

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DALE CHESTER HOLCOMBE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari
to the Florida Fifth District Court of Appeal**

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether – in a case involving a racketeering charge based on predicate incidents for “dealing in stolen property” – possession of an item that is one or more transactions removed from an alleged theft constitutes possession of stolen property (and if not, whether such a conviction violates the Due Process Clause of the United States Constitution).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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The Petitioner, DALE CHESTER HOLCOMBE, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida Fifth District Court of Appeal entered in this case on March 24, 2020 (rehearing denied on April 24, 2020). (A-3, A-4).¹

D. CITATION TO ORDER BELOW

Holcombe v. State, 293 So. 3d 1036 (Fla. 5th DCA 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Fifth District Court of Appeal.²

F. CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of United States Constitution requires the prosecution to prove guilt beyond a reasonable doubt. *See* U.S. Const. amends. V and XIV; *In re Winship*, 397 U.S. 358, 361 (1970).

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number. References to the trial transcripts will be made by the designation “T” followed by the appropriate page number.

² Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

The Petitioner was charged in Florida state court with racketeering and conspiracy to commit racketeering. The case proceeded to a jury trial in August of 2018. During the trial, the state trial court denied the Petitioner's motion for a judgment of acquittal,³ and at the conclusion of the trial, the jury found the Petitioner guilty as charged. The trial court subsequently sentenced the Petitioner to 55.5 months' imprisonment. (A-5). The Florida Fifth District Court of Appeal subsequently *per curiam* affirmed the Petitioner's convictions without discussion. (A-3).

2. Statement of the facts.

The statement of facts, as set forth in the brief filed by the Petitioner's appellate counsel in the state appellate court below, are as follows:

The Business, a licensed secondhand dealership purchasing gift cards and reselling them online, (T. 49-50, 56-57, 463) was owned by James Holcombe, who was the "boss" and a silent partner, David Lee. (T. 138, 460, 469) Originally, Dale Holcombe owned a similar business, Cash for Cards located in Deltona, but it was taken over by his son, James, when it was clear Dale did not have the capacity to manage the business. (T. 62-63, 362, 462) For the most part, James Holcombe and his father were an absentee owners – they were not involved in the day to day operations, did not interact with or do transactions with customers. (T. 339-340, 377-378, 426) The employees managed the day-to-day operations. (T. 138) Dale Holcombe, suffering from a brain tumor, had to have surgery to remove the tumor and (T. 495) after the surgery, his personality and mental capacity changed and he had cognitive limitations which precluded him from running a business. (T. 495) So, Dale worked

³ When the state trial court denied the motion for a judgment of acquittal, the court stated: "The record should reflect the judge is reluctantly denying your motion for judgment of acquittal on everything." (T. 973).

as a “gopher,” he would bring the employees water, run errands for the employees, and would transport money between stores. (T. 408, 462-463, 496)

A second-hand dealership is like a pawn shop in that it is a heavy regulated business: for each transaction, the seller must complete a secondhand dealer pawn “slip” and provide a valid ID, phone number, address, and thumbprint. (T. 64, 338, 427, 498, 525, 558, 657, 762, 815, 912); the seller must sign a document that they have authority to sell the property (T. 64, 338, 428, 816); paperwork must be submitted daily to the sheriff's office including the buyer or seller's name, phone number, address and description of what is being sold, including serial number. (T. 51, 380, 427); and following a purchase, there is a 15 day hold on property. (T. 63) In addition to the State requirements, the Business kept track of business details and customer records on a Google Drive, including which individuals were banned or preferred. (T. 147, 337) The file was backed up on a Google Cloud so every computer from the Business had access to the file and every location and employee could access the customer file. (T. 112)

A preferred customer is a trusted customer who sold a lot of cards to the Business. (T. 100, 415) Preferred customers were given better prices as incentives for cards that they brought in. (T. 284) The Business also would price match competitor's rates, let customers know there were no limits on how many cards could be exchanged, and that the Business bought almost every major gift card. (T. 445, 446)

