IN THE SUPREME COURT
STATE OF FLORIDA

THOMAS V. CAPALDO

Petitioner

vs.

STATE OF FLORIDA,

Respondent

_____/

CASE NO. 86,390

AMENDED

PETITIONER'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Petitioner was convicted of endeavoring to purchase stolen property for meeting with an undercover agent to go to another location to look at and perhaps purchase certain property described to Petitioner in an earlier telephone conversation with the agent.

The agent initiated the call and he created an imaginary transaction by offering to sell non-existent property. the agent never told Petitioner that the merchandise was stolen nor did he even hit that the property was not legitimate.

The agent admitted that his purpose in calling Petitioner three times that morning, asking him to meet to go look at the merchandise, was to "set-up" Petitioner.

The Statute seeks to punish the act of endeavoring to buy stolen property with the intent to re-sell it. Proof of the intent to reselling the merchandise is essential for a conviction. Burch v. State, 602 So.2d (5th DCA, 1992), Adkins v. State, 576 So.2d 392 (1st DCA, 1991)

819.019. 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 ss775.082, 775.083 and 775.084.
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Part of the corpus delicti for dealing in stolen property is knowledge at the time of purchase that the property is stolen. Newberry v. State, 442 So.2d 334 (1983); State v. Graham, 238 So.2d 618 (1970)

Surely, the corpus delicti also requires that the subject

property must exist somewhere other than in the imaginative mind of an entrapping police agent. without any "stolen" property to examine and purchase or refuse to purchase an innnocent but interested citizen could be easily entrapped and convicted for merely considering a purchase of non-existent property.

Respectfully, this Court should hold there there must be at least some property in existence before a citizen can be convicted of knowing that the merchandise is stolen and endeavoring to purchase it for resale.

This Court has held that even a consumated purchase of admittedly stolen merchandize will nto support a conviction under F.S. 812.09(1).

STATEMENT OF THE CASE

On July 9, 1990, Petitioner, THOMAS V. CAPALDO, was arrested. The Statewide Prosecutor charged Petitioner and four other co-defendants in a ten count Information alleging RICO, conspiracy, and dealing in stolen property crimes.

On February 16, 1993, Petitioner was first tried for the offense for which he was ultimately convicted, with two co-defendants. The trial judge entered a judgment of acquittal as to the RICO and conspiracy charges; and, granted Petitioner a severance from the co-defendants and mistried the remaining two counts of dealing in stolen property.

On April 5, 1993, Petition was retried. He was acquitted of one count and the trial judge again mistried the charge of dealing

in stolen property.

On June 23, 1993, at Petitioner's third trial, he was found guilty by a jury of dealing in stolen property, the case before this court.

On April 28, 1995, the Fifth District Court of Appeal affirmed Petitioner's conviction and certified the following question to this court:

> "IS IT NECESSARY TO PROVE THE EXISTENCE OF STOLEN PROPERTY IN ORDER TO CONVICT UNDER 812.019(1), FLORIDA STATUTES, 1993"? (Emphasis Supplied)

In the appeals court on August 31, 1995, Petitioner filed Notice to Invoke Discretionary Jurisdiction of this court in the Fifth District Court of Appeal. Petitioner was seeking this court's review of the certified question.

On September 12, 1995, this court, on it's own motion, dismissed Petitioner's notice, subject to reinstatement, because the notice was not timely filed.

On September 27, 1995, Petitioner filed his Motion To Allow Delayed Appeal And Reinstate Cause.

On January 4, 1996, this court granted Petitioner's Motion To Allow Delayed Appeal And Reinstate Cause and ordered Petitioner to filed his brief on the merits on or before January 29, 1996. This is Petitioner's brief.

STATEMENT OF THE FACTS

Fifth DCA Chief Judge Harris' synopsis of the facts and the issue follows. Please note, comments in parenthesis by counsel.

"The state was conducting an investigation concerning

suspected dealing in stolen property by Ghazi Osta, Jose Zaetar and Stephen Morris when Thomas V. Capaldo wandered onto the scene. Capaldo happened into Osta's pawn shop while an undercover officer was attempting to set up a sting operation. Osta introduced Capaldo to the undercover officer and later described him as being 'cool'. the next day, the officer showed Capaldo electronics merchandise that, although not available to Capaldo because it had already been "sold", was a sample of the type of merchandise that the officer represented might be available to him later. Capaldo stated that he would like to buy similar electronics in the future and that he could be contacted 'through Osta'.

