IN THE SUPREME COURT OF FLORIDA

JAMES WESLEY GODDARD,

Petitioner,

v.

CASE NO. 64,490

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

GWENDOLYN SPIVEY
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
- continued -

IN THE SUPREME COURT OF FLORIDA

JAMES WESLEY GODDARD,	:	
Petitioner,	:	
v.	:	CASE NO. 64,490
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the district court. Respondent was the prosecution in the trial court and the appellee in the district court. Both parties will be referred to herein as they appear before the court.

The record on appeal will be referred to herein as "R" followed by the appropriate page number in parentheses. The two-volume transcript will be referred to herein as "T" followed by the appropriate page number in parentheses.

All emphasis is supplied unless the contrary is indicated.

The trial was conducted before Duval County Circuit Judge Ralph W. Nimmons, Jr. The district court opinion was rendered by Judges Booth, Wentworth and Thompson.

II STATEMENT OF THE CASE

Petitioner was arrested May 3, 1982, for burglary, grand theft, and dealing in stolen property (R-1-4). An amended information filed August 6, 1982, charged grand theft and dealing in stolen property (R-24-25).

The grand theft count was abandoned by respondent on August 23, 1982 (R-24).

Trial was held August 26-27, 1982, on the charge of dealing in stolen property under subsection (2) of Section 812.019, Florida Statutes. The jury returned a guilty verdict (R-33; T-301).

At sentencing on September 24, 1982, petitioner was sentenced to 15 years' incarceration (R-38-42; T-319).

Petitioner's motion for new trial was denied September 24, 1982 (R-34,37). Petitioner's notice of appeal was timely filed September 29, 1982 (R-44).

Petitioner was adjudged insolvent for purposes of appeal, and the Public Defender for the Fourth Judicial Circuit was appointed (R-43,52). The Public Defender for the Second Judicial Circuit was subsequently designated to handle the appeal.

Petitioner's pro se motion for reduction of sentence was filed and denied October 6, 1982 (R-49,51).

On direct appeal, the First District Court of Appeal affirmed petitioner's conviction on September 13, 1983. Goddard v. State, __So.2d__, 8 FLW 2302 (Fla. 1st DCA September 13, 1983). The court certified the following question to the Florida Supreme Court as one of great public importance:

> DID THE FLORIDA LEGISLATURE INTEND TO PUNISH UNDER SECTION 812.019(2), FLORIDA STATUTES, THE COMMON THIEF WHO TRAFFICS IN THE GOODS WHICH HE HAS INDIVIDUALLY STOLEN, OR WAS THAT PROVISION INTENDED TO ONLY PUNISH ONE WHO ACTS AS A "RINGLEADER" IN THE ORGANIZING OF THEFTS AND TRAFFICS IN THE STOLEN GOODS.

Petitioner's timely Motion for Rehearing or Clarification was denied October 10, 1983.

Petitioner's timely Notice to Invoke Discretionary Jurisdiction was filed in this Court on November 11, 1983.

III STATEMENT OF THE FACTS

Walter Sharman's plant, located at 4507 Sunbeam Road in Jacksonville, Florida, manufactured stainless steel equipment and parts (T-13-14). The larger pieces were primarily stored in a fenced, five-acre, outdoor area (T-14). The company's inventory is valued at $150,000.00 (T-37). A complete physical inventory is conducted once a year; it is not hard to misplace numerous items (T-37).

On April 5, 1982, although the inventory showed 15 particular items, none could be found in stock (T-17). On April 26, 1982, 60 pieces were discovered missing; a police officer came, and some damage to the fence around the inventory was located (T-18-19).

Bernard Baker, an employee of Sharman Company, testified that certain stainless steel parts were not missing when he left the plant at 6:00 p.m. on April 28, 1982 (T-42-45). He testified he would have noticed when he checked the back gate (T-45). However, on cross-examination he indicated he did not check or count the fittings and did not check the fence on April 28 (T-48-49).

Robin Clark, a friend of Walter Sharman, was aware some stainless steel had been missing from the Sharman Company inventory (T-115-117). At about 11:00 p.m. on April 28, 1982, he was traveling North on San Jose Boulevard and saw an old green truck with plywood sides carrying stainless steel elbows; he tried but could find no tag (T-117-119). He testified that State Exhibit 14 was a stainless steel elbow like he saw in that truck (T-120-121). He identified the single occupant of the truck:

> I got the impression of a bushy moustache and a stocking cap. That's about all in identity, a white male.

(T-119). He testified the driver was about age 30 (T-119). When Clark got

home at 11:30, he immediately reported this to Walter Sharman (T-121). On State Exhibit 1, a city map of Jacksonville, Clark drew a circle and wrote "truck" where this occurred (T-122).

On April 28, 1982, after receiving this call from Robin Clark, Sharman returned to the plant and discovered 27 items were missing (T-19-20). Sharman sells his equipment at retail prices (T-39), and he indicated the following values for the missing items: the 15 items discovered missing on April 5 were valued at $83.75 each; the 60 pieces discovered missing on April 26 were valued at $48.75 each; and the 27 pieces discovered missing on April 29 had a total value of $4,539.39 (T-17-18,20).

On the morning of April 29, Sharman reported the latest discovery to the police (T-24). He then called the scrap dealers in an effort to locate the missing equipment (T-24-25). At one of these, Commercial Metals, he found and claimed items missing from his plant, including some removed on April 28 (T-25-26). About May 1, Sharman took photographs of these recovered items (State Exhibits 5 through 13) (T-26-30, 69-70). On State Exhibit 1, the city map, Sharman indicated his plant location with an X and his initials (T-31-33).

Sharman identified State Exhibit 14 as a stainless steel fitting removed from his plant on April 28, 1982 (T-21,73). He could identify his equipment by his "SHARMWELD" logo, by the job identification number, and by his inventory which shows this number (T-21-23).

Although Sharman testified on direct examination that he had made a theft report to the police on April 5, he stated on cross-examination that no report was made that date (T-34-35). He explained that on that date he was unsure whether the missing items were gone or just misplaced since the inventory had recently been moved (T-36).

Bernard Baker verified that when he arrived at work at about 7:00 a.m.

on April 29, 1982, some stainless steel parts were missing and a part of the fence was unfastened at the bottom (T-45-46,49).

David Albright buys and receives all nonferrous metals, including stainless steel, for Commercial Metals Company, which buys scrap iron and other metals (T-50,76). He testified petitioner was a pretty regular customer of Commercial Metals (T-77); he had sold Commercial Metals approximately a minimum of 3,000 to 3,500 pounds of stainless steel (T-70). Albright buys stainless steel for Commercial Metals from other individuals, dealers, and commercial accounts (T-81), but he had never bought stainless steel "elbows" from any other customer (T-66,92). When stainless steel is received, it is dumped into an area for processing and grading and then placed in bins (T-80-81). The stainless steel purchased from petitioner went into bins with other stainless steel (T-81).