As a security measure, sometimes the Business would transfer the value stored on card after purchasing it to prevent a dishonest customer from quickly using the value again online or otherwise defrauding the Business. (T. 285, 387) The employees based this decision on the client or notation in customer notes. (T. 286) The Business kept the original physical card in their possession. (T. 370) Sometimes the Business banned customers. Customers were banned if the gift cards they sold were obtained through illegal means or if there were other problems with the transactions. (T. 508) James Holcombe had the ultimate authority to decide which customers were banned. (T. 399)

There were four employees that testified at trial: Ronald Paul Carponella, Michael Welch, William Hooper, and Matt Angell. Each one was convicted of dealing in stolen property in connection with this case. (T. 268, 360, 407, 459) Some of the employees had suspicions that the gift cards were obtained through illegal activity. (T. 357, 377, 470) James Holcombe trusted and relied on the employees to use their own judgment to turn away illegal activity. (T. 300, 352, 395, 384, 417, 453, 505) James Holcombe instructed the employees to refuse to buy gift cards derived from stolen property. (T. 300, 384, 417, 455, 500, 505) There were

occasions where the employees did just that. (T. 315)

At trial, the employees testified James Holcombe instructed employees not to ask questions to the customers about how they obtained the gift cards. (T. 455) The customers testified the employees did not ask questions about the returns. (T. 670) James Holcombe never overtly instructed his employees to turn a blind eye to illegal activity. (T. 383, 500) All the employees testified if they knew the gift cards were stolen, they would refuse the transaction. (T. 324, 395, 417, 453, 499)

According to the trial testimony of cooperating witnesses, at one business meeting, James Holcombe told the employees if they were arrested in connection with the Business, he would bail them out and hire a lawyer to represent them. (T. 288, 372, 418, 475) James Holcombe did not discuss what type of trouble he was referring to, although some employees knew Dale Holcombe had been in trouble for making a mistake in connection with the secondhand dealer's license. (T. 327) Some employees knew you could get in trouble for failing to comply with the secondhand pawn forms. (T. 501) According to Matt Angell, the employees did not think James was offering the employees an attorney to cover for crimes being committed. (T. 502) James Holcombe explained the Business legality to Carponella and Hooper as being legal (T. 278) because the gift cards were not stolen, they were issued by the stores. (T. 278-279, 292, 419) When the store issues the gift cards, they were verifying and agreeing the returned items are not stolen. (T. 278-279, 292, 419)

In 2014, Investigator Jayson Paul began investigating shoplifters that would steal and then return merchandise to big box stores (large commercial retailers) in exchange for gift cards and later would sell the cards to the Business and other stores like it. Paul learned that "Boosters" would steal items from retail stores and then give them to another individual, anyone with an ID (sometimes a homeless individual), who would return the stolen item for gift card with store credit. (T. 66, 67, 100, 282) The crew repeated the process at different big box stores and would eventually sell the gift cards to the Business or one of its competitors. (T. 66) The big box stores knew they were being victimized and continued to issue gift cards. (T. 130-131)

As a general policy, loss prevention officers at big box stores would drain gift cards, after issuing them, if they determined they were suspicious about the customer. (T. 111) The Home Depot Corporate Investigator explained Home Depot's return process. (T. 717-719) If the clerk is suspicious about a return, the clerk must still do the return. (T. 719) The clerk does not have the authority to refuse a return. (T. 726) The clerk's job is to take care of the customer; it is not to determine whether the customer is doing something wrong. (T. 735) Home Depot

has no limitation on how many returns customers can do without a receipt. (T. 725) If the customer does not have a receipt, the transaction will go through and the customer will be given merchandise credit. (T. 720). If the clerk is suspicious, they will notify other personnel and it will go up the chain of command, and it will eventually get to the Home Depot Corporate Investigator. (T. 720) The HDCT sets up an alert that for when the customer's ID is used for a return. (T. 720)

