

**IN THE SUPREME COURT OF FLORIDA**

STATE OF FLORIDA )  
Petitioner, )  
 )  
vs. )  
 )  
SALVATORE BERTONE )  
Respondent. )  
 )  
\_\_\_\_\_ )

CASE NO. SC04-825  
LT CASE NO. 4D03-1159

**ON DISCRETIONARY REVIEW FROM THE FOURTH  
DISTRICT COURT OF APPEAL**

**RESPONDENT’S ANSWER BRIEF ON THE MERITS**

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## **PRELIMINARY STATEMENT**

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and appellant in the Fourth District Court of Appeal. Petitioner was the prosecution in the trial court and appellee in the District Court. In the brief, the parties will be referred to as respondent and petitioner, respectively.

The following symbols will be used:

The symbol “R” will denote the Record on Appeal.

The symbol “T” will denote the Transcript on Appeal.

The symbol “ST” will denote the Supplemental Transcript on Appeal.

The symbol “PB” will denote the Petitioner’s Brief on the Merits.

## **STATEMENT OF THE CASE AND THE FACTS**

Respondent accepts petitioner's recitation of the case and the facts with the following additions and corrections:

Happy Hocker Pawn shop owner Vincent Serio stated respondent received \$40 when he pawned the saws. Serio explained loans are made at about 10% of value and each saw was worth about \$200 (T. 160). Serio knew respondent because he had pawned items at the shop in the past. He had not always reclaimed the items as he had on this occasion (T. 162-163). After a few days, appellant reclaimed the saw for \$48 (T. 167).

Although respondent did not know Jose Garcia's address, he told the officers he knew where Garcia lived. It appears the officers chose not to follow up on the information (T. 187).

Respondent did admit to four prior felony convictions. His scoresheet, however, reflects prior convictions for felony driving under suspension, resisting arrest with violence, and possession of cocaine. The state presented no evidence of a fourth conviction and is evident from the scoresheet, none of respondent's prior convictions were related to theft (R. 27-28, ST. 3-5).

## **SUMMARY OF THE ARGUMENT**

While the decision of the Fourth District in reversing respondent's conviction was correct, it improperly certified conflict in the instant case. While the Second District stated the question of whether or not the defendant in Patten knew the items were stolen was for the jury to decide, it also stated that once the inference in 812.022(2) was established it was up to the defendant to give a reasonable explanation for his possession. There is no direct conflict with the decision of the Fourth District in this case and the supporting decisions of the other district courts.

Were this Court to find conflict, the decision of the Fourth District should be upheld. This decision in this case is in keeping with this Court's decision in Graham and with the Florida court's longstanding application of the rules regarding circumstantial evidence. The state relied exclusively upon the presumption to convict respondent. The presumption was based on circumstantial evidence and did not exclude respondent's reasonable hypothesis of innocence. If conflict is found, it should be resolved in favor of the decision rendered below by the Fourth District.

## ARGUMENT

**THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY CERTIFIED CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN PATTEN. HOWEVER, IF THIS COURT FINDS CONFLICT WAS PROPERLY CERTIFIED, THE DECISION OF THE FOURTH DISTRICT FINDING THE REASONABLENESS OF A DEFENDANT’S EXPLANATION REGARDING HIS POSSESSION OF RECENTLY STOLEN PROPERTY IS INITIALLY AN ISSUE FOR THE TRIAL COURT WHEN THE STATE’S CASE IS BASED ON CIRCUMSTANTIAL EVIDENCE. (restated)**

This case is before the Court based upon the decision of the Fourth District Court in Bertone v. State, 870 So. 2d 923 (Fla. 4<sup>th</sup> DCA 2004) certifying conflict between it’s decision below and that of the Second District Court in Patten v. State, 492 So. 2d 748 (Fla. 2<sup>nd</sup> DCA 1986). In determining conflict, the Fourth District cited the following language from Patten holding that “ once the state proves [a defendant] was in possession of the recently stolen property ” the inference created by section 812.022(2) was sufficient to create a jury question. The Fourth District opinion also cited Patten as holding “ it is necessary for the state only to prove the items were stolen and the accused was dealing in them”. Bertone v. State, 870 So. 2d 923, 925 (Fla. 4<sup>th</sup> DCA 2004) *quoting* Patten, 492 at 750.

