IN THE SUPREME COURT OF FLORIDA

JORGE GARCIA, :

Petitioner, :

vs. : Case No. SC03-1677

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Jorge Garcia was charged with trafficking in methamphetamine, driving under the influence of alcoholic beverages and obstructing or resisting an officer without violence, offenses dated June 9, 2001. (R22-23). A jury trial was held before Judge Maynard F. Swanson, Jr. on December 11, 2001 in Pasco County. (T1).

Deputy Joseph Irizarry of the Pasco County Sheriff's Department testified that he stopped Mr. Garcia at around 3 a.m. on June 9, 2001 for erratic driving. (T28). The deputy then decided to pull Mr. Garcia over after following him for an estimated quarter of a mile. (T31-32, 61). Mr. Garcia pulled over promptly and safely and was polite and respectful toward the officer. (T62).

The deputy pulled in behind Mr. Garcia's truck and walked up to the driver's side. (T32-33). Mr. Garcia opened the window and the deputy smelled alcohol and saw that Mr. Garcia's eyes were bloodshot. (T33). Mr. Garcia had a cooperative attitude. (T34). The deputy asked Mr. Garcia for his driver's license and registration, which Mr. Garcia handed over. (T35). The deputy asked Mr. Garcia if he had been drinking and Mr. Garcia told him he had had three beers during the evening. (T36). The deputy asked Mr. Garcia to get out of the truck, and Mr. Garcia had an unsteady balance. (T36-37).

Because of the driving, the odor of alcohol, the bloodshot eyes, and the slurred speech, the deputy asked Mr.

Garcia to take field sobriety tests. (T38). While Mr. Garcia was taking these tests, Deputy Wilkins arrived. (T49, 101-102). After observing the field sobriety tests, Deputy Irizarry decided to arrest Mr. Garcia for DUI. (T44). Deputy Bunner arrived as Mr. Garcia was being placed under arrest. (T130).

Deputy Irizarry and Deputy Wilkins began to search Mr. Garcia's truck. (T48-49). Deputy Irizarry thought the truck looked very clean. (T50). Deputy Irizarry did not find anything during the search. (T49-50). Deputy Wilkins went to the passenger side and found something in the car. (T76). Deputy Irizarry was at his police car when Deputy Wilkins handed the object to Deputy Bunner who brought it to Irizarry. (T80). None of the officers knew what the item was or that it contained drugs. (T80). Deputy Irizarry did not notice the object Deputy Wilkins took out of the vehicle until it was already removed from the truck. (T49). The object looked like a softball wrapped in black electric tape. (T50, 83). Deputy Irizarry could not tell what the object was simply by looking at it. (T50). Deputy Irizarry placed the object found in the truck into evidence. (T54). After the black taped ball was found to contain suspected drugs, Deputy Irizarry asked FDLE to process the wrapper for latent fingerprints. (T55).

Deputy Irizarry asked Mr. Garcia what the object in the truck was, and Mr. Garcia told him he did not know. (T84). Mr. Garcia told the police he had not seen the object before,

and he did not know how it got in the truck. (T84). Deputy Irizarry recalled Mr. Garcia telling him that the truck had been recently stolen and that some friends had been in his truck earlier that night. (T84).

Deputy Wilkins testified that he helped search the truck after Mr. Garcia was arrested. (T105). The truck was clean and well kept. (T110). First he looked at the driver's side and saw nothing. (T105-106). Next he searched the passenger side and on the left hand side under the seat saw a black ball. (T106-107). The deputy testified that the object found was not wedged under the seat, but could roll around. (T112). Deputy Wilkins said he was wearing latex gloves when he picked up the ball. (T107). Deputy Wilkins did not fingerprint the ball, because he did not suspect it to be anything illegal. (T108). Deputy Wilkins handed the ball to Deputy Bunner who took it to Deputy Irizarry as he stood back by his patrol car. (T108-109).

Deputy Wilkins saw Deputy Bunner unwrap the black-colored tape, but did not pay attention while Deputy Bunner was unwrapping the tape. (T109). Deputy Wilkins did not remember any pictures being taken at the scene. (T111).

Deputy Steven Bunner arrived at the scene in time to see Deputy Irizarry arresting Mr. Garcia. (T130, 146). Deputy Bunner saw Deputy Wilkins take a black taped object out of the truck. (T133). Deputy Bunner did not remember Deputy Wilkins wearing gloves when he searched the truck. (T133). Deputy

Wilkins asked Deputy Bunner if he knew what the object might be and Deputy Bunner said he had no idea. (T134). The ball was hard, but not rock hard. (T134). Deputy Bunner started unraveling the tape and letting it fall on the patrol car trunk. (T135). Underneath the tape was blue cellophane. (T136). Underneath the blue cellophane was something that looked like a white rock wrapped in cellophane. (T136). Deputy Bunner did not process the object for fingerprints, because he did not know what the object was. (T137). There was no loose powder found in the truck. (T153). Deputy Bunner knew of no evidence indicating Mr. Garcia put the object in the truck. (T153). The deputies had cameras, but Deputy Bunner cannot recall if anyone took any pictures. (T154-155).

Roberta Case worked as a crime scene technician on June 2, 2001, and processed the same truck that Mr. Garcia was driving when he was arrested. (T157-158, 183-184). The truck was photographed and processed for fingerprints because it had been stolen. (T158-161). Ms. Case stated that as a habit she looks thoroughly through the interior of a vehicle she processes and documents in her report the items found. (T163). At the time she inventoried the truck Mr. Garcia had driven, she did not find a softball-sized ball under the passenger seat.(T163). She did find many items cluttered inside the truck and in the truck bed. (T160-163). Inside the truck there were Styrofoam packing peanuts, a CD case, a blue

bandanna, a CD player, miscellaneous papers, a tape measure, power tools, stereo and audio components, and a broken videotape amid the debris.(T160-161). The truck was released on June 4, 2001. (T164).

Crime scene technician William Joseph processed a blue wrapper with black electrical tape for fingerprints, but found no latent fingerprints of value. (T177-178).

The defense moved in limine to exclude testimony of the street value of the seized methamphetamine. (T173). The trial court granted the motion and ruled, "the value of the contraband is, on this prosecution, irrelevant." (T175).

The state rested and the defense moved for a judgment of acquittal for the drug trafficking count. The motion was based on the grounds that the state had failed to prove Mr. Garcia knew the object was in his truck or that he knew what was inside the object. (T184-185). The state opposed the motion, and the trial court denied it. (T187).

Mr. Garcia took the stand in his defense. (T190). He testified that he was 29 years old and lived in Dade City with his sister. (T190-191). Mr. Garcia worked at various jobs, including construction, picking oranges, and at landscaping. (T191). He has a ninth grade education obtained in Mexico. (T191).

On June 9, 2001, Mr. Garcia worked picking oranges until 4:00 p.m. (T192). At around 7 p.m. he went to a get-together with some friends for about eight hours. (T193). His truck

was at the party and was used for playing CDs and to go with friends to buy beer. (T193-194). About 15-20 people were at the party. (T194). During two rides to the store people rode in the truck with him. (T195).

Mr. Garcia denied using drugs. (T195).

He did not put the taped ball in the truck or see it that night. (T195). He did not know the taped ball was in the truck. (T195).

