INTHE SUPREME COURT OF FLORIDA

RICHARD B. WEDDELL,

Petitioner,

v. **CASE NO. SC01-751**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the circuit court for Bay County, where he was convicted of one count of dealing in stolen property. Petitioner was the Appellant in the First District Court of Appeal. He will be referred to in this brief as Petitioner or as Mr. Weddell.

The record consists of three volumes and seven consecutively paginated supplemental volumes. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (R.I,1). Citations to the supplemental record will appear as "SR," followed by the appropriate volume and page number, e.g., (SR.IX,110).

The opinion of the District Court is attached as an appendix and will be referred to as "App".

STATEMENT OF THE CASE

By information filed June 28, 1999, Petitioner Richard Bryant Weddell was charged with the August 5, 1998, dealing in stolen property, a Dewalt 7" grinder, the property of Eastern Shipbuilders, Inc., in contravention of section 812.019(1), Florida Statutes. (R.I,21). A jury trial was held July 1, 1999. The jury returned a verdict of guilty as charged. (R.I,28). The trial court sentenced appellant to a term of 25 years as an habitual felony offender. (R.II,77,79).

On direct appeal to the First District Court of Appeal, Petitioner's conviction and sentence were affirmed in an opinion certifying and passing upon a question of great importance. The district court ruled that the Florida standard jury instruction regarding the inference arising from possession of property recently stolen constituted an impermissible comment on the evidence similar to the flight instruction disapproved in Fenelon v. State, 592 So. 2d 292 (Fla. 1992). (App.)

Notice of intent to seek discretionary review was filed by Petitioner on April 9, 2001. On April 11, 2001, this Court issued an order postponing decision on jurisdiction and briefing schedule, ordering Petitioner to file his initial brief on the merits on or before May 7, 2001.

STATEMENT OF THE FACTS

By written stipulation, and in opening argument, Petitioner

agreed that he was the person who sold a Dewalt 7" grinder, serial number 25534, to the Trading Post Pawn Shop for $75.00. (R.I,29; R.III,16).

James Ward works as the warehouse foreman for Eastern Shipbuilding Group. (R.III,18). When the company buys a tool it is stamped with the letters "E.S.G." and also with an inventory number. (R.III,18). The company also stamps the tool with the manufacturer's serial number in order to preserve that information for warranty purposes. (R.III,18). The manufacturer affixes the serial number to the tool with a piece of "stuck on tape" or plastic. (R.III,20,21,26). Eastern stamps or engraves the serial number on the tool because the manufacturer's original serial number usually gets "tore off" after the tool is placed in service. (R.III,21). The grinder does not come with a safety guard, but Eastern modifies the tool by installing a guard, and engraves the serial number under the guard. (R.III,21-22). The engraving of the manufacturer's serial number also provided a means of monitoring "employee integrity." (R.III,22). That is, Ward could be sure that the employee turned in the same tool that he checked out. (R.III,22). State's exhibit "G" is a Dewalt 7" grinder. (R.III,25). This particular grinder was placed in service at the warehouse on July 20, 1998. (R.III,25). The grinder has "E.S.G." stamped on the top and the tool number "155" stamped on each side. (R.III,21). At trial, Ward observed that the original serial number installed by

the manufacturer remained intact. (R.III,26,30). The company has a system for keeping track of which employee has a particular tool checked out for use. (R.III,23-24). The manufacturers' serial number for this particular grinder is 25534. (R.III,27). The company paid $158.00 for the grinder when purchased brand new. (R.III,27).

The grinder was checked out for use by employee Diep Nguyen sometime after it was placed in service on July 20, 1998. (R.III,27). Ward was not sure, however, of the precise day that Nguyen checked out the grinder. (R.III,27). Ward said that Nguyen came back two or three days after checking the grinder out to report that it was missing. (R.III,28). Ward could not recall the exact day that Nguyen reported the grinder missing. (R.III,28).

On September 21, 1998, Ward received a call from Nguyen inquiring about the serial number of the missing grinder. (R.III,28). Ward told him the number was 25534. (R.III,29). Nguyen said the grinder was at a pawn shop. (R.III,29). A day or so later, Ward went to the pawn shop and matched up the serial number. (R.III,29). Ward told his boss that the tool number and the letters "E.S.G." had been ground off, but both serial numbers (the original and the engraved) were still on it. (R.III,30).

After Ward got the grinder back, he stamped "E.S.G." and the number "155" on it again. (R.III,30). The marks where the "E.S.G." and "155" were ground off were still visible. (R.III,31). The

company paid the pawn shop $75.00 to get the tool back. (R.III,31). The pawn shop is located 3 or 4 miles from the warehouse. (R.III,32). Ward placed the grinder back in service and pulled it out of service on the day before trial. (R.III,32).

James Ward has never gone by the name Jack Ward. (R.III,18). James Ward did not sell the grinder to Petitioner, nor did he give Petitioner permission to sell it to the pawn shop. (R.III,32).

Various subcontractors sometimes work at the company. (R.III,33). Subcontractor Glennco Insulation was working at the plant on August 3, 1998. (R.III,33). Ward thought Glennco was working nights. (R.III,34). Glennco was working about 500 feet from where Nguyen was working. (R.III,35).

On cross-examination, Ward said Eastern Shipbuilding had about 325 employees and three or four subcontractors working in the facility. (R.III,36). Eastern also had its own night shift working, consisting of 25 or 30 employees. (R.III,37). There were about 30 to 40 people working at night. (R.III,37). The grinder could have been checked out as early as July 20, 1998. (R.III,38). Nguyen reported the grinder missing after two or three days. (R.III,38).

Ward stated that the engraved serial number placed under the safety guard is not visible after the guard is installed, so the employees would not know the serial number if the original number fell off. (R.III,39). James Ward acknowledged that there is an

employee at Eastern by the name of Mark Ward. (R.III,41). Ward wears a uniform to work every day. (R.III,42).

Diep Nguyen is a welder for Eastern Shipbuilding. (R.III,43). Diep checked out a Dewalt 7" grinder from the tool room some time in July, after July 20th. (R.III,43). Nguyen identified state's exhibit "G" as the grinder that he checked out. (R.III,43). Nguyen could not remember the specific day that he checked the grinder out. (R.III,44). On the particular day that he checked out the grinder, Nguyen was working from 6:00 a.m. to 6:30 p.m. (R.III,45). Nguyen left the grinder near the bow of a boat when he left work at 6:30 p.m. (R.III,45). Glennco employees were working about 500 feet away. (R.III,44). When he came back the next morning it was gone. (R.III,45). Nguyen reported the matter to Ward. (R.III,45). Nguyen found the grinder at a pawn shop on September 21, 1998. (R.III,46).

On cross-examination, Nguyen stated that he did not remember exactly when he checked out the grinder. (R.III,47). Nguyen said he located the grinder in the pawn shop "several months" after it was stolen. (R.III,47). Upon further inquiry, Nguyen said he located the grinder in the pawn shop "at least" two months after it was stolen. (R.III,47). Nguyen said he thought the people working near him were Glennco employees only because James Ward said that's who they were. (R.III,48).

Bob Slaughter is the project manager for Glennco Construction.

(R.III,49). Slaughter hired Petitioner to work for him. (R.III,49). Petitioner did not begin working at Eastern Shipbuilding until August 3, 1998. (R.III,50). Prior to that date, Petitioner was assigned to work at Stone Container. (R.III,50). Petitioner worked the evening shift, from 1:00 p.m. to 11:30 p.m. (R.III,50-51). Slaughter had six employees working out at Eastern. (R.III,52). Eastern also had an evening work crew on duty. (R.III,52).