Paul testified that although there were other businesses that purchased gift cards, the Business caught his attention because it was handling more business than other shops that bought gift cards. (T. 48-50, 57, 62-63)

It was never in dispute that the gift cards themselves were not stolen. (T. 122-123, 349). Rather, the card value was derived from the value of returned stolen goods. (T. 157, 349) Law enforcement never observed Dale or James Holcombe ride around with the boosters or do a return transaction at any store. (T. 133, 136) Law enforcement saw Dale take several small gift cards to buy a larger gift card. (T. 134)

In addition to looking into the Business, law enforcement investigated the individuals that sold a significant amount of gift cards to the Business. (T. 64) All were addicted to drugs (T. 512-514, 583, 647, 775, 794-796, 821, 824, 883, 903) As a result of the investigation, some of the customers were convicted of racketeering and conspiracy to commit racketeering because they ran organized theft rings that stole and returned items for gift cards. (T. 522, 578, 646, 744, 793, 821) Two such customers, Bello and Rodriguez, were not charged and were given immunity for their testimony. (T. 879, 896)

Finally, law enforcement contacted the Business. (T. 151) At no time did law enforcement send official correspondence directing the Business to stop buying cards from individuals suspected of stealing to obtain gift cards. (T. 150). Paul first spoke with an employee and asked whether the Business had a protocol for blacklisting sellers. Welch explained they blacklisted sellers whose gift cards were derived from stolen property. (T. 81)

Paul told Welch that Amanda Rodriguez and Patrick Bello were stealing merchandise to obtain gift cards. (T. 69, 149, 923) Welch told Paul he would pass the information to his boss, James Holcombe. (T. 81) The Business continued to buy gift cards from Rodriguez and Bello. (T. 84-86) Paul made this determination through the pawn shop database which showed entries with their names associated with the Business. (T. 924)

Ultimately, Paul used the database printouts to testify about 24 gift cards at issue (the printouts were not placed into evidence) Eight of the gift card transactions involved cards donated to law enforcement to

be sold to the Business. (T. 935, 938) The other sixteen cards were “sold” by Amanda Rodriguez and Patrick Bello from Walmart, Lowe’s, and Home Depot. (T. 925-935, 938) In furtherance of the investigation, Officer Patterson, working undercover as an “average looking guy,” sold gift cards to the Business ten times and attempted to record each transaction, although the first three transactions were not recorded due to technical difficulty. (T. 165-166, 171) The relevant calls, which were played at trial, are summarized below:

1. June 29, 2015: Pawned a \$95 gift card for \$48. (T. 175)
2. July 2, 2015: Patterson pawned a \$84 gift card for \$46. (T. 176)
3. July 7, 2015: Peterson pawned a \$85.05 gift card for \$47. (T. 176) He did remember which employee he spoke to. (T. 177, 183)
4. July 9, 2015: Patterson pawned a \$74.87 Home Depot gift card. (T. 177) Patterson had to wait an hour to be paid so the employee could check the balance. (T. 198) The employee explained that multiple gift cards from Home Depot had been devalued. (T. 198)
5. July 15, 2015: Pawned a \$63 JCPenny gift card for \$32. (T. 189, 230)
6. July 24, 2015: Patterson pawned a \$84.53 Home Depot gift card with Hooper. (T. 191) During this exchange, Patterson indicated that sometimes his buddies and him have good days. (T. 192) Hooper told Patterson there was no limit for exchanging cards. (T. 190-191)
7. August 4, 2015: Patterson pawned a \$105.93 Home Depot gift card with Paul Ronald Carpenella. (T. 198- 200) Patterson told Carpenella the drill was from Lowe’s but he returned it to a different store. (T. 200, 234). He did not say he stole the drill. (T. 235) He left it to inference that the drill was stolen from Lowe’s and returned to a different store so that way the item could not be tracked. (T. 235)
8. August 6, 2015: Patterson pawned a \$34.54 JCPenny gift card with Paul Ronald Carpenella. (T. 205)
9. Second Transaction on August 6, 2015: Patterson pawned a Home Depot gift card with Ronald Carpenella. (T. 202) While in the Business, Paul spoke on the phone with Sergeant Smith who pretended to discuss stealing a water filter. The undercover officer said out loud “who the fuck steals a water filter.” (T. 203, 238)

