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

REPLY BRIEF ON THE MERITS OF APPELLANT JEFFREY ARTHUR GABER

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TABLE OF CONTENTS

PAGE(S)

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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TABLE OF CONTENTS (Cont.)

PAGE(S)

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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TABLE OF CITATIONS

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

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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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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 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?

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.

A. The *Marrow* Court Correctly Relied on This Court's Opinions in *Cleveland* and *Stearns* in Concluding That Double Jeopardy Bars Dual Convictions for Armed Burglary and Theft of a Firearm Arising Out of a Single Act.

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The state argues that the *Marrow*[1] court's reliance upon *Cleveland*[2] and *Stearns*[3] was misplaced and that these decisions are irrelevant, (RB at 16, 18), because they "utilized the statutory elements test" of *Blockburger*[4] and concluded that the offenses barred by double jeopardy were "subsumed in the greater offense[s]." (RB at 18). It also attempts to distinguish *Cleveland* and *Stearns* because the offense for which they found convictions barred by double jeopardy, using or carrying a firearm contrary to section 790.07(2), is not the offense for which the *Marrow* court ruled that double jeopardy barred conviction.

Contrary to the state's analysis, neither *Cleveland* nor *Stearns* referred to or mentioned any "statutory elements test." Indeed, to the extent this nomenclature refers to the *Blockburger* test, both the offense of conviction found barred in *Cleveland* and the offense of conviction found barred in *Stearns* would have satisfied this test, thus permitting dual convictions. In *Cleveland*, the defendant was convicted of attempted robbery with a firearm, section 812.13(1) and (2)(a), and use of a firearm while committing a felony, section 790.07(2). Obviously, these offenses each "require[d] proof of an additional fact which the other [did] not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182. The offense of robbery required a taking by force, and the offense of use of a firearm required the commission of *any* offense, not just robbery. Likewise, in *Stearns* the offense of burglary while armed, section 812.02(2), and the offense of carrying a concealed weapon while committing a felony, section 790.07(2), each required proof of facts which the other did not. The

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[1] *Marrow v. State*, 656 So.2d 579 (Fla. 1st DCA 1995).

[2] *Cleveland v. State*, 587 So.2d 1145 (Fla. 1991).

[3] *State v. Stearns*, 645 so.2d 417 (Fla. 1994).

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

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armed burglary offense required proof of a burglary; the carrying a concealed firearm offense required proof that the firearm was concealed. Nonetheless, this court, in both ***Cleveland*** and ***Stearns***, held that the firearm offense convictions were barred by double jeopardy.

Also contrary to the state's analysis, neither ***Cleveland*** nor ***Stearns*** stated that the firearm offenses were "subsumed in the greater offense." Even if this were the basis for these decisions, Mr. Gaber maintains that under the facts of his case, the offense of theft of a firearm was subsumed in the greater offense of armed burglary. (PB at 17). Finally, although ***Marrow*** and the ***Gaber***[5] decision below clearly did not concern the offense of carrying a concealed firearm as did this court's decisions in ***Cleveland*** and ***Stearns***, the reach of the precedent of ***Cleveland*** and ***Stearns*** certainly goes beyond their narrow facts. The essential principle appears to be 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." ***Stearns***, 645 So.2d at 418; *accord* ***State v. Brown***, 633 So.2d 1059 (Fla. 1994). Application of this principle to the facts of the instant case, as the court correctly recognized in ***Marrow***, requires reversal of Mr. Gaber's theft of a firearm conviction.

B. The Fact That Armed Burglary and Theft of a Firearm Each Have Different Statutory Elements Does Not Eliminate the Operation of Double Jeopardy Principles.

In its effort to support the decision below, the state trumpets that Mr. Gaber's armed burglary and grand theft of a firearm convictions were for "completely separate offenses," (RB at 15, 24), "completely separate and distinct," (RB at 18), and concerned "entirely separate offenses," (RB at 19), whose "statutory elements are entirely different . . . ." (RB at 21). The state's repeated

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[5]***Gaber v. State***, 662 So.2d 422 (Fla. 3d DCA 1995).

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characterization of these offenses as separate and distinct has no legal significance. Although the state might characterize the offense of fraudulent sale of a counterfeit controlled substance and felony petit theft as "completely separate and distinct," this court has found that double jeopardy principles prohibit dual convictions for these offenses when based on a single act. *See* ***State v. Thompson***, 607 So.2d 422 (Fla. 1992). Likewise, though the state might characterize the offenses of grand theft of an automobile and robbery with a weapon as "entirely separate offenses," this court has also found that double jeopardy prohibits dual convictions for these when based on a single act. ***Sirmons v. State***, 634 So.2d 153 (Fla. 1994).

