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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,013

WILLIAM LAWRENCE COWHIG,

Respondent.

INITIAL MERITS BRIEF OF PETITIONER

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STATEMENT OF CASE AND FACTS

The law office of the victim had been burglarized sometime before the early afternoon of January 11, 1990 (R 27-28; 37).[1] Initially it was believed that the window had merely been broken without entry (R 39).

Between the hours of 2:00 p.m. on January 10 and 2:00 p.m. on January 11, 1990, the victim's law office check number 1100 was cashed at First Union Bank (R 53-54; identification number B-1; contained in state composite exhibit number 3 (R 222-224)). The $195.00 check was payable to the defendant (R 56). The defendant presented his Florida identification card, number C-200-932-54-083, to the teller (R 57; state C for identification; state exhibit number 1 (R 221)). The back of the check was endorsed by the defendant. *Id.* (The identification card and the all of the stolen checks were published to the jury without objection (R 82)). Neither the victim nor his secretary, who were the only persons authorized to sign the checks (R 29), recognized the purported signature of the victim on the check (R 32; 43). Neither of them knew of the defendant prior to this incident (R 32; 50).

On January 16, 1990, a Daytona Beach detective pulled up to the defendant (R 62). The defendant kicked off his shoes and ran (R 63). He was found hiding in a shed (R 63; 75). The detective found the defendant's identification card in one of his pockets

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1 The parties are referred to as the state and the defendant. References to the record are indicated "(R and page)".

(R 64-65). The shed was searched by a Holly Hill officer (R 67; 76). Some of the checks which had been stolen from the victim were found lodged between pieces of lumber (R 76).

The detective contacted the victim's office after the arrest of the defendant (R 40). A closer examination of the office checkbook revealed that 12 checks had been stolen from the end of the book (R 40-41). The checks had been made out to the defendant and bore the name of the victim, but none bore his signature (R 33-34; 43-45).

Two fingerprint experts in the Daytona Beach Police department compared a latent print on check number 1102 with the defendant's fingerprints that were taken during booking. They both reached the conclusion that the print on the check had been placed there by the defendant (R 92; 97).

The defendant was charged with burglary and in dealing in stolen property, under §812.019(1), Fla. Stat. (1989). (R 206). The dealing in stolen property count was related to the passing of check number 1100 (R 46). The defense expressly stated that it had no objection to that check being introduced into evidence because it was "the check that was passed." (R 79). The jury returned verdicts of guilty on both counts (R 227-228).

The defendant appealed to the Fifth District Court of Appeal. Numerous issues were advanced, but the defense did not argue at any point in the proceedings below, trial or appeal, that passing a stolen check did not constitute dealing in stolen property. The decision of the district court stated in its entirety:

> We reverse defendant's conviction for dealing in stolen property on the authority of *State v. Camp*, 579 So.2d 763 (Fla. 5th DCA 1991). Appellant's other claims of error are without merit.

Cowhig v. State, 16 F.L.W. D1920 (Fla. 5th DCA July 25, 1991). *See* appendix (A; B).[2]

The state invoked the jurisdiction of this court based upon conflict between the decision below and *Dixon v. State*, 541 So.2d 637 (Fla. 1st DCA 1989). The state asserted that conflict existed in the instant case because the *Camp* decision is currently under review by this court in *State v. Camp*, case number 78,085.[3]

This court accepted jurisdiction on March 2, 1992.

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[2] Documents in the appendix are referred to by their letter designation and page number when appropriate.

[3] Oral argument was presented to this court in *Camp* on March 2, 1992.

SUMMARY OF ARGUMENT

Point One: Penal statutes must be strictly construed to their letter. Passing stolen checks constitutes dealing in stolen property under section 812.019(1), Fla. Stat. (1989): "*Any person* who traffics in . . . property that he knows or should know was stolen shall be guilty of a felony of the second degree, [*i.e.*, dealing in stolen property]". §812.019(1), Fla. Stat. (1989) (emphasis added). "Traffic" is defined alternatively as to "*transfer*" property; *or* to "*receive* . . . property *with the intent* to sell, transfer, distribute, dispense, or otherwise dispose of such property". §§812.012(7)(a); 812.012(7)(b). (Emphases added). Subsection (a) applies to any person who transfers such property, while subsection (b) by its terms is directed at fences who receive stolen property with the intent to further dispose of it. Hence, by cashing the victim's check at the bank the defendant trafficked in the stolen property by transferring it to the bank. §812.012(7)(a).

Point Two: Alternative rules of statutory construction should not be resorted to because the language of §§812.019(1) and 812.012(7)(a) are unambiguous. Even if the language is viewed as ambiguous, the result is the same as that obtained by strict construction. The act is not as narrow as its short title suggests. Other sections pertain to activities other than fencing. The legislative history reveals that an expansion of the law as it then existed was intended. This interpretation is corroborated by the enactment of two separate definitions of

"traffic", one applicable to the transferor of stolen property, the other to the recipient. The legislature intended to remedy two separate evils through this expansion. It sought to remedy both the theft of the goods and the subsequent evil of transferring the stolen property. The legislature intended section 812.019(1) to apply not only to fences, but also to individuals, such as Cowhig, who steal property and subsequently transfer it.