After the DUI arrest the police started searching the truck. (T206). The police asked Mr. Garcia about the ball. (T207). Mr. Garcia told them he did not know anything about the object. (T207). The truck had been stolen from a shop in Lakeland on May 31, a Wednesday. (T207). Mr. Garcia next saw the truck the following Monday. (T208). The truck was dirty and had items in it that did not belong to Mr. Garcia, including a scooter, a cell phone, a tape measure, and lots of tools and debris. (T209-211, 216). Mr. Garcia took the truck back to the shop to have a stereo put in, and the truck was cleaned, with all the items not belonging to him removed, when he picked it up. (T210-211, 216). Mr. Garcia presented pictures of the truck showing that there is a hump under the passenger seat that obscures the view one from looking under it, and that from the passenger seat front, only the seat front is visible. (T212-213).

The defense rested and renewed its motion for judgment of acquittal for the trafficking in methamphetamine charge.

(T222, 229-231, 233-237). The trial court, in denying the motion, stated, "Well, I must admit, I think that the proof of any possession of the contents is certainly close to nonexistent, but I'm also persuaded by the -- I have to -- I am going to deny the motion. I think it's a very weak argument, but I think it's got to be a jury question." (T237).

A charge conference was then held. (T238). During the charge conference the defense requested that special instructions be given for the trafficking charge. (T238-245). The trial court decided to give the standard jury instructions and rejected the defense special instructions. (T245-246). The defense objected to the reading of the standard instructions for the trafficking charge. (T243-245). The grounds for the objection were that the instructions permit the jury to infer or assume knowledge of the presence of methamphetamine based on exclusive possession of the container of the drug. The instructions then violate due process by relieving the state of its burden of proof beyond a reasonable doubt. (T243-244). Because the instruction allows the fact finder to assume, or take as true, the element of knowledge, the instruction sets forth a mandatory presumption which allows an element to be considered proved without requiring the presentation of evidence of proof beyond a reasonable doubt. (T244). Additionally the instruction shifts the burden

to the accused to prove he did not know of the presence of the drug. (T244-245).

The trial court read the standard instructions from his book, and did not hand out written instructions to counsel or to the jury. (T248).

During closing argument, the prosecutor argued that Mr. Garcia knew the drugs were in the truck because he was the only person in the truck and that the jury could assume or infer he knew the taped ball contained methamphetamine from Mr. Garcia's exclusive possession of the truck. (T255-256). The prosecutor told the jury point blank, "The defense knew it was there because he put it there." (T256). She told the jury, "He knew that he had that piece of methamphetamine in his truck because he put it there. He knew it was there. Knowledge of the existence of the tape-bound ball can be inferred. Knowledge of its contents can be gleaned form the facts you heard." (T258). The prosecutor told the jury that "Common sense tells you -- and you're allowed to use common sense back there -- that this chunk has a high value to some people." (T256). She told the jury "a person would not leave 220 grams worth its weight in gold in your vehicle." (T257).

After the prosecution had completed its initial closing statement, the defense at sidebar objected to the state's comments to the jury. (T262-263). The defense objected to the state telling the jury Mr. Garcia knew the object was in his vehicle and contained drugs without pointing to any evidence

showing that. (T262). Additionally the defense objected to the state telling the jury the drugs were worth its weight in gold when the trial court had precluded the state from presenting evidence of the value of the drugs. (T175, 262-263). The trial court overruled the objection. (T263).

In the final closing argument to the jury the prosecutor stated, "The defendant testified that he's a fruit picker and a sometime-construction-worker, the owner and driver of this 2000 Ford F---." (T292). At this point the defense objected on the grounds that there was no evidence about the value of the truck and the improper inference the prosecutor was making about Mr. Garcia not being able to afford the vehicle in his line of work. (T292-293). The trial court decided to instruct the jury not to rely on comments by counsel that were not supported by the evidence, but did not specify what comments it was referring to. (T294). The prosecutor then repeated, "The defendant testified that he's a fruit picker, a sometime-construction-worker, the owner-driver of this Ford F150 truck." (T294). The defense objected and the trial court overruled the objection. (T294). So the prosecutor continued, stating, "Ford F150, Harley Davidson Special with a new stereo installed." (T294). The defense again objected that these comments were misleading the jury and the trial court overruled the objection. (T295). The prosecutor then stated, "He knew that this piece of methamphetamine was in the black ball. He knew -- [Defense objection] where the black ball

was." (T295). The defense stated, "There was no testimony to establish that. She's acting like she knows that." (T295). The trial court sustained that objection and instructed the jury that "Personal opinions as to the evidence by either counsel is not for the jury to consider." (T295).

Later in the final closing argument, the prosecution again told the jury, "The black ball -- the Judge will tell you that you can infer his knowledge of -- he's in exclusive possession of the truck. He knew this black ball is under there. It's for you to decide if he knew what was in the black ball. He was in possession of in excess of 28 grams of methamphetamines -- 220 grams, actually." (T296).

The trial court instructed the jury as follows concerning the elements of the trafficking in methamphetamine charge:

> Now, before you can find the defendant guilty of trafficking in methamphetamine, the State has to prove four elements, each of which must be proven beyond and to the exclusion of every reasonable doubt. These are:
>
> First, the defendant knowingly possessed a certain substance.
>
> And that substance was methamphetamine or a mixture containing methamphetamine.
>
> And the quantity of the substance involved was 28 grams or more.
>
> And the defendant knew that the substance was methamphetamine or a mixture containing methamphetamine.
>
> Those are the four elements that must be proven.

(T300). The trial court then instructed the jury on the following definition of possession:

> Possession may be actual or it may be constructive.
>
> Actual construction [sic] means that the thing is in the hand of or on the person, or the thing is in a container in the hand of or on the person, or the thing is so close as to be within ready reach and is under the control of the person.
>
> Mere proximity to a think is not sufficient to establish control over that thing when the thing is not in a place over which a person has control.
>
> Constructive possession means the thing is in a place over which the person has control or in which the person has concealed it. If a thing is in a place over which the person does not have control, in order to establish constructive possession, the State must prove the person has control over the thing, knowledge of the thing which was in the person's presence, and the knowledge of the illicit nature of the thing.
>
> If a person has exclusive nature -- exclusive possession -- of a thing, knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

(T300-301).

The trial court instructed the jury as follows concerning the elements of the lesser-included offense of possession of methamphetamine:

> Before you can find the defendant guilty of possession of methamphetamine, the State has to prove three elements beyond a reasonable doubt:
>
> The defendant possessed the substance.
>
> And the substance was or was a mixture containing methamphetamine.
>
> And the defendant had knowledge of the presence of the substance.
>
> And, again, the same definition of possession, both constructive as well as actual construction [sic], applies to the lesser charge as it did to the greater charge.

(T302-303).

At the close of the instructions the defense renewed its objections to the reading of the instructions for trafficking in methamphetamine and possession of methamphetamine. (T316).

During deliberations, the jury asked the following question:

"What is the difference between trafficking and possession of methamphetamine?" (T317). After consulting with counsel, the trial court decided to read the jury the elements of the two offenses. (T318-319). The defense renewed its objection to the original instructions given for the crimes. (T319). The trial court then told the jury the following:

> I will -- what I am going to read to you is the elements of each offense and

then, frankly, you're going to have to decide for yourself what the difference is.

All right. Possession of methamphetamine. Certain drugs and chemical substances are by law known as controlled substances. Methamphetamine is a controlled substance.