In Patten, the defendant was accused of stealing several items from an auction house. The defendant explained he had purchased the items from an unknown Georgia man at a flea market. Id. at 749. In affirming the defendant’s conviction, which was

based on Section 812.022(2)<sup>1</sup> the Patten court stated:

The question as to whether appellant knew the items were stolen is a jury question once the state proves the appellant was in possession of the recently stolen property. Thus, in order to establish the criminal liability of the appellee it is necessary for the state only to prove the items were stolen and the accused was dealing in it. Once that is established, then it is up to the accused to give a reasonable explanation for his having possessed and sold it, if he is to escape conviction. Coleman, 466 So.2d at 396-397.

Patten at 750. It is necessary to examine the holding set forth in Coleman v. State, 466 So. 2d 395 (Fla. 2<sup>nd</sup> DCA 1985), which is relied upon by the court in Patten.

In Coleman, the state argued that the inference created by 812.022(2) was sufficient to convict and that the reasonableness of the defendant's explanation was a jury question. The defendant argued he was entitled to a judgment of acquittal since his explanation as to how he came into possession of the property was unrefuted and dispelled the inference of guilt. Coleman at 396. The Coleman court found the statutory inference was sufficient to convict. Id. In reaching its decision the court explained:

As we see it, the rule is that where a defendant gives a patently reasonable explanation for his possession of recently stolen goods which is totally unrefuted, and there is no other evidence of guilt, the court must direct a judgment of acquittal. If, on the other hand, the explanation is only arguable reasonable or if there is any evidence which places it in doubt,

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<sup>1</sup> Section 812.022(2), Florida Statutes (1985) provides: Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.

the court should permit the jury to make the decision.

Coleman at 396-397. When the entire decision of the court in Patten is examined in accord with its reliance on Coleman, it is clear there is no conflict between Patten and the decision of the Fourth District below and review should not be granted.

However, if this Court determines conflict does exist, that conflict should be determined in favor of the decision rendered below. In State v. Graham, 238 So. 2d 618 (Fla. 1970) the court considered the common law presumption relating to the possession of recently stolen property. Initially, the Graham court determined it was necessary for the evidence to establish beyond a reasonable doubt that the defendant knew or should have known the property was stolen. Id. at 620. The court further explained that the inference of guilt established by the unexplained possession of recently stolen property could support a guilty verdict. However, if an account was given and it raised a reasonable doubt as to guilt, the defendant should be acquitted.

Id. The Court summarized as follows:

Proof of mere naked possession of property recently stolen, not aided by other proof that the accused received it knowing it to have been stolen, is not sufficient to show guilty knowledge. . . . Proof of possession should be coupled with evidence of unusual manner of acquisition, attempts at concealment, contradictory statement, the fact that the goods were being sold at less than their value, possession of other stolen property, or other incriminating evidence and circumstances.

Id. at 621. When analyzed under the criteria set forth in Graham, it is clear the decision of the District Court was correct and respondent's conviction should have

been reversed.

The decision in Graham was not effected by the enactment of 812.022(2) in 1977. As explained by the Fourth District in Jackson v. State, 736 So.2d 77, 81 (Fla. 4<sup>th</sup> DCA 1999), the inference created by 812.022(2) was not new to Florida law. The inference had been in place, as part of Florida common law, since the mid nineteenth century. Jackson held section 812.022(2) adopted the common law rule affirmed in McDonald v. State,<sup>2</sup> 56 Fla. 74, 47 So. 485, 486 (1908) and Graham. In finding that the inference adopted and incorporated the common law, the Fourth District invoked the principles of statutory construction that:

words and phrases having well defined meaning in the common law are interpreted as having the same meanings when used in statutes dealing with the same or similar subject matter. . . . Another rule of statutory construction is that a court will presume that a statute “was not intended to alter the common law other than by what was clearly and plainly specified in the statute.

Jackson at 83. Although, as noted by petitioner, the enactment of 812.022(2) occurred on the same year the legislature statutorily expanded the definition of “theft”, one does not effect the other.

