference of flight was weak. Although Curran heard the car start and saw it drive away, with headlights off, some time after he called out to the two figures he saw, (I-28-29), driver Persaud took no evasive action as he was tailed by police for two and one-half to three miles (I-66, 69-70; III-384-5), and pulled over to a parking lot shortly after the tailing officers activated their emergency lights. (I-54; III-367, 383-4).

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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B. The Entirely Circumstantial Evidence, Consisting of a Police Officer's Discovery of a Switchblade Knife, Lying in Plain View in the Center of the Passenger Seat of the Car from Which Mr. Gaber Had Just Emerged, was Legally Insufficient to Sustain His Conviction for Carrying a Concealed Weapon Charged in Count XIII.

The undisputed evidence established that the knife was discovered in plain view, lying in the center of the passenger seat from which Mr. Gaber had just emerged, as soon as Deputy Rodgers opened the passenger door. (I-60; III-378-9). Thus, the weapon was not concealed. This evidence was legally insufficient to support Mr. Gaber's conviction of carrying a concealed weapon as charged in Count XIII.[11]

This issue was definitively resolved, upon facts strikingly similar to those of the instant case, in ***State v. Teague***, 475 So.2d 213 (Fla. 1985). There, this court answered the following question in the negative:

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

Id. at 213. The relevant facts were that the defendant was stopped in his vehicle at night for driving without headlights. *Id.* at 214. The defendant exited his vehicle. When the officer requested to see his driver's license, the defendant opened the rear left door upon which the officer saw the muzzle

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[11]The state argued below that this argument was not raised in the trial court and, thus, was not preserved for appeal. In ***Troedel v. State***, 462 So.2d 392 (Fla. 1984), this court held that despite the defendant's failure to challenge the sufficiency of the evidence at trial or even on appeal, "we reach the issue anyway because we believe that a conviction based upon a crime totally unsupported by evidence constitutes fundamental error." *Id.* at 399. The district courts have consistently refused to uphold convictions unsupported by legally sufficient evidence at trial. *E.g.*, ***Harris v. State***, 647 So.2d 206, 208 (Fla. 1st DCA 1994); ***Burrell v. State***, 601 So.2d 628, 629 (Fla. 2d DCA 1992).

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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portion of a rifle lying in plain view on the front seat where the defendant had been seated. This court concluded that the firearm was not concealed within the meaning of section 790.01(2). It agreed that the statute cannot be read so expansively as to encompass circumstances where the weapon is deemed "concealed" because the carrier is "concealed." Accordingly, this court approved the district court decision affirming the trial court's order granting the defendant's motion to dismiss.

Another case with similar facts is ***Carpenter v. State***, 593 So.2d 606 (Fla. 5th DCA 1992). There, relying upon ***Teaque***, the court held that a hand gun discovered in plain view on the front seat of the automobile where the defendant had been sitting was not "concealed" as a matter of law. *Id.* at 607. The evidence established that the police officer stopped the defendant on suspicion of DUI. He ordered her out and required her to perform a field sobriety test. When he returned to the vehicle, he first observed the handgun in the front seat beside where the defendant had been sitting. It was dark; there were no street lights; and the court reasoned that the body of the defendant, who was 5'5" tall and weighed 190 pounds, may have obscured the officer's view of the gun though there was unrebutted testimony that the officer did not look into the car interior until later. The court concluded that the firearm cannot be said to have been concealed. "The police report indicates that the grip and hammer were visible to the officer, who immediately recognized it as a handgun. Carpenter made no conscious effort to conceal the weapon with her body." *Id.* at 607.

In the instant case, like ***Teague*** and ***Carpenter***, the knife, which was immediately recognizable, was lying in plain view on the front seat from which Mr. Gaber had emerged. (II-60; III-378-9). Officer Palmeri did not see it until after Mr. Gaber had been removed and Deputy Rodgers reopened the door to look for other occupants. (II-57-60). It was dark out and the windows

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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of the vehicle were darkly tinted obscuring any view into the car. (II-67-68). There was no evidence that Mr. Gaber had made any movement or effort to conceal the weapon. (II-84). The facts give rise to a reasonable inference that the knife was laying in plain view on or next to Mr. Gaber's lap before he emerged from the vehicle and landed in the middle seat when he exited. Nothing more than shear speculation and surmise support a conclusion that the knife was concealed prior to Mr. Gaber's exit.[12] Thus, this circumstantial evidence, too, was legally insufficient to support Mr. Gaber's conviction.