Brie Hanson works at the Trading Post Pawn Shop. (R.III,54). On Wednesday August 5, 1998, at about 9:15 a.m., Petitioner came into the pawn shop and sold a Dewalt 7" grinder to Hanson. (R.III,54-55). Hanson paid $75.00 for the grinder. (R.III,55). Petitioner presented his driver's license as a means of identification. (R.III,55). Hanson said that Petitioner told her that he had had the grinder for "awhile." (R.III,56). Hanson did not ask Petitioner what "awhile" meant, nor did Petitioner explain what he meant by "awhile." (R.III,58).

Hanson said she examined the grinder presented by Petitioner and that there was nothing about the grinder that would make her think that it was stolen. (R.III,57). Petitioner presented his driver's license and also left a fingerprint during the course of the transaction. (R.III,57). Hanson said she sees about a hundred people a day at the pawn shop. (R.III,57). Many of the people she sees inform her that they have owned the property for awhile. (R.III,57). Hanson did not make any special note on the pawn

ticket to indicate that Petitioner said he had it for awhile. (R.III,57). Petitioner did not explain what "awhile" meant. (R.III,58). Petitioner did not have any hesitation about producing a driver's license or leaving a fingerprint. (R.III,58). Hanson's boss looked at the grinder and said that $75.00 was a fair price for a used grinder. (R.III,58-59). Hanson said the grinder was obviously used. (R.III,59).

After the state rested, defense counsel argued on motion for judgment of acquittal that the state had failed to prove that Petitioner had knowledge that the property was stolen or should have knowledge that it was stolen. (R.III,60). In addition, defense counsel argued that:

> [t]he state would not even be entitled to the jury instruction on the inference that arises from proof of possession of recently stolen property because this grinder could have been checked out two weeks before Mr. Weddell set foot on Eastern's property and missing at that time there is no possible way he could have stolen it. And the only way he would have known it was stolen is if somebody told him it was stolen when he purchased it.

(R.III,61). The trial court denied the motion for judgment of acquittal. (R.III,67).

Petitioner Richard Weddell testified in his own defense. He began working for Glennco in June of 1998. (R.III,69). Petitioner was first assigned to work at Stone Container, and worked there until August 3, 1998. (R.III,70). On August 3, 1998, Weddell started working at Eastern Shipbuilding Group. (R.III,45). Weddell

said the grinder looks like one he purchased from an individual outside the gate of Eastern Shipbuilding for $50.00. (R.III,45). Petitioner had never met the individual before. (R.III,71).

Weddell thought it would be a good idea to get a receipt from the individual. (R.III,72). Petitioner identified Defense Exhibit #1 as a receipt that he obtained from an individual who identified himself as "Jack Ward". (R.III,72). The receipt contained Petitioner's signature as well as the handwriting of Jack Ward. (R.II,72). The receipt was admitted into evidence. (R.II,73). Petitioner said he purchased the grinder sometime between August 3 and August 5, 1998. (R.II,73). He sold the grinder on August 5, 1998. (R.II,73). Prior to purchase, he examined the grinder to see if there was anything unusual about it. (R.II,73). When he sold the grinder, Petitioner produced his Florida driver's license as identification and also affixed his thumbprint to the pawn ticket. (R.II,74). Petitioner sold the grinder for $75.00. (R.II,74). He did not do anything to conceal his identity when he sold the grinder. (R.II,74). Petitioner did not think the grinder was stolen when he sold it. (R.II,74). Petitioner admitted to being convicted of 14 prior felonies, and two misdemeanors involving dishonesty or false statement. (R.II,75).

On cross-examination, Petitioner stated that the man who sold him the grinder had a beard and wore a uniform. (R.II,76). The pants were brown with a tan or brown shirt. The man also wore a

"black support back support belt type things." (R.II,76). The man was between 5'8" and 5'10" tall, and weighed between 190 to 200 pounds. (R.II,76). That was the first time he ever saw the man. (R.II,76). The man approached Petitioner and asked if he wanted to buy a grinder. (R.II,77). Petitioner looked at the grinder "closely," and did not see any grinding marks on top, but he made sure it had a serial number on it. (R.II,77). Petitioner said there "didn't seem to be obviously anything removed." (R.II,77). Weddell asked for a receipt to be on the safe side. (R.II,77). The receipt stated that the grinder had a serial number on it, the price of purchase, and the signature of both parties. (R.II,78). Specifically, the receipt said: "received from Richard Weddell $50.00, Dewalt grinder." (R.II,78). Weddell testified that he was not concerned due to the nature of the transaction, but more because of his past; he needed to be safe. (R.II,78). Petitioner did not know the man's address, phone number, or date of birth. (R.II,78). Petitioner did not see any of the Eastern employees using grinders. (R.II,79). The grinder was in relatively good condition, but Petitioner did not think it unusual to buy an almost new grinder for $50.00. (R.II,79). The prosecutor asked Petitioner when he "first produce[d]" the grinder. (R.III,79). Petitioner first produced the receipt in March of 1999. (R.III,79). The prosecutor noted that Petitioner produced the receipt approximately seven months after working at Eastern. (R.III,79). Petitioner

specifically denied stealing the grinder. (R.II,79).

Susan Graves testified and was recognized by the court as an expert in handwriting comparison. (R.II,82). Graves conducted a test where she took a sample of Petitioner's handwriting and compared it with the receipt introduced into evidence. (R.II,83). The receipt contained three elements, the cursive "Richard Weddell", the cursive "Jack Ward", and some other printed writing. (R.II,86). Graves concluded that the signature of "Richard Weddell" was written by Petitioner, whereas the "other handwriting" on the receipt was written by someone else. (R.II,84). Graves said she gets paid for her services, but does not get any more money for rendering a particular opinion. (R.II,88). Graves said that about half the time she gives a conclusion that is detrimental to the people that hire her. (R.II,89).

On cross-examination, Graves said that as to the printed part: "received from Richard Weddell $50.00, Dewalt grinder, serial number" the person who wrote "Jack Ward" may or may not have wrote it. (R.II,89). Graves did not render an opinion as to whether Petitioner's best friend could have written part of the receipt six months after the fact. (R.II,89).

The defense rested its case. Petitioner renewed his motion for judgment of acquittal, arguing that nothing refuted his explanation that he purchased the grinder and then turned around and sold it. (R.II,91-92). The trial court denied the motion.

(R.II,93).

Petitioner objected to the state's requested jury instruction regarding recent possession of stolen property on the ground that it would be a violation of due process, as well as vague. (R.II,94,97). Petitioner also argued that the instruction regarding the possession of recently stolen property constituted an "impermissible invasion of the province of the jury" because it indicates what inferences may be drawn from possession of recently stolen property." (R.III,96). Defense counsel argued that the instruction "[t]ells the jury what inference they can draw from the evidence." In overruling the objection, the trial court noted that the contested instruction had been upheld in State v. Young. (R.III,95-97).

In closing argument, the prosecutor argued that the evidence showed that Petitioner stole the grinder when he went to work at Eastern. (R.III,104).

> He took it one of the two nights when he first started working there and he turned around and sold it to The Trading Post. That's how he knew it was stolen.

(R.III,105).

In closing argument, defense counsel addressed the matter of when Petitioner first produced the receipt for the grinder. (R.III,108). Defense counsel argued that Petitioner produced the receipt after being charged with the offense. (R.III,108). Counsel further argued that Petitioner did not have to testify, nor did he

have to produce the receipt. (R.III,109).

In rebuttal, the prosecutor emphasized that Petitioner produced the receipt six months after the incident, and that there was no proof as to who printed the receipt -- it could have been a friend of Petitioner. (R.III,113). Again, the prosecutor commented: "He did it six months later." (R.III,113). The prosecutor argued that "we don't know exactly what day it was taken but I submit it was either August 3rd or August 4th." (R.III,114). Again the prosecutor argued that Petitioner stole the grinder.