Respondent would take exception with petitioner’s assertion that Florida court’s

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<sup>2</sup> The decision explained the McDonald court had “emphasized that the unexplained possession of recently stolen property did not create a presumption of law, but was an evidentiary presumption that the jury might ‘infer as a matter of fact, of which they are the sole judge, to be considered with all the other circumstances of each particular case.” Jackson at 82.

have consistently held that an accused's explanation of possession of recently stolen goods is a fact for the jury to determine and with the interpretation of the cases cited to support that position (PB. 5-6).

Petitioner first cites to Boone v. State, 711 So. 2d 594, 596 (Fla. 1<sup>st</sup> DCA 1998). However, in Boone, the First District reversed the defendant's conviction finding it had been error for the trial court to instruct the jury on the presumption when the prosecution had not demonstrated a factual basis for possession. Unlike the case at hand, the state in Boone, had not established the defendant was in personal or exclusive possession of the stolen property. In Foster v. State, 464 So. 2d 1214, 1215 (Fla. 3<sup>rd</sup> DCA 1984), the sole issue on appeal was whether the trial court had abused its discretion in limiting defense counsel's closing argument to 15 minutes. In reversing, the Third District held it was improper to restrict argument in such a manner based on the trial court's opinion that counsel had nothing to talk about and that "it was for the jury, not the trial court, to determine the strength or weakness of the proffered defense." Id at 1216.

Likewise the decision in Hampton v. State, 549 So. 2d 1059, 1060-1061 (Fla. 4<sup>th</sup> DCA 1989) does not contradict the finding of the District Court below. In Hampton, the court dealt with circumstantial evidence presented in a second degree murder case. The court found, that in this case, there was competent evidence to support a guilty verdict and allow the jury to reject the defendant's explanation of

events.

While Redford v. State, 455 So. 2d 595-596 (Fla. 2<sup>nd</sup> DCA 1984) finds the credibility of a defendant and his explanation for possession of recently stolen property is a jury question, the opinion does not discuss the facts upon which it was based, including whether the state had presented direct or circumstantial evidence of guilt. The Fifth District stated that the reasonableness of a defendant's explanation as to how he came into possession of recently stolen property was a question of fact to be determined by the jury in connection with all other facts and circumstances. In Barnlund v. State, 724 So. 2d 632-633 (Fla 5<sup>th</sup> DCA 1998), the statement was purely dicta and not binding. The court had found the issue of the insufficiency of the evidence to sustain a conviction for theft or burglary was not preserved. Id.

The Fourth District was correct in its reliance on the decision in Graham and in finding that based on the criteria set forth in Graham respondent's conviction must be reversed. Petitioner argues that even under Graham, respondent should be convicted because other facts presented at trial, besides mere possession, establish his guilt. This is not the case.

First, petitioner correctly asserts that under Graham, the fact that stolen items have been sold at less than their value is other evidence which supports the inference. However, petitioner's assertion that respondent sold the items at less than their value is inaccurate (PB. 9). Respondent did not sell the saws, he pawned them. The owner

of the pawn shop explained that loans are normally made at 10% of value and that respondent had received \$40 for the two saws. Nothing presented by the prosecution at trial contradicts this statement by Vincent Serio as to the market value of the saws. Additionally, respondent went to a shop where he had previously pawned items and was known to the management. He made no attempt to conceal his identity and reclaimed the items a few days later for \$48. Nothing in this behavior would contradict respondent's explanation that he was pawning the items for a friend who was in need of money.

In Haugabrook v. State, 827 So. 2d 1065 (Fla. 2<sup>nd</sup> DCA 2002), the Second District Court found the defendant had not presented a patently reasonable explanation of his possession of stolen goods. While it was established that the defendant had pawned the property recently stolen, this was not among the factors considered in denying the judgement of acquittal. Id at 1067, 1069.

Petitioner argues that respondent's admission of four prior felony convictions was sufficient to discredit his patently reasonable explanation as to how he came into possession of the property. Petitioner cites to Haugabrook and Coleman to support this proposition (PB 9). While the fact of the defendant's prior convictions was considered in each of these cases, it was not the sole basis upon which the judgement of acquittal was denied. In Haugabrook, 827 at 1065, 1069, the court's conclusion was based on "a number of factors" including damage to the residence from which

the property had been taken, the defendant's status as a 10 time convicted felon, his admission he was dealing drugs to the person who gave him the property in exchange for cocaine, among others. In Coleman, 466 So. 2d 395-396, the court noted the defendant was a 3 time convicted felons, but based it's decision on the unreasonableness of his explanation.