III. THE TRIAL COURT ERRED IN DENYING MR. GABER'S MOTION TO SUPPRESS WHERE THE POLICE OFFICERS EXCEEDED THE REASONABLE BOUNDS OF AN INVESTIGATIVE DETENTION AND THE DETENTION, IN ANY EVENT, WAS UNSUPPORTED BY REASONABLE SUSPICION.

A. The Police Officers'"Felony-Style" Traffic Stop, Including Focusing Spotlights on the Vehicle so as to Blind its Occupants, Training Firearms on the Vehicle and its Occupants, and Physically Taking Custody of its Occupants Constituted a *Defacto* Arrest Unsupported by Probable Cause.

To investigate a citizen tip regarding a suspected burglary, the police officers conducted a "felony-style" traffic stop of the vehicle in which Mr. Gaber was riding. (II-54). The officers shined the spotlights of several police cruisers into the suspect vehicle to blind its occupants, (II-55; III-370), trained their firearms on the vehicle and its occupants, (II-55, 57; III-375), and immediately took physical custody of Mr. Gaber upon his exit from the vehicle. (*Id.*) Immediately after the passenger compartment was checked for other occupants, Mr. Gaber and Persaud were handcuffed, frisked, Mirandized, and placed in separate patrol cars. (II-59, 71-72). These tactics far exceeded

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[12]There was no fingerprint evidence connecting Mr. Gaber to the knife. (III-464-65).

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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the reasonable scope of an investigative detention and constituted a *defacto* arrest. The resulting search of the vehicle, thus, was illegal and its fruits should have been suppressed.

A law enforcement officer is entitled to conduct a limited investigatory detention of a suspect upon reasonable suspicion of criminal activity. *E.g.*, ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868 (1968); § 901.151, Fla. Stat. However, the scope of such a detention is narrow. To determine whether police conduct exceeds the bounds of a reasonable investigation, courts must look to whether the action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. ***Terry*** at 19-20, 88 S.Ct. at 1878-79. Courts must further determine whether the investigative methods were "the least intrusive means reasonably available to verify or dispel the officer's suspicion . . . ." ***Florida v. Royer***, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26 (1983).

Brandishing firearms or using handcuffs will not necessarily convert an investigative detention into a *defacto* arrest. *E.g.*, ***Carroll v. State***, 636 So.2d 1316, 1318 (Fla. 1994); ***Reynolds v. State***, 592 So.2d 1082, 1084-85 (Fla. 19912); ***Wilson v. State***, 547 So.2d 215, 217 (Fla. 4th DCA 1989). However, these tactics may not be routinely employed in the effectuation of an investigatory stop. "Whether such action is appropriate depends on whether it is a reasonable response to the demands of the situation." ***Reynolds*** at 1085, 1087 (Barkett, J., concurring and dissenting in part); *see* ***Wilson***, 547 So.2d at 217 (Glickstein, J., dissenting). The use of guns and handcuffs will, if excessive, invalidate an investigative detention. *See, e.g.*, ***Rogers v. State***, 619 So.2d 514 (Fla. 4th DCA 1993). Likewise, reasonable suspicion to believe a suspect is engaged in criminal activity does not authorize a frisk for weapons. Instead, to justify this additional intrusion, an officer must be "justified in believing that the individual whose suspicious behavior he is investigating at close

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LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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range is armed and presently dangerous to the officer or to others . . . ." *Id.* at 24, 88 S.Ct. at 1881. *Accord* ***Reynolds*** at 1084; ***In the Interest of J. L.***, 623 So.2d 860, 861 (Fla. 4th DCA 1993). Certainly, when police extract occupants of a vehicle, hancuff them, and place them in a patrol car, they are arrested. *E.g.*, ***Rogers***; ***Poey v. State***, 562 So.2d 449, 450 (Fla. 3d DCA 1990); ***London v. State***, 540 So.2d 211, 213 (Fla. 2d DCA 1989).

