IN THE SUPREME COURT, IN AND FOR THE STATE OF FLORIDA

WILLIE SMITH
-VS-
JULIE JONES

CASE NO. SC15-2191
L.T. CASE NO.

RESPONSE TO COURT'S ORDER TO SHOW CAUSE

Comes now Petitioner, Willie Smith - Pro Se hereby gives the Instant Response to Petioner's Show Cause order that was issued by the Florida Supreme Court.

(1) The Court was in Error - because Petitioner is not Challenging an issue out of Hillsborough County - Petitioner is Requesting A Clarification As to the Application of the 85% Sentencing Statute because the F.D.O.C has A new Interpretation that they have initiated that has Inmates Doing A Mandatory 100% Prison Sentence when the Prisoner was not Sentenced to A Mandatory Prison Sentence and Klaymus -vs- State 835 So.2d 248 (Fl 2002) Affords this Review Because no Lower Court Can "Clarify A Statute" only the FL Supreme Court.

(2) The Court is in Error - Because the 34 Cases Do not All Belong to Petitioner - and the Clerk Should Check the Case nos on those Pleadings for Petitioner's L.T Case nos. of 00-15615 and 00-9986 Before Alleging that Petitioner Submitted Frivolous and Meritless Filings of "34 CASES"

(3) Petitioner Always Alleged A Manifest In Justice And Submitted Proof of Court Transcripts that (1) Petitioner was Actually Innocent (2) Prosecutorial Misconduct and (3) Fraud Committed upon the Court, and this Court has Always

Refused to become Involved- Even though the Court Stated that it would be ever vigilant to A manifest In Justice Review in Harvard -vs- Singletary.

(4) The Rule is that a Motion could be served on ANY Justice individually and in 2004 - I Sent a Collateral Review motion to Hon. Judge or Justice Harding - Before he Retired and After Reviewing the motion and Transcripts he Transferred the Motion to Hillsborough County and told them to Treat it As A Habeas Corpus to Correct my Manifest In Justice And the Court Claimed that my Case was on Appeal and that the Supreme Court was without Jurisdiction to Transfer the Case and order A Ruling.

(5) All of my Claims have had Merit and were not frivolous and You Recently decided one of my Claims in my Favor Against the 2nd D.C.A in Williams -vs- State - 121 So3d 524 (Fl. 2013) Because my Claims were Supported by Transcripts from the Trial Courts Record. It was Just that the Fl. Supreme Court Chose not to obtain Jurisdiction and Correct the manifest In Justice of Petitioner (See Attached Exhibits-B C & D)

(6) Petitioner has become Autodidactic in Law - And upon Release from Prison will Expose the In Justices that Are Transpiring in the State of Florida - See the Attached And Accompanying Exhibits and Proposed motions - APPENDIX-G

(7) As for as the Sanctions in Leon County 2nd Judicial Circuit The sanctions were for Lawsuits that were not meritless or Frivolous - But - were Legally Insufficient And the Circuit Court Dismissed the cases and did not Guide Petitioner And (2) There were not 10 Cases in one Year and (a) Petitioner never received A Copy of the Show Cause order to Challenge it Before the Sanctions were imposed.

(8) Petitioner has submitted A Settlement for 12 Cases Against the D.O.C. in Federal Court About Similar Issues that were Dismissed in Leon County's Court - But - was Told what the Pleading Problem was in Federal Court Because of A Pro-Se Litigant under Haines vs-Kerner - And Petitioner was to have been Afforded the same Standard of Review by Leon County - But - WASN'T [APPENDIX - A]

(9) out of All Due Respect for the Court - Petitioner has never Submitted ANY Meritless or Frivolous filing to the Court and ANY Motions that were Submitted to the Court by Petitioner were Supported by Petitioners Record Transcripts to Demonstrate the Manifest Injustice that Petitioner ~~was~~ Subjected to by Virtue of An Erroneous Conviction Based on Fraud upon the Court And Prosecutorial Misconduct

(10) Petitioner has Proven that under Mancino - The Criminal Punishment Code is Illegal Because Congress's Constitutional Limitation is Disparate Sentencing that the C.P.C. Allows. and that Petitioner was Given A Harsh Sentence for Going to Trial.

(11) under Mancino my Sentence is Illegal Because the Trial Court Gave me A Harsh Sentence to Punish me for Going to Trial But - The 2nd DCA and the 8th Judicial Circuit Do not want to Accept Mancino And Always Denied the Motions [APPENDIX E]

(12) In Harvard-vs-Singletary - The Court Stated that it would be ever vigilant to Correct A Manifest Injustice And only one Supreme Court Justice Stood by this Ruling in my Case And that was Justice Harding in 2002 - And I will Thank him for it!

(13) The merits of my Cases were never Reached and were summarily Denied in my Motions and upon my Release I will find this David Lewis and Convince him that he Can't be Prosecuted - via - The Statute of Limitations And to

Confess to Stealing Triads Compound miter Saw in Case no 00-15615 and in Case no 00-9986- I will find Ricky Miller that Confessed to Stealing the Checks and Collateral Estoppel Precluded my Conviction for Such and Admit that I did not know that the Checks were Stolen - Because he Pleaded the 5th when the Investigator Asked him About Paying me for work I did on his house in A Stolen Check

(14) I will Question the Foreman and Carpenter As to what they told the Det that Prevented the State Attorney from calling them to Trial to Testify Against me and my Attorney did not Bring it up in Trial

(13) I am Autodidactic Enough at Law where I know more than Some Lawyers And upon Proving my Innocence After my Release Back to Tampa- I will Try to Convince the Channel 8 Station to do A Segment on the Injustices In the State of Florida and how the Courts Place Fraudulent Answers on motions to Deny Prisoners and it's no Harm Done - But if the Prisoner Does it - it's 5 years for Per Jury Compared to An Abuse of Discretion Motion OR Trial Court Error when the Court intentionally Does it And the cops theory OR overlook it Theory is in Place Because it was the Court Doing it to A Prisoner - Towit- A 2nd Class citizen that Dogs - Cats - Horses - etc has more Rights Than.

(14) I will use the Erroneous Prior Cases Fully that The 2nd Circuit And the Fl. Supreme Court has Presented for Sanctions Solely because I Am Alleging that the DOC Is Falsely Imprisoning Inmates By Giving All Inmates A Mandatory 100% Prison Sentence in Prison and That only one Supreme Court Justice in 20 Years Attempted to Correct my Erroneous Conviction And my Manifest Injustice.

(15) my Biggest Challenge upon My Release will be Attempting

To establish A Civil Rights Coalition to Fight the Erroneous Convictions in the State of Florida and Expose the Fraudlent Answers on Denied motions of Prisoners By the Courts.

(16) my next Issue would be for All ex Felons to be Exempt from Paying ANY Fl. Taxes because Ex Felons Are 2nd Class Citizens That Cannot vote And Are to "Automatically" be denied Due Process in A Fl. Court of Law." Another OOPS

(17) my Case will be the Proof of my Allegations Against the State of Florida And the Fl. Court SYstem - Especially when I Prove my Innocence upon my Release And Present my motions that no Court gave A D--n About Except Supreme Court Justice Harding - As Soon As He Reviewed it

(18) Furthermore - The Habitual Statute As All Recidivism Statute were only Authorized by the Constitution of the U.S. because there was no method to Punish Recidivism - But The Guidelines effectively Punish Recidivism and All Recidivism Statutes violate Multiple Punishments Prohibition under the 5th Amendment of the US Constitution

(19) Every Collateral Review motion and the Motions to Invoke Discretionary Review and the Few Mandamus Motions should not have exceeded 15 motions Total and the Court Added at least 20 other motions that were not Petitioners - But every Motion Requested that the Fl. Supreme Court Correct Petitioner's Manifest In Justice And the Fl. Supreme Court Basically Stated: - TWO WORDS - To wit - FU-k You to me - Youre in Prison For Stealing Your own Property and Pawning it - Stay there from Age 44 to AGE 61 - 17 Years. - All Justices Except Justice Harding." CONCLUSION

Petitioner has submitted the Response To the Show Cause And at this Juncture with one Year Remaining on the Erroneous Conviction and Mandatory Prison Sentence Imposed By the D.O.C. Petitioner only Responded to the Show Cause ordered for Further Proof of Allegations Against the Fl. Court System.

This Contention is made because (1) "Honorable" Supreme Justice Harding Demonstrated that my Claims were not Meitless (2) That in Accordance with the A.P. Rules of Procedure That A Writ Can be served on An individual Supreme Court Justice - Because I served or sent the Motion Directly to him and he Transferred the Motion to Hillsborough County and told the Court to Treat the motion As A Writ of Habeas Corpus and he filed the Motion himself - But - whenever I Attempted that Process after he Retired - The Clerk Threatened me About using or utilizing A Court Approved Process and (3) That Contrary to Harvard-vs-Singletary and the Actions Justice Harding - The Fl. Supreme Court Refused To Correct the Manifest In Justice that I am Subjected to and did not Transfer the Case to Hillsborough County and order The 13th Judicial Circuit to treat the motion As A Writ OF Habeas Corpus - But - Retained Jurisdiction to Dismiss the Case only and Based on Harvard, my Claims have not Deviated from the First Motion that was Sent to Justice Harding - That Also Proves that my motions were not Inappropriate meritless or frivolous.

(B) As Foras the ISSUE Pertaining to The D.O.C Giving me A D.R. Based on the Court's Recommendation - I have not Reviewed the Statute And I have to order it from the Law Library because I am in Confinement Pending Transfer Because I've written Too Many Grievances And A Threat on my Life was initiated - I say it was D.O.C Staff.

The Liberal Reading of the order Reflects that the Statute Authorizing Such is Unconstitutional Based on (1) Seperation of Powers for the D.O.C. to write me A D.R. for Something That Transpired in the Judicial Branch when the D.O.C is An Executive Branch of the Government that Can only write me A D.R. for A Rule Violation

of the Florida Dept. of Corrections. See Anglicker -vs- Dept. of Professional Regulation 593 So2d 298 (Fl. 2nd D.C.A. 1992) IN ADMINISTRATIVE LAW, AGENCY DISCIPLINARY ACTION BASED ON NON RULE POLICY IS FORBIDDEN.

The Court Can Send the D.O.C an order for D.O.C TO Give Petitioner A Direct order Themselves that Petitioner is not Submit ANY Filings to the Court OR Face Disciplinary Action for Disobeying A Direct order of the D.O.C. Because Sanctions Are Akin To Injunctions And Keep Away orders and Do not Contact orders that the D.O.C has Authority to Make the Inmate Abide By and That would be Disobeying A Direct order That is A Rule By the D.O.C And A Inmate Can be Punished for if it is violated

It seems as if Fl. Statute 944.279(1) contains unconstitutional Provisions - And the D.O.C has Been Abusing its Authority by Giving Inmates D.R.s for Conduct that is not A Rule violation of the D.O.C. In violation of 14th Amend. U.S. Constitution and the Florida Bill of Rights Since Both are Charters of Human Dignity and of Individual right that Protect against any and All abuses, and Arbitrary discriminatory OR essentially unfair exercise of delegated governmental Power, Authority, or duty of any nature OR Character Whatever - See Lawson -vs- Woodruff. 134 Fl. 439, 181 So 81 (1938)

It is well established that it is A denial of Due Process for any Government Agency to Fail To Follow its own Rules for Providing Procedural Safeguards to Persons involved in Ad Judicative Processes before it - see Bass -vs- Penson 170 F.3d 1312 (11th Cir. 1999) and Government -vs- Brooks - 927 F.2d 346 (5th Cir. 1990) For this Reason the F.D.O.C must Follow and Obey each and every one of its' Rules to bring Disciplinary Action Against ANYone.

Fl Statute 944.09 Require the F.D.O.C to Adopt Rules governing the Conduct of Prisoners - Categories of violations and Punishments be Promulgated. - Id. The D.O.C must First Advise the Prisoner of the Court's Sanction and then order, The Inmate to not Submit ANY Pro-Se Filings to that Court = Disobeying A Direct order

The Sanction order reflect that the Lower Tribunal in Leon County - 2nd Judicial Circuit will entertain A Pro-Se writ of Habeas Corpus from Petitioner and Petitioner is Alleging (2) A Manifest Injustice - because Petitioner was to have been Released from Prison in 05-2015 and was n't and is Falsely Imprisoned because the D.O.C is only Deducting Gain Time from the Maximum 100% Prison Sentence - To wit - A Mandatory Prison Sentence that Afford the Accumulation of Gain time earned to be Awarded to Reduce the Prison Sentence and not from the Statutory 85% - that Require Deducting the 15% of A 100% Prison Sentence Automatically and then Start Deducting the Earned Gain Time from the 85% T.R.D. Date

A Writ of Habeas Corpus may be used to Correct a Manifest Injustice - See Adams -vs- State 957 So2d 1183 (Fl. 3rd D.C.A. 2007)

The Attached Exhibit of the Answer to Petitioner's Grievance Reflect that Central office has Finally admitted that the D.O.C. is Deducting Every and All Inmates Earned Gaintime from the Maximum 100% Prison Sentence and not from the Statutory Required 85% Prison Sentence - That is Technically Imputing A Mandatory 100% Prison Sentence on All Florida Inmates and is violating the Seperation of Powers Doctrine via - The Florida Constitution and is violating Fl. Statute 120 - BY Enlarging and Modifying the Application of the 85% Sentencing Statute - See Appenix - H

UNNOTARIZED OATH OF AFFIRMATION

UNDER THE PENALTY OF PERJURY, I declare that I have read the foregoing, and that the facts stated therein are true and correct in accordance with Florida Statute. §92.525.

Willie Smith
Smith, Willie, pro se

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to the below listed State Agencies/Offices via hand delivery to prison officials on 02-16-2016.

Atty General Pl. of The Capitol, Tallahassee Fl. 32399 / Gen Counsel. DOC. 501 S. Calhoun St. Tallahassee Fl. 32399

Willie Smith
Smith, Willie, pro se

A8

APPENDIX - A

(1) Sanctions Alleging 12 Frivolous Lawsuits in one year - when Lawsuits were supported by Grievance

(2) Lien Print out that Petitioner has Proof that there were no 12 Lawsuits in one year.

(3) Settlement with Lawsuits Against D.O.C on similar Issues in Federal Court and not State Court with Judges that Get D.O.C money.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

WILLIE SMITH, DC#040330

Plaintiff,

vs. CASE NO.: 2004-CA-000450

CAPTAIN BAXTER, Florida Department of Corrections,

Defendant.
_____/

ORDER DENYING MOTION FOR DISQUALIFICATION AND IMPOSING SANCTIONS FOR ABUSE OF COURT PROCESSES

THIS CAUSE came before the court upon plaintiff, Willie Smith's Motion for Disqualification of Judge L. Ralph Smith from presiding over these proceedings. Fla.R.Jud.Admin. 2.160. The motion was filed April 19, 2005, along with similar motions in Cases 2003 CA 001593, 2004 CA 00200, and 2004 CA 000249.

This case was dismissed by order of Judge Smith on May 18, 2004. The appeal of that order was dismissed by the First District Court of Appeal by order entered August 3, 2004 in Case Number 1D04-2572. Consequently, this court's Order Dismissing Amended Complaint, entered May 18, 2004, is in effect and this suit is terminated. There are no further judicial acts to be taken by Judge Smith or any other Circuit Judge.

In addition, this court's Order Dismissing Complaint directed the plaintiff to Show Cause why he should not be sanctioned for abuse of this court's processes by filing numerous

(4)
8

frivolous lawsuits. At the time that order was entered, the plaintiff had filed 12 civil lawsuits within one year in this court.

The plaintiff has failed to show cause why he should not be sanctioned for excessive filing of meritless claims in this court. The court finds that the plaintiff's activities in this court have substantially interfered with the orderly process of judicial administration. See Attwood v. State, 661 So.2d 1216 (Fla. 1995); Birge v. State, 620 So.2d 234 (Fla. 1st DCA 1993); Peterson v. State, 530 So.2d 424 (Fla. 1st DCA 1988).

IT IS THEREFORE ORDERED and ADJUDGED that:

(1) the plaintiff's motion for disqualification is moot and is hereby **DENIED**;

(2) the plaintiff is hereby **PROHIBITED** from future filings in this court unless the claim is a bona fide petition for habeas corpus relief and venue is proper in this court **or** unless plaintiff is represented by a member in good standing of the Florida Bar. The Clerk of Court is hereby ordered to **return** any mail sent by the plaintiff and instructed to refrain from opening a case.

DONE AND ORDERED this 5th day of May, 2005.

L. RALPH SMITH
Circuit Judge

copies to: (next page)

(5)
9]

IBSS032 **Inmate Liens** **1/14/16 4:15:58 PM**

Inmate

* This is your current active liens owed.

Account ID: 040330 Confirm

Account Name: SMITH, WILLIE A. Search

Spendable Balance: $0.00

Current Location: MAYO C.I. ANNEX

Inmate Status: ACTIVE

Total Lien Amount: * $670.23

Retrieve *Date Placed:* *Status:* ACTIVE Add New Lien

Date Placed	Lien Type	Reference Number	Status	As of Date	Total Owed	Total Paid	Balance
10/10/2015	FEDERAL PRISON LITIGATION	115CV229	ACTIVE	11/24/2015	$350.00	$19.00	$331.00
10/21/2015	FEDERAL PRISON LITIGATION	115CV202	ACTIVE	12/29/2015	$350.00	$10.81	$339.19
01/04/2016	PROCESSING FEE	20160104	ACTIVE	01/04/2016	$0.11	$0.07	$0.04

Next 50 Liens Prior 50 Liens

Deposits are applied to liens in the following manner:
Medical Co-payments – 50%
Fed. Prison Litigation liens – 20%
All other liens – 100%

State Prison litigation liens take 100% of all deposits/funds until paid. **FS Title VI Chapter 57 states "payments of no less than 20%". This means that you are obligated to make payments to the court monthly and that we have to send them more than 20% of your monthly balance.**

This is forwarded to the court when the collected balance exceeds $10 as specified by the court.

10

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

WILLIE SMITH

-VS-

CLEMENS et. al.

CASE NO: 1:10CV-23262

COOKE/WHITE

INITIAL REQUEST TO RE-OPEN CASE - BREACH OF SETTLEMENT

Comes now Plaintiff Willie Smith, Pro-Se Respectfully Request the Court to Re-Open the case in the above styled Cause- Pursuant to A Breach of Settlement that is being committed by the Defendants in the Above Styled Cause - As is Stated in the Attached settlement Agreement to Pay Plaintiff $9500.00 For each case and defendant and as of Todays date - The defendants have only Given Plaintiff A Single $9500.00 - and in Support Plaintiff States the Following:

STATEMENT

(1) In December 2013 - The defendants Counsel - Susan Mahar, Interviewed Plaintiff at Columbia Correctional Institution Annex.

(2) Atty. Mahar offered Plaintiff a settlement of $1,000.00 for each of the 12 cases - that would be a total of $12.000.00

(3) Plaintiff Rejected that offer.

(4) Upon Further negotiating - Atty Mahar advised Plaintiff that her employer had only given her the Authority to offer up to and no more than

$10,000.00 For each case.

(5) Plaintiff advised Atty Mahar that he would Accept 9500.00 For each case and Atty. Mahar Agreed and Plaintiff Signed the Settlement Agreement that Reflected Such - To wit:

THE UNDERSIGNED, WILLIE ALBERT SMITH (hereinafter "the Undersigned") For the Consideration of NINE THOUSAND FIVE HUNDRED DOLLARS ($9500.00) I Discharge EACH AND EVERY NAMED OR IDENTIFIED DEFENDANT IN THE ABOVE REFERENCED CAUSES OF ACTIONS (NOTE: The other Inapplicable Data was omitted) I have only been Paid one $9500.00 to Discharge one Defendant

(6) The Settlement Agreement Clearly Reflected the Agreement Reached by Plaintiff of the Actions and Atty Mahar - Counsel for the defendants in the Actions to Reject the $10,000.00 For each Claim and Accept the negotiated Agreement of 9500.00 for each Claim.

(7) Plaintiff has Sent Atty. Mahar 6 Correspondences - Inquiring about the Remainder of the Settlement that Plaintiff is Due. until Plaintiff went to Confinement in July or Aug. of 2024 and Plaintiff's Legal Property and other Property went missing, and Plaintiff's Sister has finally sent Plaintiff A copy of the Settlement Agreement that Plaintiff had Sent her - Atty. Mahar has not Responded to Plaintiff's Inquires

Therefore Plaintiff has no Alternative - But to Request that the Court Re-Open - The Closed Case Against the defendants - Because of the Breach of the Settlement BY the defendants.

OATH

I Willie Smith, Plaintiff Pro-Se Do Hereby Declare That Under The Penalty of Perjury That The Foregoing Document IS True And CORRECT

10-03-2015
DATE

Willie Smith 040330
SIGNATURE DC.NO#

CERTIFICATE OF SERVICE

I Willie Smith Do Hereby Certify That A True And Correct Copy Of The Foregoing Document Has Been Sent via First Class U.S. Mail to: The office of the Atty. General / Clerk of Court U.S. District Court / Gen. Counsel - F.D.O.C.

10-03-2015
DATE

Willie Smith 040330
SIGNATURE DC.NO#

IN RE:WILLIE ALBERT SMITH DC#040330

Case No. 1:10cv23267-Cooke/White, Smith v. Clemons, USDC-SD
Case No. 1:10cv24460-Seitz/White, Smith v. Taggert, USDC-SD
Case No. 1:11cv20439-Ungaro/White, Smith v. Clemons, USDC-SD
Case No. 1:11cv23175-Altonaga/White, Smith v. Taggert, USDC-SD
Case No. 1:11cv24369-Zloch/White, Smith v. Johnson, USDC-SD
Case No. 1:11cv24488-Zloch/White, Smith v. Johnson, USDC-SD
Case No. 2:12cv14010-Martinez/White, Smith v. Scarpatti, USDC-SD
Case No. 2:12cv14123-Moore/White, Smith v. Inman, USDC-SD
Case No. 3:12cv1184-TJC/JRK, Smith v. Holmes, USDC-MD
Case No. 12-16073, Smith v. Inders, 11th USCA (Appeal of 2:12cv14010)
Case No. 13-10174, Smith v. Holmes, 11th USCA (Appeal of 3:12cv1184)
Case No. 13-12134, Smith v. Clemons, 11th USCA (Appeal of 1:11cv20439)

SETTLEMENT AND RELEASE OF ALL CLAIMS

KNOW ALL PERSONS BY THESE PRESENTS:

The undersigned, **WILLIE ALBERT SMITH**, (hereinafter "the undersigned"), for the consideration of Nine Thousand Five Hundred Dollars ($9500.00), hereby and for the heirs, executors, administrators, successors, and assigns forever releases, acquits, and discharges, the State of Florida, the Florida Department of Corrections, each and every named or identified defendant in the above referenced causes of actions, and their agents, servants, employees, and successors of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, including attorney's fees, which is alleged to have occurred and pertains to the incident which formed the basis for the above referenced lawsuits and any other claims that may have accrued while undersigned was

APPENDIX-

B

Perjured Testimony - Det. Todd

Actual Innocence
Manifest Injustice
Erroneous Conviction

Petitioner Appealed the Denial order and the 2nd D.C.A. Affirmed that Denial order Appeal Based on Law-of-The-Case. And Petitioner has Submitted the Instant motion for Collateral Review - in Lieu of the fact. That only the 2nd D.C.A. Can Review its Prior Ruling that was and is "LAW-OF-THE-CASE" See State-vs-Aikens 69 So3d 261 (Fl. 2011) Muehlman-vs-State 3 So3d 1149 (Fl. 2009) Parker-vs-State 873 So2d 270 (Fl. 2004) And United States-vs-Tamayo 80 F. 3d 1514 (11th Cir, 1996)

See Also State-vs-McBride 848 So2d 287 (Fl. 2003) Stating that the Doctrine of Res Judicata, Collateral Estoppel and LAW-OF-THE-CASE, May not be Invoked where it would defeat the Ends of Justice

STATEMENT OF CASE AND FACTS

Petitioner had a Trial by Jury for the Charge of Dealing in Stolen Property for a Compound miter saw that Petitioner had taken to the Pawn Shop.

Petitioner had a Bill of Sale for the Compound miter Saw that Petitioner had taken to the Pawn Shop

The only Evidence that the State had was the Per Jured Testimony of Det. Todd. That the Compound miter saw had the word Triad on the miter Saw to Prove that the miter Saw did not Belong to Petitioner. And was the Stolen Property of Triad Construction, And that Petitioner Pawned the Stolen Saw, [See Exhibit-D]

Pg. 124-T Line 20

20 BY MR ALLEN
21 Q- Showing you states exhibit Number Two and
22 - Three which respectfully is that the saw in Question Sir?
23 A- Yes Sir it is
24 Q- And does it have any writing on the Saw or
25 markings on that Particular Item? (4) 16]

Pg. 125-T Line 2-T

A- Yes sir. there's Black Writing Looks Like inedible Pen on one Place it said Triad and on the other side of the saw it said Willie

Pg. 127-T Line-20

Question by Defense Atty. David Bass

Q- The Pictures --- are we able to see on the Pictures in State's Exhibit. Two and Three where this Writing of Triad is Located?

A- No Sir it's not Shown in the Pictures

The next Perjured Testimony and Response with Perjured Testimony of Det. Todd was in the same Examination

Pg. 125-T Lines- 5

Q- Thank you. Now upon Learning that the saw in Question had been pawned in Close proximity to the Theft. did you take Steps to track down Mr. Smith?

A- Yes Sir I did

Q- And in fact did you start with the Address on the pawn Slip?

A- Yes I did

Q - And the address given You by Mr. Smith as his Address-

Q - The Address given to you by Mr. Smith on the Pawn Slip - did he Live there?

A- no Sir. he did not

Q- And in fact, Detective, Are you aware from Further Investigation. what his true Address is?

Pg. 126-T Line-1

A- Yes Sir.

MR. BASS. Objection. hearsay there. Your Honor

THE COURT. I'll overrule your objection

BY MR ALLEN:
Q What is Mr. Smiths true Address?
Mr. Smith resides at 3618 E. Wilder Avenue
IN Tampa
Q- And in fact did you have the opportunity to
look at the driving record of Mr. Smith to determine
Where in fact the driver's License with that address was
issued?
A- Yes I have
Q- Approximately what year was that address
issued on the Driver's License?
A- 1995
MR ALLEN: Okay, no Further Questions at this
time of this Witness, Sir
THE COURT: Mr. Bass - you may INQuire
CROSS EXAMINATION
BY MR. BASS
Q Good morning Detective
A Good morning Mr. Bass
Q- Did your investigation reveal that he did
Live at the Simms Address for a Period of time?

Pg-127-T Line-1 T

No Sir
Q-north Simms, 8520 north Simms
A- No Sir, I went out to that address and was
told that he didn't live there
Q - NO, what I'm Asking is if in your
investigation of the address maybe through the drivers
License-you saw that one time he did Live at 8520 north,
Simms
A - No Sir I never saw that [See Exhibit-H]

Petitioner, was subsequently convicted of the Crimes

in the Absence of the per Jured Testimony of Det. Todd - And As to if Petitioner Couldve obtained the Newly Discovered Evidence - To wit- the Correspondence from the D.M.V. and the Enlarged Pictures of A Compound miter Saw that Reflected that Any writing on the miter Saw Wouldve been Shown in the Pictures

The Trial Court Endeavoured to State that the Newly Discovered Evidence Couldve been obtained by Petitioner and or Petitioner's Attorney, !

Petitioner Contends that the Trial Court is in Error because the Trial Court's Record Clearly Reflect that the State Attorney Committed a Discovery Violation and Ambushed Petitioner's Attorney At Trial and did not Submit A Copy of the D.M.V. Printout / Driver's Relord of Petitioner - And did not submit the Pictures to Petitioner's Attorney

Florida Rules of Criminal Procedure - Rule 3.220 (B) PROSECUTOR'S DISCOVERY OBLIGATION - States:
(1) Within 15 Days after Service of the Notice of Discovery, the Prosecutor Shall serve a Written Discovery Exhibit which shall disclose to the defendant and Permit the defendant to inspect, Copy, Test and Photograph the following information and Material within the State's Possession and Control.
(K) ANY TANGIBLE PAPERS OR OBJECTS THAT THE PROSECUTING ATTORNEY INTENDS TO USE IN THE HEARING OR TRIAL, AND THAT WERE NOT OBTAINED FROM OR DID NOT BELONG TO THE DEFENDANT.

The Prosecutor was to have Afforded Petitioner's

Attorney a copy of the D.M.V. Driver's Information from the D.M.V. and this is Proven by the Cross Examination of Det. Todd. by Petitioner's Attorney in Exhibit-D- Pg. 126-T Line -19

19 THE COURT: Mr. Bass you may Inquire
20 CROSS EXAMINATION
21 BY MR. BASS
22 Q Good Morning Det.?
23 A- Good Morning Mr. Bass
24 Q- Did your reveal that he did
25 Live at the Simms Address for a period of Time?

Pg 127-T Line 1-T

1 A- No Sir
2 Q- North Simms, 8520 North Simms
3 A- NoSir. I went out to that address and was
4 told that he didn't Live there
5 Q- no What I'm Asking is if in Your
6 Investigation of the Address, Maybe through the drivers
7 License. You saw that one time he did Live at 8520 North
8 Simms?
9 A- no Sir I never saw that.

It is Clear by the Record in this Cross Examination that the State Violated the Rules of Discovery and did not Afford Petitioner's Attorney a Copy of the So Called Driving Record that was used. And this Direct Examination Proves that the State knew about the so Called Driver's Record on Page - 126-T Line-9-T Exhibit- D. - BY MR. ALLEN-
9 Q- And in fact did you have the opportunity to
10 Look at the driving Record of Mr. Smith to determine
11 where in fact the driver's License with that address was
12 issued?

13 A- Yes Sir, I have
14 Q- Approximately what year was that address
15 issued on the Driver's License?
16 A- 1995

This was Clearly a Trial Ambush, where the State Clearly Violated the Rules of Discovery. And Petitioner or Petitioner's Attorney Could not have obtained the D.M.V. Record of Petitioner, with Due Diligence when the Prosecutor didn't Alert Petitioner's Attorney that the Drivers Record of Petitioner would be used.

The next issue is that the State did not Afford Petitioner's Attorney the Discovery Pertaining to the Pictures that is Proven in Exhibit-D. Pg. 127-T Line 20 -

Questions By David Bass Cross Examination
20 Q- The Pictures -- are we able to see on the
21 Pictures in States Exhibit Two and Three where this
22 Writing of Triad is Located?
23 A- No Sir, it's not Shown in the Pictures

This is also Proven in Exhibit-E - Closing Arguements of David Bass - Page 233-T Line 20-T
20 Well Let's take a look AT the Pictures. The
21 State with their burden of Proof introduced some
22 Pictures for you and Triad isn't on this saw that
23 You Can See. It's their Picture. took at a Couple
24 of different Angles to make sure You got Pictures.
25 Can't see it. It doesn't say it on this one.

Pg. 234 T- Line -10
10 The State who is Charged with the burden of Proof
11 didn't want to bring you a Saw, They bring

you a Picture, backs up easily with the simple Little Polaroid, what they say the truth is that's their burden of Proof and if that.

The Closing Statement reveals that the State had committed Another Trial Ambush where Petitioner's Attorney was expecting the State to Produce the the Compound Miter - But - The State Introduced Pitures instead of the Miter Saw, and this is Proven on Page 234 - T - Line 7

7 - So I guess they could have brought it in
8 - here in A Truck if it fits in the back Seat of a
9 - Car

This Proves that the Trial Court was in Error by Stating that Petitioner Could've obtained the D.M.V. Print out and the Enlarged Pictures through the Exercise of Due Diligence when there was a Discovery violation And A Trial Ambush Pertaining to the Newly Discovered Evidence - That was perpetrated by the State upon petitioner and his Attorney

The Harmless Error Review will Reflect that the State could not have obtained the Conviction for Dealing in Stolen Property and Defrauding a Pawn Broker Without the Perjured Testimony of Det. Todd in Exhibit - F

HARMLESS ERROR REVIW

(2) The Police Report in Exhibit - A of E Reflects that Triad Construction Reported their Compound miter Saw missing on 08 - 03 - 2000

(2) Exhibit - B of E Reflects that Petitioner had worked

Triad Construction on 07-27-2000 and David Crews had worked for Triad Construction on 08-01-2000 and Triad did not Report that their Miter Saw was missing After Petitioner worked there - But-was missing After David Crews worked there.

(3) Exhibit-C of-E Is a copy of the Bill of Sale that Petitioner had for his Compound miter Saw that Jerry Davis Sold to Petitioner while at work Force on 07-13-2000

(4) Exhibit-D of-E is the Direct Examination by David Bass of the work Force Employee that Reflects that Petitioner was at work Force on July 13-To Purchase A compound miter Saw from Jerry Davis.

Page 112 T-Line 21-T

21 Q - Do you recall whether or not they were
22 working for you on the 13th of July of this past year?
23 A - They might have been, I don't have the
24 records in front of me. We go through a lot of People
25 MR BASS: If I may approach the Witness, Your?

Page 113 T- Line 1

1 Honor?
2 THE COURT: Sure go ahead.
3 BY MR. BASS:
4 Q - To refresh Your recollection Let me hand you
5 what Appears to be a Check history report?
6 A - Yes
7 Q - From Your Company, Correct?
8 A - Yes
9 Q - Does that Indicate that both of these People
10 Mr. Smith and Ms. Williams worked through Your Company?
11 A - Yes

12 Q - on July 13th ?
13 A - Yes.

(5) Exhibit E of F Is a copy of the Police Report from Det Todd stating that the miter saw that Petitioner pawned had Triad Construction written on it And he impounded the saw on that Reason and had taken Pictures.

The Pictures Did not Reflect the word Triad and nor did the Pawn Shop Personel Testify to the Fact that the Det Todd Showed them the word Triad as the Reason for Impounding the Miter Saw as The Det was Required to Pursuant to Probable Cause.

(6) Exhibit F-of-F is the Bolstering of the Per Jured Testimony of Det Todd by the Prosecutor that told the Jury That they must Believe What the Det said And Counsel for Petitioner Did not ob Ject

Page 244 - T - Line - 10 - T

10 The Defense Attorney wants to say Well
11 There's no word Triad Written on that saw. The
12 detective told you under oath that it was there
13 What he may think about whether it's there or not
14 is not evidence. He told you from the witness
15 Stand it's on the saw, period. It's there

(7) Exhibit - G of F Reflects that there is no Evidence - that Petitioner had stolen Triads miter saw and There was no Evidence that the miter Saw that Petitioner had Purchased from Jerry Davis - and Received a Receipt that had

contained the serial no# and model no# of the compound miter saw that Petitioner had pawned did not Legally belong to Petitioner

Page 102-T Line-6-T

6 Q- Okay when you got there, did you have an
7 opportunity to inspect the house and look for any signs
8 of forced entry, broken Windows, Jimmied Locks Pry
9 Locks, anything of that nature?
10 A- Yes I Did
11 Q- upon Inspection of the house in Question did
12 you see any Signs of forced entry or any way Someone
13 could have gained Access other than walking through A
14 door using a key?
15- ~~No~~ no I did not

8 Exhibit-G is A Blown up picture of A Compound Miter Saw that Reflects that any writing was on the Miter Saw- It would've been Shown in the Pictures.