Before you can find the defendant guilty of the possession of methamphetamine, the State must prove three elements, each of which must be proven beyond and to the exclusion of every reasonable doubt.

One, the defendant possessed a certain substance.

The substance was methamphetamine.

And the defendant had knowledge of the presence of the substance.

That is the possession of methamphetamine.

Trafficking in methamphetamine.

Certain drugs and chemical substances are by law known as controlled substances. Methamphetamine or any mixture containing methamphetamine is a controlled substance.

Before you can find the defendant guilty of trafficking in methamphetamine, the State must prove four elements, each of which must be proven beyond and to the exclusion of every reasonable doubt. There are:

First, the defendant knowingly possessed a certain substance.

That substance was methamphetamine or a mixture containing methamphetamine.

The quantity of that substance involved was 28 grams or more.

And the defendant knew that this substance was methamphetamine or a mixture containing methamphetamine.

(T321). The defense again objected to the contents of the instructions given the jury. (T321). On December 12, 2001, the jury then returned verdicts of guilty of possession of methamphetamine and driving under the influence of alcohol,

and not guilty of resisting arrest without violence. (R50-52, T322).

On December 20, 2001, Appellant filed a motion for new trial and a motion for renewed judgment of acquittal, stating the trial court had erred in denying the motion for judgment of acquittal for the drug charge when guilty knowledge was not proved by any evidence. (R57, 59-60). The motion also stated the trial court erred in failing to instruct the jury that the state had to prove beyond a reasonable doubt that Mr. Garcia had knowledge that the item possessed was methamphetamine. (R54-58). The defense argued that the elements of possession of methamphetamine and trafficking in methamphetamine in this case should differ only as to the weight requirement of the possessed drug, but that the jury instructions as given contain a requirement of knowledge that the substance was methamphetamine for the trafficking crime, but no such requirement for the possession charge. (T56). The motion also stated the prosecution had presented improper arguments to the jury when it told the jury Mr. Garcia knew the its weight in gold, despite a complete lack of evidence supporting these arguments. (R57-58). The defense also filed a separate Motion for Renewal of Motion for Judgment of Acquittal concerning the drug possession count. (R59-60). The trial court denied the motions, adjudicated Mr. Garcia, and sentenced him to one year of community control. (R67-68, 71, 90-91).

The district court affirmed, and wrote an opinion addressing the issues concerning the sufficiency of evidence and the jury instructions given. Garcia v. State, 854 So.2d 758 (Fla. 2d DCA 2003). The district court found the evidence sufficient to withstand the motions for judgment of acquittal. Id. at 762-764. The district court found that the jury instructions given were wrong and "expressly misleading," but that the error was not preserved for review of fundamental. Id. at 764-770. The error was not fundamental, the district court decided, because knowledge of the nature of the substance inside the black taped ball was not in dispute. Id. at767. The district court certified direct conflict with Goodman v. State, 839 So.2d 902 (Fla. 1st DCA 2003), because that decision construes this Court's decision in Scott v. State, 808 So.2d 166 (Fla. 2002) to require a finding of fundamental error when the accused defended by denying knowledge of the presence of the drug and no guilty knowledge instruction is given. 854 So.2d at 769-770.

This Court postponed its decision on jurisdiction and ordered briefs on the merits.

SUMMARY OF THE ARGUMENT

The district court erred in finding sufficient the state's evidence of drug possession, when the facts failed negated Mr. Garcia knew contraband was wrapped inside the black ball of tape found under the passenger seat of the truck occupied and driven by him, and the state failed to prove Mr. Garcia knew what was inside the black taped ball. Reversal and discharge for the drug possession charge are required.

The district court erred in finding ruling fundamental error did not occur when the trial court failed to instruct the jury on the essential element of guilty knowledge for the drug possession charge, when the jury specifically asked to know the difference between drug trafficking and drug possession and was told that drug trafficking requires proof of knowledge the substance is methamphetamine, but that drug possession requires proof of only knowledge of presence. Reversal and a new trial are required.

The trial court erred in instructing the jury on the permissive inference that evidence of exclusive possession permits one to assume knowledge of the presence of the substance. In this case the jury could have believed that by proving exclusive possession of the truck the state had met its burden of proving Mr. Garcia knew the concealed drugs in the hidden taped ball contained methamphetamine. Reversal and a new trial are required.

The trial court erred in permitting the prosecutor to argue

to the jury facts not proved by evidence concerning Mr. Garcia's knowledge that the taped ball contained methamphetamine. Reversal and a new trial are required.

ARGUMENT

I.

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT SUFFICIENT EVIDENCE EXISTED TO SUSTAIN A DRUG POSSESSION CHARGE PROVED SOLELY BY EVIDENCE OF THE MERE PRESENCE OF CONTRABAND CONCEALED IN AN INNOCUOUS OBJECT AND HIDDEN UNDER THE PASSENGER SEAT OF A RECENTLY STOLEN AND RECOVERED VEHICLE SOLELY OCCUPIED BY APPELLANT AND OTHER EVIDENCE PROVED APPELLANT'S LACK OF KNOWLEDGE OF THE CONTRABAND?

This case presents the question of whether an accused can be convicted of drug possession merely by the state's proof that there exists in the accused's recently stolen and recovered vehicle a hidden taped black ball with methamphetamine wrapped inside, when other evidence shows the accused lacked knowledge of the contraband's presence. The Second District found that evidence of the mere presence of the hidden black ball tucked under the passenger seat inside the truck driven by Mr. Garcia, proved he knew it was there and knew what was inside it. Garcia v. State, 854 So.2d 758, 762-764 (Fla. 2d DCA 2003). Permitting the state to obtain

the drug possession conviction against Mr. Garcia in this case violated his state and federal constitutionally guaranteed rights to due process and to require the state to prove the charge beyond a reasonable doubt. Reversal and discharge is required.

This case does not present facts at all similar to the facts that over thirty years ago gave rise to the presumption of knowledge from exclusive possession in Medlin v. State, 273 So.2d 394 (Fla. 1973). In Medlin the evidence concerning Medlin's giving a sixteen year old girl a capsule, saying it would make her go "up," and another pill, telling her it would make her go down from the high created by the other pill. Id. 273 So.2d at 395. When Medlin was arrested, he was in exclusive possession of the same pill he had given the young girl. Id. The presumption that arises in Medlin is that proof of the "prohibited act" gives rise to a presumption that the defendant did the act knowingly and intentionally. Id. at 397. This Court in Medlin noted that Mr. Medlin defended his case by stating he did not know what the pills contained, and this defense was rebutted by the girl's evidence that he told her what one pill was an upper and another was a downer. Id. Thus Medlin does not apply to this case in which the state did not rebut the defense of a lack of knowledge with any evidence that Mr. Garcia knew the black ball was inside his recently stolen truck or that he knew what was inside the black ball.

The district court applied the Medlin presumption in this case, when the prohibited act of possession was never proved by the state. In this case all the state proved was that the taped black ball was inside the recently stolen and recovered truck driven solely by Mr. Garcia, and that the truck had been previously inventoried after the police recovered it. (T106-107, 164). In Medlin the state proved the drugs were found on Medlin's person and that he knew what was inside the pills. Since the Medlin presumption was wrongly applied to these facts, which lacked proof of actual possession or circumstantial exclusive possession, the district court reached the wrong conclusion regarding the sufficiency of the evidence.

