IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES LEE HALL, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. SC00-2358

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fifth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the appellee and the prosecution in the lower courts, respectively. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record proper, bound at the top and contained at the beginning of the one-volume record on appeal

“T” Transcript of proceedings in the lower tribunal, bound at the side and contained at the end of the one-volume record on appeal

“SR” Supplemental record, consisting of transcript of hearing on Appellant’s change of plea

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts contained in his initial brief on the merits.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADJUDGING PETITIONER GUILTY OF BOTH GRAND THEFT AND DEALING IN THE SAME STOLEN PROPERTY.

Respondent argues in this appeal that because Petitioner entered pleas to both offenses in the instant case, the dual convictions are insulated from review. Respondent distinguishes Victory v. State, 422 So. 2d 67 (Fla. 2d DCA 1982) because in that case the defendant had moved to dismiss his prosecution for dealing in stolen property after having been convicted in another county for theft of the same property. Respondent argues that because the defendant in Victory objected to his prosecution, that case is not in direct conflict with the decision of the Fourth District Court of Appeal in the instant case. But this argument ignores the decision in Rife v. State, 446 So. 2d 1157 (Fla. 2d DCA 1984), where, as in the instant case, the defendant entered pleas to the offenses of theft and dealing in the same stolen property. As in the instant case, the factual basis for the pleas suggested that both offenses were committed in the course of the same criminal scheme or episode. In Rife, the appellate court held that

> Without something more to meaningfully disrupt the flow by a clearly disjunctive interval of time or set of circumstances, defendant's conviction of and sentence for grand theft must be set aside.

446 So. 2d at 1158. Rife is clearly directly on point with the instant decision and reaches a diametrically opposite result. It therefore establishes direct and express conflict with the decision below, which this Court has jurisdiction to -- and should -- resolve.

Respondent's secondary argument that by agreeing to the factual basis for the instant crimes, Petitioner failed to preserve his challenge to the dual convictions likewise misses the mark. Petitioner's claim is not based on the insufficiency of the factual basis to support his conviction for either theft or dealing in stolen property. Rather, it is Petitioner's contention that the *uncontested* factual basis establishes that he cannot be convicted for *both* theft *and* dealing in stolen property. Petitioner did not at the time of his plea and does not now object to the factual basis set out by the prosecution in this case; he objects to the entry of dual convictions when only one was legally authorized. There was thus and remains still no basis for any objection to the factual basis, since Petitioner freely concedes that the factual basis is accurate. It is the legal propriety of entering convictions for both offenses which forms the basis of Petitioner's argument.

Respondent's assertion that Petitioner should have moved to withdraw his plea is equally flawed. Since the error raised in the instant case does not relate to the

voluntariness of the plea or the sufficiency of the factual basis, no motion to withdraw the plea was required. Rather, the issue herein argued is one which may be the subject of a motion to correct an illegal sentence under R. Crim. P. 3.800(a). State v. Dasher, 687 So. 2d 916 (Fla. 5th DCA 1997). Such a motion may be made "at any time" and contemplates a fundamental sentencing error which may be argued for the first time on appeal. Maddox v. State, 760 So. 2d 89 (Fla. 2000).

Turning to the merits, Petitioner notes that the offense of receiving stolen property originated as a common law crime, created to reach those who would provide a market for thieves to dispose of their illicit gains. That common law proscription has since been converted into a statutorily defined crime in virtually every state in this country. Uniformly, the states also preclude conviction for both theft and receiving stolen property, based on dual considerations that it is impossible to receive something from oneself and on the recognition that the various offenses relating to theft and receiving stolen property are separate and distinct crimes which were intended to target different actors within the system by which stolen property is acquired and distributed. 19 A.L.R. 5th 59, 107-108, 113. This principle serves in many jurisdictions to preclude a defendant's conviction for receiving stolen property if the evidence demonstrates that he actually stole the property in question, even where he

has been acquitted of the theft! *E.g.*, Ex Parte Thomas, 445 So. 2d 939 (Ala. 1983); *see also* 29 A.L.R. 5th 59, §3 and cases cited therein.