The Portions of the record Presented. Reflects that the State could not have obtained the Conviction without the Perjured Testimony of Det. Todd, in Lieu of the fact that Petitioner's Bill of Sale was the only Evidence That Anyone had Legally owned a Compound Miter Saw, And the only way that the Det. Could even Remotely State that Triad had A miter Saw was to Present Perjured testimony that the Miter Saw that Petitioner had Pawned had the word Triad written on it

To Furthere Prove that the Miter Saw did not have the word Triad written on it was the Fact that the Pawn Shop Manager did not Testify to seeing the word Triad on the Miter Saw, (15) 25)

44 = 124 T

some point met with Michael McKenzie the owner of the Cash America?

A Yes, sir, I did.

Q Did he in fact agree and provide you the victim information so he in fact could relinquish or give the saw back to the victim?

A Yes, sir, I met with Mr. McKenzie and recovered the pawn ticket, photographed the saw and placed it in what is called a law enforcement hold on the saw and then facilitated the victim having the saw returned to them.

Q And during the course of your investigation did you have a chance to see the saw?

A Yes, sir, I did.

Q Did you inspect it?

A Yes, sir, I did.

MR. ALLEN: Permission to approach the witness, Your Honor.

THE COURT: Go ahead.

BY MR. ALLEN:

Q Showing you State's Exhibit Number Two and Three which respectfully is that saw in question, sir?

A Yes, sir, it is.

Q And does it have any writing on the saw or markings on that particular item?

markings on that particular item?

A Yes, sir, there's black writing looks like indelible pen on one place it said Triad and on the other side of the saw on the arm it said Willie.

Q Thank you. Now upon learning that the saw in question had been pawned in close proximity to the theft did you take steps to try to track down Mr. Smith?

A Yes, sir, I did.

Q And in fact did you start with the address on the pawn slip?

A Yes, I did.

Q And the address given by Mr. Smith as his address --

MR. BASS: Objection to that as facts not in evidence, Your Honor.

THE COURT: Are you going to tie it up?

MR. ALLEN: With the next witness.

THE COURT: All right, I'll overrule your objection at this time subject to him tying it up.

BY MR. ALLEN:

Q The address given by Mr. Smith on the pawn slip did he live there?

A No, sir, he did not.

Q And in fact, Detective, are you aware from further investigation what his true address is?

A Yes, sir.

MR. BASS: Objection, hearsay there, Your Honor.

THE COURT: I'll overrule your objection.

BY MR. ALLEN:

Q What is Mr. Smith's true address?

A Mr. Smith resides at 3618 East Wilder Avenue in Tampa.

Q And in fact did you have the opportunity to look at the driving record of Mr. Smith to determine when in fact the driver's license with that address was issued?

A Yes, I have.

Q Approximately what year was that address issued on his driver's license?

A 1995.

MR. ALLEN: Okay, no further questions at this time of this witness, sir.

THE COURT: Mr. Bass, you may inquire.

CROSS-EXAMINATION

BY MR. BASS:

Q Good morning, Detective.

A Good morning, Mr. Bass.

Q Did your investigation reveal that he did live at the Simms address for a period of time?

A No, sir.

Q North Simms, 8520 North Simms?

A No, sir, I went out to that address and was told he didn't live there.

Q No, what I'm asking is if in your investigation of the address maybe through the driver's license you saw that one time he did live at 8520 North Simms.

A No, sir, I never saw that.

Q The pictures -- are we able to see on the pictures in State's Exhibit Two and Three where this writing of Triad is located? (The blown up pictures show that if any writing was on the saw - it could be seen)

A No, sir, it's not shown in the pictures.

Q Is it just a question of I guess the saw has been returned now right it's back to?

A Yes, sir, the saw has been returned.

Q Did you return it the day you took the pictures or did it take a while or --

A I believe a couple of weeks after it was returned.

Q So it would have been in the police department's custody for two weeks or was it left at the pawn shop?

A No, sir, it was left at the pawn shop with a law enforcement hold on it.

Dear Mrs. Jimenez-Morales

Greetings and Salutations - I am writing to You again so as to Clarify my Previous Requests as I am still being Sent a Copy of my Traffic Citations - But - Rest Assured, that the Misunderstanding is my Fault and Clearly not Yours.

What I am Requesting is a Copy of my Driving Record History that Reflects the Addresses that were Placed on my Drivers ~~Licenses~~ Licenses from - 1994 or 1995 until the Year 2000

Attached for Your inspection is the Fraudulent testimony of Det. Todd at my Trial - In Which I know that my First Drivers License after I was Released from Prison in 1994 was at 8520 N. Semmes and my Second Drivers License was at 3618 E. Wilder

Therefore - I would Appreciate a Printout from You Reflecting the Addresses and Dates that I obtained my Drivers Licenses.

Thank You

Willie Smith

42

A SAFER FLORIDA
HIGHWAY SAFETY AND MOTOR VEHICLES

Julie L. Jones
Executive Director

2900 Apalachee Parkway
Tallahassee, Florida 32399-0500
www.flhsmv.gov

April 8, 2010

Mr. Willie Albert Smith #040330
Everglades Correctional Institute
Post Office Box 949000
Miami, Florida 33194

RE: Verification
DL #: S530-881-56-169-0

Dear Mr. Smith:

Thank you for your recent request. After a thorough review of our microfiche files, we were able to confirm that you were issued an identification card on October 6, 1998 to expire on May 9, 2003. That application reflects your address as 3618 East Wilder Avenue, Tampa, Florida 33610. We are enclosing that application for your use. On our microfiche film dated December 30, 1995, we found the address at 8520 North Semmes, Tampa, Florida 33604. Unfortunately, we were not able to retrieve that document.

We hope this information is helpful to you. If you have questions, you may contact Sarah Chester at (850) 617-2551 or you may write to us at the following address:

Bureau of Records
Division of Driver Licenses
2900 Apalachee Parkway, Room B231, MS 91
Tallahassee, Florida 32399-0575

Sincerely,

Patricia C. Fletcher

Patricia C. Fletcher
Assistant Section Supervisor
Division of Driver Licenses
Bureau of Records

PCF/sac

RYOBI
12" Sliding Compound Miter


FREE Parts
FREE Service
For

APPENDIX: C

(A) Reflect that Petitioner worked At the Temp SVC on the Date of the Bill of Sale that he Bought his miter Saw from from Jerry Davis that had model And Serial no't on it And this was on the Pawn Shop Ticket and The Det. Did not Present A model and Serial no't For Thads' Saw that was Supposedly Stolen

(B) The PerJured Testimony of Gloria Starks That she was not at the Job site And Testified As if She was - But Did Testify About the Foreman And Carpenter That was At the Job site that did not Testify

(C) Testimony That They Tried to State that they noticed that their miter Saw was missing when I worked Last - But the Police Report Reflect that it was not missing between July 27 - Aug-1 - But was missing From Aug. 1st to Aug 3rd when David Crews worked Last.

no one Testified that the house was open When I was Pouring Concrete outside and the house was locked

(D) no Pawn Shop Personel Testified to the Det. Pointing out the word Triad To them for the Purposes of Imprisonment And Trial Testimony

(E) Bolstering of the PerJured Testimony of Det. Todd

Exhibit-A

On 7-13-00 I RECEIVED $75.00 From Willie Smith
For My MILLER SAW THAT I Sold Him
SERIAL No# K 9930

Jerry Davis

Case #
00-CI-1515

Exhibit 1 - ~~B of A~~ C

Detective D. W. Todd further received photocopies of all the invoices t
Triad Construction Services relating to this job (copies attached). Th
invoices indicate that following people were assigned to the Triad
Construction job site by WorkForce:

06/16/00 Lloyd Bridges
06/19/00 David Olin
Continued . . .

2 of 2

Page: 9
For: P30874

Mon, Oct. 02 2000

TAMPA PD
GENERAL OFFENSE HARDCOPY

GO 2000-5779

230D - 7 PETTY/GT FROM BUIL

06/20/00 David Olin
06/21/00 David Olin
07/10/00 Nathaniel Weeks
07/10/00 Herbert Williams
07/11/00 William A. Farmer
07/11/00 Herbert Williams
07/24/00 Robert Costner
07/24/00 Johnny Rivera
07/25/00 Jose Alvarado
07/26/00 Johnny Rivera
7/26/00 Johnny Rivera
7/27/00 Leonard Poole
7/27/00 Willie A. Smith
7/28/00 Myrtle E. Williams
/28/00 Wille A. Smith
/01/00 Myrtle E. Williams
David Crews

39

447

C

EXHIBIT-A

A Yes, sir.

Q On July 26th John Rivera again and Leonard Poole, correct?

A Yes, sir.

Q And then on the 27th and 28th as you testified Willie Smith and Myrtle Williams those two days?

A Yes, sir.

Q And then August first a fellow named David Cruz?

A Yes, sir.

Q All right. Mr. Williams, excuse me, Mr. Smith and Myrtle Williams have worked for your company or through your company for sometime?

A For I have been with the company for five years and they have been there off and on. I don't know the exact hired date but yes.

Q But they've for the five years you've worked there they have been coming to you periodically?

A Yeah, every once in a while.

Q Do you recall whether or not they were working for you on the 13th of July of this past year?

A They might have been. I don't have the records in front of me. We go through a lot of people.

MR. BASS: If I may approach the witness, Your

EXHIBIT-A

Honor?

THE COURT: Sure, go ahead.

BY MR. BASS:

Q To refresh your recollection let me hand you what appears to be a check history report.

A Yes.

Q From your company, correct?

A Yes.

Q Does that indicate that both of those people Mr. Smith and Ms. Williams worked through your company?

A Yes.

Q On July the 13th?

A Yes, sir.

Q It doesn't indicate which job?

A Just that they were paid that day, yes.

Q Indicated they worked that day?

A Yes.

Q You all pay on a daily basis?

A Yes, sir.

Q Now where is your job actually located?

A We are located at 5701 East Columbus Drive in Tampa.

Q And what sort of building is that? Does it stand by itself?

A It's a single building by itself. We have a

EXHIBIT-B

hiring on a normal basis through Work Force or any other facility?

A It was just on an as needed basis. I mean that particular week we were pouring some concrete and just needed some extra hands.

Q About how many hands would you need in a situation like that?

A I really, I don't think we ever had more than two people at a time at that job site.

Q So --

A From Work Force or any other temporary.

Q So there would be five full time employees plus the two temporary?

A Well, the full time people weren't all at that job site.

Q How many would be at that particular job site?

A Um, probably three of us.

Q Okay. Three Triad employees and two temporaries?

A Not every day.

Q Well can you give us some idea about --

A We didn't use that much temporary labor at the job site.

Q Did you ever see Mr. Smith at that job site?

(Ex) 39

(Ex 39)

Exhibit -B

Q You were there eight to five like the other people? Brady violation

A No, I wasn't there the whole time.

Q Just coming and going just to see what happened since noon that sort of thing?

A And doing some work also. You didn't know my wife

Q All right but I guess William would be there all the time or not?

A Yes. Brady violation

Q And the carpenter would be there all the time?

A Yes.

Q That's the three?

A Yes, myself included.

Q Including yourself. Now in July was the house -- well tell us was this a brand new house you were building there?

A No.

Q It was a renovation?

A Yes.

Q All right so it was never a time in which there was just a bare construction site and pouring form and framing up a house it looked like a house from the street I guess?

A Yes.

— EXHIBIT-G —

TAMPA PD
GENERAL OFFENSE HARDCOPY

on, Oct. 02 2000

230D - 7 PETTY/GT FROM BUILD

General Offense Information

Operational status : **ARREST**
Reported on Aug-03-2000 (Thu.) 0800
Occurred between Jul-27-2000 (Thu.) 0800 and Aug-02-2000 (Wed.) 1700
Approved on Aug-04-2000 (Fri.) by 36865 - MAC LEAN, SCOTT N
Report submitted by 20982 - TREGOE, MARJORIE
Org unit : Squad 8
Down time : 53
Located at 3701 W EUCLID AVE
Municipality : Tampa
District : 1 Beat : B8 Grid : 178

Offenses (Completed/Attempted)

Offense : #1 230D - 7 PETTY/GT FROM BUILD - COMPLETED
Location : Residence-Single
Premises entered : 1 Entry method : Forced Entry

General Offense Information (cont'd)

Bias : None (no bias)
Value - Loss : $700 Recovered : $300
Family violence : NO
IBR Clearance status : Not Applicable

IBR Property Segment

Description	Type	Value	Date Recovered	Value Recovered
Tools-Power/Hand	STOLEN	$300	Aug-14-00	$300
Other	STOLEN	$400		

Related Event(s)

CP 2000-521166
GO 2000-69222

Related Person(s)

Case Specific : VICTIM - 01 SCARLE, GLORIA JOY
WHITE FEMALE
Born on Jul-17-1957
Residing at 6301 S WESTSHORE #801N , TAMPA , Florida 33616-
Phone Numbers
Home : (813)893-5811 Business : (813)839-5811

ontinued ...

21 39

EXHIBIT-C

THE COURT: I'll overrule your objection.

MR. BASS: Objection, leading.

THE COURT: All right, I'll overrule your objection. Stand up and make your objections. Go ahead.

BY MR. ALLEN:

Q Is there any doubt in your mind that at least on the 26th that saw was on your job site?

MR. BASS: Objection, bolstering.

THE COURT: I'll overrule your objection.

BY MR. ALLEN:

Q Is there any doubt in your mind, ma'am, that on the 26th of July last year that saw was on your particular premises at the house?

A No, there is no doubt in my mind.

Q Now did there come a point in time later where you discovered that saw was missing?

A Yes.

Q Did you in fact call the police?

A Yes.

Q During the time period we're talking about on the 27th of July to the early part of August when did you report it approximately, first, second, third day of August? 1st Day of Aug. Because Saw was there on 08-01-00 And I Found MY Saw on 07-29-00

A Yeah.

EXHIBIT-C

MR. BASS: Objection, leading.

THE COURT: Don't lead your witness, Mr. Allen.

BY MR. ALLEN:

Q As far as August was it in the very first part, middle or end of August?

A It was the first week of August.

Q How many days time span we're talking about approximately?

A Um, maybe five or six days at the most.

Q Okay. Is the -- you indicated to the jury that you're already, you're certain the last day you saw the saw as to the future date are you sure as to when that was exactly?

A With -- we reported it to the, the police on the day we noticed it was missing when we went to use it again and it was gone. They used it on 08-00 and went to use it on 08-03 and it was missing

Q Okay. And now during this time period we're taking about from July 27th to the first part of August was there any signs of forced entry anything was -- was there a break in at your house or anything like that broken windows?

MR. BASS: Objection, leading, Your Honor.

THE COURT: Don't lead your witness.

BY MR. ALLEN:

EXHIBIT-C

Q Was there any sign of forced entry?

A No.

Q At the conclusion of the day every day is the job site your house secured?

A Yes.

Q And the tools that are used on the job site where are they necessarily placed?

A They were locked inside the house.

Q Okay and did you have any indication, see anything from your observations at the time period in question of how someone could have gotten into the particular house to take the property other than with a key or when it's opened to the workers?

A No.

Q Now, during the early part of this time period that is the 27th and 28th, did you also have a brother that was working on this job site?

A Yes.

Q Was there individuals either known to you at that time or later known to you as Willie Smith and Myrtle Williams?

A Yes.

Q Were they from the temporary company of Work Force?

A Yes.

EXHIBIT C

Q I want to take you back in time to July of last year. Were you dispatched to 3701 West Euclid?

A Yes, I was. — What Day

Q And what was the nature of the call?

A Burglary, grand theft.

Q Okay, when you got there did you have an opportunity to inspect the house and look for any signs of forced entry, broken windows, jimmied locks pry locks anything of that nature?

A Yes, I did.

Q Upon inspection of the house in question did you see any signs of forced entry or any way someone could have gained access other than walking through a door using a key?

A No, I did not.

MR. ALLEN: No further questions.

THE COURT: Any questions, Mr. Bass?

MR. BASS: No, Your Honor, thank you very much.

THE COURT: May this witness be excused?

MR. ALLEN: Yes, Judge.

THE COURT: You're excused, ma'am, call your next witness.

MR. ALLEN: The State would call Ann Hollimon.

THE COURT: And who is after Ann Hollimon?

Exhibit A-OF-R- C

TAMPA PD
GENERAL OFFENSE HARDCOPY

GO 2000-57790

Mon, Oct. 02 2000

230D - 7 PETTY/GT FROM BUILD

General Offense Information

Operational status : **ARREST**
Reported on Aug-03-2000 (Thu.) 0800
Occurred between Jul-27-2000 (Thu.) 0800 and Aug-02-2000 (Wed.) 1700
Approved on Aug-04-2000 (Fri.) by 36865 - MAC LEAN, SCOTT N
Report submitted by 20982 - TREGOE, MARJORIE
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Down time : 53
Located at 3701 W EUCLID AVE
Municipality : Tampa
District : 1 Beat : B8 Grid : 178

Offenses (Completed/Attempted)

Offense : #1 230D - 7 PETTY/GT FROM BUILD - COMPLETED
Location : Residence-Single
Premises entered : 1 Entry method : Forced Entry

General Offense Information (cont'd)

Bias : None (no bias)
Value - Loss : $700 Recovered : $300
Family violence : NO
IBR Clearance status : Not Applicable

IBR Property Segment

Description	Type	Value	Date Recovered	Value Recovered
Tools-Power/Hand	STOLEN	$300	Aug-14-00	$300
Other	STOLEN	$400		

Related Event(s)

CP 2000-521166
GO 2000-69222

Related Person(s)

Case Specific : VICTIM - 01 SCARLE, GLORIA JOY
WHITE FEMALE
Born on Jul-17-1957
Residing at 6301 S WESTSHORE #801N , TAMPA , Florida 33616-
Phone Numbers
Home : (813)893-5811 Business : (813)839-5811

Continued ...

38
415)

Exhibit ~~E OF F~~ C

n, Oct. 02 2000 230D - 7 PETTY/GT FROM BUILD

Business : (813)237-2347

Occupation : MANAGER
Employed by CASH AMERICA PAWN OF TAMPA #2 - 1901 E HILLSBOROUGH AV, TAMPA

Linkage factors
Resident status : Not Applicable

elated Business(es)

OTHER -CASH AMERICA PAWN OF TAMPA #2
Located at 1901 EAST HILLSBOROUGH AVENUE , TAMPA , Florida 33610-
Phone no. : (813)237-2347
Type : Stores-All Other

VICTIM -TRIAD CONSTRUCTION SERVICES
Located at 3605 SOUTH HUBERT AVENUE , TAMPA , Florida 33629-
Phone no. : (813)839-5811
Type : Contractors Premises, Companies, Firms

Institution Particulars
Contact #1 : GLORIA JOY SCARLE - OWNER
Phone no. : (813)893-5811

Victimized by offense : 2200 - 1 BURG-STRUCTURE - COMPLETED

elated text page(s) NO Burg OR Forced entry

Document: INVEST REPORT
Author: 30874 - TODD, DOLVIN W JR
ocked By: 30874 - TODD, DOLVIN W JR On: (Mon.) Sep-18-00
elated date/time: Aug-14-00

tective D. W. Todd received this case for latent investigation. Detective W. Todd discovered that this saw was pawned at Cash America Pawn of mpa #2 on July 29, 2000. Pawn records indicated that the saw was pawned Willie Albert Smith. At the time of the pawn, Willie Smith provided a me address of "8520 North Semmes".

August 14, 2000, Detective D. W. Todd responded (43) to the Cash America Pawn Tampa #2 and met with the manager Mike McKenzie. Detective Todd placed law enforcement hold on the property and retrieved the original pawn cket number 156054 (copies attached). Detective Todd examined the saw d observed the word "Triad" written in black marker on the face of the w along with the word "Willie". Detective Todd took two (2) Polaroid otograph of the saw. Detective D. W. Todd submitted the pawn ticket to

tinued ...

me-my wife and 3 Pawn Shop employees never saw name Triad [redacted] written on the saw. I wonder

43 46

PAGE120
P43

EXHIBIT-D

thing after looking at records and I asked her a question and did you hear her say, you're right I'm mistaken. She said I never said that. She doesn't know what happened nine days ago. She said, I didn't say that.

I actually showed her and read to her the question and answer and then what she does say? Oh, the court reporter got it wrong that's the sum of them.

The defense attorney wants to say well, there's no Triad written on that saw. The detective told you under oath that it was there. What he may think about whether it's there or not is not evidence. He told you from the witness stand it's on the saw, period. It's there.

Defense counsel's beliefs, feelings or even testifying does not count. That's the evidence that you to follow.

This receipt. Well, he's not organized and it's not a high priority of the defendant but the defense wants you to believe but a man sitting in jail since September, September, October, November, December, January, before he finally realizes, oh yeah, I'm in jail. I didn't do anything wrong. I just happen to have a receipt. Just happened to

EXHIBIT-D

transpired.

Detective Todd told you that during the course of this conversation represented to him by the defendant that Mr. Lindsay in fact would say, yeah, yeah, I know exactly who Jerry Davis is. Now we know from Mr. Lindsay and Detective Todd that's not what happened.

He again misrepresented the facts to the detective. All these misrepresentations, all these thing just don't click with things.

→ Another thing you can take into conversation, folks, is the fact that he has 21, 21 felony convictions. You can take that into account when deciding whether or not you find his testimony credible. Absolutely.

Well, is he credible? Twenty-one times, I ask you please listen and remember to the way he answered and responded to questions. ←

Let's talk about his wife for a second. His wife nine days ago knows nothing about dates, times or places. She tells you she can't remember anything. She has memory problems. She's telling you this saw transaction happened at Christmas time. She's telling you she doesn't remember days, months, seasons.

98

Exhibit-E
DAVID BAIS Def. Atty.

Well, I supposed you'd at least go to a different pawn shop. That would make some sense and then the State really would have something to trumpet about when they say he pawned it that he went to some different pawn shop where he's never, ever been before. That would really sell.

But to go to the same place. Let's talk about whether the word Triad is written on the saw. That's what the testimony was from the detective I believe.

If that happened you're as well known as Mr. Smith walking into the pawn shop where he always does his business, if it says that on there it looks like Triad Construction or it just says Triad I believe it just says Triad according to the report then won't the pawn shop looking at that well, golly, I didn't know Mr. Smith had anything to do with Triad, you know, that wouldn't have happened so what do we see?

Well, let's take a look at the pictures. The State with their burden of proof introduced some pictures for you and Triad isn't on this saw that you can see. It's their picture, took at a couple of different angles to make sure you got pictures. Can't see it. It doesn't say it on this one.

Exhibit D

And I suppose where the last time anybody knew where the saw was, well, it was in the pawn shop for a while and then I believe the testimony it was returned to the people if I'm wrong about that correct me in your own memory but I believe the testimony it was returned, the saw to the Triad people so I guess they could have brought it in here in a truck if it fits in the back seat of a car.

The State who is charged with the burden of proof didn't want to bring you a saw. They bring you a picture backs up easily with the simple little Polaroid, what they say the truth is. That's their burden of proof and if that hasn't happened then the result of that or the hole in the case results in that is laid at their feet, not at Mr. Smith's feet.

Didn't prove the saw in question, just did not, could have in the easiest of ways. I could name two right here. A decent picture or the saw itself which they still don't have. They bring that to you.

There's a reasonable doubt. That's not a funny story about rain possibility and who knows what made up things that a fast lawyer talking and

APPENDIX-D

3.850 DENIAL ORDER

Relief Based on Williams - 121 So3d 524 (Fla 2013)

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 00-CF-015615**

v.

WILLIE SMITH, **DIVISION: C**
Defendant.
_____/

FINAL ORDER DENYING DEFENDANT'S "EMERGENCY 3.850 MOTION FOR POST-CONVICTION RELIEF"

THIS MATTER is before the Court on Defendant's "Emergency 3.850 Motion for Post-Conviction Relief," filed on April 20, 2015, pursuant to Florida Rule of Criminal Procedure 3.850. After reviewing Defendant's Motion, the court file, and the record, the Court finds as follows:

In case 00-CF-015615, on February 15, 2001, a jury found Defendant guilty as charged of Grand Theft ($300 or more) (count one), Dealing in Stolen Property (count two), and Obtaining Money from Secondhand Dealer by Fraud (count three). (*See* Verdict Form, attached). On June 13, 2001, the trial court dismissed count one and sentenced Defendant to fifteen (15) years' prison on count two and to time served on count three. (*See* Judgment and Sentence, attached). Defendant appealed, and on September 13, 2002, the Second District Court of Appeal issued its Mandate in case 2D01-4188 affirming on direct appeal. *See Smith v. State*, 827 So. 2d 998 (Table) (Fla. 2d DCA 2002). Defendant has filed numerous motions for post-conviction relief pursuant to Rule 3.850, the dismissals and denials of which have been affirmed on appeal in numerous post-conviction motion appeals.[1]

[1] The Second District Court of Appeal has affirmed the court's rulings on Defendant's rule 3.850 motions on April 8, 2003 (in case 2D02-5295), May 11, 2005 (in case 2D04-4834), September 12, 2005 (in case 2D05-2897), March 13, 2008 (in case 2D07-1553), July 18, 2013 (in case 2D12-4305), and December 2, 2014 (in case 2D14-1057); the Second District also granted voluntary dismissal of one 3.850 post-conviction appeal on September 12, 2003 (in case 2D03-3794).

527

In his current rule 3.850 motion –which appears to be his eighth rule 3.850 motion for post-conviction relief filed in this case– Defendant alleges as follows:

> The trial court did not afford Petitioner the jury instruction pursuant to Florida Statutes Section 812.025 pertaining to the dual charge in the Information of Grand Theft count 1 and dealing in stolen property count 2, that the jury had to find Petitioner guilty of either grand theft or dealing in stolen property- to wit- one or the other but not both. [ ] On August 29, 2013 –and this is April 14, 2015 - that has 5 more months before the 2 year limitation run out– the Florida Supreme Court ruled in *Williams v. State*, 121 So. 3d 524 (Fla. 2013) and in *Culpepper v. State*, 137 So. 3d 378 ([Fla.] 2014) and *Crosby v. State*, 137 So. 3d [377] Fla. 2014) that petitioner was entitled to have a jury instruction molded after Fl. Statute 812.025, and that the trial court had erred by not doing such.

The Court notes that, if properly filed pursuant to Florida Rule of Criminal Procedure 3.850, Defendant's Motion is untimely filed more than two years after his judgment and sentence became final, and does not raise claims qualifying under any of the exceptions to that timeliness requirement. *See* Fla. R. Crim. P. 3.850(b). Additionally, Defendant's Motion is successive, without any explanation as to good cause why Defendant could not have asserted his claim in a prior motion. *See* Fla. R. Crim. P. 3.850(h); (*see* Orders, attached). Regardless, even if not-successive and untimely filed under rule 3.850, Defendant would still warrant no relief on his allegation, as his claim is one of trial court error is one that should have been raised on direct appeal, and is not cognizable in a rule 3.850 motion for post-conviction relief. *See Swanson v. State*, 984 So. 2d 629 (Fla. 4th DCA 2008) (noting that a "claim of trial court error is not cognizable in a motion for post-conviction relief" and citing *Gorham v. State*, 521 So. 2d 1067, 1070 (Fla. 1988) "holding that any claim of error regarding jury instructions given by the court should have been raised on direct appeal, and was not cognizable in a rule 3.850 motion"). The Court notes that summary denial of Defendant's Motion under these circumstances is proper. *see also e.g. Sims v. State*, 114 So. 3d 613 (Fla. 4th DCA 2014) ("affirm[ing] the summary denial of Sims's untimely and successive rule 3.850 motion, raising nine grounds, the first seven of which, claiming alleged trial court error in the jury instructions, were not cognizable").

It is therefore **ORDERED AND ADJUDGED** that Defendant's April 20, 2015, "Emergency 3.850 Motion for Post-Conviction Relief" is hereby **DENIED**.

This is a Final Order on Defendant's Motion for Post-Conviction Relief. Defendant has thirty (30) days from the date of this Order within which to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this ORIGINAL SIGNED CONFORMED COPY day of _____, 2015.

NOV 02 2015

SAMANTHA L. WARD
CIRCUIT JUDGE

SAMANTHA L. WARD, Circuit Judge

Attachments:
April 20, 2015, "Emergency 3.850 Motion for Post-Conviction Relief"
Verdict Form
Judgment and Sentence
September 16, 2014, "Order Denying a Second or Successive or Amended 3.850 Post-Conviction Motion Based on Newly Discovered Evidence"
January 22, 2014, "Order Denying Second or Successive Motion for Post-Conviction Relief Based on Newly Discovered Evidence and Supplement for Successive or Second 3.850 Post-Conviction Relief Motion Request Based on Newly Discovered Evidence"
June 28, 2012, "Order Dismissing Defendant's 3.850 Post-Conviction Motion Based on 3.850(b) Newly Discovered Evidence with Prejudice"
January 20, 2010, "Order Denying Claim Nine of 3.850 Post-Conviction Motion, Supplemental Statement for 3.850, and Amended Claim for Newly Discovered Evidence"
April 21, 2005, "Order Denying Petition for 3.850 Post-Conviction Motion- 3.850"

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of this Order (*with attachments*) has been furnished to Willie A. Smith (DC # 040330), Mayo Correctional Institution- Annex, 8784 US Highway 27 West, Mayo, Florida 32066-3458, by regular U.S. Mail, and that a conformed copy of this Order (*without attachments*) has been furnished to the Assistant State Attorney for Division C, 419 North Pierce Street, Tampa, Florida 33602, by inter-office mail, on this 2 day of November, 2015.

DEPUTY CLERK

547

IN THE CIRCUIT COURT THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY STATE OF FLORIDA

FILED
CLERK'S PERMIT OFFICE
2015 APR 20 AM 8:41
HILLSBOROUGH COUNTY, FL
CIRCUIT CRIMINAL

WILLIE SMITH

-VS-

CASE NO. 00-15615

STATE OF FLORIDA

"EMERGENCY"

3.850 MOTION FOR POST CONVICTION RELIEF

Comes now Petitioner Willie Smith Pro-se hereby move the Court for Post Conviction Relief Pursuant to Fl. Rule of Criminal Procedure - Rule 3.850. And in Support Petitioner State the Following:

STATEMENT

(1) In 2001 - Petitioner was charged with a 3 count Information - To wit - Count-1 - Grand Theft of A Compound Miter Saw / Count-2 - Dealing in Stolen Property of the very Same Compound Miter Saw and Count-3 - Defrauding a Pawn Broker

(2) Petitioner Pleaded not Guilty and had A Trial by Jury

(3) Daniel Perry was the Trial Judge

(4) Curtis Allen was the State Attorney

(5) Petitioner's Attorney was David Bass from the Hillsborough County Public Defender's office.

(6) The Trial Court did not Afford Petitioner the Jury Instruction Pursuant to Florida Statute 812.025 Pertaining to the Dual Charges in

In the Information of Grand Theft Count-1 and dealing in Stolen Property Count-2-That the Jury had to find Petitioner Guilty of Either-Grand Theft OR Dealing in Stolen Property -To Wit- one or the other But not both

(7) The Trial Court did not Afford Petitioner the Jury Instruction Pertaining to Fl. Statute 812.025 and the Jury Convicted Petitioner of Both Grand Theft And Dealing in Stolen Property of the Compound Miter Saw

(8) The Courts Record will Reflect that Petitioner was Sentenced to 15 years for the Dealing in Stolen Property Conviction - And that the State Requested that the Grand Theft Conviction Be Merged into the Dealing in Stolen Property Conviction - And the Court Agreed to the Merger

(9) The Courts Record will Reflect that Petitioner Also Submitted numerous Post Conviction motions Stating that Counsel Requested the Jury Instruction - Pertaining to 812.025 that the Jury was to find Petitioner Guilty of either Grand Theft - OR Dealing in Stolen Property - To wit- one of the other - But not Both and was Ineffective for not Preserving the Denial of the Jury Instruction for Direct Appeal or that Counsel didn-ot Request the Jury Instruction And was Again Ineffective for not Doing such.

(10) Petitioner had A Direct Appeal that ended in A Silent P.C.A. and the issue was not Raised.

(11) The Trial Court Always denied the motions About that Issue-By stating that the State Attorney Merged the Grand Theft Conviction with the Dealing in Stolen Property Conviction - And there was no harm Done.

(12) At Trial - It was the Province of the Jury to find Petitioner Guilty of either Grand Theft or Dealing in Stolen Property - And the Jury may have found Petitioner Guilty of Grand Theft only - where it was the State Attorney that Chose to merge the Grand Theft And keep the Dealing in Stolen Property and not the Jury

(13) The 2nd D.C.A. Always Affirmed the Trial Court denials of Petitioner's Motions

(14) on Aug. 29th 2013 - And this is April 14th 2015 - That has 5 more months Before the 2 year limitation Run out - The Florida Supreme Court Ruled in Williams-vs-State 121 So3d 524 (Fl. 2013) and in Culpepper-vs-State 137 So3d 378 2014 and Crosby-vs-State 137 So3d 138 (Fl 2014) That Petitioner was Entitled to have A Jury Instruction Molded After Fl. Statute 812.025, and that the Trial Court had Erred BY not doing such

(15) The Florida Supreme Court Ruled that the 2nd D.C.A. Decisions on this Issue were in Error and that the defendant was Entitled to A new Trial on this Issue OR to have the Conviction Vacated.

Petitioner Avers - That to have the Conviction vacated would mean that Petitioner would be due Immediate Release from Prison where Petitioner has served the 5 Year Consecutive Prison Sentence that was imposed for the Uttering a forged Instrument Charge in Case no# 00-9986

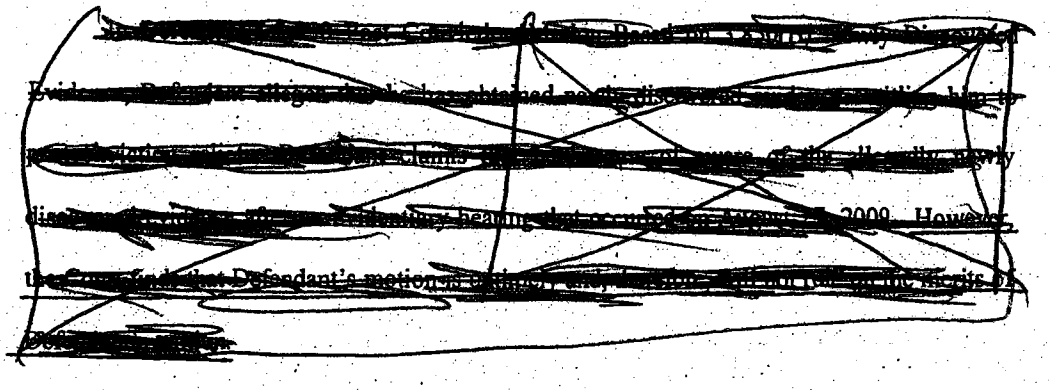
The only other Alternative would be to set the case for Trial Again And Afford Petitioner the Proper Jury Instructions molded After Fl Statute 812.025 To find Petitioner Guilty of one OR the other But not Both - And Petitioner would Prefer "A NEW TRIAL" so that Petitioner can Prove this Time That he is Actually Innocent - Because Petitioner can Rebut And Prove the Perjured Testimony And can have the Attorney to Ask the Questions that would Prove Petitioner's Innocence. This Time.