It should also be noted that although respondent admitted to four prior felony convictions, the prosecution was able to establish three, none of which involved theft or dealing in stolen property. Rather, respondent had previously been convicted of resisting arrest with violence, driving with a suspended license, and possession of cocaine. These convictions alone do not rebut respondent's patently reasonable explanation and defeat a motion for judgement of acquittal.

Petitioner next contends that respondent's explanation was not patently reasonable because he did not provide enough specific information regarding Jose Garcia (PB 9-10). Petitioner asserts respondent was required to provide corroborating evidence regarding Mr. Garcia and his involvement in the case. In Wilson v. State, 2004 WL 784520 (Fla. App. 2 Dist., April 14, 2004), the court based its decision that the defendant's explanation was only arguably reasonable on the discrepancies between the defendant's testimony and that of the investigating officer, not on the lack of detail regarding, Bob, the person from whom the defendant professed to have received the property.

Leaving aside the issue of whether a criminal defendant can be required to provide corroboration to prevail at a motion for judgement of acquittal, the petitioner has presented no legal support for this argument. Respondent, however, did provide information regarding Mr. Garcia and how he knew him. He explained he knew Garcia from the labor hall and had known him for five months (T. 182). He pawned the tools for Garcia, whose car was broken down and had no identification, and there was nothing to indicate the tools did not belong to Garcia (T. 182-183, 192). Respondent had been to Garcia's home but could not provide an address. He was never asked by the police or the prosecution to provide directions (T. 187). There is nothing in this testimony which casts doubt on respondent's explanation.

Lastly, the petitioner asserts that respondent was using the property outside the regular course of business (PB 11). Petitioner cites to State v. Jackson, 601 So. 2d 615 (Fla. 3<sup>rd</sup> DCA 1992), in which the court reversed a dismissal of a dealing in stolen property charge and Thompson v. State, 480 So. 2d 179, 181-182 (Fla. 3<sup>rd</sup> DCA 1985) in which the court held that when the defendant purchased or sold the property as a dealer in such, out of the regular course of business, and without the indicia of ownership it was sufficient to give rise to the inference created in 812.022(2).

Neither case is on point. Jackson deals with a dismissal of the charges and Thompson deals with whether the evidence presented is sufficient to give rise to the inference. Additionally, in both cases property was sold and not pawned and later

retrieved.

A review of cases from each of the five District Court reveals support for the opinion issued below. In M.M. v. State, 547 So. 2d 139-140 (Fla. 1<sup>st</sup> DCA 1989), the court found the defendant's explanation as to how he came into possession of a recently stolen motorcycle was reasonable, unrefuted, and exculpatory. The defendant had explained he borrowed the motorcycle from a friend. He gave the friend's first name and offered to show the police where the friend lived. The court, in reversing the conviction, noted that the police failed to investigate the defendant's explanation.

As in M.M., respondent gave the police the name of the man from whom he received the saws and told them he had been to the man's house. *See also* McNeil v. State, 433 So. 2d 1294-1295 (Fla. 1<sup>st</sup> DCA 1983)(unrefuted, reasonable, and exculpatory explanation for possession of property made mere possession insufficient to establish guilt). Stockton v. State, 371 So.2d 106-107(Fla. 1<sup>st</sup> DCA 1978)( circumstantial evidence insufficient to show knowledge property was stolen).

In Dellechiaie v. State, 734 So. 2d 423 (Fla. 2<sup>nd</sup> DCA 1998), the defendant was charged with grand theft of a car. The defendant, along with two other men, was seen towing the stolen car to the home which he shared with his parents the day after the car was discovered stolen. Id at 424. Dellechiaie stated he had found the car in the woods along side a dirt road. It had been stripped of various parts including the engine, transmission and radiator. It had no rims or tires. A man in the area told Dellechiaie

he could have the car and wrote out a receipt. The Second District found the state's circumstantial evidence case did not contradict the hypothesis of innocence presented by the defense and the inference of guilt was dispelled by the defendant's explanation. Id at 425.