> I submit to you he put the grinder in his truck, took it out, took it to the pawn shop, sold it the next day. Sometime during the night he ground off the markings.

(R.III,114). The prosecutor further argued that Mr. Diep checked the grinder out sometime between July 20th and August 4th, and it was gone the next morning. (R.III,114). The prosecutor instructed the jurors to "ask yourself when this receipt appeared." (R.III,115). In summary, the prosecutor again opined that "the defendant took the grinder when he was working that night." (R.III,117).

The trial court instructed the jury, inter alia, that "proof of possession of property recently stolen unless satisfactorily explained gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen." (R.III,118-119). The jury returned a verdict of guilty as charged. (R.II,127).

SUMMARY OF THE ARGUMENT

ISSUE I -- The state failed to prove the essential element that Petitioner "knew" that the grinder was stolen when he pawned it. The state argued that Petitioner either (1) "knew" the grinder was stolen because he stole it; or (2) should have known the grinder was stolen because of its appearance. The state's evidence, however, showed that the grinder was stolen July 20 or 21st, approximately 14 days *before* Petitioner began working at Eastern Shipbuilding.(R.III,25,38,45,47,50). Petitioner, therefore, could not have stolen the grinder. The state also failed to prove that a reasonable person should have known that the grinder was stolen on the basis of its appearance. The state's failure of proof lies in the fact that the manufacturer's serial numbers had not been removed and the price paid by petitioner was not unusually low given that the state's witness, the pawn shop employee, testified that the grinder was in "obviously used" condition. (R.III,26,30,57,59). Moreover, the state conceded in its answer brief below, that the scratch marks on the grinder were "either easy to miss or were not such that they would alert an ordinary person to the fact that the grinder was stolen." (AB,38). Under these facts, the state failed to prove that Petitioner "knew" that the grinder was stolen when he sold it.

Petitioner's conviction on legally insufficient evidence also violates his federal constitutional right to due process of law in

that the state failed to prove every element of the offense beyond a reasonable doubt. Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir. 1982)(possession of stolen goods a few days after burglary not so recent as to exclude possibility of innocent purchase even if court rejects defendant's unrebutted explanation of acquisition, noting no attempt to conceal goods or identity at pawn shop; evidence therefore legally insufficient)(citing Jackson v. Virginia, 443 U.S. 307 (1979)).

ISSUE II -- In his defense, petitioner testified that he purchased the grinder from someone outside of the Eastern plant, that he had no reason to believe that the grinder was stolen, and that there was nothing about the grinder's appearance to indicate that it was stolen. Petitioner's testimony was reasonable and unrebutted and therefore must be accepted as true. Evans v. State, 643 So. 2d 1204, 1206 (Fla. 1st DCA 1994), rev. denied, 652 So. 2d 818 (Fla. 1995)(citing Dudley v. State, 511 So. 2d 1052 (Fla. 3d DCA 1987)). Moreover, even if Petitioner's explanation is rejected as not credible, the state's evidence was still legally insufficient to sustain petitioner's conviction. Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir. 1982)(citing Jackson v. Virginia, 443 U.S. 307 (1979)).

ISSUE III -- The Florida standard jury instruction regarding the inference to be drawn from unexplained possession of recently stolen property should be abandoned as it constitutes an

impermissible comment on the weight of the evidence in the same manner as the "flight" instruction abandoned in Fenelon v. State, 594 So. 2d 292 (Fla. 1992).

ISSUE IV -- The Florida standard jury instruction regarding the inference to be drawn from unexplained possession of recently stolen property constitutes a constitutionally impermissible mandatory rebuttable presumption as to an essential element of the offense, i.e., "knowing" possession of stolen property, because it *requires* the jury to presume that a defendant knows or should know property was stolen if found in possession of recently stolen property, and shifts the burden to the defendant to establish otherwise. See Sandstrom v. Montana, 442 U.S. 510, 517 (1979); Francis v. Franklin, 471 U.S. 307, 314 n.2 (1985). This appears to be a question of first impression. The error is fundamental. Gunn v. State, 78 Fla. 599, 83 So. 511 (1919).

ISSUE V -- The prosecutor argued the case on two impermissible grounds to which defense counsel failed to object. First, the prosecutor argued facts not in evidence. Specifically, the prosecutor argued that Petitioner knew the grinder was stolen because he stole it. This argument was impermissible because the uncontroverted evidence showed that Petitioner could not have stolen the grinder as he did not begin working at the plant until two weeks after the grinder was stolen.

Second, the prosecutor impermissibly commented on Petitioner's

right to remain silent. This occurred when the prosecutor asked Petitioner to state when he first produced the receipt in his defense, implying that his failure to speak up immediately upon his arrest supplied an indicia of guilt. This improper comment on Petitioner's right to remain silent continued in closing argument where the prosecutor twice accused Petitioner of fabricating the receipt. (R.III,113). These comments, taken together, so deprived Petitioner of a fair trial that they should be regarded as fundamental error cognizable for the first time on appeal.

ISSUE VI -- By granting the state's motion to substitute photos for the grinder, the trial court prevented the appellate courts from having a complete record for review. This was a critical error in the present case because this reviewing court is on equal footing with the jury (since this is not a question of credibility of a witness), and could examine the grinder to determine if its appearance raises a reasonable suspicion that the grinder was stolen. Thus, this reviewing court should consider the question of the sufficiency of the evidence *de novo*.

Petitioner recognizes that his trial counsel did not object to the exclusion of the grinder from the record on appeal. This matter, however, is so critical to Petitioner's fundamental right to adequate appellate review and due process of law, that it should not be dismissed under the doctrine of waiver or "invited error." See generally, Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100

L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); State v. Gurican, 576 So. 2d 709, 711, n.2 (Fla. 1991).

ARGUMENT

ISSUE I
WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE?

STANDARD OF REVIEW

Courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. In circumstantial evidences cases, "a judgment of acquittal is appropriate if the state fails to exclude every reasonable hypothesis except that of guilt." Williams v. State, 711 So. 2d 41 (Fla. 1st DCA 1998)(quoting Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995)). Therefore, at the outset, "the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences." Williams v. State, 711 So. 2d 41 (Fla. 1st DCA 1998)(quoting Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995)). After the judge determines, as a matter of law, whether such competent evidence exists, the "question of whether the evidence is

[in fact] inconsistent with any other reasonable inference is a question of fact for the jury." Williams v. State, 711 So. 2d 41 (Fla. 1st DCA 1998)(citing Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997)).

MERITS

During the presentation of the state's case-in-chief, several key facts were uncontroverted. First, Petitioner did not begin working at Eastern Shipbuilding until August 3, 1998. (R.II,50). Second, Diep Nguyen found the stolen grinder in a pawn shop on September 21, 1998. (R.II,46). Diep Nguyen stated that the grinder had been stolen "at least" two months prior to September 21, 1998. (R.II,47). The grinder was stolen, therefore, no later than July 21, 1998. This is consistent with the testimony of James Ward who said the grinder was placed in service on July 20, 1998. (R.II,25). Next, the pawn shop operator, Brie Hanson, testified that she examined the grinder and determined that there was nothing about the grinder that would suggest that it was stolen. (R.II,25). Hanson said the grinder was obviously used. (R.II,59). Hanson's boss examined the grinder and thought that $75.00 was a fair price for a used grinder. (R.II,58-59). The shipbuilding company paid $158.00 for the grinder when purchased brand new. (R.II,27).

Given these key facts, the state failed to produce competent evidence to rebut the reasonable hypothesis that Petitioner purchased the grinder without the requisite knowledge that it was

stolen, and then sold it to the pawn shop some time later. Under these facts, Petitioner could have purchased the grinder approximately sixteen (16) days before he pawned it on August 5, 1998.[1] Specifically, Hanson's testimony that Petitioner told her that he had owned the grinder for "awhile," does not conflict with this reasonable hypothesis of innocence, since the term "awhile" is ambiguous.

