IN THE SUPREME COURT OF FLORIDA

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

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This court accepted jurisdiction to address 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).

Melvin Williams was charged with attempted burglary of an unoccupied dwelling, grand theft, dealing in stolen property and providing false information to a pawnbroker. (R11-15). The burglary and grand theft charges were alleged to have occurred on August 8, 2008, and the other two offenses were alleged to have occurred the next day, on August 9, 2008. (R25-29).

The defense requested the following special jury instruction under section 812.025: “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.” (R36, T126-130). The trial court recognized the need for such an instruction

but, lacking a standard instruction, refused to give the jury any instruction. (T128-130, 188-200). The court said, "They [the jury] are not trained to deal with it and, unfortunately, the instruction as crafted – and again, I'm not slighting anyone who prepared this instruction, you've taken it right out of the Hall case, but it is woefully inadequate as it relates to this very complicated issue of law, which is why I have encouraged to the extent possible, given my limited vocabulary, to beg, plead and implore the Florida Supreme Court to do its job and give us an instruction, us the trial courts, us the practitioners, you folks." (T197). The court also noted that jurors were not trained in the law and so could not follow the statutory mandate. (T198-199). Further, the trial court found, "I further find that there is no way humanly possible for this Court to the [sic] craft a lawful instruction given the absence of guidance from our appellate courts as it relates to April 20, 2009." (T199). The court acknowledged that its ruling would preclude the defense from arguing to the jury that it must follow the legislative mandate and convict Petitioner of either dealing in stolen property or theft, but not both. (T201). The court gave the standard instructions for both dealing in stolen property and grand theft. (T233-254).

At the sentencing hearing, the court merged and dismissed the grand theft charge into the dealing in stolen property charge, finding, "it was the same property as was proven to the

satisfaction of the jury." (R104). The court sentenced Petitioner to concurrent fifteen year sentences for burglary and dealing in stolen property and to a consecutive five years prison sentence for the false information count. (R84-89, 113).

On direct appeal, Petitioner argued that a new trial was required because the trial court had refused the requested instruction under section 812.025. On July 22, 2011, the district court affirmed and stating, "We conclude 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." Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011). The district court stated that there was no method for instructing the jury under section 812.025 for the following reasons: the legislature does not provide criteria for the jury to determine which of the two crimes to select, the trial judge would be required to give the jury extensive and unusual instructions, and because 812.025 required the jury to make a finding of law. Id. at 363-364. The district court stated that a new trial was not the proper remedy in this case because "[a]ll that remains is to select one offense or the other as the offense resulting in a judgment and

sentence.” Id. at 365.

The district court certified the three questions noted above.

A timely notice to invoke this Court’s jurisdiction was filed and this Court accepted jurisdiction on August 2, 2011.

SUMMARY OF THE ARGUMENT

The issue here is a defendant's remedy when a jury is not instructed under section 812.025, despite a requested instruction under that law, and the jury then returns guilty verdicts on both theft and dealing in stolen property. The district court below held that the proper remedy was to vacate the lesser conviction, while Kiss held that the proper remedy was a new trial. Kiss is correct. This Court has stated that section 812.025 requires the finder of fact to determine whether the defendant's action show the intent of a common thief or of one who traffics in stolen property. Hall v. State, 826 So.2d 268 (Fla. 2002). This is a factual determination upon which a jury must be instructed. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases has already proposed a jury instruction for section 812.025. The refusal to give such a requested instruction and to thusly deprive the jury of this legislatively mandated fact finding function is reversible error requiring a new trial. This Court should approve Kiss and disapprove Williams.

ARGUMENT

UNDER SECTION 812.025, FLA. STAT. (2008), PETITIONER COULD NOT BE CONVICTED OF BOTH THEFT AND DEALING IN STOLEN PROPERTY WHEN BOTH COUNTS AROSE FROM A SINGLE COURSE OF CONDUCT, AND THE REMEDY FOR THIS ERROR IS A NEW TRIAL.

Section 812.025 provides: "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." The issue here is whether the jury should have been instructed under this statute when such an instruction was requested and applied. Because the jury should have been so instructed and was not, reversal and a new trial are required. [1]

In section 812.025, the legislature plainly stated that a fact finder cannot return a guilty verdict for both of the crimes of dealing in stolen property and theft. In Hall v. State, 826 So.2d 268 (Fla. 2002), this Court asserted:

> Section 812.025 allows the State to charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use or to the

[1] The standard of review for a question of statutory interpretation is *de novo*. J.A.B. v. State, 25 So. 3d 554, 557 (Fla. 2010). The standard of review for the withholding of a proposed jury instruction is abuse of discretion. Quick v. State, 46 So.3d 1159 (Fla. 4th DCA 2010).

