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 REPLY BRIEF

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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.

In plain and unambiguous language, Section 812.025, Fla. Stat. (2007), states that although a single information may charge separate counts of theft and dealing in stolen property in connection with one scheme or course of conduct and that the two counts may be consolidated for trial, "the trier of fact may return a guilty verdict on one or the other, but not both, of the counts." Either Section 812.025 means what it says, or it does not. When a statute "is clear and unambiguous, . . . *the statute must be given its plain and obvious meaning.[7]" Saleebv v. Rocky Elston Const., Inc., 3 So. 3d 1078, 1082 (Fla. 2009) (quoting Holly v. Auld. 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)). Section 812.025 is a clear directive which Florida courts are bound to enforce and which results in fundamental error when it is not enforced. See Saris v. State Farm Mut. Auto. Ins. Co., 49 So. 3d 815, 817 (Fla. 4th DCA 2010) ("As a court of law, we are compelled to abide by plain statutory intent, regardless of whether or not the appellant first raises that argument in the circuit court"); Toiberman v. Tisera, 998 So. 2d 4, 8 (Fla. 3rd

DCA 2008) ("Fundamental or plain error, such as this one, is not waived simply because the parties and the trial court ignored the clear statutory prohibition against [it]").

All of the arguments presented in the State's answer brief ignore the plain language of Section 812.025. The State argues that although fundamental error occurred when the trial court adjudicated and sentenced Mr. Blackmon on both petit theft and dealing in stolen property, fundamental error did not occur when the jury was allowed to return verdicts on both charges (Answer Brief at 5-10) ("AB"). To make this argument, the State simply ignores the clear directive of Section 812.025 and misinterprets Hall v. State, 826 So. 2d 268 (Fla. 2002) .

The State argues, "[T]his Court acknowledged in Hall that it was proper to charge a defendant with both counts. This Court merely precluded a conviction for both counts" (AB at 7). The State repeatedly asserts that Section 812.025 only prohibits dual "convictions" (AB at 12, 13, 14, 15, 16). Importantly, in Hall, the defendant's convictions for both grand theft and dealing in stolen property resulted from a nolo contendere plea, not a jury trial. Therefore, in applying Section 812.025, this Court determined, "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." 826 So. 2d at 271. This Court did not simply

"preclude[] a conviction for both counts," as the State argues, but precluded a *verdict* on both counts, requiring the trial court in Hall to "make a choice" between the two counts.

The State's reliance upon United States v. Gaddis, 424 U.S. 544 (1976) (AB at 10), is misplaced. Most significantly, Gaddis did not involve a statute equivalent to Section 812.025. Further, although the State relies upon the concurring opinion, the opinion of the Court is persuasive support for Mr. Blackmon's contention that Section 812.025 required the jury to decide between the two charges.

In Gaddis, the defendant was convicted of, inter *alia,* both robbing a bank and receiving the proceeds from a bank robbery. 424 U.S. at 545-46. The Court of Appeals for the Fifth Circuit ordered a new trial on those counts, finding it was error to allow the jury to return verdicts on both counts. Id. at 546-47. The Supreme Court held that the Fifth Circuit was correct that a person convicted of robbing a bank could not also be convicted of receiving the proceeds of a bank robbery because the receiving statute was intended to punish persons who received the proceeds "from the robber" and was not intended to increase the punishment of the robber. Id. at 547-48.

In addressing the Fifth Circuit's remedy of a new trial, the Supreme Court explained its previous decision in Milanovich v. United States, 365 U.S. 551 (1961), upon which the Fifth Circuit

had relied:

> In Milanovich there was evidence that the petitioner and her husband, "as owners of an automobile, transported three others under an arrangement whereby the three were to break into a United States naval commissary building with a view to stealing government funds," that she and her husband "were to remain outside for the return of their accomplices after the accomplishment of the theft," but that they "drove off without awaiting the return of their friends." If believed by the jury, this evidence was clearly sufficient to support a verdict that the petitioner was guilty of robbing the naval commissary. There was also evidence in Milanovich, however, of other and different conduct on the part of the petitioner that about 17 days after the naval commissary robbery she had obtained and appropriated silver currency taken in the robbery and concealed the same in a suitcase in her home. If believed by the jury, this evidence was clearly sufficient to support a verdict that the petitioner was guilty of receiving and concealing the stolen property. The trial judge refused to instruct the jury that the petitioner could not be convicted for both stealing and receiving the same currency, and she was convicted and separately sentenced on both counts. This Court held that under Heflin Tv. United States. 358 U.S. 415 (1959),] the jury should have been instructed that the petitioner could not be separately convicted for stealing and receiving the proceeds of the same theft. Since it was impossible to say upon which count, if either, a properly instructed jury would have convicted the petitioner . . . , her convictions were set aside and the case was remanded for a new trial.

Gaddis, 424 U.S. at 548-49 (footnotes omitted).

The Supreme Court concluded that the facts in Gaddis were distinguishable from Milanovich and reversed the Fifth District's remedy of a new trial, holding that the proper remedy was to vacate the conviction on the receiving count. Id. at 549. This was so, the Court said, because although the evidence supported

the bank robbery conviction, there was no evidence apart from the robbery itself that the defendant had received the bank's funds. Id.

The Supreme Court then went on to say that factual scenarios could arise in which the jury should be instructed it could not return verdicts on both robbery and receiving:

> In many prosecutions under [the bank robbery statute] the evidence will not, of course, be so clearcut as in the present case. Situations will no doubt often exist where there is evidence before a grand jury or prosecutor that a certain person participated in a bank robbery and also evidence that that person, though not himself the robber, at least knowingly received the proceeds of the robbery. In such a case there can be no impropriety for a grand jury to return an indictment or for a prosecutor to file an information containing counts charging [both robbery and receiving]. If, upon the trial of the case the District Judge is satisfied that there is sufficient evidence to go to the jury upon both counts, he must, under Heflin and Milanovich, instruct the members of the jury that they may not convict the defendant both for robbing a bank and for receiving the proceeds of the robbery. He should instruct them that they must first consider the [robbery] charges . . . , and should consider the [receiving] charge . . . only if they find insufficient proof that the defendant himself was a participant in the robbery.

Gaddis, 424 U.S. at 549-50 (footnotes omitted).

If "Gaddis was the basis for §812.025," as the State suggests (AB at 11 n.4), it shows that Section 812.025 means what it says. The State argues that in Gaddis, the Supreme Court "specifically rejected the remedy of a second trial" (AB at 10). This is flatly wrong. The Supreme Court reversed the remedy of a second trial in that case, but clearly stated that in other

factual situations, the jury may be required to choose between the two charges.

As explained above, all of the State's arguments rely upon the proposition that Section 812.025 merely prohibits dual "convictions." This is true of the State's reliance upon Williams v. State, 66 So. 3d 360 (Fla. 2nd DCA 2011), review *granted,* Williams v. State, 70 So. 3d 588 (Fla. 2011) (AB at 14-16), and of the State's argument that remedies for double jeopardy violations provide an apt analogy to remedies for violations of Section 812.025 (AB at 15-16). These arguments ignore the language of Section 812.025, which plainly prohibits dual "verdicts." In light of this language, the proper remedy for a violation of Section 812.025 is a new trial at which a jury can "make a choice" between the two offenses. Hall, 826 So. 2d at 271.

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.

The State asserts, "State v. Graham, 238 So. 2d 618 (Fla. 1970), was issued before the enactment of § 812.022(2), Fla. Stat., and did not interpret that statutory inference" (AB at 24 n.ll). However, Florida courts have repeatedly applied the rule of Graham to the section 812.022(2) inference (See Petitioner's Initial Brief at 25-26 (citing cases)). In Jackson v. State, 736 So. 2d 77 (Fla. 4th DCA 1999), the court addressed "whether the legislature's enactment of section 812.022(2) in 1977 should be read to have adopted the common law rule of McDonald \v. State. 47 So. 485, 486 (1908),] or that of Graham for Chapter 812 theft cases." 73 6 So. 2d at 83. The court concluded that "section 812.022(2) should be read as having adopted the common law rule of Graham." Id. In light of the State's assertion, this Court should take the opportunity to affirm that Florida courts have correctly applied the rule of Graham to the section 812.022(2) inference.

