IN THE
SUPREME COURT OF FLORIDA

DAVID DEVON BLACKMON,

Petitioner,

v. **Case Number: SC11-903**

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED CONFLICT

PETITIONER'S INITIAL BRIEF

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

This proceeding involves the direct appeals from Appellant's criminal convictions and sentences in case number 1D10-2018 and from Appellant's revocation of probation and sentence in 1D10-2021. The trial held in case number 1D10-2018 also served as the violation of probation hearing in case number 1D10-2021, and the two cases were consolidated for briefing on appeal. The following symbols will be used to designate references to the records in these appeals:

"R2018-V[volume number]. [page number]" - two volumes labeled "Record on Appeal";

"R2021. [page number]" - one volume labeled "Record on Appeal."

STATEMENT OF THE CASE

In case number 1D10-2018, Mr. Blackmon was charged by amended information with burglary of an unoccupied structure (Count 1), petit theft (Count 2), and dealing in stolen property by trafficking (Count 3) (R2018-V1. 3-4). At trial, the court did not instruct the jury that it could not return guilty verdicts for both theft and dealing in stolen property under section 812.025, Florida Statutes (2009), and Petitioner did not request that instruction. Blackmon v. State, 58 So. 3d 343, 345 (Fla. 1st DCA 2011). The jury acquitted Mr. Blackmon of

burglary, but found him guilty of both petit theft and dealing in stolen property (R2018-V1. 38).

The court adjudicated Mr. Blackmon guilty on both Counts 2 and 3 and imposed a sentence of time served on Count 2 and a sentence of five years in prison on Count 3 (R2021. 67-68, 70). Mr. Blackmon timely filed a notice of appeal (R2018-V1. 42).

In case number 1D10-2021, Mr. Blackmon was charged with fraudulent use of a credit card (Count 1) and theft of a credit card (Count 2) in August of 2006 (R2021. 1). On June 13, 2007, Mr. Blackmon pled nolo contendere to both charges and was ordered to serve 11 months, 15 days in jail to be followed by 24 months of probation (R2021. 22-23, 25-26). On December 28, 2009, the Department of Corrections filed a violation report charging Mr. Blackmon with violating Condition 2 of his probation by failing to pay the costs of supervision (Count 1) and with violating Condition 5 by committing burglary and larceny (Counts 2 and 3) (R2021. 29-31). On February 11, 2010, the Department of Corrections added violations of Condition 16 for failing to pay court costs (Count 4) and of Condition 20 for failing to pay restitution (Count 5) (R2021. 39-41).

On March 31, 2010, at the conclusion of the trial in case number 1D10-2018, the State announced it was not proceeding against Mr. Blackmon on the financial violations, only on the

new law violations (R2021. 45-46). Count 2 charged a new law violation by committing burglary, and Count 3 charged a new law violation by dealing in stolen property (R2021. 45-46). The court found Mr. Blackmon guilty of Counts 2 and 3 (R2021. 47). The court revoked Mr. Blackmon's probation and sentenced him to serve five years in prison concurrent with the sentence imposed in case number 1D10-2018 (R2021. 59, 70). Mr. Blackmon timely filed a notice of appeal (R2021. 77).

On appeal to the First District Court of Appeal, Mr. Blackmon challenged his convictions for both petit theft and dealing in stolen property (1D10-2018 & 10-2021, Initial Brief of Appellant at 14-18). Mr. Blackmon argued and the State agreed that the trial court fundamentally erred in convicting Mr. Blackmon of both offenses. Blackmon, 58 So. 3d at 345. However, Mr. Blackmon argued the remedy for this error was a new trial, while the State argued the remedy was to vacate the petit theft conviction. Id.

Mr. Blackmon's argument in the First District relied upon Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010). The First District described the decision in Kiss:

> In that case, a jury found the defendant guilty of three counts of dealing in stolen property and one count of grand theft of the same property and in the same course of conduct. Id. at 811. On appeal, the defendant argued that the trial court fundamentally erred by failing to instruct the jury that, pursuant

> to section 812.025, it could not return a guilty verdict on both grand theft and dealing in stolen property. Id. The defendant argued that the trial court did not cure this error by adjudicating him guilty of only the dealing in stolen property count and, therefore, he was entitled to a new trial. Id. The Fourth District agreed and remanded for a new trial. Id. The court reasoned that the failure to instruct the jury on its obligation under section 812.025 prejudiced the defendant because, if properly instructed, the jury could have found the defendant guilty of only theft, the lesser offense.