ARGUMENT

Point One

THE DISTRICT COURT REACHED AN ERRONEOUS DECISION BY FAILING TO STRICTLY CONSTRUE SECTION 812.019, FLA. STAT. (1989), WHICH PROSCRIBES TRANSFERRING STOLEN PROPERTY AS WELL AS ITS RECEIPT WITH THE INTENT TO FURTHER DISPOSE OF IT.

"One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter." *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991) (citations omitted). Passing stolen checks constitutes dealing in stolen property under section 812.019(1), Fla. Stat. (1989).[4] "While legislative intent controls construction of statutes in Florida, that intent is determined primarily from the language of the statute. The plain meaning of the statutory language is the first consideration." *State v. Davis*, 556 So.2d 1104, 1106 (Fla. 1990) (citation omitted); *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976). "The best evidence of the intent of the legislature is generally the plain meaning of the statute." *In re Order on Prosecution of Criminal Appeals*, 561 So.2d 1130, 1137 (Fla. 1990) (citation omitted); see also *State v. Perez*, 531 So.2d 961, 962 (Fla. 1988). The district court erred by determining that section 812.019(1), Fla. Stat. (1989), was applicable to fences exclusively because the unequivocal statutory language reveals

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[4] "'Property' means anything of value, and includes . . . intangible personal property, including rights, privileges, interests, and claims." §812.012(3), Fla. Stat. (1989).

that the legislature intended to permit the prosecution of "any person" who transfers stolen property.

Section 812.019(1)

> **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 . . .

§812.019(1), Fla. Stat. (1989) (emphasis added).

There is no ambiguity in the statutory language. "When the language of a penal statute is clear, plain and without ambiguity, effect must be given to it accordingly." *Graham v. State*, 472 So.2d 464, 465 (Fla. 1985) (citation omitted); see also *Perkins, supra*, 1312-1313. The dealing in stolen property section is applicable to *any person* who traffics in such property. The legislature did not intend to limit prosecution under this section to fences. "No words of limitation are used." *State v. Parsons*, 569 So.2d 437, 438 (Fla. 1990). "Had the legislature intended to include it in the proscription, it could have easily have done so." *State v. Zanger*, 572 So.2d 1379, 1380 (Fla. 1991).

"When a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." *Milazzo v. State*, 377 So.2d 1161, 1162 (Fla. 1979); see also *City of Tampa v. Thatcher Glass Corporation*, 445 So.2d 578, 579 (Fla. 1984); *Southeastern Fisheries v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla. 1984). "Any" is defined in material part as "every; all". *Webster's College Dictionary* (NY: Random House 1991). "Person" is defined as "a human being; a man, woman, or

child." *Ibid.* "[T]he Legislature must be assumed to know the meanings of words and to have expressed its intent by the use of the words found in the statute." *Thayer, supra*, 817.

Furthermore, "the express mention of one thing implies the exclusion of another; expressio unius est exclusio alterius." *Id*; see also *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988). The express mention of this broad class, "any person", excludes the limitation placed by the district court upon the application of section 812.019(1) to fences only. The district court misconstrued the provision by determining that the section only applies to fences because "[i]nference and implication cannot be substituted for clear expression." *Carille v. Game and Fresh Water Fish Commission*, 354 So.2d 362, 364 (Fla. 1978) (citation omitted). "Where the language used has a definite and precise meaning, the courts are without power to restrict or extend that meaning." *Graham, supra*; see also *In re Order on Prosecution of Criminal Appeals, supra*, 1137; *Chaffee v. Miami Transfer Company, Inc.*, 288 So.2d 209 (Fla. 1974), held: "[T]o invoke a limitation or to add words to the statute not placed there by the Legislature [is something courts] may not do." *Id.*, 215.

The legislative intent to permit the prosecution of "any person" who traffics in stolen property pursuant to section 812.019(1) is irrefutable in light of the unambiguous language used.

Section 812.012(7)

Not only does strict construction of section 812.019(1) establish that the legislature intended to authorize the prosecution of any person who traffics in stolen property, but section 812.012(7), which defines the element of "traffic", also reveals such an intent. It has long been established that "[s]tatutes relating to the same subject matter must be read in pari materia, and this rule is applicable with special force where the statutes in question were enacted by the same legislature as part of a single act." *Major v. State*, 180 So.2d 335, 337, n. 1 (Fla. 1965). Sections 812.012 and 812.019 were both enacted under Ch. 77-342, Laws of Fla. The term "traffic" is defined under two separate and independent subsections:

> **812.012 Definitions.-** As used in ss. 812.012 - 812.037:
>
> *****
>
> (7) "Traffic" means:
>
> (a) To sell, *transfer*, distribute, dispense, or otherwise dispose of property.
>
> (b) To buy, *receive*, possess, obtain control of, or use property with intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.

§812.012(7), Fla. Stat. (1989) (emphases added).

The two definitions of "traffic" are separate and distinct. "The courts' obligation is to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both." *Carawan v. State*, 515 So.2d 161, 168 (Fla. 1987), overridden on other grounds, *State v. Smith*, 547 So.2d 613 (Fla. 1989) (citations omitted); see also *Cilento v. State*, 377 So.2d 663,

666 (Fla. 1979); *D.B. v. State*, 544 So.2d 1108, 1109-1110 (Fla. 1st DCA 1989). The definition under subsection (a), pertains to those persons, such as Cowhig, who *transfer* stolen property. The second definition applies to fences who *receive* the stolen property with the intent to redistribute it. To interpret the two separate subsections as both precluding the same conduct by the same class of criminals, *i.e.*, fences, would be to render completely ineffective subsection (a). Such an interpretation is untenable because "[e]ffect must be given to every part of the section . . ." *State v. Rodriquez*, 365 So.2d 157, 159 (Fla. 1978). In providing two definitions of "traffic" under two separate subsections, the legislature revealed its intent to apply the act to two distinct classes of offenders.