RELIEF SOUGHT

Whatever the Trial Court decide to Do - It must Do Expeditiously In Lieu of the Circumstances And Case Law Presented - To either Grant the motions and vacate the Conviction for Grand Theft and Dealing in Stolen Property and have Petitioner Immediately Released from Prison OR Set the Case for A New Trial OR Submit the issue to the 2nd D.C.A. for Guidance in Lieu of the Fact that it was the 2nd D.C.A. Bad Law that had Affirmed this Prejudicial Error all of these Years.

DISCUSSION

TIMELINESS



In case 00-CF-015615, the Second District Court of Appeal affirmed Defendant's convictions and sentences on August 23, 2002, and the mandate issued on September 13, 2002. Therefore, Defendant's FLA. R. CRIM. P. 3.850 two-year limitations period commenced on or about September 13, 2002, and ended on or about September 13, 2004. *See Beaty v. State*, 701 So.2d 856 (Fla. 1997) (finding the two-year period for filing a FLA. R. CRIM. P. 3.850 motion began to run when the appellate court issued its mandate). Defendant filed his present motion on March 2, 2012, well outside of the two-year time requirement. However, there are three enumerated exceptions to the timeliness rule in FLA. R. CRIM. P. 3.850(b):

> **(b) Time Limitations.** A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that:
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence, or

CASE NUMBER 00-00015615
DIVI[illegible] A

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR THE COUNTY OF HILLSBOROUGH, STATE OF FLORIDA
TAMPA DISTRICT

OCT 05 2000, SPRING Term 2000

STATE OF FLORIDA

V.

WILLIE ALBERT SMITH
AKA WILLIE ALBERT DAVIS

INFORMATION FOR:

COUNT ONE
GRAND THEFT THIRD DEGREE
($300 - $5,000)
F.S. 812.014 (2)(c)1

COUNT TWO
DEALING IN STOLEN PROPERTY
F.S. 812.019 (1)

COUNT THREE
OBTAINING MONEY FROM
SECONDHAND DEALER BY FRAUD
F.S. 538.04 (A)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, JOHN F. RUDY, II, STATE ATTORNEY OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR THE COUNTY OF HILLSBOROUGH, CHARGES THAT:

COUNT ONE

WILLIE ALBERT SMITH AKA WILLIE ALBERT DAVIS, between the 27th day of July, 2000, and the 29th day of July, 2000, inclusive, in the County of Hillsborough and State of Florida, did unlawfully obtain or use, or endeavor to obtain or use certain property of another, to-wit: a saw, the property of TRIAD CONSTRUCTION OR GLORIA SCARLE, the value of said property being three hundred ($300.00) dollars or more, but less than five thousand ($5,000.00) dollars in money current in the United States of America; and in so doing the

defendant intended either to permanently or temporarily deprive the said TRIAD CONSTRUCTION OR GLORIA SCARLE of a right to the property or a benefit therefrom, or to appropriate the property to his own use or to the use of any person not entitled thereto.

COUNT TWO

WILLIE ALBERT SMITH AKA WILLIE ALBERT DAVIS, on the 29th day of July, 2000, in the County of Hillsborough and State of Florida, did unlawfully traffic or endeavor to traffic in stolen property, to-wit: a saw the property of TRIAD CONSTRUCTION OR GLORIA SCARLE, a further description of said property being to the State Attorney unknown, and in so doing the defendant knew or should have known that said property was stolen.

COUNT THREE

WILLIE ALBERT SMITH AKA WILLIE ALBERT DAVIS, on the 29th day of July, 2000, in the County of Hillsborough and State of Florida, did knowingly give false verification of ownership or give a false or altered identification, and did receive less than $300.00 from a secondhand dealer for goods sold or pledged. Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA CASE NO.: 00-15615

VS. DIVISION: A

WILLIE SMITH

VERDICT FORM

We, the jury, find as follows as to Count One of the information: (check only one as to this Count)

X A. The defendant is guilty of Grand Theft, ($300.00 or more) as charged.

____ B. The defendant is guilty of Petit Theft (less than $300.00).

____ C. The defendant is not guilty.

We, the jury, find as follows as to Count Two of the information: (check only one as to this Count)

X A. The defendant is guilty of Dealing in Stolen Property, as charged.

____ B. The defendant is not guilty.

We, the jury, find as follows as to Count Three of the information: (check only one as to this Count)

X A. The defendant is guilty of Obtaining Money From Secondhand Dealer by Fraud, as charged.

____ B. The defendant is not guilty.

SO SAY WE ALL, dated this 15 day of February, 2001.

Foreperson of the Jury

83

627

APPENDIX-E

- B- Denial order of 3.850 Newly Discovered Evidence Limited Evidentiary Hearing Excluded Exculpatory witness That was to have Been Disclosed Pursuant to Discovery And Brady - States witness William Searle

Exhibit-A Excerpt from Evidentiary hearing Dowin

- williams Claim

Court should summarily deny Defendant's motion at this time pending the submission of a credible and sworn affidavit from the supposedly existing witness, "the undertaker." (*See* State's response to Defendant's motion for post-conviction relief, attached).

After reviewing claim nine, the State's response, the court files, and the record, the Court finds "rule 3.850 does not require the filing of supporting affidavits; it only requires a brief statement of facts in support of the motion." *Butler v. State,* 946 So. 2d 30, 31 (Fla. 2d DCA 2006), quoting *Roundtree v. State,* 884 So. 2d 322, 323 (Fla. 2d DCA 2004) (citing *Valle v. State,* 705 So. 2d 1331 (Fla. 1997), and *Smith v. State,* 837 So. 2d 1185 (Fla. 4th DCA 2003)). Therefore, on October 3, 2008, the Court granted an evidentiary hearing on claim nine.

At the August 27, 2009, evidentiary hearing, when asked to explain what the newly discovered evidence was that he believed would compel the Court to grant him a new trial, Defendant responded as follows:

> SMITH: Okay. The newly discovered evidence was that at Washington (ph) Correctional; I think it was 2008, I was approached by an individual that said he knew me from Tampa, and the [sic] he knew me from working at a temp service. Okay, I didn't recognize him because that's not my normal work. Only thing I was working at a temp service because I had dislocated my shoulder on the dock and needed extra money. Anyway, he started asking me what I was in for and I explained to him I was in for stealing my own property. He said how was that and I say, I was working at this little place in (indiscernible) Plaza and they tried to say that I stole their compound matter [sic], so, and pawned it, and in all respect, I pawned one that I had purchased, two, three weeks prior. And then he started laughing and say he knew I didn't steal anything because he knew who had stole it; the same person on Triad invoice, that was August 1st, which was David Cruz (ph). He said he called him "Crazy D." And I asked him how did they do it, and he said he was part of the (indiscernible) but he wouldn't make me no sworn affidavit, but he would tell me how they did it, if it would help me. I say okay, because they try and say I had access

> to the place, and I said I never had access into it, because the foreman that caught me would testify that I didn't, but they didn't bring him to trial. So he told me when they did that framing work on Monday, which they had asked me to do , and I decided not to come that Monday, that upon leaving, David Cruz did something; jimmy the back door and stuck something in it, where's to so it would open. They came in at night and just pushed it open and went in and stole the stuff.

(*See* August 27, 2009, transcript, pps. 4-5, attached). He testified the "undertaker" refused to give him his name because he did not trust the State Attorney's Office. (*See* August 27, 2009, transcript, pps. 5-6, attached). He testified he did not know the undertaker's true name. (*See* August 27, 2009, transcript, p. 6, attached).

Additionally, when asked if he knew where the undertaker could be located now, he responded as follows:

> SMITH: Well, some people that I inquired of when I came back here said that he frequented Lake and 29th, there; it's a high drug area, and a couple of people, one person said that he think he still in prison. And one said, when I called you that day, the guy said he thought he was still locked in. Another guy came and said he was still in prison. I think there's one or two, running around, but either went out or went in, but either he still in, but I know he got transferred and I got transferred down to Everglades from Washington Correction.

(*See* August 27, 2009, transcript, p. 6, attached). He testified at this moment, he did not know who the man was and did not know where the man may be. (*See* August 27, 2009, transcript, p. 6, attached). When asked if there was any other evidence or documents he would like to present to the Court besides what he had already presented, that he was told by this man he met in prison, Defendant responded, "No, there's nothing else I can present, except for the fact that he told me that David Cruz was, you know; that him and David Cruz did it and I got the trial invoice to show that David Cruz worked on August 1st and they found all this missing, August

3rd. That's all." (*See* August 27, 2009, transcript, p. 7, attached). Moreover, when asked to give a description of the undertaker, he described him as a black male, with brown, skin, about six feet, four inches or six feet, five inches tall, and weighing about 230 or 240 pounds. (*See* August 27, 2009, transcript, pps. 7-8, attached).

At the same hearing, Ms. Gloria Scarle testified she did not know anyone that goes by the nickname "The Undertaker" that had any connection with working on any of her job sites or properties. (*See* August 27, 2009, transcript, p. 10, attached). She testified she was at the job site on the morning of the theft. (*See* August 27, 2009, transcript, p. 10, attached). However, she testified she did not know anything about how the theft occurred. (*See* August 27, 2009, transcript, pps. 10-11, attached). She did not have any recollection of whether she opened the house that was under construction when she arrived. (*See* August 27, 2009, transcript, p. 11, attached). When asked if she had any information regarding the work on the job site that Defendant or his wife did when they were there, she responded, "I don't really recall, at this point. I mean, it was - - I know that I had called a temporary service for two just general laborers. But what they specifically did that day, I don't recall." (*See* August 27, 2009, transcript, p. 11, attached). When asked if she personally had any information or evidence regarding Defendant having committed the offense, or being involved in the commission of the offense, she responded, "Other than he was there that day, and the saw disappeared; no." (*See* August 27, 2009, transcript, p. 11, attached).

After reviewing the allegations, all Defendant's pleadings, the testimony, evidence, and argument presented at the August 27, 2009, evidentiary hearing, the court files, and the record, the Court finds Defendant failed to produce at the evidentiary hearing the individual named "The Undertaker." The Court further finds Defendant failed to produce at the evidentiary hearing the

individual named David Crews a/k/a David Cruz or "Crazy D." Therefore, the Court finds Defendant failed to provide this Court with any admissible newly discovered evidence which would probably produce an acquittal on retrial. **As such, no relief is warranted upon claim nine.**

The Court notes with respect to Defendant's allegations that his convictions for grand theft and dealing in stolen property violate double jeopardy, the record in case 00-CF-015615 reflects that although he was found guilty of grand theft ($300) (count one), dealing in stolen property (count two), and obtaining money from second hand dealer (count three), because convictions and sentences on both counts one and two would violate double jeopardy, the grand theft (count one) merged into count two and was dismissed. (*See* judgment and sentence, attached). Therefore, the Court finds judgment was not entered, nor was Defendant sentenced for grand theft (count one). **As such, there is no double jeopardy violation.**

It is therefore **ORDERED AND ADJUDGED** that claim nine of Defendant's February 29, 2008, "3.850 post conviction motion", June 12, 2008, and June 23, 2008, "supplemental statement for 3.850," and July 10, 2008, "amended claim for newly discovered evidence" are hereby **DENIED.**

Defendant has thirty (30) days to appeal this order and the Court's September 24, 2008, and October 3, 2008, orders.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this 24th day of Jan, 2010.

MICHELLE SISCO, Circuit Judge

Exhibit B

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

JAF

STATE OF FLORIDA CASE NO.: 00-CF-015615

v.

WILLIE SMITH, DIVISION: C
Defendant.
_____/

FILED
CLERK CIRCUIT COURT
2012 JUN 28 PM 1:14
HILLSBOROUGH COUNTY, FL
CIRCUIT CRIMINAL

ORDER DISMISSING DEFENDANT'S 3.850 POST CONVICTION MOTION BASED ON 3.850(B) NEWLY DISCOVERED EVIDENCE WITH PREJUDICE

THIS MATTER is before the Court on Defendant's 3.850 Post Conviction Motion Based on 3.850(B) Newly Discovered Evidence, filed on March 9, 2012. The Court, after considering Defendant's motion, the court file, and the record, finds as follows:

PROCEDURAL HISTORY

In case 00-CF-015615, a jury found Defendant guilty of Grand Theft ($300 or more) (count one), Dealing in Stolen Property (count two), and Obtaining Money from Secondhand Dealer by Fraud (count three) on February 15, 2001. On June 13, 2001, the Court sentenced Defendant to fifteen years Florida State Prison on count two and to time served on count three.[1] On August 23, 2002, the Second District Court of Appeal affirmed Defendant's convictions and sentences and the mandate issued on September 13, 2002.

Defendant filed a motion for postconviction relief under FLA. R. CRIM. P. 3.850 on September 23, 2002. The postconviction court denied Defendant's motion on October 16, 2002. The Second District Court of Appeal affirmed the postconviction court's ruling on February 14, 2003 and the mandate issued on April 14, 2003. *See Smith v. State*, 847 So.2d 474 (Fla. 2d DCA 2003) (Table). Defendant filed the present motion on March 9, 2012.

[1] Count one merged and was dismissed.

96

DISCUSSION

TIMELINESS

In Defendant's 3.850 Post Conviction Motion Based on 3.850(B) Newly Discovered Evidence, Defendant alleges that he has obtained newly discovered evidence entitling him to postconviction relief. Defendant claims that he became of aware of the allegedly newly discovered evidence after an evidentiary hearing that occurred on August 27, 2009. However, the Court finds that Defendant's motion is untimely and, therefore, will not rule on the merits of Defendant's motion.

In case 00-CF-015615, the Second District Court of Appeal affirmed Defendant's convictions and sentences on August 23, 2002, and the mandate issued on September 13, 2002. Therefore, Defendant's FLA. R. CRIM. P. 3.850 two-year limitations period commenced on or about September 13, 2002, and ended on or about September 13, 2004. *See Beaty v. State*, 701 So.2d 856 (Fla. 1997) (finding the two-year period for filing a FLA. R. CRIM. P. 3.850 motion began to run when the appellate court issued its mandate). Defendant filed his present motion on March 2, 2012, well outside of the two-year time requirement. However, there are three enumerated exceptions to the timeliness rule in FLA. R. CRIM. P. 3.850(b):

> **(b) Time Limitations.** A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that:
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity, or

(3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion. A claim based on this exception shall not be filed more than 2 years after the expiration of the time for filing a motion for postconviction relief.

Defendant argues that his present motion falls under the timeliness exception enumerated in FLA. R. CRIM. P. 3.850(b)(1). However, claims of newly discovered evidence must be brought within two years of the time the new facts were or could have been discovered with the exercise of due diligence. Defendant states that he became aware of the allegedly newly discovered evidence at an evidentiary hearing which took place in 2009. A review of the record shows that the evidentiary hearing in question was held on August 27, 2009. (*See* August 27, 2009 Evidentiary Hearing Transcript, attached). Under FLA. R. CRIM. P. 3.850(b)(1), the time within which to bring a claim based on this allegedly newly discovered evidence would have commenced on or about August 27, 2009, and ended on or about August 27, 2011. Defendant did not file the present motion based on this allegedly newly discovered evidence until March 9, 2012, outside of the two-year time frame.

Defendant appears to understand that his motion is untimely under FLA. R. CRIM. P. 3.850(b)(1), and argues that he could not file the present motion based on newly discovered evidence until an appeal was denied in January of 2012. Defendant appears to be referring to an appeal taken after a prior FLA. R. CRIM. P. 3.850 motion was denied following the evidentiary hearing which occurred on August 27, 2009. The Second District Court of Appeal affirmed the

postconviction court's ruling on November 2, 2011 and the mandate issued on February 14, 2012. *See Smith v. State*, 78 So.3d 546 (Fla. 2d DCA 2011) (Table).

However, Defendant's claim that he had to wait until final disposition of his appeal before bringing the present claims of newly discovered evidence is incorrect. In *Montague v. State*, 710 So.2d 228 (Fla. 2d DCA 1998), the Second District Court of Appeal held that a trial court has jurisdiction to consider a FLA. R. CRIM. P. 3.800(a) motion while a FLA. R. CRIM. P. motion was pending on appeal where the issues were dissimilar. *Id.* at 229. In *Ali v. State*, 732 So.2d 481, 481–482 (Fla. 2d DCA 1999), the Second District Court of Appeal cited favorably to *Keel v. State*, 740 So.2d 4 (Fla. 1st DCA 1999), which held that, "[A]n appeal of a postconviction relief matter will not deprive trial courts of jurisdiction so long as the issues raised in the two cases are unrelated." In *Smith v. State*, 34 So.3d 818 (Fla. 2d DCA 2010) and *Brinson v. State*, 25 So.3d 1255 (Fla. 2d DCA 2010), the Second District Court of Appeal held that concurrent jurisdiction exists when the second postconviction motion raises new issues unrelated to those raised in the first motion. *Smith*, 34 So.3d at 818; *Brinson*, 25 So.3d at 1256. Prior to the Second District Court of Appeal's consideration of the issue, the First District had held that a trial court is not divested of jurisdiction by an appeal from an order denying postconviction relief, "if the issues presented in a subsequent motion or petition are unrelated to those previously denied and which are then on appeal." *Kimmel v. State*, 629 So.2d 1110, 1111 (Fla. 1st DCA 1994). The First District Court of Appeal later held that, "an appeal of a postconviction relief matter will not deprive trial courts of jurisdiction so long as the issues raised in the two cases are unrelated." *Bates v. State*, 704 So.2d 562, 563 (Fla. 1st DCA 1997).

Defendant's present FLA. R. CRIM. P. 3.850 raises three claims of newly discovered evidence, one concerning the availability of a witness to testify at Defendant's trial, and two

concerning alleged perjury by two of the state's witnesses at Defendant's trial. The FLA. R. CRIM. P. 3.850 motion that was on appeal raised one claim of newly discovered evidence, concerning an alleged statement made by a fellow inmate.. (*See* January 20, 2010, Order Denying Claim Nine of 3.850 Post Conviction Motion, Supplement Statement for 3.850, and Amended Claim for Newly Discovered Evidence). These two FLA. R. CRIM. P. 3.850 raised distinct issues. Therefore, it cannot be said that Defendant was required to wait for the completion of his appeal in his prior FLA. R. CRIM. P. 3.850 case before raising his present FLA. R. CRIM. P. 3.850 motion.

For these reasons, the Court finds that Defendant's 3.850 Post Conviction Motion Based on 3.850(B) Newly Discovered Evidence is untimely. Therefore, Defendant's 3.850 Post Conviction Motion Based on 3.850(B) Newly Discovered Evidence is **DISMISSED WITH PREJUDICE.**

NEWLY DISCOVERED EVIDENCE

The Court additionally writes to note that, even were Defendant's claims of newly discovered evidence timely, Defendant's motion would still be denied on the merits. Defendant describes his newly discovered evidence thusly:

(1) Defendant asked trial counsel to call an exculpatory witness, Mr. William Scarle, but trial counsel refused to do so. The evidentiary hearing on August 27, 2009 revealed that Mr. Scarle was available to testify at Defendant's trial.

(2) The evidentiary hearing on August 27, 2009 revealed that the State used perjured testimony from state witness Detective D.W. Todd as a method to prosecute Defendant.

(3) The evidentiary hearing on August 27, 2009 revealed that the State used perjured testimony from state witness Gloria Scarle as a method to prosecute petitioner.

Defendant initially describes his first claim of newly discovered evidence thusly: "The exculpatory witness – to wit – William Scarle, that Petitioner had requested for counsel to subpoena for trial and counsel refused was able and available for trial." He later expands upon this newly discovered evidence claim by explaining: "The newly discovered evidence is an excerpt of the evidentiary hearing held in 2009. That reflects that William Scarle was able and available for trial – But, the evidentiary hearing Judge would not allow William Scarle to testify and a (sic) evidentiary hearing must be held to allow William Scarle to testify to the exculpatory evidence and testimony."

In *Rutherford v. State*, 926, So.2d 1100, 1107–1108 (Fla. 2006), the Supreme Court of Florida provided the following guidance for considering claims of newly discovered evidence:

> In *Jones v. State*, 591 So.2d 911 (Fla.1991), this Court set forth the standard that must be satisfied in order for a conviction to be set aside based on newly discovered evidence. First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" Id. at 916 (quoting *Hallman v. State*, 371 So.2d 482, 485 (Fla.1979)). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones*, 591 So.2d at 915. In determining whether the evidence compels a new trial under Jones, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916.

The Court notes that Defendant's first claim of newly discovered evidence does not meet the above standard. Defendant initially states that he requested his trial counsel to call William Scarle, but that trial counsel refused. This is not, in fact, the first time that Defendant has raised

this accusation. Defendant previously raised this issue in his September 23, 2002 Motion for Post Conviction Relief, filed in case 00-CF-015615, in which Defendant states that trial counsel was ineffective for failing to depose the foreman and the carpenter at Defendant's request.[2] (*See* September 23, 2002 Motion for Post Conviction Relief, attached). In a subsequent Petition for 3.850 – Post Conviction Motion – 3.850, filed on January 5, 2005, Defendant claimed that trial counsel was ineffective for failing to investigate or call at trial the foreman and the carpenter. (*See* April 21, 2005 Order Denying Petition for 3.850 – Post Conviction Motion – 3.850, attached). Perhaps most telling, in a June 30, 2010 Petition for Writ of Mandamus, Defendant requested that the Court order the deposition of William Scarle. (*See* June 23, 2010 Petition for Writ of Mandamus, with attachments, attached). In that document, Defendant attached a previous 3.850 motion, in which Defendant actually explained why trial counsel did not call William Scarle: "Counsel told petitioner that the Prosecutor told him that he would not charge me with Grand Theft. But with dealing in stolen property, and at trial, that he would not have to prove that I didn't steal anything, and he didn't need to talk to [William Scarle] or call [him] for trial, and the first thing that the Prosecutor instructed the jury on was Grand Theft, and the Prosecutor's opening remarks was that the state would prove that Petitioner stole the saw." (*See id.*).

Insofar as Defendant is claiming that witness William Scarle's availability for trial is newly discovered evidence of trial counsel's ineffective assistance, the Court does not agree. Defendant's accusation is that trial counsel refused to call William Scarle. Defendant has clearly been aware of trial counsel's refusal since the trial, and has complained of the refusal in previous postconviction motions. Additionally, Defendant has previously explained why trial counsel did

[2] The record before the Court shows that the "foreman" is witness William Scarle. *See, e.g.*, Trial Transcript, Pg. 99, attached.

not call William Scarle, and that explanation was not related to William Scarle's availability to testify. (*See* June 23, 2010 Petition for Writ of Mandamus, with attachments, attached). Therefore, were Defendant's present motion timely, the Court would be unable to find that William Scarle's availability for trial is newly discovered evidence of trial counsel's ineffective assistance.

Insofar as Defendant is claiming that witness William Scarle's availability for trial is newly discovered evidence that would likely produce an acquittal on retrial, the Court would be unable to agree. At best, the alleged fact that William Scarle was available for Defendant's trial is information that could have been discovered by the use of due diligence. At worst, Defendant was aware of William Scarle's availability before the trial, as Defendant himself claims that he asked his trial counsel to call the witness, but trial counsel refused. (*See also* June 23, 2010 Petition for Writ of Mandamus, with attachments, attached). Regardless, the Court would be unable to find that William Scarle's alleged availability for Defendant's trial constitutes newly discovered evidence.

The Court also notes that the following language from Defendant's motion suggests that Defendant may be using the word "trial" to actually refer to his August 27, 2009 evidentiary hearing: "The newly discovered evidence is an excerpt of the evidentiary hearing held in 2009. That reflects that William Scarle was able and available for trial – But, the evidentiary hearing Judge would not allow William Scarle to testify and a (sic) evidentiary hearing must be held to allow William Scarle to testify to the exculpatory evidence and testimony." The evidentiary hearing transcript does indeed indicate that William Scarle was available to testify at the evidentiary hearing:

> WILLIE SMITH: All right. For one, you'd subpoenaed William Scarle; he ain't out here?

MR. CASTILLO: Is William Scarle out there, because I –

THE BAILIFF: He is.

MR. CASTILLO: He is?

THE COURT: Now, what in the world is he going to testify to?

Evidentiary Hearing Transcript, 12, attached.

However, the postconviction court did not allow William Scarle to testify, finding that William Scarle was a known witness at the time of Defendant's trial that could not be considered newly discovered evidence:

> THE COURT: It's not newly discovered. These are the alleged victims?
>
> MS. NEWCOMB: Yes.
>
> THE COURT: They were clearly known at the time of the – when the defendant pled guilty or was found guilty.
>
> WILLIE SMITH: Okay. They did not – these people did not testify. (Indiscernible) Cruz, I can show you –
>
> THE COURT: No. I'm not going allow you to call – this whole – your whole claim is newly discovered evidence. These witnesses were clearly known, or could have been known, or any information that they had could clearly – either was known or could have been known at the time your case was resolved. So, no. I'm not going to allow you to now call in the other alleged victim. Or not alleged, since you've been found guilty. So, no. So what would you like to tell me.

Evidentiary Hearing Transcript, 13, attached.

When Defendant writes, "the evidentiary hearing Judge would not allow William Scarle to testify and a (sic) evidentiary hearing must be held to allow William Scarle to testify to the exculpatory evidence and testimony," he appears to be making two claims, neither of which are related to the newly discovered evidence exception. First, he seems to be arguing that the

postconviction court erred in not allowing William Scarle to testify at his evidentiary hearing. However, a claim of postconviction court error cannot be raised in a subsequent motion for postconviction relief, but must rather be raised in a direct appeal. Second, he seems to claim that the testimony of William Scarle would have been exculpatory, and as William Scarle did not testify at Defendant's original trial, the allegedly exculpatory testimony would have constituted newly discovered evidence. However, hypothetical testimony does not constitute newly discovered evidence which the Court can consider in reviewing a postconviction claim.

Therefore, if the Court had not already found Defendant's motion untimely, it would deny Defendant's first claim of newly discovered evidence for these reasons.

Defendant describes his second claim of newly discovered evidence thusly: "The prosecutor used perjured testimony from Det. as a method to prosecute petitioner." He elaborates this claim by writing, "The newly discovered evidence for Ground Two is a D.M.V. printout that reflects that petitioner resided at 8520 N. Semmes in 1995. Contrary to the detective's testimony and that the D.M.V. records reflect such contrary to the Det.'s testimony. The newly discovered evidence reflects in the pictures submitted the black writing on the miter saw could be shown in the pictures contrary to the Det.'s testimony and that the state bolstered the perjured testimony of the Det."

Defendant attached two documents to his motion in support of this second claim of newly discovered evidence: (1), a letter from the Division of Driver Licenses stating that when Defendant was issued an identification card on October 6, 1998, the application included an address of 3618 East Wilder Avenue, Tampa, Florida 33610, and also stating that a second document preserved on microfiche shows an address of 8520 North Semmes, Tampa, Florida

33604 on December 30, 1995; and (2), two photos of what Defendant claims to be a compound miter saw, although apparently not the one which was the subject of Defendant's case.

The Court first notes that the letter from the Division of Driver Licenses would not constitute newly discovered evidence. Memorialization of Defendant's residency could have been obtained by the due diligence of either Defendant or his trial counsel. The same is true of Defendant's attached photographs. Such photographs could have been easily obtained by either trial counsel or Defendant with the exercise of due diligence. As such, the photographs also cannot be considered newly discovered evidence.

Therefore, if the Court had not already found Defendant's motion untimely, it would deny Defendant's second claim of newly discovered evidence for these reasons.

Defendant describes his third claim of newly discovered evidence thusly: "The prosecutor used perjured testimony from Gloria Scarle as a method to prosecute Petitioner." Defendant elaborates this claim by writing: "The excerpts from the evidentiary hearing in 2009 clearly reflects that Gloria Scarle submitted perjured testimony in 2001 at Petitioner's trial. Where she stated that the theft of Triad's miter saw was on – 07-29-2000 and at the evidentiary hearing she stated that the theft was on 08-03-2000."

The Court first notes that is has reviewed the evidentiary hearing transcript from August 27, 2009, and finds no record of witness Gloria Scarle stating that the theft of the miter saw occurred on August 3, 2000. (*See* August 27, 2009 Evidentiary Hearing Transcript, attached). Defendant has attached some portions of the evidentiary hearing transcript which include hand-written notations that Defendant presumably added. Through these portions and notations, Defendant seems to attempt to draw some sort of inference that witness Gloria Scarle provided inconsistent testimony. However, such hand-written notations and Defendant's inferences are a

far cry from Defendant's claim that Gloria Scarle actually "stated that the theft was on 08-03-2000."

Additionally, the Court has reviewed Gloria Scarle's testimony at Defendant's February 15, 2001 trial. At no point in her testimony does she state that the theft in question occurred on July 29, 2000, also contrary to Defendant's assertion that, "she stated that the theft of Triad's miter saw was on – 07-90-2000." Rather, she states that the last time she observed the saw on the construction site was July 26 or 27, and subsequently reported it missing in the first week of August. (*See* February 15, 2001 trial transcript, pgs. 89–106, 199–200, attached).

Defendant's claim of newly discovered evidence in the form of inconsistent testimony from Gloria Scarle appears to be factually inaccurate. As the claim is without factual merit, if the Court had not already found Defendant's motion untimely, it would deny Defendant's third claim of newly discovered evidence for this reason.

ORDER

It is therefore **ORDERED AND ADJUDGED** that Defendant's March 2, 2012 Amended 3.850 Motion for Post Conviction Relief is hereby **DISMISSED WITH PREJUDICE.**

Defendant has thirty (30) days from the date of this order within which to appeal.

DONE AND ORDERED, in chambers, in Hillsborough County, Florida, this 27 day of June, 2012.

Samantha Ward

SAMANTHA L. WARD, Circuit Judge

Attachments:

August 27, 2009 Evidentiary Hearing Transcript
January 20, 2010 Order Denying Claim Nine of 3.850 Post Conviction Motion,

87

Appendix -F

3.800-A Issues Where The Trial Court nor the 2nd D.C.A. will Accept the Ruling in State vs- Mancino - That Any Sentence that do not Comport with Constitutional or Statutory Limitations is Illegal - State vs Mancino 714 So2d 429 (FL, 1998) and Plott -vs State 148 So3d 90 (FL 2014)

Score sheet that Reflect the Disparity of 3½ Years Compared to the 20 years of 15 and 5 Consecutive where 32 months and 42 Months Consecutive is 74 months At 6 Years 2 month - And the Allowance for this Type of Sentence in A Sentencing Scheme Make the Sentencing Scheme to not Comport with the Requirements of Congress's Sentencing Reform Act. and Illegal Pursuant to Mancino and Deem the Criminal Punishment Code Unconstitutional - See motion inside Alleging Such.

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

CASE NOS: 00-CF-009986
00-CF-015615

v.

WILLIE SMITH,
Defendant.
_____/

DIVISION: C

ORDER GRANTING DEFENDANT'S "REQUEST TO CONSOLIDATE 3.800(A) MOTIONS"
and
FINAL ORDER DENYING MOTIONS FOR CORRECTION OF ILLEGAL SENTENCE

THIS MATTER is before the Court on Defendant's "3.800(a) Motion for Correction of an Illegal Sentence," filed on July 13, 2015, in case 00-CF-015615; Defendant's "3.800(a) Motion to Correct an Illegal Sentence," filed on September 17, 2015, in cases 00-CF-009986 and 00-CF-015615; Defendant's "Request to Consolidate 3.800(a) Motions," filed on September 23, 2015, in cases 00-CF-009986 and 00-CF-015615; and Defendant's "Supplement for 3.800(a) Motion," filed on September 30, 2015, in 00-CF-009986 and 00-CF-015615. After reviewing Defendant's Motions, the court file, and the record, the Court finds as follows:

In case 00-CF-015615, on February 15, 2001, a jury found Defendant guilty as charged of Grand Theft ($300 or more) (count one), Dealing in Stolen Property (count two), and Obtaining Money from Secondhand Dealer by Fraud (count three). (*See* Verdict Form, attached). On June 13, 2001, the trial court dismissed count one and sentenced Defendant to fifteen (15) years' prison on count two and to time served on count three. (*See* Judgment and Sentence, attached). Defendant appealed, and on September 13, 2002, the Second District Court of Appeal issued its Mandate in case 2D01-4188 affirming on direct appeal. *See Smith v. State*, 827 So. 2d 998 (Table) (Fla. 2d DCA 2002).

89

In case 00-CF-009986, on June 8, 2001, following a non-jury trial, Defendant was convicted of Uttering a Forged Instrument (count one) and Petit Theft (count two), and the court sentenced Defendant to five (5) years' prison on count one and to time served on count two, with Defendant's sentence on count one to run consecutively to Defendant's sentence in case 00-CF-015615. (*See* Waiver of Right to Jury Trial, Non-Jury Trial Date Sheet, Judgment and Sentence, attached). Defendant appealed, and on September 13, 2002, the Second District Court of Appeal issued its Mandate in case 2D01-3078 affirming on direct appeal. *See Smith v. State*, 827 So. 2d 998 (Table) (Fla. 2d DCA 2002).

The motions pending before the Court at this time are Defendant's July 13, 2015, 3.800(a) Motion (filed in case 00-CF-015615), Defendant's September 17, 2015, 3.800(a) Motion (filed in cases 00-CF-009986 and 00-CF-015615), Defendant's September 23, 2015, Request to consolidate those 3.800(a) Motions (filed in cases 00-CF-009986 and 00-CF-015615), and Defendant's September 30, 2015, Supplemental 3.800(a) Motion (filed in cases 00-CF-009986 and 00-CF-015615). The Court first finds that it will grant Defendant's September 23, 2015, "Request to Consolidate 3.800(a) Motions," and will address the consolidated 3.800(a) Motion jointly as Defendant's 3.800(a) Motions for Correction of Illegal Sentence (in cases 00-CF-009986 and 00-CF-015615).

In his 3.800(a) Motions for Correction of Illegal Sentence, Defendant alleges that his sentence is illegal because it fails to comport with statutory or constitutional limitations, involved an upward departure from the permissible range on his scoresheet, and was vindictive. Defendant contends that his sentence amounted to an "unwarranted sentencing variation," which he argues to be "illegal under constitutional law" and against the intent of the Criminal Punishment Code, which he argues was enacted to avoid such unwarranted sentence variations. Defendant argues that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the trial court should have

imposed the lowest permissible sentence according to Defendant's scoresheet. Defendant acknowledges that he has raised these same claims in prior motions, but asserts that "the previous denial orders of the claims presented were erroneously denied based on bad law" in light of *Plott v. State*, 148 So. 3d 90 (Fla. 2014).

A review of the record reflects that this Court has previously addressed Defendant's allegations concerning *Apprendi* and an allegedly illegal departure sentence as well as Defendant's allegations of vindictive sentencing. (*See* Orders, attached). As such, Defendant is not entitled to further review of these issues. *See e.g. Brazell v. State*, 770 So. 2d 189 (Fla. 2d DCA 2000) (noting that, "[a]lthough Florida rule of Criminal Procedure 3.800(a) does not prohibit the filing of successive motions, a defendant is not entitled to successive review of a specific issue which has already been decided"). To the extent Defendant is alleging that this Court "erroneously denied" those claims, such a claim is not cognizable here and should have been raised in a timely motion for rehearing and/or on appeal. Additionally, with respect to Defendant's reference to *Plott v. State*, 148 So. 3d 90 (Fla. 2014) –which Defendant argues supports his contention that his sentence is illegal, the Court notes that, in that case, the Florida Supreme Court held that "a claim of error under *Apprendi* and *Blakely* [*v. Washington*, 542 U.S. 296 (2004)] is cognizable in a rule 3.800(a) motion." 148 So. 3d at 91. The Court explained further, however, that caselaw "limit[s] challenges under rule 3.800(a) to *only those sentences that exceed the statutory maximum*." *Id* at 94 (emphasis added). In the instant case and with respect to Defendant's claims, the Court notes that, as has been explained in previous Orders, Defendant's sentence did not exceed the statutory maximum, and as such, Defendant warrants no relief on these claims. (*See* Orders, attached).[1]

[1] In its most recent Order, the Court specifically explained that "the sentences imposed in cases 00-CF-009986 and 00-CF-015615 are not illegal for purposes of Rule 3.800(a) as the sentences do not exceed the statutory maximum," and, on appeal, the Second District Court of Appeal affirmed, issuing its Mandate on July 13, 2015, in case 2D4-5222. (*See* Order, Mandate, attached).