Blackmon, 58 So. 3d at 346.

The First District found "some attraction to the Fourth District's reasoning in Kiss because section 812.025, by its terms, imposes an obligation on the trier of fact (here, the jury), not the trial court." Blackmon, 58 So. 3d at 346. However, the First District disagreed with Kiss, choosing to follow its decision in Alexander v. State, 470 So. 2d 856 (Fla. 1st DCA 1985), which held that the proper remedy for the trial court's failure to instruct the jury on section 812.025 is to vacate the conviction for the lesser offense. Blackmon, 58 So. 3d at 346-47. The First District reasoned:

> In our view, 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. Moreover, in this case, we have no trouble concluding that the jury would have found Blackmon guilty of dealing in stolen property had it been required to choose between that offense and petit theft because the evidence established that Blackmon did not steal the bars for his personal use, but

> rather that he sold the stolen bars at his earliest opportunity.

Id. at 347 (citation omitted).

The First District further explained that its decision was consistent with this Court's decision in Hall v. State, 826 So. 2d 268 (Fla. 2002):

> The remedy of vacating the lesser offense is also consistent with the remedy directed by the Florida Supreme Court in Hall. The defendant in that case was charged with, among other things, grand theft and dealing in stolen property. See 826 So. 2d at 269. The defendant pled nolo contendere to those charges. Id. The trial court accepted the plea and adjudicated the defendant guilty of both offenses. Id. On appeal, the defendant argued that the trial court erred when it adjudicated him guilty of both offenses in violation of section 812.025. Id. The Fourth District affirmed, concluding that the statute did not apply when the defendant entered a plea of nolo contendere. Id. at 270.
>
> On review, the Florida Supreme Court quashed the Fourth District's decision. Id. at 272. The court reasoned that:
>
> > 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 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. . . . Just as the trier of fact must make a choice if the defendant goes to trial, so too must the trial judge make a choice if the defendant enters a plea of nolo contendere to both counts. . . . Thus,

> we find that section 812.025 prohibits a trial court from adjudicating a defendant guilty of both theft and dealing in stolen property in connection with one scheme or course of conduct pursuant to a plea of nolo contendere.
>
> Id. at 271. Notably, the supreme court did not construe section 812.025 to preclude a defendant from entering pleas to both theft and dealing with [sic] stolen property; rather, the court construed the statute to prohibit the trial court from adjudicating a defendant guilty of both offenses. As a result, the court remanded not to allow the defendant to withdraw his pleas, but rather with directions that either the grand theft count or the dealing in stolen property count be reversed and that the defendant be resentenced on the remaining count. Id. at 272.

Blackmon, 58 So. 3d at 347.

The First District reversed Mr. Blackmon's petit theft conviction and remanded with directions that the trial court vacate that conviction. Blackmon, 58 So. 3d at 348. The court also certified conflict with Kiss "regarding the proper remedy when, contrary to section 812.025, the defendant is convicted of both theft and dealing in stolen property." Id.

In his appeal, Mr. Blackmon also argued that the State's evidence was insufficient to support his convictions for petit theft and dealing in stolen property in case number 1D10-2018 and was insufficient to support the trial court's finding of a violation of probation in case number 1D10-2021 (1D10-2018 & 10-2021, Initial Brief of Appellant at 12-14, 18-19). As to both

the new convictions and the finding of a probation violation, Mr. Blackmon contended that the State's evidence was entirely circumstantial, that he presented a reasonable hypothesis of innocence which the State's evidence did not rebut and that the only evidence supporting the convictions and probation violation was the evidentiary inference in section 812.022(2), Fla. Stat. (2007). Relying upon State v. Graham, 238 So. 2d 618 (Fla. 1970), and its progeny, Mr. Blackmon argued that this evidentiary inference was legally insufficient to support his convictions and probation violation. The First District did not address these arguments.