Albright testified petitioner had sold other metal items to other Commercial Metals employees, and Albright had bought stainless steel from petitioner on three occasions (T-77,86). Albright first bought stainless steel (and copper, radiators, aluminum fins and batteries) from petitioner on February 22, 1982 (T-63-64,77). On all occasions, petitioner was driving an early model, stake-body, green Ford truck; Albright did not notice a tag on the truck, although he sometimes gets a tag number for identification (T-59,62,65,90). Petitioner signed his name to the Warehouse Receiving Report, State Exhibit 4, and Albright did not request any identification (T-64). Petitioner sold stainless steel to Commercial Metals a second time on March 18, 1982 (T-60,83). Petitioner signed the Warehouse Receiving Report, State Exhibit 3, and was paid $160.96 in cash; Albright requested no identification (T-60-62,84). Finally, on April 29, 1982, petitioner was waiting at Commercial Metals to sell stainless steel elbows when Albright

arrived at 7:30 a.m. (T-51,58). A male teenager was with petitioner on that occasion (T-58). Petitioner sold 990 pounds of stainless steel for $141.00; he signed the Warehouse Receiving Report, State Exhibit 2, and was paid by check (T-51-57,85). Albright asserted on cross-examination that he was never suspicious the stainless steel was stolen until Walter Sharman contacted Commercial Metals (T-85-86). On April 29, Walter Sharman came to Commercial Metals, identified the stainless steel elbows as his, and took possession (T-67-68,70). When petitioner came to Commercial Metals a few days later with non-stainless steel items to sell, Sharman and the police were called (T-87-92). Albright identified State Exhibit 14 as a stainless steel element similar in size to metal bought from petitioner, adding that he also bought smaller pieces (T-57-58,73); he identified State Exhibits 5 through 13 as photographs of stainless steel elbows identical to those sold by petitioner to Commercial Metals (T-69-70).

David Emory Coffman, an officer with the Jacksonville Sheriff's Office, arrested petitioner at Commercial Metals at 9:00 a.m. on May 3, 1982 (T-106-107). With petitioner was a young white male teenager (T-109). Officer Coffman could not remember the response when he asked petitioner his name, but it was not James Wesley Goddard or James, Jr. (T-107-108,112). When Officer Coffman requested identification, petitioner gave him a driver's license with his name and photograph thereon (T-108-109). Petitioner had a very thick moustache on that date, just as he had in court (T-110). On cross-examination, Officer Coffman testified that when he first arrived at Commercial Metals and passed petitioner to enter the office petitioner acted "evasive", like

he did not want the officer to see who he was (T-113).

Henry Ross Shraeder, age 17, testified he knows and lives near petitioner (T-125-126). He testified for the petitioner that he was with petitioner near Ploof Truck Lines when petitioner purchased the stainless steel sold to Commercial Metals on April 29 (T-126-131). Ploof Truck Company was near the Springfield area where he and petitioner live; Shraeder marked Ploof and his and petitioner's residences on the map, State Exhibit 1 (T-131-136). Shraeder testified petitioner bought the stainless steel from a black man, about age 59, with a moustache and driving a blue truck (T-128-129). Shraeder did not know whether petitioner had bought metal from the man before and did not know how much was paid for the metal (T-132,137). Shraeder helped transfer the metal from the seller's truck to their truck (T-128). He could not remember the date of the purchase but testified it occurred about 7:00 p.m. (T-126, 130); however, on cross-examination, he stated it was around 6:00 or 7:00 p.m. (T-137). Shraeder did not have on a watch in court or when the stainless steel was bought or sold and did not know the exact times for either (T-138-139). Shraeder testified petitioner then took him home, left with the truck, and returned about 7:00 a.m. the next morning, at which time he and petitioner went to Commercial Metals to sell the metal (T-130-131). Shraeder stated he and petitioner were arrested that date (T-131).

Shraeder stated the truck belonged to his father; it was a 1959 green and black Ford truck with black steel sides, not plywood sides (T-127-128). Shraeder agreed there were not many trucks like it on the highway (T-138). There were no fenders on the front; the truck did have a tag, but Shraeder did not know the number (T-133,138). Petitioner had

used the truck before to haul things (T-128).

Shraeder had no idea the stainless steel might have been stolen (T-130). At the time he helped petitioner unload it, it was not clean as it was in court but was rusty, rained on, and dirty (T-128-130). Shraeder testified that otherwise State Exhibit 14 looked like the same thing he unloaded with petitioner (T-129).

Petitioner, James Wesley Goddard, Jr., testified he was age 29 and was self-employed in the junk business; he buys and resells junk and old cars, junks out old cars, and people give him junk (T-140-141). He had sold stainless steel to Commercial Metals on three occasions (T-141). The first occasion was about February 22, 1981 (T-141); the second occasion was March 18 (T-143); and the third occasion was April 29, 1982 (T-146). On the first two occasions, the stainless steel was purchased from a black male named Charlie at petitioner's home (T-141-144). Petitioner did not know Charlie's last name and never got in touch with him; Charlie knew how to contact petitioner (T-142,167-168). Other than the third purchase, petitioner saw Charlie one other time, on April 28, at Twenty-First Street and Phoenix, with metal in the back of his truck (T-168). On April 29, 1982, petitioner bought the stainless steel at Florida Parking Lot at about 7:00 p.m., maybe a little before (T-158,161). The stainless steel was in the back of Charlie's blue three-quarter ton pickup truck (T-161). Petitioner identified Charlie as a black male, 5'10" to 11", with a full beard, not just a moustache (T-142,161-163). He paid Charlie $80.00 for the metal bought on April 29 (T-163). Petitioner testified there were about 15 pieces of metal purchased on that date, although he did not count them (T-163). Petitioner had no idea the metal was stolen (T-151,169). He looked at it good, but he did not go over it real

close (T-168-169). He did not give any receipts for the purchase (T-166). He was not suspicious of the metal because of the Shamweld stamp because he did not recognize the stamp (T-166-167). Also, when he purchased the stainless steel, it was dirty and scratched up, not shiny and clean as in the courtroom (T-151). The stainless steel was not covered with rust as Shraeder testified; stainless does not rust, but it was dirty and scratched up (T-154).

Petitioner testified that Commercial Metals did not indicate anything was wrong with the stainless steel on the three occasions he sold it to them (T-143,145,147). He was paid each time he sold stainless steel to Commercial Metals (T-142,144,146). Petitioner had sold a variety of metals to Commercial Metals on maybe 15 occasions, including aluminum, copper, black iron, cast iron, and junk motors (T-147).

Petitioner testified he had driven Shraeder's father's truck numerous times and that he did not own a truck in April, 1982, or on the date of trial (T-150-152). The truck had tags on April 29, 1982 (T-161).

Petitioner testified that after he purchased the stainless steel on April 29, he took Shraeder home and then rode around looking for the home of a friend named Vernon Knight (T-149-150). Although he knew Knight lived in one of three houses behind Lanes Bowling Alley off Hendricks Avenue, he did not know the exact address (T-150,164). Knight did not have a telephone (T-165). Petitioner did not locate Knight's house that evening (T-150). Knight's house was way out Hendricks Avenue, about six miles (T-150,164). Petitioner testified he did not know where Sunbeam Road is, that he thought San Jose Boulevard and Hendricks Avenue were two different roads, that he was on Hendricks Avenue, not San Jose Boulevard,

and that he did not know where Goodbys Lake was located (T-165). Petitioner denied he was in that area because he had just stolen the stainless steel from Sharman Company (T-165).

