IN THE SUPREME COURT OF FLORIDA

MELVIN D. WILLIAMS, **Petitioner,** **v.** **STATE OF FLORIDA,** **Respondent.**	**Case No.: SC11-1543**

ON DISCRETIONARY REVIEW OF DECISION OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Melvin D. Williams, was the Defendant in the trial court and the Appellant below. This brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution in the trial court, and the Appellee in the Second District. The brief will refer to Respondent as such, the prosecution, or the State.

The record on appeal consists of seven volumes, including all Supplemental Volumes, and will be referenced as "Vol._;" or "Supp.Vol._" to refer to the appropriate volume, followed by the appropriate Record page number as "R:_", or the appropriate Transcript page number as "T:_".

The Issue Statement presented by Petitioner raises only one Issue. However, the Second District Court certified three questions of Great Public Importance. Accordingly, Respondent shall formulate the Issues presented herein as answers to those questions.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case for purposes of this appeal with the following additions and/or corrections:

This Court accepted jurisdiction to address the following three questions certified below by the Second District Court of Appeal:

> 1. MUST THE TRIAL COURT INSTRUCT THE JURY TO PERFORM THE SELECTION PROCESS DESCRIBED IN SECTION 812.025 OF THE FLORIDA STATUTES?
>
> 2. IF SO, MUST THE APPELLATE COURT ORDER A NEW TRIAL ON BOTH OFFENSES IF THE TRIAL COURT FAILS TO GIVE THE INSTRUCTION?
>
> 3. IF THE APPELLATE COURT IS NOT REQUIRED TO MANDATE A NEW TRIAL, MUST IT REQUIRE THE TRIAL COURT TO SELECT THE GREATER OFFENSE OR THE LESSER OFFENSE WHEN THE TWO OFFENSES ARE OFFENSES OF DIFFERENT DEGREES OR OF DIFFERENT SEVERITY RANKING?

Williams v. State, 66 So. 3d 360, 365 (Fla. 2d DCA 2011).

The State charged Petitioner by Supercedes Information with four offenses: (1) burglary of an unoccupied dwelling, pursuant to § 810.02(1)(b)(3)(b), Fla. Stat. (2008), (2) third-degree grand theft, pursuant to § 812.014(2)(c)(1), Fla. Stat. (2008), (3) dealing in stolen property, pursuant to § 812.019(1), Fla. Stat. (2008), and (4) providing false information on a pawnbroker form, pursuant to § 539.001(8), Fla. Stat. (2008).

(Vol.1;R:25-29). During the jury trial, Petitioner asked the court to instruct the jury under Section 812.025. The proposed instruction essentially tracked the language of the statute, which states:

> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

See § 812.025, Fla. Stat. (2008).

The trial court denied this request, explaining that there was no standard jury instruction on this topic and that the proposed instruction was inadequate to explain to the jury how to make its decision. (Vol.3;T:198-200). The trial court also appeared to have been persuaded by the State's argument that the statute should not apply in this context because Petitioner had taken more items in the burglary than he had pawned at the pawnshop. (Vol.3;T:198-200).

The jury returned a verdict of guilty as charged on all four counts. (Vol.1;R:39-40). At sentencing, the trial court dismissed the grand theft charge, as the lesser of the two offenses. (Vol.1;R:81-89). The trial court then sentenced Petitioner to fifteen years' imprisonment for the burglary concurrent with fifteen years' imprisonment for the offense of

dealing in stolen property. (Vol.1;R:81-89). Additionally, it imposed a sentence of five years' imprisonment to run consecutively to the other two counts, for the final offense of providing false information to a pawnbroker. (Vol.1;R:81-89).

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts presented by Petitioner for purposes of this appeal, with the following additions, corrections and/or clarifications:

On August 8, 2008, police were called to investigate a burglary at the victim’s home in Tampa. The stolen items consisted of two digital gaming systems, some related video games, approximately 30 DVDs, and a camera. During the investigation of the burglary, the police discovered fingerprints at the scene of the crime, that matched Petitioner’s fingerprints. Specifically, the fingerprints were found on a PCV pipe located inside the kitchen window of the victim’s home. The evidence established this window was the point of entry into the home, as well as the exit point.

A further investigation at a pawn shop (Cash America), established that on August 9, 2008, Petitioner had pawned some of the items stolen the night before, which consisted of one of the gaming systems, the Nintendo DS, and three Nintendo games. (Vol.1;T:76-77, 81, 83-86). The event was recorded on a video

camera, and showed Petitioner was the person who pawned the system and some video games. The evidence admitted at trial included the video tape furnished by Cash America, and testimony from the clerk who worked there, who identified Petitioner as the person conducting the subject transaction. (Vol.1;T:96-110). The clerk also testified that the items submitted by Petitioner were sold outright and were not to be reclaimed. (Vol.1;T:96-110).

Petitioner's fingerprints were taken at trial, and expert testimony established that the prints from trial matched both the prints at the home and at the pawn shop. Moreover, Miss Hobbs, one of the owners of the burglarized home, testified that she did not recover all of the items taken from her home. (Vol.1;T:20-44). At the close of the evidence, the parties and the trial judge all agreed that the stolen property represented a greater amount in value than the property pawned by Petitioner. The trial judge also noted that Petitioner sold some of the stolen property outright instead of leaving the items at Cash America subject to be reclaimed from the pawn shop. (Vol.1;T:191-192).

Additionally, the trial court went out of its way to express on the record its hesitation in giving the defense's proposed jury instruction:

> Here's the problem that I have and I'm going

to tell it like it is, as I always do, so there is a complete record.

At this point there is evidence as it relates to an alleged theft of property from Miss Hobbs' home. There is evidence that could, arguably, in the light most favorable to the State, be used to support a conviction of Mr. Williams for the offenses charged.