It is therefore **ORDERED AND ADJUDGED** that Defendant's September 23, 2015, "Request to Consolidate 3.800(a) Motions" is hereby **GRANTED**.

It is **FURTHER ORDERED** that Defendant's July 13, 2015, "3.800(a) Motion for Correction of an Illegal Sentence," September 17, 2015, "3.800(a) Motion to Correct an Illegal Sentence," and September 30, 2015 "Supplement for 3.800(a) Motion" are hereby **DENIED**.

This is a Final Order on Defendant's Motion for Post-Conviction Relief. Defendant has thirty (30) days from the date of this Order within which to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this day of _____, 2015.

ORIGINAL SIGNED
CONFORMED COPY
NOV 02 2015
SAMANTHA L. WARD
CIRCUIT JUDGE

SAMANTHA L. WARD, Circuit Judge

Attachments:
July 13, 2015, "3.800(a) Motion for Correction of an Illegal Sentence"
September 17, 2015 "3.800(a) Motion to Correct an Illegal Sentence"
September 23, 2015, "Request to Consolidate 3.800(a) Motions"
September 30, 2015, "Supplement for 3.800(a) Motion"
Verdict Form (00-CF-015615)
Judgment and Sentence (00-CF-015615)
Waiver of Right to Jury Trial (00-CF-009986)
Non-Jury Trial Date Sheet (00-CF-009986)
Judgment and Sentence (00-CF-009986)
October 19, 2010, "Order Denying Motion to Correct Illegal Sentence"
October 18, 2012, "Order Denying Defendant's Motion for Correction of Illegal Sentence"
November 21, 2013, Mandate (2D13-690)
September 16, 2014, "Order Denying 3.800(a) Motion for Correction of an Illegal Sentence"
October 27, 2014, Mandate, (2D14-1970)
July 13, 2015, Mandate (2D14-5222)

Copies to:

Willie A. Smith (DC # 040330)
Mayo Correctional Institution- Annex
8784 US Highway 27 West
Mayo, Florida 32066-3458
(*conformed copy, with attachments*)

Assistant State Attorney, Division C
(*conformed copy, without attachments*)

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice Division

STATE OF FLORIDA **CASE NO.: 00-CF-009986**
00-CF-015615

v.

WILLIE SMITH,
Defendant.
_____/

DIVISION: C

ORDER DENYING MOTION FOR REHEARING

THIS MATTER is before the Court on Defendant's Motion for Rehearing, filed on November 23, 2015.[1] After reviewing Defendant's Motion, the court file, and the record, the Court finds as follows:

In his Motion, Defendant seeks rehearing of this Court's November 2, 2015, Order denying Defendant's 3.800(a) Motions to Correct Illegal Sentence, filed on July 13, 2015, September 17, 2015, and September 30, 2015. After reviewing the pleadings and record, the Court finds that it will not grant rehearing on this matter, as the November 2, 2015, Order addressed adequately Defendant's allegations in his Motions. As such, Defendant's Motion for Rehearing warrants no relief and must be denied.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion for Rehearing is hereby **DENIED.**

Defendant has thirty (30) days from the date of this Order within which to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this ORIGINAL SIGNED ~~COPY~~ day of December, 2015.

DEC 11 2015

SAMANTHA L. WARD
CIRCUIT JUDGE

SAMANTHA L. WARD, Circuit Judge

Copies to:
-Willie A. Smith (DC # 040330), Mayo Correctional Institution- Annex, 8784 US Hwy 27 West, Mayo, FL 32066
-Assistant State Attorney for Division C

93

[1] Although filed with the clerk of court on November 23, 2015, Defendant's Motion for Rehearing contains a certificate of service indicating that the Motion was provided to prison officials on November 18, 2015.

IN THE DISTRICT COURT OF APPEAL SECOND DISTRICT
IN AND FOR THE STATE OF FLORIDA

WILLIE SMITH
-VS-
STATE OF FLORIDA

CASE NO. 2D15-5537
L.T. CASE NO. 00-15615/00-9986

INITIAL BRIEF OF APPELLANT ON APPEAL FOR SUMMARY DENIAL OF APPELLANT'S 3.800(A) MOTION FOR A CORRECTION OF AN ILLEGAL SENTENCE

ATTORNEY FOR APPELLANT
WILLIE SMITH - PRO-SE
MAYO C.I. ANNEX
8784 WEST U.S. HWY 27
MAYO, FL. 32066

ATTORNEY FOR APPELLEE
ASST. ATTORNEY GENERAL
3704 FRONTAGE ROAD
CONCOURSE CENTER-4
TAMPA FL. 33607

INDEX

UNIFORM CITATIONS

(1) BOYD -VS- STATE 880 So 2d 726 (Fl. 2nd D.C.A. 2004 — 4
(2) CARTER -VS- STATE -786 So 2d 1173 (Fl. 2001) — 4
(3) HALL -VS- STATE - 823 So 2d 257 (Fl. 2002) — 6
(4) KING -VS- STATE - 751 So 2d 691 (Fl. 2nd D.C.A. 2000)
(5) McDONOLD -VS- STATE. 757 So 2d 56 (Fl. 2nd D.C.A. 1999)
(6) MOORE -VS- STATE -882 So 2d 977 (Fl. 2004)
(7) HOLTON -VS- STATE - 573 So 2d 284 (Fl. 1990) at 293
(8) PLOTT -VS- STATE - 148 So 3d 90 (Fl. 2014)
(9) NADER -VS- FL. DEPT. HWY S. & M.V. 87 So 3d 712 (Fl. 2012)
(10) STATE -VS- MANCINO - 714 So 2d 429 (Fl. 1998)
(11) STATE -VS- WARNER - 762 So 2d 507 (Fl. 2002)
(12) WILSON -VS- STATE - 845 So 2d 142 (Fl. 2003)

OTHER CITATIONS

(1) FL. RULE CRIM P. RULE 3.800(A)
(2) FL. STATUTE 3.704

FEDERAL CITATIONS

(1) APPRENDI -VS- NEW JERSEY - 530 U.S. 466 (2002)
(2) CUNNINGHAM -VS- CALIFORNIA: 127 S Ct. 856 (2007)
(3) BORDENKIRCHER -VS- HAYES - 98 S Ct 663 (1978)
(4) NORTH CAROLINA -VS- PEARCE - 89 S Ct. 2072 at 742 (1969)
(5) U.S. -VS- DROGE - 961 F.2d 1030 (2nd Cir. 1992)

OTHER FEDERAL CITATION

(1) REFORM ACT OF CONGRESS 28 U.S.C. 991 (B)(1)(B) and 994(F)

STATEMENT OF CASE AND FACTS

Petitioner had elected to have a Trial by Jury for the Charge of Dealing in Stolen Property in case no# 00-15615 and A Trial before Judge in case no# 00-9986, for the Charge of uttering a forged Instrument. Petitioner Scored out to 38 months

Petitioner was found guilty by the Jury and was found Guilty by the Trial Judge in the Trial by Judge. Petitioner Scored out to 38 months

AT Sentencing the State Attorney made the following Request for a harsh Prison Sentence AS Punishment for Petitioner Requesting A Trial by the Jury And A Trial by the Judge. -[See Exhibit-B]

Pg 261 T Line -17

~~If you remember the facts TA Question, he took~~
an oath and testified before the Court and the Jury
on the Stolen Property an essentially, it's the
State's Position he tried to talk his Way out of
He totally disregarded the oath and thought maybe
he Could Just Shoot from the hip and get out of
this Charge

He produced Some receipt that was dated
Approximately 13 days, 13 days before the theft.

Pg 262 - Line -1

even happened when the victim had the Crime
reported. Made up this Story implicating Jerry
Standing on the Street Corner

If You remember, we brought in Several
Rebuttal Witnesses to show that Conversations he
said he had with the detective. Ms Scarle and the
owner of the work force all never happened

You have the situation, I believe Your honor
Can take into Consideration and also the uttering A

forged instrument trial your Honor heard last Friday. Some of the testimony quite frankly was incredible that he didn't have any idea this was going on.

That he was standing out there in the Parking lot, He sees some guy named Raleigh Miller and he's there as another patient, and then ironically this guy Raleigh Miller gives him a check and signed by somebody else

He goes down and cashes the check the same day and he has no idea it's stolen or anything wrong with it

Judge, I don't believe that People should be treated differently because they go to trial. I ~~don't think Punishment should. They have a~~ constitutional right to trial, however. I think

Pg 263 - I - Line 1

there should be a difference when People try to go to trial and misrepresent the facts and evidence to trier of fact and try to do everything that they can to beat the Charge

I don't believe that they should receive the same consideration or break when someone coming in at arraignment and steps up and says, I'm sorry.

I believe Mr. Smith did everything he could to say anything it took to try to beat this Charge.

The Trial Court Judge Sentenced Petitioner to 15 years in Case no# 00-15615 and a 5 year Consecutive Sentence in Case no# 00-9986

The Trial Court did not inquire as to what Petitioner has scored out to on the Scoresheet. And was Pre disposed to impose the Maximum Penalty Provided by Statute for both crimes and to Run them,

(4) - a 98)

consecutively, because of the Request of the State Attorney.

Petitioner has submitted numerous motions on this issue And the merits of the claim was never Reached and the silent P.C.A. was the LAW-OF-THE-CASE Therefore Petitioner has submitted the Instant Motion.

ARGUEMENT/MEMORANDUM OF LAW

The Trial Court denied Petitioner's 3.800 (A) motion Stating that A Vindictive Sentence is not Cognizable in a motion to Correct an Illegal Sentence Based on Boyd-vs-State, 880 So2d 726 (Fl. 2ND DCA. 2004)

Boyd Stated that an illegal Sentence is illegal if it imposes Punishment that no Judge Could Possibly impose for the Charged Crime under the entire body of Sentencing Statutes without Regard to the Underlying factual Circumstances. [see Exhibit-C]

The Boyd Ruling is incomplete for the Purposes of determining an Illegal Sentence - In Lieu of the fact Boyd did not Consider the Florida Supreme Court Rulings in State-vs-Mancino-714 So2d 429 at 433 (FL 1998) and Carter-vs-State 786 So2d 1173 (Fl. 2001) Stating that an Illegal Sentence has been Enlarged to include "A SENTENCE THAT DOES NOT COMPORT WITH COSTITUTIONAL LIMITATIONS IS BY DEFINITION ILLEGAL!!

One Constitutional Limitation on a Prison Sentence is that a Prison Sentence Cannot be used to Punish A defendant for Exercising his or her Constitutional Right to Any Type of Trial

A JUDGE MIGHT IMPOSE A SEVERE PENALTY BECAUSE

A DEFENDANT INSISTED ON A PARTICULAR KIND OF TRIAL, AND REFUSED TO ADMIT HIS GUILT, ADDITIONAL PUNISHMENT FOR THIS REASON THAT I HAVE STATED WOULD BE FLAGRENTLY UNCONSTITUTIONAL See North Carolina -vs- Pearce 89 S.Ct. 2072 at 742 (1969)

WHERE TRIAL COURT IMPOSES LENGTHY SENTENCE OUT OF PERSONAL SPITE, AND IN RETALIATION FOR DEFENDANT'S ASSERTION OF HIS STATUTORY RIGHTS RESENTENCING IS REQUIRED - See U.S. -vs- Droge 961 F.2d 1030 (2nd Cir. 1992)

A TRIAL COURT MAY NOT USE THE SENTENCING PROCESS TO PUNISH A DEFENDANT, NOT WITHSTANDING HIS GUILT, FOR EXERCISING HIS RIGHT TO RECEIVE A FULL AND FAIR TRIAL. (2) WHERE THE COURT IMPOSES A LENGTHY SENTENCE OUT OF PERSONAL SPITE AND IN RETALIATION FOR A DEFENDANT'S ASSERTION OF HIS CONSTITUTIONAL RIGHTS, RESENTENCING IS REQUIRED - See Bordenkircher -vs- Hayes 98 S.Ct. 663 (1978)

It is and was proven by the face of the record that the prosecutor Requested a harsh Prison Sentence because Petitioner Requested a Trial by Jury in Case no# 00-1561S and Lost, and Petitioner Requested a Trial by Judge in Case no- 00-9986 and Lost and the Trial Court Judge did not Review or Consider the Score Sheet and Sentenced Petitioner to A 15 Year Prison Sentence in Case no# 00-1561S where Petitioner only Scored out to 42 months and in Case no# 00-9986 - The Court Sentenced Petitioner to 5 Years to Run Consecutive to the 15 Years

where Petitioner only scored out to 38 months where 15 years is the maximum for a 2nd Degree Felony and 5 Years is the Maximum for a First Degree Felony.

A DEFENDANT HAS THE RIGHT TO MAINTAIN HIS OR HER INNOCENCE, AND HAVE A TRIAL BY JURY. Art 1 § 22 Fl. CONSTITUTION. "THE PROTECTION" PROVIDED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, GUARANTEES AN ACCUSED, THE RIGHT AGAINST SELF INCRIMINATION, THE FACT THAT A DEFENDANT HAS PLED NOT GUILTY CANNOT BE USED AGAINST HIM OR HER IN ANY STAGE OF THE PROCEEDINGS BECAUSE DUE PROCESS GUARANTEES AN INDIVIDUAL THE RIGHT TO MAINTAIN HIS OR HER INNOCENCE EVEN WHEN FACED WITH ~~EVIDENCE OF OVERWHELMING GUILT. A TRIAL COURT~~ VIOLATES DUE PROCESS BY USING A PROTESTATION OF INNOCENCE AGAINST A DEFENDANT. THIS APPLIES TO THE GUILT PHASE. AS WELL AS THE PENALTY PHASE UNDER Art. 1 Section 9 of the Fl. Constitution - See Holton -vs- State, 573 So2d 284 (Fl. 1990) at 293

APPROPRIATE REMEDY FOR AN UNREBUTTED PRESUMPTION OF JUDICIAL VINDICTIVENESS IS TO BE RESENTENCED BY A DIFFERENT JUDGE, See Wilson -vs- State 845 So2d 142 (Fl. 2003) and State -vs- Warner - 762 So2d 507 (Fl. 2002)

A VINDICTIVE SENTENCE THOUGH LAWFUL REQUIRED RESENTENCING BY A DIFFERENT JUDGE - See King -vs- State 751 So2d 691 (Fl. 2nd D.C.A 2000) See also McDonold -vs- State 751 So2d 56 (Fl. 2nd D.C.A, 1999)

By the Face of the Record - This was an unRebutted.

harsh Punishment Prison Sentence that was imposed upon Appellant, by the Lower Tribunal at the Request of the State Attorney. Because Appellant had Chosen A Trial in Both Cases and did not admit Guilt when the State Attorney Stated that "Appellant doesn't deserve the Same Sentencing Consideration that Afforded to a defendant that admits Guilt"

GROUND-TWO

Appellant Submitted A Second 3.800 (A) motion to the Lower Tribunal and had the Motions Consolidated

Appellant alleged that by the face of the Record, it is Proven that Appellant's Prison is Legal under State Law - But - is Illegal under Constitutional Law - Pursuant to the Sentencing Reform Act of Congress "28 - U.S.C." 991 (B) (1) (B) and "994 (F)

Where the Sentencing Reform Act was imputed to Move the Sentencing System in a Direction of Increased Uniformity and the Enactment of the Criminal Punishment Code was designed by the Legislature of the State of Florida to "USURP" The Authority of Congress - By eliminating the Restrictions on Unwarrented Sentencing Variations of Criminals

This is Proven where the C.P.C has mandatory Language for Sentencing Purposes - And is not Advisory - But has no upward Sentencing cell as if the C.P.C is Advisory

IN Cunningham -vs- California 127 Sct. 856 (2007) Justice Breyer explained:

UNDER Post Booker Federal Sentencing

system. The district Courts while not Bound to APPLY the Guidelines must Consult those Guidelines and take them into Account When Sentencing Id at 264. 125 S.Ct. 738. In addition, Sentencing Courts must take Account of the General Sentencing Goals set Forth by Congress-including Avoiding unwarranted Sentencing disparities - Page 225 - Exhibit # 867 at 12

The Fl. Supreme Court's Case of Moore -vs- State 882 So2d 977 (Fl. 2004) Reflect that the Guidelines Established a Uniform set of Standards to Guide A Sentencing Judge to Eliminate Unwarranted Variation in Sentencing, that Comported with the Intent of Congress - And - that the Fl. Legislature enacted the Criminal Punishment Code with the Sole Purpose to Eradicate the Restraints on unwarranted Variations in Sentencing and Allow A Trial Court Sentencing Judge Unrestrained Authority and Power to Sentence a Defendant to any Given Sentence within a Statutory Range Regardless of the Points as long as the Sentence is higher than the Permissible Range Lowest Computation - To wit - "UNWARRENTED VARIATIONS IN SENTENCES"

BASIS FOR MOTION

The Fl. Supreme Court Ruled in Plott -vs- State 148 So3d 90 (Fl. 2014) Citing State -vs- Mancino - 714 So2d 429 (Fl. 1998) Stating:

A SENTENCE THAT PATENTLY FAILS TO COMPORT WITH STATUTORY OR CONSTITUTIONAL LIMITATIONS IS BY DEFINITION ILLEGAL!

The Constitutional Limitation that Congress Placed on Prison Sentences is Unwarrented Sentencing Variations, and by the Face of the Record it is Proven that Petitioner has an unwarrented Sentence Variation!

Under a Corrected Scoresheet. Petitioner Scored out a lowest Permissible Sentence of 32 months and Petitioner has a 15 Year Prison Sentence because the C.P.C Allow for the 15 Year Statutory Maximum for a 2nd Degree Felony to be the only Restraint of Sentencing Petitioner - That Run Afoul of Congress's Limitation of the Constitution for A Prison Sentence.

Under the old Guidelines the Limitation on Petitioner's Prison Sentence would be the Lowest Permissible Sentence of 32 months to the highest Permissible Sentence of 37 months and now Petitioner has in excess of A 143 month Prison Sentence and that is Clearly an unwarrented Sentence Variation. See Moore-vs-State 859 So2d 613 (FL 1st D.C.A. 2003)

Furthermore - The Criminal Punishement Code has no Procedural Safeguards that would comport with the Intent and Requirement of Congress that Unwarrented Sentencing Variations are ERADICATED - To wit. The very Same Circumstances that the Criminal Punishment Code has Re-Enacted for the State of Florida - Moore-vs-State supra

Petitioner's 15 Year Prison Sentence is A Prime example of the Discretionary Abuse and unwarrented Sentencing Variation that Congress has Chosen to and Sought to Eradicate.

The Constitutionality of the C.P.C. was Discussed in Hall-vs-State 823 So2d 757 (Fl. 2002)

under the Due Process Issue. Hall Raised the Disparity in Sentencing by the C.P.C. and that is Miss the rationale and objective of Congress by enacting the Guidelines - and the Fl. Supreme Court clearly passed on that issue and did not Address the Issue and nor did Hall Request Clarification on the Sentencing Disparity Issue.

The Fl. Supreme Court only addressed the Discriminatory issue - But only addressed the Fact that the Legislature Applied the C.P.C. to everyone and not just "violent offenders" as the Law was Profiling to get to be voted in.

The Fl. Supreme Court did not Review [9,10] under the Discrimination Pertaining to the Procedures that the Judge used for the Sentence that was Selected for Sentencing Purposes Because the C.P.C. Clearly has no Ceiling - Moore -vs- State Supra - other than a Statutory Maximum.

The Court Dismissed Hall's Equal Protection of the Law Reply Brief and Stated that it was waived, when it was not waived and is incorporated in the Procedural Discrimination that the Fl. Supreme Court did not Address and overlooked - which is the very same Procedural Discrimination and Denial of Equal Protection that Petitioner is and was subjected to that Allowed the Sentencing Court to Sentence Petitioner to an Unwarrented Sentence variation

In Hall at [6] Id at 962. The Legislature in the exercise of its Authority and Responsibility to establish Sentencing Criteria, to Provide for the imposition of Criminal Penalties and to make the best use of State Prisons so that violent Criminal offenders are Appropriately Incarcerated, has determined that it is in the best interest

of the State to Develop, Implement, and Revise a Sentencing Policy: This Change Also Includes non violent Crimes

In Cunningham - Pages 870, 871 and 872 Reflect that in Lieu of the fact that the C.P.C. is not advisory - that THE C.P.C. IS BOUND BY APPRENDI" and must have A Highest Permissible Sentence Computation to be Reflected on the Scoresheet and Adhered to by Judges.

The Criminal Punishment Code itself is not Advisory, because of the Mandatory Language That is Reflected in the Statute and do not have A Highest Permissible Range except the Maximum Sentence that can be imposed for the degree of Crime. and that is what allow the unwarrented Sentencing disparities - To wit - A Sentencing Scheme that has Mandatory Sentencing under A Range that has no Cap and is not Bound BY Apprendi Solely Because there is An unconstitutional Sentencing Scheme that is Enacted by virtue of the Fl Legislature

In Cunningham at Pg. 880, 866 and 862 A Review of the Possible unwarrented Sentencing variation, that the C.P.C. Clearly do not have.

Appellant Submitted the Apprendi Claim - Pursuant to the Fl. Supreme Court's ruling in Plott-vs-State, 148 So 3d 90 (Fl. 2014) That Ruled that any Apprendi Claim is Cognizable in an Illegal Sentence motion. Pursuant to State-vs Manlino 714 So 2d 263 (Fl. 1998)

SUMMARY OF THE ARGUEMENT

(1) The Arguement will Reflect that the Lower Tribunal Abused it's Discretion by not Deciding Appellants 3.800 (a) Motion Pursuant to Mancino

(b) The Arguement will Reflect that the harsh Prison Sentence that was imposed because Appellant had elected to go to Trial is Illegal Pursuant to Mancino

(3) The Arguement will reflect that the Criminal Punishment Code is Is Unconstitutional because the language in the C.P.C. is Mandatory and not advisory for the C.P.C. to not have A Highest Permissible Sentencing cell that would be Sub Jected to Appendi:

ARGUEMENT ONE

WHETHER THE LOWER TRIBUNAL ABUSED IT'S DISCRETION BY NOT DECIDING APPELLANTS 3.800 (A) MOTION PURSUANT TO MANCINO?

The Florida Supreme Court is Stare Decisis to All courts in the State of Florida and Appellant Requested Review of the Two 3.800 (A) motions Pursuant to A) Plott -vs- State. 148 So3d 90 (Fl. 2014) and State -vs- Mancino 714 So2d 363 (Fl 1998) That any Prison Sentence that is Imposed that does not Comport with Statutory OR Constitutional Limitations is Patently Illegal and is Cognizable in a 3.800 (A) Motion

The Lower Tribunal Refused to Review Appellants 3.800 (A) motion Pursuant to Plott and Mancino

ON THE OTHER HAND WE ARE LOATHE TO SUGGEST THAT A CIRCUIT COURT MAY RELY UPON WHAT APPEARS TO BE CONTROLLING PRECEDENT IN THIS CONTEXT BASED UPON IT'S OWN INTERPRETATION OF A STATUTE OR CONSTITUTIONAL PROVISION. A CIRCUIT COURT'S OBLIGATION IS TO RESPECT PRECEDENT FROM OTHER DISTRICTS. See Nader vs FL Dept. of Highway Safety and Motor Vehicles 87So 3d 712 (Fl. 2012)

The Controlling Precedent and Stare Decisis is the Florida Supreme Court's Cases of Platt and Mancino - That the Circuit Court Clearly Refused to Acknowledge

ARGUEMENT TWO

WHETHER THE HARSH PRISON SENTENCE THAT WAS IMPOSED AS A PUNISHMENT SENTENCE BECAUSE APPELLANT HAD ELECTED TO GO TO TRIAL ILLEGAL PURSUANT TO MANCINO?

BY the Face of the Record - To wit - the Score Sheet it is Reflected that Appellant Scored out to 46 months on an Erroneous Score Sheet, and that the State Attorney Requested a harsh Prison Sentence for Appellant, because Appellant did not Admit Guilt and Requested A Trial by Jury and A Trial by Judge and the Court Granted the Request of the State to impose harsh Prison Sentences upon Appellant - To wit 15 years + 5 years to Run Consecutive and not 46 months and 46 months to run Concurrently and that is unconstitutional

A JUDGE MIGHT IMPOSE A SEVERE PENALTY BECAUSE A DEFENDANT INSISTED ON A PARTICULAR KIND OF TRIAL AND REFUSED TO ADMIT GUILT. ADDITIONAL

PUNISHMENT FOR THIS REASON THAT I HAVE STATED WOULD BE FLAGRENTLY UNCONSTITUTIONAL - See North Carolina -vs- Pearce 89 S.Ct. 2072 at 742 (1969) and Hutton -vs- State, 573 So2d 284 (Fl. 1990) at 293

ARGUEMENT-THREE

WHETHER APPELLANT'S SENTENCE IS ILLEGAL BECAUSE APPELLANT WAS SENTENCED -VIA- THE UNCONSTITUTIONAL VERSION OF FL STATUTE 3.704 THAT HAS MANDATORY LANGUAGE AND DO NOT HAVE APPRENDI REQUIRED SAFE GUARDS OF A HIGHEST PERMISSIBLE SENTENCING RANGE BASED ON PRIOR CONVICTIONS?

The Constitutional limitations on Prison Sentences in Lieu of Apprendi, Supra as is Clarified in Cunningham, Supra is that only Advisory Sentencing Schemes Do not Implicate Apprendi. But- Mandatory Language Sentencing Schemes Implicate Apprendi and is Required to have A Highest Permissible Sentencing Calculation - And the Criminal Punishment Code is A Sentencing Scheme with mandatory language - But Do not have a Highest Permissible Sentencing Calculation based on Prior Convictions, that is Governed by the Ruling in Apprendi

CONCLUSION

Appellant has (1) demonstrated that the Lower Tribunal Abused its Authority by not deciding Appellant's motion Pursuant to the Ruling in Mancino

RELIEF SOUGHT

Petitioner Seek to have the 2nd District Court of Appeal

make a Ruling on Appellants Claims of the Constitutional Limitations on Prison Sentences- Pursuant to Manlino that has now deem Sentences that would normally be unlawful to now be Illegal- OR- Sentences that would normally be Improper to now Also be deemed Illegal such as Appellants harsh Prison Sentence that was imposed as Punishment because Appellant Chose a Trial by Jury and a Trial by Judge And didn't Admit Guilt.

Appellant seeks to have the 2nd District Court of Appeal make A Ruling in the Issue of the Constitutional Limitation on A Sentencing Statute - That only if the Sentencing Statute do not have Mandatory Language - Could it be deemed advisory and not bound by Apprendi and not have A Highest Permissible Sentence Calculation based on Prior Convictions - And that the C.P.C. has the Mandatory Language that makes the C.P.C Bound by Apprendi - But - do not have the "REQUIRED" Highest Permissible Sentencing Calculations of Prior Convictions - To wit - The C.P.C. is A mandatory Sentencing Scheme and is not Advisory to ONLY have A Lowest Permissible Sentence Calculation and not A Highest Permissible Sentence Calculation based on Prior Convictions

"FURTHER MORE- THE THREE ISSUES OF APPELLANT ARE MATTERS OF GREAT PUBLIC IMPORTANCE"

IN THE CIRCUIT COURT. THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY. FLORIDA

WILLIE SMITH

-VS-

STATE OF FLORIDA

CASE NO# 00-15615

3.800(A) MOTION FOR A CORRECTION OF AN ILLEGAL SENTENCE

Comes now Petitioner. Willie Smith, Pro-Se hereby moves the Court to Correct the Illegal Sentence that was imposed. Pursuant to FL. Rules of Criminal Procedure- Rule 3.800(A), and in Support, Petitioner States the Following:

STATEMENT

By the Face of the Record it is Proven that Petitioners Prison Sentence is Illegal Pursuant to Plott-vs. State 148 So3d 90 (Fl. 2014) citing State-vs-Mancino-714 So2d 429 (Fl. 1998) Stating: "A SENTENCE THAT PATENTLY FAILS TO COMPORT WITH STATUTORY OR CONSTITUTIONAL LIMITATIONS IS ILLEGAL BY DEFINITION"

The Constitutional Limitations that Petitioner Prison Sentence Fail to Comport with is "Two Fold" -To Wit- The trial Court Imposed A 20 year Prison Sentence to Punish Petitioner for Electing to have A Trial by Jury in Case NO# 00-15615 And a trial By Judge in Case NO# 00-9986 -To wit- 15 years and 5 Years to Run Consecutive- At the Behest of the State Attorney for the Court to do So when Petitioner only Scored out to 42 months on A Corrected Scoresheet.

The 2nd Constitutional Limitation is the Jury Trial Guarantee Reflected in Apprendi -vs-

New Jersey 120 S.Ct. 2348

THE SUPREME COURT STATED IN PLOTT." THE QUESTION BEFORE US IS WHETHER A MOTION BROUGHT UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(A) IS AN APPROPRIATE VEHICLE TO ATTACK A DEFENDANT'S UPWARD DEPARTURE SENTENCE UNDER Apprendi-vs-New Jersey 120 S. Ct. 2348 and Blakely-vs-Washington 124 S.Ct. 2531 (2004)." WE CONCLUDE THAT A CLAIM OF ERROR UNDER APPRENDI AND BLAKELY IS COGNIZABLE IN A RULE 3.800(A) MOTION. ACCORDINGLY WE QUASH THE SECOND DISTRICTS OPINION IN PLOTT AND APPROVE THE FIRSTS DISTRICT DECISION IN HUGHES

Petitioner only Scored out to 42 months on A corrected Scoresheet and had A Trial by Jury in Case No# 00-1561S and Received A 15 Year Prison Sentence and in Case No# 00-9986 Petitioner had A Trial by Judge and Received A 5 Year Prison Sentence and in Neither Case was there Any Aggrivating Circumstances Presented to Justify the Increased Prison Sentence

BASIS FOR MOTION

Petitioner Contends that he has raised these two Sentencing Issues Before And the Trial Court denied the Motions on the BASIS of the 2nd D.C.A. Case in Boyd-vs-State that was decided in 2004-880 So2d 726 - That did not Recognize or Accept the Supreme Courts Ruling in State-vs-Mancino that was decided in 1998

Boyd is Also in Conflict with Way-vs-State, 760 So 2d 903 (Fl. 2000) That State - At A Sentence Correction the State And the defendant May Review the Record for Justification of the new Sentence Imposed

display of Judicial vindictiveness - where the Trial Court imposed a Harsh Prison Sentence upon Petitioner for exercising his Constitutional Right to a Jury Trial and a Trial by Judge - That Requires Resentencing by a Different Judge and only if there is something in the Record to Justify the Increased Sentence - The Increased Sentence may be Re-Imposed. - See U.S. vs Goodwin 457 U.S. 368 (1982)

Boyd is also using the Fact that At Resentencing with a Different Judge - That it Takes an Evidentiary hearing to Review the Record for Sentencing - This use of a Review of the Record to Determine a Proper Sentence after the Granting of An Illegal Sentence motion is A Court Process that does not negate A 3.800(A) motion as Stated in Boyd - See Wike-vs-State 698 So.2d 817 (Fl. 2000)

CONCLUSION

Petitioner has demonstrated that the 15 Year Prison Sentence with a 5 Year Prison Sentence to Run Consecutive, that was imposed upon Petitioner ~~as~~ A Punishment because Petitioner had elected to go to trial is unconstitutional and Illegal Pursuant to Mancino and Carter, and Requires Resentencing by A Different Judge

Petitioner has demonstrated that the 2nd D.C.A's case - To wit Boyd, did not Consider the Rulings in Mancino and Carter that Stated - Any Sentence that does not Comport with Constitutional Limitations is Patently Illegal

RELIEF SOUGHT

Petitioner Seeks Resentencing By a Different Judge

(X) - A 113)

CONCLUSION

Petitioner has demonstrated that the Previous Denial orders of the Claims Presented were Erroneously denied based on the "BAD LAW" Reflected in Boyd that did not Accept or Recognized the Ruling in Mantino As An Issue for an Illegal Sentence - And - Boyd Also Stated that A factual Determination of the Record to Justify A Sentence under A Harmless Error Analysis After the Sentence has been Deemed to be an Illegal Sentence is not Afforded in A. 3.800 (a) Motion Runs Afoul of Way-vs-State Supra and the Ruling in Plott - That Require A Harmless Error Analysis Pursuant to Galindez 955-So2d at 524 - and Petitioners Vindictive Sentence Claim is Sub Sect to the Harmless Error Analysis - via - United States-vs-Goodwin 102 S.Ct. 2485-(1982) "PEARCE AND ITS PROGENY ESTABLESHED" A PRESUMPTIVE VINDICTIVENESS MAYBE OVERCOME ONLY BY OBJECTIVE INFORMATION IN THE RECORD JUSTIFYING THE INCREASED SENTENCE.

The Question is Whether the Court could have Legally Imposed the Sentence Absent the Error? And the Answer is Negative - Because their is nothing in the Record to Justify the Increased Sentence and Upward Departure Sentence from the Lowest Permissible Range of 42 Months.

RELIEF SOUGHT

IN IMPOSING SANCTIONS OF LAW UPON DEFENDANT FOR ILLEGAL CONDUCT. THE JUDICIAL SYSTEM ITSELF MUST FOLLOW AND OBEY THE LAW AND NOT IMPOSE AN ILLEGAL SENTENCE, AND WHEN ONE IS FOUND THE SYSTEM SHOULD WILLINGLY REMEDY IT. State-vs-Montegue, 682 So2d 1085 (Fla 996) on Remand 702 So2d 257 (Fla 1997)

IN THE CIRCUIT COURT, THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY FLORIDA

WILLIE SMITH,
Defendant,

v. Case No: 00-15615 / 00-9986

STATE OF FLORIDA,
Plaintiff,
_____/

3.800(A) MOTION TO CORRECT AN
ILLEGAL SENTENCE

Comes now Petitioner, Willie Smith, *pro se* hereby moves the Court to correct the illegal sentence that was imposed pursuant to Florida Rules of Criminal Procedure, Rule 3.800(A) and in support, Petitioner state the following:

STATEMENT

Petitioner contends that by the face of the record it is proven that Petitioner's prison sentence is legal under state law. But, is illegal under Constitutional Law pursuant to the sentencing Reform Act of Congress. §28 U.S.C. §994(F). Where the Sentencing Reform Act was imputed to move sentencing system in a direction of increased uniformity and the enactment of the Criminal Punishment Code was designed by the legislature of the State of Florida to usurp the Authority of Congress by eliminating the restrictions on unwarranted sentencing variations of defendant/criminals.