In addition, the defacement of the inscriptions does not conflict with Petitioner's hypothesis of innocence because even the state's witness, Hanson, said she examined the grinder and could find nothing to suggest that the grinder was stolen. The "scraping" type of damage could be interpreted, by an innocent purchaser, to have occurred in the ordinary course of usage. Moreover, the manufacturer's serial number was not removed. This would lead an innocent purchaser to reject any thought of suspicion.

Further support for Petitioner's reasonable hypothesis of innocence is found in the following facts: (1) the grinder was not pawned for an unusually low price; (2) Petitioner did not hesitate to produce his identification and to submit his fingerprint during the course of the transaction. See Valdez v. State, 492 So. 2d 750

[1] Alternatively, someone other than Petitioner could have stolen the grinder on or about July 20-21, 1998, and sold it to him around August 3, 1998, as stated by Petitioner in his defense. (R.II,73).

(Fla. 3d DCA 1986)(production of personal identification when pawning stolen items significant factor supporting claim of lack of guilty knowledge that items were stolen); (3) Eastern Shipbuilding had about 325 employees (and numerous subcontractors' employees), any one of which could have stolen the grinder; (4) Eastern Shipbuilding had a problem with "employee integrity", as stated by Mr. Ward.

Under the evidence presented, that state failed to produce competent evidence to rebut Petitioner's claim that he had no knowledge that the grinder was stolen when he purchased it and subsequently pawned it for a reasonable price. The trial court, therefore, erred in denying Petitioner's motion for judgment for acquittal made at the end of the state's case.

Petitioner's conviction on legally insufficient evidence also violates his federal constitutional right to due process of law in that the state failed to prove every element of the offense beyond a reasonable doubt. Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir. 1982)(citing Jackson v. Virginia, 443 U.S. 307 (1979)).

ISSUE II
WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF ALL THE EVIDENCE?

In his defense, Petitioner testified that he purchased the grinder from someone outside of the Eastern plant, that he had no reason to believe that the grinder was stolen, and that there was

nothing about the grinder's appearance to indicate that it was stolen. Specifically, Petitioner noted that the manufacturer's serial number was visible and undisturbed. Petitioner produced a receipt provided to him by the seller, indicating the seller's name, the purchase price, and the serial number of the grinder. (SR.IV,84).

Petitioner's defense was reasonable, unrebutted and unimpeached, and therefore must be accepted as true. Both a trial court and jury are bound to accept a defendant's account of events where it is "reasonable, unrebutted and impeached." Evans v. State, 643 So. 2d 1204, 1206 (Fla. 1st DCA 1994), rev. denied, 652 So. 2d 818 (Fla. 1995)(citing Dudley v. State, 511 So. 2d 1052 (Fla. 3d DCA 1987)).

> It is well settled in Florida that a defendant's otherwise reasonable, unrebutted, and unimpeached testimony in a criminal case must be accepted by a trier of fact and -- if such testimony is entirely exonerating, the trial court is obligated to enter a judgment of acquittal for the defendant on the crime charged. On the other hand, where the defendant's exonerating testimony (a) is not reasonable on its face, or (b) is contradicted by other evidence in the case, or (c) is otherwise impeached, the trier of fact is privileged to reject such testimony and convict the defendant of the crime charged, providing, of course, there is otherwise sufficient evidence of guilt.

Dudley v. State, 511 So. 2d 1052, 1057-1058 (Fla. 3d DCA 1977) (e.s.). The only challenge to Petitioner's credibility was the prosecutor's observance of his prior criminal history and speculative argument that he fabricated the receipt some six or

seven months after pawning the grinder. While prior criminal history may generally be relied upon to challenge a defendant's credibility, there is a major flaw in the proof offered and argument advanced by the state. *If Petitioner fabricated the receipt six or seven months after selling the grinder, it is highly unlikely that he would have been able to remember the manufacturer's serial number so as to include it on the receipt.* The fact that the receipt contains the serial number of the grinder is strong corroboration of Petitioner's defense. The mere aspersion of Petitioner's character is therefore insufficient to rebut the defense which must be regarded as reasonable, unrebutted and unimpeached.

Since the state failed to prove that the grinder was stolen on or after August 3, when Petitioner had access to Eastern Shipbuilding, the only circumstantial evidence that Petitioner may have "known" that the grinder was stolen was his subsequent possession of it. The most comprehensive and cogent analysis of the probative value of naked possession of stolen property appears in Jackson v. State, 736 So. 2d 77 (Fla. 4th DCA 1999). Jackson explains the application of two lines of decisional authority apparently irreconcilable "at first blush." Jackson, 736 So. 2d at 81. The first line of cases, McDonald v. State, 56 Fla. 74, 47 So. 485, 486 (1908), and its progeny, suggests that the mere possession of recently stolen property, standing alone, is sufficient to

create a jury question as to the guilty knowledge of the defendant in a prosecution for larceny. A different rule evolved, however, in circumstantial cases involving the offense of receiving stolen goods. In State v. Graham, 238 So.2d 618, 621 (Fla. 1970), the supreme court established that mere possession of recently stolen property was legally insufficient to support a conviction for receiving stolen property without additional corroborating evidence such as unusual manner of acquisition, attempts at concealment, contradictory statements, the fact that the goods were being sold at less than their value, possession of other stolen property, or other incriminating evidence and circumstances. Jackson, 736 So. 2d at 82, quoting State v. Graham, 238 So. 2d at 621. In 1977, the legislature broadened the definition of "theft" to include, inter alia, receiving stolen property. Jackson, 736 So. 2d at 82. The contemporaneous enactment of section 812.022(2), Florida Statutes, thus engendered the question whether the legislature intended to codify the rule of McDonald or the rule of Graham under the new theft statute. Jackson, applying principles of statutory construction, correctly concluded that the legislature intended section 821.022(2), to codify the rule articulated in Graham, since the new theft statute encompassed conduct previously known as "receiving stolen property." Jackson, 736 So. 2d at 83.

In Jackson, the conviction for grand theft auto was based solely on Jackson's possession of the automobile. Jackson's

explanation that he innocently purchased the automobile was "arguably reasonable" and there was no evidence adduced by the state to counter the hypothesis that the VIN numbers could have been altered within 20 hours of the theft. Jackson was in possession of the stolen auto four days after the theft, a period deemed not to be a "very short time" after the theft, so as to suggest inadequate opportunity for transfer of possession. Jackson, 736 So. 2d at 83. Notably, the alterations to the VIN numbers included partial riveting to the dashboard, removal of the VIN numbers from the driver's side front door and the inside of the trunk lid. These alterations in the VIN numbers were deemed insufficient to place a reasonable person on notice of the probable stolen nature of the vehicle. Jackson, 736 So. 2d at 83, citing Periu v. State, 490 So. 2d 1327, 1329 (Fla. 3d DCA 1986). The evidence against Jackson was therefore deemed insufficient, as a matter of law, to support his conviction for auto theft.

The present case is comparable to Jackson. There is no proof, or even a reasonable inference, that Petitioner stole the grinder. The Eastern employee who used the grinder said it was stolen "at least" two months prior to its recovery on September 21. The Eastern foreman stated that the grinder was "placed in service" on July 20. Although there was no precise evidence as to the exact date of the theft, the only time frame suggested by the evidence was July 20 or 21. It remains, therefore, that the evidence of

Petitioner's guilty knowledge would have to be something about the appearance of the grinder which would place him on notice of the probable stolen nature of the grinder. In this vein, the state offered the defacement of the engraving "E.S.G." and inventory number "155." There is no indication, however, that this defacement was so conspicuous or unusual so as to place a reasonable purchaser on notice that the grinder was probably stolen. Even the pawn shop operator, a witness for the state, testified that she examined the grinder and did not find anything unusual to suggest that it was stolen. Moreover, the manufacturer's serial number was intact, a strong indication that the grinder was not stolen.

