

047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 67 557

DONALD WAYNE RHAMES,

Respondent.

\_\_\_\_\_ /

FILED  
CLERK  
BY [Signature]

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH  
Attorney General

JOHN W. TIEDEMANN  
Assistant Attorney General  
The Capitol  
Tallahassee, FL 32301  
(904) 488-0290

COUNSEL FOR PETITIONER

TOPICAL INDEX

	<u>Page (s)</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
STATEMENT OF JURISDICTION	3
SUMMARY OF ARGUMENT	4
ISSUE: THE FIRST DISTRICT'S DECISION THAT RESPONDENT'S ADJUDICATION AND SENTENCE FOR CONSPIRACY TO COMMIT GRAND THEFT COULD NOT STAND BECAUSE SUCH WAS A NECESSARILY LESSER INCLUDED OFFENSE OF DEALING IN STOLEN PROPERTY AS AN ORGANIZER CONFLICTS WITH THIS COURT'S DECISION OF <u>ROTEBERRY V. STATE</u> , 468 So.2d 971 (Fla. 1985).	5

ARGUMENT	5
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

<u>Bell v. State</u> 437 So.2d 1057 (Fla. 1983)	5
<u>Blake v. State,</u> 444 So.2d 1054 (Fla. 1st DCA 1984)	7
<u>Gibson v. Avis Rent-a-Car System,</u> 386 So.2d 520 (Fla. 1980)	6
<u>King v. State,</u> 104 So.2d 730 (Fla. 1957)	7
<u>Lancaster v. State,</u> 369 So.2d 687 (Fla. 1st DCA 1979)	7
<u>Parker v. State,</u> 276 So.2d 98 (Fla. 4th DCA 1973)	7
<u>Rhames v. State,</u> So.2d (Fla. 1st DCA 1985), 10 F.L.W. 1284, on motion for rehearing denied, 10 F.L.W. 1939	1,6

Rotenberry v. State,  
468 So.2d 971 (Fla. 1985)

3,4,6

OTHERS

Fla.R.App.P. 9.030(a)(A)(iv)	3
Fla.R.App.P. 9.120(d) & 9.220	1
§775.021(4), Fla.Stat.	6
§777.04, Fla.Stat.	5
§812.014(2)(b)(1), Fla.Stat.	5
§812.019(1), Fla.Stat.	5
§812.019(2), Fla.Stat.	5
Article V, Section 3(b)(3) Constitution of the State of Florida	3

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO.

DONALD WAYNE RHAMES,

Respondent.

---

PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and the appellee below in Rhames v. State, \_\_\_ So.2d \_\_\_ (Fla. 1st DCA 1985), 10 F.L.W. 1284, on motion for rehearing denied, 10 F.L.W. 1939, and the petitioner here, will be referred to as "the State." Donald Wayne Rhames, the criminal defendant and appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, a conformed copy of the decision under review is attached to this brief as an appendix.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the opinion of the First District in Rhames v. State, which the State adopts as its statement of the case and facts. It need be noted here only that the State on August 26 timely filed a notice with the First District to invoke this Court's discretionary jurisdiction over the decision below.

STATEMENT OF JURISDICTION

The State seeks to invoke this Court's discretionary jurisdiction over the decision below under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) on grounds that this decision expressly and directly conflicts with a decision of this Court, Rotenberry v. State, 468 So.2d 971 (Fla. 1985), on the same question of law.

SUMMARY OF ARGUMENT

The First District determined that conspiracy to commit grand theft was a necessarily lesser included offense of dealing in stolen property as an organizer, thus precluding a separate adjudication and sentence therefore, contrary to this Court's decision in Rotenberry v. State, 468 So.2d 971 (Fla. 1985). This Court should grant conflict certiorari review to rectify this error.

ISSUE

THE FIRST DISTRICT'S DECISION THAT  
RESPONDENT'S ADJUDICATION AND  
SENTENCE FOR CONSPIRACY TO COMMIT  
GRAND THEFT COULD NOT STAND BECAUSE  
SUCH WAS A NECESSARILY LESSER INCLUDED  
OFFENSE OF DEALING IN STOLEN PROPERTY  
AS AN ORGANIZER CONFLICTS WITH THIS  
COURT'S DECISION OF ROTENBERRY V. STATE,  
468 So.2d 971 (Fla. 1985).