Petitioner testified that, when the arresting officer first asked his name, he told him his name was James, Jr., because he usually goes by that name (T-149). Petitioner testified he told the detective shortly after his arrest that he bought the stainless steel from a black man on Florida Avenue (T-157). However, petitioner then said he made a mistake when he said Florida Avenue, that he told the detective Florida Avenue when asked where he met the individual from whom he bought the stainless steel and he told the detective that he purchased the stainless steel at Florida Parking Lot, not Florida Avenue (T-157-158). Petitioner testified that the stainless steel was purchased near Ploof, which is not on Florida Avenue (T-157). Petitioner testified he had previously been convicted of one felony (T-168).

Petitioner testified that he had been in the junk business about two years, that he goes by poundage, and that he received 15 cents per 100 pounds for stainless steel (T-153). Petitioner stated he was not aware that the retail value of a piece of stainless steel like State Exhibit 14 was approximately $80.00 because he did not know the "brand new price" (T-152-153). Petitioner stated he never learned the fair market value of these parts new because junk is usually not new (T-154). Petitioner sold the stainless steel on April 29 to Commercial Metals for $141.00 (T-163). When he paid Charlie $80.00 for it, he did not know that was a lot less than the metal was worth on the fair market (T-163). He did not go by weight when he purchased it because he had no scale with him (T-163). He did hear Sharman's testimony that the items

sold to Commercial Metals on April 29 were worth more than $2,000.00 (T-163-164).

In rebuttal, David Lewis Boos, a Jacksonville Sheriff's Office Burglary Detective who investigated the April 28 theft from Sharman Company, testified he questioned petitioner on May 3, 1982 (T-182-183). According to Boos, petitioner told him he bought the metals from a black man on Florida Avenue (T-185). Also, petitioner told him he did not know the man's name from whom the metal was bought (T-186). In response to petitioner's testimonial assertion that the detective had questioned him at length and attempted to confuse him, Boos testified he questioned petitioner approximately five minutes and asked him five or six questions (T-186).

At a bench conference, the defense attorney noted that Boos, in his deposition, stated petitioner told him he bought the metals off Florida Avenue, not on Florida Avenue (T-186-187). On cross-examination, Boos testified he remembered giving the answer in deposition that petitioner did not make any statement to him other than that he bought the metals from a black man off Florida Avenue (T-189). Boos agreed that the normal procedure in some cases was to reduce a defendant's statement to writing but testified he did not do that here, but was testifying from his memory (T-190). On redirect examination, Boos testified he wrote petitioner's statement in his supplemental report and had refreshed his memory before testifying at trial (T-190-191).

At the charge conference on the proposed jury instructions, the prosecutor agreed with the trial judge that there were no lesser included offenses to this charge (T-194-195). The central theme of the prosecutor's closing argument was that petitioner stole and then sold the stainless

steel parts. After deliberating for approximately four hours, the jury sent a note to the judge that it "could not reach a verdict" (T-288). Over defense objection, the judge gave the Allen charge and sent them back for further deliberations (T-289-294). In response to a jury question in the middle of that charge to the effect that the jury was confused between the charge of dealing in stolen property and "actually stealing and trafficking", the state requested the jury be recalled for instruction "as to the definition of theft" (T-294). Over strenuous defense objection (T-294-298), the court recalled the jury, repeated the elements of the charged offense, and instructed the jury as to theft (T-299-300).

The jury returned a guilty verdict on the charge of dealing in stolen property (R-33; T-301). On September 24, 1982, petitioner was sentenced to 15 years' incarceration (R-38-42; T-319).

On direct appeal, petitioner raised two issues, insufficiency of the evidence to prove the first element under Section 812.019(2), Florida Statutes, and the trial court's re-instruction of the jury contrary to the standard jury instructions after the jury had announced it was hung.

The First District Court of Appeal affirmed petitioner's conviction based on the conclusion that the prosecution could establish the first element under Section 812.019(2) with evidence the petitioner actually committed a theft, construing the words "plans" and "initiates" in the language of that first element to mean no more than that planning and initiating inherent in any theft. Thus, the court ruled that a defendant could be convicted of the first-degree felony of dealing in stolen property under subsection (2) of Section 812.019 upon proof that the defendant stole and sold property. Although petitioner pointed out in briefs and on rehearing that this construction nullified Section 812.025, Florida Statutes,

which prohibits a simultaneous conviction for theft and trafficking (Section 812.019(1)), the court never addressed this problem. The court did certify this case to the Florida Supreme Court as one of great public importance.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL.

This is a case of first impression in the courts of this state. The specific issue presented is what behavior is proscribed by subsection (2) of Section 812.019, Florida Statutes (1981), the Dealing in Stolen Property statute of the Florida Anti-Fencing Act of 1977. Specifically, petitioner contends that the respondent failed entirely to introduce any proof as to the primary element of this charge and that respondent proved, at most, lesser crimes for which petitioner was not tried.

Petitioner was charged by information with grand theft of the second degree in violation of Section 812.014, Florida Statutes (a third-degree felony), and with dealing in stolen property in violation of Section 812.019(2), Florida Statutes (a first-degree felony). Section 812.019 reads:

> 812.019 Dealing in stolen property.--
> (1) Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.
>
> (2) Any person who initiates, organizes, plans, finances, directs, manages, or supervises the theft of property and traffics in such stolen property shall be guilty of a felony of the first degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Petitioner was charged under subsection (2) of that statute.[1] Also, Section

1. For purposes of clarification, subsection (1) will also be referred to herein as the "trafficking" subsection and subsection (2) will also be referred to as the "organizing" subsection.

812.025, Florida Statutes (1981), reads:

> 812.025 Charging theft and dealing in Stolen Property.-- Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

Thus, under Section 812.025, the information charging petitioner with both grand theft and dealing in stolen property was proper on its face, but the respondent could not have properly obtained a conviction for both crimes. Lennear v. State, 424 So.2d 151 (Fla. 5th DCA 1982), Ebnetter v. State, 419 So.2d 1173 (Fla. 2d DCA 1982); Ridley v. State, 407 So.2d 1000 (Fla. 5th DCA 1981); and Kelly v. State, 397 So.2d 709 (Fla. 5th DCA 1981).

It is equally clear that respondent could have charged petitioner with either or both subsections (1) and (2) of Section 812.019, since subsection (1) is a lesser included offense of subsection (2) under the Schedule of Lesser Included Offenses.[2] Nevertheless, the respondent charged only subsection (2) and expressly agreed with the trial judge that there were no lesser included offenses (T-194-195). Therefore, respondent limited itself to a charge of dealing in stolen property under subsection (2). The trial judge instructed the jury, in accordance with the Standard Jury Instructions for Section 812.019(2), that the elements of this crime were as follows:

---

2. See, In The Matter Of The Use By The Trial Courts Of The Standard Jury Instructions In Criminal Cases And The Standard Instructions In Misdemeanor Cases, No. 57,734 (Fla., April 16, 1981), as modified by In The Matter Of The Use By The Trial Courts Of The Standard Jury Instructions In Criminal Cases, No. 58,799 (Fla. June 5, 1981).

> One, that the Defendant initiated, organized, planned, financed, directed, managed, or supervised the theft of the property which is alleged to have been stolen which has been described to you.
>
> And, two, this is the other element, that the Defendant trafficked in that property which was allegedly stolen property.

(T-274-275). Inexplicably, respondent abandoned the grand theft charge prior to trial (R-24).[3]

At trial, respondent introduced no proof whatsoever as to the first element of this crime, i.e., that petitioner initiated, organized, planned, financed, directed, managed, or supervised the theft. This primary element of proof under Section 812.019(2) obviously requires proof of some act in addition to and beyond mere theft. Rather, respondent's entire proof went to prove grand theft, burglary, and trafficking in stolen property, i.e., the sale of the stolen property.[4] However, it is this first element of proof under subsection (2) that is the core of that greater offense. Thus, respondent convicted a common thief as some sort of master fence or kingpen of organized theft.