The state sought to prove drug possession through circumstantial evidence of constructive possession. State v. Garcia, 854 So.2d at 762. This Court recently explained the standard of review in a circumstantial evidence case as follows: "A motion for judgment of acquittal should be granted in a **circumstantial evidence** case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Consistent with the standard set forth in *Lynch [v. State,* 293 So.2d 44 (Fla.1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, 'the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the

law.' [*Lynch,*] 293 So.2d at 45. The state's evidence would be as a matter of law 'insufficient to warrant a conviction.' Fla. R.Crim.P. 3.380. It is the trial judge's proper task to *review* the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to '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. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every **reasonable hypothesis** of **innocence** beyond a reasonable doubt. *State v. Law,* 559 So.2d 187, (Fla.1989) (citations and footnote omitted)." Floyd v. State, 850 So.2d 383, 396 (Fla. 2002), cert. denied, 2004 WL 46784 (U.S., filed January 12, 2004).

This Court has defined constructive possession as follows: "'Constructive possession exists where the accused without physical possession of the controlled substance knows of its presence on or about his premises and has the ability to maintain control over said controlled substance.' Hively v. State, 336 So.2d 127, 129 (Fla. 4th DCA 1976). To establish constructive possession, the state must show that the accused had dominion and control over the contraband, knew the

contraband was within his presence, and knew of the illicit nature of the contraband. Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981). Brown v. State, 428 So.2d 250 (Fla. 1983).

It has long been held and recently reaffirmed that the burden of proof beyond a reasonable doubt cannot be met in a circumstantial evidence case by stacking or pyramiding inferences. Miller v. State, 770 So.2d 1144 (Fla. 2000); Gustine v. State, 86 Fla. 24, 28, 97 So. 207, 208 (1923). The circumstantial evidence in this case can only meet the proof beyond a reasonable doubt standard if the evidence of knowledge is proved without stacking inferences. Miller; Gustine.

The district court's conclusion that proof of sole vehicle occupancy[1] alone suffices to prove knowledge of contraband concealed in a covered and hidden container in the vehicle is the product of a stacking of inferences. To permit a conviction for drug possession to rest on mere proof of sole possession of a vehicle, one must infer that the sole occupant of the vehicle knew of the presence of the covered and otherwise innocuous-appearing item that contained the contraband. From this fact the fact finder must then stack the additional inference on to that one and infer that from

[1]Although the state elicited evidence that the truck belonged to Mr. Garcia during Mr. Garcia's testimony, the state failed to prove Mr. Garcia owned the truck during the presentation of the state's case. The state cannot rely on evidence adduced during the defense case to establish the necessary proof in its own case, and the trial court cannot consider such evidence when ruling on a motion for judgment of acquittal. Hampton v. State, 662 So.2d 992 (Fla. 2d DCA 1995). The inquiry of the reviewing court must be on whether the state presented sufficient evidence during its case to support the conviction obtained. Walker v. State, 604 So.2d 475 (Fla. 1992).

knowledge of the mere presence of the covered and concealed and otherwise innocuous-appearing item, that one can infer the sole occupant knew what was inside the item. This stacking of inferences is not constitutionally permitted, because it does not meet the standard of proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970); Ingram v. United States, 360 U.S. 672, 680 (1959); Hayes v. State, 660 So.2d 257, 265 (Fla. 1995); Jackson v. State, 575 So.2d 181, 188 (Fla.1991).

To hold otherwise permits the state to obtain a criminal conviction for drug possession merely by proving the presence of a hidden and covered item containing contraband inside a person's recently stolen and occupied vehicle. This makes a person criminally responsible for the contents of all items in one's vehicle, even when others have recently occupied the vehicle, and when there exist no other facts supporting the vehicle owner's knowledge of the item or of its contents. Under the rational of the district court opinion, the inside of every ball, package and container is deemed known by every vehicle owner/occupant who solely occupies the vehicle. The district court's decision ignores the due process requirements of Winship and Jackson, and permits the state to obtain a conviction with less proof than is constitutionally required under the due process clauses of the state and federal constitutions. U.S. Const. Amend. XIV; Art. I, §9, Fla. Const.

While knowledge of visible contraband in a vehicle may be inferred from exclusive possession of the vehicle, State v. Paleveda, 745 So.2d 1026, (Fla. 2d DCA 1999), knowledge of secreted and covered containers of contraband cannot rationally be inferred from mere evidence of exclusive possession of a vehicle containing the hidden and covered container. See N.K.W. v. State, 788 So.2d 1036 (Fla. 2d DCA 2001)(LSD found in accused's wallet found in another home closet not sufficient to prove knowledge where others had access to wallet during party; E.H.A. v. State, 760 So.2d 1117 (Fla. 4th DCA 2000)(knowledge of marijuana and pipe found in accused's backpack not proved when backpack found in acquaintance's car trunk when accused was not there); Rita v. State, 470 So.2d 80 (Fla. 1st DCA 1985), rev. denied, 480 So.2d 1296 (Fla. 1985)(knowledge of over 2000 pounds of marijuana in padlocked rear cargo compartment of refrigerator truck driven and solely occupied by accused not proved where accused had no key to open padlock and no windows or other openings permitted access to or observation of cab's contents). Some proof of knowledge is required to tie the hidden and covered container and its unknown contents to the vehicle owner's knowledge of those contents. Such proof of knowledge was completely lacking in this case.

The police officers testified that none of them could tell what the black taped ball was just by looking at it. (T50, 80, 108, 134). None of the police officers knew the

object contained drugs. (T80). Because the police did not suspect the object was contraband, they handled it with bare hands. (T136-137). Deputy Wilkins testified that he did not immediately fingerprint the black ball because "I didn't suspect it to be anything." (T108). Deputy Bunner, who unraveled the taped ball, said he knew of no evidence indicating Mr. Garcia had put the ball in the truck. (T153). There were no fingerprints found on the tape or the cellophane. (T177-178). There was no loose powder found in the passenger seat, out of plain sight. (T106-107). The state's evidence only showed Mr. Garcia denied knowing what the black taped ball and its contents were, and this evidence was not rebutted. (T84, 155-156). There was no evidence Mr. Garcia was nervous about seeing the black ball, or reacted to its presence in a manner showing he knew it contained illegal drugs. There was no evidence of the value of the drugs, and the trial judge had precluded the state from presenting evidence of street value. (T175). The jury convicted Mr. Garcia of the lesser charge of drug possession, thus finding the weight of the drugs was not proved to be in excess of four grams.