> use of a person not entitled to the use of the property or whether the defendant traffics or endeavors to traffic in the stolen property. The linchpin 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.

826 So.2d at 271.

This Court stated the jury must choose between the two crimes in deciding such a case. Id. Additionally, this Court stressed that the choice between the two crimes is determined by a factual resolution of the evidence concerning the defendant's intended use of the stolen property.

The jury in this case was not afforded this legislatively mandated choice and rendered verdicts for both crimes. A new trial is required. Id.; Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010).

In Mr. Williams' case, the theft and dealing in stolen property charges involved the same property and therefore the crimes were based upon "one scheme or course of conduct." Thus, under section 812.025, Mr. Williams could not be convicted of both charges.

The question raised by the conflict between the Second District's decision in Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011), and the Fourth District's decision in Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010), concerns a criminal defendant's remedy when a jury is not instructed to choose between the

offenses of both theft and dealing in stolen property, as requested by the defense pursuant to section 812.025, and thus returns guilty verdicts on both charges. The Second District held that the proper remedy for so failing to instruct the jury was to vacate the lesser conviction, while the Fourth District held that the proper remedy, even when the instruction was not requested, was to grant a new trial. Williams v. State, 66 So.3d at 365; Kiss v. State, 42 So. 3d at 813. The First District has held that the proper remedy for the failure to instruct the jury regarding section 812.025 when no such instruction was requested in the trial court was to vacate the conviction for the lesser offense. Blackmon v. State, 58 So.3d 343, 346-347 (Fla. 1st DCA 2011). This Court should disapprove Williams and Blackmon and approve Kiss.

The Second District's analysis of the presented issue is flawed in that it fails to recognize the following key points: 1) the statute is readily enforceable and indeed the Supreme Court Committee on Standard Jury Instructions in Criminal Cases has already proposed an instruction for implementing it[2]; 2) the harm done by not instructing the jury is that the accused is deprived of the legislatively mandated right to have the jury make the appropriate factual determination and choose between the charged crimes; 3) the error of refusing to allow the jury to exercise that choice cannot be cured by the judiciary any more than the

[2] *The Florida Bar News*, "Proposed jury instructions for criminal cases," 14.2 and 14.3 Dealing In Stolen Property (Fencing 14.2) (Organizing 14.3) (May 15, 2011)

judiciary can substitute its judgment for any lawfully based jury decision.

Additionally the reasoning of the Second District's opinion is flawed in that it relies on precedent regarding this issue that has only recently been squarely addressed by the district courts. The remedy of dismissing the lesser crime as fashioned in previous cases cannot be deemed applicable precedent to Mr. Williams' case when those cases did not involve the issue here of the failure to properly instruct the jury as requested on section 812.025. This Court's decision in Hall cannot be relied upon as precedent for this practice of dismissing the lesser charge rather than providing a new trial with the proper jury instructions, because in Hall the defendant requested the dismissal remedy and the issue of a proper jury instruction was not present in that case involving a plea bargain. See Initial Brief of Petitioner on the Merits, Hall v. State, SC00-2358.

A. Section 812.025 is readily enforceable and the jury is the appropriate body to determine what intent was proved by the evidence and to thus decide between the two crimes as mandated by the legislature.

As this Court said in Hall, "Section 812.025 allows the State to charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent

(..continued)
(http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/cb4d33dd5976b18e8525788b0047c7fc!OpenDocument&Highlight=0,14.3*).

to appropriate said property to his own use or to the use of a person not entitled to the use of the property or whether the defendant traffics or endeavors to traffic in the stolen property. The linchpin 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." This is a plain statement by this Court that section 812.025 can and should be implemented.

The Second District held that section 812.025 is unenforceable because it requires the jury to exercise discretion and step outside a pure fact-finding role. That court said the jury cannot perform the function the legislature requires it to do because the jury has no legal criteria or factual basis for so doing. This view the district court supports with prior case law which did not squarely deal with the issue presented in this case, but instead followed a judicially crafted and until lately unchallenged remedy of simply dismissing the lesser of the two offenses and convicting and sentencing on the greater. That the appellate courts have treated the two crimes of dealing in stolen property and theft like lesser included offenses, by dismissing one, adjudicating and sentencing on another, does not mean the statute is not workable or a jury cannot follow it.