The different wording employed in the two subsections also reveals that the act applies to persons other than fences. While subsection (b) includes the intent of the receiver to further dispose of the stolen property in the definition, subsection (a) does not. For subsection (a) to be limited in its application to fences, as (b) clearly is, it must contain some qualifying language to reveal such an intent by the legislature. The definition neither includes such a qualification nor does it expressly limit its application to dealers in property. To the contrary, section 812.012(7)(a), like section 812.019(1), is by its express terms broad in application.

The order of the definitions is also significant. The criminal process is begun by the theft. It is followed by a transfer. Assuming the recipient is a fence, the property is

knowingly received as stolen. The fence then transfers it a second time to another. Section 812.012(7)(a) involves the transfer of stolen goods and subsection (b) its receipt. In practice, however, a fence first receives stolen property and then later transfers it. As a result, had the legislature intended both definitions to be applicable only to fences, the order of the definitions would have been reversed. That is, the subsection concerning the receipt of the stolen property would precede the subsection pertaining to its transfer.

Constitutional considerations

"[A]bsent a violation of constitutional right, specific, clear and precise statements of legislative intent control . . ." *Carawan, supra*, 165. It was within the prerogative of the legislature to make criminal the transfer of stolen property by any person because there exists no constitutional prohibition to such legislation. The only constitutional provision even remotely implicated as a bar is double jeopardy in light of the potential of four charges stemming from each stolen check. Theoretically, an individual could be charged with theft, forgery, uttering a forgery and dealing in stolen property. Double jeopardy presents no bar to multiple convictions because each offense contains different elements. *Carawan, supra*, 165, citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Convictions for both theft and dealing in stolen property are, however, expressly precluded by legislative grace. §812.025, Fla. Stat. (1989). "[A]bsent the prohibition

of the statute, Section 812.025, we can envision no reason why a person might not be the thief and also be guilty of dealing in the same stolen property." *Coley v. State*, 391 So.2d 725, 727 (Fla. 1st DCA 1981), approved, *Zanger, supra*.

There are, on the other hand, constitutional clauses that mandate strict construction of penal statutes to the letter. Due process requires strict construction so that prohibited acts may be ascertained with precision. *Perkins, supra*, 1312.[5] Moreover:

> The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. . . . As we have stated,
>
> > The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary.
>
> This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers.

Perkins, supra, 1313-1314, *citing* Art. II, §3, Fla. Const. (other citations and footnote omitted).

Summary of point one

Section 812.019(1) expressly applies to *any person* who traffics in stolen property. An individual traffics in such

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[5] This constitutional requirement negates the statutory rule of construction provided in section 812.037, Fla. Stat. (1989), to the extent that the section purports to provide the means of interpreting the penal provisions of the act. Although not necessary to the resolution of the instant case, there appears to be no constitutional bar to the application of this section to the remedial provisions of the act.

property in one of two alternative ways. The first, applicable to the defendant, is committed by transferring the stolen property. §812.012(7)(a). The second, applicable to fences, is by receiving stolen property with the intent to further dispose of the property. §812.012(7)(b). The unequivocal statutory language reveals that the legislature intended that transferrors of stolen property be punished for dealing in stolen property as well as, and independently of, fences. "It is axiomatic that where the legislature has defined a crime in specific terms, the courts are without authority to define it differently." *State v. Jackson*, 526 So.2d 58 (Fla. 1988) (citation omitted). The district court erred in reversing the defendant's conviction for dealing in stolen property because he had trafficked in the stolen check by transferring it to the bank.

Point Two

THE LEGISLATIVE INTENT TO PUNISH ANY PERSON WHO TRANSFERS STOLEN PROPERTY AS WELL AS FENCES IS APPARENT WHEN ALTERNATIVE RULES OF STATUTORY CONSTRUCTION ARE APPLIED.

"[C]ourts never resort to rules of construction where the legislative intent is plain and unambiguous." *State v. Smith*, 547 So.2d 613, 615, citing *Carawan, supra*, 165. "[R]ules of statutory construction 'are useful only in case of doubt and should never be used to create doubt, only to remove it.'" *Carawan* (citation omitted). No ambiguity exists unless it is read into section 812.019(1) by construing the expansive words "[a]ny person" as a term of limitation evidencing an unexpressed legislative intent to permit the prosecution only of fences. In light the clear statutory language of sections 812.019(1) and 812.012(7)(a) prohibiting the transfer of stolen property by any person, other rules of construction should not be considered.

Assuming ambiguity, *arguendo*, "[t]o determine legislative intent, [this court] must consider the act as a whole - 'the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject.'" *State v. Webb*, 398 So.2d 820, 824 (Fla. 1981) (citation and emphasis omitted); see also *Carawan, supra*, 167. Application of these factors reveals that the legislature intended section 812.019(1) to apply to any person who transfers stolen property.