Several cases demonstrate the excessiveness of the officers' guerrilla tactics in the instant case. In ***Reynolds***, the Tallahassee "crack squad" was working with a confidential informant investigating a female distributing crack from a car to individuals outside a lounge. *Id.* at 1083-84. The informant, equipped with a wireless transmitter, advised monitoring officers that the female had crack on her person and he had seen crack in the car. After the car stopped at a service station, Reynolds stepped out. He was accosted by several officers, handcuffed, and frisked before consenting to a search. *Id.*[13]

Addressing "whether it is proper for police to handcuff a person whom they are temporarily detaining," this court noted that "[c]ourts have generally upheld the use of handcuffs in the context of a ***Terry*** stop where it was reasonably necessary to protect the officers' safety or to thwart a suspect's attempt to flee." *Id.* However, the court warned that "police may [not] routinely handcuff suspects in order to conduct an investigative stop. Whether such action is appropriate depends on whether it is a reasonable response to the demands of the situation." *Id.* at 1085. Approving the use

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[13]There is no indication in either this court's decision, or the lower court's opinion, ***Reynolds v. State***, 558 So.2d 127 (Fla. 1st DCA 1990), that the investigating officers utilized firearms in conducting their detention.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
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of handcuffs in this case, the court pointed to the following specific circumstances:

> The suspected crime was more than a simple street purchase of drugs. Officers reasonably believed that the woman in the car was resupplying street vendors with crack cocaine and Reynolds was driving the car. The suspected felony occurred at night in a neighborhood known for a high incidence of cocaine trafficking and use. One of the officers testified that in cocaine cases "we experience on a regular basis very intense violent resistance many times immediately upon contact in a restraining or apprehension situation." Another officer testified that she had been hurt in such a situation.

Id. at 1085-86.[14]

In ***Wilson v. State***, 547 So.2d 215 (Fla. 4th DCA 1989), the court considered whether the use of handcuffs automatically converts an investigative detention into an unlawful arrest. The defendant was found leaning up against a house, near the front door, at which a tactical unit of police officers was executing a search warrant for drugs. "It was after dark and the house was located in an area of high crime and drug activity." *Id.* at 216. The police approached with guns drawn and told the defendant and several other men to get down and handcuffed them. *Id.* The court noted testimony that this was a standard precaution used for securing an area under these circumstances and that the department had experienced aggressive behavior and resistance by persons at such scenes and that there was a likelihood of firearms being present. *Id.* The court approved the use of handcuffs under these limited circumstances.[15] *Accord* ***Harper v. State***, 532 So.2d 1091 (Fla. 3d DCA 1988)(use of handcuffs on person unknown to SWAT team executing search warrant in crack

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[14]Justice Barkett, joined by Justice Kogan, maintained that even such testimony about a police officer's prior experience, when unconnected to the specific facts of a particular investigative detention, does not establish a sufficient basis to justify the use of handcuffs. *Id.* at 1088.

[15]Judge Glickstein, in dissent, objected that the majority had placed its imprimatur on the routine handcuffing of all persons who are in or near a house where police are about to execute a search warrant. *Id.* at 217.

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house approved), *rev.denied*, 541 So.2d 1172 (Fla. 1989); ***State v. Ruiz***, 526 So.2d 170 (Fla. 3d DCA)(drawing weapons on, and ordering stranger to lie on ground outside home subject to narcotics raid part of reasonable investigative detention), *rev.denied*, 534 So.2d 401 (Fla. 1988), *cert.denied*, 488 U.S. 1044 (1989); *cf.* ***Carroll v. State***, 636 So.2d 1316 (Fla. 1994)(investigatory detention not converted into arrest despite fact that suspect was held at gunpoint where detainee suspected of murder and encountered by single officer on deserted highway).

In the instant case, unlike ***Reynolds*** and ***Wilson***, there was no evidence that using spotlight to blind the vehicle occupants, brandishing and aiming firearms at the car and occupants, and physically taking custody of Mr. Gaber was a reasonable response to the demands of this situation. Unlike the potentially volatile circumstances of a multi-suspect encounter with suppliers of street crack vendors in ***Reynolds*** or the raid of an apparent drug house in ***Wilson***, in the instant case, the officers merely encountered a vehicle containing what they believed would be two occupants suspected of burglary. In ***Reynolds*** and ***Wilson*** the felonies occurred in neighborhoods known for cocaine trafficking and other crime. In the instant case, the detention took place at a location selected by the officers.