Mr. Blackmon filed notice of his intent to seek discretionary review in this Court. The Court accepted jurisdiction.

STATEMENT OF THE FACTS

At the trial on the burglary and other charges, State witness Joseph Workman testified he was the shop foreman at W.D. Rogers Mechanical Contractors (R2018-V2. 38). On November 23, 2009, the shop closed at 3:30 p.m. ((R2018-V2. 38). The next morning, an employee told Workman he was missing his flat bar which had been on the table by the bandsaw (R2018-V2. 38). About 10 to 14 pieces of flat bar were missing and could not be found (R2018-V2. 39). The bars had been machined on one side,

cut into links and numbered a, b, c and so forth (R2018-V2. 39). The bars were stainless steel, half an inch thick and one and a half inches wide with one beveled edge (R2018-V2. 39-40).

Workman testified that the shop had a six foot chain link fence with barbed wire on the top (R2018-V2. 40). Workman could tell where someone had climbed over the fence because the barbed wire was pushed down a little bit, there were broken bushes below that area, and there were foot prints on the sides of metal racks inside the fence where someone climbed up and jumped back over the fence (R2018-V2. 40). Workman could also see where the bars had been thrown over the fence and stabbed into the ground (R2018-V2. 40-41).

Workman notified his boss and called several scrap companies to alert them about the missing bars (R2018-V2. 41). Workman was later notified that the bars were found at a scrap yard and went to the scrap yard to identify them (R2018-V2. 42). The materials for the bars cost three or four hundred dollars (R2018-V2. 42).

State witness Steven Harris was the assistant operations manager at Southern Recycling (R2018-V2. 45). When a person brings in items to sell, the company policy is to scan a copy of the person’s picture ID and to take a picture of the person (R2018-V2. 45). In November of 2009, W.D. Rogers notified

Harris's company that some articles were missing from their shop, and Harris located those items in his business (R2018-V2. 46). Harris identified State Exhibit 1A as the receipt for those items dated November 24 (R2018-V2. 46, 47; R2018-V1. 48). State Exhibit 1B was a copy of the scale ticket and indicated the sale occurred at 8:02 a.m. (R2018-V2. 46-47; R2018-V1. 49). State Exhibit 1C was a scanned thumb print and a photograph of the customer (R2018-V2. 47; R2018-V1. 50). State Exhibit 1D was a scan of a driver's license (R2018-V2. 47; R2018-V1. 51). The photograph was taken on November 24 (R2018-V2. 47). The thumb print, photograph and driver's license were Mr. Blackmon's (R2018-V2. 80-81). The company paid $61.80 for the bars (R2018-V2. 48).

The State rested (R2018-V2. 50). The defense moved for a judgment of acquittal, arguing that the State had presented no evidence that the theft, burglary and dealing in stolen property were committed by Mr. Blackmon (R2018-V2. 51). Defense counsel argued there was no evidence that Mr. Blackmon entered the facility, no evidence that Mr. Blackmon was the person who took the bars from the facility, and no evidence that Mr. Blackmon knew the bars were stolen (R2018-V2. 51). Pointing out that the State's case was based upon circumstantial evidence, defense counsel argued the State had not presented evidence from which

the jury could exclude every reasonable hypothesis except guilt (R2018-V2. 51, 52). Defense counsel acknowledged the inference created by the possession of recently stolen property, but argued that a conviction could not be based solely upon an inference "that because he possessed something that had recently been stolen, that he would have knowledge of it and that he's the one who took it" (R2018-V2. 52).

The State argued that it had met its burden because no reasonable hypothesis of innocence had been presented at that point and because the circumstances of the burglary combined with the possession of stolen property were sufficient (R2018-V2. 53). The State also argued that the evidence was not solely circumstantial because there was direct evidence that Mr. Blackmon sold the property (R2018-V2. 53). Defense counsel responded there was no direct evidence that Mr. Blackmon knew the items were stolen, that Mr. Blackmon was the person who entered the property, or that Mr. Blackmon was the person who committed the theft (R2018-V2. 54). The court denied the motion (R2018-V2. 54).