In Rowe v. State, 782 So. 2d 949 (Fla. 2<sup>nd</sup> DCA 2001), the defendant was charged with grand theft. The defendant's uncle came to the convenience store at which the defendant was working and presented a credit card stating he had permission to use it. The transaction was cleared and purchases in the amounts of \$577.55 and \$322.76 were made. Rowe had been trained for the position by a computer program and it was unclear whether she had been informed of the store policy which prohibited credit card transactions in amounts over \$40. The court found the evidence was insufficient to support intent and did not exclude every reasonable hypothesis of guilt. Id at 951.

In D.G. v. State, 547 So. 2d 295 (Fla. 3<sup>rd</sup> DCA 1989), the court correctly held the inference was sufficient to send the case to the jury and support a conviction when the defendant was arrested while driving the stolen car within 24 hours of its theft. He did not offer any explanation as to his possession of the car and did not explain the damage to the vehicle. Unlike the facts in D. G., the property which respondent pawned was not damaged and he offered a reasonable and unrefuted explanation as to how he came to be in possession of the saws. *See also* Periu v. State, 490 So.2d

1327, 1329 (Fla. 3<sup>rd</sup> DCA 1986)(evidence that stolen vehicle had a smashed front windshield and the absence of vin number sufficient to send case to jury). P.N. v. State, 443 So. 2d 193-194 (Fla. 3<sup>rd</sup> DCA 1983)( alternate explanation given by defendant as to how he came into possession of property sufficient to send case to jury). Again, the prosecution at trial presented no evidence would have shown respondent should have known the saws were stolen.

A series of cases in the Third District is clearly in accord with the decision by the Fourth District below. In Valdez v. State, 492 So. 2d 750-751 (Fla. 3<sup>rd</sup> DCA 1986), the defendant was charged with dealing in stolen property and theft in connection with some diving equipment and a bicycle. The property had been left in an alleyway next to the victims home. The value of the items was over \$600. Some of the property, the less expensive items, were found at a pawn shop. Valdez had pawned the items providing his identification and mailing address. When asked if the property was stolen he responded it was not and he had found it in a trash can. Id. The court found Valdez's explanation to be unrefuted, exculpatory and not unreasonable. This decision was reached, in part, because he had given the pawn shop his real name and mailing address. The conviction in the circumstantial evidence case was reversed. Id. Not only did respondent provide the pawn shop with his correct name and address, he went to a shop where he was known. Unlike most cases, he returned and reclaimed the property.

In R.M. v. State, 450 So.2d 897 (Fla. 3<sup>rd</sup> DCA 1984), the defendant's conviction was reversed when the state failed to establish he had knowledge the car was stolen or the intent to steal it. The court held that "R.M.'s 'unrefuted, exculpatory and not unreasonable explanation of his possession' of the stolen automobile – that he had borrowed it from his stepfather – 'rendered the state's case . . . insufficient as a matter of law to establish guilt.' R. A. L. V. State, 402 So. 2d 1337 (Fla. 3<sup>rd</sup> DCA 1981)." Id at 898. See also R.D.S. v. State, 446 So. 2d 1181 (Fla. 3<sup>rd</sup> DCA 1984)(defendant's explanation that he bought previously damaged moped from one Rodney Middleton for \$35 was unrefuted and not unreasonable, despite fact vin number removed; number could have as easily been removed by person who sold the moped as by the defendant); R.A.L. v. State, 402 So.2d 1337 (Fla. 3<sup>rd</sup> DCA 1981) (defendant's explanation that he bought stolen moped at flea market was unrefuted, exculpatory and not unreasonable); P.L.C. v. State, 458 So. 2d 800 (Fla. 3<sup>rd</sup> DCA 1984)( defendant's presence in car which contained stolen purses two blocks and half an hour from the scene failed to preclude reasonable hypothesis of innocence based on claim he entered the car after purses were stolen and did not know either that they were present or that they were stolen); A.R. v. State, 393 So. 2d 1174-1175 (Fla. 3<sup>rd</sup> DCA 1981) ("where the unrefuted explanation is such that the circumstantial evidence of guilt by reason of possession is also susceptible to the hypothesis of innocence, we must reverse."); J. J. v. State, 463 So. 2d 1168 (Fla. 3<sup>rd</sup> DCA 1985) (defendant's

explanation that he had been given recently stolen moped by friend named Tim he had met at neighborhood park three weeks before arrest was unrefuted, exculpatory and not unreasonable and without additional circumstances, the facts were insufficient as a matter of law to establish guilt).