There is also testimony that not all of the stolen property was retained. There's also evidence that the property that was pawned was sold, and I use that in the generic sense as a term of art, to Cash America. There was no intent to reclaim that property as a cash price was given, allegedly, to Mr. Williams by Miss Trejo on behalf of Cash America, which would support the Dealing in Stolen Property charge.

So, again, the jury can do whatever the jury decides unanimously as it relates to these charges, but as I sit here right now, I mean, these jurors are not trained in the law as it relates to the very complicated matters that would then have to be instructed upon by this Court and, perhaps, argued by counsel. I mean, we have opened an abyss. And perhaps that's the reason, in the defense of our committee on criminal jury instructions and Florida Supreme Court, that this is in the many years since the Hall case has never been resolved, because those men and women get together once or twice a year and they properly fought over it vehemently, and I don't blame them because it's complicated issue.

So despite the wording of the Hall court, we, the trial court, are left in this dilemma. And it is a dilemma that I will solve as follows:

I'm denying the defense request for the jury instruction finding that, as written, it is woefully inadequate. I further find that

> **there is no way humanly possible for this Court to the craft a lawful instruction given the absence of guidance from our appellate courts as it relates to April 20, 2009 [the instant trial date].**
>
> **I will take action and entertain a proper defense motion as it relates to this very issue subsequent to the jury reaching a verdict, but before judgment is entered as it relates to the defendant, if, indeed, that is even necessary. They may acquit on all charges.**
>
> I find that this effort on the part of the Court will fully protect Mr. Williams' rights as it relates to this important matter. That's my ruling.

(Vol.3;T:198-200)(emphasis added).

SUMMARY OF THE ARGUMENT

This Court should either find that jurisdiction was improvidently granted or approve the Second District Court's decision in Williams v. State, 66 So. 3d 360 (Fla. 2d DCA 2011), review granted, No. SC11-1543, 2011 WL 4597556 (Fla. Sept. 22, 2011).

The Trial Court was not required to instruct the Jury to perform the selection process described in Section 812.025 of the Florida Statutes. The main issue presented here is a criminal defendant's remedy when a jury is not instructed pursuant to section 812.025 and thus returns guilty verdicts on both theft and dealing in stolen property. The Williams Court, consistent with case law from all District Courts except the Fourth District held that the proper remedy was to vacate the lesser conviction, while Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010) held that the proper remedy was a new trial. The Williams decision is correct.

Even if this Court determines that a trial court errs in allowing a jury to return guilty verdicts on both theft and dealing in stolen property, such error is subject to a harmless error analysis and does not amount to fundamental error. Moreover, any prejudice resulting from guilty verdicts on both crimes can be cured by vacating the conviction for the lesser offense. Thus, a new trial is not required. Accordingly, this

Honorable Court should affirm and approve Williams, and disapprove Kiss and its progenies.

ARGUMENT

ISSUE I:

MUST THE TRIAL COURT INSTRUCT THE JURY TO PERFORM THE SELECTION PROCESS DESCRIBED IN SECTION 812.025 OF THE FLORIDA STATUTES?

This Honorable Court should answer this question in the affirmative, approve Williams v. State, 66 So. 3d 360 (Fla. 2d DCA 2011), review granted, No. SC11-1543, 2011 WL 4597556 (Fla. Sept. 22, 2011), and disapprove Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010), and its progenies. However, before discussing the ultimate question presented, the State will first address this Court's Jurisdiction.

A. Jurisdiction was improvidently granted.

This Court should determine that jurisdiction was improvidently granted because the evidence shows that the theft and the dealing in stolen property charges did not involve the same property, nor were they part of one scheme or course of conduct. Although the trial court in this case gave Mr. Williams the benefit of Section 812.025, the evidence does not support that he was entitled to its benefit. See Wilkins v. State, 2011 WL 5253029, 1 (Fla. 2d DCA 2011). Section 812.025, Florida Statutes (2008), prohibits dual convictions for both theft and dealing in stolen property when the crimes are in connection with "one scheme or course of conduct..". § 812.025, Fla. Stat.

(2008). Thus, Section 812.025 precludes dual convictions for theft and dealing in stolen property only when those charges relate to "one scheme or course of conduct" and does not entirely foreclose the possibility of prosecution for both offenses in connection with the same stolen property. § 812.025, Fla. Stat. (2008); Wilson v. State, 884 So. 2d 74, 77 (Fla. 2d DCA 2004); Rife v. State, 446 So. 2d 1157, 1158 (Fla. 2d DCA 1984). Likewise, the statute does not foreclose the possibility of prosecution for both offenses if the theft and dealing in stolen property did not consist of the same property.

In this case, the evidence presented at trial reflects that Petitioner's charges do not relate to the same property, nor to "one scheme or course of conduct". The Information accused Petitioner of committing the burglary and grand theft on August 8, 2008, and the dealing in the stolen property as well as providing false information on a pawnbroker form the following day, August 9, 2008 (Vol.1;R:25-27). The facts presented at trial further bore out that not all the items taken from the burglary were pawned at Cash America. The items stolen were approximately 30 DVDs, two gaming systems, electronic games and a digital camera. The evidence showed Petitioner only pawned off one game system and three electronic video games.

The jury received evidence that Petitioner pawned some specific stolen items and no evidence as to the status of the

remaining items. Therefore, the jury was free to infer that the remaining items were retained for Petitioner's own use. Proof that Petitioner sold some of the stolen items and retained the rest for his own use would therefore militate against an instruction requiring the jury to return a guilty verdict on either the charge of theft or dealing in stolen property, but not both. § 812.025, Fla. Stat. (2008).

