

**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA

**FILED**

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Chief Deputy Clerk

DARYELL CALLIAR,

Petitioner,

v.

CASE NO. 93,592

STATE OF FLORIDA,

Respondent.

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

NANCY A. DANIELS  
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SECOND JUDICIAL CIRCUIT

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PETITIONER'S REPLY BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

The undersigned counsel certifies that this brief was typed using Courier New 12. References to the State's Answer Brief will be made by use of the symbol "AB" followed by the appropriate page number in parentheses. References to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses.

Petitioner relies on his Initial Brief to reply to the State's arguments with the following additions:

## II. ARGUMENT

**ISSUE: THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING PETITIONER'S CONVICTION FOR POSSESSION OF BURGLARY TOOLS BECAUSE NO EVIDENCE WAS PRESENTED FROM WHICH THE JURY COULD FIND THAT PETITIONER USED, OR INTENDED TO USE, TOOLS TO COMMIT A BURGLARY OR TRESPASS.**

In its Answer Brief, the State offers a plausible, albeit tortured, construction of section 810.06, Florida Statutes -- the burglary tools statute. (AB-7). However, the issue in this case is not whether the State offers a plausible construction of section 810.06 or even the best construction of section 810.06. Rather, the issue before this Court is whether the State offers the only reasonable construction of section 810.06. It does not. In his Initial Brief, petitioner offers a reasonable construction of section 810.06 that would preclude his conviction for possession of a burglary tools -- the same construction adopted by the Third District in Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992) and Judge Joanas in Calliar v. State, 714 So. 2d 1134 (Fla. 1<sup>st</sup> DCA 1998) (J. Joanas, dissenting). To the extent section 810.06 is susceptible of differing constructions, this Court must construe the provision most favorably to petitioner. See § 775.021(1), Fla. Stat. (1995).

It is no answer that petitioner's construction "could foreseeably require the statutory cataloging under § 810.06, Fla. Stat. (1995) of all underlying offenses that may be committed using a tool." (AB-9). Section 810.06 could be amended to read:

Whoever has in his possession any tool, machine, or

implement with intent to use the same, or allow the same to be used, to commit any trespass, burglary, **or any offense underlying a burglary** shall be guilty of a felony of the third degree. . . .

Alternatively, section 810.06 could be amended to read:

Whoever has in his possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any trespass, burglary, **or theft** shall be guilty of a felony of the third degree.  
. . . .

See, e.g., § 609.59, Minn. Stat. (1996) (proscribing possession of "any device, explosive, or other instrumentality with intent to use or permit the use of the same to commit burglary or theft"). In short, the State's "Henny Penny" approach simply does not wash.

Accordingly, this Court should quash the decision below and remand with appropriate directions.

### III. CONCLUSION

Based on the foregoing arguments, reasoning, and citation of authority, petitioner respectfully requests that this Court quash the First District's decision with respect to the possession of burglary tools conviction, approve the Third District's decision in Hierro, and remand with appropriate directions.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of this Reply Brief has been furnished to Sherri Tolar Rollison, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, this 9th day of February, 1999.

Respectfully submitted,  
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