IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-2390

LEONARDO MARRERO,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
DIRECT CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, Leonardo Marrero, was the Appellant/Defendant in the proceedings below and the Respondent, State of Florida, was the Appellee/Plaintiff in the proceedings below. In this brief, the parties will be referred to as they stood in the lower courts, by proper name, or as Petitioner and Respondent.

The symbol "R." will refer to the record before the Third District Court of Appeal. The symbol "T." will refer to the transcripts of the trial court proceedings. All emphasis is added unless otherwise noted.

BASIS FOR REVIEW

The decision below, *Marrero v. State*, 22 So. 3d 822 (Fla. 3d DCA 2009), is being reviewed based on a conflict with the following decisions:

(1) *Carnley v. State*, 89 So. 808 (Fla. 1921) and *Negron v. State*, 306 So. 2d 104 (Fla. 1975), *receded from on other grounds by Butterworth v. Fleuellen*, 389 So. 2d 968 (Fla. 1980), which require the state to prove with conclusive evidence, not inference or conjecture, its allegation of value beyond a reasonable doubt;

(2) *Miller v. State*, 667 So. 2d 325 (Fla. 1st DCA 1995) and *Wingfield v. State*, 751 So. 2d 134 (Fla. 2d DCA 2000), which hold that in felony criminal mischief cases the evidence is insufficient to prove a damage threshold greater than $1000 when the state does not produce any evidence regarding the monetary value of damages;

(3) *Wingfield* and *T.B.S. v. State*, 935 So. 2d 98 (Fla. 2d DCA 2006), which require that determinations in assessing monetary figures for damage require special skill, experience, or training; and

(4) *T.B.S., A.D. v. State*, 866 So. 2d 752 (Fla. 2d DCA 2004), *S.P. v. State*, 884 So. 2d 136, 138 (Fla. 2d D CA 2004), and *Clark v. State*, 746 So. 2d 1237 (Fla. 1st DCA 1999), as a life-experience exception was not applied in any of these factually similar cases.

STATEMENT OF THE CASE AND FACTS

Petitioner, Leonardo Marrero, was charged with and convicted of felony criminal mischief in violation of Section 806.13, Florida Statutes. *See* § 806.13(1)(b)3, Fla. Stat. (2006). (R. 6-7). At trial and on appeal, Mr. Marrero challenged the legal sufficiency of the evidence to establish that the damage threshold was $1000 or greater, where there was no evidence presented regarding the cost of repair or replacement of the four damaged glass entrance doors.

The charges stemmed from an incident, which the jury viewed on videotape, on October 5, 2006 just before 8:00 p.m. when Mr. Marrero drove a Ford F150 pick-up truck into an entrance to the Miccosukee casino. (T. 215-219). The casino's facilities director described the entrance as consisting of four hurricane-impact, sun-resistant 16-17 foot glass doors, each framed in special aluminum, one 42 inches wide with an automated entry for the handicapped. (T. 191-192, 197-98). The doors were installed eight years earlier, when the building was constructed; they were operational prior to the crash, but were destroyed and had to be replaced as a result of the crash. *Id.*

No testimony or other evidence of the repair or replacement costs of the entrance doors was admitted into evidence. The state asked the facilities director if he had ever previously replaced or purchased glass similar to that destroyed in the incident, but he

replied no. (T. 198). The state also attempted to introduce the temporary repair costs. (T. 194). The defense, relying on *R.C.R. v. State*, 916 So. 2d 49 (Fla. 4th DCA 2005), objected to the introduction of the temporary repair costs, as the temporary repair costs may be rendered inadmissible if the permanent repair costs are also introduced, as the sum of these costs may exceed the fair market value of the doors. (T. 195-196). The state offered to not admit the permanent repair costs, but argued that the temporary costs should be admitted. (T. 196). The trial court sustained the defense objection. (T. 196). The state never attempted to admit the permanent repair costs. (T. 196-199).

The defense moved for a judgment of acquittal on felony criminal mischief as the state presented no evidence regarding the value of the damage to the casino entrance. (T. 238, 246). The trial court agreed: "I don't see any evidence to the value." (T. 241). When the state suggested that the jury rely upon its "common sense experience," the trial court replied, "I think the State has to prove beyond a reasonable doubt. I don't think they can guess." (T. 241). The trial court repeatedly asked the state: "Where is the evidence of the damage?" (T. 241-242).

The state asked to recall the facility director, but the trial court reminded the state that it had already asked the facility director about the costs and he didn't know anything about the costs. (T. 241-242). The trial court asked: "What exhibit did you

not introduce that you wish you had introduced? I never saw another exhibit." (T. 242). The state replied that it did not seek to introduce the other invoice regarding the permanent repairs based on the trial court's earlier ruling that the temporary costs were not admissible. The trial court reminded the state that it excluded the temporary repair costs as they were temporary. The state replied that it read the cases and "to me any kind of repair, any replacement value other than fair market value, et cetera, as delineated –" (T. 243). The trial court interrupted: "All right." It then reserved ruling on the motion for acquittal as to felony criminal mischief. (T. 243).

The defense rested, and renewed its motion for judgment of acquittal. The trial court once again pointed out its concerns with the lack of evidence:

> I will be honest with you. I am concerned about the lack of evidence of value. The case L.C. versus State, 579 Southern 2d 783 states that in the absence of any proof of value, adjudication to delinquency, it's a juvenile case, was reduced to criminal mischief as a second degree misdemeanor, and I am not sure that there was any proof of value here. (T. 246-47).