Subsequently and through Osta, the undercover officer sold a shipment of cigarettes to Capaldo at a price which suggested that the cigarettes were stolen." (*The trial judge entered a judgment of acquittal on that transaction in the second trial V9/P252, 343) "During that transaction, Capaldo and the officer agreed that Osta would no longer be a part of their dealings. Shortly thereafter," (*more than 3 months later), "the officer called Capaldo and advised him that electronic merchandise similar to that which he had been shown was again available. In fact, no such merchandise existed. When Capaldo showed up to purchase the imaginary merchandise," (*Petitioner only intended to meet the officer who was to take Petitioner to an imaginary place to see the imaginary merchandise and then decide <u>if</u> he wanted to buy any of the merchandise. V10/P52-55, 120-121; V12/P355-356), "he was arrested for violation of section 9812.019(1)--Dealing in Stolen Property. He appeals his conviction of that charge; we affirm. (Fifth DCA Opinion, Page 2) (*NOTE - Dates and comments added by Petitioner's

counsel)

In September, 1988, law enforcement agents developed evidence that Osta, a pawn shop owner, was trafficking in stolen property. Undercover agent Bisland befriended Osta and began a series of undercover "stings" on Osta and his associates. (V3/P468)

On March 20, 1990, Bisland was at Osta's pawn shop discussing their illegal dealings (V3/P276, 282) when Petitioner and his wife coincidentally entered the shop. (V10/P26-30) Petitioner was not a party to the earlier conversation. Osta and Bisland asked Petitioner and his wife if they would be "available for a deal" the next day. (V10/P26-30) Neither Bisland nor Osta told Petitioner that Bisland was dealing in stolen merchandize. (V10/P30, 36, 104, 106, 111, 115, 117, 118, 334,335) Osta asked Bisland not to get Petitioner into trouble and told Bisland that he should not tell Petitioner that the property was stolen or hot. (V6/P 106; V10/P110) Osta was Bisland's primary target. (V3/P467-472, V6/P53-88, V10/P25, 82, 87)

Agent Bisland admitted that he had no reason to believe that Petitioner was ever engaged in any criminal activity whatsoever before he, Bisland, began to offer to sell Petitioner electronics. (V6/P139, V10/P20-21, 87, 123, 124, 127, 128) Yet, from the first day they met, Bisland targeted Petitioner for prosecution. (V10/P30)

Bisland set up a legitimate-looking warehouse and invited Petitioner and his wife to look at some electronics. (V10/P30-33, 36, 105-108, 334-337) On March 21, 1990, Bisland offered to obtain similar merchandize for Petitioner in the future at a good price but he never told Petitioner that the merchandize was hot or

stolen. (V10/P37, 38, 104, 106, 334-337)

As Petitioner was leaving Bisland's business, the agent handed him a VCR and asked him to give it to Osta as a gift. That became the basis for one of the counts against Petitioner and his wife for "dealing in stolen property". (V6/P95, 96,. 139, 140 and V3/P281, 472) Bisland admitted that his purpose in inviting Petitioner to his warehouse was to wet his appetite for future stings. Bisland, gave the appearance of a clean-cut, legitimate businessman, (V12/P334) and he took Petitioner to his warehouse located among other open businesses with a furnished front office and all of the indicia of an operating legitimate business. (V10/P32, 33, 106, 108, 334-337) The electronics that Bisland showed Petitioner were packaged in legitimate factory boxes with serial numbers and documentation. (V12/P334-337)

Although Agent Bisland engaged in cryptic hints that he intended to serve as warnings to be used at trial to prove guilt, Petitioner did not understand that Bisland was hinting that those goods were stolen. (V6/P140-143; V10/P36-38, 108, 339-341) Petitioner had bought legitimate merchandize under similar circumstances many times in the past. (V12/P339-341)

On March 30, 1990, Petitioner and his wife were invited to Bisland's warehouse where they were surprised to find that they were being offered cigarettes not electronics. At first Petitioner declined the offer but ultimately purchased cigarettes for his own consumption. (V6/P99, 100, 101) Petitioner verified that the cigarettes carried a legitimate Florida tag stamp and demanded a written receipt for the transaction. At that point agent Bisland and Petitioner agreed to cut Osta out of any future dealings and

they exchanged phone numbers to facilitate direct contact for future transactions. (V6/P103, 104; V10/P43, 44, 129)

On April 5, 1993, Petitioner's second jury trial ended with a judgment of acquittal on the charge that he was dealing in stolen cigarettes and a mistrial on the remaining count of dealing in stolen property. (V9/P252, 343)