In Cunningham v. California, 127 S.Ct. 856 (2007) Justice Breyer explained:

> Under the post Booker Federal Sentencing system, the District Courts while not bound to apply the guidelines must consult those guidelines and take them into account when sentencing goals set forth by congress including avoiding unwarranted sentencing disparities. Page 275; Exhibit A 867 at 12

The Florida Supreme Court's case of Moore vs. State, 882 So.2d 977 (Fl.2004) reflect the Guidelines established a uniform set of standards to guide a sentencing judge to eliminate unwarranted variation in sentencing, that comported with the intent of Congress, and that the Florida Legislature enacted the Criminal Punishment Code with the sole purpose to eradicated the restraints on unwarranted variations in sentencing and allow a Trial Court sentencing judge unrestrained authority and power to sentence a defendant to any given sentence within a statutory range regardless of the points as long as the sentence is higher than the permissible range lowest computation, to wit: "UNWARRANTED VARIATIONS IN SENTENCES."

BASIS FOR MOTION

The Florida Supreme Court ruled in Plott vs. State, 148 So.3d 90 (Fl. 2014) citing State vs. Mancino, 714 So.2d 429 (Fl. 1998) stating:

> A sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal!

The Constitutional limitations that Congress has placed on prison sentences is unwarranted sentencing variations, and by the face of the record it is proven that petitioner has an unwarranted sentence variation.

Under a corrected scoresheet, Petitioner scored out a lowest permissible sentence of 32 months and Petitioner has a 15 year prison sentence because the C.P.C. allow for the 15 year statutory maximum for a 2nd Degree Felony to be the only restraint of sentencing Petitioner. That run afoul of Congress's limitation of the Constitution for a prison sentence.

Under the old guidelines the limitation on Petitioner's prison sentence would be the lowest permissible sentence of 32 months to the highest permissible sentence of 37 months and now Petitioner has in excess of 143 month prison sentence and that is clearly an unwarranted sentence variation. See Moore vs. State, 859 So.2d 613 (Fl. 1st DCA 2003).

Furthermore, the Criminal Punishment Code has no procedural safeguards that would comport with the intent and requirement of congress that unwarranted sentencing variations are eradicated—to wit—the very same circumstances that the Criminal Punishment Code has re-enacted for the State of Florida Moore vs. State, supra.

Petitioner's 15 year prison sentence is a prime example of the discretionary abuse and unwarranted sentencing variation that congress has chosen to and sought to eradicate.

The Constitutionality of the C.P.C. was discussed in Hall vs. State, 823 So.2d 757 (Fl. 2002) under the Due Process issue, Hall raised the disparity in sentencing by the C.P.C. and that is also the rationale and objective of congress by enacting the guidelines and the Florida Supreme Court clearly passed on that issue and did not address the issue and nor did Hall request clarification on the sentencing disparity issue.

The Florida Supreme Court only addressed the discriminatory issue—but, only addressed the fact that the legislature applied the C.P.C. to everyone and not just "violent offenders" as the law was profiling to get to be voted in.

The Florida Supreme Court did not review [9.10] under the discrimination pertaining to the procedures that the judge used for the sentence that was selected for sentencing purposes because the C.P.C. clearly has no ceiling. Moore vs. State supra, other than a statutory maximum.

The Court dismissed Hall's equal protection of the law reply brief and stated that it was waived, when it was not waived and is incorporated in the Procedural Discrimination that the Florida Supreme Court did not address and over looked, which is the very same procedural discrimination and denial of Equal Protection

that Petitioner is and was subjected to that allowed the sentencing court to sentence petitioner to an unwarranted sentence variation.

In Hall at [6] Id at 762, the Legislature in the exercise of its authority and responsibility to establish sentencing criteria to provide for the imposition of criminal penalties and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated has determined that it is in the best interest of the state to, develop, implement and revise a sentencing policy:

> §921.002(1) Florida Statute (Supp. 1998) The code sets forth guidelines in sentencing criminal defendants for non Capital Felonies.

The propaganda used to obtain the votes to pass the C.P.C. Bill was the need for a revised sentencing scheme for violent criminals and the "Log-Rolling" was that non violent criminal's sentencing guidelines were also revised, without proper notice to the public that non violent criminal guidelines would be revised.

In Cunningham, Pages 870, 871 and 872 reflect that C.P.C. is not advisory and is binding by [redacted] and the C.P.C. is unconstitutional because the C.P.C. do not reflect a highest permissible prison sentence that a Judge may sentence a defendant to—but, that is also the problem that allow for the unwarranted sentencing disparity.

In Cunningham, Pg. 880 reflects review of a possible unwarranted sentencing variation that the C.P.C. clearly do not have and Page 866 and 867.

CONCLUSION

Petitioner has demonstrated that the 15 year prison sentence and the 5 year prison sentence are both unwarranted variations in a prison sentence that exceed the Constitutional limitation set on a prison sentence by Congress, pg. 867 Cunningham at 12.

RELIEF SOUGHT

Petitioner seeks to have the illegal sentence corrected as a matter of law!

UNNOTARIZED OATH OF AFFIRMATION

UNDER THE PENALTY OF PERJURY, I declare that I have read the foregoing, and that the facts stated therein are true and correct in accordance with Florida Statute §92.525.

_____

Willie Smith, *pro se*

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to the below listed State Agencies/Offices via hand delivery to prison officials on this day _____ of September 2015.

_____ _____

_____ _____

_____ _____

_____ _____

_____

Willie Smith, *pro se*

[4] [5] The concerns previously relevant to the Court's analysis in deciding *ripp* and its progeny are no longer present in CPC sentencing. The Legislature as now specifically provided that a defendant may be sentenced up to the tatutory maximum for *any* offense, including an offense after a violation of robation; a trial judge is no longer limited by an established guidelines aximum and a one-cell bump. Therefore, because the concerns related to uidelines sentencing are no longer present in CPC sentencing, and the courts are o longer specifically limited to a sentencing range under the CPC, there is no ustification for continuing to treat separate offenses as an interrelated unit fter the minimum sentence is established. The certified question is therefore nswered in the negative--defendants who violate a consecutive term of probation re not entitled to credit for prison time served on a separate offense. The irst District's thoughtful, articulate, and well-reasoned decision in *Moore* is hus approved, and, to the extent it is in conflict, the Second District's ecision in *Thomas* disapproved.

On review, we agreed with the sentence imposed by the trial court. Initially, e noted the purpose of the sentencing guidelines:

> The purpose of the sentencing guidelines is "to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process" so as to eliminate unwarranted variation in sentencing. Fla. R.Crim. P. 3.701(b). One guidelines scoresheet must be utilized for all offenses pending before the court for sentencing. Fla. R.Crim. P. 3.701(d)(1). A sentence must be imposed for each separate offense, but the total sentence cannot exceed the permitted range of the applicable guidelines scoresheet unless a written reason is given. Fla. R.Crim. P. 3.701(d)(12). [redacted] imposed after revocation of probation must be within the recommended guidelines range and a one-cell bump. Fla. R.Crim. P. 3.701(d)(14).

The different results flow from the fact that under the CPC, unlike the guidelines, sentences for different offenses need not be imposed as a unit. We recognized in *Tripp* that the guidelines were designed to establish uniform standards that would eliminate unwarranted sentence variation by limiting the trial court's discretion to impose sentences outside presumptive sentencing ranges. *See* 622 So.2d at 942. As the First District stated in this case, the CPC "was intended to return to trial judges most of the discretion regarding sentencing that they had traditionally enjoyed prior to the adoption of the sentencing guidelines." *Moore v. State*, 859 So.2d 613, 617 (Fla. 1st DCA 2003). In contrast to the guidelines, the CPC has no ceiling other than the statutory

John CUNNINGHAM, Petitioner,

v.

CALIFORNIA.

No. 05–6551.

Argued Oct. 11, 2006.

Decided Jan. 22, 2007.

Background: Defendant was convicted in the Contra Costa County Superior Court of continuous sexual abuse of a child under the age of 14. Defendant appealed. The California Court of Appeal, Mark B. Simons, J., 2005 WL 880983, affirmed. The California Supreme Court denied review. Certiorari was granted.

Holding: The Supreme Court, Justice Ginsburg, held that California's determinate sentencing law, which authorized judge, not jury, to find facts exposing defendant to elevated upper term sentence violated defendant's right to trial by jury.

Reversed and remanded.

Justice Kennedy filed opinion dissenting in which Justice Breyer joined.

Justice Alito filed opinion dissenting in which Justices Kennedy and Breyer joined.

1. **Jury** ⇐34(6)
   Sentencing and Punishment ⇐316

   The Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. U.S.C.A. Const.Amend. 6.

2. **Jury** ⇐31.1
   Sentencing and Punishment ⇐322

   California's determinate sentencing law (DSL), which authorized the judge, not the jury, to find facts by a preponderance of the evidence exposing a defendant to an elevated upper term sentence violated a defendant's right to trial by jury. U.S.C.A. Const.Amends. 6, 14.

3. **Jury** ⇐34(6)
   Sentencing and Punishment ⇐322

   Except for a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

West Codenotes

Prior Version Held Unconstitutional

West's Ann.Cal.Penal Code §§ 1170, 1170.3

Prior Version Recognized as Unconstitutional

N.J.Stat.Ann. § 2C:44–3(e)

West's RCWA 9.94A.120(2)

Recognized as Unconstitutional

18 U.S.C.A. §§ 3553(b)(1), 3742(e)

Syllabus *

Petitioner Cunningham was tried and convicted of continuous sexual abuse of a child under 14. Under California's determinate sentencing law (DSL), that offense is punishable by one of three precise terms of imprisonment: a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. The DSL obliged the trial judge to sentence Cunningham to the 12–year middle term unless the judge found one or more additional "circumstances in aggravation." Court Rules adopted to implement the DSL define "circumstances in aggravation" as facts that justify the upper term. Those facts, the Rules provide, must be established by a preponderance of the evidence. Based on a post-trial sentencing hearing, the judge found by a preponderance of the evidence six aggravating facts, including the particular vulnerability of the victim, and one mitigating fact, that Cunningham had no record of prior crimi-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

U.S., at 233, 125 S.Ct. 738. Both were "mandatory and impose[d] binding requirements on all sentencing judges." *Ibid.* All Members of the Court agreed, however, that the Guidelines would not implicate the Sixth Amendment if they were advisory. *Ibid.* Facing the remedial question, the Court concluded that rendering the Guidelines advisory came closest to what Congress would have intended had it known that the Guidelines were vulnerable to a Sixth Amendment challenge. Under the advisory Guidelines system described in *Booker*, judges would no longer be confined to the sentencing range dictated by the Guidelines, but would be obliged to "take account" of that range along with the sentencing goals enumerated in the Sentencing Reform Act (SRA). *Id.*, at 259, 264, 125 S.Ct. 738. In place of the SRA provision governing appellate review of sentences under the mandatory Guidelines scheme, the Court installed a "reasonableness" standard of review. *Id.*, at 261, 125 S.Ct. 738. Pp. 863 – 868.

(b) In all material respects, California's DSL resembles the sentencing systems invalidated in *Blakely* and *Booker*. Following the reasoning in those cases, the middle term prescribed under California law, not the upper term, is the relevant statutory maximum. Because aggravating facts that authorize the upper term are found by the judge, and need only be established by a preponderance of the evidence, the DSL violates the rule of *Apprendi*.

While "that should be the end of the matter," *Blakely*, 542 U.S., at 313, 124 S.Ct. 2531, in *People v. Black*, the California Supreme Court insisted that the DSL survives inspection under our precedents. The *Black* court reasoned that, given the ample discretion afforded trial judges to identify aggravating facts warranting an upper term sentence, the DSL did "not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge)," 35 Cal.4th, at 1255–1256, 29 Cal.Rptr.3d 740, 113 P.3d, at 543–544. This Court cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in a particular case, does not shield a sentencing system from the force of this Court's decisions. The *Black* court also urged that the DSL is not cause for concern because it reduced the penalties for most crimes over the prior indeterminate sentencing scheme; because the system is fair to defendants; and because the DSL requires statutory sentence enhancements (as distinguished from aggravators) to be charged in the indictment and proved to a jury beyond a reasonable doubt. The *Black* court's examination, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. This Court's decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, is the very inquiry *Apprendi's* bright-line rule was designed to exclude.

Ultimately, the *Black* court relied on an equation of California's DSL to the post-*Booker* federal system. That attempted comparison is unavailing. The *Booker* Court held the Federal Guidelines incompatible with the Sixth Amendment because they were "mandatory and impose[d] binding requirements on all sentencing judges," 543 U.S., at 233, 125 S.Ct. 738. To remedy the constitutional infirmity, the Court excised provisions that rendered the system mandatory, leaving the Guidelines in place as advisory only. The

a range the judge could not exceed without undertaking additional factfinding. *Booker*, 543 U.S., at 227, 233–234, 125 S.Ct. 738. The judge did so, finding by a preponderance of the evidence that Booker possessed an amount of drugs in excess of the amount determined by the jury's verdict. That finding boosted Booker into a higher Guidelines range. Booker was sentenced at the bottom of the higher range, to 360 months in prison. *Id.*, at 227, 125 S.Ct. 738.

In an opinion written by Justice STEVENS for a five-Member majority, the Court held Booker's sentence impermissible under the Sixth Amendment. In the majority's judgment, there was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in *[Blakely]*." *Id.*, at 233, 125 S.Ct. 738. Both systems were "mandatory and impose[d] binding requirements on all sentencing judges." *Ibid.*[10] Justice STEVENS' opinion for the Court, it bears emphasis, next expressed a view on which there was no disagreement among the Justices. He acknowledged that the Federal Guidelines would not implicate the Sixth Amendment were they advisory:

"If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by [this case] would have been avoided entirely if Congress had omitted from the [federal Sentencing Reform Act] the provisions that make the Guidelines binding on district judges.... For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

"The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges." *Ibid.* (citations omitted).

In an opinion written by Justice BREYER, also garnering a five-Member majority, the Court faced the remedial question, which turned on an assessment of legislative intent: What alteration would Congress have intended had it known that the Guidelines were vulnerable to a Sixth Amendment challenge? Three choices were apparent: the Court could invalidate in its entirety the Sentencing Reform Act of 1984(SRA), the law comprehensively delineating the federal sentencing system; or it could preserve the SRA, and the mandatory Guidelines regime the SRA established, by attaching a jury-trial requirement to any fact increasing a defendant's base Guidelines range; finally, the Court could render the Guidelines advisory by severing two provisions of the SRA, 18 U.S.C. § 3553(b)(1) and 3742(e) (2000 ed. and Supp. IV). 543 U.S., at 246–249, 125

10. California's DSL, we note in this context, resembles pre-*Booker* federal sentencing in the same ways Washington's sentencing system did: The key California Penal Code provision states that the sentencing court "*shall order* imposition of the middle term" absent "circumstances in aggravation or mitigation of the crime." § 1170(b) (emphasis added), and any move to the upper or lower term must be justified by "a concise statement of *the ultimate facts*" on which the departure rests, Rule 4.420(e) (emphasis added). But see *post*, at 876 – 877 (ALITO, J., dissenting) (characterizing California's DSL as indistinguishable from post-*Booker* sentencing).

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S.Ct. 738.[11] Recognizing that "reasonable minds can, and do, differ" on the remedial question, the majority concluded that the advisory Guidelines solution came closest to the congressional mark. *Id.*, at 248–258, 125 S.Ct. 738.

Under the system described in Justice BREYER's opinion for the Court in *Booker*, judges would no longer be tied to the sentencing range indicated in the Guidelines. But they would be obliged to "take account of" that range along with the sentencing goals Congress enumerated in the SRA at 18 U.S.C. § 3553(a). 543 U.S., at 259, 264, 125 S.Ct. 738.[12] Having severed § 3742(e), the provision of the SRA governing appellate review of sentences under the mandatory Guidelines scheme, see *supra*, at 867, and n. 11, the Court installed, as consistent with the Act and the sound administration of justice, a "reasonableness" standard of review. 543 U.S., at 261, 125 S.Ct. 738. Without attempting an elaborate discussion of that standard, Justice BREYER's remedial opinion for the Court observed: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Ibid.*[13] The Court emphasized the provisional character of the *Booker* remedy. Recognizing that au-

11. Title 18 U.S.C. § 3553(b)(1) mandated the imposition of a Guidelines sentence unless the district court found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Section 3742(e) directed the court of appeals to determine, *inter alia*, whether the district court correctly applied the Guidelines, § 3742(e)(2), and, if the sentence imposed fell outside the applicable Guidelines range, whether the sentencing judge had provided a written statement of reasons, whether § 3553(b) and the facts of the case warranted the departure, and whether the degree of departure was reasonable, § 3742(e)(3).

12. Section 3553(a) instructs sentencing judges to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," "the kinds of sentences available," and the Guidelines and policy statements issued by the United States Sentencing Commission. § 3553(a)(1), (3)-(5). Avoidance of unwarranted sentencing disparities, and the need to provide restitution, are also listed as concerns to which the judge should respond. § 3553(a)(6)-(7).

In a further enumeration, § 3553(a) calls for the imposition of "a sentence sufficient, but not greater than necessary" to "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." § 3553(a)(2).

13. While this case does not call for elaboration of the reasonableness check on federal sentencing post-*Booker*, we note that the Court has granted review in two cases raising questions trained on that matter: *Claiborne v. United States*, — U.S. —, 127 S.Ct. 551, 166 L.Ed.2d 406 (cert. granted, Nov. 3, 2006); and *Rita v. United States*, — U.S. —, 127 S.Ct. 551, 855, 166 L.Ed.2d 406 (cert. granted, Nov. 3, 2006). In *Claiborne*, the Court will consider whether it is consistent with the advisory cast of the Guidelines system post-*Booker* to require that extraordinary circumstances attend a sentence varying substantially from the Guidelines. *Rita* includes the question whether is it consistent with *Booker* to accord a presumption of reasonableness to a within-Guidelines sentence.

In this regard, we note Justice ALITO's view that California's DSL is essentially the same as post-*Booker* federal sentencing. *Post*, at 873–878. To maintain that position, his dissent previews, without benefit of briefing or argument, how "reasonableness review," post-*Booker*, works. *Post*, at 880–881. It is neither necessary nor proper now to join issue with Justice ALITO on this matter.

[124]

comparable to the level of discretion that the high court has chosen to permit federal judges in post-*Booker* sentencing." 35 Cal.4th, at 1261, 29 Cal.Rptr.3d 740, 113 P.3d, at 548. The same equation drives Justice ALITO's dissent. See *post*, at 873 ("The California sentencing law . . . is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *[Booker]*.").

The attempted comparison is unavailing. As earlier explained, see *supra*, at 866 – 867, this Court in *Booker* held the Federal Sentencing Guidelines incompatible with the Sixth Amendment because the Guidelines were "mandatory and imposed binding requirements on all sentencing judges." 543 U.S., at 233, 125 S.Ct. 738. "[M]erely advisory provisions," recommending but not requiring "the selection of particular sentences in response to differing sets of facts," all Members of the Court agreed, "would not implicate the Sixth Amendment." *Ibid.* To remedy the constitutional infirmity found in *Booker*, the Court's majority excised provisions that rendered the system mandatory, leaving the Guidelines in place as advisory only. *Id.*, at 245–246, 125 S.Ct. 738. See also *supra*, at 866 – 867.

California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their "discretion to select a specific sentence within a defined range." *Booker*, 543 U.S., at 233, 125 S.Ct. 738. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.

Nevertheless, the *Black* court attempted to rescue the DSL's judicial factfinding authority by typing it simply a reasonableness constraint, equivalent to the constraint operative in the federal system post-*Booker*. See 35 Cal.4th, at 1261, 29 Cal.Rptr.3d 740, 113 P.3d, at 548 ("Because an aggravating factor under California law may include any factor that the judge reasonably deems relevant, the [DSL's] requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to *Booker's* requirement that a federal judge's sentencing decision not be unreasonable."). Reasonableness, however, is not, as the *Black* court would have it, the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. *Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless.[15]

mitted to a jury, and proved beyond a reasonable doubt." (emphasis added)).

15. Justice ALITO, however, would do just that. His opinion reads the remedial portion of the Court's opinion in *Booker* to override *Blakely*, and to render academic the entire first part of *Booker* itself. *Post*, at 880 – 881. There would have been no majority in *Booker*

126

Justice KENNEDY, with whom Justice BREYER joins, dissenting.

The dissenting opinion by Justice ALITO, which I join in full, well explains why the Court continues in a wrong and unfortunate direction in the cases following *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). See, *e.g.*, *United States v. Booker*, 543 U.S. 220, 326–334, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (BREYER, J., dissenting in part); *Blakely v. Washington*, 542 U.S. 296, 314–324, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (O'Connor, J., dissenting); *id.*, at 326–328, 124 S.Ct. 2531 (KENNEDY, J., dissenting); see also *Apprendi*, *supra*, at 523–554, 120 S.Ct. 2348 (O'Connor, J., dissenting); *Jones v. United States*, 526 U.S. 227, 264–272, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (KENNEDY, J., dissenting). The discussion in his dissenting opinion is fully sufficient to show why, in my respectful view, the Court's analysis and holding are mistaken. It does seem appropriate to add this brief, further comment.

In my view the *Apprendi* line of cases remains incorrect. Yet there may be a principled rationale permitting those cases to control within the central sphere of their concern, while reducing the collateral, widespread harm to the criminal justice system and the corrections process now resulting from the Court's wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries. The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rule of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating "[f]acts relating to the crime"), with Rule 4.421(b) (listing aggravating "[f]acts relating to the defendant"). The Court should not foreclose its efforts.

California, as the Court notes, experimented earlier with an indeterminate sentencing system. *Ante*, at 858. The State reposed vast power and discretion in a nonjudicial agency to set a release date for convicted felons. That system, it seems, would have been untouched by *Apprendi*. When the State sought to reform its system, it might have chosen to give its judges the authority to sentence to a maximum but to depart downward for unexplained reasons. That too, by considerable irony, would be untouched by *Apprendi*. Instead, California sought to use a system based on guided discretion. *Apprendi*, the Court holds today, forecloses this option.

As dissenting opinions have suggested before, the Constitution ought not to be interpreted to strike down all aspects of sentencing systems that grant judicial discretion with some legislative direction and control. Judges and legislators must have the capacity to develop consistent standards, standards that individual juries empaneled for only a short time cannot elaborate in any permanent way. See, *e.g.*, *Blakely*, 542 U.S., at 314, 124 S.Ct. 2531 (opinion of O'Connor, J.); *id.*, at 326–327, 124 S.Ct. 2531 (opinion of KENNEDY, J.) (explaining that "[s]entencing guidelines are a prime example of [the] collaborative process" between courts and legislatures). Judges and sentencing officials have a broad view and long-term commitment to correctional systems. Juries do not. Judicial officers and corrections professionals, under the guidance and control of the legislature, should be encouraged to participate in an ongoing manner to improve the various sentencing schemes in our country.

This system of guided discretion would be permitted to a large extent if the Court confined the *Apprendi* rule to sentencing

enhancements based on the nature of the offense. These would include, for example, the fact that a weapon was used; violence was employed; a stated amount of drugs or other contraband was involved; or the crime was motivated by the victim's race, gender, or other status protected by statute. Juries could consider these matters without serious disruption because these factors often are part of the statutory definition of an aggravated crime in any event and because the evidence to support these enhancements is likely to be a central part of the prosecution's case.

On the other hand, judicial determination is appropriate with regard to factors exhibited by the defendant. These would include, for example, prior convictions; cooperation or noncooperation with law enforcement; remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community. This is so even if the relevant facts were to be found by the judge by a preponderance of the evidence. These are facts that should be taken into account at sentencing but have little if any significance for whether the defendant committed the crime. See Berman & Bibas, Making Sentencing Sensible, 4 Ohio St. J.Crim. L. 37, 55–57 (2006).

The line between offense and offender would not always be clear, but in most instances the nature of the offense is defined in a manner that ensures the problem of categories would not be difficult. *Apprendi* suffers from a similar line-drawing problem between facts that must be considered by the jury and other considerations that a judge can take into account. The main part of the *Apprendi* holding could be retained with far less systemic disruption. It is to be regretted that the Court's decision today appears to foreclose consideration of this approach or other reasonable efforts to develop systems of guided discretion within the general constraint that *Apprendi* imposes.

Justice ALITO, with whom Justice KENNEDY and Justice BREYER join, dissenting.

The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for "reasonableness"; and both—the California law explicitly, and the federal scheme implicitly—require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict. Because this Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment, the same should be true with regard to the California system. I therefore respectfully dissent.

I

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and the cases that have followed in its wake, the Court has held that under certain circumstances a criminal defendant possesses the Sixth Amendment right to have a jury find facts that result in an increased sentence. The Court, however, has never suggested that all factual findings that affect a defendant's sentence must be made by a jury. On the contrary, in *Apprendi* and later cases, the Court has consistently stated that when a trial court makes a fully discretionary sentencing decision (such as a sentencing decision under the pre-Sentencing Reform Act of 1984

543 U.S., at 259, 125 S.Ct. 738. As Justice BREYER explained, "the existence of § 3553(b)(1) is a necessary condition of the constitutional violation. That is to say, without this provision . . . the statute falls outside the scope of *Apprendi's* requirement." *Ibid.*

Under the post-*Booker* federal sentencing system, "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.*, at 264, 125 S.Ct. 738. In addition, sentencing courts must take account of the general sentencing goals set forth by Congress, including avoiding unwarranted sentencing disparities, providing restitution to victims, reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public, and effectively providing the defendant with needed educational or vocational training and medical care. See *id.*, at 260, 125 S.Ct. 738 (citing 18 U.S.C. § 3553(a) (2000 ed. and Supp. IV)).

It is significant that *Booker*, while rendering the Guidelines advisory, did not reinstitute the pre-Guidelines federal sentencing system, under which "well-established doctrine bar[red] review of the exercise of sentencing discretion" within the broad sentencing ranges imposed by the criminal statutes. *Dorszynski v. United States*, 418 U.S. 424, 443, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974). Rather, *Booker* conditioned a district court's sentencing discretion on appellate review for "reasonableness" in light of the Guidelines and the § 3553(a) factors. See *Booker*, *supra*, at 261, 125 S.Ct. 738 ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable").

Although the *Booker* Court did not spell out in detail how sentencing judges are to proceed under the new advisory Guidelines regime, it seems clear that this regime permits—and, indeed, requires—sentencing judges to make factual findings and to base their sentences on those findings. The federal criminal statutes generally set out wide sentencing ranges, and thus in each case a sentencing judge must use some criteria in selecting the sentence to be imposed. In doing this, federal judges have generally made and relied upon factual determinations about the nature of the offense and the offender—and it is impossible to imagine how federal judges could reasonably carry out their sentencing responsibilities without making such factual determinations.

Under the mandatory Federal Sentencing Guidelines regime, these factual determinations were relatively formal and precise. (For example, a trial judge under that regime might have found based on a post-trial proceeding that a drug offense involved six kilograms of cocaine or that the loss caused by a mail fraud offense was $2.5 million.) By contrast, under the pre-Sentencing Reform Act federal system, the factual determinations were often relatively informal and imprecise. (A trial judge might have concluded from the presentence report that an offense involved "a large quantity of drugs" or that a mail fraud scheme caused "a great loss.") Under both systems, however, the judges made factual determinations about the nature of the offense and the offender and determined the sentence accordingly. And as the Courts of Appeals have unanimously concluded, the post-*Booker* federal sentencing regime also permits trial judges to make such factual findings and to rely on those findings in selecting the sentences that are appropriate in particular cases.[4]

Under the post-*Booker* system, if a defendant believes that his or her sentence was based on an erroneous factual determination, it seems clear that the defendant may challenge that finding on appeal. As noted, the post-*Booker* system permits a defendant to obtain appellate review of the reasonableness of a sentence, and a sentence that the sentencing court justifies solely on the basis of an erroneous finding of fact can hardly be regarded as reasonable. Thus, under the post-*Booker* system, there will be cases—and, in all likelihood, a good many cases—in which the question whether a defendant will be required to serve a greater or lesser sentence depends on whether a court of appeals sustains a finding of fact made by the sentencing judge.

A simple example illustrates this point. Suppose that a defendant is found guilty of 10 counts of mail fraud in that the defendant made 10 mailings in furtherance of a scheme to defraud. See 18 U.S.C. § 1341 (2000 ed., Supp. IV). Under the mail fraud statute, the district court would have discretion to sentence the defendant to any sentence ranging from probation up to 50 years of imprisonment (5 years on each count). Suppose that the sentencing judge imposes the maximum sentence allowed by statute—50 years of imprisonment—without identifying a single fact about the offense or the offender as a justification for this lengthy sentence. Surely that would be an unreasonable sentence that could not be sustained on appeal.

Suppose, alternatively, that the sentencing court finds that the mail fraud scheme caused a loss of $1 million and that the victims were elderly people of limited means, and suppose that the court, based on these findings, imposes a sentence of 10 years of imprisonment. If the defendant challenges the sentence on appeal on the ground that these findings are erroneous, the question whether the defendant will be required to serve 10 years or some lesser sentence may well depend on the validity of the district court's findings of fact.

Booker, then, approved a sentencing system that (1) requires a sentencing judge to "consult" and "take into account" legislatively defined sentencing factors and guidelines; (2) subjects a sentencing judge's exercise of sentencing discretion to appellate review for "reasonableness"; and (3) requires sentencing judges to make factual findings in order to support the exercise of this discretion.

II

The California sentencing law that the Court strikes down today is not meaningfully different from the federal scheme upheld in *Booker*.

As an initial matter, the California law gives a judge at least as much sentencing discretion as does the post-*Booker* federal scheme. California's system of sentencing triads and separate "enhancements" [5] was

4. Every Court of Appeals to address the issue has held that a district court sentencing post-*Booker* may rely on facts found by the judge by a preponderance of the evidence. See *United States v. Kilby*, 443 F.3d 1135, 1141 (C.A.9 2006); *United States v. Cooper*, 437 F.3d 324, 330 (C.A.3 2006); *United States v. Vaughn*, 430 F.3d 518, 525–526 (C.A.2 2005); *United States v. Morris*, 429 F.3d 65, 72 (C.A.4 2005); *United States v. Price*, 418 F.3d 771, 788 (C.A.7 2005); *United States v. Magallanez*, 408 F.3d 672, 684–685 (C.A.10 2005); *United States v. Pirani*, 406 F.3d 543, 551, n. 4 (C.A.8 2005) (en banc); *United States v. Yagar*, 404 F.3d 967, 972 (C.A.6 2005); *United States v. Mares*, 402 F.3d 511, 519, and n. 6 (C.A.5 2005); *United States v. Duncan*, 400 F.3d 1297, 1304–1305 (C.A.11 2005); *United States v. Antonakopoulos*, 399 F.3d 68, 74 (C.A.1 2005).

5. These enhancements, which add additional years onto the base-triad term selected by the

aggravating "fact" before imposing an upper term sentence, that would not make this case constitutionally distinguishable from *Booker*. As previously explained, the "advisory Guidelines," bounded by reasonableness review, effectively (albeit less explicitly) impose the same requirement on federal judges. *Booker's* reasonableness review necessarily supposes that some sentences will be unreasonable in the absence of additional facts justifying them. (Recall the prior hypothetical case in which it was posited that the district court imposed a sentence of 50 years of imprisonment for mail fraud without citing a single aggravating fact about the offense or the offender.) Thus, although the post-*Booker* Guidelines are labeled "advisory," reasonableness review imposes a very real constraint on a judge's ability to sentence across the full statutory range without finding some aggravating fact.[11]

The Court downplays the significance of *Booker* reasonableness review on the ground that *Booker*-style "reasonableness . . . operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." *Ante*, at 870 (emphasis in original). But this begs the question, which concerns the scope of those "Sixth Amendment constraints." That question is answered by the Court's remedial holding in *Booker*, which necessarily stands for the proposition that it is consistent with the Sixth Amendment for the imposition of an enhanced sentence to be conditioned on a factual finding made by a sentencing judge and not by a jury.

The Court relies heavily on *Blakely's* admonition that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S., at 303, 124 S.Ct. 2531 (emphasis in original). But the Court fails to recognize how this statement must be understood in the wake of *Booker*.

For each statutory offense, there must be a sentence that represents the least onerous sentence that can be regarded as reasonable in light of the bare statutory elements found by the jury. To return to our prior example of a mail fraud offense, there must be some sentence that represents the least onerous sentence that would be appropriate in a case in which the statutory elements of mail fraud are

immediately following; there is nothing to suggest that this provision excludes consideration of more general sentencing objectives that are not conducive to such trial-type proof. As the Rules explicitly recognize, these different categories of sentencing considerations are not mutually exclusive. See Rule 4.410(b) ("The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case").

11. The Court believes that in order to reach this conclusion, I must "previe[w] . . . how 'reasonableness review,' post-*Booker*, works," *ante*, at 867, n. 13, and perhaps even prejudge this Court's forthcoming decisions in *Rita* and *Claiborne*, *ante*, at 870 – 871, n. 15. But my point is much more modest. We need not map all the murky contours of the post-*Booker* landscape in order to conclude that reasonableness review must mean *something*. If reasonableness review is more than just an empty exercise, there inevitably will be *some* sentences that, absent any judge-found aggravating fact, will be unreasonable. One need not embrace any presumption of reasonableness or unreasonableness to accept this simple point. If this is the case—and I cannot see how it is not, given the Court's endorsement of reasonableness review in *Booker*—then there is no meaningful Sixth Amendment difference between California's sentencing system and the post-*Booker* "advisory Guidelines." Under both, a sentencing judge operating under a reasonableness constraint must find facts beyond the jury's verdict in order to justify the imposition of at least some sentences at the high end of the statutory range.