Defense witness Danna Faircloth testified she was Mr. Blackmon's fiancé, and they had been together for two and a half years (R2018-V2. 55). Faircloth and Mr. Blackmon lived together and had one car (R2018-V2. 56). On November 23, 2009, at about

11:00 p.m., Faircloth picked Mr. Blackmon up from his job as a dishwasher at a restaurant (R2018-V2. 56). Mr. Blackmon went to work at 5:00 p.m. and got off at 12:00 a.m. (R2018-V2. 56).

On the way home, Faircloth and Mr. Blackmon saw some pipes laying on the side of the road on Baars Street (R2018-V2. 56). They then went home (R2018-V2. 57). The next morning, they got up at 5:00 a.m. because Mr. Blackmon's son had to catch the school bus at 6:00 a.m. (R2018-V2. 57). Mr. Blackmon took his son to the bus stop on November 24, 2009 (R2018-V2. 57). After Mr. Blackmon came back from the bus stop, Faircloth saw him pick up the pipes that were laying on the side of the road (R2018-V2. 58). The pipes were one house length from their home (R2018-V2. 58). Faircloth had one felony conviction and one conviction for a crime of dishonesty (R2018-V2. 58-59).

On cross-examination, Faircloth testified that when she and Mr. Blackmon saw the bars, they were on the curb or in the street (R2018-V2. 62). They stopped to look at them, and Mr. Blackmon said if they were still there in the morning, he was going to get them when he took his son to the bus stop (R2018-V2. 62). Faircloth could see the writing on the bars, and the bars were shiny in their headlights (R2018-V2. 63). In her deposition, Faircloth had testified she did not see the markings on the bars, only that they were shiny (R2018-V2. 63). She

misunderstood the prosecutor's previous question about seeing the markings (R2018-V2. 64). In early 2009, Mr. Blackmon brought charges against Faircloth and later dropped those charges (R2018-V2. 64). Faircloth was not prosecuted (R2018-V2. 64). Her testimony at Mr. Blackmon's trial was not her way of paying him back (R2018-V2. 64).

On redirect, Faircloth testified she and Mr. Blackmon were together at the time of the accusation against her, and they stayed together after the accusation (R2018-V2. 65). The accusation against her was just a misunderstanding (R2018-V2. 65).

Mr. Blackmon testified that in November 2009, he was employed as a dishwasher at a restaurant (R2018-V2. 77). On November 23, 2009, he went to work at 4:00 p.m. and got off around 12:30 a.m. (R2018-V2. 78). Faircloth took Mr. Blackmon to work and picked him up when he got off (R2018-V2. 78). In the early morning of November 24, as he was on the way home, Mr. Blackmon saw some pipes lying in the road next to the curb (R2018-V2. 78). He got out of the car and looked at them (R2018-V2. 78). He then went home, thinking someone might come back for the pipes (R2018-V2. 78). Mr. Blackmon could look out the back door of his home and see the corner where the pipes were (R2018-V2. 78).

The next morning, Mr. Blackmon got up at 5:00 or 5:30 a.m. to get his son ready for school (R2018-V2. 79). When he took his son to the bus stop, Mr. Blackmon saw that the pipes were still in the street, so he picked them up (R2018-V2. 79). He took the pipes to the junkyard when it opened (R2018-V2. 80). At the junkyard, he gave his driver's license, which contained his current address, gave a fingerprint and had his photograph taken (R2018-V2. 80-81). Mr. Blackmon knew he was being photographed and knew the junkyard made a copy of his driver's license (R2018-V2. 81).

Mr. Blackmon found the pipes on Baars, and W.D. Rogers Mechanical Contractors was a quarter mile or a mile up the road, also in Mr. Blackmon's neighborhood (R2018-V2. 81). Mr. Blackmon had scrapped metal before (R2018-V2. 81-82). Mr. Blackmon had five felony convictions and one conviction for a crime of dishonesty (R2018-V2. 82).