Agent Bisland called Petitioner at least ten times and contacted Osta on numerous occasions to inquire about dealing with or to send messages to Petitioner concerning the sale of property. Bisland had more than twenty contacts aimed at entrapping Petitioner. (V6/P96-99, 105, 106, 108, 115, 117, 118, 120, 126; V10/P28, 32, 39, 41, 43, 45, 47-51)

On April 9, 1990, Bisland set up a meeting with Petitioner, that Petitioner cancelled but the agent continued in his telephone efforts to induce Petitioner to accept his offers of merchandize. (V6/P105, 106, 108; V10/P43-47)

On July 9, 1990, long after Osta was out of the picture, Bisland awakened Petitioner at his home with a phone call. Bisland told Petitioner that he was coming to town with some electronics and wanted to know if Petitioner was "interested". In a second phone call that morning Bisland read a fictitious list of "non-existent" electronics, and quoted Petitioner a price of $9,800.00, approximately one-third retail. During the second call, Bisland told Petitioner that "if he wasn't interested in all of it" he would sell it to someone else. (V10/P52-54)

At 10:30 a.m., Bisland made his third call to Petitioner's home to set up the meeting. Petitioner asked if he should meet Bisland at his place of business. Bisland told him that he had

moved his business to Ormond Beach and that Petitioner should meet him in a park from where Bisland would lead him to the new place of business and show him the merchandise. (V10/P54, 55) Bisland admitted that the sole purpose of those phone calls were to "set up" Petitioner. (V10/P120-126)

Petitioner only said that he was "interested" and agreed to meet Bisland to examine, and intended to possibly negotiate, a purchase of some of the merchandise. (V10/P52-54, 120-121; V12/P355-356)

Petitioner testified, at his trial, that if agent Bisland had taken him to his new place of business (which did not exist) to inspect the electronics (also non-existent) that, before purchasing anything, he would have:

1. Inspected the merchandise for defects;
2. Tried to determine if it had been repackaged;
3. Verified that the merchandise was serial numbered; and that the numbers on the packaging boxes matched the numbers on the merchandise;
4. Assessed the condition of the electronics;
5. Determined whether the factory warranties were included;
6. Verified Bisland's also known as Burton's source for the merchandise;
7. Examined the documentation, proving the merchandise was legitimate;
8. Obtained a written receipt from "burton"; and
9. Verified "Burton's" identification.

(V12/P356-359)

Petitioner made a honest living by buying legitimate merchandise and reselling it. (V12/P333, 361)

Petitioner was immediately arrested upon arriving at the park and never had the opportunity to decline to purchase the merchandise if Bisland could not authenticate its legitimacy. (V10/P59)

The State's "proof" that Petitioner knew that the imaginary

electronics were stolen rested entirely upon some vague, innocuous comments Bisland made three and one-half months earlier on March 21, 1990, about some other merchandise. (V6/P140, 141) No such 'hints" were given to Petitioner concerning the imaginary property which was the subject of the July 9th, phone calls and meeting which lead to Petitioner's arrest and conviction.

ARGUMENT

Judge Cowart's dissent in Lamar v. Keesee, 512 So.2d 1066 (Fla. 5th DCA, 1987) commenting on that court's decision holding that the crime of endeavoring to traffic in stolen property does not require that the property be stolen said:

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> "The average laymen is probably hard pressed to understand how one can be convicted of dealing in stolen property if the property is not stolen and why, if the person does not commit a completed crime because the property was not stolen, he can be convicted of trying ('attempting' or 'endeavoring') to do something that is legally or physically impossible for him to do."
>
> Lamar, 512 So.2d at 1068

Judge Cowart's observation is certainly cogent. the average layman would be even more pressed to understand how one could be convicted of dealing in stolen property if the property never even existed and that the conviction could be based upon his simply agreeing to look at the property, something that is legally and physically impossible for him to do, with the intention of deciding whether or not to buy it. Page five of the Fifth DCA opinion, in this case, cites this court as having upheld the constitutionality of Section 812.019(1), and quotes this Court:

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> "The terms 'traffic' and 'stolen property' are defined in

> section 812.012(6) and (7), from which it is clear that the statute applies only to certain acts relating to the disposition of 'property that has been the subject of any criminally wrongful taking.' (Emphasis added).
>
> (NOTE - Fifth DCA, citation of authority, Thomas, at 370 So.2d 1142 is in error)

Where ever the Fifth DCA found this Court's language mistakenly attributed to the case found at 370 So.2d 1142, the quote does appear to be applicable. In construing Section 812.019(1), this court held that statute applied "only to certain acts related to this disposition of 'property that has been the subject of any criminal wrongful taking'" (Fifth DCA opinion, page 5, source unknown)

In the instant case, the property never existed and was a creation of agent Bisland's mind; so, it certainly could not have been the subject of any "criminally wrongfully taking" or of any criminal trafficking in such non-existent property.