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EXHIBIT-A

RULE 3.9(a) CRIMINAL PUNISHMENT CODE SCORESHEET

1. DATE OF SENTENCE	2. PREPARER'S NAME	3. COUNTY	4. SENTENCING JUDGE
6-8-01	☐ DC ☑ SAO Curt Allen	Mills	PC

5. NAME (LAST, FIRST, M.I.)	6. DOB	8. RACE	10. PRIMARY OFF. DATE	12. PLEA
Smith, Willie R.	5-9-56	☑ B ☐ W ☐ OTHER	5-1-00	
	7. DC #	9. GENDER	11. PRIMARY DOCKET #	TRIAL ☑
		☑ M ☐ F	00-998[illegible]	

I. **PRIMARY OFFENSE:** If Qualifier, please check ___A ___S ___C ___R (A=Attempt, S=Solicitation, C=Conspiracy, R=Reclassification)

FELONY DEGREE	F.S.#	DESCRIPTION	OFFENSE LEVEL	POINTS
3F	831.02	U.F.I.	2	2

(Level - Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116)

Prior capital felony triples Primary Offense points ☐

FILED

I. 10

II. **ADDITIONAL OFFENSE(S):** Supplemental page attached ☐

DOCKET#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	POINTS	TOTAL
00-998[illegible]	MM	812.014	M	☐☐☐☐	.2	.2
Description: P.T. (First Degree)						
00-998[illegible]	3F	831.02	2	☐☐☐☐	1.2	1.2
Description: U.F.I.						
00-1595	MM	538.04	M	☐☐☐☐	.2	.2
Description: Obs. Mov. Through Beyond Other Fraud						

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐

Supplemental page points ___

II. 25 → 10

III. **VICTIM INJURY:**

		Number	Total			Number	Total
2nd Degree Murder	240 X	___ =	___	Slight	4 X	___ =	___
Death	120 X	___ =	___	Sex Penetration	80 X	___ =	___
Severe	40 X	___ =	___	Sex Contact	40 X	___ =	___
Moderate	18 X	___ =	___				

II. 2 → 12

III. 0

IV. **PRIOR RECORD:** Supplemental page attached ☐

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	NUMBER		POINTS	TOTAL
1F	812.13	8	☑☐☐☐	Att. Armed Robbery	1	X	19	= 19
2F	784.045	6	☐☐☐☐	Agg. Assault LEO	1	X	9	= 9
3F	810.02	4	☐☐☐☐	Burglary	5	X	2.4	= 12
3F	810.16	4	☐☐☐☐	Poss. Burg. Tools	1	X	2.4	= 2.4
2F	893.13	4	☐☐☐☐	Purchase Cocaine	1	X	2.4	= 2.4
3F	812.014	4	☐☐☐☐	GTMV	2	X	2.4	= 4.8

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

3F	893.13	3	Poss. Cocaine	4	1.6	6.4
3F 84	831.02	2	U.F.I.	1	.8	.8
3F	831.02	2	U.E. Comp. Fraud	1	.8	.8
MM	Various	M	Various Misd.	12	.2	1

Supplemental page points ___

Page 1 Subtotal: 68.8

IV. 58.8 → 68.8 → 35

VBH

EXHIBIT-A

Page 1 Subtotal ~~68.8~~

V. Legal Status violation = 4 Points — V. 4

VI. Community Sanction violation before the court for sentencing — VI. 0
6 points x each successive violation OR
New felony conviction = 12 points x each successive violation

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 Points — VII. 0

VIII. Prior Serious Felony = 30 Points — VIII. 0

Subtotal Sentence Points ~~72.8~~ ~~92.~~ 90.8

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enforcement Protection	Drug Trafficking	Grand Theft Motor Vehicle	Street Gang (offenses committed on or after 10-1-96)	Domestic Violence (offenses committed on or after 10-1-97)
___ x 1.5 ___ x 2.0 ___ x 2.5	___ x 1.5	___ x 1.5	___ x 1.5	___ x 1.5

Enhanced Subtotal Sentence Points IX. 0

TOTAL SENTENCE POINTS ~~72.8~~ ~~92.~~ 90.8

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non-state prison sanction.

If total sentence points are greater than 44: ~~72.8~~ ~~92.2~~ 90.8 (total sentence points) minus 28 = ~~44.8~~ 64.2 62.8 x .75 = ~~33.6~~ ~~48.15~~ 47.1 (lowest permissible prison sentence in months)

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s. 775.082, F.S., unless the lowest permissible sentence under the code exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

_______________ maximum sentence in years

TOTAL SENTENCE IMPOSED

		Years	Months	Days
☒ State Prison	☐ Life	15		
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation				

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison releasee reoffender, or a ☐ mandatory minimum applies.

☐ Mitigated Departure ☐ Plea Bargain

Reason 35

JUDGE'S SIGNATURE [signature] 13

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91

(22) (13) 12

EXHIBIT-A

RULE 3.992(RIMINAL PUNISHMENT CODE . RESHEET

1. DATE OF SENTENCE	2. PREPARER'S NAME ☐ DC ☑ SAO	3. COUNTY	4. SENTENCING JUDGE
6-14-01	Curt Allen	Mill.	

NAME : LST, FIRST, MI.)	6. DOB	8. RACE	10. PRIMARY OFF. DATE	12.
Smith, Willie R.	5-9-56	☑ B ☐ W ☐ OTHER	7-29-00	PLEA ☐
	7. DC #	9. GENDER	11. PRIMARY DOCKET #	TRIAL ☑
		☑ M ☐ F	00-1366	

PRIMARY OFFENSE: If Qualifier, please check ___A ___S ___C ___R (A=Attempt, S=Solicitation, C=Conspiracy, R=Reclassification)

FELONY DEGREE	F.S.#	DESCRIPTION	OFFENSE LEVEL	POINTS
3F / 2F	831.02 / 810.014	U.F.I. O.S.P.	2 / 5	

(Level-Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=35, 7=56, 8=74, 9=92, 10=118)

Prior capital felony triples Primary Offense points ☐

FILED

JUN 13 2001

RICHARD AKE, CLERK

I. 28

ADDITIONAL OFFENSE(S): Supplemental page attached ☐

DOCKET#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	COUNTS	POINTS	TOTAL
00-9986	MM	812.014	M	☐☐☐☐	1	x 2	= 2
Description	P.T. (First Degree)						
00-1505	MM	538.04	M	☐☐☐☐	1	x 2	= 2
Description	Obtain Money from Landlord Under by Threat						
00-9986	3F	831.02	2	☐☐☐☐	1	x 1.2	= 1.2
Description	U.F.I.						

(Level-Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=26, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐ Supplemental page points ___

II. 2 / 1.2 / 3.2

VICTIM INJURY:

		Number	Total			Number	Total
Degree Murder	240 X	___	= ___	Slight	4 X	___	= ___
ath	120 X	___	= ___	Sex Penetration	60 X	___	= ___
ere	40 X	___	= ___	Sex Contact	40 X	___	= ___
derate	18 X	___	= ___				

III. 0

PRIOR RECORD: Supplemental page attached ☐

MM REE	F.S #	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	NUMBER	POINTS	TOTAL
/	812.13	8	☐☐☐☐	Att. Armed Robbery	1	x 19	= 19
/	784.045	6	☐☐☐☐	Agg. Assault LEO	1	x 9	= 9
/	810.02	4	☐☐☐☐	Burglary	5	x 9.9	= 3
/	810.14	4	☐☐☐☐	P.O.I. Burg. Tool	1	x 2.4	= 2.4
/	893.13	#4	☐☐☐☐	Poss. Cocaine	1	x 2.4	= 2.4
/	812.014	4	☐☐☐☐	GTMV	2	x 2.4	= 4.8

Points M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29) Supplemental page points ___

	893.13	3	Poss. Cocaine	4	1.6	6.4	33
32	831.02	2	U.F.I.	1	to .8	8	IV. 55.6
	831.02	2	U.E. Comp Fraud	1	Page 1 Subtotal:	5	58.8
	Various	M	Various Misd	5	1.2		

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MA

EXHIBIT-A

Page 1 Subtotal 68.8

V. Legal Status violation = 4 Points — V. 4

VI. Community Sanction violation before the court for sentencing
6 points x each successive violation OR
New felony conviction = 12 points x each successive violation — VI. 0

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 Points — VII. 0

VIII. Prior Serious Felony = 30 Points — VIII. 0

Subtotal Sentence Points 72.8

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enforcement Protection	Drug Trafficking	Grand Theft Motor Vehicle	Street Gang (offenses committed on or after 10-1-96)	Domestic Violence (offenses committed on or after 10-1-97)
___ x 1.5 ___ x 2.0 ___ x 2.5	___ x 1.5	___ x 1.5	___ x 1.5	___ x 1.5

Enhanced Subtotal Sentence Points IX. 0

TOTAL SENTENCE POINTS 72.8

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non-state prison sanction.

If total sentence points are greater than 44:

72.8 (total sentence points) minus 28 = 44.8 x .75 = 33.6 (lowest permissible prison sentence in months)

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s. 775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

_____ (maximum sentence in years)

TOTAL SENTENCE IMPOSED

		Years	Months	Days
☒ State Prison	☐ Life	2	10	
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation				

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison releasee reoffender, or a ☐ mandatory minimum applies.

☐ Mitigated Departure ☐ Plea Bargain

Other Reason 33

JUDGE'S SIGNATURE [signature] 36

1347 [signature] 30

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APPENDIX - C

ISSUES THAT NEED TO BE DECIDED - AND ARE DENIALS OF DUE PROCESS FOR THE INDIVIDUALS THAT THE CASES PERTAIN TO

(1) No Jury Instruction Molded After the Weapons Statute Pertaining to the Jury Finding of A Common Pocket Knife

(3) Whether 300 Plants or More And Trafficking in Cannabis Are 2 Distinct Forms of Trafficking Because the Police Are Pulling up the Cannabis Plants and Are Drying the Plants And Coming up with A Dry Weight of 25 Lbs or More from only 20 Plants and Charge A Defendant with Trafficking

IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

WILLIE SMITH

-VS-

STATE OF FLORIDA

CASE NO#

REF. CASE NO# 882 So.2d 890 (Fl. 2004)

L.T. CASE NO#

MOTION FOR COLLATERAL REVIEW OR ANY WRIT NECESSARY TO CORRECT A MANIFEST INJUSTICE

Comes now Petitioner _____, Pro-se hereby move the Court for Collateral Review or ANY Writ necessary to Correct A Manifest Injustice in the above STYled cause Pursuant to Florida Statute 924.051(7) and in Support Petitioner States the Following:

(7) IN A DIRECT APPEAL OR A COLLATERAL PROCEEDING THE PARTY CHALLENGING THE JUDGEMENT OR THE ORDER OF THE COURT, OF TRIAL, HAS THE BURDEN OF DEMONSTRATING THAT A PREJUDICIAL ERROR OCCURRED IN THE TRIAL COURT. A CONVICTION OR SENTENCE MAY NOT BE REVERSED ABSENT AN EXPRESS FINDING THAT A PREJUDICIAL ERROR OCCURRED IN THE TRIAL COURT

There Are two Pre Judicial Errors that occurred in the trial Court that Led to the Manifest Injustice that Petitioner is Sub Jected to - Towit - A Conviction for Armed Burglary and having A Life Sentence Imposed when Petitioner only Committed A Burglary of A Structure And was to have 5 years imposed.

(1) Petitioner was Charged with Armed Burglary where Petitioner had Burglarized A Restaurant and had a Folding knife in his Pocket

Petitioner was Charged - via - Florida Statute 790.001(13) "The Term weapon is defined by Statute as Any Dirk, Metallic Knuckles, Slingshot, Billie, Tear Gas Gun, Chemical weapon or device, or anyother deadly weapon, except a firearm or A Common Pocket knife" - To wit - A Folding knife with 3¾ inch blade and Approximate overall Length of 8½ inches was a common Pocket knife and was thus not a weapon, unless it was used as A weapon

THE PREJUDICIAL ERROR IS THAT THIS STATUTE IS A STEVOLUTIONARY REFINEMENT AND THERE IS NO JURY INSTRUCTION THAT WAS MOLDED AFTER THE STATUTE TO PROPERLY GUIDE THE JURY TO MAKE A DETERMINATION THAT IS REQUIRED BY LAW - To wit - THAT PETITIONER'S FOLDING KNIFE - Did or Did not have "ANY CHARACTERISTICS OF A WEAPON" that were present "AND" was OR was not a common POCKET knife. - To wit "AN EXEMPTION"

(2) The Second Pre Judicial Error is that the State Prosecuted Petitioner As if the Folding knife was Statutorily defined AS A weapon and further misled the Jury by Asking Petitioner "if he had used the weapon could it have Caused Great Bodily harm" and Petitioner Said Yes: The Folding knife was not A Proven weapon "BECAUSE EACH OF THESE DEVICES HAS THE ACTUAL ABILITY TO CAUSE DEATH OR INFLICT BODILY HARM. ANY ITEM THAT IS NOT SPECIFICALLY DEFINED IN THE STATUTE AS A WEAPON and that is not Likely to Produce death OR Great Bodily harm will not be held to be A weapon." And the State was Prohibited from Asking the Pre Judicial Question when Petitioner's knife was Folded and in his Pocket - But - the state did so ANYway

JURISDICTION

Jurisdiction is invoked Pursuant to Art V Section 3(B)(3) Florida Constitution - And FL. Rules of App. P. Rule 9.040

JUDICIAL NOTICE

In the case herein of Bunkley. The State Endeavoured to State that it was the common Pocket knife's Safety device, -To wit- The Blade Locking Mechanism that Stopped the Pocket knife's Blade from folding in on it's user's Fingers and Cut the fingers with the Blade. where the State Alluded to this Safety Mechanism And Stated that this is what made the common Pocket knife A weapon. And the Jury Agreed because there was no Rebuttal Case Law At that Time.

The 3rd D.C.A in F.R.-vs- State 81 So3d 572 (3rd D.C.A. 2012) Cited Bunkly And Stated that the Locking Blade mechanism for Safety Purposes is what made A common Pocket knife A weapon Because of the Supreme Court.

This Case of F.R. And the Case herein of Bunkley Are not in Accordance with the Exemption section of FL. Statute 790.001(13) Because these Cases Do not Rebut The State's Simple Contention that the Pocket knife's Blade's Safety locking Mechanism is what makes the Pocket knife A weapon As the 4th D.C.A. Cases that State - A Poket knife must have weapon Like Characteristics to be deemed A weapon - and not A common Pocket knife - Such as Hilt Guard, notched Combat Styled Grip, double Edge Blade OR A Switch Blade - And the Characteristics must Be noticeable - See T.S.W.-vs. State 82 So3d 1021 (4th D.C.A. 2011) C.R. vs. State 73 So3d 825 (FL 4th D.C.A. 2011) And D.J. -vs. State 83 So3d 857 (FL 4th D.C.A 2011)

The Jury Instructions Should be molded to Reflect the weapon Like Characteristics And whatever else that the Jury Relied on to deem the common Pocket knife A weapon to have A Sufficiency of the Evidence Appeal that Petitioner was Deprived of. Based on the 4th D.C.A. Rulings that would properly Instruct the Jury As

to what to base their decision upon - And not just the fact that Petitioner Testified to matters Beyond his Expertise.

IT IS INHERENT AND INDISPENSABLE REQUISITE OF A FAIR TRIAL THAT IS IMPARTIAL UNDER PROTECTIVE POWERS OF FEDERAL AND STATE CONSTITUTIONS AS CONTAINED IN DUE PROCESS OF LAW CLAUSES THAT DEFENDANT BE ALLORDED RIGHT TO HAVE COURT CORRECTLY AND INTELLIGENTLY INSTRUCT JURY ON ESSENTIAL ELEMENTS OF CRIME CHARGED AND REQUIRED TO BE PROVEN BY COMPETENT EVIDENCE

SUCH PROTECTIONS OF A FAIR AND IMPARTIAL TRIAL CANNOT BE TREATED WITH IMPUNITY UNDER THE GUISE OF A HARMLESS ERROR. - Constitutional Law -268 - See Henderson-vs-State 15.5 Fl. 487 So2d 649 (FL 1945) Motley-vs-State 155. Fl. 545 So 2d 798 (Fl. 1945) and Croft-vs-State 117 Fl. 832 (1935)

Therefore Fl. Statute. 790.001 (13) Require A Jury Instruction Pertaining to the Weapon Like Characteristics of a Folding Pocket knife to deem it A weapon or not

Furthermore: The Question Asked of Petitioner As to if the Pocket knife that Petitioner had could Cause Death or Bodily harm - That was Great - And Petitioner said Yes - was not Proven by Competent Evidence - in Lieu of the Fact that the State did not Inquire of Petitioner - How did he know that the Pocket knife could do such? As Did he use it As Such? "And this is An Inference"

FLORIDA LAW IS WELL SETTLED THAT ELEMENTS OF AN OFFENSE CANNOT BE ESTABLISHED BY MERE INFERENCE! See State-vs-Von Deck 607 Fl. 1388 (Fl. 1992) and State-vs-Dye 346 So2d 538 (Fl. 1977) Petitioner-was not deemed a "KNIFE EXPERT"

IT IS AXIOMATIC THAT COUNSEL CANNOT ASK QUESTIONS OF A WITNESS THAT HAVE NO BASIS IN FACT AND MERELY INTENDED TO INSINUATE THE EXISTANCE OF FACT TO A JURY See Delmonte Banana Co.-vs-Chacon 466 So2d 1167 (Fl 3rd D.C.A. 1982)

There was no evidence that Petitioner had Previously used the Pocket knife to cause Death or Great Bodily harm to Justify and uPhold A conviction based on that Inference.

BASIS FOR MOTION

The Supreme Court of the State of Florida is Stare Decisis for all Florida Courts and the Florida Supreme Court has Previously deemed Petitioner's Conviction in the instant case at bar As being a valid Conviction and that is "THE-LAW-OF-THE-CASE" and no Lower Court can disturb the Finding of the Florida Supreme Court without the Supreme Court's Consent

The Florida Supreme Court May Revisit it's own Prior Ruling - See United States -vs- Tamayo 80 F.3d 1514 (11th Cir. 1996) State -vs- Aikens 69 So3d 261 (Fl. 2011) Muehlman -vs- State 3 So3d 1149 (Fl. 2009) and Parker -vs State 873 So2d 270 (Fl. 2004)

See Also State -vs- McBride 848 So2d 287 (Fl. 2003) Stating that the Doctrine of Res Judicata, Collateral Estoppel and LAW-OF-THE-CASE May not be Invoked where it would defeat the ends of Justice

Furthermore - This issue Concerns A Matter of Great Public importance - And A Matter that will have A EFFECT ON numerous Individuals And will Provide Guidance to the Circuit Courts of Florida And the District Court of Appeals because there is no Jury Instruction Molded After Fl. Statute 790.001-(13) Pertaining to A Common Pocket knife Fact Finding Requirement. And there Should be Because the Jury must Be instructed on the Defendant's Defense - That is Provided for by Statute,

Florida Statute 924.34 (2001) - When an Appellate Court determines that the evidence does not Prove the offense for which the defendant was found Guilty - But does establish Guilt of A Lesser degree of the offense or a Lesser offense necessarily included in the offense Charged. The Appellate Court Shall reverse the Judgement for the Lesser degree of the offense OR for the Lesser Included offense.

THE ARGUEMENT/MEMORANDUM OF LAW

Petitioner was Subjected to A Structural Defect in his Trial Court's mechanism And was Prejudiced by the Structural Defect. See Vasquez-vs-Hillery. 474 U.S. 254/106 S.Ct. 617 (1986) Arizona-vs-Fulminante 111 S.Ct. 1264 (1991) and U.S.-vs. Wiles 102 F.3d 1043 (10th Cir. 1996)

The Structural Defect was that the Jury was not Instructed on Petitioner's Theory of Defense And that is "THE WEPONS STATUTE 790.001 (13) HAS AN EXEMPTION THAT STATE THAT A FOLDING KNIFE THAT HAS A BLADE AND IS A COMMON POCKET KNIFE - ENCOMPASSES ANY POCKET KNIFE NOT USED AS A WEAPON COULD BE DEEMED A WEAPON

Petitioner's defense was that he did not have A weapon - But - Did have A Folding knife That was A common Pocket knife That met the Statutory Exemption Reflected in Florida Statute 790.001 (13) And the Jury was to have been instructed on Such - See Williams-vs-State 121 So.3d 524 (Fl. 2013) Stating that the Jury must be Instructed As to the Requirements Contained in the Criminal Statute - And this include the Exemption Pertaining to a Common Pocket knife that Preclude the Pocket knife from Being Deemed to be Considered A Weapon - unless found so by the Jury"

STATUTES - IIII

"WHEN A STATUTE IS CLEAR, A COURT NEED NOT LOOK BEHIND THE STATUTE'S PLAIN LANGUAGE FOR LEGISLATIVE INTENT OR RESORT TO RULES OF STATUTORY CONSTRUCTION OR ASCERTAIN INTENT: THE PLAIN AND ORDINARY MEANING OF THE WORDS OF A STATUTE MUST CONTROL"

THE STATUTE BEING A CRIMINAL STATUTE. THE RULE THAT IT MUST BE CONSTRUED STRICTLY APPLIES. NOTHING

IS TO BE REGARDED AS INCLUDED WITHIN IT THAT IS NOT WITHIN IT'S LETTER AS WELL AS IT'S SPIRIT. NOTHING THAT IS NOT CLEARLY AND INTELLIGENTLY DESCRIBED IN IT'S VERY WORDS AS WELL AS MANIFESTLY INTENDED BY THE LEGISLATURE IS TO BE CONSIDERED WITHIN IT'S TERMS - See State Vs. Wershow 343 So2d 605 (Fl. 1977) and Ex Parte Amos 93 Fl. 5, 112 So 289 (1927)

The Structural defect And Pre Judicial Error is that there is no Jury Instruction that is Molded After the Exemption Portion of FL Statute 790.001(13) Pertaing to A Common Pocket Knife - that "STRIPPED" Petitioner of his only defense - To wit. Petitioner was not Armed because he had in his possession - on his person A Folding knife that was A common Pocket knife that was not A weapon And was Exempt from the weapons Statute - That negates A Armed Burglary Conviction and the Imposition of A Life Sentence

The Evidence At Petitioner's trial Proved that Petitioner had Possessed A Common Pocket knife that was Exempt from the weapons Statute - But - The Jury was not Instructed to find such - And the State Further Buttressed this Pre Judicial Error And Structural Defect By Asking Petitioner if he had used the knife could it had Caused Great Bodily harm - when the Law is - had the Jury deemed that Petitioner's Folding knife was A common Pocket knife And not A weapon - Then Petitioner would have to have been using the Folding knife as A weapon Before the state could've Asked Petitioner the Question About the knife being able to cause Great Bodily harm - when the evidence Reflected that the knife was Folded And in Petitioner's Pocket, And was not being used As A weapon

(8) 1997

CONCLUSION

(1) Petitioner has demonstrated the need for the Florida Supreme Court to Revisit it's Prior Ruling Pertaining to Petitioner's Case As being A Valid Conviction

(2) Petitioner has demonstrated that he was "STRIPPED OF AVIABLE DEFENSE AT TRIAL" - Because of A Structural Defect of the Jury not having A Jury Instruction molded After the exemption section of Fl. Statute 790.001(13) Pertaining to A Common Pocket knife

(3) Petitioner has demonstrated that he is subJected to A manifest InJustice of being convicted of A Armed Burglary and having A Life Sentence Imposed - where the Evidence Prove that Petitioner was in Possession of A common Pocket knife - that is Exempt from being a weapon - via - the weapon Statute that negate the Armed Burglary Conviction and Allow for A 3rd Degree Burglary of A Structure Punishible by 5 years only

(4) Petitioner has demonstrated the need for A Jury Instruction to be molded After Fl. Statute 790.001(13) In Lieu of the fact that this is A Defense to Possessing A weapon that is Deemed to be A Pocket knife And it is the Jury that is to make the Factual Determination that A Folding knife is common OR not And is Therefore Exempt OR NOT - And not the Prosecutor. - via - A Special Jury verdict form of Possessing a weapon - Common Pocket knife OR A common Pocket knife used As A weapon

RELIEF SOUGHT

The Florida Supreme Court is the Highest APP. Court in the State of Florida - And can reverse the Judgement of an Armed Burglary to A 3rd Degree Burglary of A Structure for Petitioner to Correct the Manifest InJustice And Request A Jury Instruction molded After Fl. Statute 790.001(13) Exemption Status

IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
IN AND FOR THE STATE OF FLORIDA

WILLIE SMITH
-VS-
STATE OF FLORIDA

CASE NO.
L.T. CASE NO. 13-CF 018753
13-CF-018711

PETITION FOR A WRIT OF CERTIORARI

Comes now Petitioner, Willie Smith #, Pro-Se Do hereby move the Court for A Writ of Certiorari in the Above styled Cause-Pursuant to Fl. Rules of Appellate Procedure-Rule 9.100 (c) (1) and in support Petitioner States the Following: The District Court's of Appeal Have All Departed from the Essential Requirements of Law!

STATEMENT

on the other hand, we are loathe to suggest that a Circuit Court may reject what appears to be Controlling Precedent in this Context based on it's own Interpretation of the Statute, or Constitutional Provision. A Circuit Court's obligation is to Respect Precedent from their District and other Districts

A District Court is authorized to find Clearly established Law on the Face of the Statute. Even when another District has interpreted the Statute to Require a Different out come in a Published Opinion

Moreover - A District Court is Authorized to Grant Certiorari Relief and Quash A Circuit Courts decision, that obeyed the Controlling Precedent and disobeyed the Plain Language of the Statute. A District Court May Grant a Second Tier Writ of Certiorari after determining that the decision is in Conflict with the relevant Statute - So long as the legal Error is also sufficiently egrigious and Fundamental to fall within the Scope of Certiorari - Jurisdiction - See Wader-vs-Dept. of H.S and m.v. 87503 J712 (FL2012)

ARGUEMENT IN SUPPORT TO ACCEPT JURISDICTION

The Arguement in support to ACCEPT JURISDICTION IS first found in Nader-vs-Florida Department of Highway Safety and Motor Vehicles 87 So3d 712 (Fl. 2012) at [2] + [3] Second Certified Question. Common Law Certiorari Proceeding: A District Court's review in Certiorari to review a Circuit Court's Decision may occur in two Discrete Situations (1) Certiorari review of a NON-FINAL order entered by the Circuit Court

At [4] + [5] In the first situation involving non final orders by the Circuit Court, in the course of ongoing Proceedings, a Party seeking review through a Petition for a Writ of Certiorari "MUST DEMONSTRATE" (1) A material Injury in the Proceeding that cannot be corrected on Appeal A.k.A. Irreparable harm and (2) A Departure from the Essential Requirements of law. See Belair -vs- Drew 770 So2d 1164 (FL 2000) and Martin-Johnson Inc -vs- Savage - 509 So2d 1097 (Fl. 1987)

The Support is found secondly in State-vs-Klayman, 835 So2d 248 (FL. 2002) Stating in Dissent - BY Wells and Harding: "Based on the Majority's decision in this case. Every decision in which a District Court has Construed and Applied a Criminal Statute is a non final order until the Statute is Ultimately Clarified by this Court.

Petitioner Contends that the 2nd D.C.A.'s Construction and Application of Fl. Statute 893.135. Pertaining to Trafficking in Cannabis "Do not Rely on Different Quantities of Cannabis" "IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW" and the Plain Language of the Statute, as well as Abrogating the Legislative Intent and has Subjected Petitioner to Irreparable Harm. In that Petitioner is being Punished for a Crime that was Perpetrated by the Police and that is by the Plain Language of the Statute - To wit - "ANY PERSON"

The Plain Language of the Statute reflect that the Legislature intended to Punish a Defendant for Manufacturing

"NON CALLOUS CANNABIS" - To wit Plants with Roots. That has living Tissue that a defendant cannot smoke - But if a defendant has 300 Plants or more - no matter how large or small - To wit - a seedling - Is more than what the legislature has Allowed for Personal use and a simple Possession Charge - To wit - Trafficking in Cannabis

The Plain language of the Statute reflect that the Legislature intended to Punish a defendant for Manufacturing 25 lbs or more of Callous Material that was severed from a Cannabis Plant - To wit - A Cutting or A Harvested Plant with no evidence of Root Formation. And For non Callous Cannabis that Consisted of 300 or more Plants Webster Dictionary defined Callous as: Unfeeling, and insensitive - To wit - Dead - A Cutting - Severed from the Plant with Roots and Harvested also without roots

Therefore - The legislature has Clearly and distinctly Placed 2 different Types of Trafficking in the Cannabis ReQuirement - To wit - 300 Plants or more with roots that a defendant has - To wit - Non Callous Tissue and Trafficking in Cannabis of 25 lbs or more of Callous Tissue that a defendant has Contrary to the Interpretations and Applications of 1911 s District Court of Appeals in the State of Florida: "that 300 or more ½ inch tall seedling Cannabis Plants is not Trafficking"

Therefore - The harm is that this issue Cannot be Appealed and the Police are Manufacturing - The non-Callous Tissue into Callous Tissue and Certiorari Review is the only method to Resolve this issue. That is Now non-Final until the Statute is Clarified by the FL Supreme Court. A non Final order that Cannot be Appealed

"WHETER THERE ARE TWO DISTINCT QUANTITIES OF CANNABIS"?

The District Courts of Appeal have Clearly Abrogated the Legislature's Right and Power to Sentence A Defendant to 7 years min. man for over 2000 Baby ½ inch seedling Plants and a 15 year min mun. For 10,000. or more baby ½ inch Plants = no weight. 7416)

Petitioner Contend that the Second District Court's of Appeal-Ruling in Perez-Liva-vs-State-152 So3d 98 (Fl. 2nd D.C.A 2014) at (F.N. 2) Stating:

THE STATE DOES NOT ARGUE THAT THE CULTIVATION COUNT IS BASED ON A SEPERATE QUANITY OF CANNABIS FROM THE CANNABIS IN THE TRAFFICKING COUNT: even if it did - Courts have rejected such an Arguement: IS A departure from the ESSENTIAL REQUIREMENTS OF LAW: Pursuant to Statute

Petitioner Contends that the 2nd D.C.A. is Correct where all of the 5 D.C.A's Case law reflect that the Police have pulled up the Cannabis Plants, Harvested it and dried it out and weighed it and when the Harvested Cannabis weighed over 25 lbs. The defendant was Charged with Trafficking, and this Conduct is not Afforded for by Statute

Petitioner Contends that this Action is Contrary to the Plain Language of the Statute and is Allowing the Police to Commit the Crime of Manufacturing 25#lbs or more of Cannabis - from a Cannabis Plant to Charge A Defendant with Trafficking in 25#lbs or more of Cannabis. When the Cultivation Count is Based on non-Callous Material and the other is not.

LEGAL ARGUEMENT

Fl Statute 893.135-(1)(a)- Any Person who knowingly sells, Purchase, Manufactures, delivers or brings into this State, or who is knowingly in Actual Possession or Constructive Possession of - in excess of 25 Pounds of Cannabis, or 300 or more Cannabis Plants, Commits a Felony of the First Degree, which Felony Shall be known as "Trafficking in Cannabis"

"The Statute Clarified" and made the Distinction between (1) CULTIVATION TRAFFICKING" in Cannabis Plants - To wit - 300 Plants or more - To wit - two

matter how Large or Small:
FOR THE PURPOSE OF THIS PARAGRAPH. A PLANT INCLUDING - BUT NOT LIMITED TO A SEEDLING OR A CUTTING IS A CANNABIS PLANT IF IT HAS SOME READILY OBSERVABLE EVIDENCE OF ROOT FORMATION, SUCH AS ROOT HAIRS. TO DETERMINE IF A PIECE OR PART OF A CANNABIS PLANT SEVERED FROM THE CANNABIS PLANT IS IT SELF A CANNABIS PLANT. THE SEVERED PIECE OR PLANT MUST HAVE SOME READILY OBSERVABLE EVIDENCE OF ROOT FORMATION, SUCH AS ROOT HAIRS. "CALLOUS" TISSUE IS NOT READILY OBSERVABLE EVIDENCE OF ROOT FORMATION. THE VIABILITY AND SEX OF A PLANT AND THE FACT THAT THE PLANT MAY NOT BE A DEAD HARVESTED PLANT ARE NOT RELEVANT IN DETERMINING IF THE PLANT IS A "CANNABIS PLANT"

The statute Clearly States that there Are two TYPES of Trafficking Requirements For "Trafficking in Cannabis" (1) 300 Cannabis Plants or More that have evidence of Root Formation - To wit - no matter how Small - to wit - A Seedling or no matter how Large - To wit - A Cutting or A Dead or Harvested Plant as long as it has Roots. and (2) 25 #lbs or more of Callous Tissue from A Cannabis Plant that has been Severed or is A Cutting or is HARvested with no evidence of Root formation - To wit - NON Callous Living tissue and Callous NON Living Tissue
The District Courts of Appeal in the State of Florida Are not Accepting the Plain Language of the Statute and the Rationale behind it.
(1) It is obvious that Individuals - Smoke Cannabis and Cannot Smoke A Living Cannabis Plant that has Roots and A defendant will commit the

Trafficking offense if he has 300 or more Plants Irregardless of the fact that the 300 or more Plants are Baby Plants - to wit - Seedlings that do not weigh more than one lb when Pulled up and is Dried out. It is Trafficking because it was 300 or more Plants Reflected by Statute for the Commission of Trafficking in Cannabis Plants of non Callous Tissue

(2) It is obvious that the 25 lbs or more of Cannabis is the Callous Tissue that is Severed from A Cannabis Plant and A Defendant would have to have 25 lbs or More of Callous Tissue to be Trafficking in Cannabis and not Trafficking in Cannabis Plants - 300 or more when it is the Callous tissue that is Smoked and used. In Perez-Riva -vs- State Supra - the 2nd D.C.A. has went so far as to Delete the 300 Plant Requirement from the Statute in its Ruling on Page 5 - Double Jeapordy Review - Stating:

(A) any Person who knowingly sells Purchases, Manufactures, delivers or brings into this State, or who is knowingly in Actual or Constructive Possession of in excess of 25 lbs of Cannabis Commits A Felony of the First Degree, which shall be known as Trafficking in Cannabis.

There is Clearly no Mentioning of the 300 Cannabis Plant Requirement in the Ruling. and the other D.C.A.'s in the State of Fl. has Stated that the Statute do not make the Distinction between Cannabis that Can be Smoked and Cannabis that Cannot be Smoked. and that contention is in error in lieu of the mentioning of Callous Material

This Assertion is where the District Courts of Appeal are in Error because the Statute Clearly States 300 or more Plants with Roots Actually

Is the Requirements FOR NON Callous Cannabis that can't be Smoked and is called A Plant by Statute- no matter how Small or Big- To it. A Seedling, Cutting, OR Dead Harvested Plant that has evidence of Root formation.

The Florida Supreme Court explained in the case of State -vs- McMahon 94 So3d 468 (Fl. 2012) FURTHER. THE COURT MUST GIVE THE STATUTORY LANGUAGE IT'S PLAIN AND ORDINARY MEANING 2.d Quoting Seagrave -vs- State 802 So2d 281, 286 (Fl. 2001)

[S] WE ARE ALSO MINDFUL THAT IN GIVING EFFECT TO THE UNAMBIGOUS TEXT OF A STATUTE COURTS MAY NOT EXTEND, MODIFY OR LIMIT THE STATUTE'S EXPRESS TERMS OR IT'S REASONABLE OR OBVIOUS IMPLICATIONS - BECAUSE TO DO SO WOULD BE AN ABROGATION OF LEGISLATIVE POWER - See Hill -vs- Davis 70 So3d 572 (Fl. 2011) Quoting Holly -vs- Auld 450 So2d 217, 219 (Fl 1984)

The District Courts of Appeal in Florida as well as the Police Departments do not Recognize and do not adhere to the Statutes Requirement. that A Cannabis Plant is non Callous Material with a Root and Cannot be used As a Controlled Substance - And it takes 300 OR More of these Cannabis Plants - That are more than normal use - because the Purpose of these Plants are to have Callous tissue that is Severed from the living Plant to be Dried and used as A Controlled Substance and it would take 2816's OR More of this Callous tissue that would be and is called Cannibas - Mainly because it is not part of the Cannabis Plants with Roots ANY more.

Petitioner was Charged with Cultivation because he had a Marijuana Grow house with 285 LARGE Cannabis Plants and the Police Pulled up the Plants with Roots and turned the non Callous Material into Callous Material by Severing the Cannabis from the Cannabis Plant and Charged Petitioner with Trafficking in Cannabis When it was Clearly the Police that Dried out the Callous Material that they Severed from the Cannabis Plant, and Manufactured over 300 lbs of Cannabis and Charged Petitioner with Committing the Trafficking infraction of Manufacturing Cannabis from A Cannabis Plant.

THE STATUTE BEING A CRIMINAL STATUTE - THE RULE THAT IT MUST BE CONSTRUED STRICTLY. NOTHING IS TO BE REGARDED AS INCLUDED WITHIN IT, THAT IS NOT WITHIN IT'S TERMS, AS WELL AS IT'S SPIRIT. NOTHING THAT IS NOT CLEARLY AND INTELLIGENTLY DESCRIBED IN IT'S LETTER OR VERY WORDS, AS WELL AS MANIFESTLY INTENDED BY THE LEGISLATURE IS TO BE CONSIDERED WITHIN IT'S TERMS. See State-vs-Wershow - 343 So2d 605 (Fl. 1977) and ex Parte Amos 93 Fl. 5, 112 So 289 (Fl. 1927)

Fl. Statute 893.135 (1)(A) do not Allow for the Police to Pull up or Harvest A non Callous-Cannabis Plant-and turn the Cannabis Plant into Callous Cannabis for the Purpose of Charging a Defendant with Trafficking Cannabis solely because the defendant do not have over 300 or More Cannabis Plants.