An abstract argument, one made for this first time in the district court's opinion, that a statute is not "enforceable," is not a lawful basis for striking down the statute in this specific case. There is no showing in fact or in law that the jury in this case could not follow the proposed instruction or another one fashioned to meet the requirements of the statute. The district court's opinion is flawed in that it invalidates a readily enforceable law based on arguments not placed at issue in this case or argued below. The state below in the trial court and district court did not seek to invalidate its own law, but argued the remedy was dismissal of one conviction. The district court decided the statute is unenforceable without the issue of the statute's enforceability having been raised or properly litigated below.

A jury is perfectly capable of carrying out the requirements the legislature sets forth in section 812.025. Historically the jury has been given the role of fact finder and the ability to exercise its discretion, should it see fit to do so. The jury resolves factual disputes and determines which crime applies to that factual resolution. Blakley v. Washington, 542 U.S. 296, 305-306)(2004)("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[3]); Apprendi v. New Jersey,

[3] The United States Supreme Court provides the following citations to support this statement: *See* Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to

530 U.S. 466, 490 (2000)(emphasizing the importance of the jury fact finding function in a democracy). Additionally the jury has traditionally been afforded a pardon power that has long been recognized by this Court. Sanders v. State, 946 So.2d 953 (Fla. 2007); Amado v. State, 585 So.2d 282, 282-283 (Fla. 1991); State v. Wimberly, 498 So. 2d 929 (Fla. 1986); Potts v. State, 430 So.2d 900, 903 (Fla. 1982); Bailey v. State, 224 So.2d 296, 297 (Fla. 1969). See also Fairfax, "Grand Jury Discretion and Constitutional Design" 93 Cornell Law Rev. 703 (2008)(analyzing the role of discretion in all branches of the criminal justice system).

The legislature has codified this historical role of the jury in this narrow instance for these two crimes, dealing in stolen property and theft. The jury can readily fulfill its legislatively mandated function in following the given jury instructions and deciding between the two crimes of dealing in stolen property and theft.

As this Court noted in Hall,

> [S]ection 812.019, which is part of the Florida Anti-Fencing Act, Chapter 77-342, Laws of Florida, is intended to punish those who knowingly deal in property stolen by others. *[State v.] Camp,* 579 So.2d [763, 764 (Fla. 5th DCA 1991)]. The basic scenario

(..continued)
the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control ... in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative").

envisions a person who steals and then sells the stolen property to a middleman (the "fence") who in turn resells the property to a third person. *See generally* G. Robert Blakely & Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform,* 74 Mich. L.Rev. 1512 (1976). The statute punishes both the initial thief and the fence. *See* § 812.012(7), Fla. Stat. (1989). According to its legislative history, this law is an adaptation of the Model Theft and Fencing Act, consistent with the organization of Florida law, as proposed by G. Robert Blakely and Michael Goldsmith in their exhaustive study on stolen property law. Blakely and Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform,* 74 Mich. L.Rev. 1512 (1976). That article focuses on the receivers of stolen property as the central figures in theft activities, and that the law should be *focused on the criminal system that redistributes stolen goods.*

Staff of Fla. H.R. Select Comm. on Organized Crime, CS for SB 1431 (1977) Memorandum (April 7, 1977).

State v. Camp, 596 So.2d 1055, 1057 (Fla.1992) (alteration in original). 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.

[E]vidence of theft only, with the intent *personally* to put the stolen item or items to normal use, constitutes only the crime of theft and not the crime of trafficking or dealing in stolen property within the meaning of chapter 812, Florida Statutes, even if the normal use is achieved by some form of transfer, distribution, dispensation, or disposition of the item. *Id.* (quoting *Grimes v. State,* 477 So.2d 649, 650 (Fla. 1st DCA

1985)).

Hall v. State, 826 So.2d at 270-271. According to Hall, the fact finder or jury must determine which criminal intent is proved by the evidence and decide whether theft or dealing in stolen property has been proved. In light of this language by this Court, the Fourth District has properly determined that section 812.025 requires the trial court to instruct the jury that it can return a guilty verdict only on either theft or dealing in stolen property. Kiss v. State, 42 So. 3d at 811-12; Aversano v. State, 966 So. 2d 493, 496 (Fla. 4th DCA 2007).

Instructing the jury to choose which crime applies, allows the jury to decide whether the facts showed the accused intended to act as a fence or just as a common thief. The defense would then be permitted to make that factual argument to the jury, which was precluded in this case. (T201). There is nothing arbitrary in how the jury will implement its choice.