There is no evidence that Petitioner knew or should have known that the imaginary merchandise that Bisland was going to show him at his imaginary place of business on July 9th, was stolen. (V12/P359)

If Section 812.019(1), Dealing in Stolen Property, makes it a crime for a citizen to agreed to meet and undercover agent to look at merchandise and the citizen is arrested before he has an opportunity to look at the merchandise, verify the legitimate origin of the goods and make a decision to either purchase or not purchase, any citizen could be the victim of an over zealous law enforcement officer and prosecutor. Particularly when the agent tragets the citizen who admittedly had no prior criminal record and who the agent had no reason to believe was previously dealing in

stolen property. (V6/P139; V10/P123, 127,128)

The jury's determination that petitioner knew or should have known the merchandise was stolen was undoubtedly based upon the numerous hearsay discussions between Osta, who talked about his own illegal transactions, and Bisland who played out the charade of being a dealer in stolen property. (V10/P28-31,39-41, 103-106) Petitioner was not present for any of those discussions nor is there any evidence that the content of those discussions were conveyed to him by either Osta or Bisland.

Yet, the Fifth DCA determined that the numerous hearsay discussions between Osta and Bisland, although clearly inadmissible and unquestionably intended "to show that Capaldo believed that the merchandise was stolen were harmless." The Fifth DCA said:

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> "Capaldo raises two points that warrant discussion. First he contends the the court improperly admitted" (*at lease five) "hearsay statements made by Osta" (*and by agent Bisland to Osta), "on the basis of the coconspirator exception to the hearsay exclusion. Although the evidence supports the finding that a conspiracy to deal in stolen property did exist for a period of time and that the statements in question were made during that conspiracy, it is clear that the conspiracy between Osta and Capaldo had ended" (*more than 3 months) "prior to the offense charged in this information.
>
> We agree with Capaldo that section 90.803(18)(3), Florida Statutes (1993), does not permit statements made during a conspiracy to commit one crime to be admitted in prosecution for an entirely different offense not involving the conspiracy. See Usher v. State, 642 So.2d 29 (Fla.2d DCA 1994). We find, however, that the error was harmless under the facts of this case. The purpose of these statements" (*by Osta and agent Bisland to each other) "was to show that Capaldo believed that the merchandise was stolen." (*obviously not harmless, emphasis supplied) "We find that even without the admission of the hearsay statements, the evidence of Capaldo's intent to purchase stolen property was overwhelming."

(Fifth DCA opinion page 2 and 3)
(NOTE - Facts and comments added by Petitioner's counsel)

An examination of the entire trial record, including a close examination of the permissible evidence on which the jury could have legitimately relied, and, in addition and even closer examination of the impermissible hearsay statements which might have possibly influenced the jury verdict, clearly shows that the harmless error test has not been met. (V10/P28-31, 103-106) State v. DiGuilio, 491 So.2d 1129, at 1135 (Fla. 1986)

Petitioner was entrapped by an over zealous agent and the prosecutiobn relied upon inadmissible hearsay to convince the jury that Petitioner knew or should have known that the non-existent property that he was considering purchasing at the imaginary location was stolen.

If this court does not make it clear that Section 812.019(1), Dealing in Stolen Property, does not permit prosecutions based upon imaginary merchandise, there will be no limit to the inventiveness of over zealous law enforcement officers to create crimes out of thin air with the real danger, as in this case, of entrapping otherwise innocent citizens into thinking about illegal conduct and convicting them for it.

Aren't there enough real crimes being commited without the Florida Department of Law Enforcement using their imagination and a fantasy to entrap and convict a citizen?

CONCLUSION

Petitioner respectfully urges this Court to answer the question certified by the Fifth District Court of Appeal in the affirmative. And, to at least require the existence of "stolen

property" which can be observed and either accepted or rejected by the targeted citizen who might, as in this case, demand authenication of the legitimacy of the property before actually consumating the transaction.

Respectfully submitted,

JOHN W. TANNER, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to ROBERT BUTTERWORTH, Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 27th day of January, 1996.

JOHN W. TANNER, P.A.