Petitioner not only burglarized the residence and pawned some of the items for cash; he also kept some of the items. Because the facts bore out that Petitioner was both a thief and a dealer in stolen property, Section 812.025 should not apply. As Judge Gerber aptly noted in Kiss, there are times when the state produces sufficient evidence to prove both crimes and the jury can properly return a guilty verdict on both crimes. Kiss, 42 So. 3d at 812-813. On these facts, the jury was correct in returning a verdict finding Petitioner guilty of both Grand Theft and Dealing in Stolen Property.

Courts of this State have approved dual convictions where the State proved that the theft of property and sale of that same property were distinct and unrelated criminal incidents. Rife v. State, 446 So. 2d 1157, 1158 (Fla. 2d DCA 1984); Cleaves v. State, 450 So. 2d 511, 512 (Fla. 2d DCA 1984)(stating Court's unwillingness to create a presumption that section 812.025 prohibits a conviction of theft and dealing in stolen property

simply because the same property is involved on dates in close proximity with each other when there is no other evidence of one scheme or course of conduct before the trial court at the time of the finding of guilt of the offenses); But Cf. Kelly v. State, 397 So.2d 709, 710 (Fla. 5th DCA 1981) (holding that the fact that one week elapsed between the theft and the pawning of the stolen property does not support the state's argument that a different scheme or course of conduct arose by reason of the interim); Corvo v. State, 916 So. 2d 44 (Fla. 3d DCA 2005); Williams v. State, 404 So.2d 1165 (Fla. 2d DCA 1981); Jones v. State, 453 So. 2d 1192 (Fla. 3d DCA 1984).

The courts of this state have interpreted the statute to prevent dual convictions in some, but not all, cases. As Justice Canady explained when he was a member of the Second District Court:

> As we noted in Rife v. State, 446 So. 2d 1157, 1158 (Fla. 2d DCA 1984), Section 812.025 precludes dual convictions for theft and dealing in stolen property only when those charges relate to "one scheme or course of conduct" and thus does not entirely foreclose the possibility of prosecution for both offenses in connection with the same stolen property. However, as was true of the defendant in Rife, Wilson was accused of stealing and selling the same property on the same day. Id. Likewise, nothing in the instant case "meaningfully disrupt[ed] the flow [of Wilson's conduct] by a clearly disjunctive interval of time or set of circumstances."

Williams at 365, citing Wilson v. State, 884 So. 2d 74, 77 (Fla. 2d DCA 2004).

Here, the offenses occurred on two separate days and did not involve the same property. The record shows Mr. Williams pawned only a portion of the stolen items the next day. (Vol.3;T:186-198). There was a meaningful disruption from the theft via an interval of time. “Thus, it may have been possible to sustain a conviction for grand theft and a conviction for dealing in stolen property due to the break in time and by allocating portions of the amount stolen to each offense”. Wilkins v. State, 2011 WL 5253029, 1 (Fla. 2d DCA 2011).

The statutory prohibition against dual convictions only extends to the theft and dealing of the same stolen property “in connection with one scheme or course of conduct.” § 812.025, Fla. Stat. (2008). The dealing in stolen property charge dealt with separate conduct involving a disjunctive interval of time or set of circumstances, which was in essence divorced from the burglary and the theft. Because both charges occurred on two separate days and involved different property, there was no one scheme or course of conduct. Thus, the statute does not apply to the facts of this case. Accordingly, Jurisdiction was improvidently granted in this case.

B. The Trial Court was not required to instruct the Jury to perform the selection process described in Section 812.025 of the Florida Statutes.

The alleged error in this case arises from an application of section 812.025, Fla. Stat. (2008). The record shows Petitioner asked the court to instruct the jury under Section 812.025. The proposed special jury instruction read as follows:

> An information may charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but you may return a guilty verdict on one or the other, but not both, of the counts.

(Vol.1;R:38).

"A trial court has wide discretion in instructing the jury and the court's rulings on the instructions given to the jury are reviewed with a presumption of correctness on appeal." James v. State, 695 So. 2d 1229, 1236 (Fla. 1997). The decision on whether to give a particular jury instruction is within the trial court's discretion, and, absent "prejudicial error," such decisions should not be disturbed on appeal. Card v. State, 803 So. 2d 613, 624 (Fla. 2001), citing Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990); See Alston v. State, 723 So. 2d 148, 159 (Fla. 1998)(holding trial court did not abuse its discretion in denying defendant's request for a special jury

instruction).

Given that the trial court had no Standard Jury Instruction to apply, there is no requirement to give a special instruction ordering the Jury to perform the selection process described in Section 812.025, Florida Statutes. The trial court denied Petitioner's request explaining that there was no standard instruction on this topic and that the proposed instruction, as written, was inadequate to explain to the jury how to make this decision. (Vol.3;T:198-200). The trial court also appeared to have been persuaded by the State's argument that the statute should not apply in this context because Mr. Williams had taken more items in the burglary than he had pawned at the pawnshop. Id. at 362.

The legislature enacted Section 812.025, in 1977. See Ch. 77–342, § 9, Laws of Fla. As the Fourth District accurately noted in Kiss, the statute is not necessary to avoid a claim of double jeopardy. See 42 So.3d at 813. Instead, as Judge Altenbernd points out, "it is a rare, if not unique, form of statutory double jeopardy that announces a legislative policy encouraging the courts to convict a defendant of fewer than all possible offenses in this context". Id. at 362.

On its face, this statute allows the State to charge a defendant under one charging document, with both grand theft and dealing in stolen property. § 812.025, Fla. Stat. (2008). It

also allows the State to try these charges in one trial and presumably, as the State did here, the State may present evidence establishing both crimes. § 812.025, Fla. Stat. (2008). The trial court then instructs the jury on the elements of both crimes. Although both charges are submitted to the jury, the jury "may return a guilty verdict on one or the other, but not both, of the counts." § 812.025, Fla. Stat. (2008).