The district court's opinion took a case and controversy that involved the error of failing to give a requested jury instruction as required by statute and decided instead the issue of statutory validity and statutory interpretation. In this way the district court missed the points addressed by the statute and by this Court previously in Hall. There is no lawful basis for refusing completely to instruct the jury to follow the law set forth in section 812.025 in this case. An instruction was

plainly requested and the statute is plain in its requirements and has been valid and unchallenged by any party since its inception in 1977. Indeed, no party in this proceeding challenged the statute's validity or enforceability.

The district court's reasoning and conclusions regarding the statute's interpretation and validity are wrong, because its underlying premise is flawed. The statute is readily enforceable within its plain meaning.

Section 812.025 is plain in its requirements and therefore requires no interpretation. As this Court has recently stated regarding the rules of statutory interpretation, "[i]t is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. Thus, to determine the meaning of a statute, we first look to its plain language. When the statute is clear and unambiguous, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Saleeby v. Rocky Elson Constr., Inc.,* 3 So.3d 1078, 1082 (Fla.2009) (citations and internal quotation marks omitted).

The Second District's analysis of this statute ignores the plain language of the statute and overcomplicates the implementation of the law. The statute does not require the jury to know sentencing schemes or to make judicial determinations or to arbitrarily flip a coin to decide which crime applies. The statute requires the jury to determine which intent was proved by

the evidence and thus which of the two crimes applies to the those facts.

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 which addresses section 812.025:

> The proposed instruction is to be given if the jury is also instructed on theft for a crime committed in the same scheme or course of conduct and states:
>
> 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 for criminal cases," 14.2 and 14.3 Dealing In Stolen Property (Fencing 14.2) (Organizing 14.3) (May 15, 2011)(http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/cb4d33dd5976b18e8525788b0047c7fc!OpenDocument&Highlight=0,14.3*). This drafted instruction clearly refutes the lower court's argument that no cogent instruction can be made implementing the statute.

Additionally the district court opinion does not explain why the jury is not capable of determining which crime applies to the proved facts and then rendering a verdict accordingly. Instead the district court states that because the jury does not know which degree of crime applies to which offense, it is not capable of following the statute. This analysis ignores the traditional role of the jury which has for years made fact finding determinations without knowing the applicable penalty or degree of crime. As this Court distinguished the two crimes in Hall, the jury can choose between facts showing the accused had kept the taken goods for his or her own possession or facts showing the defendant had trafficked in the stolen goods. Making that factual choice does not require knowing the degree of the crime or instructing on a penalty. This is exactly the kind of fact finding function a jury routinely does, although in a different

manner, since the jury is choosing between two crimes that are not greater or lesser included offenses. There is nothing arbitrary in the law as plainly written and it can be ready carried out by a jury.

The reasoning set forth by the Fourth District should be followed in deciding how to apply section 812.025. In Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010), the defendant was convicted of three counts of dealing in stolen property and one count of grand theft; all the offenses occurred in the same scheme or course of conduct. After the verdict, the trial court struck the grand theft charge and sentenced Kiss on the three dealing charges. On appeal, Kiss argued that "the trial court committed fundamental error by failing to instruct the jury - pursuant to section 812.025 - that it could return a guilty verdict on one or the other of the charges, but not both[, and] the trial court did not properly cure this error by adjudicating him guilty on the counts for dealing in stolen property and discharging him as to the count for grand theft."[4] Agreeing with this argument, the district court granted a new trial:

> If the jury had followed the statute, and was required to choose, it might well have returned a verdict only on the theft charge. The failure to charge the jury on this statute thus puts a defendant at a disadvantage.
>
> . . .
>
> ... [T]he Florida Supreme Court, in construing the application of section 812.025, stated:
>
> "Section 812.025 allows the State to charge theft

[4] Id. at 811.

> and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use ... or whether the defendant traffics or endeavors to traffic in the stolen property. The linchpin 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."

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

The state asserts there is no error, as the trial court struck the charge of grand theft and sentenced Kiss only on the dealing in stolen property counts. The supreme court's decision in Hall, and the plain meaning of section 812.025, makes it clear that the state is not entitled to have the jury convict Kiss of both dealing in stolen property and grand theft. The statute does not permit this option. To conclude otherwise would make the language of the statute meaningless.