Paul noticed Carpenella looked up at him at the end of the conversation and told him to get off the phone. (T. 203) Carpenella could not hear the person on the phone indicating he stole a water filter and it could have been the profanity that made the employee look up. (T. 204, 239)

Carpenella recalled the conversation where Paul spoke about water filters on the phone after watching the tape. (T. 292) He did not recall

anything suspicious taking place in the store because he did not pay attention to the customers whenever they spoke. (T. 292, 325) Although sometimes he would get input from James Holcombe on whether he suspected someone obtained gift cards derived from stolen property, he did not tell James Holcombe about the water filters. (T. 324) Had the customer told Carpenella he stole the drill and returned it; he would have refused the transaction. (T. 324)

10. August 28, 2015: Patterson pawned a Home Depot card with William James Hooper. (T. 209) Patterson told Hooper that him and his buddy “get a bunch of stuff from Lowe’s and stuff. We get drills, we get circuit breakers. If you got a good ID card, you could come with us and help exchange it.” (T. 208) Hooper completed the exchange and responded that “we can’t deal with stolen goods” and declines the offer. (T. 210, 234) Hooper testified that he did not remember the undercover officer saying the drills were stolen. He was unsure if the person was breaking the law or not and never notified James Holcombe about the incident. (T. 439)

11. Second Transaction August 28, 2015: Patterson pawned a \$79 JCPenny gift card with William James Hooper. (T. 213-214)

12. September 3, 2015: Patterson pawned a \$106.40 Lowe’s gift. (T. 218) The undercover officer asked if he could come back “as many times a day” and the employee said “yes.” (T. 216)

13. Second Transaction September 3, 2015: Patterson pawned a Target gift card. (T. 221) There were several employees in the store during this exchange. Angel told Paul, “you’re killing it today.” Then Patterson explained that he walks in and out of Target, no one paying attention, and does a return, no one cares. (T. 221, 247) In response, James Holcombe stood up said “we don’t talk about that in here” and he asked Paul if he was doing anything illegal. (T. 249) Paul denied doing anything illegal. (T. 222, 249)

Another prolific “booster” Peter Laplace worked with his wife, Denise Laplace, and Brian Miller. (T. 92, 516, 583) Laplace usually was the one who took the cards to the Business. (T. 525, 585) Sometimes, Brian Miller would accompany Laplace inside the store. (T. 588) On one occasion, Miller tried to do a transaction with Dale Holcombe, but he turned him away. (T. 605-606, 612) When Miller came in, Dale looked up his ID, couldn’t find him in the Google Drive and refused to do the transaction. (T. 606) During another transaction, one of the cards they sold to the Business had zero balance. Miller told Laplace they could return to Lowe’s. (T. 596) Miller testified Matt Angell responded, “Don’t talk about that stuff while you’re in here or you’re not doing business anymore.” (T. 596)

Laplace testified that he told at least two employees, William

Hooper and Matt Angell, that the gift cards were derived from stolen property. (T. 530) He never told this to Dale or James Holcombe. (T. 548) On one occasion, Hooper asked Laplace how much he paid returners, Laplace told him ten percent of the cards. (T. 536) Angell asked Laplace how he avoided lost prevention at Target. (T. 537) Laplace told Angell how he did it. (T. 537) On August 2015, the employees told Laplace that he was banned and could no longer sell gift cards to the Business. (T. 533, 594). Laplace instructed Miller to go inside and sell the gift cards to the Business. (T. 533, 593) When Miller first sold gift cards, he did not get the same percentage for the card as Laplace. (T. 558) Laplace made a phone call and sent Miller back into the store to get the higher percentage. (T. 559-594) Laplace instructed Miller not to mention Laplace's name or he would not be able to sell the cards to the Business. (T. 620) As a result, Miller received a higher percentage authorized by James Holcombe. (T. 559-565, 617) Defense counsel objected to this statement as inadmissible hearsay.