Language of the act

Section 812.005

"Sections 812.012-812.037 [are] known as the Florida Anti-Fencing Act." §812.005, Fla. Stat. (1989). This designation does not undermine the state's position however. This court has already at least twice determined that the act is broader than its short title suggests:

> Chapter 77-342, codified as sections 812.012-812.037, is an omnibus *theft act* and is entitled the "Florida Anti-Fencing Act." Ch. 77-342, §2, Laws of Fla. Despite its narrow title, the act encompasses more than just trafficking in stolen property. *Roush v. State*, 413 So.2d 15 (Fla. 1982). As part of its title, chapter 77-342 states that it prescribes the "acts that constitute the offense of theft."

State v. Dunmann, 427 So.2d 166 (Fla. 1983) (emphasis added), receded from in part on other ground, *Daniels v. State*, 16 F.L.W. S654 (Fla. October 10, 1991); see also *State v. G.C.*, 572 So.2d 1380, 1381-1382.

This court also discussed the expansive range of the Florida act in the *Roush* case:

> At the outset, it should be noted that the instant case presents this Court with no problem of statutory construction. To buttress this conclusion, several observations are in order relative to the scope of the Florida Anti-Fencing Act, sections 812.005-812.037, Florida Statutes (1977 & Supp. 1978) . . .
>
> Doubtless, some would argue that the statute's short title, "The Florida Anti-Fencing Act," implies some intent on the part of the legislature to limit the scope of the act to fencing activities . . . As this Court stated in *King Kole, Inc. v. Bryant*, 178 So.2d 2, 4 (Fla. 1965), however, a "title need not be an index to the contents. It is not necessary that it delineate in detail the substance of the statute." Further, in the presence of language as unequivocal as that embodied in the act, "[w]here words selected by the Legislature are clear and unambiguous, . . . judicial interpretation is not appropriate to displace the *expressed* intent." *Heredia v. Allstate Insurance Co.*, 358 So.2d 1353, 1355 (Fla. 1978) (emphasis supplied [by *Roush* court]).

Roush v. State, 413 So.2d 15, 18-19 (Fla. 1982).

While the act's "*short* title" is the Florida Anti-Fencing Act, §812.005, the full title of the enabling legislation includes much more than just fencing activities:

> AN ACT relating to theft and stolen property; prescribing acts that constitute the offense of theft; providing for grades of theft; providing penalties; making it a crime for any dealer to possess stolen property knowing that the identifying features have been altered; providing a penalty; making it a crime to traffic in property known to have been stolen; making it a higher degree crime to initiate, organize, plan, finance, direct, manage or supervise a theft and traffic in stolen property; providing penalties; providing for the treatment of evidence of dealing in stolen property; providing for precluded defenses; providing a supplemental fine; providing for the rights of innocent persons; providing civil remedies of divestiture, reasonable restrictions on future activities, dissolution or reorganization of any enterprise, revocation or suspension of licenses or permits, and forfeiture of corporation charter or revocation of certificate authorizing a foreign corporation to conduct business within this state; providing for seizure and disposition of seized and forfeited property; providing that any aggrieved person may institute civil proceedings; amending s. 905.34, Florida Statutes, to extend the subject matter jurisdiction of the statewide grand jury to include violations of this act; adding subsection (7) to s. 812.031, Florida Statutes, 1976 Supplement, providing that stolen property retains its character as stolen property for purposes of the unlawful receipt of stolen property until certain conditions are met; amending s. 934.07, Florida Statutes to permit authorization for the interception of wire or oral communications to provide evidence of any violation of the provisions of this act; repealing s. 812.011, Florida Statutes, relating to definitions; repealing s. 812.021, Florida Statutes, relating to larceny; repealing s. 812.031, Florida Statutes, relating to stolen property; repealing s. 812.071, Florida Statutes, relating to larceny of horses and cows; providing severability; providing an effective date.

Ch. 77-342, Laws of Fla.

The holdings of this court in *Roush* and *Dunmann* that the act is not merely an anti-fencing act are clearly supported by the

assorted sections within the act which address crimes other than fencing.

Section 812.012(1)

The dealing in stolen property statute is *not* limited to a "dealer in property" as defined in section 812.012(1), Fla. Stat. (1989). *See Camp*, at D1114. The fact that section 812.019, Fla. Stat. (1989), is entitled "Dealing in stolen property" does not lead to a contrary conclusion. The legislature did not place such an express limitation in section 812.019(1) and the relevant statutory definition requires only a transfer of the stolen property by any person. §812.012(7)(a).

Those who transfer stolen property to others, deal in the property even though not a "dealer in property" as defined under section 812.012(1). A "dealer" is "a trader or merchant . . ." *Webster's College Dictionary* (NY: Random House 1991); *see* section 812.012(1), Fla. Stat. (1989). However, while "dealing", of course, applies to those who conduct a given business, the term is not limited to such business persons. "Deal" / "dealing" is defined in material part as "to trade or do business[.]" *Webster's College Dictionary* (NY: Random House 1991). A "trade" is comprised of "an exchange of items . . ." *Id.* An analogy might be useful in making this point. One who buys a used car deals with the sales person in negotiating a sales figure and by exchanging cash for the vehicle. However, the purchaser is not a used car dealer, the sales person and his or her employer are.