The Fourth District addressed the issue in Jackson v. State, 736 So. 2d 77-78 (Fla. 4<sup>th</sup> DCA 1999). As previously noted, the court in Jackson adopted the standard set forth by the Supreme Court in State v. Graham, 238 So. 2d 618 (Fla. 1970). In Jackson, the defendant was driving a car which was revealed by a tag check to be stolen. The vin number on the dashboard was different than those in other places. Jackson presented a title in his name showing the title had been transferred 4 days earlier. An officer testified that someone one had gone through a great deal of trouble to ensure the car was difficult to identify. Testimony was presented that Jackson purchased the car when it was listed for sale on the side of the highway. Id. at 79. In reversing Jackson's conviction, the court found it had been based solely on his possession of the stolen vehicle and there were no other indications that he knew it was stolen. Additionally, his explanation was more than arguably reasonable and the state presented no evidence to place the explanation in doubt. Id. at 84.

In Cavagnaro v. State, 464 So. 2d 216 (Fla. 4<sup>th</sup> DCA 1985), the court reversed when the only direct evidence presented to establish the defendant knew the property was stolen was the testimony of a witness who said he had told him so. The witness

later stated he had told the defendant he was only kidding. Finding the only direct evidence had been negated, the court reversed because the remaining evidence was “fragmentary and circumstantial”. Id.

In Youngs v. State, 736 So. 2d 85, 87 (Fla. 4<sup>th</sup> DCA 1999), the court affirmed the defendant’s conviction finding the additional facts that the property had been stolen in the middle of the night and pawned as soon as the shop opened and that Youngs had offered no explanation for his possession of the property. The defendant’s conviction was also affirmed in Cleveland v. State, 758 So. 2d 1180-1181 (Fla. 4<sup>th</sup> DCA 2000). In that case, the court considered the fact that the defendant had lied about being the owner of the property, but also that he had made contradictory statements to the police and pawn broker. Respondent’s case is different than Youngs and Cleveland in that he offered a consistent and reasonable explanation for his possession of the property and there is no evidence the property was pawned immediately after it had been stolen. The property could have been stolen up to two days before it was pawned and it was not pawned until late afternoon.

On the other hand, the defendant’s conviction was reversed in J. H.v. State, 868 So. 2d 1237-1238 (Fla. 4<sup>th</sup> DCA 2004). While at school, J.H. was found in possession of a cell phone which belonged to a teacher. He explained he had been told by a classmate that the phone was his. When the classmate left the phone in class, J. H. picked it up to save it for him. The fellow student admitted he had stolen the phone.

The court found the explanation exculpatory, unrefuted and reasonable.

The defendant's conviction was affirmed in Smith v. State, 742 So. 2d 352 (Fla. 5<sup>th</sup> DCA 1999). The court found Smith's explanation that he had been given the property by someone named Joey was not be credible in light of incriminating statements he had made to the police regarding falsified registration numbers on the stolen boat and trailer. Id at 355. However, in so holding the court stated:

The reasonableness of the defendant's explanation is generally a question of fact for the jury. *Boone v. State*, 711 So. 2d 594, 596 (Fla. 1<sup>st</sup> DCA 1998); *Coleman v. State*, 466 So. 2d 395, 397 (Fla. 2<sup>nd</sup> DCA 1985). But where a reasonable explanation for possession of recently stolen property is totally unrefuted, and there is not other evidence of guilt, the court must grant directed verdict for the defendant. *Coleman* at 397. The initial determination that the explanation is reasonable or credible is left to the judge. If, however, the explanation is only arguably reasonable, or if there is any evidence which places it in doubt, it should be left to the jury to determine the defendant's guilt, and an instruction on the inference of possession of recently stolen property is proper. Anderson v. State, 703 So. 2d 1105 (Fla. 5<sup>th</sup> DCA 1997).

Smith at 355.