On cross-examination, Mr. Blackmon testified that he picked up the steel bars because "[s]omebody didn't come back and get them. It was just, like, I was going to pick them up. I scrap junk" (R2018-V2. 85). He took the bars to the scrap yard "[t]o see if they were worth anything. Get the money for them" (R2018-V2. 85). Mr. Blackmon thought the bars were worth something and saw the writing on them (R2018-V2. 85-86). The

bars were “just something I found on the side there” (R2018-V2. 86). Mr. Blackmon testified that when people put items out for the garbage, he hauls the items (R2018-V2. 86). Mr. Blackmon got about $60 for the bars (R2018-V2. 86).

The defense rested (R2018-V2. 87). Defense counsel renewed the motion for judgment of acquittal, arguing that there was no competent evidence presented which was inconsistent with Mr. Blackmon’s reasonable hypothesis of innocence (R2018-V2. 87). Defense counsel argued there was no direct evidence that Mr. Blackmon entered the property, that he committed the theft or that he knew the bars were stolen when he sold them (R2018-V2. 87-88). Defense counsel argued that nothing in the State’s case contradicted Mr. Blackmon’s reasonable hypothesis of innocence that he found the bars on the side of the road (R2018-V2. 88).

The State argued it had presented competent evidence rebutting the defense theory and the decision whether or not to believe the defense theory was up to the jury (R2018-V2. 89). Defense counsel reiterated that the State had not presented any evidence inconsistent with the defense theory and that the inference created by recent possession of stolen property was insufficient (R2018-V2. 90, 91-92). The court denied the motion (R2018-V2. 92).

SUMMARY OF THE ARGUMENT

1. The 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. Blackmon 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 held that section 812.025 requires the finder of fact to determine whether the defendant is a common thief or is one who traffics in stolen property. This is a factual determination upon which a jury must be instructed. Failing to give such an instruction and thus allowing the jury to return verdicts on both theft and dealing in stolen property is fundamental error requiring a new trial. This Court should approve Kiss and disapprove Blackmon.

2. The evidentiary inference provided in section 812.022(2) is legally insufficient, standing alone, to support convictions for theft, dealing in stolen property or burglary, and the inference is also legally insufficient to support a probation revocation based upon any of those charges when the defendant presents a reasonable, unrebutted and innocent explanation for possessing the property. That inference was the only evidence supporting the State's case against Mr. Blackmon on both the new charges and the probation violation. Mr.

Blackmon's convictions and probation revocation should be discharged.

ARGUMENT

ARGUMENT I

UNDER SECTION 812.025, FLA. STAT. (2007), MR. BLACKMON 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.

Standard of Review: Mr. Blackmon's argument presents a question of statutory interpretation which is reviewed *de novo*. J.A.B. v. State, 25 So. 3d 554, 557 (Fla. 2010).

Argument: Section 812.025, Fla. Stat. (2007), 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.

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

The question raised by the conflict between the First District's decision in Blackmon v. State, 58 So. 3d 343, 345

(Fla. 1st DCA 2011), and the Fourth District's decision in Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010), 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 First District held that the proper remedy was to vacate the lesser conviction, while the Fourth District held that the proper remedy was a new trial. Blackmon, 58 So. 3rd at 347; Kiss, 42 So. 3d at 813. Mr. Blackmon submits that the Court should disapprove Blackmon and approve Kiss.

This Court has addressed the remedy for dual convictions entered in contravention of section 812.025 in the context of a nolo contendere plea. Hall v. State, 826 So. 2d 268 (Fla. 2002). In Hall, the defendant pled nolo contendere to charges of grand theft and dealing in stolen property. 826 So. 2d at 269. The trial court adjudicated Hall guilty of both offenses and imposed sentences on both offenses. Id. On appeal to the Fourth District, Hall argued that the trial court erred in adjudicating him guilty of both grand theft and dealing in stolen property in violation of section 812.025. Id. The Fourth District held that section 812.025 did not apply to nolo contendere pleas, relying upon Brown v. State, 464 So. 2d 193

(Fla. 1st DCA 1985), *approved*, 487 So. 2d 1073 (Fla. 1986).[1] Hall v. State, 767 So. 2d 560, 562 (Fla. 4th DCA 2000).