Although this subsection (2) has nowhere been interpreted by the courts of this state, the Florida Supreme Court has held the entire Florida Anti-Fencing Act constitutional. State v. Dickinson, 370 So.2d 762 (Fla.

---

3. Presumably, respondent feared that giving the jury that choice would result in a conviction on the lesser charge of grand theft, although respondent clearly advanced evidence and argument of theft throughout the trial; e.g., see Issue II, infra. Perhaps respondent also misconstrued the first element of subsection (2) as set forth above to mean no more than that the defendant committed the theft; see Issue II Infra.
4. Petitioner sees no difference between the proof necessary for a conviction under subsection (1) and for proof of the second element of subsection (2) quoted above.

1979); see also, Edwards v. State, 381 So.2d 696 (Fla. 1980); State v. Allen, 362 So.2d 10 (Fla. 1978); State v. Lewis, 364 So.2d 1223 (Fla. 1978); and, State v. Belgrave, 364 So.2d 1225 (Fla. 1978). However, the language of Section 812.019(2) at issue here was not specifically mentioned or discussed in that case.

The scope of Section 812.019(2) is clear from a number of vantage points. First, the facial construction of the entire Florida Anti-Fencing Act indicates that Section 812.019(2) was intended to reach a professional or master fence, someone who organizes thefts. Note not only the title of the Act, to which this particular statute responds, but also the increased punishment: Simple theft is a third-degree felony; trafficking under subsection (1) is a second-degree felony; and organizing under subsection (2) is a first-degree felony. The intended scope of these offenses is clear: Section 812.014 proscribes the theft of property, even if retained by the thief. Section 812.019(1) prohibits the disposal of stolen property, whether by the actual thief or by a fence.[5] Section 812.019(2) proscribes not only the disposal of stolen property ("trafficking") but primarily the initiation, organization, planning, financing, direction, management, or supervision of thefts.[6] Note also that the Standard Jury Instructions label the title of subsection (1) as "DEALING IN STOLEN PROPERTY (FENCING)" and the title of subsection (2) as "DEALING IN STOLEN PROPERTY (ORGANIZING)". Under general rules of statutory construction, use of the disjunctive word "or" indicates that proof of any one of the listed acts would be sufficient to establish that element.

---

5. Although the thief could not be convicted of theft and trafficking, due to Section 812.025, the possibility of a trafficking conviction under subsection (1) presumably was intended to discourage thieves from disposing of stolen property for profit or other benefit.
6. Subsection (1) is directed at simple fencing while subsection (2) is directed at the organization of thefts, i.e., the master or professional fence; see the discussion at 22-26, infra.

Finally, the doctrine of ejusdem generis dictates that each listed act should be construed in the context of the general class of acts; therefore, while the words "initiates...plans...the theft" might in isolation imply no more than that the defendant committed the theft, this interpretation is negated by the other acts listed and by other considerations discussed infra at 26[7]. Note that the absence of any definition for this phrase in the jury instructions could very well have misled the jury.[8]

Second, the language of Section 812.019(2) reflects a broader proscription than mere theft plus trafficking. If subsection (2) was intended to prohibit no more than a simple theft plus the trafficking proscribed under subsection (1), i.e., if the language of subsection (2) ("initiates, organizes, plans, finances, directs, manages or supervises a theft") meant no more than "theft", the Legislature would have said just that: "Commits thefts and traffics." Also, it would make no sense for the Legislature to have enacted one statutory subsection if it does no more than repeat or combine two crimes already defined separately in the same chapter, i.e., theft at Section 812.014 and trafficking at Section 812.019(1). Finally, any such legislative intent is specifically negated by the adoption of Section 812.025, which specifically prohibits convictions for both theft and trafficking, thus Section 812.025 precludes the definition of subsection (2) as no broader than a simple theft plus trafficking. Such

---

7. See Soverino v. State, 356 So.2d 269, 273 (Fla. 1978).
8. Specifically, the words "initiates...plans...the theft" could be considered by a jury to mean no more than that the defendant committed the acts necessary to accomplish any theft, in that any act of theft presumably requires some minimal, if miniscule, initiation and planning. Indeed, this was the district court's reasoning. However, the legislative history and facial construction of this statute clearly indicate a broader meaning for these words.

a definition would render subsection (2) useless and duplicative and could also confuse the sentencing decision where a defendant was charged with both theft and subsections (1) and (2). Thus, Section 812.025 reflects the distinction between the thief and the fence: Section 812.014 represents punishment for the thief, and Section 812.019 represents punishment for the fence. As such, Section 812.025 prohibits punishment of one defendant as both thief and fence based on a single criminal episode or act.

In Washington v. State, 378 So.2d 852, 853 (Fla. 4th DCA 1979), the court stated:

> The elements of this crime [trafficking under subsection (1)] are obviously different from the elements which must be proved in a burglary or grand theft case.

The District Court opinion was erroneous in that it effectively nullified Section 812.025 by construing the first element of Section 812.019(2) to mean no more than the planning or initiating inherent in any theft (or any intentional act, for that matter). The First District wrote:

> We find the language of Section 812.019(2), Florida Statutes, plain and unambiguous. The word "or," a disjunctive article, as used in the context of Section 812.019(2), Florida Statutes, prohibits the doing of either or any act so joined. Clearly, one who actually commits a theft also, at least, initiates and plans it, each act of which is proscribed by Section 812.019(2).
>
> Accordingly, we conclude that Section 812.019(2), Florida Statutes, is intended to apply to the common thief who also traffics in the goods which he has stolen and, therefore, affirm the judgment of conviction. . . .

Even though petitioner emphasized the effect of such a construction upon Section 812.025, both in brief and on rehearing, the First District never addressed this aspect of the case.

The District Court's conclusion, quoted immediately above, that the statutory language ("plans . . . initiates") was unambiguous is also incorrect, in that an analysis of Section 812.019(2), even when done in isolation, does not

indicate whether the enumerated acts are to be narrowly or broadly applied.

Third, the legislative history of Section 812.019 indicates that it was intended to reach fencing operations. The Florida Supreme Court has stated:

> As indicated by its title, the Florida Anti-Fencing Act (Section 812.005, Florida Statutes 1977)), one object of this legislation was to expand the larceny statute to reach 'fencing' of stolen goods . . . .
>
> State v. Allen, supra, at 11 n.2.