Petitioner asserts the Fourth District erred in classifying this as a circumstantial evidence case arguing the fact respondent pawned the items is direct evidence of guilt (PB 4). Petitioner offers no support for this position. In Hayden v. State, 760 So. 2d 1031 (Fla. 2d DCA 2000), the defendant was charged with burglary and dealing in stolen property. The evidence presented was that the police had lifted a fingerprint from the windowpane at the point of entry for the burglary and a thumbprint on a slip

at the pawn shop where the stolen property was shortly thereafter pawned. Hayden admitted pawning the items and the thumbprint was found to have been his. The state had failed to examine the print found at the scene of the burglary in a timely fashion and that evidence was excluded. In reversing the conviction, the Second District found the evidence, the defendant's thumbprint on a pawn slip and his admission that he had pawned the items, entirely circumstantial. Id at 032-1033.

There was no direct evidence which linked respondent to the burglary of the truck and the theft of the saws. The prosecution presented no evidence which in any way rebutted respondent's reasonable explanation as to how he came to pawn and recover the saws. In Bunderick v. State, 528 So. 2d 1247-1248 (Fla. 1<sup>st</sup> DCA 1998), numerous stolen items were found in the defendant's truck, mobile home and storage shed. Bunderick had called the police when a fire broke out. He was cooperative in almost every regard. He lied about how he suffered an injury to his hand, eventually admitting it was sustained in a fight. Id. The court found that the defense had presented a reasonable and entirely uncontroverted explanation as to how he had come into possession of the property. In doing so, they found the case was based solely on circumstantial evidence and that therefore "no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Id.

In Jackson, 736 So. 2d at 80, the Fourth District quoted this Court's decision

in State v. Law, 559 So. 2d 187, 188 (Fla. 1989), as to the standard of review to be applied in circumstantial evidence cases:

A special standard of review of the sufficiency of the evidence applies when a conviction is wholly based on circumstantial evidence. Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to determine, and where there is substantial competent evidence to support the jury verdict, we will not reverse.

(Citations omitted). It is the trial judge's job 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." Id. at 189. The judges's analysis must view the evidence "in the light most favorable to the state". Id. The state is not required to conclusively rebut every possible variation of events that might be inferred from the evidence, but "only to introduce competent evidence which is inconsistent with the defendant's theory of events." Id.

Jackson at 80.

In Bunderick, 528 So. 2d at 1248, the court found the case should not have gone to the jury because the evidence produced at trial was "virtually nonconflicting except for the inference of guilt or innocence." The only evidence presented was the defendant's possession of the recently stolen goods. That was not sufficient. Id. See also Dellechiaie v. State, 734 So. 2<sup>nd</sup> 423-424 (Fla. 2<sup>nd</sup> DCA 1998)(none of state's circumstantial evidence contradicted defense hypothesis of innocence); Redding v. State, 357 So. 2d 483-484 (Fla. 3<sup>rd</sup> DCA 1978)(defendant's lies about leaving town without paying rent did not establish he stole property from leased premises;

circumstantial evidence did not rebut hypothesis of innocence).

A review of the facts presented at trial shows that none of the other factors suggested by Graham were present. There was no evidence of an unusual manner of acquisition. Respondent's friend, Jose Garcia, asked him to pawn the saws because he needed the money and did not have any identification. Respondent knew Garcia's car was broken. He knew Garcia from the labor hall and therefore Garcia's possession of saws could not be considered unusual. Respondent did not attempt to conceal his possession of the saws. He pawned them, using his own name and at a pawn shop where he was already known. He later returned to recover them. The saws were pawned, not sold, and the transaction was not in any way unusual. Respondent made no incriminating statements, did not possess other stolen property and there was no other evidence beyond his simple possession.

As stated by the Third District in A.R. and F. M. v. State, 393 So. 2d 1174-1175 (Fla. 3<sup>rd</sup> DCA 1981), in reversing a circumstantial evidence case in which the defendant's explanations were unrefuted "The law does not deal in probabilities, but in proof beyond a reasonable doubt." The Fourth District Court of Appeal was correct in reversing respondent's conviction. Should this Court find conflict exists, it should be resolved in favor of the decision issued below.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Honorable Court reconsider the finding of conflict by the Fourth District and if the Court finds conflict with the decision of the Second District in Patten, resolve that conflict in favor of the decision of the Fourth District and affirm it's opinion reversing respondent's conviction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of this brief has been furnished to Daniel Hyndman, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this 23<sup>rd</sup> day of August, 2004.

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Of Counsel

**CERTIFICATE OF FONT COMPLIANCE**

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

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Ellen A. Griffin  
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