When engaging in statutory construction,

> [L]egislative intent is the polestar .... Thus, to determine the meaning of a statute, we first look to its plain language. When the statute is clear and unambiguous, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

[Citation omitted]. There is no ambiguity in section 812.025, as that section's statutory language is clear.

There are numerous cases from the district courts that have concluded that the cure to this anomaly of permitting a jury to return a verdict for both dealing in stolen property and grand theft is to strike the lesser of the two offenses. A review of these cases shows that there is no analysis given to support this remedy. The source of this misconception resides in ... Ridley v. State, 407 So. 2d 1000 (Fla. 5th DCA 1981) ....

... The court in Ridley noted that section 812.025 "prohibits a guilty verdict on both counts charging these two statutory offenses as to the same property." Id. at 1002. It further noted that while the State was not required to elect between these counts, section 812.025 requires that the trial court should have instructed the jury that guilty verdicts could not be returned as to both counts. Because this was not done, the district court felt compelled to relieve Ridley of one of the two convictions. In doing so, the district court noted that

> we find no law exactly in point indicating which of the two convictions and sentences should be reversed and vacated. Since we uphold appellant's conviction of burglary as based on the inference that he committed the theft, which in turn is based on the inference arising from his possession of recently stolen property, it is somewhat illogical to uphold the conviction of burglary and void the conviction of the theft upon which it is based.

Id. (emphasis added).

At this juncture, the Fifth District mistakenly analogized this situation to one involving double jeopardy, although recognizing that it is not directly applicable.

> Cases involving the voiding of one of two convictions because of double jeopardy concepts ... are not directly applicable. However, since dealing in stolen property is a felony of the second degree, and grand theft ... is but a felony of the third degree, ... we reverse the less serious conviction.

Id. (footnote omitted)(citations omitted).

Charging a defendant with dealing in stolen property and grand theft does not involve the issue of double jeopardy. If this were so, then the Fifth District would have been correct .... However, dealing in stolen property and grand theft each has an essential element that the other lacks [and] a conviction for both ... does not violate double jeopardy....

... [F]ailure to instruct the jury on section 812.025 puts the defendant at a disadvantage. That

> disadvantage exists in the instant case. 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.... [T]he state is free to charge both offenses, but the trier of fact must choose one or the other - but not both.
>
> We, therefore, reverse and remand for a new trial, and we certify conflict with Ridley and its progenies.[5]

The logic in Kiss applies here in this case where the error was preserved by a requested jury instruction. Kiss follows the plain meaning of section 812.025 and recognizes the harm in failing to instruct the jury according to it. In this case where the defense plainly requested an instruction under 812.025, the error cannot be cured by a judge, but only by the fact finder. The conviction should be reversed and the matter remanded for a new trial.

B. The remedy for the error is a new trial on both offenses.

What factual finding would have been made by the jury, given the legislatively mandated choice of deciding what intent was proved and then deciding between the two crimes, is completely unknown and cannot be decided by a trial judge or an appellate court. The jury decided both crimes applied, because it was not given the requested instruction to choose between the offenses. Without the requested instruction, the jury made no factual determination between the two crimes, as required by the statute.

[5] Id. at 811-13 (citations omitted) Despite the certified conflict, Kiss was

Without the required jury fact finding between the two crimes, a determination of which crime was proved cannot be then cured by the judiciary any more than the judiciary can correct a wrongly completed verdict form. See Harper v. State, 66 So.3d 1092 (Fla. 3d DCA 2011); Thomas v. State, 789 So.2d 1104 (Fla. 4th DCA 2001); Esskuchen v. State, 756 So.2d 156 (Fla. 5th DCA 2000)(error made in completion of verdict form is properly corrected by sending jury back to deliberate and return with a completed verdict).

The error is not cured because the trial court decided to sentence Mr. Williams as it did. The error occurred during the trial and not merely in sentencing. The sentence imposed for the remaining dealing in stolen property crime was fifteen years, (R84-89, 113), which is a much greater sentence than five years, the maximum permitted for grand theft as charged here. Moreover, dealing in stolen property is a second degree felony and grand theft is a third degree felony. Since Mr. Williams was not found guilty only of grand theft, but was adjudicated and sentenced for dealing in stolen property, the harm is evident and plain. The defense was denied the statutorily granted right to present the defense and argue to the jury that the grand theft charge was the applicable crime in this instance because Mr. Williams was not a fence or goods trafficker, but merely a common thief.

Additionally, the jury was deprived of its pardon power and its ability to choose which crime applied best to the unique facts

(..continued)
not taken to the supreme court.

of this case. That power was given to the jury in this unique piece of legislation. That the law is unique or different does not make it unenforceable or arbitrary. The state still retains the power to withhold the choice required by the statute by not charging both offenses.