The title of the present Act reads in part:

> making it a higher degree crime to initiate, organize, plan, finance, direct, manage or supervise a theft and traffic in stolen property; . . . .[9]

The various bills proposed in the Legislature prior to the Act's adoption reflected the desire to prohibit organized theft. Both the companion House of Representatives legislation[10] and the Senate legislation actually enacted were based upon the Model Theft and Fencing Act:

> HB2149 is an adaptation of the Model Theft and Fencing Act as proposed by G. Robert Blakey and Michael Goldsmith in their exhaustive study on stolen property found in the Michigan Law Review. That article focuses on the receivers of the stolen property as the central figure in theft activities.[11]

Finally, the minutes of the committee meeting at which the Act was passed reflected a statement by its drafter, Senator McClain, that:

> If you merely traffic in stolen property, it is a felony of the second degree but if you initiate, organize, plan, manage, direct, or supervise a theft and deal in the stolen property it is a much more severe crime and it is a felony of the first degree, so there are two grades of dealing in stolen property.[12]

Also, two prosecutorial representatives at the meeting indicated support for the

---

9. Committee Substitute By The Senate Judiciary-Criminal Committee For Senate Bill 1431, passed May 10, 1977, by the Senate Committee and subsequently enacted as the Florida Anti-Fencing Act of 1977.
10. House Bill 2149.
11. Summary of House Bill 2149; see also, Senate Staff Analysis and Economic Statement for SB1431.
12. These minutes are recorded on tapes on file in the State Archives.

anti-fencing portions of the Act, stating that fencing was one of the biggest problems of law enforcement and prosecutorial offices. Specifically, the representative of the Department of Criminal Law Enforcement stated that: "fencing is one of our more serious problems of the more highly organized, sophisticated nature".

Fourth, the Model Theft and Fencing Act, upon which this statute was expressly based, clearly indicates the proscribed behavior. Therein, the authors discuss the need for legal changes to address the development of sophisticated fencing systems for redistribution of stolen property. They describe a fence as follows:

> Although patterns of redistribution differ in sophistication, all fences are essentially businessmen engaged in "[t]he performance of business activities that direct the flow of goods . . . from producer [thief] to consumer or user." As middlemen, fences must locate supplies of stolen goods, contact purchasers, provide transportation and storage facilities, and finance the entire process. During redistribution, therefore, fences confront two major risks: the risk of detection while performing the middleman functions and the risk of financial loss if the particular stolen goods cannot be marketed profitably. As this section of the article will show, the extent of both these risks varies inversely with the sophistication of the fencing operation. Risks are minimized for the most successful fences who have leadership ability, business acumen, established contacts with thieves, broad operation bases, tight organizational control, and legitimate facades. It is, of course, these sophisticated receiving operations that pose the greatest challenge to our society.[13]

Throughout the article, they distinguish the thief from the fence, and the theft from the "redistribution" or fencing of the stolen property:

> the two major participants in redistribution systems. First, there are the fences who often find it both profitable and not very risky to purchase stolen goods from thieves and

---

13. G. Robert Blakey and Michael Goldsmith, "Criminal Redistribution of Stolen Property: The Need for Law Reform", 74 Mich.L.Rev. 1511, 1523, August, 1976.

> resell them at retail and wholesale levels. . . . Second, there are the thieves who, with the growth of viable fencing schemes, have available purchasers for their stolen property . . . . In general terms, a symbiotic relationship between fences and thieves appears to have developed.[14]

This is reflected in the Florida Statutes' distinction between theft and dealing in stolen property. Blakey and Goldsmith further described the role of the fence:

> Any sketch of this relationship must recognize the primary role played by receivers. Such recognition is crucial if proper legal techniques for controlling theft are to be developed. Unfortunately, law enforcement efforts in the United States have traditionally focused on capturing the thief rather than on eliminating the fence. This "theft-oriented" approach was perhaps sufficient in preindustrial society but is inadequate and seriously misdirected today because it fails to recognize that thieves steal primarily for profit rather than for personal consumption. Fencing systems play a vital role in theft activity because most thieves are unable to deal directly with the consuming public and must therefore operate through middlemen who have the financial resources to purchase stolen goods and the contacts to help in their redistribution. Although thieves usually receive only a small fraction of the retail value of their goods, the ability of most fences to make prompt payment facilitates rapid disposal of stolen property and reduces the risk of detection that prolonged possession entails. Without fences, few thieves could survive because fences both satisfy their motive for stealing and provide an incentive for future theft. Thus, the first step in combatting the theft problem is to realize that law enforcement efforts should be primarily directed at the fence.[15]

The authors describe an organized fencing operation as is logically depicted by the language of subsection (2) of Section 812.019:

> [T]he most sophisticated fences are far removed from those receivers who are owners of seedy pawnshops or who undiscriminately select potential customers on the street, and thus they pose peculiar problems for law enforcement.

* * *

---

14. Id., at 1513-1514.
15. Id., at 1514-1516.

> Risks are minimized for the most successful fences who have leadership ability, business acumen, established contacts with thieves, broad operation bases, tight organizational control, and legitimate facades. It is, of course, these sophisticated receiving operations that pose the greatest challenge to our society.
>
> * * *
>
> The master fence directs a big-time operation and either organizes large-scale thefts or serves as a middleman for other organizers. While other fences may perform similar services, the master fence is distinguished by his ability to insulate himself from the actual theft and subsequent redistribution process. The master fence operates as a broker, buying and selling goods valued in the hundreds of thousands of dollars that are always the product of large-scale theft, yet rarely, if ever, seeing or touching any of it.
>
> To be successful, therefore, a master fence must have an extensive system of contacts including both informants and potential large-scale purchasers. For example, as an organizer of thefts, a master fence relies upon his paid connections, . . . The master fence then contacts potential buyers, but does not actually arrange the theft until he has a firm agreement for resale. Once such an agreement is concluded, he plans in great detail the theft itself and arrangements for storing, legitimizing, and delivering the stolen goods.
>
> * * *
>
> Successful master fences usually require access to the extensive capital resources, personnel and connections of organized crime syndicates.
>
> * * *
>
> Because they deal in large quantities of stolen goods, the activities of master fences have a sharp impact on the national economy. More significantly, however, since master fences must rely upon outside sources for support because of their high overhead costs, their growth and success is a good indicator of the extent to which organized crime syndicates control theft and fencing activity.[16]

These distinctions underlie the grading in the Florida Act from thief, to trafficker, to organizer. The thief commits the initial wrongful taking of property. The trafficker of subsection 1 is either a thief who disposes of the property he stole, and is thus subjected to a greater punishment, or is

---

16. Id., at 1522, 1535-1538.

a small-scale fence[17] who resells or transfers the stolen property; e.g., a delivery truck driver who knew or should have known the property was stolen, or anyone who aids in the redistribution of stolen property, "trafficks" in stolen property under subsection 1. An organizer under subsection 2 is the true, sophisticated or "master" fence depicted by Blakey and Goldsmith, who organizes, directs, manages, finances and controls an entire, large-scale fencing operation. As Blakey and Goldsmith point out, a professional fence may at times, after locating a buyer, even "initiate" and "plan" the details of actual thefts. However, this professional fence does not participate in the actual taking of the stolen property. This explains the use of the words "plans" and "initiates" in the first element of subsection 2 as being something greater than the behavior inherent in a simple theft under Section 812.014. Also,

---

17. Blakey and Goldsmith characterized this individual as follows:

> By definition, the neighborhood fence is a small-time operator. He may, on occasion, actually steal merchandise for resale, but more often he is supplied by local thieves . . . a neighborhood fence may occasionally expand his operation by organizing thefts for customers, by working closely with other fences, and by serving as one of many distributors for property stolen by organized crime syndicates.
>
> There are several reasons why neighborhood fences represent considerably less of a threat to our society than do large-scale fences. First, they are more easily detected by conventional police investigative techniques . . . Second, neighborhood fences rarely expand because they usually have limited financial resources and marketing opportunities . . . Finally, although a small-scale fencing operation may generate substantial personal income, neighborhood fences probably only distribute a small percentage of the stolen property redistributed annually.
>
> Id., at 1530-1531.

these two words must be construed in light of the overall list of behaviors in subsection 2, which indicates behavior of an "organizing" or "managerial" nature. Again, if simple theft is what the Legislature intended by this language of subsection 2, that is not what it wrote.