As Justice Kogan explained in his ***Sirmons*** concurrence, but the state insists upon ignoring, section 775.021(4) "obviously stops a good deal short of throwing Florida into what might be called a 'strict ***Blockburger***' approach to multiple punishments law." *Id.*, 634 So.2d at 184. Instead, "double jeopardy . . . forbids multiple prosecutions for a single act, even if it is linguistically possible to express two or more offenses so that each contains an element the other lacks." ***Lewis v. State***, Case No. 91-4131, 20 FLW D2128 (Fla. 1st DCA Sept. 13, 1995)(dual convictions for petit theft and uttering a forgery based on the single act of attempting to cash a forged check barred on double jeopardy grounds). *See, e.g.*, ***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); ***Blanchard v. State***, 634 So.2d 1118 (Fla. 2d DCA)(dual convictions for battery and false imprisonment based on single act barred on double jeopardy grounds), *rev. denied*, 641 So.2d 1344 (Fla. 1994).

Certainly, the offenses at issue in the instant case, armed burglary and theft of a firearm, are no more "separate and distinct" than the offenses which the above referenced cases have held cannot

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support separate convictions. Florida's double jeopardy jurisprudence, derived from section 775.021(4) and article I, section 9, of the Florida Constitution, does not limit this court to examining only the statutory elements of these two offenses. *See* ***Sirmons***, 634 So.2d at 184. Instead, it is free to recognize that on the facts of the instant case, the single act of removing the firearm from within the home enhanced the second degree felony of burglary of a dwelling to the first degree felony of armed burglary. Both offenses, as charged in the information and proven at trial, arose from a singular core act. Upon the enhancement of the burglary to armed burglary, Mr. Gaber had been duly punished for taking the firearm from within the dwelling. *See* ***Cleveland***. Thus, double jeopardy principles bar Mr. Gaber's theft of a firearm conviction.

C. Section 775.021(4)(b) Requires a Court to Examine Both the *Allegata* and *Probata* in Determining Whether Double Jeopardy Principles Prohibit Dual Convictions for a Single Act.

Any reasonable interpretation of section 775.021(4) dictates that to decide the question of multiple convictions and punishments based on separate offenses criminalizing the same act, a court must examine the allegations of the charging document and the proof at trial. *See* ***Sirmons***, 634 So.2d at 184 (Kogan, J., concurring). Likewise, numerous decisions of this court and the lower appellate courts reversing convictions based on double jeopardy grounds could not be explained absent an examination of the *allegata* and *probata* before the respective courts. *See, e.g.*, ***Stearns***; ***Sirmons***; ***Brown***;[6] ***Thompson***;[7] ***Johnson***;[8] ***Lewis***; ***Crawford***; ***Blanchard***. Despite this deeply

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[6]***Brown v. State***, 633 So.2d 1059 (Fla. 1994).

[7]***State v. Thompson***, 607 So.2d 422 (Fla. 1992).

[8]***Johnson v. State***, 597 So.2d 798 (Fla. 1992).

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entrenched double jeopardy jurisprudence, the state steadfastly insists that the question of multiple convictions must be resolved "without regard to the accusatory pleading or the proof adduced at trial." ***State v. McCloud***, 577 So.2d 939, 941 (Fla. 1991). (RB at 23).

As Justice Kogan explained in ***Sirmons***, the application of fundamental canons of statutory construction demands an interpretation of section 775.021(4)(b) that requires an examination of the *allegata* and *probata* of a particular case. *Id.*, 634 So.2d at 154-56. This is the course which this court and the lower appellate courts have clearly, and correctly taken. Applying this rationale, Mr. Gaber maintains that under section 775.021(4)(b)3, in the instant case, the offense of theft of a firearm was subsumed by the greater offense of armed burglary. (PB at 17). To the extent ***McCloud*** stands for a contrary proposition, it was decided or, at least, justified in error and should be overruled, narrowed, or clarified. For these reasons, whether based on a proper interpretation of section 775.021(4)(b), or an interpretation of article I, section 9, of the Florida Constitution which provides greater protection than the fifth amendment to the United States Constitution, ***see Traylor v. State***, 596 So.2d 957 (Fla. 1992), Mr. Gaber's conviction for theft of a firearm in count II was improper and must be reversed.

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

A. Regardless of Whether This Court Accepts Jurisdiction on the Certified Question, it Should Review the Sufficiency of the Evidence to Correct a Manifest Miscarriage of Justice.

Although recognizing this court's authority to do so, the state argues that this court should decline to review the sufficiency of the evidence to support Mr. Gaber's convictions because "[t]here is nothing particularly compelling about the question in this case" and "there is no reason to question

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the ability of the District Court of Appeal to resolve it in a reliable and final manner." (RB at 25). Contrary to the state's assertion, the compelling nature of the question derives from the fact that the frail, circumstantial evidence introduced at trial utterly failed to support *any* of Mr. Gaber's convictions. The Third District's decision contradicts numerous well-established doctrines regarding the evaluation of circumstantial evidence in cases like this. Thus, to prevent a manifest miscarriage of justice of the highest order, this court should review Mr. Gaber's sufficiency of the evidence arguments.