Under Petitioner's theory of defense, the Eastern engravings could have been removed by the person who sold the grinder to him. The case of R.D.S. v. State, 446 So. 2d 1181 (Fla. 3d DCA 1984), is instructive. R.D.S. was adjudicated delinquent on the charge of grand theft after being found in possession of a stolen moped from which the identification number had been removed. R.D.S. claimed that he purchased the moped from a boy named Rodney Middleton for $35. The state argued that the naked possession of the stolen property was supported by the additional evidence of the removal of the identification number. The court held, however, that the evidence supported an equal inference that the identification number had been removed from the moped by the person who sold it to

R.D.S. The adjudication, therefore, was reversed.

Petitioner's position in the present case is even stronger than that of the juvenile R.D.S. In the present case, the state presented no evidence to refute the claim that Petitioner purchased the grinder from someone else. Petitioner's claim of innocent purchase is supported by the fact that the manufacturer's serial number remained intact. The engravings "E.S.G." and "155" could have been removed by the thief. The "scratch marks", therefore, had no meaning to Petitioner who had no idea what was there before. The scratch marks suggested, if anything, only innocent and inconsequential damage. Clearly, the grinder had been used. First, it was altered by Eastern, which modified it by installing a safety guard. Some damage could have occurred during that installation, and the grinder received one day of heavy industrial use by an Eastern employee. Second, the thief could have gotten considerable use out of the grinder prior to selling it to Petitioner. Since the evidence suggested that the grinder was stolen on July 20 or 21, the thief could have personally used the grinder for almost two weeks before selling it to Petitioner on August 3. Third, since Petitioner sold the grinder so quickly after purchase, it was probably in substantially the same condition when he sold it as when he purchased it. The grinder's appearance at that time was described as "obviously used." (R.III,59). In short, there was nothing in the circumstances beyond Petitioner's

naked possession of the grinder to suggest that he "knew" it was stolen. Accordingly, the evidence was legally insufficient to convict him of dealing in stolen property. Jackson v. State; R.D.S. v. State; see also, Lampley v. State, 214 So. 2d 515 (Fla. 3d DCA 1968)(where date of theft not specifically proven, inference of guilt based upon possession of recently stolen property not applicable; evidence legally insufficient).

Petitioner's conviction on legally insufficient evidence also violates his federal constitutional right to due process of law in that the state failed to prove every element of the offense beyond a reasonable doubt. Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir. 1982)(Jackson v. Virginia, 443 U.S. 307 (1979)).

ISSUE III

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN INSTRUCTING THE JURY ON THE INFERENCE ARISING FROM UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY BECAUSE THE INSTRUCTION CONSTITUTES AN IMPERMISSIBLE COMMENT ON THE EVIDENCE?

STANDARD OF REVIEW

The question whether a Florida standard jury instruction invades the province of the jury or constitutes an impermissible comment on the evidence is purely a question of law and, like all other questions of law, is reviewed *de novo*.

MERITS

The trial court instructed the jury, over objection, that unexplained possession of recently stolen property gives rise to an inference that the person in possession knew the property to be stolen. This instruction invades the province of the jury and constitutes an impermissible comment on the evidence and the inferences to be drawn from the evidence. Just as the "flight" instruction was eliminated in Fenelon v. State, 594 So. 2d 292 (Fla. 1992), the instruction regarding the inference to be drawn from possession of recently stolen property should be eliminated.

Briefly stated, the former "flight" instruction stated that when a suspected person attempts to escape or flee, such is a circumstance from which guilt may be inferred. In Fenelon, the supreme court noted that the long standing "flight" instruction provides an exception to the rule that "the judge should not invade

the province of the jury by commenting on the evidence or indicating what inferences may be drawn from it." Fenelon, 594 So. 2d at 293.

> Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character, or credibility of any evidence.

Fenelon, 594 So. 2d at 293, citing Whitfield v. State, 452 So. 2d 548, 549 (Fla. 1984). In reconsidering the flight instruction, this Court held that the trial judge should not be permitted to comment on evidence of flight, just as it is not permitted to comment on any other evidence adduced at trial. Fenelon, 594 So. 2d at 293.

In addition, this Court noted the inherent difficulty in determining when flight actually indicates consciousness of guilt. The Court also noted the widespread confusion in the proper application of the instruction as reflected by the many and varied circumstances under which it has been given, i.e., "lack of a meaningful standard for assessing what type of evidence merits the instruction." Fenelon, 594 So. 2d at 294-295.

The present case is analogous to Fenelon. If the possession of recently stolen property raises any harmful inferences, it is for the jury to decide what they are. The trial court should not be permitted to comment on the weight or the character of the evidence adduced at trial. Moreover, the jury does not need such "assistance" from the court. Jurors must be presumed to have some

degree of common sense.

In the present case, the contested instruction is even more harmful than the flight instruction disapproved in Fenelon. The flight instruction, at least, was couched in permissive terms, i.e., flight is a circumstance from which guilt "may" be inferred. The present instruction, in contrast, is an even more powerful comment on the nature and character of the evidence since it is mandatory in nature. That is, the trial court instructed the jury that once possession of recently stolen property was proven, such fact "gives rise" to an inference that the accused knew the property was stolen. The language "gives rise" is mandatory, and is a powerful admonition from the court that the jury must find that the defendant knew the property was stolen. Thus, the contested instruction deprived the jury of its traditional discretion in fact finding. No comment on the evidence could be more improper.

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

Section 90.106, Fla. Stat. (2000).

The proscription against judicial comment on the evidence is designed to ensure a defendant's due process right to a fair and impartial tribunal. See e.g., Hamilton v. State, 109 So. 2d 422, 444 (Fla. 3d DCA 1959).

> During a jury trial, the judge occupies a dominant position. Any remarks and comments that the judge makes

> are listened to closely by the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel, section 90.106 recognizes that a judge is prohibited from commenting on the weight of the evidence, or the credibility of the witnesses, and from summing up the evidence to the jury. If such comment and summing up were permitted, impartiality of the trial would be destroyed.

Ehrhardt, Florida Evidence, section 106.1, (2001 ed.)(citing Hamilton v. State, 109 So. 2d 422, 424 (Fla. 3d DCA 1959)(footnotes omitted).

In accordance with the well established proscription against judicial comment on the weight of the evidence this Court, in Whitfield v. State, 452 So. 2d 548, 549 (Fla. 1984), held it error for the trial court to instruct the jury that the defendant's refusal to submit to fingerprinting was a circumstance from which it could infer consciousness of guilt. Similarly, this Court disapproved a formerly acceptable jury instruction regarding the inference arising from inconsistent exculpatory statements. In Johnson v. State, 465 So. 2d 499 (Fla.), cert. denied, 474 U.S. 865 (1985), this Court approved of the following jury instruction:

> Inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent.

Id. at 504. Subsequently, however, the Court on its own motion reversed its position and determined that such instruction constituted an impermissible comment on the evidence, and should no longer be given. See In re Instructions in Criminal Cases, 652 So.

2d 814 (Fla. 1995).

An analogous and persuasive case is Barfield v. State, 613 So. 2d 507 (Fla. 1st DCA 1993). In Barfield v. State, the First District Court of Appeal reversed a conviction for petit theft on the ground that the standard jury instruction regarding the inference arising from the sale of recently stolen property at a price substantially below fair market value constituted an impermissible comment on the evidence like the flight instruction in Fenelon.[2]

In another analogous context, it was held that the trial court's special jury instruction -- that lack of affirmative medical treatment was not an intervening cause relieving defendant of criminal liability -- was an improper comment on the evidence in a prosecution for unlawful blood alcohol manslaughter where pneumonia was a causative factor in the victim's death. Fecske v. State, 757 So. 2d 548 (Fla. 4th DCA 2000). This was true even though the special instruction given was an accurate statement of the law because the instruction amounted essentially to a directed verdict as to the element of causation. Id. at 549.