ARGUMENT

In Rhames v. State, the decision which the State seeks reviewed, the First District relied upon this Court's decision of Bell v. State, 437 So.2d 1057 (Fla. 1983) to hold that respondent's adjudication and sentence for conspiracy to commit grand theft in violation of §777.04 and 812.014(2)(b)(1), Fla.Stat. could not stand because such was a necessarily lesser included offense of the charge of dealing in stolen property as an organizer in violation of §812.019(2), Fla.Stat., under which respondent was convicted of and adjudicated and sentenced for the lesser included offense of dealing in stolen property as a trafficker in violation of §812.019(1), Fla.Stat.<sup>1</sup> Although the First

---

1

These statutes read as follows:

777.04 Attempts, solicitation, conspiracy, generally.--  
(3) Whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection(4).

(Continued on next page)



District correctly noted that this Court's decision of Rotenberry v. State, 468 So.2d 971 (Fla. 1985) had limited Bell v. State and required that the test for determining whether one offense is a necessarily lesser included offense of another for purposes of precluding separate adjudications and sentences is "whether it is statutorily impossible under any conceivable set of facts to commit the primary offense without also committing the secondary offense", Rhames v. State, 10 F.L.W. 1939, see also §775.021(4), Fla.Stat., it incorrectly applied this test, which constitutes grounds for conflict certiorari review, see Gibson v. Avis Rent-a-Car System, 386 So.2d 520 (Fla. 1980). Clearly, it is statutorily possible to deal in stolen property as an organizer without conspiring to commit grand theft, for two reasons.

---

Footnote 1 Continued

(4) Whoever commits the offense of criminal attempt, criminal solicitation, or criminal conspiracy shall be punished as follows....

(d) If the offense attempted, solicited, or conspired to is a felony of the third degree, the person convicted is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

812.014 Theft.--

(1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriately the property to his own use or to the use of any person not entitled thereto....

(2)(b) It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084, if the property stolen is:

1. Valued at \$100 or more, but less than \$20,000.

(Continued on next page)

First, conspiracy to commit grand theft requires confederation with another who is also acting unlawfully, see e.g. Parker v. State, 276 So.2d 98 (Fla. 4th DCA 1973) and King v. State, 104 So.2d 730 (Fla. 1957), while dealing in stolen property requires only confederation with another who may or may not be acting unlawfully, see e.g. Blake v. State, 444 So.2d 1054 (Fla. 1st DCA 1984) and Lancaster v. State, 369 So.2d 687 (Fla. 1st DCA 1979). Secondly, conspiracy to commit grand theft requires that the aforementioned confederation concern property of at least \$100.00 in value, whereas dealing in stolen property does not require that the confederation concern property of any particular minimum value.

In other words, one could hypothetically deal in stolen property as an organizer by inducing a naive pawn shop owner to sell "penny ante" stolen goods and not be guilty of conspiracy to commit grand theft. The First District's failure

---

Footnote 1 Continued

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 supervise 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.

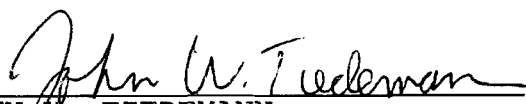
to appreciate this fact requires this Court to grant conflict certiorari review over Rhames v. State and, following briefing on the merits, to reverse with directions that respondent's adjudication for conspiracy to commit grand theft be reinstated.

CONCLUSION

WHEREFORE, the State of Florida respectfully submits that this Court should GRANT conflict certiorari jurisdiction to review the decision below and, following briefing on the merits, REVERSE the First District with directions that respondent's adjudication and sentence for conspiracy to commit grand theft be REINSTATED.

Respectfully submitted,

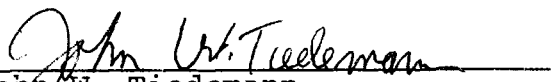
JIM SMITH  
Attorney General

  
JOHN W. TIEDEMANN  
Assistant Attorney General  
The Capitol  
Tallahassee, FL 32301  
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on Jurisdiction has been forwarded to Mr. Robert G. Kerrigan of KERRIGAN, ESTESS & RANKIN, 400 East Government Street, P.O. Box 12009, Pensacola, FL 32589, on this 20th day of August, 1985.

  
John W. Tiedemann  
Assistant Attorney General