Further, the statutory definition of "dealer in property" applies directly to sections 812.016 and 812.022(4), both of which expressly seek to remedy actions of a fence. Unlike these sections, §812.019 does not explicitly refer to a "dealer in property". As the legislature did not expressly limit prosecutions under §812.019, Fla. Stat. (1989), to fences or other dealers in property, the district court erred in inferring such an intent because "[c]ourts should not add additional words to a statute not placed there by the legislature, especially where uncertainty exists as to the intent of the legislature." *In re Order on Prosecution of Criminal Appeals, supra*. The dealing in stolen property section applies to "any person", including both dealers in property and any other persons who transfer the stolen property.

Section 812.012(7)

As discussed in detail above, the legislature chose to twice define the term under section 812.012(7). Subsection (a) relates to the transferor, subsection (b) pertains to fences, as recipients of the stolen property with an intent to redistribute the property. The distinct statutory provisions are independent of one another and provide for the prosecution of either the transferor, irrespective of whom the transferee is and the latter's state of mind, or of the recipient of stolen property. Had the legislature intended only prosecution of fences, it would have defined "traffic" but once.

Sections 812.014 and 812.015

The theft provisions address crimes involving the taking of another's property unlawfully; conduct that precedes the transfer of the property which constitutes dealing in stolen property. The theft section provides:

> **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) *Appropriate* the property to his own use or to the use of any person not entitled thereto.

§812.014, Fla. Stat. (1989) (emphases added).

Theft is also addressed under the next section, which includes the following material definitions:

> **812.015 Retail and farm theft . . .**
> (1) As used in this section:
> . . .
> (d) "Retail theft" means the *taking* possession of or carrying away of merchandise, money, or negotiable documents; altering or removing a label or price tag; transferring merchandise from one container to another; or removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value.
> . . .
> (g) "Farm theft" means the unlawful *taking* possession of any items that are grown or produced on land owned, rented, or leased by another person.

§812.015, Fla. Stat. (1989) (emphases added).[6]

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[6] Section 812.015(1)(d) uses the word "transferring" in a context different than §§812.012(7)(a) or 812.019(1). Transfer under the retail theft section relates to moving property from one container to another during the commission of the theft. Transfer under the dealing in stolen property section, on the other hand, takes place after the crime of theft is completed, *i.e.*, in disposing of the stolen property by transferring it to another individual or entity.

Each of the provisions above are limited to the criminal act committed in initially divesting the rightful owner of his or her property. "Obtain" means "to come into possession of; get, acquire or procure, as through effort or request." *Webster's College Dictionary* (NY: Random House 1991). "Use" in this context is defined as "to avail oneself of; apply to one's own purposes[.]" *Ibid.* To "deprive" is "to divest of something possessed or enjoyed; dispossess, strip." *Ibid.* To "appropriate" is "to take to or for oneself; take possession of." *Ibid.* A "taking" is "to get into one's hands or possession by voluntary action . . . [or] to get into one's possession or control by force or artifice[.]" *Ibid.* The dealing in stolen property section, on the other hand, relates to actions after the theft is completed, *i.e.*, the transferring of the previously stolen property:

> **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 . . .

§812.019, Fla. Stat. (1989).

A comparison of the above sections shows that there are two separate evils addressed by the statutes. The initial taking of another's property is remedied by the theft provisions. The subsequent transfer or receipt of the stolen property is remedied by section 812.019(1).

Section 812.019(1)

As discussed in length under the preceding point, section 812.019(1) applies to "any person" who traffics in stolen property. Had the legislature intended to restrict application of the section to fences, it would have provided in section 812.019(1): "*Any dealer in property* 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." A "'[d]ealer in property' means any person in the business of buying and selling property." §812.012(1).

Section 812.019(1) is significant not only because it expressly applies to any person who transfers stolen property, but also because there is no requirement that the stolen property be transferred to a dealer in such property. Had the legislature intended to limit application of the section to fences and those who transferred stolen goods to them, it would have provided under the section: "*Any dealer in property* or *any person who through a dealer in property* 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 . . ."

"Had the legislature intended to include [either limitation] in the proscription, it could have easily done so." *Zanger, supra*. The legislature intended neither limitation because it chose instead to use the all-encompassing term "any person" without qualification.

Section 812.022

The section related to evidentiary presumptions regarding theft or dealing in stolen property also reveals that the legislature intended to address the evil of transferring stolen property by punishing those involved in the criminal process from the thief through subsequent knowing recipients. Section 812.022(3) provides in part that the "[p]roof of the purchase *or* sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person buying *or* selling the property knew or should have known that the property had been stolen." (Emphases added.) Not only does the disjunctive "or" indicate the legislative intent to address the criminal process by punishing any person who transfers stolen goods as well as fences, but subsection (1) provides a specific presumption for theft. Moreover, there is a presumption pertinent to a dealer in property specifically. §812.022(4). As there exist three presumptions material to the instant issue, *i.e.*, related to theft, purchase or sale of recently stolen property, and purchase or sale of recently stolen property by a dealer in property, the legislative intent to remedy the distribution of stolen goods by independently punishing all in the criminal process is apparent.