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[2] The specific jury instruction at issue stated:

> Proof 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 a person buying or selling the property knew or should have known that the property had been stolen.

While the recent authorities cited above are sufficiently analogous and persuasive, the controlling decisional authorities are of a more esteemed vintage. In Gunn v. State, 78 Fla. 599, 83 So. 511 (1919), and Long v. State, 44 Fla. 134, 32 So. 870 (1902), this Court set forth two rules of law applicable to the present case.

> Where the taking is open, in the presence of others, not amounting to robbery, and there is no concealment, or, in short, where the testimony as to the taking, standing alone, raises a presumption of an innocent taking, and there is nothing in it from which a jury may legitimately infer a felonious purpose, then a verdict against the accused cannot be sustained, and it would be the duty of the court to set it aside.

Long v. State, 44 Fla. 134, 140, 32 So. 870, 872 (1902).

> Where there is a conflict in the evidence as to the intent with which the property was taken, or it is of such a character as to legitimately authorize an inference of a felonious purpose, then the matter should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony.

Gunn v. State, 78 Fla. 599, 83 So. 511 (1919).

Petitioner contends that the first rule of law set forth in Long v. State applies because there was no affirmative evidence presented to refute his claim that he purchased the grinder legitimately. Petitioner's position is, of course, also pertinent to his claim that the trial court erred in denying his motion for judgment of acquittal. At the very least, assuming there existed a conflict in the evidence on the question of felonious intent then, under the latter rule set forth above, the trial court

impermissibly commented on the weight of the evidence by instructing the jury on the inference arising from possession of recently stolen property. Gunn v. State; Long v. State. These authorities are still vital, and were recently cited in an article published in the Florida Bar Journal.

> This presumption is a rule of law only; neither party is entitled to a jury instruction regarding any presumptions arising from the openness - or lack thereof - of the taking.

Richard J. Sanders, Claims of Right in Theft and Robbery Prosecutions, Nov. Fla. B.J. 60, n.7 (1999)(citing Long v. State, 32 So. 870 (1902)).

No case from this Court has overruled or receded from the rule expressed in Long v. State and Gunn v. State, that instructing the jury on the inference arising from possession of recently stolen property constitutes an impermissible comment on the weight of the evidence. The instruction was revisited in Edwards v. State, 381 So. 2d 696 (Fla. 1980), and State v. Young, 217 So. 2d 567 (Fla. 1968). These cases, however, raised and resolved different issues. Both Edwards and State v. Young held that the inference arising from unexplained possession of recently stolen property does not constitute an unconstitutional comment on the defendant's right to remain silent. Edwards also found that the inference did not violate due process because the permissive inference was "rationally related" to the underlying factual finding of possession of property recently stolen. "It is axiomatic that no

decision is authority on any question not raised and considered." Goldman v. State Farm General Ins. Co., 660 So. 2d 300, 304 (Fla. 4th DCA 1995)(quoting State ex rel. Helseth v. Du Bose, 99 Fla. 812, 128 So. 4, 6 (Fla 1930); State ex rel. Christian v. Austin, 302 So. 2d 811, 818 (Fla. 1st DCA 1974), quashed in part, cause remanded, 310 So. 2d 289 (Fla. 1975); Mattis, Stare Decisis Among and Within Florida's District Court of Appeal, 18 U. Miami L. Rev. 148 (1990)). Edwards and State v. Young, therefore, have no application in the present case and do not recede from Long v. State and Gunn v. State.

Other Jurisdictions

Other jurisdictions have considered the same issue raised by appellant and concluded that a jury instruction regarding the inference to be drawn from possession of recently stolen property constitutes an impermissible comment on the weight of the evidence. In Lott v. State, 268 S.W. 891 (Ark. 1954), the Supreme Court of Arkansas considered the following instruction:

> [In a prosecution for receiving stolen goods], proof of receiving the stolen goods or being in possession thereof knowing them to be stolen is an essential element of the offense. *It is not sufficient, Gentlemen, to merely show that the goods were stolen, and that the defendants were in possession thereof, but the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction of receiving stolen property.*

Id. at 891-892 (emphasis in original). Relying on an established line of state decisional authority, the court held that it was an

invasion of the province of the jury to instruct them, as a matter of law, that the unexplained possession of recently stolen property raised a "presumption" of guilt. Id. at 892, citing Thomas v. State, 107 S.W. 390 (Ark. 1908); see also, Pitts v. State, 509 S.W.2d 809 (Ark. 1974)(jury instruction based upon permissive statutory inference – that possession of more than 300 milligrams of morphine "permitted" inference of possession with intent to deliver – constituted impermissible comment on weight of the evidence); French v. State, 506 S.W.2d 820 (Ark. 1974)(jury instruction based upon statute providing that possession of more than one ounce of marijuana shall create a rebuttable presumption of possession with intent to deliver constituted impermissible comment on evidence); Ethridge v. State, 654 S.W.2d 595 (Ark. Ct. App. 1983)(jury instruction based upon statutory presumptions of intoxication arising from blood alcohol levels constituted improper comment on evidence).

In Texas, it is error to instruct the jury that possession of recently stolen property may give rise to a presumption of guilt. In Roberts v. State, 672 S.W.2d 570 (Tex. Ct. App. 1984), the court held the following jury instruction constituted an impermissible comment on the weight of the evidence:

> A presumption of the defendant's guilt of burglary sufficient to sustain a conviction may arise from a defendant's possession of property stolen or taken in a recent burglary. However, in the prosecution for burglary, to warrant such an inference or presumption of guilt from the circumstance of possession alone, such

> possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of right to the property by a defendant.

Id. at 577-578; see also, Moreno v. State, 755 S.W.2d 866, 869 n.3, (Tex. Crim. App. 1988)(en banc)(noting abandonment of jury instructions regarding presumption of theft intent from nighttime entry and guilt of theft from recent unexplained possession of stolen property as impermissible comments on weight of evidence); Browning v. State, 720 S.W.2d 504 (Tex. Crim. App. 1986)(en banc) (jury instruction regarding presumption of intent to commit theft arising from non-consensual nighttime entry constituted impermissible comment on weight of evidence); Hardesty v. State, 656 S.W.2d 73 (Tex. Crim. App. 1983)(presumption of guilt of theft arising from unexplained possession of recently stolen property constituted impermissible comment on weight of evidence); Mercado v. State, 718 S.W.2d 291 (Tex. Crim. App. 1986)(instructing jury that intent to kill may be inferred from use of deadly weapon constituted impermissible comment on weight of evidence).[3]

In yet another analogous context, the courts of numerous jurisdictions have held that the trial court should not instruct the jury that it could infer from the defendant's failure to call a witness - the so-called "missing witness" instruction – that the

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[3] See also State v. Stone, 268 S.E.2d 50, 55 (W.Va. Ct. App. 1980)(disapproving instruction regarding inference to be drawn from possession of recently stolen property), overruled on other grounds, State v. Julius, 408 S.E.2d 1, 7 (W.Va. Ct. App. 1991).

witness' testimony would have been harmful to the defendant. See State v. Tahair, No. 2000-076, 2001 WL 204014 (Vt. Mar. 2, 2001)(collected cases). A number of reasons are ascribed to the renunciation of the missing witness rule including, most notably, that such a jury instruction constitutes an impermissible comment on the weight of the evidence. Id. at 10 (citations omitted).