This Court disapproved the Fourth District's decision. The Court looked to the legislative history of the Florida Anti Fencing Act, which contains section 812.025 as well as sections 812.014 (theft) and 812.019 (dealing in stolen property). Hall, 826 So. 2d at 270-71. The Court summarized the differing purposes of the theft and dealing in stolen property statutes:

> 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 person who steal for personal use and for whom redistribution is incidental.

Id. at 271. Because the two statutes have differing purposes, the Court concluded that when theft and dealing in stolen property charges are based upon "one scheme or course of conduct," the trier of fact must make a factual determination regarding "whether the defendant is a common thief who steals

[1]In reviewing Brown, this Court did not address the section 812.025 issue.

property with the intent 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." Id. The defendant's "intended use of the stolen property" is the "linchpin" of section 812.025, which "allows this element to be developed at trial." Id. Based upon evidence regarding the intended use of the property, "the trier of fact may find the defendant guilty of one or the other offense, but not both." Id.

Thus, the Court held that section 812.025 prohibits a trial court from adjudicating a defendant guilty of both theft and dealing in stolen property in connection with one scheme or course of conduct pursuant to a nolo contendere plea. Hall, 826 So. 2d at 271. When a defendant enters a plea to both theft and dealing in stolen property, the trial judge must "make a choice" between the two counts. Id. The Court remanded "with directions that the conviction be reversed on either Count III [grand theft] or count IV [dealing in stolen property] . . . and that the defendant be resentenced on the remaining count." Id.

Kiss is entirely consistent with Hall, while Blackmon 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 Blackmon, where the appellate court itself decided 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, 826 So. 2d at 271, the only remedy for failing to instruct the jury to make this decision is a new trial. However, the First 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, 826 So. 2d at 271.

The Second District has recently addressed section 812.025 and concluded that "the language of section 812.025 is not an adequate jury instruction and we doubt that there is any adequate method to instruct on this statute." Williams v. State, ___ So. 3d ___, 2011 WL 2936748 at *3 (Fla. 2nd DCA July 22, 2011). This is so, according to the Second District, because "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." Id. at *4. To the contrary, this Court has clearly explained that section 812.025 requires the finder of fact to make a factual determination regarding "whether the defendant is a common thief who steals property with the intent 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." Hall, 826 So. 2d at 271.

In fact the Supreme Court Committee On Standard Jury Instructions In Criminal Cases has drafted and published a

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," 14.3 Dealing In Stolen Property (Organizing) (May 15, 2011). At its June 17, 2011, meeting, the jury committee voted

to table this proposed instruction until this Court resolved the conflict between Kiss and Blackmon.

Under Hall, section 812.025 requires the trial court to instruct the jury that it can return a guilty verdict on either theft or dealing in stolen property. Kiss, 42 So. 3d at 811-12; Aversano v. State, 966 So. 2d 493, 496 (Fla. 4th DCA 2007). Thus fundamental error occurred in Mr. Blackmon's case when the jury was permitted to return verdicts on both theft and dealing in stolen property. The remedy for this fundamental error is a new trial. Kiss, 42 So. 3d at 811-12. This Court should approve Kiss and disapprove Blackmon.

ARGUMENT II

THE EVIDENTIARY INFERENCE IN SECTION 812.022(2), FLA. STAT. (2007), STANDING ALONE, IS LEGALLY INSUFFICIENT TO SUPPORT MR. BLACKMON'S CONVICTIONS AND REVOCATION OF PROBATION.

Standard of Review: A trial court's ruling on a motion for judgment of acquittal is reviewed *de novo* on appeal. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). A trial court's order finding a violation of probation is reviewed for an abuse of discretion. State v. Carter, 835 So. 2d 259, 262 (Fla. 2002).[2]

Argument: The State's cases that Mr. Blackmon was guilty of theft and dealing in stolen property and that he violated his probation was entirely circumstantial and relied upon the evidentiary inference in section 812.022(2), Fla. Stat. (2007), which provides:

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

See R2018-V2. 114, 115-16 (jury instructions). This inference was the only evidence supporting the State's cases.

[2]Having accepted jurisdiction of the certified conflict, this Court also has jurisdiction to consider this issue. PK Ventures, Inc. v. Raymond James & Associates, Inc., 690 So. 2d 1296, 1297 n.2 (Fla. 1997).