Section 812.025

In section 812.025, Fla. Stat. (1989), the legislature has expressly provided that a person may be charged "with theft *and* dealing in stolen property . . ." (Emphasis added). Had the

legislature intended section 812.019(1) to apply only to fences, it would not have enacted section 812.025 because thieves, not fences, commit the theft and then deal in stolen property by transferring it. Fences, on the other hand, may make a subsequent transfer of the stolen property, but they deal in stolen property as well by merely receiving it. They are by definition the receivers of stolen property (C-2, p. 1), who have no direct role in the initial theft.[7]

Act as a whole

"An examination of the Florida Anti-Fencing Act clearly reveals that, despite its narrow title, the act encompasses a range of activities far broader than trafficking in stolen property." *Roush, supra*, 19. Just as clearly then, the act was not intended by the legislature to be limited in its application simply to fences.

Legislative history / state of law at time of enactment

The legislative history likewise reveals that the legislature did not intend to limit application of the act to fences. Although the legislature chose to designate the act as the "Florida Anti-Fencing Act", the short title in this analytical context does not reveal an intent to limit application of the act to fences. In addition to the reasons stated above, the act was patterned after the "Model Theft *and* Fencing Act" (C-2, p. 1,

[7] Under different circumstances, neither at issue here nor material to the instant analysis, is a fence is indirectly involved when supervising the theft. §812.019(2).

emphasis added). The model act, like the Florida act, addresses far more than fencing. In light of its reliance upon the model act, the legislature had to have known that the enactment was broader than merely addressing fencing activity. *Thayer, supra.*

One passage from a memorandum which were submitted to the legislature by the Committee on Criminal Justice indicated that the *focus* should be placed upon those who receive the stolen goods:

> The legislative history of section 812.019 contains the following language:
>
> > The attached proposed committee bill is an adaption [sic] of the Model Theft and Fencing Act, consistent with the organization of Florida law, as proposed by G. Robert Blakey and Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich.L.Rev. 1512 (1976). That article focuses on the receivers of stolen property as the central figures in theft activities, and that the law should be focused on the criminal system that redistributes stolen goods.

Camp, supra, D1114.[8]

It is not clear in what context the authors had advanced their position because the article was not submitted to the legislature.

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[8] The library for the Florida Department of State has provided the legislative history of the enacting legislation, ch. 77-342, Laws of Fla. It is contained in the appendix in its entirety. Those documents deemed immaterial to the instant issue have been placed at the end of the appendix under the heading "Miscellaneous". References to the documents are indicated by the appendix letter designation and page number if necessary. *E.g.*, "(A 1)" refers to the first document, first page.

Moreover, the committee did not recommend to the legislature that the focus should be exclusive of others involved in the criminal process. On the following page the committee distinguished the anticipated legislation on dealing in stolen property from the then existing law which prohibited receiving stolen property (C-2, p. 2, *see* §812.031, Fla. Stat. (1975)). Had the committee meant for the law to apply exclusively to fences, there was no reason for it to have drawn the distinction because fences are the recipients of stolen property.

Additionally, the committee observed that there was a new definition for "traffic". *Id.* Again, "traffic" now has two definitions under separate subsections. §812.012(7)(a) and (b). Subsection (a) applies to transferor of stolen property independently of the recipients, while the second subsection pertains to those, such as fences, who receive the stolen property. The expansion of the definition of "traffic" in this manner reveals the intent of the legislature to punish all persons involved in the criminal process of distribution of stolen property from the thief up to and including all who knowingly receive the property in subsequent transfers:

> [I]t is [a] well settled rule of construction that the last expression of the legislative will is the law in cases of conflicting provisions in the same statute or in different statutes the last in point of time or order of arrangement prevails.

Johnson v. State, 27 So.2d 276, 282 (Fla. 1946) (citation omitted); see also *In re Recall of Kortetsky*, 557 So.2d 24, 27 (Fla. 1990) (Grimes, J., dissenting); *State v. Ross*, 447 So.2d 1380, 1382 (Fla. 4th DCA 1984); *cf. Dunmann, supra*, 168.

As the committee noted, the law as it existed when the memorandum was submitted focused exclusively upon receivers of

stolen property. *See* §812.031, Fla. Stat. (Supp. 1976). The legislature repealed that section in the same enabling legislation in which the new definitions of "traffic" were established. *See* ch. 77-342, §16, Laws of Fla. "[A] repealed statute may be looked to the same as other statutes to ascertain the intention of the Legislature." *Lambert v. Mullan*, 83 So.2d 601, 603 (Fla. 1955). "[W]hen the legislature makes a complete revision of a subject it serves as an implied repeal of earlier acts unless an intent to the contrary is shown." *Dunmann, supra*, 168; see also *Reino v. State*, 352 So.2d 853, 861 (Fla. 1977); *Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 497 So.2d 630, 633 (Fla. 1986). *A fortiori*, to construe the act as limited to fences, there must be a contrary intent shown since the legislature expressly repealed §812.031, and expanded the individuals subject to prosecution from only the receivers of stolen property under section 812.031 to include "any person" who trafficks in stolen property under section 812.019(1). There simply is no statutory language expressed in the act that evidences a contrary legislative intent.

Furthermore, had the legislature intended to permit the prosecution only of fences, it would not have repealed section 812.031. Although that section proscribed the receipt of stolen property, it did not include a prohibition against such individuals transferring the property. Nonetheless, the legislature would have simply amended 812.031 to include that element if it intended to limit prosecutions to fences only. Its intent to permit the prosecution of anyone involved in the

process is evidenced by the language contained in the new sections, *i.e.*., any person who traffics in property known to be stolen, through its transfer *or* its receipt, is guilty of dealing in stolen property. §§812.019(1); 812.012(7).