Petitioner acknowledges that his argument -- that the jury instruction regarding possession of property recently stolen constitutes an impermissible comment on the evidence -- was rejected in Lynn v. State, 395 So. 2d 621 (Fla. 1st DCA 1981), and also apparently rejected in Washburn v. State, 683 So. 2d 533 (Fla. 4th DCA 1996). Lynn v. State, however, predates this Court's ruling in Fenelon, which provides compelling authority for abandonment of the jury instruction regarding the inference to be drawn from unexplained possession of recently stolen property. See Washburn v. State, 683 So. 2d 533 (Fla. 4th DCA 1996)(Pariente, J., dissenting); Lynn v. State, 395 So. 2d 621, 624 (Fla. 1st DCA 1981) (Ervin, J., dissenting); cf., Anderson v. State, 703 So. 2d 1105 (Fla. 5th DCA 1997)(instruction not an improper comment on evidence where defendant failed to advance a credible explanation for possession of stolen "Airstream travel trailer").[4]

For the reasons expressed, Petitioner urges the Court to find

[4] The same issue was raised in Currington v. State, 711 So. 2d 218 (Fla. 5th DCA 1998), but deemed not preserved for appellate review and not a matter of fundamental error.

that the trial court erred, as a matter of law, in instructing the jury that possession of recently stolen property "gives rise" to an inference that the person in possession knew the property to be stolen.

Difficulty of Application

Another aspect of the analysis, as addressed in Fenelon, is the difficulty in application of the disputed instruction. Even though there may be little difficulty in determining the fact of the defendant's possession of the stolen property (as in the present case), difficulty is frequently encountered in determining whether the defendant's possession of the stolen property is "recent" to the time of the theft.

> Whether or not stolen property found in possession of a person will be regarded as "recently stolen property"... may depend on the nature of the property, the facility of its handling and transfer and other factors.... For example, the doctrine as to possession of recently stolen property can be invoked when a longer period between the time of its theft and its discovery is involved where the item is an automobile which presents difficulty and legal complications for its sale and transfer, than would be applied to an item such as a "two dollar pistol", which can be passed from hand to hand almost as readily as a pack of cigarettes.

Robinson v. State, 257 So. 2d 300 (Fla. 3d DCA 1972); see also, Annotation, *What Constitutes "Recently" Stolen Property Within Rule Inferring Guilt From Unexplained Possession of Such Property*, 89 A.L.R. 3d 1202, 1209 (1979). Because a wide range of factors play a role in the determination of what constitutes "recent" possession, the application of the contested jury instruction

invites inconsistent, unfair and arbitrary application.

For example, possession of a gun two and one-half weeks after it was stolen was not "recent." Morgan v. State, 427 N.E. 2d 1131, 1133 (Ind. Ct. App. 1981). On the other hand, possession of a gun 15 days after it was stolen was "recent." State v. Curiel, 634 P.2d 988 (Ariz. Ct. App. 1981).

Possession and pawning of four office calculators and dictaphone recorder less than one week after a burglary was "recent." Morris v. State, 303 S.E. 2d 492 (Ga. Ct. App. 1983). On the other hand, possession and pawning of a camera within a few days of a burglary was not "recent" so as to contradict the defendant's explanation, i.e., innocent purchase. Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir. 1982).

Possession of jewelry (cheerleader pin), stereo and camera six weeks after burglary was "recent." People v. Riley, 424 N.E. 2d 1377 (Ill. App. Ct. 1981). On the other hand, possession of jewelry 19 days after burglary was not "recent." People v. Sanders, 555 N.E. 2d 812 (Ill. App. Ct. 1990).

Possession of automobile two days after theft was not "recent." Gibson v. State, 533 N.E. 2d 187 (Ind. Ct. App. 1989). On the other hand, possession of a camcorder 4 ½ months after theft was recent, Brown v. State, 814 S.W. 2d (Ark. Ct. App. 1991).

Possession of a stolen and forged check (unique item) where date of theft not established with specificity (although apparently

within one month of possession), not "recent." Lampley v. State, 214 So. 2d 515 (Fla. 3rd DCA 1968). On the other hand possession of unique items, i.e., camcorder, antique watch and gym bag ten months after theft was "recent." Wynn v. State, 699 A.2d 512 (Md. Ct. Spec. App. 1997), reversed on other grounds, 718 A.2d 588 (Md. 1998). Petitioner submits that the aforementioned cases, at the very least, arguably demonstrate the difficulty and inconsistency inherent in the application of a jury instruction regarding inferences arising from possession of "recently" stolen property and militate in favor of abandoning the instruction.

Under Florida law, there is a specific problem which arises in determining the proper application of the contested instruction. A "claim of right" has been historically recognized as a defense to the charge of larceny, theft or robbery. See, Richard J. Sanders, *Claims of Right in Theft and Robbery Prosecutions*, 73-Nov. Fla. B.J. 60, n.3 (1999)(citing Rodriguez v. State, 396 So. 2d 798, 799 (Fla. 3d DCA 1981)).

> [W]hen a claim of right is raised, it is improper to instruct the jury regarding any presumptions arising from "possession of recently stolen property" (see Fla. Std. Jury Instr. (Crim.), p. 136 and 148) because "[that] presumption applies in a different type of case, that is, where the property is indisputably stolen and the question is who stole it." Jones v. State, 495 So. 2d 856, 857 (Fla. 4th DCA 1986); Gunn v. State, 83 So. 2d 511 (Fla. 1919).

Richard J. Sanders, *Claims of Right in Theft and Robbery Prosecutions*, 73-Nov. Fla. B.J. 60, n.7 (1999).

The claim of right defense is not limited to those instances where an accused admits to taking property directly from the alleged victim. For example, where a motel employee failed to remits proceeds of room rentals to the alleged victim owner, the accused employee was entitled to raise the claim of right defense. Rodriguez v. State, 396 So. 2d 798 (Fla. 3d DCA 1981). A strong corollary of the "claim of right" defense is the previously noted rule from Long v. State, stating that where the taking is open with no attempt at concealment, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent. Thus, as in Long v. State and Gunn v. State, the "taking" need not be from the person or the premises of the alleged victim. Nor must the taking be openly accomplished in order for the defense to be asserted. Richard J. Sanders, *Claims of Right in Theft and Robbery Prosecutions*, 73-Nov. Fla. B.J. 60, n.7 (1999)(citing Rodriguez v. State, 396 So. 2d 798 (Fla. 3d DCA 1981)). In fact, the claim of right defense may apply even if the disputed property is taken from someone other than the alleged victim, as the motel employees in Rodriguez v. State appropriated the contested funds from third parties, the motel customers. It follows that in the present case where petitioner testified that he innocently purchased the grinder from a third party (not the alleged victim) and obtained a receipt for his purchase, and where the state's evidence was not inconsistent with petitioner's explanation of

acquisition, petitioner's defense is a species of the "claim of right" defense. Accordingly, the jury instruction regarding possession of recently stolen property should not apply. Long; Gunn; Rodriguez.

Alternatively, even if petitioner's defense is not deemed a claim of right defense, his defense is so closely related to a "claim of right" as to demonstrate the difficulty in the fair use and application of the challenged instruction. For example, if petitioner had testified that he purchased the grinder directly from Easter Shipbuilding, the case would have boiled down to a swearing match between petitioner and the company foreman. Petitioner clearly would have asserted a claim of right defense, and the contested instruction should not have been given. Consistent with this proposition is Jones v. State, 495 So. 2d 856 (Fla. 4th DCA 1986), wherein the defendant claimed to have legitimately purchased an automobile from the dealer, trading in his truck in partial payment. The dealer, however, claimed that the automobile was to be taken only for a test drive. In light of the dispute as to the defendant's state of mind, i.e., felonious intent, and the question whether the vehicle was, in fact, stolen, the jury instruction regarding possession of recently stolen property should not have been given. Id. The only distinction between the present case and Jones v. State is that petitioner claimed to have purchased in good faith the grinder not from the

alleged victim, Eastern Shipbuilding, but from an intervening party. This distinction in circumstances is far too insignificant to be determinative of the propriety of giving the standard jury instruction regarding possession of recently stolen property. This is particularly true in the present case, where the state's evidence failed to exclude the possibility that a third party may have stolen the grinder, and there was nothing about the appearance of the grinder to place a reasonable purchaser on notice of its probable stolen nature. The manufacturer's serial numbers had not been altered. See Cosby v. Jones, 1373, 1382 (11th Cir. 1982).