CONCLUSION

Petitioner has demonstrated the need for Certiorari review for the Inter Pretation of the Statute. 893.135 (1)(A) and Petitioner Request the Inter Pretation Because of the Departure from the Essential Requirements of Law.

1517

RELIEF SOUGHT

In Lieu of the Ambiguity Surrounding the District Courts of Appeal, Rulings in the State of Florida and the Plain language of the Statute 893.135 (2)(A) as to whether, the 300 Plants Requirement is A distinct and different Requirement from the 25 16's or more. When the 300 Plants or More is Based on the "Non-Callous" Living Material of A Cannabis Plant that is used to Manufacture Cannabis by Turning the unusable Non Callous Material into Callous material, and into Cannabis that is Manufactured and Require 25 16's or More of the Callous Material that do not have Root formation - and it is No Matter if it is 300 or more ½ inch high Baby Cannabis Plants 300 or more is Trafficking in Cannabis Pursuant to the Statutory Requirement

Petitioner Request that the 2nd D.C.A. either Agree with Petitioner's Interpretation of the Statute OR Request "Clarification" of the Statute Pursuant to State-vs-Klayman, 835 So2d 248 (Fl. 2002)

A DECISION BY STATE SUPREME COURT CONFIRMING THE ORIGINAL INTENT BEHIND A STATUTE IS A CLARIFICATION OF EXTANT LAW THAT APPLIES TO ALL CASES PENDING OR FINAL, DECIDED UNDER SAME VERSION OF THAT STATUTE Courts-100 (2)

WHERE LEGISLATURE CEDES NO DISCRETION TO THE COURTS EITHER DIRECTLY OR INDIRECTLY, BUT ISTEAD EMPLOYS DEFINITIVE LANGUAGE that ordinarily requires NO Judicial Construction, the Legislature intends that the Statute be Applied as enacted - Statutes-190

In Greenwade-vs-State, 124 So 3d 215 (Fl. 2013), At [8] and In Klayman at 254 - The Court Ruled:

THE LEGISLATURE THUS INTENTED AT THE TIME OF ENACTMENT FOR THE COURTS TO APPLY THE

TRAFFICKING STATUTE STRICTLY AS WRITTEN WITH REGARDS TO THE TYPES AND QUANTITIES OF PROSCRIBED SUBSTANCES:

The Two Proscribed Substances in the Cannabis Trafficking Statute are 300 Plants or more of NON CALLOUS Plant Material with Roots - no Matter how large or small -OR- 25 lbs OR more of Callous Plant Material that is Severed from the Cannabis Plant and do not have Any Root Formation that would Deem the Callous Material to be A Plant and Subjected to the 300 Plant OR more Requirement instead of the 25 lbs. For Dual Prosecutions of 300 non Callous Plants and 25 lbs of Callous Cannabis In the Dissent- Wells and Harding Stated "Based on the Majority's Decision in this case Every Decision in which a District Court has construed and applied a criminal statute is now non final until the statute is ultimately clarified by this Court. State -vs- Klayman, Supra

OATH

I Petitioner _____, Pro-Se here by Declare that Under the Penalty of Perjury That the Foregoing Document Is True And correct

_____ _____ _____
DATE SIGNATURE D.C.N.O.

CERTIFICATE OF SERVICE

I Do Hereby Certify That A True And Correct Copy of The Foregoing Document Has Been Sent via - First Class U.S. Mail To: The Att'y. General Concourse Center 4-3507 Frontage Road Tampa, Fl 33607

_____ _____
DATE SIGNATURE D.C.N.O.

EXHIBITS

(2) Second D.C.A. Case Perez-Riva-vs-State 152 So3d 98 (Fl. 2nd D.C.A. 2014

(2) Fl. Statute 893.135

(3) Fl. Supreme Court Case State-vs-McMahon 94 So3d 468 (Fl. 2012)

(4) - Greenwade-vs-State 124 So3d 215 (Fl. 2013)

*98 152 So.3d 98

39 Fla. L. Weekly D2467

District Court of Appeal of Florida,
Second District.

Eduardo PEREZ-RIVA, Appellant,
v.
STATE of Florida, Appellee.

No. 2D14-412.
Nov. 26, 2014.

Background: Defendant whose convictions and sentences for drug-related offenses were affirmed on direct appeal filed motion for postconviction relief. The Circuit Court, Lee County, Bruce E. Kyle, J., summarily denied the motion. Defendant appealed.

Holdings: The District Court of Appeal, LaRose, J., held that:

(1) police officers lacked probable cause to search around defendant's residence with a drug-sniffing dug or to obtain a search warrant for the residence;

(2) trial counsel's failure to challenge search warrant and his failure to move to suppress constituted deficient performance;

(3) prejudice prong of the *Strickland* test for ineffective assistance of counsel was satisfied; and

(4) defendant's convictions for manufacturing cannabis and trafficking in cannabis violated double jeopardy.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Controlled Substances ⚿137

96H ---
96HIV Searches and Seizures
96HIV(B) Search Without Warrant
96Hk137 Odor detection; use of dogs.

[See headnote text below]

[1] Controlled Substances ⚿148(3)

96H ---
96HIV Searches and Seizures
96HIV(C) Search Under Warrant
96Hk144 Affidavits, Complaints, and Evidence for Issuance of Warrants
96Hk148 Informants
96Hk148(3) Reliability; corroboration.

Police officers who received a tip from a confidential informant that marijuana plants were growing in defendant's garage lacked probable cause to search around defendant's residence with a drug-sniffing dog or to obtain a search warrant for the residence, even though officers noticed nails sticking through the garage door from the outside in, which was an allegedly common method of reinforcing doors to cultivate marijuana; search warrant affidavit provided no information as to the reliability of the informant, and officers only noticed the nails during their illegal use of the drug-sniffing dog. U.S.C.A. Const.Amend. 4.

[2] Criminal Law ⚿1926

110 ---
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1926 Suppression of evidence.

Trial counsel's failure to challenge search warrant that was based on a tip from a confidential informant and a search of the area around defendant's residence with a drug-sniffing dog, and his failure to move to suppress the evidence found during execution of the warrant, constituted deficient performance in drug prosecution, so as to support a claim of ineffective assistance of counsel; counsel should have been aware, at the time of defendant's trial, of precedent holding a dog sniff based on an anonymous tip to be an illegal search, and of the Supreme Court's grant of review of the issue, and record disclosed no obvious reason for counsel's inaction. U.S.C.A. Const.Amends. 4, 6.

[3] Criminal Law ⚿1926

110 ---
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues

110k1921 Introduction of and Objections to Evidence at Trial
110k1926 Suppression of evidence.

Prejudice prong of the *Strickland* test for ineffective assistance of counsel was satisfied with respect to trial counsel's deficient performance in drug prosecution in failing to challenge a search warrant that was based on a tip from a confidential informant and a search of the area around defendant's residence with a drug-sniffing dog, and in failing to move to suppress the evidence found during execution of the warrant; there was a reasonable probability of a different result if counsel had acted differently, as defendant's case was not yet final when Supreme Court announced new rule of law finding a sniff test at the front porch of a home to be a search requiring probable cause. U.S.C.A. Const.Amends. 4, 6.

[4] Courts ⇐100(1)

106 ----
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) In general; retroactive or prospective operation.

A supreme court decision announcing a new rule of law must be given retrospective application by the courts of the state in every case pending on direct review or not yet final.

[5] Criminal Law ⇐1030(1)

110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) In general.

To benefit from a change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review.

[6] Double Jeopardy ⇐146

135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk146 Drugs and narcotics.

(Formerly 135Hk135)

Defendant's convictions for manufacturing cannabis and trafficking in cannabis violated double jeopardy; both convictions were based on defendant's cultivation of the same cannabis, and the quantity requirement of trafficking was not a separate element that allowed dual prosecution. U.S.C.A. Const.Amend. 5; West's F.S.A. §§ 893.13, 893.135.

[7] Double Jeopardy ⇐134

135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk132 Identity of Offenses; Same Offense
135Hk134 Several offenses in one act; separate statutory offenses and legislative intent.

A double jeopardy analysis of an alternative conduct statute breaks the conduct elements into the specific alternative conduct which is in the other statute being compared. U.S.C.A. Const.Amend. 5.

[8] Double Jeopardy ⇐134

135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk132 Identity of Offenses; Same Offense
135Hk134 Several offenses in one act; separate statutory offenses and legislative intent.

In performing a double jeopardy analysis of an alternative conduct statute like the trafficking statute, the court must focus on the particular component of the statute that is in issue, and the court need not consider in double jeopardy analysis any alternative conduct that also could prove trafficking. U.S.C.A. Const.Amend. 5; West's F.S.A. § 893.135.

pending on direct review or not yet final." *Smith v. State*, 598 So.2d 1063, 1066 (Fla.1992). Mr. Perez-Riva's case was not final until our appellate mandate issued on October 23, 2012. Thus, his case was not yet final when our supreme court announced the new rule of law on April 14, 2011.

[5] "To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." *Id.* Had trial counsel raised these issues with the trial court and brought to its attention *Rabb*, *Jardines*, and the supreme court's acceptance of conflict jurisdiction, the trial court might have suppressed the evidence, following *Rabb* 's rationale. (FN1) Alternatively, the trial court could have followed *Jardines* and denied the motion to suppress. In that case, trial counsel could have filed a motion for a new trial based on *Jardines* because it issued within the ten-day period for a new trial motion. *See* Fla. R. Crim. P. 3.590(a), 3.600(a)(2) ("The verdict is contrary to law...."); 3.600(b)(6) ("The court erred in the decision of any matter of law arising during the course of the trial."). In either case, ***103** the probability of a different result is sufficient to undermine confidence in the outcome.

Accordingly, the postconviction court erred in summarily denying the motion on these two claims. On remand, the postconviction court should attach portions of the record refuting the claims or hold an evidentiary hearing.

Double Jeopardy

[6] Mr. Perez-Riva also argues that the postconviction court erred in denying his sixth claim, alleging that his trial counsel was ineffective for failing to object on double jeopardy grounds to his convictions and sentences for both cultivating (manufacturing) cannabis and trafficking of the same cannabis. (FN2) *See* §§ 893.13(1)(a)(2), .135(1)(a), Fla. Stat. (2010). The postconviction court concluded that cultivation and trafficking each required an element that the other did not: cultivation required manufacturing, which trafficking did not require, and trafficking required possession of twenty-five pounds or more of cannabis, which cultivation did not require.

On appeal, the State concedes error. We agree. *See, e.g., Odom v. State*, 104 So.3d 1238 (Fla. 5th DCA 2012) (holding dual convictions of attempted manufacture of methamphetamine and trafficking violated double jeopardy); *Fonseca v. State*, 114 So.3d 1010 (Fla. 5th DCA 2012) (holding convictions for both manufacturing and trafficking same drugs violated double jeopardy); *Stacey v. State*, 83 So.3d 749 (Fla. 5th DCA 2011) (holding convictions for manufacture of methamphetamine and possession of methamphetamine violated double jeopardy) (manufacture includes possession, possession has no separate element)).

Section 893.13, the basis for Mr. Perez-Riva's cultivation/manufacture charge, provides, in pertinent part, as follows:

(1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, *manufacture*, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to ... (2)[A] controlled substance named or described in s. 893.03(1)(c) [cannabis] ... commits a felony of the third degree....

Section 893.135, the basis for the trafficking charge, provides, in pertinent part, as follows:

(1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, purchases, *manufactures*, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 25 pounds of cannabis, ... commits a felony of the first degree, which felony shall be known as "trafficking in cannabis"....

(Emphasis added.)

[7][8] Because the trafficking statute is an alternative conduct statute, a double jeopardy analysis "breaks the conduct elements ***104.** into the specific alternative conduct which is in the other statute being compared." *Gibbs v. State*, 698 So.2d 1206, 1209 (Fla.1997). "[T]he court must focus on the particular component of the statute that is in issue" and the court need not consider in double jeopardy analysis any "alternative conduct" that also could prove trafficking. *Johnson v. State*, 712 So.2d 380, 381 (Fla.1998). The conduct element

of the trafficking statute is not compared by considering the entire range of conduct that could constitute trafficking to the entire range of conduct that could constitute manufacture, but rather by comparing only trafficking manufacture with simple manufacture. *Cf. Gibbs*, 698 So.2d at 1209 (holding double jeopardy analysis of trafficking and possession both based on possession should have compared only trafficking possession and simple possession). Mr. Perez-Riva could not be convicted on both counts when the underlying conduct element, i.e., manufacture, was the same for both offenses. The quantity requirement of trafficking is not a separate element that allows dual prosecution. *Gibbs*, 698 So.2d at 1209. Therefore, we reverse the postconviction court's ruling on this issue and remand for further proceedings as to Mr. Perez-Riva's ineffective assistance of counsel claim.

Conclusion

We reverse and remand to the trial court for further proceedings as to claims one, two, and six. We affirm without further comment the denial of Mr. Perez-Riva's remaining claims.

Affirmed in part, reversed in part, and remanded.

SILBERMAN and VILLANTI, JJ., Concur.

(FN1.) The trial court could have followed either *Rabb* or *Jardines* because this court had not decided the issue. *See Miller v. State*, 980 So.2d 1092, 1094 (Fla. 2d DCA 2008) (holding that a single district court's opinion is binding on all state trial courts and that "[i]f there is unresolved conflict between the district courts, the trial court is bound by the precedent in its own appellate district") (citing *Pardo v. State*, 596 So.2d 665, 666-67 (Fla.1992)).

(FN2.) The State does not argue that the cultivation count is based on a separate quantity of cannabis from the cannabis in the trafficking count; even if it did, courts have rejected such an argument. *See McGlorthon v. State*, 908 So.2d 554, 556 (Fla. 2d DCA 2005) (holding that conviction of two counts of possession could not be based on separate quantities found in the same search); *Fleurimond v. State*, 10 So.3d 1140, 1149 (Fla. 3d DCA 2009) ("[D]ual convictions for possession of the same type of drugs, found at the same time, even though found in different locations, ... constitutes a double jeopardy violation."); *Sims v. State*, 793 So.2d 1153, 1154 (Fla. 4th DCA 2001) (holding that convictions for possession with intent to sell and simple possession could not be based on cannabis being found in different parts of the house in the same search); *accord Gonzalez v. State*, 123 So.3d 691, 692 (Fla. 4th DCA 2013).

Fla. Stat. § 893.135

*** STATUTES AND CONSTITUTION ARE CURRENT THROUGH ACT 2009-51 OF THE 2009 REGULAR SESSION ***
*** Annotations current through June 12, 2009 ***

TITLE 46. CRIMES (Chs. 775-896)
CHAPTER 893. DRUG ABUSE PREVENTION AND CONTROL

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 893.135 (2009)

§ 893.135. Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking

(1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 25 pounds of cannabis, or 300 or more cannabis plants, commits a felony of the first degree, which felony shall be known as "trafficking in cannabis," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity of cannabis involved:

1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but not more than 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $ 25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but not more than 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $ 50,000.

3. Is 10,000 pounds or more, or is 10,000 or more cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $ 200,000.

For the purpose of this paragraph, a plant, including, but not limited to, a seedling or cutting, is a "cannabis plant" if it has some readily observable evidence of root formation, such as root hairs. To determine if a piece or part of a cannabis plant severed from the cannabis plant is itself a cannabis plant, the severed piece or part must have some readily observable evidence of root formation, such as root hairs. Callous tissue is not readily observable evidence of root formation. The viability and sex of a plant and the fact that the plant may or may not be a dead harvested plant are not relevant in determining if the plant is a "cannabis plant" or in the charging of an offense under this paragraph. Upon conviction, the court shall impose the longest term of imprisonment provided for in this paragraph.

(b) 1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into

(159)

STATE-VS-M'MAHON-94 So3d 468 (Fl. 2012)

See > Chaves-Mendez, 809 So.2d at 910-11.

> [1] Although > Chaves-Mendez can be distinguished from > McMahon, in part, on the basis that the sentence in > Chaves-Mendez was apparently an improper downward departure sentence, see > Chaves-Mendez, 809 So.2d at 911 (Sawaya, J., concurring and concurring specially), that fact is not apparent in the majority opinion. The majority opinion in > Chaves-Mendez conflicts with > McMahon in that > Chaves-Mendez allowed a State appeal on the claim that the trial court improperly initiated a plea dialogue whereas > McMahon did not. Moreover, by holding such an error to be per se reversible, > Chaves-Mendez misapplied our decision in > Warner wherein we made clear that error by the trial court in improperly initiating a plea dialogue is subject to harmless error analysis. See > Warner, 762 So.2d at 515 n. 14. > (FN2)

To resolve the conflict presented in this case--whether the State may appeal a sentence that is otherwise legal on the ground that the trial court improperly initiated a plea dialogue with a defendant--we begin by addressing the State's right to appeal in a criminal case.

ANALYSIS

> [2]> [3]> [4] "The State's right to appeal in a criminal case must be 'expressly conferred by statute.' " > Exposito v. State, 891 So.2d 525, 527 (Fla.2004) (quoting > Ramos v. State, 505 So.2d 418, 421 (Fla.1987)). The State's authority to appeal a criminal case is set forth in > sections 924.07 and > 924.071, Florida Statutes (2009). > (FN3) > Section 924.07(1), Florida Statutes (2009), authorizes the State to appeal in a criminal case in the following circumstances:

(1) The state may appeal from:

(a) An order dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a criminal offense, the violation of probation, the violation of community control, or the violation of any supervised correctional release.

(b) An order granting a new trial.

(c) An order arresting judgment.

(d) A ruling on a question of law when the defendant is convicted and appeals from the judgment. Once the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal.

(e) The sentence, on the ground that it is illegal.

(f) A judgment discharging a prisoner on habeas corpus.

(g) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure.

(h) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.

(i) A sentence imposed below the lowest permissible sentence established by the Criminal Punishment Code under chapter 921.

(j) A ruling granting a motion for judgment of acquittal after a jury verdict.

(k) An order denying restitution under s. 755.089.

(l) An order or ruling suppressing evidence or evidence in limine at trial.

(m) An order withholding adjudication of guilt in violation of s. 775.08435.

(2) An appeal under this section must embody all assignments of error in each pretrial order that the state seeks to have reviewed. The state shall pay all costs of the appeal except for the defendant's attorney's fee.

> § 924.07, Fla. Stat. (2008) (emphasis added). These limitations on the State's right to appeal in a criminal case are not new; the State's right to appeal in criminal cases historically has been extremely limited. See, e.g., State v. Burns, 18 Fla. 185 (1881). Statutes such as > section 924.07 "which afford the government the right to appeal in criminal cases should be construed narrowly." > Exposito, 891 So.2d at 528 (quoting > State v. Jones, 488 So.2d 527, 528 (Fla.1986)). Further, the Court "must give the 'statutory language its plain and ordinary meaning.' " > Id. (quoting > Seagrave v. State, 802 So.2d 281, 286 (Fla.2001)).

> [5] We are also mindful that in giving effect to the unambiguous text of a statute, courts may not extend, modify, or limit the statute's express terms or its reasonable or obvious implications because "[t]o do so would be an abrogation of legislative power." See > Hill v. Davis, 70 So.3d 572, 575 (Fla.2011) (quoting > Holly v. Auld, 450 So.2d 217, 219 (Fla.1984)). Therefore, we are not at liberty to judicially modify the authorizing statute to extend to the State authority to appeal a sentence based on any grounds other than those specifically specified by the Legislature.

> Florida Rule of Appellate Procedure 9.140(c), which serves as the procedural counterpart to > section 924.07, Florida Statutes, lists the same types of orders that the State may appeal in a criminal case. See > Fla. R.App. P. 9.140(c)(1). Subdivision (c)(1)(M) of the rule provides that the State may appeal an order "imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines." > Fla. R.App. P. 9.140(c)(1)(M). In this case, the conflict question concerns

> 124 So.3d 215
38 Fla. L. Weekly S717
Supreme Court of Florida.
Baron GREENWADE, Petitioner.
v.
STATE of Florida, Respondent.
No. SC12-598.
Oct. 17, 2013.

Background: Defendant was convicted in the Circuit Court, Duval County, David M. Gooding, J., of trafficking in cocaine in amount more than 200 grams, but less than 400 grams. Defendant appealed. The District Court of Appeal, > 80 So.3d 371, affirmed and certified conflict. Defendant filed application for review.

Holding: The Supreme Court, Lewis, J., held that evidence did not establish quantity element of trafficking charge, where state combined, tested, and weighed contents of nine small bags found in defendant's possession instead of testing each bag for cocaine individually before commingling and weighing their contents.

Decision quashed.

Canady, J., dissented, with opinion, in which Polston, C.J., concurred.

West Headnotes

> [1] Controlled Substances K> 34

96H ---
96HII Offenses
96Hk32 Sale, Distribution, Delivery, Transfer or Trafficking
> 96Hk34 Elements in general.

To support a conviction for trafficking in cocaine in an amount greater than 200 but less than 400 grams, the state must prove three essential elements beyond a reasonable doubt: (1) the defendant knowingly sold, purchased, manufactured, brought into the state, or actively or constructively possessed a certain substance, (2) the substance was cocaine, and (3) the quantity of the substance met the statutory weight threshold. > West's F.S.A. § 893.135(1)(b).

> [2] Criminal Law K> 561(1)

110 ---
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k561 Reasonable Doubt
> 110k561(1) In general.

The state is required to prove each and every element of the offense charged beyond a reasonable doubt to establish a prima facie case.

> [3] Criminal Law K> 753.2(6)

110 ---
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
> 110k753.2(6) Suspicion or conjecture; reasonable doubt.

If the prosecution fails to meet its burden of proving each element of the offense charged beyond a reasonable doubt, the case should not be submitted to the jury, and a judgment of acquittal should be granted.

> [4] Criminal Law K> 1134.70

110 ---
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
> 110k1134.70 In general.

[See headnote text below]

> [4] Criminal Law K> 1139

110 ---
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
> 110k1139 In general.

Supreme Court reviews the denial of a motion for judgment of acquittal de novo, and will not reverse a conviction that is supported by competent, substantial evidence.

> [5] Criminal Law K> 1144.13(3)

110 ---
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
> 110k1144.13(3) Construction in favor of government, state, or prosecution.

[See headnote text below]

> [5] Criminal Law K> 1159.2(7)

110 ---
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
> 110k1159.2(7) Reasonable doubt.

The state has presented sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the state, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt.

> [6] Criminal Law K> 741(6)

110 ---
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
> 110k741(6) Circumstantial evidence.

[See headnote text below]

> [6] Criminal Law K> 753.2(3.1)

110 ---
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
> 110k753.2(3.1) In general.

[See headnote text below]

> [6] Criminal Law K> 753.2(6)

110 ---
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
> 110k753.2(6) Suspicion or conjecture; reasonable doubt.

State is not required, in order to survive motion for acquittal, to conclusively rebut every possible variation of events which could be inferred from evidence, but is required only to prove each element of offense charged beyond a reasonable doubt; once the state meets this threshold burden, it is the responsibility of the jury to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

> [7] Controlled Substances K> 74

96H ---
96HIII Prosecutions
96Hk70 Weight and Sufficiency of Evidence
> 96Hk74 Substance and quantity in general.

[See headnote text below]

> [7] Controlled Substances K> 82

96H ---
96HIII Prosecutions
96Hk70 Weight and Sufficiency of Evidence
> 96Hk82 Sale, distribution, delivery, transfer or trafficking.

There was insufficient evidence to support conviction for trafficking in cocaine in amount more than 200 grams, but less than 400 grams, as the state combined, tested, and weighed the contents of nine small bags found in defendant's possession instead of testing each bag for cocaine individually before commingling and weighing their contents; cocaine, a white powder, was a substance that posed an identifiable danger of misidentification, and the state, in effect, by commingling the bags before testing each individual bag, could eliminate any possibility of

the three measured bales, the State could not establish that the defendants possessed more than 10,000 pounds of marijuana. > Id. at 311-12. As a result, the court reversed the defendants conviction for trafficking in more than 10,000 pounds, but held that the State had established the defendants were guilty of the lesser included offense of trafficking between 2,000 and 10,000 pounds. > Id. at 312. The defendants asserted that the district court should apply > Ross and hold that when marijuana is separately packaged, an examination of only some of those packages is insufficient to prove that all of those packages contain marijuana. > Id. The district court refused to apply > Ross, stating:

We decline to interpret this dicta [from > Ross] to mean that in all cases all packages must be examined. Instead, the lack of visual examination should be just one factor considered when determining the sufficiency of the evidenceregarding the identification of marijuana. There may be cases, as here, where the circumstantial evidence is sufficient so that it would be unnecessary to require law enforcement to examine all packages.

> Id. (emphasis supplied).

Finally, in > Lyons v. State, the defendant was convicted of trafficking in cocaine in an amount greater than 400 grams after two bricks of powdered cocaine were discovered in the defendant's car during a traffic stop. > 807 So.2d 709, 710 (Fla. 5th DCA 2002). The two bricks were found hidden in the backseat of the car inside a cereal box that was packed inside a grocery bag. > Id. Testimony during trial revealed that the two bricks were "approximately the same size and were otherwise similar in appearance to one another." > Id. at 711. Further testimony indicated that the two bricks were not tested for the presence of cocaine until after they were commingled, but once they were commingled, the aggregate substance tested positive for cocaine and weighed 813.4 grams. > Id. at 710.

The > Lyons court recognized that the rule delineated in > Ross was relevant, but concluded that it was distinguishable primarily because the size of the nearly identical bricks, which weighed over double the statutory threshold, was enough for a jury to reasonably find that one of the two nearly identical bricks contained at least 400 grams of a substance containing cocaine. > Id. at 711. As a result, the district court upheld the defendant's conviction for trafficking in cocaine in an amount greater than 400 grams. > Id.

In sum, the two different lines of case law described above provide a comprehensive history of how the rule originally delineated in > Ross has either been applied or materially distinguished. In virtually all cases in which law enforcement have encountered a defendant in possession of multiple individually wrapped packets of white powder suspected to be a controlled substance, but failed to independently chemically test each individual packet, both state and federal courts have held that the defendant's motion for judgment of acquittal should have been, or was properly, granted on the basis that the State failed to meet its burden to prove the essential element of weight. The application of > Ross has not been limited to only substances suspected to be cocaine, but has also been extended to other drugs that share a similar white powdery appearance, such as heroin and methamphetamine.

Conversely, when the chemical composition and structure of the substance at issue differs from a white powder—e.g., marijuana or crack cocaine—courts have almost universally not applied > Ross and have allowed the State to prove the weight and identity of a substance with circumstantial evidence. Before the decision under review was issued, > Lyons was the only case that allowed the State to use circumstantial evidence to prove the identity and weight of a white powdery substance suspected to be cocaine.

The decision of the First District below falls outside of this consistent line of case law and holds that the Legislature's policy reason for penalizing possession of mixtures or compounds containing cocaine articulated in > Yu "legitimizes" the practice of commingling and weighing the contents of multiple packets of white powder before chemical testing. See > Greenwade, 80 So.3d at 374. However, we conclude that the First District's reliance on the "legislative policy" articulated by this Court in > Yu was misguided. As previously noted, in > Yu we upheld the constitutionality of > section 893.135 against the claim that penalizing possession of a certain amount of "any mixture containing cocaine" without regard to the percentage of cocaine in the mixture was a violation of due process and equal protection. > Yu, 400 So.2d at 764-65. In upholding the statute's constitutionality, we stated that:

The legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine and thus could pose a greater potential for harm to the public.

> Id. at 765 (emphasis supplied). The decision below makes no mention of > Yu's constitutional posture, despite relying almost entirely upon > Yu and this purported "policy decision by the [L]egislature" to justify its adoption of the totality of the circumstances approach. See > Greenwade, 80 So.3d at 372, 374. The applicability of > Yu to the legal issue presented, however, is limited because the issue before the Court today is neither constitutional in nature, nor does it involve a determination of whether it is permissible for the State to seek a conviction for trafficking without determining the percentage of illegal drugs in the tested substance. See > Yu, 400 So.2d at 764. Accordingly, we conclude that it was inappropriate for the First District to rely on limited select portions of > Yu as a basis for adopting the circumstantial evidence test.

This Case

> [7] We believe the decision in > Ross was well reasoned, and we adopt its analysis here. Courts across Florida have almost universally followed the rule delineated in > Ross for decades because it provides a concise and simple rule for prosecutors, law enforcement officers, and courts to follow. > Ross supports and enhances the clarity, transparency, and credibility of the evidence collection process and the criminal justice system as a whole. Further, we find the approach articulated by the Third District in > Ross to be more consistent with our statutory scheme and the proper administration of justice.

> [8] It is a basic rule of statutory construction that statutes that are penal in nature must be strictly construed, and the conduct of the accused must fall plainly and unmistakably within the criminal statute to justify a conviction. > Nell v. State, 277 So.2d 1, 4 (Fla.1973). It is apparent from the plain language of the relevant statutory sections that the Legislature intended to define and punish trafficking in different types of substances differently based upon the chemical composition of the substance involved. > Section 893.135, the statute under which Greenwade was charged and convicted, indicates that the Legislature intended to harshly punish the distribution of controlled substances or mixtures of controlled substances. See > § 893.135, Fla. Stat. (2009). Specifically, the statute punishes offenders for trafficking in cocaine, heroin, and methamphetamine—the three controlled substances referenced by the cases above as resembling a white powdery substance—by making the crime a first-degree felony that carries amandatory-minimum sentence ranging from a minimum of three years to life imprisonment, and fines that range from $50,000 to $500,000. See > § 893.135(1)(b), (c), (f), Fla. Stat. (2009).

It is equally apparent that the Legislature specifically intended to punish the distribution of counterfeit and look-alike substances less harshly. See > § 831.31, Fla. Stat. (2009); > § 817.563, Fla. Stat. (2009). Under > section 817.563:

It is unlawful for any person to agree, consent, or in any manner offer to unlawfully sell to any person a controlled substance named or described in s. 893.03 and then sell to such person any other substance in lieu of such controlled substance.

> § 817.563, Fla. Stat. (2009). While > section 831.31(1) provides:

It is unlawful for any person to sell, manufacture, or deliver, or to possess with intent to sell, manufacture, or deliver, a counterfeit controlled substance.[> (FN5)]

> § 831.31(1), Fla. Stat. (2009). Violators of these sections may face a range of criminal charges from a second-degree misdemeanor to a third-degree felony. See > § 831.31, Fla. Stat.; > § 817.563, Fla. Stat. A second-degree misdemeanor is punishable by a maximum of sixty days' imprisonment and a $500 fine, while a third-degree felony is punishable by a maximum of five years' imprisonment and a $5,000 fine. See > §§ 775.082-83, Fla. Stat. (2009).

It is so ordered. (QUINCE, CANADY, LABARGA, and PERRY, JJ., concur. LEWIS, J., concurs in result. POLSTON, C.J., dissents with an opinion.)

[1]The National Employment Lawyers Association, Florida Chapter, which is an organization that consists of attorneys who represent employees in claims filed under the FCRA, filed an amicus curiae brief in support of the Petitioner.

[2]The Human Rights Act of 1977 was the former name of the FCRA until the Legislature changed the name in 1992. *See* ch. 92-177, § 1, Laws of Fla. Although the name has been changed and the Legislature made several other statutory revisions in 1992, as well as in the late 1970s and early 1980s, Florida law has prohibited discrimination in employment practices based on an individual's "sex" since the Human Rights Act was first enacted. *See* ch. 77-341, § 6, Laws of Fla. (stating that "[i]t is an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex").

[3]Although the Third District accurately quoted from *O'Loughlin*, it is not entirely clear whether the First District in *O'Loughlin* actually held that the FCRA does not encompass pregnancy discrimination. While the First District's decision stated that the FCRA does not "recognize[ ] that discrimination against pregnant employees is sex-based discrimination," the First District's decision ultimately affirmed the appellant's recovery for pregnancy discrimination based upon a claim she filed under only the FCRA. *O'Loughlin*, 579 So. 2d at 791, 792, 796. As noted by the Fourth District in *Carsillo*, 995 So. 2d at 1120, reliance on *O'Loughlin* has produced varying results over the years, as the case "has been interpreted differently by federal district courts in which pregnancy discrimination claims have been asserted under the Florida Act."

Some courts have recognized that *O'Loughlin* actually affirmed an award of back pay for pregnancy discrimination under the FCRA, while others have interpreted *O'Loughlin* as construing the FCRA to prohibit recovery for pregnancy-based discrimination. *See, e.g., Boone v. Total Renal Labs., Inc.*, 565 F. Supp. 2d 1323, 1326 (M.D. Fla. 2008) (acknowledging that "[c]ourts have differed in their characterization of the *O'Loughlin* court's holding" and concluding that *O'Loughlin* stands for the proposition that the FCRA does "not cover pregnancy discrimination"); *Jolley v. Phillips Educ. Grp. of Central Fla., Inc.*, No. 95-147-CIV-ORL-22, 1996 WL 529202, at *6 (M.D. Fla. July 3, 1996) (explaining that *O'Loughlin* "entertained a pregnancy-based discrimination suit" under the FCRA and recognizing a state law claim for pregnancy discrimination). Another federal court has recently acknowledged the confusion and inconsistency in the law in this area. *See Wright v. Sandestin Invs., LLC*, 914 F. Supp. 2d 1273, 1281-82 (N.D. Fla. 2012) (noting that the Florida district courts of appeal are not in agreement as to "whether pregnancy discrimination is actionable under the FCRA"; observing that federal district courts in Florida are "divided on the issue," which has not been addressed by the Eleventh Circuit Court of Appeals; and anticipating this Court's ruling in this case).

(POLSTON, C.J., dissenting.) I respectfully dissent because the plain meaning of the Florida Civil Rights Act does not encompass pregnancy discrimination.

Specifically, section 760.10, Florida Statutes (2011) (emphasis added), of the Florida Civil Rights Act of 1992 provides the following:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, national origin, age, handicap, or marital status.

The plain meaning and fair import of the term "sex" as used in section 760.10 is gender, meaning whether one is female or male. *See Merriam Webster's Collegiate Dictionary* 1073 (10th ed. 2001) (defining "sex" as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male"); *Garner's Modern American Usage* 739 (3d ed. 2009) (defining the noun "sex" by referring the reader to the definition of "gender"). On its face, the term "sex" does not refer to whether one is pregnant or not pregnant even though that status is biologically confined to one gender. *See Boone v. Total Renal Labs., Inc.*, 565 F. Supp. 2d 1323, 1325 (M.D. Fla. 2008) ("On its face, the FCRA does not cover pregnancy."); *see also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (concluding that pregnancy discrimination does not in itself constitute sex discrimination while interpreting Title VII of the federal Civil Rights Act, which at the time included language very similar to Florida's current statute). Therefore, pursuant to the statute's plain meaning, section 760.10's prohibition against sex discrimination does not encompass discrimination on the basis of pregnancy.