Mr. Blackmon admitted that he sold the metal bars after finding them on the side of the road, thus presenting a reasonable hypothesis of innocence. This hypothesis was supported not only by Mr. Blackmon's and Faircloth's testimony, but also by the facts that when he sold the bars, Mr. Blackmon made no attempt to conceal his identity, giving the scrap yard his name, his identification and his fingerprint. State Exhibit 1C, the photograph the scrap yard took at the time of the sale, shows Mr. Blackmon smiling broadly, not looking furtive or guilty. No State evidence contradicted Mr. Blackmon's reasonable hypothesis of innocence.

In State v. Graham, 238 So. 2d 618 (Fla. 1970), where the defendant was convicted of buying, receiving or aiding in the concealment of stolen property, this Court held that the common law predecessor to the section 812.022(2) inference was insufficient to support a conviction:

> Proof of mere naked possession of property recently stolen, not aided by other proof that the accused received it knowing it to have been stolen, is not sufficient to show guilty knowledge. . . . Proof of possession should be coupled with evidence of unusual manner of acquisition, attempts at concealment, contradictory statements, the fact that the goods were being sold at less than their value, possession of other stolen property, or other incriminating evidence and circumstances.

238 So. 2d at 621 (citation omitted). Applying the Graham rule to theft and dealing in stolen property charges, Florida courts have found the section 812.022(2) inference, without more, is legally insufficient to support a guilty verdict when the defendant presents an unrefuted, reasonable and innocent explanation for possessing the property. M.M. v. State, 547 So. 2d 139 (Fla. 1st DCA 1989); McNeil v. State, 433 So. 2d 1294 (Fla. 1st DCA 1983); Bertone v. State, 870 So. 2d 923 (Fla. 4th DCA), *rev. denied*, State v. Bertone, 889 So. 2d 72 (Fla. 2004); Jackson v. State, 736 So. 2d 77 (Fla. 4th DCA 1999); Dellechiaie v. State, 734 So. 2d 423 (Fla. 2nd DCA 1998); Valdez v. State, 492 So. 2d 750 (Fla. 3rd DCA 1986).

The trial court revoked Mr. Blackmon's probation based on findings that he committed burglary and dealing in stolen property. In a probation revocation proceeding, the State has the burden to prove a violation by a preponderance of the evidence. Corker v. State, 31 So. 3d 958, 960 (Fla. 1st DCA 2010). While a probation violation may be proved by circumstantial evidence, that evidence must be inconsistent with the defendant's reasonable hypothesis of innocence. Andrews v. State, 693 So. 2d 1138, 1140 (Fla. 1st DCA 1997). The section 812.022(2) inference may also be applied to a burglary charge. Walker v. State, 896 So. 2d 712, 714 (Fla. 2005).

In Mr. Blackmon's case, no "other incriminating evidence and circumstances," Graham, 238 So. 2d at 621, support his convictions and revocation of probation. Mr. Blackmon did not attempt to conceal his conduct with the metal bars, nothing about the condition of the bars should have alerted him that the bars were stolen, Mr. Blackmon was not caught in any lies about his conduct, and his trial testimony did not conflict with any pretrial explanation. *See* Bertone, 870 So. 2d at 925. In these circumstances, the section 812.022(2) inference was legally insufficient to support Mr. Blackmon's convictions for theft and dealing in stolen property and his revocation of probation. This Court should order those convictions and probation revocation discharged.

CONCLUSION

Based upon the arguments presented here, this Court should approve Kiss and disapprove Blackmon, order a new trial on the theft and dealing in stolen property charges, and/or direct that Mr. Blackmon's theft and dealing in stolen property convictions, as well as the revocation of his probation, be discharged.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished by U.S. Mail to **Charmaine Millsaps**, Assistant Attorney General, The Capitol PL01, Tallahassee, Florida 32399-1050, and to **Mr. David Devon Blackmon**, DOC# 121397, NWFRC Annex, 4455 Sam Mitchell Drive, Chipley, FL 32428-3597, on this _____ day of September, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR Mr. Blackmon