Finally, note the article's discussion of the connection between some sophisticated fencing operations and organized crime. This correlates with the statute's use of the language "organizes . . . the theft" and with the reference to "organizing" in the title to the Standard Jury Instructions for subsection 2.

The District Court's opinion is, again, unsound for ignoring this clear legislative intent. The District Court wrote:

> It is a well-settled rule that where the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, resort to rules of statutory interpretation to ascertain legislative intent is unnecessary. The Legislature is held to have intended that which it plainly expressed.

However, as pointed out above, the language of subsection (2) is not clear even when considered in isolation. Moreover, when the statutory language is considered in conjunction with the other relevant statutes, the ambiguity of its scope is patent. Thus, consideration of the legislative history is not only proper but necessary. It certainly cannot be said that it is proper to ignore what is clear legislative intent when it is contrary to the result reached, but that is what the District Court did here.

Fifth, petitioner finds instructive the Arizona and New Jersey statutes based upon Blakey and Goldsmith's Model Theft and Fencing Act, although unfortunately neither have reported decisions construing or applying the first element of Section 812.019(2). Section 13-2307, Ariz. Rev. St. Anno., entitled Trafficking in Stolen Property , reads in relevant part:

> B. A person who knowingly initiates, organizes, plans, finances, directs, manages or supervises the theft and trafficking. . . .

This statute is of superior construction to the Florida statute both because the former's language ("trafficking") clarifies that the listed acts apply to both the theft and the trafficking, thus avoiding a misinterpretation as merely "theft plus trafficking." Note that Florida cases refer to Section 812.019 as if it were one crime, i.e., dealing in stolen property, while the Arizona statutory scheme clarifies the distinction. Finally, note that Section 2C:20-7.1, New Jersey Statutes Annotated, is entitled Fencing, which clarifies the statute's purpose.

Clearly, the sophisticated fencing operation depicted by Blakey and Goldsmith is not petitioner. For example, as respondent pointed out, petitioner did not even own his own truck. There was absolutely no proof whatsoever that petitioner engaged in any of the "organizational" activity specifically prohibited by subsection 2. The criminal activity at which that subsection was directed was not even suggested by the evidence at petitioner's trial. (Note that the fencing operation described by Blakey and Goldsmith at 1534 more clearly fits the behavior of Commercial Metals,[18] to whom petitioner sold the stolen property. The defense attorney questioned their culpability in this regard; and the evidence at petitioner's trial would have support a trafficking conviction against Commercial Metals and/or its employees as well as it would have against petitioner; i.e., purchase of stolen property under the presumption of knowledge of its character as stolen property.

Finally, in support of his argument there was insufficient proof of the crime charged to deny his motion for judgment of acquittal, petitioner points to the jury's announcement, after four hours' deliberation, that it could not agree on a verdict (T-288), to the jury's incredibly astute question as to the

---

18. "In any case, false sales receipts are drafted and the fence's personal check for the purchase price is cashed so that he has a receipt and a cancelled check, thereby making his conviction extremely difficult even if the goods are identified." Id., at 1534-1535.

difference between the crime charged and the crimes of stealing and trafficking (their understanding of the instruction on dealing in stolen property), and to the jury's return of a guilty verdict only after the judge then instructed them for the first time as to "theft" and for the fourth time as to the charge against petitioner. Given the lack of definition in the jury instructions as to the scope of subsection (2), the actual evidence of theft presented and argued at trial, and the giving of the theft instruction after the jury had announced it was hung on the charge of dealing in stolen property, the conclusion is apparent that the jury convicted petitioner of either theft or of theft plus trafficking. That was not charged, that is not proof of subsection 2, and that is prohibited by Section 812.025.

In Hutcheson v. State, 409 So.2d 207, 208 (Fla. 5th DCA 1982), the Court reversed a conviction under subsection 1 of Section 812.019, stating:

> If the state had charged him with feloniously misappropriating those funds perhaps the evidence would have supported a conviction. The state attorney made a mistake, charged one crime and proved something else. Thus we must reverse the conviction.

Here, if respondent had tried petitioner for grand theft, burglary, and/or trafficking in stolen property under subsection 1, this issue would not be before this Court. However, regardless of its reasons, respondent made its choice to prosecute only under subsection 2 of Section 812.019 and then failed to prove the primary element of that crime.

In Ridley v. State, supra, a similar situation was addressed. The defendant was convicted of burglary, grand theft, and dealing in stolen property under subsection 1. In finding the evidence of burglary and grand theft sufficient, the Court stated:

> We find the proof of appellant's possession of property recently stolen was sufficient to give rise to an inference that he not only stole the property but also committed the burglary which was necessary to accomplish

> the theft. See State v. Young, 217 So.2d 567 (Fla. 1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969), see also Shaw v. State, 209 So.2d 477 (Fla. 1st DCA 1968). The inference of guilt arises only when the accused's possession of recently stolen property is personal and exclusive, Griffin v. State, 370 So.2d 860 (Fla. 1st DCA 1979), or from the defendant's distinct and conscious assertion of possession, Palmer v. State, 323 So.2d 612 (Fla. 1st DCA 1975). Appellant's possession at the time that he sold some of the stolen property meets both characterizations.

Apparently, the sale of the stolen property in Ridley supported the conviction for dealing in stolen property under subsection (1), but the Court properly held that Section 812.025 precluded convictions under both the grand theft statue and the dealing in stolen property statute. In the instant case, respondent might have tried petitioner for grand theft, burglary, and/or trafficking in stolen property under subsection (1). But there is no proof here that petitioner committed any act necessary to prove the first element for a conviction under subsection (2) of Section 812.019. Since there was no proof introduced, that element was certainly not proven, as it must be for a conviction, beyond a reasonable doubt. Heath v. State, 97 Fla. 330, 120 So. 846 (1929); Mathis v. State, 121 Fla. 232, 163 So. 479 (1935); Savage v. State, 152 Fla. 367, 11 So.2d 778 (1943); Adams v. State, 102 So.2d 47 (Fla. 1st DCA 1958).

In sum, respondent erred by dropping the theft charge, thereby leaving the jury with nothing but the ultimate charge of being an organized fence under Section 812.019(2). The jury then erred by convicting petitioner of a crime which was in no way proven. Since respondent introduced no evidence of the primary element under subsection 2 of Section 812.019, petitioner's motion for judgment of acquittal should have been granted. Petitioner must now be discharged.

ISSUE II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, IMMEDIATELY AFTER AN ALLEN CHARGE, IT RECALLED THE JURY AT RESPONDENT'S REQUEST TO GIVE AN INCORRECT PARTIAL REINSTRUCTION ON A CRIME FOR WHICH PETITIONER WAS NOT TRIED.

The issue here is whether the trial judge erred by recalling the jury, at respondent's request and over strenuous defense objection, shortly after the jury had announced it was hung and had been given an Allen charge, for an additional instruction on theft, which instruction was not only incomplete but was also likely to confuse the jury and thereby prejudice petitioner by the return of a guilty verdict, since the reinstruction implied that the only evidence necessary for proof of the first element of the crime charged was proof of theft.