The difficulty in determining the proper application of the instruction militates in favor of its abandonment, altogether, or at least in those cases where the defendant makes the claim of innocent purchase, either through the presentation of testimony or evidence, or merely through his theory of defense.

ISSUE IV

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSTRUCTING THE JURY THAT POSSESSION OF RECENTLY STOLEN PROPERTY GIVES RISE TO AN INFERENCE THAT THE PERSON IN POSSESSION KNEW THE PROPERTY WAS STOLEN?

Section 924.051(3), Florida Statutes, permits the raising of issues involving fundamental error for the first time on appeal. Instructing the jury on the inference arising from possession of recently stolen property constitutes fundamental error cognizable for the first time on appeal. Gunn v. State, 83 So. 511, 512 (Fla. 1919); but see Currington v. State, 711 So. 2d 218, 219 (Fla. 5th

DCA 1998). The present issue also involves a matter of fundamental error since the giving of an erroneous or misleading jury instruction pertaining to a disputed element of the offense constitutes fundamental error. State v. Delva, 575 So. 2d 643 (Fla. 1991); Stewart v. State, 420 So. 2d 862 (Fla. 1982). In the present case, the instruction regarding possession of recently stolen property bears directly upon the critical and disputed element at trial, i.e., "knowing" possession of stolen property. The matter, therefore, involves a question of fundamental error.

The trial judge gave the standard jury instruction which states:

> Proof of possession of recently stolen property, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.

(R.III,113).

This jury instruction constitutes a constitutionally impermissible mandatory rebuttable presumption as to an element of the offense by *requiring* the jury to presume that a defendant knows or should know property was stolen if found in possession of recently stolen property, and shifts to the defendant the burden to establish otherwise. See Sandstrom v. Montana, 442 U.S. 510, 517 (1979); Francis v. Franklin, 471 U.S. 307, 314 n.2 (1985).

As Sandstrom commands, our analysis begins with an examination of the language of the instruction. Sandstrom, 442 U.S. at 513. If the instruction does not inform the jury that it has a choice as

the fact finder, or that the jury might infer a conclusion, then a reasonable juror could view the instruction as mandatory. Id. at 515. In the present case, the instruction states that proof of possession of recently stolen property "*gives rise to an inference* that the person in possession of the property knew or should have known that the property had been stolen." The instruction does not state that possession of recently stolen property may give rise to an inference.... Because of this error, a reasonable juror could regard the instruction as mandatory. Even though the instruction provides the defendant with an opportunity to rebut the mandatory presumption on an element of the offense (i.e., "knowing" possession of stolen property), Sandstrom specifically holds that a jury instruction which shifts the burden to the defense with respect to an element of the crime violates the constitutional right of due process. Id. at 523.

This appears to be a question of first impression in Florida. Although the contested instruction has previously been found constitutional on due process grounds, the cases so finding have assumed the presumption to be *permissive* rather than mandatory and upheld the instruction on the ground that the *permissive* inference was "rationally related" to the underlying factual finding of recent possession of stolen property. See Edwards v. State, 381 So. 2d 696 (Fla. 1980)(citing Barnes v. United States, 412 U.S. 837 (1973), and State v. Young, 217 So.2d 567 (Fla. 1968)(finding

permissive presumption not violative of right to remain silent)).

In Edwards, this Court rejected a due process challenge to the instruction, but appears not to have been presented with the argument that the instruction constituted an impermissible mandatory rebuttable presumption. In upholding the instruction, this Court relied on Barnes v. United States, 412 U.S. 837 (1973), wherein the contested jury instruction on recent possession of stolen property created, unquestionably, a permissive rather than a mandatory presumption. Furthermore, in commenting on the contested instruction, this Court stated that even if Edwards had failed to present any evidence in explanation of his possession of recently stolen property, "the jury was not compelled to find him guilty." Edwards, therefore, may only be cited for the proposition that a jury instruction creating a permissive inference arising from the unexplained possession of recently stolen property satisfies due process concerns because the fact inferred is rationally related to the underlying fact of possession of recently stolen property. Both Edwards and State v. Young, 217 So. 2d 567 (Fla. 1968), held that the inference created by section 812.022(2), Florida Statutes, does not violate a defendant's right to remain silent. The present argument, i.e., that the statutory inference is mandatory rather than permissive, appears to be a question of first impression. In the present case, the contested instruction is a constitutionally impermissible mandatory rebuttable

presumption. Sandstrom v. Montana; see also, Francis v. Franklin, 471 U.S. 307 (1985).

Alternatively, if Edwards is construed to hold that the statutory inference is permissive rather than mandatory, the decision is incorrect since it ignored Sandstrom and misconstrued Barnes. In Barnes, the instruction at issue stated, in pertinent part:

> Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property was stolen.
>
> *However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.*

Barnes, 412 U.S. at 839 (emphases added). Clearly, the instruction at issue in Barnes did not require the jury to draw any specific inference based on the possession of recently stolen property, as does the Florida Standard Jury Instruction at issue in the present case. Indeed, the United States Supreme Court in Sandstrom specified that the instruction at issue in Barnes did not constitute a presumption "of the conclusive or burden-shifting variety." Sandstrom, 442 U.S. 510, 519 n.9.

This constitutional error cannot be regarded as harmless in the present case because the question of appellant's "knowledge" was the critical issue in the case and was hotly contested, and

the evidence showed undoubtedly that appellant did not steal the grinder.

ISSUE V

WHETHER THE PROSECUTOR COMMITTED FUNDAMENTAL ERROR BY IMPROPERLY ARGUING FACTS NOT IN EVIDENCE, i.e., THAT PETITIONER ACTUALLY STOLE THE GRINDER, AND BY IMPROPERLY COMMENTING ON PETITIONER'S RIGHT TO REMAIN SILENT, i.e., ARGUING THAT PETITIONER FAILED TO PRODUCE THE RECEIPT FOR PURCHASE OF THE GRINDER UNTIL SIX OR SEVEN MONTHS AFTER IT WAS STOLEN?

STANDARD OF REVIEW – Whether the prosecutor's closing argument deprived Petitioner of a fair trial is purely a legal question which should be reviewed *de novo*.

MERITS – See Summary of Argument (nothing added).

ISSUE VI

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY EXCLUDING THE GRINDER FROM THE RECORD ON APPEAL, THEREBY THWARTING EFFECTIVE APPELLATE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE?

STANDARD OF REVIEW – Whether Petitioner is deprived of adequate appellate review due to the failure to include the grinder in the record on appeal is purely a question of law which should be review *de novo.*

MERITS – See Summary of the Argument(nothing added).

CONCLUSION

Based upon the argument and authority presented in ISSUE I or ISSUE II, Petitioner requests that the court reverse his conviction and remand with directions that he be discharged. Based upon the argument and authority presented in either ISSUE III, IV, V, or VI, or the cumulative effect thereof, Petitioner requests that the court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Thomas H. Duffy, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to Appellant, Richard B. Weddell, #714698, N.F.R.C., P.O. Box 628, Lake Butler, Florida, 32054, on this ____ day of May, 2001.

RICHARD M. SUMMA

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

RICHARD M. SUMMA