Accordingly, I would approve the holding of the Third District, and I respectfully dissent. I also note that recourse for pregnancy discrimination unquestionably exists for Floridians under the plain meaning of current federal law. *See Boone*, 565 F. Supp. 2d at 1326-27 ("Title VII, as amended by the PDA, provides a cause of action for pregnancy discrimination and thus is broader in its protections than the FCRA.").

* * *

Criminal law—Grand theft—Dealing in stolen property—Jury instructions—Where charges of theft and dealing in stolen property are in connection with one scheme or course of conduct, it is error for trial court to deny request for jury instruction informing jury that it cannot return guilty verdicts for both offenses in connection with one scheme or course of conduct

TONSHAD LEVON CULPEPPER, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. SC13-417. April 17, 2014. Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions. Second District—Case No. 2D11-4647 (Polk County). Counsel: Howard L. Dimmig, II, Public Defender, and Karen M. Kinney, Assistant Public Defender, Bartow, for Petitioner. Pamela Jo Bondi, Attorney General, Tallahassee; Robert J. Krauss, Chief-Assistant Attorney General and Dawn A. Tiffin, Assistant Attorney General, Tampa, for Respondent. 137 So3d 378 - 2014

(QUINCE, Judge.) We have for review *Culpepper v. State*, 107 So. 3d 521 (Fla. 2d DCA 2013), in which the Second District Court of Appeal affirmed the trial court's dismissal of a conviction of grand theft when the defendant was charged with both grand theft and dealing in stolen property in connection with one scheme or course of conduct. The Second District certified conflict with *Kiss v. State*, 42 So. 3d 810 (Fla. 4th DCA 2010), and certified the same questions it had certified in *Williams v. State*, 66 So. 3d 360 (Fla. 2d DCA 2011), *quashed*, 121 So. 3d 524 (Fla. 2013). At the time that the Second District issued its decision below, *Williams* was pending review in this Court. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

We stayed proceedings in this case pending disposition of *Williams v. State*, 121 So. 3d 524 (Fla. 2013). In *Williams*, we held that the defendant's convictions for dealing in stolen property and grand theft violated section 812.025, Florida Statutes (2008); that the trial court erred in denying the defendant's request for a jury instruction modeled after that section; and that the trial court erred in precluding defense counsel from arguing during closing arguments that the jury could find the defendant guilty of either offense. *Id.* at 534. We concluded that the errors were harmful and quashed the Second District's decision. *Id.* We then issued an order in the instant case directing Respondent to show cause why this Court should not accept jurisdiction, summarily quash the Second District's decision below, and remand for reconsideration in light of our decision in *Williams*. Respondent filed a response conceding that it was "unable to show cause why this Court should not accept jurisdiction and remand for reconsideration in light of its opinion in *Williams*." Petitioner did not file a reply.

Upon consideration of Respondent's response, we grant the petition for review, quash the district court's decision in *Culpepper*, and remand this case to the Second District with instruction that the case be remanded to the trial court for further proceedings consistent with this Court's decision in *Williams*.

It is so ordered. (POLSTON, C.J., and PARIENTE, LEWIS, CANADY, LABARGA, and PERRY, JJ., concur.)

* * *

63

Criminal law—Grand theft—Dealing in stolen property—Jury instructions—Where charges of theft and dealing in stolen property are in connection with one scheme or course of conduct, it is error for trial court to deny request for jury instruction informing jury that it cannot return guilty verdicts for both offenses in connection with one scheme or course of conduct 187 So3d 138

TERRICK M. CROSBY, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. SC13-1193. April 17, 2104. Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions. Second District—Case No. 2D11-463 (Collier County). Counsel: Terrick M. Crosby, pro se, Malone, for Petitioner. Pamela Jo Bondi, Attorney General, Tallahassee, and Susan Mary Shanahan, Assistant Attorney General, Tampa, for Respondent.

(QUINCE, Judge.) We have for review *Crosby v. State*, 125 So. 3d 822 (Fla. 2d DCA 2013), in which the Second District Court of Appeal affirmed the trial court's dismissal of a conviction of grand theft when the defendant was charged with both grand theft and dealing in stolen property in connection with one scheme or course of conduct. The Second District certified conflict with *Kiss v. State*, 42 So. 3d 810 (Fla. 4th DCA 2010), and certified the same questions it had certified in *Williams v. State*, 66 So. 3d 360 (Fla. 2d DCA 2011), *quashed*, 121 So. 3d 524 (Fla. 2013). At the time that the Second District issued its decision below, *Williams* was pending review in this Court. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

We stayed proceedings in this case pending disposition of *Williams v. State*, 121 So. 3d 524 (Fla. 2013). In *Williams*, we held that the defendant's convictions for dealing in stolen property and grand theft violated section 812.025, Florida Statutes (2008); that the trial court erred in denying the defendant's request for a jury instruction modeled after that section; and that the trial court erred in precluding defense counsel from arguing during closing arguments that the jury could find the defendant guilty of either offense. *Id.* at 534. We concluded that the errors were harmful and quashed the Second District's decision. *Id.* We then issued an order in the instant case directing Respondent to show cause why this Court should not accept jurisdiction, summarily quash the Second District's decision below, and remand for reconsideration in light of our decision in *Williams*. Respondent filed a response conceding that it was "unable to show cause why this Court should not accept jurisdiction and remand for reconsideration in light of its opinion in *Williams*." Petitioner agreed.

Accordingly, we grant the petition for review, quash the district court's decision in *Crosby*, and remand this case to the Second District with instruction that the case be remanded to the trial court for further proceedings consistent with this Court's decision in *Williams*.

It is so ordered. (POLSTON, C.J., and PARIENTE, LEWIS, CANADY, LABARGA, and PERRY, JJ., concur.)

* * *

Melvin D. WILLIAMS, Petitioner,

v.

STATE of Florida, Respondent.

No. SC11-1543.

Supreme Court of Florida.

Aug. 29, 2013.

Background: Defendant was convicted in the Circuit Court, Hillsborough County, Gregory P. Holder, J., of burglary of an unoccupied dwelling, dealing in stolen property, and providing false information to a pawnbroker. Defendant appealed. The District Court of Appeal, 66 So.3d 360, affirmed and certified questions of great public importance.

Holdings: The Supreme Court, Quince, J., held that:

(1) where both theft and dealing in stolen property counts were submitted to the jury, trial court was required to instruct jury that it could not convict defendant of both offenses in connection with one scheme or course of conduct;

(2) defendant's dealing in stolen property and grand theft offenses were in connection with one scheme or course of conduct;

(3) trial judge erred in precluding defense counsel from asserting during closing arguments that the jury could find defendant guilty of theft "or" dealing in stolen property; and

(4) defendant was prejudiced by trial court's erroneous failure to give his requested instruction.

Quashed.

Canady, J., filed dissenting opinion.

1. Criminal Law ⇐1139

Supreme Court's interpretation of a statute is a purely legal matter and subject to a de novo standard of review.

2. Statutes ⇐1111

When a statute is clear, a court need not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent; the plain and ordinary meaning of the words of a statute must control.

3. Larceny ⇐27
Receiving Stolen Goods ⇐6

The trier of fact is precluded from returning guilty verdicts on both theft and dealing in stolen property in connection with one scheme or course of conduct, notwithstanding that the State has proven both offenses beyond a reasonable doubt; the trier of fact must make a choice as to 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. West's F.S.A. §§ 812.014, 812.019, 812.025.

4. Larceny ⇐70(1)
Receiving Stolen Goods ⇐9(2)

Trial courts have an obligation to instruct the jury that it cannot convict a defendant of both dealing in stolen property and theft in connection with one scheme or course of conduct when both theft and dealing in stolen property counts are submitted to the jury. West's F.S.A. §§ 812.014, 812.019, 812.025.

5. Larceny ⇐27
Receiving Stolen Goods ⇐6

Defendant's dealing in stolen property and grand theft offenses were "in connection with one scheme or course of conduct," and thus defendant could not be convicted of both offenses; the specific items stated in the two counts were identical, defendant had sold to pawn shop some of the items that he had taken from victim's house the day prior, and there was no clearly disjunctive interval of time or set of circumstances to meaningfully disrupt the flow of defendant's conduct. West's F.S.A. §§ 812.014, 812.019, 812.025.

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐2086

Where both theft and dealing in stolen property counts were submitted to the jury, trial judge erred in precluding defense counsel from asserting during closing arguments that the jury could find defendant guilty of theft "or" dealing in stolen property. West's F.S.A. § 812.025.

7. Criminal Law ⇐1163(1)

The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

8. Criminal Law ⇐1173.2(1)

Trial court's failure to give defendant's requested instruction, prohibiting jury from convicting defendant of both dealing in stolen property and theft in connection with one scheme or course of conduct, was prejudicial error, such that defendant was entitled to new trial; jury returned verdict convicting defendant of both offenses, and although trial court thereafter dismissed the lesser grand theft conviction, had the trial court granted defendant's request, the jury could have acquitted defendant of the greater offense while convicting him of the lesser grand theft offense. West's F.S.A. §§ 812.014, 812.019, 812.025.

James Marion Moorman, Public Defender, and Carol J.Y. Wilson, Assistant Public Defender, Bartow, FL, for Petitioner.

Pamela Jo Bondi, Attorney General, Tallahassee, FL; Robert J. Krauss, Chief Assistant Attorney General and Danilo Cruz-Carino, Assistant Attorney General, Tampa, FL, for Respondent.

QUINCE, J.

This case is before the Court for review of the decision of the Second District Court of Appeal in *Williams v. State*, 66 So.3d 360 (Fla. 2d DCA 2011), which certified to this Court three questions of great public importance. *Id.* at 361.[1] We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. We rephrase the certified questions as follows:

1. MUST A TRIAL COURT INSTRUCT THE JURY PURSUANT TO SECTION 812.025, FLORIDA STATUTES (2008), WHEN BOTH THEFT

1. The Second District asked:
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?
Id. at 365.

AND DEALING IN STOLEN PROPERTY OFFENSES ARE SUBMITTED TO THE JURY?

2. IF A TRIAL COURT DENIES A DEFENDANT'S REQUEST FOR A JURY INSTRUCTION UNDER SECTION 812.025, MUST THE DEFENDANT BE GIVEN A NEW TRIAL IF THE JURY CONVICTS THE DEFENDANT OF BOTH THEFT AND DEALING IN STOLEN PROPERTY CONTRARY TO SAID STATUTE?

We answer both rephrased questions in the affirmative. Accordingly, we quash the decision of the Second District in this case.

I. FACTS AND PROCEDURAL HISTORY

On the evening of August 8, 2008, the victim discovered that her house had been broken into and that two video game systems, games, about thirty DVDs, and a digital camera were taken from her house. The intruder entered and exited the home through the kitchen window. Melvin Williams' fingerprints were on a PVC pipe which had been used by the victim to secure the kitchen window. The next afternoon, Williams sold a video game system and games to a pawn shop for $40. For this transaction, Williams signed the pawn shop's contract, affixed his thumbprint to the contract, and presented his driver's license. The items Williams sold to the pawn shop were positively identified by the victim.

The State charged Williams with one count of burglary of an unoccupied dwelling; one count of grand theft, a third-degree felony; one count of dealing in stolen property, a second-degree felony; and one count of providing false information to a pawnbroker. After the State presented its case-in-chief, Williams moved for a judgment of acquittal. According to Williams, the State failed to present a prima facie case that he committed the burglary, evidence that he knowingly possessed the items, evidence that he falsified information on the pawnbroker form, and sufficient evidence of value. The trial court denied Williams' motion. Williams did not put on a defense.

Based on section 812.025, Florida Statutes, Williams requested that the jury be given the following instruction:

> CHARGING THEFT AND DEALING IN STOLEN PROPERTY
>
> 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.

Williams' request apprised the trial judge of pertinent language from our decision in *Hall v. State*, 826 So.2d 268 (Fla.2002):

> 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.

Id. at 271. As to this proposed jury instruction, the following exchange took place:

> DEFENSE COUNSEL: ... The issue is that Dealing [in] stolen property or Grand Theft should be decided by the trier of fact.
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> THE COURT: They will be, both of them will be.
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> DEFENSE COUNSEL: Right. But the jury, based upon Florida Statute 812.025 which reads that a person can be only convicted of one or the other, then the next step is for the jury to determine one or the other and that [is] decided by the jury, not later on by the Court once a conviction is made.
>
> THE COURT: Negative. I'm not doing that. There's no standard jury instruction, nor do these cases abrogate the ability of this Court and, indeed, the responsibility of this Court to properly evaluate this issue as a matter of law. We are not going to convert this jury into lawyers. It would be entirely confusing for this jury to be given this conflicting, contrasting instruction that has not yet been reviewed and ultimately approved or blessed by the Florida Supreme Court. As such, I'm not submitting this issue to the jury, but I will reserve jurisdiction to address this issue, which is well-raised and timely raised, at the appropriate time after the jury has considered all the evidence.
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> DEFENSE COUNSEL: Your Honor, specifically, if I may, ... *Hall v. State* I believe addresses that particular issue....
>
> THE COURT: Do any of these cases say that the Court can't properly go back and fix this issue as a matter of law after the jury has rendered its verdict?
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> DEFENSE COUNSEL: Yes, Your Honor, one does say that.
>
> THE COURT: And which one would that be?
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> DEFENSE COUNSEL: It would be *Hall* that I provided to the court....
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> THE COURT: I note for the record that our Supreme Court, despite having raised this issue in 2002 in the *Hall* case has not yet seen fit to encourage our Florida Bar committee on criminal jury instructions to properly write an instruction as it relates to section 812.025 of the Florida Statutes. I find this to be abysmal in light of the fact that this jury must be properly instructed in accordance with Florida law and no jury instruction has yet been crafted by that committee or approved by the Florida Supreme Court. I profess a complete lack of any understanding as to any valid justification for the lack of action by this committee and/or the Florida Supreme Court.
>
> I will on this record encourage that committee and, indeed, our Florida Supreme Court to fulfill the responsibilities incumbent upon those bodies to properly give guidance to these trial courts and these juries as it relates to Florida law. That's all I'm going to say about that, because this is not good, folks, because there is no guidance whatsoever other than these cases, *Hall*, that say, Oh, yeah, you've got to do this, trial court. We're not going to tell you how to do it, just figure it out....
>
> But I just don't think saying you may return a guilty verdict for one or the other but not both would be essentially telling the jury, well, it's either grand theft, either he took all this, or he sold some of if [sic] to a pawn broker. There's no way they're going to be able to make that determination without getting confused....
>
> DEFENSE COUNSEL: The jury has to make the decision....
>
> THE COURT: [The proposed instruction, which was taken] right out of the *Hall* case ... is woefully inadequate as it relates to this very complicated issue of law....
>
> THE COURT: So despite the wording of the *Hall* court, we, the trial court, are left in this dilemma. And it is a dilemma that I will solve as follows:
>
> *I'm denying the defense request for the jury instruction* finding that, as written, it is woefully inadequate. I fur-

ther find that there is no way humanly possible for this Court to ... craft a lawful instruction given the absence of guidance from our appellate courts....

I will take action and entertain a proper defense motion as it relates to this very issue subsequent to the jury reaching a verdict, but before judgment is entered as it relates to the defendant, if. indeed that is even necessary....

DEFENSE COUNSEL: Well, Your Honor, the defense in the closings wouldn't be able to say, Look, Members of the jury, you can find him guilty of Grand Theft or Dealing in Stolen Property if we're not going—

THE COURT: No. You're being precluded from that given the Court's ruling.

(Emphasis added.)

The trial court instructed the jury on the standard jury instructions—which were relied on by the State and do not refer to section 812.025 or otherwise instruct a jury that it is precluded from finding a defendant guilty of both dealing in stolen property and theft "in connection with one scheme or course of conduct." § 812.025, Fla. Stat. (2008).[2]

Williams was convicted of all of the charges. Thereafter, Williams asked the trial court to dismiss the dealing in stolen property conviction; the State objected. In dismissing the grand theft conviction, the lesser of the two offenses, the trial judge stated:

I will merge and dismiss Count II, which is Grand Theft Third Degree, into Count III, which is dealing in Stolen Property, as it was the same property as was proven to the satisfaction of the jury. Clearly, to sentence this defendant on both would be multiplicious for sentencing purposes only. As such, I will deny the motion to merge and dismiss Count III into Count II, but will grant, as pretty much I always do, dismiss the Grand Theft Third Degree finding that it is subsumed within Count III, Dealing in Stolen Property.

Accordingly, the trial court adjudicated Williams guilty of dealing in stolen property, burglary, and providing false information to a pawnbroker. Williams was sentenced to fifteen years in prison for the dealing in stolen property conviction and fifteen years in prison for the burglary conviction, which were ordered to run concurrently with each other. The trial court also imposed a five-year prison term for providing false information to a pawnbroker, which was ordered to run consecutively to the fifteen-year sentences.

On appeal to the Second District, relying on *Kiss v. State*, 42 So.3d 810 (Fla. 4th DCA 2010), Williams argued that he was entitled to a new trial because the trial court denied his requested instruction modeled after section 812.025.[3] *Williams v. State*, 66 So.3d 360, 362 (Fla. 2d DCA 2011). The Second District observed that "trial courts have been attempting to fulfill the apparent substantive intent of [section 812.025] by obtaining factual determinations from the jury on both [dealing in stolen property and theft] and then entering a judgment of conviction and a sentence on the greater charge." *Id.* at 361. If "a trial court overlooks this statute, on appeal this court has consistently reversed only the lesser offense and, if necessary, remanded the case for resentencing without consideration of the lesser offense."

2. The State also argued that not all of the items taken from the victim's home were sold to the pawn shop by Williams.

3. Williams was tried before the Fourth District Court of Appeal issued its decision in *Kiss*.

Id. at 362. Consequently, the district court held that the trial court below "did not err in following established precedent." *Id.* at 363. The district court maintained that the trial court was not obligated to give the requested instruction because the language contained in section 812.025 was "not an adequate jury instruction" and "doubt[ed] that there [was] any adequate method to instruct on this statute." *Id.* The district court continued:

> This statute does not prevent a court from entering a judgment.... Instead, it essentially prevents a jury from checking a box on a verdict form to disclose its findings of fact as to one of two charges. Significantly, the legislature has given neither the jury nor the trial court any guidance on which of the two boxes the jury should leave empty. This lack of any criteria for the jury's determination is very problematic.
>
> ....
>
> If [the Florida Legislature] intended the jury to have the discretion to pick either the greater or the lesser offense for any or no reason, the rule would seem to be impermissibly arbitrary.
>
> In many respects, 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 363–64. The district court explained that a new trial is an unnecessary remedy:

> The factual determinations of the prior jury appear to be without error. All that remains is to select one offense or the other as the offense resulting in a judgment and sentence. The courts have been following the policies of double jeopardy as to this issue. Even if we concluded that we must select the offense with the lesser degree or the lesser penalty, a new trial would not be warranted.

Id. at 365 (footnote omitted). The Second District concluded as follows:

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

Id. at 361. Accordingly, the Second District affirmed the trial court's dismissal of Williams' grand theft conviction, expressly recognized conflict with the Fourth District Court of Appeal in *Kiss*, and certified three questions of great public importance to this Court. *Id.* at 361, 365.[4]

II. ANALYSIS

[1] The question before us is whether a jury must be instructed, in accordance with section 812.025, Florida Statutes (2008), that it cannot find a defendant guilty of both dealing in stolen property and theft "in connection with one scheme or course of conduct" when both offenses are submitted to the jury. We further decide whether a defendant is entitled to a new trial on dealing in stolen property and theft, having been convicted of both offenses after the trial court denied the defendant's request for a jury instruction modeled after section 812.025. This Court's interpretation of a statute is a purely legal matter and subject to a de novo standard of review. *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1220 (Fla. 2010).

4. *See supra*, footnote 1.

Section 812.025, Florida Statutes, 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.

§ 812.025, Fla. Stat. (2008). In *Blackmon v. State*, 121 So.3d 535, 2013 WL 4555655 (Fla.2013), we rejected the defendant's contention that he was entitled to a new trial after being convicted of both petit theft and dealing in stolen property contrary to section 812.025, Florida Statutes (2009). *Id.*, at 541.[5] Notably, the defendant in *Blackmon* "did not request a jury instruction under section 812.025." *Id.* at 548. We determined that the First District Court of Appeal properly reversed that defendant's petit theft conviction while upholding his dealing in stolen property conviction. *Id.* at 541.

Whether Trial Courts Must Instruct under Section 812.025?

[2] Williams asks this Court to find that trial courts must instruct juries on section 812.025. When a statute is clear, this Court need not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *State v. Burris*, 875 So.2d 408, 410 (Fla.2004). The plain and ordinary meaning of the words of a statute must control. *Marrero v. State*, 71 So.3d 881, 887 (Fla.2011).

[3] In *Blackmon*, we expressly found that the trial court erred "in failing to instruct the jury on the rendering of dual convictions contrary to section 812.025." *Blackmon*, at 548. The Florida Legislature's intent as to section 812.025 is clear: the trier of fact is precluded from returning guilty verdicts on both "theft and dealing in stolen property in connection with one scheme or course of conduct," notwithstanding that the State has proven both offenses beyond a reasonable doubt. § 812.025, Fla. Stat. (2008). Under section 812.025, "the trier of fact must make a choice" as to

> 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 v. State, 826 So.2d 268, 271 (Fla. 2002). Simply put, the fact-finder must be aware that it cannot convict a defendant of both dealing in stolen property and theft "in connection with one scheme or course of conduct." As noted by the Fourth District, "the state is not entitled to have the jury convict ... 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.*" *Kiss*, 42 So.3d at 812 (emphasis added).

[4] It is important to note that with three exceptions, the State is "to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity ... to determine legislative intent." § 775.021(4)(b), Fla. Stat. (2008).[6] As section 812.025 conflicts with such intent, it is paramount that our trial courts assist in giving the proper effect to section 812.025. Thus, in light of the plain language expressed in the statute, we conclude that trial courts have an obligation to instruct the jury on section 812.025 when both theft and dealing in stolen property counts are submitted to the jury. *See Ridley v. State*, 407 So.2d 1000, 1002 (Fla. 5th DCA 1981) ("[W]e read Florida Rule of Criminal Procedure 3.505[7] with section 812.025, Florida Statutes (1979), to require that the trial judge should have instructed the jury that guilty verdicts could not be returned as to both counts.").

We note that the Legislature has failed to give any guidance pertaining to how a jury should proceed in convicting a defendant of either dealing in stolen property or theft pursuant to section 812.025, when both offenses were proved by the State beyond a reasonable doubt and were "in connection with one scheme or course of conduct."[8] In *Hall*, we explained 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.*

826 So.2d at 271 (emphasis added). The language we utilized in *Hall* was a hybrid of the relevant language contained in section 812.025, and the theft and dealing in stolen property statutes:

Section 812.025

> 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.*

§ 812.025, Fla. Stat. (2008) (emphasis added).

Theft

> A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another *with intent to*, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) *Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.*

§ 812.014, Fla. Stat. (2008) (emphasis added).[9]

Dealing in Stolen Property

5. Section 812.025 has not been amended since its enactment in 1977.

6. The three exceptions are: (1) offenses which require identical elements of proof; (2) offenses which are degrees of the same offense as provided by statute; and (3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. *Id.*

7. Florida Rule of Criminal Procedure 3.505 provides, "The state need not elect between inconsistent counts, but the trial court shall submit to the jury verdict forms as to each count with instructions applicable to returning its verdicts from the inconsistent counts." Fla. R.Crim. P. 3.505.

8. An instruction directing a jury to select one offense over the other based on their respective penalties is impermissible. *See* Fla. R.Crim. P. 3.390(a) ("Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.").

9. We acknowledge that "common thief" is not expressed in the theft statute.

> Any person who *traffics in, or endeavors to traffic in, property* that he or she knows or should know was *stolen* ....

§ 812.019(1), Fla. Stat. (2008) (emphasis added). To "traffic" is "[t]o sell, transfer, distribute, dispense, or otherwise dispose of property." § 812.012(8)(a), Fla. Stat. (2008). Alternatively, to "traffic" is "[t]o buy, receive, possess, obtain control of, or use property *with the intent* to sell, transfer, distribute, dispense, or otherwise dispose of such property." § 812.012(8)(b), Fla. Stat. (2008) (emphasis added).

As we explained in *Hall*, the trier of fact must determine the defendant's intent when deciding to convict a defendant of either theft or dealing in 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. The legislative scheme is clear and the same legislative rationale militates against allowing a defendant to plead guilty to inconsistent counts, i.e., *stealing property with intent to use under section 812.014 or stealing property with intent to traffic in the stolen goods pursuant to section 812.019*. 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. Legislative history leads us to believe that this comports with legislative intent. 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.

Hall, 826 So.2d at 271 (emphasis added).

Proposal from the Supreme Court Committee on Standard Jury Instructions In Criminal Cases

As we stated above, the current standard jury instruction for dealing in stolen property under section 812.019(1) fails to inform the jury that it is precluded from finding a defendant guilty of both theft and dealing in stolen property "in connection with one scheme or course of conduct." *See* Fla. Std. Jury Instr. 14.2 (Crim.). However, in the May 15, 2011, edition of *The Florida Bar News*, the Supreme Court Committee on Standard Jury Instructions In Criminal Cases ("Committee") published a proposed amendment to Florida Standard Jury Instruction 14.2 (Criminal), adding the following language:

> Give if jury is also instructed on theft for crime committed in same scheme or course of conduct....
>
> 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,[10] 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 [illegible] and [him][her] guilty [illegible]
>
> 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.[12]

10. We note that section 812.025 does not impose a requirement of "the same property."

11. Under the theft [illegible] he intent to appropriate the property to his or her own use" or "to the use of any person not entitled to the use of the property." *See* § 812.014(1)(b), Fla. Stat. (2008).

12. In *In re Standard Jury Instructions in Criminal Cases–Instruction 14.2*, 121 So.3d 520, 2013 WL 4555389 (Fla.2013), on our own motion, we have authorized the use of amended instruction 14.2 on an interim basis and have established a period for comments and suggestions.

This Case

[5] The jury convicted Williams of grand theft and dealing in stolen property, among other offenses.[13] As to grand theft and dealing in stolen property, the information alleged as follows:

> [Grand theft:] between the 8th day of August, 2008, and the 9th day of August, 2008 ... [Williams] did knowingly and unlawfully obtain or use, or endeavor to obtain or use certain property of another, to-wit: *two video systems, miscellaneous video games and DVD's*, the property of [the victim], the value of said property being three hundred ($300.00) dollars or more, but less than five thousand ($5,000.00) dollars in money ... and in so doing the defendant intended either to permanently or temporarily deprive the said [victim] of a right to the property or a benefit therefrom, or to appropriate the property to his own use or to the use of any person not entitled thereto.
>
> [Dealing in stolen property:] on the 9th day of August, 2008 ... [Williams] did unlawfully traffic or endeavor to traffic in stolen property, to-wit: *two video systems, miscellaneous video games and DVD's* the property of [the victim], a further description of said property being to the State Attorney unknown, and in so doing the defendant knew or should have known that said property was stolen.

Thus, the specific items stated in these two counts were identical. The evidence at trial, however, established that Williams sold to the pawn shop only some of the items that he had taken from the victim's house the day prior.[14]

After thoroughly reviewing the record, we conclude that the dealing in stolen property and grand theft offenses were "in connection with one scheme or course of conduct" as there was no "clearly disjunctive interval of time or set of circumstances" "to meaningfully disrupt the flow" of Williams' conduct. *Rife v. State*, 446 So.2d 1157, 1158 (Fla. 2d DCA 1984); *see also Stallworth v. State*, 538 So.2d 1296 (Fla. 1st DCA 1989) (reversing the defendant's grand theft conviction for stealing

13. After the jury verdict, the trial court dismissed the grand theft conviction, which action was affirmed by the Second District. *Williams*, 66 So.3d at 365.

14. It is unclear what Williams did with the remaining stolen items that were not part of the instant pawn shop transaction.

two television sets and trafficking in one of the televisions four days later); *Jones v. State*, 453 So.2d 1192, 1194 (Fla. 3d DCA 1984) (reversing the convictions for grand theft and dealing in stolen property "[s]ince the theft of the car and the stereo and the sale of the stereo two days later were all a portion of the same scheme or course of conduct"). Having determined that these offenses were "in connection with one scheme or course of conduct," we conclude that the dual convictions in the instant case violated section 812.025. *See Blackmon*, at 548 & n. 17 (finding that the dealing in stolen property and petit theft convictions, which were committed "in connection with one scheme or course of conduct," violated section 812.025).

[6] "[T]rial courts have an obligation to instruct the jury on section 812.025 when both theft and dealing in stolen property counts are submitted to the jury." *See supra*, at 531. In this case, we find that the trial judge erred in denying Williams' request for an instruction which would have informed the jury that it could not return guilty verdicts for both theft and dealing in stolen property in connection with one scheme or course of conduct. Further, the trial judge erred in precluding counsel for Williams from asserting during closing arguments that the jury could find Williams guilty of theft *or* dealing in stolen property.

[7] We next determine if the errors were harmless. "This Court has defined the harmless error test as placing 'the burden on the state, as the beneficiary of the error,' to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.' " *Ibar v. State*, 938 So.2d 451, 466 (Fla.2006) (quoting *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986)).

[8] Here, it is significant that Williams specifically requested a jury instruction under section 812.025—unlike the defendant in *Blackmon*—which would have prevented the jury from returning the improper dual convictions. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932, 942 (Fla.2000) ("Absent a finding to the contrary, juries are presumed to follow the instructions given them."). Had the trial court granted Williams' request, the jury could have acquitted him of dealing in stolen property while convicting him of grand theft. As the Fourth District in *Kiss* stated, "[The] failure to instruct the jury on section 812.025 puts the defendant at a disadvantage." *Kiss*, 42 So.3d at 813 (citing *Anderson v. State*, 2 So.3d 303, 304 (Fla. 4th DCA 2008) (Klein, J., concurring specially)). We find that the State has failed to meet its burden of showing that the errors were harmless. It cannot be said that the State has proved beyond a reasonable doubt that the jury would have come to the same decision if instructed under section 812.025. Accordingly, Williams is entitled to a new trial on the dealing in stolen property and grand theft counts.

III. CONCLUSION

For the reasons discussed above, we quash the decision of the Second District Court of Appeal in this case.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.

CANADY, J., dissents with an opinion.

CANADY, J., dissenting.

Because I conclude that any error here in failing to instruct the jury regarding section 812.025, Florida Statutes (2008), was harmless, I would approve the result reached by the Second District Court.

Section 812.025 is most reasonably understood in relation to the rule of construction in section 775.021(4)(a), Florida Statutes (2008). The general rule established by section 775.021(4) is that offenders are to be "sentenced separately for each criminal offense" committed "in the course of one criminal transaction or episode." But this rule is subject to three exceptions: "1. Offenses which require identical elements of proof. 2. Offenses which are degrees of the same offense as provided by statute. 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." § 775.021(4)(b), Fla. Stat. (2008). In enacting section 812.025, the Legislature established an additional specific exception from the general rule of separate sentences for each criminal offense for circumstances where the offenses of "theft and dealing in stolen property" are committed "in connection with one scheme or course of conduct."

The exception established by section 812.025 should be treated in a manner similar to the exceptions enumerated in section 775.021(4). As reflected on the standard verdict form, Florida Standard Jury Instruction (Crim.) 3.12, if a jury "return[s] a verdict of guilty, it should be for the highest offense which is been proven beyond a reasonable doubt." Where a jury returns impermissible dual convictions, "the conviction of the lesser crime should be set aside." *State v. Barton*, 523 So.2d 152, 153 (Fla.1988); *see also Pizzo v. State*, 945 So.2d 1203, 1206 (2006) ("When an appellate court determines that dual convictions are impermissible, the appellate court should reverse the lesser offense conviction and affirm the greater."). Here, there is no suggestion that the trial court failed to set aside the conviction for the lesser offense.

There is no basis for concluding that section 812.025—any more than section 775.021(4)—is designed to allow the jury to return a verdict for a lesser offense when it has determined beyond a reasonable doubt that the evidence supports a conviction for the relevant greater offense. The jury here was properly instructed on the elements of the charged offenses. And judgment was properly entered against the defendant for dealing in stolen property based on the jury's verdict convicting him of that offense—the greater of the two offenses for which a guilty verdict was returned. Any deficiency in instructing the jury with respect to section 812.025 did not taint the conviction for dealing in stolen property and did not in any way prejudice the defendant. Any such error is harmless beyond a reasonable doubt. There is no more harm here than there is under section 775.021(4) when impermissible dual convictions have been returned and the conviction for the lesser offense has been set aside.

The judgment entered against Williams should not be disturbed. I dissent.

David Devon BLACKMON, Petitioner,

v.

STATE Of Florida, Respondent.

No. SC11–903.

Supreme Court of Florida.

Aug. 29, 2013.

Background: Defendant was convicted in the Circuit Court, Escambia County, Linda L. Nobles, J., of petit theft and dealing

APPENDIX-A

B

Columbia

REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL

RE: Smith, Willie DC #040330

APPEAL #: 14-6-11909

Your request for administrative remedy and/or appeal has been received, reviewed and evaluated.

Under s. 944.275, Florida Statutes, you are required to serve a **minimum** of 85% of the sentence imposed. This does not mean that you will automatically be released on the 85% date; you have to earn gain-time to reduce your maximum release date down to your tentative release, which may or may not equal the 85% date.

The 85% date on the 15 year sentence imposed in case 00-15615 is August 17, 2013, but the sentences' interim end point is August 31, 2013. The 85% date on the consecutive 5 year term in case 00-9986 is not computed from August 17, 2013, but is computed from the interim end point of August 31, 2013:

Interim End-point of case 00-15615	August 31, 2013
85% of 5 years in days	+ 1551
Jail Credit	- 208
85% Minimum Service Release Date	May 5, 2017

Based on the foregoing, your request is denied.

S. Haynes 4-28-14

Signature and Typed or Printed Name Employee Responding (S. Haynes)

Signature of Warden Asst. Warden, or Secretary's Representative

5/6/14

Date

(14)

040330 Smith, Willie

Sentence Calculation

case # 00-15615 as of 1/25/16:

Date of Sentence:		6/13/2001
Sentence in Days	+	5475
Jail Time Credit	-	206
Time out on Escape/Parole/S.S. Bond	+	0
Extra Credit Awarded by FPC	-	0
Basic Gaintime Awarded	-	0
Basic Gaintime Ineligible	+	0
Basic Gaintime Penalized	+	0
Additional Gaintime Awarded	-	961
Additional Gaintime Penalized	+	0
Gaintime Forfeited Due To D.R.	+	154
Tentative Release Date:		8/31/13

85% date 8/17/2013

040330 Smith, Willie

Sentence Calculation

case#00-9986 as of 1/25/16
consecutive to case#00-15615

Date of Sentence:		8/31/13
Sentence in Days	+	1825
Jail Time Credit	-	208
Time out on Escape/Parole/S.S. Bond	+	0
Extra Credit Awarded by FPC	-	0
Basic Gaintime Awarded	-	0
Basic Gaintime Ineligible	+	0
Basic Gaintime Penalized	+	0
Additional Gaintime Awarded	-	248
Additional Gaintime Penalized	+	0
Gaintime Forfeited Due To D.R.	+	0
Tentative Release Date:		5/31/2017

85% date 5/5/2017

Dear Clerk

on the front of the Envelope is my new Change of Address to Gulf C.I.

Willie Smith

Willie Smith O40380 Z2-114[illegible]
Gulf C.I. Annex
699 Ike Steele Road
Wewahitchka Fl
32465

POLICE
016
RED