In ***Reynolds***, one officer testified they regularly experienced "very intense violent resistance immediately upon contact in a restraining or apprehension situation"; another testified she had been hurt in such a situation. In ***Wilson*** the testimony established police experience with aggressive and resistant behavior at similar crime scenes and a likelihood of firearms being present. By contrast, in the instant case, the only testimony indicated that the tactics employed by the police were standard. *See* ***United States v. Melindez-Garcia***, 28 F.3d 1046, 1052-53 (10th Cir. 1994). There was no testimony that it was <u>necessary</u> to focus lights to blind the vehicle occupants, brandish

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firearms on the vehicle and Mr. Gaber, and take physical custody of Mr. Gaber. The officers had no information that the defendants were armed or dangerous. The detention could have been effected safely and efficiently without these dangerous and invasive tactics. Thus, the police tactics escalated the detention into a *defacto* arrest. Because the arrest was unsupported by probable cause,[16] the fruits of the resulting search of the vehicle should have been suppressed. *E.g.*, ***State v. Rizo***, 463 So.2d 1165, 1167 (Fla. 3d DCA 1984).[17]

B. The Police Officers Did Not Have a Founded, Reasonable Suspicion to Stop the Vehicle in Which Mr. Gaber was a Passenger; Therefore, the Trial Court Erred in Denying the Motion to Suppress Evidence Obtained as a Result of this Illegal Stop.

A police officer may stop a vehicle and temporarily detain its occupants if the officer has a founded or reasonable suspicion that the occupants have committed, are committing, or are about to commit a crime. *E.g.*, ***Popple v. State***, 626 So.2d 185, 186 (Fla. 1993); ***Cresswell v. State***, 564 So.2d 480, 481 (Fla. 1990); section 901.151(2), Fla. Stat. A "founded suspicion" is a suspicion which has some factual foundation in the circumstances interpreted in the light of the officer's knowledge, experience and specialized training. ***State v. Stevens***, 354 So.2d 1244, 1247 (Fla. 4th

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[16]To avoid duplication, Mr. Gaber will rely on his argument, *infra.*, that the facts failed to establish reasonable suspicion to support an investigative detention. "Probable cause," of course, requires a higher degree of certainty than "reasonable suspicion." *See, e.g.*, ***Cresswell v. State***, 564 So.2d 480, 481 (Fla. 1990).

[17]Certainly, by the time the police handcuffed Mr. Gaber and placed him in the police cruiser, he was under arrest. *E.g.*, ***London***. No further information regarding the suspected burglary had been obtained. (II-74-75, 91). The only additional fact known to the police that conceivably could have supported an arrest was the discovery of the knife. However, discovery of the knife in plain view on the front passenger seat did not establish probable cause to believe Mr. Gaber was carrying a concealed weapon. *E.g.*, ***State v. Hardy***, 610 So.2d 38, 41 (Fla. 5th DCA 1992); ***Gibson v. State***, 576 So.2d 899 (Fla. 2d DCA 1991); ***Cope v. State***, 523 So.2d 1270, 1271 (Fla. 5th DCA)(*en banc*), *rev.denied*, 531 So.2d 1355 (Fla. 1988); ***Mitchell v. State***, 494 So.2d 498, 500 (Fla. 2d DCA 1986).

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

DCA 1978); ***Lachs v. State***, 366 So.2d 1223 (Fla. 4th DCA 1979).