On August 31, 2015, Paul contacted Dale Holcombe and told him Peter Laplace was stealing items and using stolen property to obtain gift cards. (T. 92- 93) The officer asked Holcombe what happens to the gift cards. (T. 96) Dale Holcombe told the officer "My son takes care of that. I have no business in it. You'll have to talk to him about it." (T. 96) In the customer notes under Pete Laplace, the file noted that an investigator came into the Business and that they could "no longer sell cards for us and to tell him to have someone else sell them for him." (T. 160-161) The author of this note is unknown. (T. 161) After the August 31 meeting, the Business stopped buying cards from Laplace but continued to buy gift cards from Brian Miller. (T. 97, 154) The officer considered Brian Miller as part of the same group as Laplace. (T. 97)

Similar to Laplace's crew, Connor's crew stole merchandise from stores, returned for gift cards, and then sold the gift cards to the Business. (T. 97-99) Cooley began noticing certain stores would devalue the card. (T. 807) Cooley told one of the employees to run that card quicker to make sure it was not devalued. (T. 807) Hooper's response was that "[I]'ll check them." (T. 807, 813) On one occasion, James Holcombe told Connor that the Kohl's card sold to the Business the day before had zero balance. (T. 838) James told Connor to not let it happen again or they would not purchase his cards. (T. 838) Connor said James said the card had zero balance was because Kohl's knew it was derived from stolen property. (T. 839)

On another occasion, Connor testified he told Hooper, without being prompted in anyway, that he was stealing merchandise. (T. 847) Connor testified Hooper did not respond, he was just talking, but he did not remember what he said. (T. 847, 850-851) At a different time, Connor

testified he told James Holcombe the gift cards were derived from stolen merchandise. (T. 851) James responded by telling Connor that the more Home Depot cards he sold, the higher percentage he would be paid. (T. 853) Cooley never interacted with Dale Holcombe. (T. 805-806, 811)

At trial, other individual boosters testified. Dawn Campbell sold gift cards to the Business because she thought they were legitimate and not doing anything illegal. (T. 699) Campbell sold gift cards to Dale Holcombe. (T. 656, 658, 700) She never discussed the gift cards were derived from stolen property to the employees. (T. 696) Nicole Hanrahan worked with Erica Johnson, Billy Kennerson and Mia Davis. She never met Dale Holcombe. (T. 776) On one occasion, Hanrahan said William Hooper laughed at a conversation where she described being “manhandled” by a Bealls security person. (T. 764) She testified she told William and Matt that she stole items. (T. 779) Patrick Bello sold gift cards to the Business derived from stolen merchandise. (T. 881). Bello did not know either Holcombe and could not identify them. (T. 891) Amanda Rodriguez sold gift cards to the Business derived from stolen merchandise. (T. 898) Rodriguez’ role was to sell the gift cards because she received a high percentage. (T. 899) She did not know who James or Dale Holcombe was. (T. 908) Rodriguez testified she told the employees the gift cards were derived from stolen property and they bought the gift card anyway. (T. 915)

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The question presented in this case is:

Whether – in a case involving a racketeering charge based on predicate incidents for “dealing in stolen property” – possession of an item that is one or more transactions removed from an alleged theft constitutes possession of stolen property.

The Due Process Clause of the Constitution requires the State to prove guilt beyond a reasonable doubt. *See* U.S. Const. amends. V & XIV; *In re Winship*, 397 U.S. 358, 361 (1970). For the reasons set forth below, the Petitioner requests the Court to grant review in this case and address the question presented.

The Petitioner was charged with racketeering and conspiracy to commit racketeering, and both counts alleged that the predicate incidents for these offenses was “dealing in stolen property (fencing).” In order to prove that the Petitioner was guilty of dealing in stolen property, the prosecution had to prove that the Petitioner trafficked in or endeavored to traffic in property that he knew or should have known was stolen. *See* § 812.019(1), Fla. Stat. “Stolen property” means “property that has been the subject of any criminally wrongful taking.” § 812.012(7), Fla. Stat.