In this case, which was decided after Kiss, the Second District held that the trial court's decision to deny an instruction on section 812.025, even when the defendant requested the instruction and preserved the issue for review did not warrant a new trial. Williams, 66 So.3d at 365. The trial court did not abuse its discretion in denying Petitioner's proposed special jury instruction.

Trial courts are generally accorded broad discretion in formulating jury instructions. See Westerheide v. State, 767 So. 2d 637, 656 (Fla. 5th DCA 2000), rev. granted, 786 So.2d 1192 (Fla. 2001); Barton Protective Servs., Inc. v. Faber, 745 So. 2d 968 (Fla. 4th DCA 1999)). Here, the error complained of did not result in a miscarriage of justice. In fact, the record shows the trial court denied Petitioner's proposed special instruction because it may have confused or mislead the jury. (Vol.3;T:198-200).

In Hall v. State, 826 So.2d 268, 271 (Fla. 2002), which

involved a similar dual conviction albeit in the context of a plea, this Honorable Court held that the defendant could be convicted of only one offense. This Court did not remand to allow the defendant to withdraw his plea. Instead it sent the case back to the Fourth District with instructions to reverse one of the two affected judgments and sentences. Id. at 272. This Court expressly approved the Second District's decision in Victory v. State, 422 So. 2d 67 (Fla. 2d DCA 1982), which had reversed a second judgment and sentence in a similar manner.

This Court explained that "[T]he lynchpin of Section 812.025 is the defendant's intended use of the stolen property. *The legislative scheme allows this element to be developed at trial* and it is upon this evidence that the trier of fact may find the defendant guilty of one or the other offense, but not both." Id. at 273, emphasis added. The Hall Court made clear that the intended use of the stolen property would have to be developed as a matter of proof at trial as it is understandably not apparent at the time of charging. The dealing in stolen property statute therefore addresses the evil of the middleman (the "fence") who does not steal, but sells the property stolen by another to a third source. "The criminalization of one who receives of stolen property and traffics in them for profit focuses on the redistribution of the stolen goods whereas the theft statute focuses on those persons who steal for personal

use and for whom redistribution is incidental." *Id.* at 271.

Yet, a defendant who pawns items previously stolen by him makes a "transfer" as defined by the statutory definition of trafficking in stolen property and is guilty as a trafficker. See State v. Nesta, 617 So. 2d 720 (Fla. 2d DCA 1993)(holding that, "[o]ne who attempts to sell or sells stolen goods to a pawnbroker is not using the stolen items for his own personal use but has met the statutory requirements for dealing in stolen property."); accord State v. Holcomb, 627 So. 2d 127, 127-28 (Fla. 5th DCA 1993) (holding that pawning stolen property "is a 'transfer' as that term is used in the statutory definition of trafficking in property."). As this Court stated:

> "it appears that the dealing in stolen property statute and the theft statute address two different evils. The former is directed toward the criminal network of thieves and fences who knowingly deal in the redistribution of stolen property, whereas the theft statute is directed toward those persons who steal for personal use and for whom redistribution is incidental".

Hall v. State, 826 So. 2d 268, 271 (Fla. 2002).

The analysis in Hall requires the jury to determine which intent was proven by the evidence and thus which of the two crimes applies to those facts. Hall essentially divided thieves into two classes of criminals. The thief that steals for personal gain and the thief that is a trafficker in stolen property. However, this analysis does not address a third

category of person which falls under the statute. An individual who has both an intent to steal some property for personal use, and the intent to steal other property for redistribution, or to traffic them for profit.

In the case *sub judice*, the facts show that Petitioner represents this third class of criminal. One who intentionally retains some items for personal use while selling the remainder for gain. In such cases, a reading of Hall and the statute does not provide sufficient guidance on how to instruct the jury when dealing with this factual scenario.

Respondent agrees with the Second District's Opinion that the procedural requirements in section 812.025 are unenforceable. Williams v. State, 66 So. 3d 360, 361 (Fla. 2D DCA 2011). The Court reasoned that:

> "the procedural requirements in section 812.025 are unenforceable to the extent that the statute (1) attempts to establish a procedure by which a jury does not return a factual finding announcing a verdict of guilty on each of the two separately charged offenses despite its determination that the State has proven the offenses beyond a reasonable doubt and (2) requires the jury to make this selection without any legal criteria or factual basis."

Id. at 361.

The statute is intended to avoid guilty verdicts for both offenses if they arise out of the same scheme or course of conduct. See § 812.025, Fla. Stat. (2008). As Judge Altenbernd

pointed out in Williams, case law shows that "for many years, trial courts have been attempting to fulfill the apparent substantive intent of this statute by obtaining factual determinations from the jury on both charges and then entering a judgment of conviction and a sentence on the greater charge." Id. at 361. District Courts have traditionally applied this philosophy and vacated the verdict for the lesser charge in cases where a jury convicts a defendant of both theft and dealing in stolen property. Bishop v. State, 718 So. 2d 890, (Fla. 2d DCA 1998); Poole v. State, 67 So. 3d 431, 432 (Fla. 2d DCA 2011); Blackmon v. State, 58 So. 3d 343 (Fla. 1st DCA 2011); Drew v. State, 861 So. 2d 110, (Fla. 1st DCA 2003); State v. Keith, 732 So. 2d 9, (Fla. 3rd DCA 1999); T.S.R. v. State, 596 So. 2d 766 (Fla. 5th DCA 1992). As the Fifth District noted in Ridley, when "the State has convinced the jury beyond a reasonable doubt as to both [charges] [the court] reverse[s] the less serious conviction." 407 So. 2d at 1002. Even the Fourth District has reversed such cases without ordering a new trial, recognizing that "[t]he remedy routinely imposed under these circumstances ... is vacating the conviction which carries the lesser sentence." Anderson v. State, 2 So. 3d 303, 304 (Fla. 4th DCA 2008). The trial court did not err in following this

established precedent.[1]

This method is analogous to a situation when a court reserves ruling on a Motion for Judgment of Acquittal, thereby reserving its right to rule on the legal issue raised in the motion after the jury returns its verdict. See State v. Fagan, 857 So. 2d 320, 321 (Fla. 2d DCA 2003); Cf. Rios v. State, 920 So. 2d 789, 790 (Fla. 5th DCA 2006)(holding that court's failure to timely rule on the motion for judgment of acquittal was harmless); See Hitchcock v. State, 413 So. 2d 741, 746 (Fla. 1982), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982)(holding that error is subject to a harmless error analysis).