Petitioner was initially charged with grand theft, burglary, and dealing in stolen property under Section 812.019(2), Florida Statutes (1981). However, the theft and burglary charges were abandoned, and petitioner was tried only on the dealing in stolen property charge. The prosecution's evidence nevertheless went in part to the crime of theft. At the conference on the proposed jury instructions, respondent expressed no objections. In closing argument, the prosecutor continuously asserted and almost completely relied on petitioner's alleged "theft" of the property involved (T-221-227, 254-255, 258, 260-265, 271-272). For example:

> There is virtually no reason that the green truck that was seen by Robin Clark at 11:00 o'clock on the evening of April 28th, less than a mile away from the Sharman Company, there is no reason that that truck was there, but for the express purpose of taking away the stolen metal from the Sharman Company.
>
> * * *
>
> he stole it. He stole it from Sharman Metals . . . .
>
> * * *
>
> he knew it was stolen because he stole it.

* * *

> he was the one who stole it. I ask you all to perform your duty and to give us a verdict of guilty as charged.
>
> (T-222, 227, 258, 271-272).

The evidence that petitioner sold the property when he knew or should have known it was stolen was all that was relevant to establish the second or "trafficking" element of Section 812.019(2).

The only arguable purpose respondent might advance for the burglary and theft evidence and argument was that it believed that established the first element of Section 812.019(2). However, that argument is unavailable, first because it is incorrect (see Issue I, supra), and second because the prosecutor at one point argued that that proof was not necessary for petitioner's conviction:

> this Defendant bought and sold these items for a small fraction of their true value. You know that. That in itself is dealing in stolen property. We don't have to prove this Defendant stole that property for him to be guilty of dealing in stolen property. . . . If the Defendant knew or even should have known that this property was stolen, then he is guilty of dealing in stolen property. It's as simple as that. The evidence does not have to prove he stole it.
>
> (T-257-258).

Also, the portion of the prosecutor's argument just quoted was clearly a misstatement of the evidence necessary under Section 812.019(2), since it omits the first element, although it was a correct statement of the evidence necessary for proof of the second element under the statute, i.e., trafficking.

The jury was instructed that the essential elements of proof required against petitioner were:

> One, that the Defendant initiated, organized, planned, financed, directed, managed, or supervised the theft of the property which is alleged to have been stolen which has been described to you.

> And, two, this is the other element, that the Defendant trafficked in that property which was allegedly stolen property. Now, property means simply anything of value. The term "stolen property," means property that has been the subject of any criminally wrongful taking. And the term "traffic" is a legal term which means as follows:
>
> It means to sell, transfer, distribute, dispense, or otherwise dispose of property. And it also means -- traffic also means to buy, receive, possess, obtain, obtain control of or use of the property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of that property.
>
> (T-274-275).

The judge immediately repeated these instructions (T-275-276).

After more than three hours' deliberation, "the jury buzzed and could not reach a verdict" (T-288). The judge advised the jurors he understood they "were having difficulty or were -- had been unable to reach a verdict so far" (T-288). After the defense attorney suggested the judge either poll the jury to determine the possibility of a verdict or declare a mistrial, the trial judge gave the "new so-called Allen Charge from the new standard instructions" (T-289-290). Petitioner objected and moved for mistrial (T-290). In the middle of that instruction, the following exchange occurred:

> THE FOREMAN: Your Honor --
>
> THE COURT: Yes, ma'am.
>
> THE FOREMAN: The one question that they have is the accusation that was read at the beginning was just on dealing in stolen property, and then tonight when you read it, it was on, you know, actually stealing and trafficking; is that right? That's --
>
> THE COURT: Yeah. Okay. All right. Well, I appreciate your bringing that out because I may be able to clarify that for you.
>
> Let me see the court file. Let me do this: Let me read to you the charge from the Information first, and then I'm going to give you the essential elements of the crime as I did, and maybe this will help you to clarify.

(T-291-292).

The judge then read the information, repeated the elements and definitions for the third time, and completed the "Allen Charge" (T-293-294).

As soon as the jury retired to deliberate a second time, respondent asked:

> Your Honor, I am going to ask in light of the last question by the jury as to the law, I am going to ask that the Court call them back out and instruct them as to the definition of theft, because it's quite obvious that they're confused as to the definition of theft.
>
> * * *
>
> And their question was about that first element, and I don't see how it could at all prejudice the Defendant to give them a legal definition of the term used in the charge.
>
> (T-294-295).

The defense attorney vigorously objected:

> Judge, I would object to going back and giving them a new charge at this point in the proceedings. They have been instructed.
>
> * * *
>
> They have been instructed on the law and what the State has to prove. The dealing in stolen property charge has been read to them. That's what he's charged with, and I would strenuously object to going back and giving a new grand theft charge at this point.
>
> (T-294-295).

When the judge suggested the definition of theft should have been given originally, the defense attorney correctly argued:

> Judge, it wasn't requested. I think it -- to go back and do it now is just going to highlight things. They have asked the question. The question has been answered.
>
> The dealing in stolen property charge is in the Standard Jury Instructions which the Court has used and does not say, here, give a definition of theft as in the theft charge.
>
> (T-295-296).

However, the court reasoned as follows:

THE COURT: I'm inclined to believe that the framers of this instruction overlooked the fact that theft is a term of legal art and it should be defined. For example, it sounds to me like I think if I were a juror and with the posture of the instructions at this point, I would have to find that the Defendant burglarized the place and he wouldn't have had to have done that.

* * *

. . . I really don't see any harm in -- it just makes common sense to me that where there is an aspect of the instructions on the law that have been -- I may be wrong, but I just have a hard time seeing how this could be error to fill in an obvious error that was inadvertently -- we all overlooked, I think, because without a definition of theft, there is a gap in these instructions on what this crime is.

MR. SHORE: Well, Judge, I don't think it's contemplated by the Standard Jury Instructions. It wasn't requested by State until now when they think there is a problem about it.

The jury did not ask for a definition of theft. All they asked was whether they had to find that there was a theft in the dealing which is part of the charge, and I think --

THE COURT: It's highly irregular is what you're saying?

MR. SHORE: Yes, sir. And at this point to go back and try to redo the jury instructions and highlighting something in their minds is highly improper and prejudicial to the Defendant and --

THE COURT: I'm not sure it's improper. It is unusual. And I don't recall doing this before, but I know that, for example, when we have a burglary and grand theft case, for example, I always have a feeling that the jury is confused and think that theft is -- they get confused between the theft and the intent to steal as an element of burglary, and this is -- I can well understand why they would be confused as a result of the instructions.

I'm going to -- I'm going to give a definition. I'm going to bring them back out over your strenuous objection.

MR. SHORE: Right.

THE COURT: I'm going to redefine this offense for them and as a part of that, I'm going to define for them what theft is because they could very well be under the impression and they probably are, that they would have to find that the defendant broke into that place and stole the items. And theft could be committed by using property of another and not -- I mean, I just think they need to be instructed on what theft means, so I'm going to instruct them on what theft means.

(T-296, 297-298).