Evils to be corrected

The remedial purpose of the act is accomplished by punishing both the persons who transfer stolen goods as well as fences. *See* §812.037, Fla. Stat. (1989). The legislature intended to remedy the distribution of stolen property by addressing on different levels the assorted criminals involved in the process.

There are separate and distinct evils involved. Initially there is the theft of property. Next there is the transfer by the thief to another person or entity, which may or may not be a fence. In either event, the legislature intended to permit the prosecution of the thief for dealing in stolen property. *See* §812.025. The crime is committed under §812.019(1) upon the transfer. To whom the transfer is made is immaterial to determining the culpability of the thief who makes the transfer.

Much of the dilemma in construing section 812.019(1) stems from the judicially created "personal use" doctrine. See *Grimes v. State*, 477 So.2d 649 (Fla. 1st DCA 1985). The "personal use" doctrine has no application to §812.019, Fla. Stat. (1989), because the dealing in stolen property section includes the additional element of trafficking in the property:

> The offense of "dealing" in stolen property is committed by one who "traffics" in such property, the term "traffic" as defined in Section 812.012(7)(a) meaning "To sell, *transfer*, distribute, dispense, or

> otherwise dispose of property" *or*, under subparagraph (7)(b), "To buy, *receive*, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property." We conclude, therefore, that the actions which constitute the offense of dealing in stolen property encompasses the sale, distribution or transfer of the property, *or* the *receiving*, possessing or obtaining the control of the property with the intent to sell, transfer or distribute it. These additional elements, furthermore, are separate and distinct from the essential elements of the crime of theft. Thus, absent the prohibition of the statute, Section 812,025, we can envision no reason why a person might not be the thief and also be guilty of dealing in the same stolen property.

Coley, supra.

The theft is completed upon the taking, while conviction under §812.019(1) requires the additional act of subsequently transferring *or* receiving the stolen property.

The "personal use" concept was flawed from its inception. The *Grimes* court, like the court below, improperly relied upon its interpretation of legislative intent rather than strict construction to reach its conclusion:

> We concede that to trade stolen food stamps at a store for food is a form of transfer, distribution, dispensation, or disposition of the stamps. However, in our view, the legislature did not intend that type of activity to be included in the proscriptions of section 812.019. The trading of food stamps for food amounts to *personal* use of the stamps since, due to their intrinsic nature, as argued by the State, that is the only legitimate manner in which they can be used by their holder.

Id., 650 (emphasis in opinion).

The *Grimes* decision is unsound because "[a] court cannot speculate as to what was intended by the Legislature." *Bayou Barber College, Inc. v. Mincey*, 193 So.2d 610, 612 (Fla. 1967) (citation omitted). "Inference and implication cannot be

substituted for clear expression." *Carille, supra,* 364 (citation omitted). *See also Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 64 S.Ct. 1215 (1944), *held*: Court cannot "draw upon some unexpressed spirit outside the bounds of the normal meaning of words . . ." U.S. at 617, S.Ct. at 1221; *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 104 S.Ct. 766, 78 L.Ed.2d 549 (1984), *held*: "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." U.S. at 398, S.Ct. at 764 (citation omitted). When a court perceives that a literal interpretation of a statute is at odds with legislative intent, it "must examine the matter further." *Radio Telephone Communication v. Southeastern Telephone Co.*, 170 So.2d 577, 580 (Fla. 1965). There is no indication in the *Grimes* decision that the court looked anywhere to ascertain the legislative intent. Rather, the panel merely imposed that which it subjectively deemed to be proper.

Nothing in the legislative history suggests that the mere fact that one who deals in stolen property ultimately puts that which he or she obtains in exchange for the stolen goods to personal use is precluded from prosecution under 812.019. Furthermore, the primary flaw in the court's analysis appears immediately after the passage quoted above:

> Evidence of theft only, with the intent *personally* to put the stolen item or items to normal use, constitutes only the crime of theft and not the crime of trafficking or dealing in stolen property within the meaning of chapter 812, Florida Statutes, even if the normal use is achieved by some form of transfer, distribution, dispensation, or disposition of the item.

Id., 650 (emphasis in opinion).

The above ruling stands in direct contradiction to the statutory provisions. §§812.019(1); 812.012(7)(a). The transfer is the additional element that distinguishes dealing in stolen property from theft. *Coley, supra.* The subsequent transfer of stolen property is not an element under any of the theft provisions; it is, however, a necessary element to establish dealing in stolen property.

Further, applicability of the personal use doctrine to the theft statute is apparent, but not so to the dealing in stolen property section. An illustration may be helpful. If a person such as Grimes merely stole food to eat, that would be for his personal use and would constitute theft, *i.e.*, the taking and terminal use of another's property. However, in subsequently transferring the food stamps, which the court conceded had occurred, the additional element of subsequent transfer necessary to constitute dealing in stolen property under section 812.019 was satisfied. The First District focused upon this distinction in *Dixon v. State*, 541 So.2d 637 (Fla. 1st DCA 1989), in which it receded from its earlier holding in *Grimes*:

> Other "personal use" cases cited by the *Grimes* decision are *Townsley v. State*, 443 So.2d 1072 (Fla. 1st DCA 1984) (auto stolen for personal use of thief), and *Lancaster v. State*, 369 So.2d 687 (Fla. 1st DCA 1978) (stolen engine put to use in thief's own van). The essence of the offense of dealing in stolen property, also referred to as "trafficking," is that the stolen property is being distributed or moved into the mainstream of commerce so as to have a detrimental effect beyond that of the original theft. A theft, followed by a personal, terminal use of the stolen property by the thief does not have the extra ingredient required for an offense under Section 812.019, Florida Statutes. The "personal use" cases are based on that principle.