An investigative detention is illegal if it is based on "bare suspicion" or "mere suspicion." ***Popple***, 626 So.2d at 186; ***Coladonato v. State***, 348 So.2d 326, 327 (Fla. 1977). It cannot be based on a "hunch," ***Cresswell***, 564 So.2d at 481; ***Bartlett v. State***, 508 So.2d 567, 568 (Fla. 2d DCA 1987); ***Turner v. State***, 552 So.2d 1181, 1182 (Fla. 4th DCA 1989); ***Dames v. State***, 566 So.2d 51, 52 (Fla. 1st DCA 1990); a "hunch sparked by professional experience," ***Carter v. State***, 454 So.2d 739, 741 (Fla. 2d DCA 1984); a "generalized suspicion," ***R.E. v. State***, 536 So.2d 1125 (Fla. 1st DCA 1988); "curiosity," ***Romanello v. State***, 365 So.2d 220, 221 (Fla. 4th DCA 1978), "instinct," ***Schneider v. State***, 353 so.2d 870, 871 (Fla. 4th DCA 1977); "guesswork," ***Wilson v. State***, 433 So.2d 1301, 1302 (Fla. 2d DCA 1983); or "feeling." ***Carter***. Nor can a stop be "exploratory." ***Currens v. State***, 363 So.2d 1116, 1117 (Fla. 4th DCA 1978). Without more, an officer can't stop an individual or a vehicle "just to check 'em out," ***Dees v. State***, 564 So.2d 1166 (Fla. 1st DCA 1990), or "because it didn't look right," ***Delp v. State***, 364 So.2d 542, 543 (Fla. 4th DCA 1978). Although an officer may rely on information given in a radio dispatch or a "be on the lookout" (BOLO), to justify a stop, the information in the dispatch must be reasonably specific that a crime has been committed or is being committed and that the persons to be stopped are the perpetrators. *See* generally ***Chase v. State***, 656 So.2d 588 (Fla. 2d DCA 1995); ***London v. State***, 540 So.2d 211 (Fla. 2d DCA 1989); ***R.E. v. State***, 536 So.2d 1125 (Fla. 1st DCA 1988).

Applying these principles to facts similar to those at bar, several courts have found stops invalid. In ***R.E. v. State***, 536 So.2d 1125 (Fla. 1st DCA 1988), police received a tip from a named citizen that he saw two people in a white car meet with others in a blue Pontiac and pass a key case,

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

suggesting a drug transaction. The witness identified the suspects in the white car as white males. Although the witness observed no drugs or money change hands, "the behavior of the participants *suggested* to him that a drug transaction had taken place." *Id.* at 1126. A subsequent call by the same citizen several days later caused a BOLO to be issued for a white Pontiac with a tag number "whose driver might be selling drugs." Shortly thereafter, a police officer observed the described vehicle and "[a]lthough there was nothing to arouse suspicion and the driver was obeying the traffic laws, Officer Lewis stopped the car on the basis of the message he had received." *Id.* at 1126-7.

Reversing denial of suppression, the First District held that even if the police officer "had testified that the facts were consistent with a drug transaction, a basis for reasonable suspicion would still be lacking." *Id.* at 1127. While their was "no dispute concerning Mr. Davis' reliability, nor was it questioned that the white Pontiac . . . was the same late model automobile" observed by the citizen-informant, the court nevertheless held the stop to be illegal:

> The instant case . . . involved the report of generalized, allegedly suspicious activity. In such cases, it is necessary to make the additional showing that the information made it reasonable to suspect that a crime had been, was being, or would be committed. This showing was never made.
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> * * *
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> . . . [T]he instant case involves a citizen's claim of suspicious activity that has minimal objective basis and, except for innocent details of identification, is uncorroborated by law enforcement's subsequent observations. Corroboration of nothing more than innocent details of identification . . . does not, however, create or support a suspicion that crime is afoot, which is essential if a report of generalized, allegedly suspicious activity is to justify a stop.

Id. at 1128.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

Another instructive decision is ***London v. State***, 540 So.2d 211 (Fla. 2d DCA 1989). There a police officer received a BOLO of an actual robbery (unlike the mere suspicion of a possible burglary in the case at bar) that had just occurred at a sandwich shop after midnight. The officer was a mere three quarters of a mile and two minutes from the location of the robbery. The description in the BOLO was of "a black male, armed with a handgun, wearing a mask." However, no direction of flight or vehicle was included in the BOLO. While en route to the scene, the officer observed a white Oldsmobile approaching him on a street leading directly from the robbery location, only three quarters of a mile from the robbery. The vehicle was occupied by two black males traveling at a normal rate of speed. Only six minutes had elapsed since the robbery and the officer "saw no traffic other than the white car while en route to the robbery scene." *Id.* at 212. The officer did not initially stop the Oldsmobile but, instead, went to the scene and spoke to a witness who stated he saw a white car pulling out from the robbed sandwich shop driving at a high rate of speed. Based upon this description of a "white vehicle," the officer "suspected that it had been involved in the robbery" and caused a BOLO to be issued for a white vehicle with two black males traveling westbound at a high rate of speed. Another officer, hearing the BOLO, and observing a white Oldsmobile which "was the only car on the road at the time," stopped the Oldsmobile although she "observed no traffic infractions before stopping the vehicle." *Id.* The occupants were removed at gunpoint, handcuffed, and placed in patrol cars.