Under this principle, the jury may return a verdict of not-guilty of the charge in question, thereby making the issue moot. The same principle applies here. Assuming the statute applies, trial courts are cognizant of the fact that if the jury returns a not-guilty verdict on one of the charges in question, then no violation of the statute has occurred. Thus, contrary to

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[1] As pointed out by Judge Altenbernd in the Second District, the Fourth District has never overruled Anderson v. State, 2 So. 3d 303 (Fla. 4th DCA 2008), in an en banc opinion, and thus, the authority of the panel in Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010), to disregard the routine remedy that the Fourth District had used in prior cases, especially in the context of fundamental error must be questioned.

Petitioner's contention, a trial court can achieve compliance with the statute without giving a jury instruction to perform the process described in Section 812.025.

This statute does not prevent a court from entering a Judgment, which is the actual adjudication of guilt that is the condition precedent to the entry of a sentence. Williams So. 2d at 362, citing Fla. R.Crim. P. 3.650 & 3.700(a). "Instead, it essentially prevents a jury from checking a box on a verdict form to disclose its findings of fact as to one of two charges. Williams, So. 2d at 362. "Significantly, the legislature has given neither the jury nor the trial court any guidance on which of the two boxes the jury should leave empty. This lack of any criteria for the jury's determination is very problematic." Id. at 362.

The core problem with this statute is that it is attempting to require the trial court to have the finder of fact make decisions that simply are not factual decisions. After a jury has found that the State proved the elements of both offenses beyond a reasonable doubt, its job is done. It has never been, and should not be, the function of the jury to make additional legal decisions that are not at least mixed questions of fact and law.

The Supreme Court Committee On Standard Jury Instructions In Criminal Cases has drafted and published the following

proposed jury instruction on dealing in stolen property (fencing) which addresses Section 812.025:

> Give if jury is also instructed on theft for crime committed in same scheme or course of conduct. § 812.025, Fla. Stat. See Hall v. State, 826 So. 2d 268 (Fla. 2002); Rife v. State, 446 So. 2d 1157 (Fla. 2d DCA 1984); Allwine v. State, 978 So. 2d 272 (Fla. 4th DCA 2008).
>
> You will receive separate verdict forms for theft and dealing in stolen property because the defendant is charged with both crimes. However, **if the theft and the dealing in stolen property consisted of the same property, which was stolen and trafficked during one scheme or course of conduct, Florida law places limits on a jury's authority to find the defendant guilty of both crimes.**
>
> If you find the defendant committed theft and dealing in stolen property of the same property during one scheme or course of conduct and you also find the defendant stole the property with the intent to appropriate the property to [his] [her] own use, you should find [him] [her] guilty only of theft.
>
> If you find the defendant committed theft and dealing in stolen property of the same property during one scheme or course of conduct and you also find that the defendant intended to traffic in the stolen property, you should find [him] [her] guilty only of dealing in stolen property.
>
> **If you find the theft and the dealing in stolen property did not consist of the same property or were not part of one scheme or course of conduct, you may find the defendant guilty of both crimes. Theft and dealing in stolen property consist of one scheme or course of conduct if they involve**

the same property and there is no meaningful disruption via an interval of time or set of circumstances.

The Florida Bar News, "Proposed jury instructions ffor criminal cases", 14.2 and 14.3 Dealing In Stolen Property (Fencing 14.2 (Organizing 14.3)(May 15, 2011). However, it is worth noting that the proposed jury instructions addresses circumstances where the theft and the dealing consist of the same property.

The language of section 812.025 is not an adequate jury instruction. This statute is odd in many respects, and the courts of this state will better achieve the legislature's intent in this statute by following the current, routine methods and not by giving the jury an instruction that provides them no guidance in their decision. Williams, So. 3d 360, 361 (Fla. 2D DCA 2011).

Respondent contends that the proposed jury instruction submitted herein was inadequate. The proposed special jury instruction did not provide any guidance as to how to determine which charge proved beyond a reasonable doubt by the State it should dismiss. Moreover, it is worth noting that the proposed jury instruction as crafted would not address the facts of this case given that both offenses involved different property.

Whether to give a special jury instruction is discretionary. Card So. 2d at 624. Respondent rejects

Petitioner's claim the trial court erred in denying his request that the court give the special jury instruction he proposed. Although the special jury instruction essentially tracked the language of the statute, it gave the jury no procedural guidance on how to accomplish the statute's mandate. Moreover, the proposed jury instruction did not track the language of either Hall v. State, 826 So. 2d 268 (Fla. 2002), or Allwine v. State, 978 So. 2d 272, 275 (Fla. 4th DCA 2008).

As previously mentioned, this Court acknowledged in Hall that it was proper to charge a defendant with both counts. This Court merely precluded a conviction for both counts. Petitioner attempts to take this Court's decision in Hall further, arguing that it was fundamental error for the judge not to give his proposed special jury instruction or to sua sponte create a special jury instruction regarding §812.025, Fla. Stat. (2008). However, this Court has never required such. While the State does recognize that it would be error to convict a defendant of both offenses, it is not error to try a defendant for both offenses. In the instant case, there was no dispute that the State could try Petitioner for both offenses. Moreover, Petitioner never presented a defense that he was more of a thief or more of a trafficker.