On recalling the jury, the judge instructed them:

> Ladies, I have identified an area that I think probably leaves a void in the instructions on the definition of this crime, and I think, perhaps, by -- there is a term that is "theft" which is a legal term, and I think, perhaps, by defining that, it might make more complete the definition of this crime, and it may be of some assistance to you in your deliberations.
>
> Now, you will recall that the first element of this offense of dealing in stolen property is that the Defendant must be shown to have initiated, planned, financed, directed, managed, or supervised the theft of the property alleged. Now, I'm going to tell you what theft means.
>
> It doesn't mean burglary, it doesn't mean robbery, it doesn't mean anything else. It means theft. And I'm going to tell you what theft means. A person is guilty of theft if he knowingly obtains or uses or endeavors to obtain or to use the property of another with the intent to appropriate that property to his own use or to the use of any person not entitled to it.
>
> (T-299-300).

The judge then repeated the elements and other definitions for the fourth time (T-300). The jury returned a guilty verdict after an additional 25 minutes' deliberation (T-300-301). This error was explicitly raised in petitioner's Motion for New Trial (R-34-35), which was denied (R-37).

The trial judge's actions and reasoning were incorrect in several aspects: (1) the jury indicated (by its silence), after their question and his answer, that there were no "other questions about legal principles or the law" (T-293);

(2) the prosecutor and judge were correct that the jury was confused, not "as to the definition of theft", but rather as to the definition of the proof required under the first element of the crime charged; as respondent stated: "Their question was about that first element"; (3) the jury's recall by the court, together with the repetition of the elements of the crime, highlighted that aspect of the instruction; (4) the defendant was prejudiced in not being advised of this intended instruction prior to its argument; see, Florida Rule of Criminal Procedure 3.390(c); (5) the definition of theft given was inconsistent with the Standard Jury Instructions and contained gratuitous additions; (6) the trial judge stated no basis for the conclusion that the framers of the Standard Jury Instructions "overlooked the definition of theft in the instruction on dealing in stolen property"; (7) the term theft is no more a "term of legal art" than the specific acts listed as violative of subsection (2) of Section 812.019; and (8) the judge's conclusion that the jury probably thought they would have to find petitioner guilty of burglary and theft to convict under Section 812.019(2) was questionable, but the jury certainly could have been left with no doubt, after the reinstruction, that proof of theft was sufficient proof of the first element of the crime charged.

However, petitioner's primary complaint with the reinstruction on theft was that it incorrectly advised the jury that the definition or proof of the first element of subsection (2) was the same as theft, i.e., the jury could find petitioner guilty of violating Section 812.019(2) on proof of theft and trafficking. Petitioner contends that the juror's question did not request a definition of theft but instead indicated the jury did not understand the difference between the charge of dealing in stolen property and the original instructions, which to the jury implied "actually stealing and trafficking" (T-292). Thus, the jury understood the first element of the crime to mean no more than "stealing". In

that posture, the judge's reinstruction on theft clearly reaffirmed that misinterpretation of the necessary evidence for proof of the first element of subsection (2). As long as the judge was assuming responsibility for correcting the Standard Jury Instructions, he should have done so properly by defining the first element of proof under subsection (2) along the lines of "organizing" thefts, or even "fencing", but certainly not merely theft. In that light, the judge's reinstruction actually worsened the Standard Jury Instructions by giving an incorrect interpretation. Also, if theft were merely a legal term used, the situation would be different; however, theft was a significantly lesser crime for which petitioner was not tried (although it was strenuously argued by the prosecution).

The Florida Supreme Court has clearly held that:

> the repeated charges should be complete on the subject involved. The giving of a partial instruction fails to inform the jury fully and often leads to undue emphasis on the part given as against the part omitted.

Hedges v. State, 172 So.2d 824, 826 (Fla. 1965). In that case, the trial judge had omitted the definition of justifiable homicide, thus he "erroneously left with the jury an incomplete, and, potentially misleading instruction". Id. Here, the trial judge not only omitted part of the Standard Jury Instructions' definition of theft, but most importantly omitted from his reinstruction the primary aspect of the first element of proof under subsection (2), i.e., petitioner "initiated, organized, planned, financed, directed, managed, or supervised", thereby giving undue emphasis to "theft" and misleading the jury to the effect that proof of theft was proof of that element of the offense.

The Florida Supreme Court has also pointed out that it is not reversible error to vary from the Standard Jury Instructions if the variance is a correct instruction:

> Although it is preferable to use the standard instructions where they are appropriate, as Mr. Justice Adkins pointed out in Rigot v. Bucci, 245 So.2d 51 (Fla. 1971),

> . . . the charge given in the instant case was not erroneous.

State v. Bryan, 290 So.2d 482, 484 (Fla. 1974). See also, Rigot v. Bucci, 245 So.2d 51 (Fla. 1971) (no reversible error where incorrect charge not helpful to jury but not harmful).

The decisions of this Court have affirmed this standard for reinstruction of the jury. See, Faulk v. State, 296 So.2d 614, 618-619 (Fla. 1st DCA 1974); see also, Reynolds v. State, 332 So.2d 27 (Fla. 1st DCA 1976). In Davis v. State, 397 So.2d 1005, 1006 (Fla. 1st DCA 1981), this Court reversed a murder conviction stating:

> Also, it is clear that once the [Standard Jury Instruction] is given, it must be given properly on a reinstruction.

In the instant case, the trial court's reinstruction was contrary to the holding in Davis because it expressly modified the Standard Jury Instruction on dealing in stolen property. In Hunter v. State, 378 So.2d 845 (Fla. 1st DCA 1979), this Court relied on Hedges v. State, supra, to reverse the conviction where the jury had requested reinstruction on penalties but the trial judge had responded with an incomplete reinstruction on the degrees of homicide, giving insufficient focus to justifiable and excusable homicide. Likewise, the trial judge below failed to address the jury's question with a complete and accurate definition of the first element of proof under Section 812.019(2), giving instead an incomplete instruction on theft.

Finally, in Cole v. State, 353 So.2d 952, 954 (Fla. 2nd DCA 1978), the Court concluded:

> When a jury returns to the courtroom and asks to be reinstructed, the trial court should ordinarily limit its reinstructions to whatever is necessary to answer the jury's specific question. But the additional charge must be complete in respect to the subject on which the jury requests reinstruction; otherwise, a partial reinstruction can lead to undue emphasis on the part given as against the part omitted.

Also, see the decision of the Third District Court in Ingram v. State, 393 So.2d 1187, 1188 (Fla. 3rd DCA 1981), where fundamental error was found in the trial

judge's omission from the jury instructions of an element of the offense:

> It seems clear beyond dispute that the jury here was completely misled as to what the defendant was charged with. . . .

That same result obtained in petitioner's case, where the erroneous and improper instruction on theft was added to the Standard Jury Instruction, which already lacks definition as to the terms comprising the first element, thus compounding the confusion revealed by the jury's question after announcing it was hung.

In sum, the trial judge committed reversible error by giving the additional instruction on theft; if additional instruction was required, it should have been a correct and complete instruction on the elements of the offense charged and the definitions therefor.

V CONCLUSION

As to Issue I, petitioner must be discharged for respondent's failure to introduce any proof as to the first element of Section 812.019(2), Florida Statutes, under which petitioner was charged.

As to Issue II, petitioner's conviction must be reversed due to the trial judge's recall of the jury for an incomplete and improper additional instruction.

GWENDOLYN SPIVEY
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Kathryn L. Sands, Assistant Attorney General, Suite 513, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida; and to Mr. James Wesley Goddard, #054141, Post Office Box 2886, Vero Beach, Florida 32960, on this 29th day of Novmeber, 1983.

GWENDOLYN SPIVEY