In Florida, the statute defining receiving stolen property (now "dealing" in stolen property), is Section 812.025, Florida Statutes (1997), which expressly maintains the long-standing prohibition against conviction for both that offense and theft of the same property. Thus, while California has held that the addition of the word "sells" to a statute prohibiting the receiving, concealing, or possession of stolen property did not evidence an intent by the legislature to exclude the thief from those subject to punishment as the fences reached by the amendment, People v. Tabarez, 206 Cal. App. 3d 551, 253 Cal. Rptr. 658 (Cal. 3rd DCA 1988), Florida's statute specifically includes a legislative proscription against punishing a single individual as both a thief and a fence where both prosecutions arise from a single transaction. There can be no doubt in this State, then, as to the legislative intent to preclude conviction for both dealing in stolen property and theft of the same property.

Moreover, while Respondent theorizes that the legislature's prohibition of dual convictions was intended to apply only in the limited situation where a defendant committed both theft and dealing in stolen property in the same act, answer brief at 7-8, no such limitation is contained in the statute, nor is the inference of such a

limitation appropriate in light of the long and continuing history of precluding convictions for both being the thief and the fence of the same property. Contrary to Respondent's assertion that "there is no reason to conclude that the Legislature intended only one conviction in this situation," answer brief at 8, there is the best reason in the world to so conclude: the Legislature's own statutory language to that effect!

Respondent's further argument that the theft and sale of the identical property in a single day does not constitute "one scheme or course of conduct," answer brief at 8-9, while imaginative, is completely refuted by the case law in this State, which clearly supports Petitioner's position. *E.g.,* Barnlund v. State, 724 So. 2d 632 (Fla. 5th DCA 1998) (property stolen on May 28-29 and pawned the next day and the next week; State concedes error); Blair v. State, 667 So. 2d 834, 841 (Fla. 4th DCA 1996) (jewelry stolen on one date and dealt on the same date or sometime thereafter: "The state has not been able to prove that the theft of the jewelry and the dealing of that same jewelry were distinct and unrelated criminal incidents"); Burrell v. State, 601 So. 2d 628 (Fla. 2d DCA 1992) (property stolen from storage unit discovered in defendant's possession in South Carolina, where he planned to sell it at flea market); Shearer v. State, 582 So. 2d 28, 29 (Fla. 5th DCA 1991) (theft of camera, luggage and

jewelry and dealing in stolen camera the same day: "Because the theft arose out of the same course of conduct or scheme as the fencing crime, we reverse and set aside the conviction for the lesser crime of petit theft"); Stallworth v. State, 538 So. 2d 1296 (Fla. 1st DCA 1989) (television set stolen on March 7 and trafficked on March 11); Rhames v. State, 473 So. 2d 724 (Fla. 1st DCA 1985) (defendant assists in theft of outboard motors and in sales of same motors); Alexander v. State, 470 So. 2d 856 (Fla. 1st DCA 1985) (defendant steals outboard motor and then pawns or sells it); Jones v. State, 453 So. 2d 1192 (Fla. 3d DCA 1984) (sale of stereo occurred two days after its theft); Victory v. State, 422 So. 2d 67 (tractor-trailers stolen in Pasco County and sold in Manatee County on same date); Daniels v. State, 422 So. 2d 1024 (Fla. 1st DCA 1982) (conviction for dealing stolen property in Franklin County reversed where defendant had already been convicted in Gulf County for grand theft of same property).