Reversing the denial of suppression, the Second District held that the defendant "was effectively under arrest when he was handcuffed, held at gun point, and placed in the patrol car." *Id.* at 213. Finding no probable cause to support this effective arrest, the court held:

> Here, the description of the suspects and the vehicle was quite general and was obtained by an unidentified source, without there

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

> being any evidence showing the source to be reliable. This court has held in previous cases that a vague description will not justify law enforcement in stopping, much less arresting, every individual or vehicle which might possibly meet that description. Nor was the BOLO information buttressed by any supporting factual data. There was no identifying evidence linking the suspects to the robbery, and the vehicle's occupants were not observed by the officers committing any crime or traffic infraction. . . . No impartial magistrate could have issued a warrant solely on the basis of the BOLO information.

Id. at 213-14 (citations and footnotes omitted).

Finally, the Second District's decision in ***Chase v. State***, 656 So.2d 588 (Fla. 2d DCA 1995), also counsels reversal of the decision below. There police received a BOLO of a "possible" drug transaction involving four individuals at a specified home and two "white vehicles" out front. *Id.* at 588-89. Police went to the location and found two white cars parked out front and when the defendant emerged from the house, ordered him to come forward. Subsequent events led to the discovery of crack cocaine. Reversing the denial of suppression, the court held that "[t]he information provided in the radio dispatch was woefully inadequate to create . . . the founded suspicion of criminal activity necessary to support a ***Terry*** investigatory stop of Chase. In addition to the fact that the dispatch only relayed that a *possible* drug transaction was occurring involving *possibly* four individuals, no descriptions were provided of the individuals . . . , no license tag numbers were given, and there was no indication that the source of the information had seen a drug transaction . . . ." *Id.* at 589. [Original emphasis].

In the instant case, as in ***R.E.***, ***London***, and ***Chase***, the information available to Deputy Palmeri when he stopped the Firebird and detained Mr. Gaber was insufficient to establish reasonable suspicion. As in ***R.E.*** and ***Chase***, the observations of the source of the BOLO only suggested a possible crime. Mr. Curran acknowledged that he saw no criminal offense. (II-30, 36).

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

Mr. Curran's observations, and the BOLO, concerned merely "generalized, allegedly suspicious activity." ***R.E.***, 536 So.2d at 1128. These facts fell well short of those in ***London*** where the BOLO indicated an actual robbery had just occurred. As in ***London***, where the suspect Oldsmobile "was the only car on the road at the time," the vague description in the instant case of a white or possibly yellow Camaro or Firebird, (II-30, 39, 51, 64), was general and vague. Moreover, in the instant case, there was no description of the vehicle's occupants, whatsoever, or any identifying evidence linking them to the crimes. Deputy Palmeri, though he tailed the Firebird for several miles, failed to observe any criminal activity or traffic offenses that might corroborate the BOLO. (II-66; III-383-4). Under these circumstances, the stop of the Firebird and detention of Mr. Gaber was unsupported by reasonable suspicion. Because the stop was unlawful, evidence obtained from the resulting search of the vehicle should have been suppressed. *See* ***Rizo***, 463 So.2d at 1167; *see* generally ***Wong Sun v. United States***, 371 U.S. 471, 83 S.Ct. 407 (1963).

CONCLUSION

For the reasons and on the basis of the applicable law and the arguments set forth herein, Mr. Gaber respectfully requests that this court disapprove the decision below and reverse the trial court's judgments of conviction and sentences on all counts with directions that he be discharged.

Respectfully submitted,
ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
(305) 858-9550

By: Benjamin Waxman
BENJAMIN S. WAXMAN
Fla. Bar No. 403237

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail, this 13th day of February, 1996, to: Paulette R. Taylor, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.

BY: Benjamin Waxman
BENJAMIN S. WAXMAN

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491