The district court determined that knowledge of contraband found within a vehicle is always generally inferred from exclusive possession of the vehicle, in this case regardless of how the contraband is contained or where it is found. Garcia v. State, 854 So.2d at 762. The district court

concluded this inference applies to this case because the presumption "is based on the eminently sensible recognition of the reality that persons who lay claim to a valuable possession – such as illegal drugs – are quite unlikely to place that valued possession in a motorized conveyance which is under the exclusive dominion and control of another and which may speedily bear it away to a place from which is cannot be recovered. It is thus reasonable to assume that a person who is in exclusive possession and control of a motor vehicle bears responsibility for such items of value that are located in the vehicle." Id. In this case in which there was no proof regarding the value of the contraband, and in which the jury rejected the finding that trafficking amounts were involved, this described "reality" and logic does not apply. Moreover, a vehicle owner's knowledge of contraband which is not visible or discernible as contraband, should not be presumed. Otherwise, drugs hidden inside of baseballs or basketballs or other innocent looking objects like the black taped ball found in this case, will be presumed "known" and possessed by the vehicle owner, merely by the object's presence inside the accessible parts of a vehicle. This is logical, because parts of a vehicle are accessible to anyone who uses it, and most people do not search their vehicles after each occupant leaves. Under the district court's logic, a person, like Mr. Garcia, has no means of defending the possession charge, other than denying knowledge of the

presence of the innocent looking object and explaining who else was inside the truck. When no fingerprints or other corroborating evidence substantiate the knowledge element, but knowledge is proved by mere presence of the innocent looking object in the vehicle, the evidence of the knowledge element is not proved beyond and to the exclusion of every reasonable doubt. The rationale that requires additional proof of knowledge for concealed or covered items containing contraband in a home, compels the same result for a vehicle, which is usually more frequently occupied by non owners than a home. See N.K.W. v. State, 788 So.2d 1036 (Fla. 2d DCA 2001).

The district court opinion fails to recognize the importance of the taped black ball in which the drug was found in considering whether the constructive possession was proved beyond a reasonable doubt. A covered container of contraband cannot be treated the same as a visible plastic bag of drugs for purposes of proving knowledge. While district courts have permitted sole occupancy of a vehicle to stand as sufficient proof of knowledge of drugs found in the car, those cases do not deal with covered containers, but merely with the joint versus sole occupancy question. The added facts of a covered and concealed container with an otherwise normal appearance, which happens to contain contraband in a vehicle recently occupied by others, including robbers, distinguishes this case completely from the sole vehicle occupancy cases relied upon by the Second District in this case. See Lee v. State, 835

So.2d 1177(Fla. 4th DCA 2002)(driver's sole occupancy of vehicle at time of arrest provided sufficient evidence that accused knew of marijuana cigarette found on driver's side floor); Parker v. State, 641 So.2d 483 (Fla. 5th DCA 1994)(sole occupancy of vehicle recently occupied by another and in which cocaine was found under the passenger seat sufficient to prove knowledge of the cocaine); Jordan v. State, 548 So.2d 737 (Fla. 4th DCA 1989)(constructive possession of cocaine and marijuana in glove box found in rental car proved by sole occupancy of driver who smelled like marijuana and admitted to smoking it, when other cocaine was found in trunk which state proved was accessible only to accused).

In addition to the above cases, the Fourth District found sufficient evidence of constructive possession proved by sole vehicle occupancy and ownership where the contraband cocaine was found under the spare tire located in the trunk. Johnson v. State, 689 So.2d 1124 (Fla. 4th DCA 1997), rev'd on other grounds, 712 So.2d 380 (Fla. 1998). This Court quashed Johnson on double jeopardy grounds, and did not discuss or reverse the Fourth District's ruling on the sufficiency issue. Johnson v. State, 712 So.2d 380 (Fla. 1998). Johnson can be reconciled with the arguments presented here, because in Johnson the cocaine was found under the spare tire in the trunk, a place that is logically accessible only to someone who owned the vehicle and had keys to the trunk. In this case the contraband was found in a black taped ball hidden in a

part of the truck that was accessible to anyone who was inside of it, under the passenger seat. (T106-107).

This Court found in an actual possession case that "the State proceeds at its own peril in relying on the [State v. Medlin, 273 So.2d 394 (Fla. 1973)][2] presumption, when there is evidence which tends to negate the presumption." State v. Williamson, 813 So.2d 61, (Fla. 2002). This Court stated "the presumption may not be sufficient when there is evidence which tends to negate the presumption." Id. at 64. In this circumstantial evidence case, the evidence shows Mr. Garcia did not know about the presence of the black taped ball in his truck or what was inside the black taped ball. The state presented no evidence that rebutted those facts. The evidence showed that the police thought the black taped ball was an innocent object by appearance. This fact of an innocent looking container is similar to the fact in Williamson concerning the inability to read without a microscope the word "codeine" on the Tylenol pills found on Williamson. If the proof in an actual possession case like Williamson requires more evidence than the simple act of possessing the object, then in this circumstantial evidence case, more evidence is certainly required to sustain a conviction.

Since the state failed to present any evidence that rebutted the reasonable hypothesis of innocence that Mr.

[2] The Medlin presumption is that a person's actual possession of contraband gives rise to the inference that the person had knowledge of the presence of the illegal substance. State v. Williamson, 813 So.2d 61, 64 (Fla. 2002).

Garcia did not know what was inside the black taped ball and did not know the black taped ball was in his truck, the evidence against Mr. Garcia is insufficient. The decision of the district court must be quashed and the methamphetamine possession conviction vacated.

II.
WHETHER THE DISTRICT COURT ERRED IN RULING THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE ESSENTIAL ELEMENT OF GUILTY KNOWLEDGE WAS FUNDAMENTAL ERROR?

The district court wrongly decided that this Court's decision in State v. Delva, 575 So.2d 643 (Fla. 1991), required ruling that the trial court's erroneous instructions to the jury regarding guilty knowledge were not fundamental error because guilty knowledge was not in dispute. The district court so concluded by narrowing defining guilty knowledge to include only knowledge that the substance seized was illicit and to exclude knowledge of the substance's container and knowledge that the container held an illicit substance. This narrow definition of guilty knowledge is not required by this Court's decision in Delva, and the finding that fundamental error did not occur, conflicts with this Court's decisions in Chicone v. State, 684 So.2d 735, 745 (Fla. 1996) and Reed v. State, 837 So.2d 366 (Fla. 2002) and Scott v. State, 808 So.2d 166 (Fla. 2002). Reversal and a new trial are required.

In closing argument the defense repeatedly told the jury the state had failed to prove Mr. Garcia knew the ball was in the truck "and that he knew what was in it." (T277, 279, 280). The defense clearly disputed knowing the ball was in the truck and knowing what the ball contained.

In Scott a random search of Scott's locker located in his cell revealed cannabis hidden inside his eyeglass case. Scott v. State, 722 So.2d 256 (Fla. 5th DCA 1998)(en banc), rev'd 808 So.2d 166 (Fla. 2002). Scott argued on appeal that his conviction should be set aside because the trial court refused to give a requested instruction on guilty knowledge. Id. This Court, in quashing the Fifth District's 5-4 en banc majority opinion, specifically rejected the district court's reasoning that Scott's testimony that someone planted the drugs in his locker did not place at issue his knowledge of the illicit nature of the marijuana discovered. Scott v. State, 808 So.2d at 171. In Scott this Court specifically stated that "Scott's argument that he did not possess the drugs and had no knowledge of the drug's presence in his locker encompasses the argument that he was unaware of the illicit nature of the substance." Id.

The Second District below found that Scott is not relevant to Mr. Garcia's case, because Scott involved preserved and not fundamental error. Garcia v. State, 854 So.2d at 758. The scope and applicability of the guilty knowledge essential element to the particular facts of a case

do not hinge on whether a particular case involves preserved or fundamental error. Either guilty knowledge encompasses knowledge of the drug's presence in a concealed place, as this Court found it did in Scott, or guilty knowledge does not. Delva is not decisive to Mr. Garcia's case or to Scott, because Mr. Delva claimed only that he did not know the package was in his car, not that he did not know from looking at the package that it had cocaine in it.