Given that there is more than one way to ensure compliance with the statute, it cannot be said that it is error to deny a

special jury instruction or to fail to instruct the jury to perform the selection process described in Section 812.025. Accordingly, this Court should answer the certified question in the negative, and resolve the existing conflict among the Districts by affirming the Second District's opinion, thereby disapproving Kiss and all other conflicting decisions holding that it is fundamental error to not give an instruction pursuant to Section 812.025.

ISSUE II:

MUST THE APPELLATE COURT ORDER A NEW TRIAL ON BOTH OFFENSES IF THE TRIAL COURT FAILS TO GIVE AN INSTRUCTION?

Even if it was error to not give an instruction pursuant to Section 812.025, it is subject to a harmless error analysis. Thus, it cannot be fundamental error, and no new trial is required. The Second District Court properly found that the remedy for guilty verdicts for both Trafficking In Stolen Property and Grand Theft arising out of the same scheme or Transaction, in violation of Section 812.025, Fla. Stat. (2008), is to vacate or dismiss the conviction for the lesser offense.

But Petitioner is not satisfied. Instead he argues that a new trial on both offenses is required. Petitioner claims that

pursuant to § 812.025, Fla. Stat. (2008), the proper remedy when a jury is not instructed to choose between the offenses of theft and dealing in stolen property, as requested by the defense, is a new trial. Petitioner relies chiefly on *Kiss v. State*, 42 So.3d 810 (Fla. 4th DCA 2010) in support of his argument that in the case such as his, where the defendant is charged with both grand theft and dealing in stolen property, the trial court's denial of a proposed jury instruction requiring the jury to return a verdict on one of the counts, but not both, constituted fundamental error. In Kiss, the majority held that the trial court's failure to instruct the jury pursuant to Sec. 812.025 is *in and of itself* fundamental error and required that both offenses be reversed and remanded for a new trial. Id. at 812. Kiss however, recognized it went against longstanding precedent, and certified conflict with *Ridley v. State*, 407 So. 2d 1000 (Fla. 5th DCA 1981).

In this case, the Second District Court disagreed with Kiss and concluded that the trial court's failure to instruct the jury on Section 812.025 did not constitute fundamental error warranting a new trial. Williams v. State, 66 So. 3d 360, 361 (Fla. 2d DCA 2011). Thus, the Court held that the proper remedy for guilty verdicts for dealing in stolen property and grand theft was to vacate the conviction for the lesser offense. Id. at 364. The Court recognized conflict with Kiss and certified

the three questions of great public importance now before this Court. Id. at 365.

District Courts have consistently held that the proper remedy in a case such as this case is to dismiss the grand theft charge and sentence the defendant only for the dealing in stolen property charge. *Bishop v. State,* 718 So. 2d 890 (Fla. 2d DCA 1998) *Duncan v. State,* 503 So. 2d 443, 444 (Fla. 2d DCA 1987); *Repetti v. State*, 456 So. 2d 1299, 1300 (Fla. 2d DCA 1984); Blackmon v. State, 58 So. 3d 343 (Fla. 1st DCA 2011); Drew v. State, 861 So. 2d 110, (Fla. 1st DCA 2003); State v. Keith, 732 So. 2d 9, (Fla. 3rd DCA 1999); T.S.R. v. State, 596 So. 2d 766 (Fla. 5th DCA 1992). Here, the court's act of vacating the grand theft sentence did not affect the remaining sentences and saved judicial time and effort. See Poole v. State, 67 So. 3d 431, 432 (Fla. 2d DCA 2011).

Having been charged and convicted of all three counts of burglary, grand theft and dealing in stolen property, Petitioner prays for a new trial asserting that fundamental error has resulted based on the trial court's denial of his special jury instruction. Petitioner makes this claim despite the fact that the trial court dismissed the Grand Theft charge "finding that it is subsumed within Count III, Dealing in Stolen Property" (Vol.1;R:104).

Petitioner's argument is premised upon the notion that had

the jury been instructed to pick one of the charges, the jury could have picked the lesser, and thus his sentence would have been impacted. Essentially, the argument is that failure to instruct the jury on section 812.025 puts the defendant at a disadvantage. However, the failure to instruct the jury did not place Petitioner at a disadvantage. The fact remains that the jury here had an opportunity to acquit on the dealing in stolen property and refused to do so. Secondly, no matter what verdict the jury could have returned on these two charges, Petitioner is still left with the burglary conviction on count I, and that greater offense allows for the highest sentence imposed in this case. Thus, Petitioner was not prejudiced by the trial court's refusal to give the special jury instruction pursuant to Section 812.025.

In Kiss, the Fourth District Court reversed for new trial specifically based on the ground of prejudice. The Court stated: "In choosing to sentence Kiss on the dealing in stolen property charges, the trial court imposed a sentence of three and one-half years in prison, followed by five years probation. *Had the jury found Kiss guilty of only grand theft, the maximum sentence could not exceed five years.*" Kiss, 42 So.3d at 813, emphasis added. However, Petitioner cannot make the same argument.

Unlike in Kiss, given Petitioner's Burglary conviction, had the trial court adjudicated and sentenced Petitioner on the

grand theft and not on the dealing in stolen property, it would not have affected the maximum sentence the trial court could impose, and that Petitioner could have received.

Here, the record shows Petitioner was sentenced to 15 years state prison on the burglary, 15 years on the dealing in stolen property to run concurrently, and 5 years on the false information on pawnbroker form, to run consecutive to the 15-year sentence (Vol.;R:113)(Vol.;T:262). Under this sentencing scheme, there is no net difference in Appellant's overall sentence. Thus, the length of Petitioner's overall sentence would not have been affected at all, even if the trial court had vacated the greater offense.