The prosecution’s evidence at trial established that the gift cards themselves were not stolen property – rather the prosecution argued it was the “face value” that was stolen. However, this was contrary to the charging document – which alleged the gift cards themselves were the stolen goods.

In support of his argument, the Petitioner relies on *State v. Graham*, 327 P.3d 717 (Wash. Ct. App. 2014), where a Washington appellate court addressed a similar

scenario. The facts of *Graham* were as follows:

Ms. Graham entered the Ephrata Walmart store with an empty shopping cart and placed two television wall mount kits and a battery for a motorized toy-vehicle in her cart. She then took the less expensive of the wall mount kits and the battery to customer service and asked to return them, claiming to have recently purchased them. Because she did not have a receipt, Walmart issued a gift card to Ms. Graham for the value of the returned items. Ms. Graham used this gift card to purchase the more expensive of the wall mount kits, which she returned to the store the next day in exchange for approximately \$100 in cash.

Id. at 717-718. Ms. Graham was subsequently charged with trafficking in stolen property and the trial court granted her motion to dismiss – concluding that “there was no transfer or disposition of stolen property because [t]he first transaction . . . consisted only of theft of a gift card by deception. . . . The second transaction . . . consisted only of use (‘negotiation’) of that property in its intended manner; using the gift card as cash.” *Id.* at 718 (alterations in the original) (quotations to the record omitted). On appeal, the Washington appellate court affirmed the trial court’s dismissal, stating:

Turning to the second segment of the overall transaction – Ms. Graham’s return, for cash, of the mount kit purchased with the gift card – the issue is whether that second kit was “stolen property” that she trafficked by returning it. “Stolen property” is defined, again, as “property that is obtained by theft, robbery, or extortion.” RCW 9A.82.010(16).

. . . .

In order for Ms. Graham’s second return of a wall mount kit to fall within the statutory definition, we would have to read the definition of “stolen property” to include not only property that is itself stolen, *but also property that was acquired in a legitimate exchange but can be traced back through a series of exchanges to property that was obtained by theft, robbery or extortion.* The plain language of the statutory definition of “stolen property” does not support such a reading nor could the legislature possibly have intended it.

Viewing the evidence and reasonable inferences therefrom in the light most favorable to the State, Ms. Graham did not sell or transfer

stolen property to another person. The trial court properly dismissed the second degree trafficking in stolen property charge.

Id. at 719-720 (emphasis added).

The facts of *Graham* are analogous to the facts in the instant case. As explained by the *Graham* court, to hold otherwise would mean that illegally obtained cash would forever be tainted (and anyone who subsequently accepts the cash would be guilty of a crime).

The Petitioner also relies on the decision of the New York trial court in *People v. Gbohrou*, 718 N.Y.S.2d 791 (NY. Sup. Ct. 2000). In that case, the court considered whether possession of an item that is one or more transactions removed from an alleged theft constitutes possession of stolen property and the court stated:

This court has found no authority for the proposition that the possessor of merchandise purchased by another with stolen money is him/herself in possession of stolen property even if the possessor knows that the purchasing funds have been stolen. Accordingly, in this court's view of the law, neither defendant's possession of the household furnishings, vehicle, or other merchandise purchased with money alleged to have been stolen from the Davies constitutes possession of stolen property.

Id. at 797.

In the instant case, the gift cards' face value may have been derived from fraudulent returns, but the cards were issued by the various retail stores. There is no dispute in the record that the gift cards in question were not stolen. Thus, as a matter of fact and law, there was no dealing in stolen property in this case – even if the cards' “face value” were based on illegal returns. If the holdings in *Graham* and *Gbohrou* are adopted and applied to this case, then it would be a violation of the Petitioner's

constitutional due process rights to sustain his convictions.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider this important question.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

/s/ Crytal McBee Frusciante

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