Since Scott, the First and the Fifth Districts have found that guilty knowledge encompasses cases in which knowledge of the presence of the contraband was contested. Quaintance v. State, 845 So.2d 294 (Fla.1stDCA 2003); Thomas v. State, 844 So.2d 723 (Fla. 5th DCA 2003); Goodman v. State, 839 So.2d 902 (Fla. 1st DCA 2003). Additionally, the Fourth District has determined that since Scott found the error of failing to instruct on guilty knowledge could not be harmless, it is fundamental error to fail to give the instruction for a case involving drugs being thrown from the car's passenger side and being found on the floor of the car the defendant drove. Johnson v. State, 833 So.2d 252 (Fla. 4th DCA 2002). These decisions rightly follow this Court's decision in Scott.

Although finding the jury instruction error not to be fundamental, the district court nevertheless concluded that the lack of an instruction on knowledge of the substance was "clearly inadequate and erroneous" for the drug possession conviction obtained. Garcia v. State, 854 So.2d at 765. The

district court also properly concluded that the actual instructions given below in this case were "expressly misleading." Id. at 767. The district court found the instructions were misleading because they "could have affirmatively created an impression among the jury members that guilty knowledge would be necessary to establish guilt for trafficking and for nonexclusive constructive simple possession cases but not for actual simple possession and exclusive constructive simple possession cases." Id. The district court held that because Mr. Garcia relied on a lack of knowledge defense, the error of omitting the instruction regarding knowledge of the illicit nature of the substance could not be deemed fundamental. Id. 767-768. The district court erroneously concluded that because the defense was a lack of knowledge of the black ball and of its contents, that the defense did not dispute the omitted essential element of knowledge and the error could not be deemed fundamental. Id. This holding is wrong and should be quashed.

It is important to note that the error below concerns the misleading instructions given the jury in response to the jury's direct question about the difference between trafficking possession and simple possession. It is axiomatic that a trial court should not give the jury instructions that are confusing or misleading. Butler v. State, 493 So.2d 451 (Fla. 1986); Finch v. State, 116 Fla. 437, 156 So. 489 (1934). Since the error in this case was committed in this specific

context of misleading instructions in response to a direct jury question, Delva, which does not concern an erroneous jury instruction in response to a direct jury question, is not precedent for the error in this case. The standard trafficking in drugs charge that was read to the jury in this case contains a specific fourth element that states, "and the defendant knew that the substance was methamphetamine or a mixture containing methamphetamine." (T300); Florida Standard Jury Instructions in Criminal Cases, Trafficking in Illegal Drugs F.S. 893.135(1)(c). The standard instructions for drug possession, however, contain only three elements, the third of which instructs that the state need only prove "the defendant had knowledge of the presence of the substance." (T302); Florida Standard Jury Instructions in Criminal Cases, Drug Abuse - Possession F.S. 893.13(1)(f).

Here the defense specifically requested in the written instructions that the jury be told that "the State must prove beyond a reasonable doubt that the Defendant had knowledge that the thing was methamphetamine or a mixture containing meth-amphetamine and it is a controlled substance." (R45). The trial court declined to give this instruction, but did instruct the jury on the trafficking charge, of which Appellant was acquitted, that the state had to prove the accused "knew that the substance was methamphetamine or a mixture containing methamphetamine." (T300). On the lesser-included offense of possession, the trial court did not

instruct the jury on the guilty knowledge requirement and the jury convicted Mr. Garcia of this lesser charge. (T302-303). Appellant preserved the error in the instructions below by requesting the special instruction regarding the trafficking possession charge, since this request apprised the trial court of the error in the possession charge as well.

The trial court was again apprised of the error in the jury instructions during deliberations when the jury asked the following question:"What is the difference between trafficking and possession of methamphetamine?" (T317). After consulting with counsel, the trial court decided to read the jury the elements of the two offenses. (T318-319). The defense renewed its objection to the original instructions given for the crimes by stating, “I will just renew the objections we had to the original instruction.” (T319). The trial court then told the jury the following:

> I will -- what I am going to read to you is the elements of each offense **and then, frankly, you're going to have to decide for yourself what the difference is.**

(T321). The trial court then read the jury only the standard instructions for trafficking by methamphetamine possession and for simple drug possession.

Aside from weight, the only difference between the trafficking instruction and the possession instruction given in response to the jury question, is that knowledge is more specifically defined in the trafficking instruction to include guilty knowledge that that substance possessed is methamphetamine. The word “substance” is not defined for the possession charge and the word substance would could logically then be understood to include the container of the drug. The jury returned a verdict for the charge of possession, and not for the trafficking charge. Since the weight element was not disputed at trial, the jury very likely determined that the difference between trafficking possession and simple possession lay in that trafficking possession required guilty knowledge that the thing possessed was methamphetamine, while simple possession required only proof of possession of the thing itself. This confusing instruction to the jury goes to the heart of why telling the jury about the guilty knowledge requirement was so key to a fair trial for Mr. Garcia, and why the lack of instruction on that element for the possession charge was fundamental error, if not properly preserved by the requested special instruction on guilty knowledge for trafficking possession.

The evidence below showed that the black taped ball was found under the passenger seat and that no one knew what was inside it before the police unraveled the tape. The jury could have followed the instructions read and convicted Mr. Garcia, finding that Mr. Garcia knew or should have known the taped ball was in the car, but that he did not know what the ball contained. The trafficking instruction given the jury requires that Mr. Garcia know that what he had was methamphetamine. The drug possession instruction given, as interpreted by the state supreme court in Chicone, does not require a finding of knowledge that the item possessed is an illicit substance. Applying the instructions given to the facts in this case, the jury was able to convicted Mr. Garcia of drug possession even though there was no evidence that Mr. Garcia knew what was inside the black taped ball.

The defense did not specifically request the Chicone guilty knowledge instruction for the lesser included drug possession crime, but did make that request for the drug trafficking charge. Since the two crimes differ only by the weight of the possessed drug, the possession element given to the jury should have been the same for both crimes. The trial court then was apprised of the requirement that an instruction on guilty knowledge be given for drug possession as well as for trafficking and this error cannot be deemed harmless. Scott. The district court erred in finding the error was not preserved at the trial level.

The district court's strong reliance on Delva as the binding precedent for the circumstances of this case is at the foundation of its erroneous holding regarding fundamental error. In Delva the defendant was found with a package of cocaine under the front seat of the car he was driving and with a cocaine pricing list in his wallet. His defense was that he did not know the package of cocaine was in the vehicle and that others had used the vehicle recently. These facts are quite different from those presented here. The evidence in the case against Mr. Garcia was that he was driving the truck alone and a black taped ball was found inside the truck during an inventory search. Unlike Delva, there was no additional proof that tied Mr. Garcia to the black taped ball. In Delva there was a pricing list found on the defendant. Here there was no comparable proof such as powder in the truck, pricing lists, or guilty behavior by Mr. Garcia. The black taped ball was not a discernible package of contraband, like the package of cocaine in Delva. In Mr. Garcia's case the defense of knowledge had two components to it. The knowledge defense Mr. Garcia asserted was that Mr. Garcia did not know of the presence of the black taped ball and that Mr. Garcia did not know the black taped object was a container for methamphetamine. Although Mr. Garcia's defense was not that he did not know that the powder inside the black taped ball was an illicit substance, under Scott he was still entitled to an instruction on guilty knowledge of the illicit nature of

the substance. This is so because crucial to the asserted defense is a lack of proof showing Mr. Garcia knew the black taped ball was a container for illegal drugs. This separates Mr. Garcia's case from Delva in a key way. While Delva's defense was that he did not know the package of obvious cocaine was under his seat, Mr. Garcia's defense was that he did not know the black taped ball was in his truck or that it contained a substance with illegal drugs.