Although the imposition of both convictions may be fundamental error, the failure of a judge to give a special jury instruction, or to sua sponte create a jury instruction is not. It is appropriate for the State to charge and try a defendant for both offenses. However, §812.025, Fla. Stat., is a rare form of statutory double jeopardy which precludes the conviction for both offenses. Since it is analogous to improper dual-convictions for double-jeopardy reasons, the remedy is to vacate the lesser conviction. To hold otherwise, would create an unintended windfall in the future.

A contemporaneous objection is required, as it is in many situations, to preserve an error involving jury instructions.

State v. Delva, 575 So.2d 643, 644 (Fla. 1991). "[The contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client."). Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995).

To hold that failing to instruct on §812.025, Fla. Stat., amounts to fundamental error would engender precisely the strategy that the contemporaneous objection rule is designed to prohibit; specifically, counsel could allow the case to go the jury, knowing a failure to instruct on the element would have no effect on the client's defense. Even if the jury convicted the client, the client would still be guaranteed a second trial, in which he could try his defense all over again; the alleged "fundamental error" would be immaterial and simply be a vehicle for obtaining a second chance at acquittal. See Davis, 661 So.2d 1193 at 1197. Such is the strategy which Delva prohibited; even something as important as an instruction on an element of a crime does not amount to fundamental error when the element is not in dispute. Consequently, Petitioner is not entitled to a new trial.

In the instant case, the First District Court of Appeal echoed the reasoning of Ridley. The First District held that the remedy of vacating the lesser,

> …better respects the jury's determination that the state met its burden to prove the greater offense and also avoids the need to speculate what verdict the jury might have returned had it been required to choose between the greater and lesser offenses.

Blackmon v. State, 58 So.3d 343, 347 (Fla. 1st DCA 2011). Thus, it is not the failure to instruct the jury, and its attendant concern as to which offense the jury would have chose, that is really at issue; rather, it is the prohibition against dual-convictions which is the true error at issue. As such, the only remedy which serves the dual purposes of respecting the jury's verdicts and complying with the statutory prohibition on dual-convictions is to vacate the lesser of the two convictions. The question of what a jury would have decided is therefore not properly before an appellate court and the only remaining issue is curing the improper dual-convictions while respecting the verdicts of the jury.

While the Kiss opinion criticizes the analogy to double jeopardy made in Ridley, double jeopardy is actually a very good analogy. While the basis for double jeopardy is a constitutional prohibition on dual convictions rather than a statutory prohibition on dual convictions, both have the same result and the same remedy. In both situations, the appellate court is faced with the same legal dilemma and must then decide whether to vacate one of the convictions and if so, which one,

or whether to remand for yet another trial. Therefore, the remedy for a violation of a constitutional prohibition of dual convictions is a perfect analogy for the proper remedy for a violation of a statutory prohibition of dual convictions. One naturally flows from the other. The Fifth District's reliance on double jeopardy remedies was correct and the use of the remedy for double jeopardy was therefore apt. Double jeopardy, merger, common law, and §812.025, Fla. Stat., all involve prohibitions on dual convictions and the same remedy applies to all four - vacating the lesser offense.

The remedy proposed by the Fourth District, that of ordering a new trial on both offenses if the court fails to give an instruction pursuant to Section 812.025, is neither necessary nor efficient. Judicial economy and effectiveness mandates that the lesser offense be vacated if the court fails to give an instruction pursuant to Section 812.025. As the Fifth District Court held in *Simon v. State*, 840 So. 2d 1173 (Fla. 5th DCA 2003), "in order to save judicial time and effort", the appropriate remedy in these cases is to vacate the conviction and sentence for grand theft and affirm the balance of the judgment. Id. at 1173; See Mohansingh v. State, 824 So. 2d 1053, 1054 (Fla. 5th DCA 2002). The Simon Court explained:

> "Simon need not be resentenced because he was sentenced to ten years as an habitual offender for dealing in stolen property, and

> to probation for two years consecutive to the prison sentence for the other crimes. Thus, our vacating the grand theft sentence of probation will not affect the other three sentences".

Id. at 1173.

Petitioner cannot prevail in his claim that he was prejudiced by the failure of the trial court to give the proposed jury instruction. Even assuming arguendo that it was error to not give an instruction pursuant to Section 812.025, it is subject to a harmless error analysis. *State v. DiGuilio,* 491 So. 2d 1129, 1138 (Fla. 1986). Thus, even if error, it is not fundamental error. Fundamental error must be harmful error. Cardenas v. State, 867 So. 2d 384, 390-391 (Fla. 2004), quoting Reed v. State, 837 So. 2d 366, 369-70 (Fla. 2002).

In Reed, this Honorable Court clarified and explained that "fundamental error is not subject to harmless error review"[2]. Id. at 369-370. "By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental". Id. at 370. This Court again referred to what it had said in Delva, 575 So.2d at 644-45:

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[2] This Court receded from State v. Clark, 614 So. 2d 453 (Fla. 1992), to the extent that it held that fundamental error can be harmless error. Reed v. State, 837 So. 2d 366, 370 (Fla. 2002).

> "Instructions ... are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred". Castor v. State, 365 So. 2d 701 (Fla. 1978); Brown v. State, 124 So. 2d 481 (Fla. 1960). To justify not imposing the contemporaneous objection rule, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown, 124 So.2d at 484. In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).
>
> Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error. However, we likewise caution that not all harmful error is fundamental. Error which does not meet the exacting standard so as to be "fundamental" is subject to review in accord with State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla.1986) (discussing the harmless error test).

Id. at 370.

In this case, as in many across the State, whatever prejudice existed was cured by the trial court's decision to vacate the lesser offense, thereby avoiding an adjudication of guilt. Given the abscence of any prejudice, Petitioner cannot claim harm.