B. The Evidence That May Have Supported the Convictions of Codefendant Persaud the Driver and Owner of the Vehicle in Which All the Stolen Property was Discovered, Failed to Support the Convictions of Mr. Gaber, a Mere Passenger in the Vehicle.

The state makes a compelling argument to support the convictions of Persaud, the driver of the vehicle in which the stolen property was discovered. It may be reasonable to infer that Persaud's vehicle was the one observed leaving the area of the burglaries and that Persaud was one of two persons observed at the scene of the burglaries shortly before he drove away in his vehicle. It also may be reasonable to infer that Persaud knew of, and possessed (i.e., had custody and control over) the stolen property concealed under the cushion in the rear of his car. However, this circumstantial evidence which may have adequately supported the convictions of Persaud, the driver and owner of the vehicle containing the stolen property, utterly failed to support the convictions of passenger Gaber.

The state baldly asserts that the "evidence was clearly sufficient to establish that [Mr. Gaber] was one of the two individuals that Mr. Curran observed preparing to enter the house across the canal." (RB at 26). However, neither Mr. Curran nor any other witness identified Mr. Gaber as one

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of the two individuals observed at the scene. Nor was there any fingerprint evidence or other physical evidence that directly connected Mr. Gaber to the scene of the burglaries. Even assuming, *arguendo*, Mr. Gaber's mere presence at the scene of the burglaries, this evidence, even together with evidence of flight or concealment, would have been insufficient to sustain his convictions. *E.g.*, ***Howard v. State***, 552 So.2d 316 (Fla. 2d DCA 1989); ***C.P.P. v. State***, 479 So.2d 858 (Fla. 1st DCA 1985); ***J.W. v. State***, 467 So.2d 796 (Fla. 3d DCA 1985); ***P.L.C. v State***, 458 So.2d 800 (Fla. 3d DCA 1984).

Without even acknowledging the abundant caselaw cited in Mr. Gaber's Brief on the Merits that *exclusive* possession of recently stolen property must be proven to obviate the state's burden of proving knowledge that particular property was stolen, (PB at 21-23), the state urges that the cases ***Scobee v. State***, 488 So.2d 595 (Fla. 1st DCA 1986) and ***Palmer v. State***, 323 So.2d 612 (Fla. 1st DCA 1975), control on this point. (RB at 27). ***Scobee*** is clearly distinguishable because there, in addition to proof of the defendant's joint possession of stolen property shortly after the offense, the state proved that the defendant was one of the perpetrators at the scene of the offense. As discussed above, in the instant case such evidence was wholly lacking. Despite the state's assertions to the contrary, Mr. Gaber was neither "seen at the scene of the crime" nor "observed actively participating in the crime." (*Id.*). ***Palmer*** is likewise distinguishable because the defendant was the driver of the vehicle in which the stolen property was discovered. The state's attempt to distinguish ***Howard*** "[b]ecause the evidence was sufficient to establish that [Mr. Gaber] actively participated in the burglaries," (*id.*), is unsupported by the record.

In its final assault on Mr. Gaber's sufficiency of the evidence argument, the state urges that the jury was free to reject one of his hypotheses of innocence, that he was a mere hitchhiker, picked

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up by Persaud after the burglaries. (RB at 27-28). Ultimately, in a circumstantial evidence case, it is for the trial court in the first instance, and the appellate court in the second instance, to decide whether the evidence was inconsistent with the defendant's reasonable hypothesis of innocence. Were this not the case, an appellate court would never have the authority, where the state has presented a *prima facie* case, to reverse a judgement of conviction. Such a rule would improperly restrain the judiciary from exercising its constitutional mandate of ensuring protection of a defendant's due process rights. Clearly, the authority of an appellate court to undertake this responsibility is not only permitted, but an imperative. Thus, in cases such as this, where one, if not several, hypotheses of innocence have gone wholly unrebutted, it is the solemn responsibility of the appellate court to reverse a judgment of conviction and direct the entry of an acquittal.

C. 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 state asserts, as if established by direct evidence, that Mr. Gaber "was sitting on the knife," and then suggests that the legal issue is whether this constitutes legally sufficient evidence of concealment. (RB at 28-29). The only evidence that Mr. Gaber was sitting on the knife was circumstantial. This evidence was not inconsistent with the reasonable hypotheses of innocence derived from the same evidence that the knife was sitting fully exposed either on the front seat next to Mr. Gaber, or on Mr. Gaber's lap, immediately before Mr. Gaber emerged from the vehicle. Thus, this evidence, too, was legally insufficient to support Mr. Gaber's carrying a concealed weapon conviction which must be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail, this 1st day of April, 1996, to: Paulette R. Taylor, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N921, P.O. Box 013241, Miami, Florida 33101.

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