The State's Answer Brief does not demonstrate that its case for finding Mr. Blackmon guilty of theft and dealing in stolen property rested upon anything other than the inference arising from possession of recently stolen property under Section

812.022(2), Fla. Stat. (2007). As evidence independent of that inference showing that Mr. Blackmon knew or should have known that the steel bars were stolen, the State points to facts that (1) the bars were stolen and (2) Mr. Blackmon sold them at his earliest opportunity after they were stolen (AB at 22). Fact number 1 shows only that the bars were stolen, and fact number 2 shows only that Mr. Blackmon possessed the bars the morning after they were stolen. The two facts together show only "possession of recently stolen property."

The fact that the bars were stolen is not inconsistent with Mr. Blackmon[7]s defense that he found the bars by the side of the road near his home, which was in the same neighborhood as the metal yard (R2018-V2. 78, 81). The jury acquitted Mr. Blackmon of committing the burglary during which the bars were stolen (R2018-V1. 38), clearly finding that Mr. Blackmon was not the original thief. The fact that Mr. Blackmon sold the bars the morning after they were stolen is also not inconsistent with Mr. Blackmon's defense that he saw the bars by the side of the road when he came home the previous evening, decided to leave them there in case someone returned for them and then picked up and sold the bars when they were still there in the morning (R2018-V2. 78-80) .

The State's citation to Youngs v. State. 736 So. 2d 85 (Fla. 4th DCA 1999) (AB at 22), does not assist its argument. In

Youngs, the defendant offered no explanation of his early morning possession of property stolen during the preceding night, and the court held, "[u]nexplained possession of stolen property in the early morning, after a nighttime theft, is another facet of proof, in addition to the section 812.022(2) inference, which supports the conviction." 736 So. 2d at 86. In contrast to Youngs, Mr. Blackmon offered an explanation for his possession of the steel bars.

The State argues that Mr. Blackmon[7]s explanation "is simply not reasonable considering all the other evidence presented," but points to no specific evidence rebutting that explanation (AB at 22). Rather, the State contends that it is "unreasonable to believe" that the burglar who stole the bars would then leave them in the street (Id). The burglar may have lost his nerve, found the bars too cumbersome or heavy, or feared that someone witnessed the theft. Whatever motivated the burglar to leave the bars in the street, the State's speculation is not evidence rebutting Mr. Blackmon's reasonable hypothesis of innocence or rendering that hypothesis unreasonable.

Presenting a new argument not offered in the circuit court or First District, the State contends that Mr. Blackmon's hypothesis of innocence was "actually a hypothesis of guilt" under Section 705.102, Fla. Stat. (AB at 22). The State cannot

present a new argument which it failed to present below. State v. Dupree, 656 So. 2d 430, 432 (Fla. 1995).

Additionally, Mr. Blackmon was not charged with a violation of Section 705.102, so it is a mystery how that section could be applied here. Nevertheless, the State contends it "was not required to refute Petitioner's hypothesis" because it was "yet more evidence that Petitioner was guilty" (AB at 23). Mr. Blackmon was charged with theft and dealing in stolen property and presented a reasonable hypothesis of innocence. In light of the State's wholly circumstantial case which relied upon the inference regarding recently stolen property, the State *was* required to refute that hypothesis and did not. Graham.

CONCLUSION

Based upon the arguments presented here and in Mr. Blackmon's initial brief, 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 **Jay Kubica,** Assistant Attorney General, The Capitol PLOl, Tallahassee, Florida 32399-1050, and to **Mr. David Devon Blackmon,** DOC# 121397, NWFRC Annex, 4455 Sam Mitchell Drive, Chipley, FL 32428-3597, on this Q|[| day of December, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

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

Respectfully submitted,

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