Respondent's argument that a defendant may be convicted of theft and dealing in stolen property even where the same property is the subject of both prosecutions and the transactions are separated by only a short time period is thus untenable under the laws of this State. Its reliance on Cleaves v. State, 450 So. 2d 511 (Fla. 2d DCA 1984) for a contrary position is misplaced. In Cleaves, the defendant raised a

challenge to his dual convictions for theft and dealing in stolen property for the first time after the revocation of his probation and relied solely on the allegations in the information that both offenses involved the same property but were committed on different days. There was no statement of the underlying facts which gave rise to the initial prosecution, and the appellate court cited both this factor *and* the procedural posture of the case as the basis for affirming the judgment:

> Here, we have nothing in the record before us to disclose any facts as to the underlying crimes, except that the same property was involved on dates in close proximity with each other. Any inference derived from the fact that the same property was involved on dates in close proximity with each other is not enough to make void the previous adjudications of guilt based on the prior nolo contendere pleas. *An appeal from an order revoking probation may only review proceedings subsequent to the order of probation.* [Citations omitted.]

450 So. 2d at 511 (emphasis added). In the present case, Petitioner appealed directly from his conviction *and* a factual basis exists from which it must be concluded that the theft and dealing in stolen property charges arose from "one scheme or course of conduct." Cleaves is therefore, inapplicable to the instant cause.

Petitioner having been convicted of both theft and dealing in stolen property based on acts which arose from a single scheme or course of conduct, he is precluded by statute from being convicted for both offenses. His conviction and sentence for

theft must, therefore, be vacated and set aside.

POINT II

THE CRIMINAL PUNISHMENT CODE VIOLATES THE FEDERAL AND FLORIDA CONSTITUTIONAL GUARANTEES REGARDING DUE PROCESS OF LAW.

Article V of the Florida Constitution specifically provides that this Court shall have discretionary jurisdiction to review decisions of a district court of appeal that "expressly declare valid a state statute." The decision of the Fourth District Court of Appeal below expressly declares the Florida Criminal Punishment Code (CPC) constitutional, rejecting in detail Petitioner's attacks against the validity of that statute. Consequently, the Florida Constitution grants this Court jurisdiction to address Petitioner's claims. Pagano v. State, 387 So. 2d 349 (Fla. 1980).

Further, this Court has jurisdiction to review the instant case by virtue of the district court of appeal's certification of conflict and the existence of actual conflict between the district court's decision in the instant case and the decision of another district court of appeal. *See* Argument, Point I, *supra.* On review, however, this Court's power is not limited to analysis of the certified question only. Bell v. State, 394 So. 2d 979 (Fla. 1981). Once this Court determines that it has jurisdiction because of conflict on a point of law with another case, it also has jurisdiction to consider all the issues appropriately raised in the appellate process, just as though the

case had originally come to this Court on appeal. This authority, while discretionary and to be exercised only when those other issues have been properly briefed and argued and are dispositive, avoids piecemeal determination of a cause and promotes the efficient and speedy administration of justice. Savoie v. State, 422 So. 2d 308 (Fla. 1982). On this basis, too, then, this Court has jurisdiction to consider the constitutionality of the Criminal Punishment Code.

Moreover, this Court should exercise its discretionary power of review on this matter. The statute governs sentencing in this State and alters in a significant way the manner in which sentence is to be determined and imposed, as well as the rights of defendants to challenge their sentences. The issues raised by Petitioner should therefore be confronted and resolved by this Court.

Respondent argues, *inter alia*, that because defendants, prior to the sentencing guidelines, did not have the power to appeal sentences imposed within the statutory maximum, the CPC's denial of the defendant's right to appeal is in effect no more than a return to the *status quo ante*. It is not just the denial of a right to appeal by the defendant that results in constitutional defect, however. It is the CPC's denial to the defense *what it gives to the prosecution*. By setting up a system where *only one side* – the State, the party in whose favor the statute acts, not the party against which it is

sought to be invoked! – has the right to challenge the validity of a court's sentencing decision, the CPC brings itself outside the protections of due process and equal protection as guaranteed by the Florida and United States Constitutions. *Cf.* Wardius v. Oregon, 412 U.S. 470, 479 (1973).

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court reverse the judgment and sentence below and remand this cause with such directions as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JAMES J. CARNEY, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of APRIL, 2001.

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Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately this____ day of APRIL, 2001.

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