Applying the test in Reed, Respondent concludes that even if it was error to not give an instruction pursuant to Section 812.025, it is subject to a harmless error analysis, and thus

cannot be fundamental error. Here, the evidence supported convictions for both grand theft and dealing in stolen property. Additionally, a guilty verdict could have been obtained without the assistance of the alleged error. See Delva, 575 So. 2d at 644. Accordingly, this Court should answer the certified question in the negative, and resolve the existing conflict among the Districts by affirming the Second District's opinion, thereby rejecting the Fourth District's position Kiss and Aversano that it is fundamental error to not give an instruction pursuant to Section 812.025.

ISSUE III:

GIVEN THAT APPELLATE COURTS ARE NOT REQUIRED TO MANDATE A NEW TRIAL, THEY MUST REQUIRE THE TRIAL COURT TO VACATE THE LESSER OFFENSE WHEN THE TWO OFFENSES ARE OFFENSES OF DIFFERENT DEGREES OR OF DIFFERENT SEVERITY RANKING.

As argued herein, the proper remedy for not giving a special instruction pursuant to Section 812.025, Fla. Stat. (2008), is to vacate the conviction for the lesser offense. Consistent with Ridley, Williams, Blackmon, and Alexander, this Court should conclude that the proper remedy is for the conviction of the lesser offense to be vacated. Indeed, as the Fourth District observed in a pre-Kiss decision, this is the

remedy "routinely imposed under these circumstances." Anderson, 2 So. 3d at 304 (citing prior cases from the Second, Fourth, and Fifth Districts). This remedy better respects the jury's determination that the state met its burden to prove the greater offense and also avoids the need to speculate what verdict the jury might have returned had it been required to choose between the greater and lesser offenses. Blackmon v. State, 58 So. 3d 343, 347 (Fla. 1st DCA 2011). Moreover, the remedy of vacating the lesser offense is also consistent with the remedy directed by this Court in Hall v. State, 826 So. 2d 268 (Fla. 2002).

The procedure the trial court utilized to fulfill the intent of section 812.025 is the same procedure that most, if not all, circuit courts have used in the Second District and others for many years. Williams So. 3d 362. When a trial court overlooks this statute, on appeal the Second District, the Third District, the First and the Fifth District have consistently reversed only the lesser offense and, if necessary, remanded the case for resentencing without consideration of the lesser offense. See, e.g., Wilson v. State, 884 So.2d 74 (Fla. 2d DCA 2004); Rife v. State, 446 So.2d 1157 (Fla. 2d DCA 1984); Victory v. State, 422 So. 2d 67 (Fla. 2d DCA 1982); Blackmon v. State, 58 So. 3d 343 (Fla. 1st DCA 2011); Drew v. State, 861 So. 2d 110, (Fla. 1st DCA 2003); State v. Keith, 732 So. 2d 9, (Fla. 3rd DCA 1999); T.S.R. v. State, 596 So. 2d 766 (Fla. 5th DCA 1992).

The trial court properly dismissed the Theft charge and sentenced Petitioner for dealing in stolen property. The Appellate Court was not Required to Mandate A New Trial. Both the District Court and the Trial Court followed established precedent. The trial court's remedy of dismissing the grand theft and sentencing Petitioner on the dealing in stolen property count was proper. Even if the jury had been instructed to choose between the two charges, and returned a verdict on only one, Petitioner's overall sentence would not have been affected.

As previously stated Kiss is distinguishable because the evidence in that case supported a finding of prejudice. Kiss, 42 So. 3d at 813. In contrast, given his status, and the penalty for burglary, Petitioner's sentence would have been unaffected. Thus, any error in permitting both verdicts was harmless. Because there is no reason to think the jury was misled in any way nor to show prejudice once the lesser offense is vacated the error is simply harmless. Accordingly, the proper remedy when a jury is not instructed to choose between the offenses of theft and dealing in stolen property, is to Vacate or Dismiss the Conviction for the Lesser Offense.

The rule of lenity does not apply here. See, e.g., Clines v. State, 912 So. 2d 550, 560 (Fla. 2005). "[T]he rule [of lenity] 'is applicable to sentencing provisions' if they 'create

ambiguity or generate differing reasonable constructions.' " Kasischke v. State, 991 So. 2d 803, 816-817 (Fla. 2008), quoting Nettles v. State, 850 So. 2d 487, 494 (Fla. 2003); Wallace v. State, 860 So. 2d 494, 497-98 (Fla. 4th DCA 2003)("Application of [the] rule [of lenity] means that if there is a reasonable construction of a penal statute favorable to the accused, the court must employ that construction." (emphasis supplied))).

The rule, codified in section 775.021(1), Florida Statutes (2001), provides that "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021, Fla. Stat. (2001). However, what the rule of lenity doesn't address is what to do when the law is silent on an issue. Gross v. State, 820 So. 2d 1043, 1045 (Fla. 4th DCA 2002). Here, the law is silent as to what the remedy should be if a trial court does not follow the requirements of the statute.

Nevertheless, relying on the rule of lenity, Petitioner argues that the greater offense be vacated. This suggestion does not withstand analysis. The contention is refuted by the fact that to do so would usurp the function and role of the jury. In this case, the jury concluded that the greater offense was proven beyond to the exclusion of every reasonable doubt. If the

trial court would have dismissed or vacated the greater offense, it would have completely ignored the jury's role as fact finder. Respondent submits to this Court that vacating the lesser offense respects the jury's verdict and their role.

Whenever the verdict of guilty as to the greater offense is justified and supported by the evidence, the proper remedy is to vacate the lesser offense, when the two offenses are of different degrees or severity ranking. Accordingly, given that Appellate Courts are not required to mandate a new trial, they should require the trial courts to vacate the lesser offense when the two offenses are offenses of different degrees or of different severity ranking.

CONCLUSION

Based on the arguments and authority presented herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Carol J. Y. Wilson, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, FL 33831, this _____ of November, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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