The district court erred in holding that the knowledge instruction is fundamental error strictly when the defense is lack of knowledge that the substance found is an illegal drug. This holding results in exactly the kind of unjust result that occurred in this case, a jury confused by a trafficking instruction requiring guilty knowledge and a possession instruction requiring no guilty knowledge, which confusion leads to a wrong conviction for the possession charge. The error here is fundamental because the jury was expressly misled. The trial judge told the jury that the difference between trafficking and possession was that trafficking required proof of guilty knowledge, but possession did not. The jury then concluded that since the state did not prove Mr. Garcia knew the substance inside the ball was contraband, but did prove he had the black taped ball, that possession was the appropriate result. These wrong and misleading instructions then permitted the jury to convict Mr.

Garcia of a crime without finding an essential element, i.e., that Mr. Garcia knew the ball contained methamphetamine.

The result in this case is in conflict with this Court's decisions in Chicone v. State, 684 So.2d 735, 745 (Fla. 1996) and Scott v. State, 808 So.2d 166 (Fla. 2002), and is not supported by Delva. This Court has not held that the concept of guilty knowledge is limited in every factual situation to knowledge of what a pill or powder actual is. In Mr. Garcia's case guilty knowledge means knowledge that the innocuous container was in his car, knowledge that the container had anything inside of it, and knowledge that the substance inside of the container was an illicit substance. (T25-26, 195, 206-210). The district court below jumped to the conclusion that Delva required that fundamental error could only be found here if guilty knowledge of the contents of the black taped ball was at issue. Delva did not involve an innocuous container, and the only defense asserted there was that Mr. Delva did not know the package was inside of the car. Moreover, Delva did not involve facts negating proof of knowledge, but contained facts of the pricing slip, which supported proof of guilty knowledge. In Mr. Garcia's case the undisputed evidence showed that the black taped ball was not suspicious, nor suspected to contain contraband. The undisputed facts show that Mr. Garcia did not know the black ball was inside his truck, that Mr. Garcia did not know what was inside of the

black taped ball when it was shown to him, and that the truck had been recently stolen and recovered with items not belonging to Mr. Garcia. (T25-26, 195, 206-210). The only facts the state proved that could rebut these assertions were that the innocuous container was found inside Mr. Garcia's solely occupied truck, and that the truck had been inventoried after recovery from the theft. (T49-50, 160-164).

The state did not prove the element of guilty knowledge with evidence of the drug being present and visible in other parts of the truck, or nervous behavior on Mr. Garcia's part upon revealing the methamphetamine, or, as in Delva, the presence of other physical evidence, like a pricing list, showing involvement in drug deals. The district court's decision rests on the false assumption that the defense of a lack of guilty knowledge is a fungible defense, and on the additional false assumption that the defense of failing to know the presence of a container of illicit drugs implicitly waives any dispute about knowledge of the contents of the container. Garcia v. State, 854 So.2d at 767.

This Court in Chicone stated plainly that "When an instruction excludes a fundamental and necessary ingredient of law required to substantiate the particular crime, such a failure is tantamount to a denial of a fair and impartial trial." 684 So.2d at 745. Here, where the trial court told the jury that guilty knowledge was an element of trafficking possession, but not of possession itself, a denial of a fair

and impartial trial occurred. Such error, if not deemed preserved must be found to be fundamental. Floyd v. State,850 So.2d 383 (Fla. 2002); Smith v. State, 521 So.2d 106 (Fla. 1988). Additionally this Court has recently stated that a jury instruction that informs the jury a conviction is permitted under circumstances when it is not allowed, amounts to fundamental error. Floyd at 13 (fundamental error occurred when jury was instructed it could convict accused of burglary by proof defendant lacked consent to be on premises at time of entry or when remaining in the premises, was fundamental error where there was no evidence of surreptitious entry). In this case in which the jury was not instructed on the essential element of guilty knowledge for the possession charge of which Mr. Garcia was convicted, and in which the jury was read instructions telling it that guilty knowledge was an element of trafficking possession, but not of simple possession, the error was not harmless and was fundamental. The erroneous instruction was a denial of due process and violated Mr. Garcia's rights under the federal and state constitutions. U.S. Const. Amend. XIV; Art. I, §9, Fla. Const. The decision of the district court should be quashed and this case remanded for a new trial.

ISSUE III.

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE PRESUMPTION OF KNOWLEDGE OF THE PRESENCE OF THE CONTROLLED

SUBSTANCE FROM THE EXCLUSIVE POSSESSION OF IT?

The instructions to the jury, taken as a whole, told the jury that guilty knowledge of the contents of the black taped ball could be inferred or assumed from Mr. Garcia's exclusive possession of the truck. The trial court instructed the jury that the essential element of the drug possession crime, guilty knowledge of the illicit nature of the substance, need not be proved when it instructed the jury on the permissive inference that exclusive possession of "a thing" assumes knowledge of "its" presence. (T300-301). The defense objected to instructing the jury on the permissive inference of exclusive possession on the ground that the presumption violated due process and relieved the prosecution of its burden of proof and foreclosed an independent jury determination of the facts proved. (T243-245). The defense argued that there was a reasonable likelihood that the jury would apply the challenged instruction in a way that shifts the burden of persuasion to the defendant to prove a lack of knowledge. (T245). When the trial court instructed the jury in this case regarding exclusive possession, the trial court read an unconstitutional, misleading and erroneous instruction. The reading of this instruction denied Mr. Garcia his right to due process guaranteed by the state and federal constitutions. Art. I, §9, Fla. Const.; U.S. Const.

Amend. XIV. Reversal and a new trial are required. (T301-303).

The challenged instruction states as follows: "If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed." This instruction has been interpreted to create a permissive presumption. Gatlin v. State, 556 So.2d 772 (Fla. 1st DCA 1990). In a given case, if a juror could reasonably view the permissive presumption in an unconstitutional manner, the instruction violates due process by lessening the state's burden of proof and by shifting the burden of proof to the defense. Id. at 773; Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

In this case a jury could have reasonably viewed the instruction in an unconstitutional manner by concluding that exclusive possession of the truck relieved the state of proving the essential element of knowledge of the illicit nature of the methamphetamine found in the taped ball under the passenger seat. This is especially so, since the trial court failed to give the Chicone instruction on guilty knowledge. By instructing the jury that knowledge can be presumed from exclusive possession and simultaneously failing to instruct the jury on guilty knowledge, the trial court told the jury that guilty knowledge of the illicit nature of the concealed drugs could be inferred or assumed from proof of exclusive possession of the ball or of the truck.

The prosecutor told the jury in the first closing argument that it could determine Mr. Garcia had put the black taped ball containing methamphetamine in the truck, by his exclusive possession of the truck. (T255-256). The prosecutor told the jury, "The defendant knew it [the methamphetamine] was there because he put it there." (T256). During the state's second and final argument to the jury, the prosecution told them this again. "The black ball -- the Judge will tell you that you can infer his knowledge of -- he's in exclusive possession of the truck. He knew this black ball is under there. It's for you to decide if he knew what was in the black ball. He was in possession of in excess of 28 grams of methamphetamines -- 220 grams, actually." (T296-297).