Dixon, at 638.

The continued vitality of the personal use doctrine is suspect. Although the First District declined to expressly overrule its earlier decisions, the court strictly construed the statute in *Bailey v. State*, 559 So.2d 742 (Fla. 1st DCA 1990). The court held in material part:

> We find that appellant's reliance on *Dixon* and its stream of commerce language is misplaced. The statute is clear that an endeavor to sell property known to be stolen constitutes trafficking. *See* §§812.019(1), 812.012(7)(a), Fla. Stat. (1987). . . . The statute does not require that the property enter the stream of commerce, and we are unwilling to extend the language in *Dixon* to include situations for which it was not intended.

Bailey, at 743.

The facts of this case stand in sharp contrast to those in *State v. Camp*, 579 So.2d 763 (Fla. 5th DCA 1991). Camp had been "charged with 36 counts of forgery, 36 counts of uttering a forgery and 42 counts of dealing in stolen property." *Id.*, 764. Cowhig, on the other hand, was charged with and convicted of only one count of dealing in stolen property (R 206; 227-228). The disparity lies, no doubt, in the fact that Camp had committed many more crimes over a period of years. No inference can be drawn from the statutory language that legislative intent may be determined by the number of charges preferred by a prosecutor against a given individual. The legislation contains no such implication.

The instant case sets a more neutral factual setting than *Camp* for determining whether the legislature intended to apply section 812.019(1) to any person who transfers stolen property, rather than limit application of the section merely to fences.

As this court has observed: "Traditionally, the legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender." *State v. Cogswell*, 521 So.2d 1081, 1082 (Fla. 1988) (citation omitted). In light of this legislative deference to the executive branch, the application of section 812.019(1) by different prosecutors is not illustrative of legislative intent.

The number of charges were a feature of the *Camp* decision and preceded the court's conclusion that section 812.019 "is not intended to convert a third degree felony into a second degree felony merely because the thief sells the stolen property rather than consumes it." *Id.*, 764. Such an inference is unwarranted because the thief who subsequently transfers stolen property commits an additional crime. The legislature intended to provide more severe punishment for any person who in addition to stealing property subsequently transfers it.

The procedural postures of the cases are significant as well. Camp was in a pretrial posture; the trial court dismissed all of the dealing in stolen property counts. *Camp*, 764. Cowhig, on the other hand, had gone through trial and stood convicted by the jury. While Camp stood charged with numerous counts of dealing in stolen property, it is impossible to ascertain how many counts she ultimately would have been convicted of before or after trial. Some prosecutors charge heavily initially, but later extend a plea offer which results in many counts be dismissed by the state. Another possibility is that the jury might have returned verdicts of guilty on only some of the counts through

the exercise of "its inherent pardon power". *State v. Abreau*, 363 So.2d 1063, 1064 (Fla. 1978). Perhaps she would have been acquitted. In any event, the actions of a single prosecutor in one case should not form the basis for a court to decide to whom the legislature intended to apply the dealing in stolen property section.

Summary

Section 812.019(1) expressly applies to *any person* who traffics in stolen property. An individual traffics in such property in one of two alternative ways. The first, applicable to the defendant, is committed by transferring the stolen property. §812.012(7)(a). The second, applicable to fences, is by receiving stolen property with the intent to further dispose of the property. §812.012(7)(b). The unequivocal statutory language reveals that the legislature intended that transferrors of stolen property be punished for dealing in stolen property as well as, and independently of, fences. "It is axiomatic that where the legislature has defined a crime in specific terms, the courts are without authority to define it differently." *State v. Jackson*, 526 So.2d 58 (Fla. 1988) (citation omitted). The district court erred in reversing the defendant's conviction for dealing in stolen property because he had trafficked in the stolen check by transferring it to the bank.

Alternative rules of statutory construction should not be resorted to because the language of §§812.019(1) and 812.012(7)(a) are unambiguous. Even if the language is viewed as

ambiguous, the result is the same as that obtained by strict construction. The act is not as narrow as its short title suggests. Other sections pertain to activities other than fencing. The legislative history reveals that an expansion of the law as it then existed was intended. This interpretation is corroborated by the enactment of two separate definitions of "traffic", one applicable to the transferor of stolen property, the other to the recipient. The legislature intended to remedy two separate evils through this expansion. It sought to remedy both the theft of the goods and the subsequent evil of transferring the stolen property. The legislature intended section 812.019(1) to apply not only to fences, but also to individuals, such as Cowhig, who steal property and subsequently transfer it.

CONCLUSION

The decision of the Fifth District Court of Appeal should be quashed and the cause remanded with directions to reinstate the conviction for dealing in stolen property.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Gary W. Tinsley, Esq., 645 N. Halifax Ave., Daytona Beach, FL 32118; and to F. Wesley Blankner, Esq, 217 E. Ivanhoe Blvd., N., Orlando, FL 32804 (counsel for respondent in *State v. Camp*, F.S.C. no. 78,085), by mail delivery on this 24th day of March, 1992.

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