The state argued in the district court that 812.025 does not apply to the facts of this case because the state's evidence at trial showed more items were missing from the burglarized home than were pawned by Mr. Williams. The trial court, however, specifically found the jury determined that the same property that was stolen was the same property that was pawned, and that fact finding, and not the arguments of counsel, should be considered the record evidence in this matter. (R104). The district court wrote that "the trial court gave Mr. Williams the benefit of section 812.025, but it is not entirely clear from the evidence that he was entitled to its benefit." Williams, 66 So.3d at 365.

There is no logical basis for determining 812.025 is inapplicable to the facts of this case where only one burglary and theft lead to one pawn shop transaction. That was one scheme or course of conduct, even if all the items missing were not pawned. The gaming system and several DVDs stolen from the home were pawned and thus part of the same scheme. District courts have held that when the items pawned are from the same batch of items taken, section 812.025 applies because the same scheme or course of conduct lead from the theft to the trafficking. See L.O.J. v.

State, 974 So.2d 491 (Fla. 4th DCA 2008)(three guns stolen and only one gun pawned and common scheme or course of conduct found under 812.025); Corvo v. State, 916 So.2d 44 (Fla. 3d DCA 2005)(drums and jewelry stolen but only jewelry pawned and common scheme or course of conduct found); Toson v. State, 864So.2d 552 (Fla. 4th DCA 2004)(many items stolen from a single residence and only 3 of them pawned and common scheme and course of conduct found). In this case the state's evidence showed two gaming systems and multiple games were taken from the residence, and one gaming system and several games were pawned. The same scheme or course of conduct applies to the theft and the trafficking conduct and the statute applies to the facts of this case.

However, applying the statute at sentencing, as occurred below and as affirmed by the district court, does not cure the error of depriving the jury of its statutorily required fact finding determination. Kiss, in which the Fourth District Court of Appeal required a new trial for the error of not instructing the jury in accordance with Section 812.025, is entirely consistent with Hall, while Williams is not. Because Hall entered a plea, the finder of fact in that case was the trial court, and this Court directed the finder of fact to "make a choice" between the two counts. Hall, 826 So. 2d at 271. This Court left the decision regarding which count should be reversed to the finder of fact and did not itself direct reversal of one of the counts. This is precisely what occurred in Kiss, where the appellate court

directed that the finder of fact (there, a jury) decide which count applied. This is the precise opposite of what occurred in Williams, where the appellate court itself would decide which count applied rather than leaving that decision to a finder of fact.

Because a jury must decide whether the defendant is "a common thief" or is a person who "traffics or endeavors to traffic in stolen property," Hall v. State, 826 So. 2d at 271, the only remedy for failing to instruct the jury to make this decision is a new trial. However, the Second District and other Florida Courts of Appeal have remedied this error by striking the lesser of the two offenses. *See, e.g.,* Lutz v. State, 60 So. 3d 500 (Fla. 1st DCA 2011) (citing cases). In Kiss, the court explained that no analysis has been given to support this remedy, which is based upon Ridley v. State, 407 So. 2d 1000, 1002 (Fla. 5th DCA 1981). Kiss, 42 So. 3d at 812. As Kiss further explains, the Ridley court decided to reverse the lesser conviction based upon a mistaken analogy to a double jeopardy violation. Id. at 813. Ridley and its progeny have failed recognize that the error is the failure to instruct the jury. Section 812.025 directs, "the trier of fact may return a guilty verdict on one or the other, but not both, of the counts." As this Court has said, "[t]he legislative scheme is clear" and requires that "the trier of fact must make a choice if the defendant goes to trial." Hall v. State, 826 So. 2d at 271.

The legislature has plainly provided for the jury to decide

which crime applies in this case and that legislation is consistent with the jury's historical function as a fact finder of which intent was proved and also consistent with the discretion historically given the jury to pardon or nullify. Not giving the jury the option to choose between the two crimes charged is an error that cannot be cured by the trial judge, because it is a function the legislature properly and solely gave to the jury. Accordingly, a new trial is the only appropriate remedy.

CONCLUSION

Based on the arguments and authority presented herein, Petitioner respectfully requests that this Court quash the decision of the district court, reverse the grand theft and dealing in stolen property judgments and sentences below and remand this case for a new trial on those charges.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Pamela Jo Bondi, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of October, 2011.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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