Telling the jury that the state could prove guilty knowledge through exclusive possession of the truck was a due process violation. The permissive inference, in combination with the lack of a Chicone instruction and the prosecutor's statements that exclusive possession of the truck could alone be enough on which to convict, diminished the state's burden of proof of each essential element beyond a reasonable doubt, and eliminated alto-gether the requirement that the state prove illicit knowledge of the nature of the substance.

The due process violation is apparent here, because instead of the state bearing the burden of proving Mr. Garcia knew that drugs were in the black taped ball, the defense was placed in the position of having to prove Mr. Garcia did not

know there were drugs in the taped black ball. Mr. Garcia was consistent from the time the drugs were discovered, until his trial testimony, in stating he knew nothing about the presence of the methamphetamine. The evidence in the case shows that even the police had no idea what was in the taped ball until it was unraveled. There was no evidence that Mr. Garcia acted nervous or was not surprised by the discovery of the ball and the drugs it contained. There was no evidence that Mr. Garcia behaved in any way consistent with having possession of the drugs. Instead, the evidence showed he consistently denied knowing about the drugs and that the truck had been recently stolen and that others had been in the truck that night. Thus the evidence showed it was more likely Mr. Garcia did **not** know about the drugs found in his truck.

The permissive inference then permitted the state to obtain a conviction based not only on a lack of affirmative proof of guilty knowledge and but also based on a failure to rebut the defense evidence showing an affirmative lack of guilty knowledge. Thus the permissive presumption permitted the state to avoid proving an essential element and to fail to rebut affirmative evidence negating the presence of that essential element. The permissive presumption in this case lead to a conviction based on less than proof beyond a reasonable doubt and was a violation of due process. Reversal and a new trial without this jury instruction are required.

ISSUE IV.

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE TO THE JURY FACTS NOT IN EVIDENCE CONCERNING MR. GARCIA'S KNOWLEDGE THAT THE TAPED BALL CONTAINED METHAMPHETAMINE?

This case presents another instance in which the state sought to bolster the weak link in a deficient evidentiary case by means of improper closing argument. See Gore v. State, 719 So.2d 1197 (Fla. 1998)(reversal of circumstantial evidence death case in which prosecutor told jury in closing to convict defendant solely if it did not believe his testimony and prosecutor argued personal belief defendant had done the killing); Kellogg v. State, 761 So.2d 409 (Fla. 2d DCA 2000)(reversal of capital sexual battery convictions based on witness credibility contest where prosecutor in closing argument expressed a personal belief in accused's guilt); Connelly v. State, 744 So.2d 531 (Fla. 2d DCA 1999)(prosecutor's personal opinion about case and defense required reversal); Palazon v. State, 711 So.2d 1176 (Fla. 2d DCA 1998)(reversal required where prosecutor attacked character of defense counsel in close sexual battery case); Washington v. State, 687 So.2d 279 (Fla. 2d DCA 1997)(prosecutor statement made during closing to "bolster a difficult case" required reversal in close credibility contest).

Here the prosecutor tried to obtain a conviction for the drug charge through arguing to the jury that the missing piece of evidence in the case actually existed, although the state had presented no facts to support this assertion. The still missing piece of evidence is proof of guilty knowledge of the illicit nature of the methamphetamine found in the taped ball. The state argued Mr. Garcia knew of the methamphetamine concealed in the hidden taped ball because 1) Mr. Garcia was a fruit picker who drove a certain type of truck with a new stereo and because 2) the size of the methamphetamine found was large and too valuable to have been simply left by someone. There was no proof that the truck was of such a great value that it would be unusual for a fruit picker or construction worker to own it, and there was no evidence that the amount of methamphetamine found had a great value. In fact, the trial court had made a specific ruling excluding evidence of the value of the methamphetamine from evidence. (T173-175). The prosecutor then resorted to using not only nonexistent facts in her closing argument, but nonexistent facts that the trial court had specifically previously ruled were inadmissible in this trial.

The prosecutor began to overcome this critical deficiency in her case by arguing as follows: "The defense knew it was there because he put it there." (T256). She told the jury, "He knew that he had that piece of methamphetamine in his truck because he put it there. He knew it was there.

Knowledge of the existence of the tape-bound ball can be inferred. Knowledge of its contents can be gleaned from the facts you heard." (T258). The prosecutor told the jury that "Common sense tells you -- and you're allowed to use common sense back there -- that this chunk has a high value to some people." (T256). She told the jury "a person would not leave 220 grams worth its weight in gold in your vehicle." (T257).

After the prosecution had completed its initial closing statement, the defense at sidebar objected to the state's comments to the jury. (T262-263). The defense objected to the state telling the jury Mr. Garcia knew the object was in his vehicle and contained drugs without pointing to any evidence showing that. (T262). Additionally the defense objected to the state telling the jury the drugs were worth its weight in gold when the trial court had precluded the state from presenting evidence of the value of the drugs. (T262-263). The trial court overruled the objection. (T263).

In the final closing argument to the jury the prosecutor stated "The defendant testified that he's a fruit picker and a sometime-construction-worker, the owner and driver of this 2000 Ford F---." (T292). At this point the defense objected on the grounds that there was no evidence about the value of the truck and or that Mr. Garcia could not afford the vehicle in his line of work. (T292-293). The trial court decided to instruct the jury not to rely on comments by counsel that were not supported by the evidence, but did not specify what

comments it was referring to. (T294). The prosecutor then repeated, "The defendant testified that he's a fruit picker, a sometime-construction-worker, the owner-driver of this Ford F150 truck." (T294). The defense objected and the trial court overruled the objection. (T294). So the prosecutor continued, stating, "Ford F150, Harley Davidson Special with a new stereo installed." (T294). The defense again objected that these comments were misleading the jury and the trial court overruled the objection. (T295). The prosecutor then stated, "He knew that this piece of methamphetamine was in the black ball. He knew -- [Defense objection] where the black ball was." (T295). The defense stated, "There was no testimony to establish that. She's acting like she knows that." (T295). The trial court sustained that objection and instructed the jury that "Personal opinions as to the evidence by either counsel is not for the jury to consider." (T295).

Although the trial court did sustain the one comment by prosecutor, this single favorable ruling did not cure the numerous other improper arguments which preceded it, were objected to and which the trial court overruled. Palazon v. State, 711 So.2d 1176, 1178 (Fla. 2d DCA 1998)(when an objection is overruled, a motion for mistrial is not required to preserve the error).

The prosecutor's closing remarks sought to prove missing evidence through argument. To prove a criminal case through opinion and conjecture is a blatant denial of due

process and a fair trial, in violation of the state and federal constitutions. Art. I, §9, Fla. Const.; U.S. Const. Amend. XIV. Miller v. State, 712 So.2d 451, 453 (Fla. 2d DCA 1998). Such error cannot be deemed harmless and requires reversal and a new trial. Goodwin v. State, 751 So.2d 537 (Fla. 1999); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities presented herein, Appellant respectfully requests that this Court either discharge Mr. Garcia from the drug possession conviction or reverse and grant him a new trial on that count.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to John Klawikofsky, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2004.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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