The trial court reserved ruling on the renewed motion for acquittal, and the issue was presented to the jury. (T. 247). The court instructed the jury:

> The punishment provided by law for the crime of criminal mischief is greater depending upon the value of the property damages. Therefore, if you find the defendant guilty of criminal mischief, you must determine by your verdict whether:

a. The damage to the property was $1,000 or greater.
b. The damage to the property was greater than $200 but less than $1,000.
c. The damage to the property was $200 or less.

(R. 41). The verdict form included three boxes for the jury to determine the value of the property damage, if it found the defendant guilty of criminal mischief. (R. 55).

During deliberations, the jury sent out a note with two questions: "Can we enter a verdict for count one without rendering an opinion on the value of the property?" and "Was there testimony about the amount of damage to the property?" (T. 290; R. 37-38). The trial court answered the questions as follows:

> If you find the defendant guilty of criminal mischief, you must make a determination of the value of the property damaged. Your verdict with regard to the value must be for the highest amount which was proven beyond a reasonable doubt. If the exact value of the property damage cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, then you must find the value is less than two hundred dollars.[1] (T. 294).

Shortly thereafter, the jury returned a verdict against Mr. Marrero for felony criminal mischief. (T. 289, 294-96). At that point, the trial court denied the motion for acquittal on felony criminal mischief, but, noting the jury's "expressed [ ] concern for

[1] The underlined portion of the response is not part of the standard jury instruction on criminal mischief; rather the trial court adopted it from the standard jury instruction on theft. *See* Fla. Std. Jury. Insts. 12.4 and 14.1. (T. 292-294).

the value," asked the parties to brief the issue prior to sentencing. (T. 300-301).

The defense filed a written motion for judgment of acquittal, citing a line of Florida cases standing for the proposition that, in the absence of competent, admissible evidence that the value of property damage exceeded $1,000, the trial court was required to enter a judgment for second degree misdemeanor criminal mischief, where the property damage is $200 or less. (R. 59-73). The State responded that, although it had concededly presented no evidence of the monetary value of the property damage, the jury was entitled to apply "their individual and collective life experiences" to the State's evidence of the size and type of materials damaged to infer that the value of the damage was at least $1000. (R. 74-92).

The trial court agreed with the state and denied the motion for acquittal:

> The State introduced a videotape of the criminal episode showing the Defendant driving his truck through the grand front entrance doors to the Micossukee Casino. The doors were very large ornate doors made of impact glass and framed in metal. Although the State failed to prove any direct evidence of the value of the doors, this Court finds that reasonable persons could not doubt that, based on the evidence presented to the jury which was sufficient and self-evident, coupled with their common knowledge and life experience, the very nature of the doors is indicative of a [sic] incontrovertible minimum value of $1000. *See, e.g.*, *Jackson v. State*, 413 So.2d 112 (Fla. 2nd DCA 1982). (R. 93-94).

The trial court adjudicated Mr. Marrero guilty of felony criminal mischief and sentenced him to serve thirty-six months in prison on that count, with restitution to be

determined later.[2] (R. 95-98, 106-110).

On appeal, the Third District Court of Appeal affirmed the trial court's denial of the motion for judgment of acquittal on felony criminal mischief. *See Marrero v. State*, 22 So. 3d 822 (Fla. 3d DCA 2009). In its decision, the Third District found that "[a]s a general rule, it will be necessary for the State to present evidence of the cost of repair or replacement in a criminal mischief case, if the State wishes to convict the defendant of mischief exceeding either the $200 or $1000 threshold. *See id.* § 806.13(1)(b)2., 3." *Marrero*, 22 So. 3d at 823. The Third District further acknowledged that the state did not present any evidence of the cost of repair or replacement of the four doors. *See id.*

It then expressed that contrary to this general rule " '[i]t has been said that 'a trial court may conclude 'that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met . . . .' " *T.B.S. v. State*, 935 So. 2d 98, 99 (Fla. 2d DCA 2006) (quoting *A.D. v. State*, 866 So. 2d 752, 753 (Fla. 2d DCA 2004)); *S.P. v. State*, 884 So. 2d 136, 138

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[2] At the restitution hearing, the state presented the testimony of the owner of the glass company who repaired the entrance doors. The owner testified that, after the incident, he installed temporary doors at the casino for a cost of eight thousand two hundred fifty dollars. (R. 192-93). He later repaired and installed the permanent doors for a cost of forty-seven thousand five hundred dollars. (R. 194-95).

(Fla. 2d DCA 2004); *Clark v. State*, 746 So. 2d 1237, 1241 (Fla. 1st DCA 1999)."

Marrero, 22 So. 3d 823. Based on this life-experience exception to the general rule requiring evidence of the cost of repair or replacement, the Third District held:

> In this case the jury had a videotape of the collision which destroyed four extremely tall impact-resistant doors, including one door with a special mechanism for handicapped entry. We agree with the trial court that based on common experience, the jury could reasonably conclude that the cost of repair or replacement easily exceeded $250 per door or $1000 in the aggregate.

Marrero, 22 So. 3d at 823.

STANDARD OF REVIEW

In reviewing the denial of a motion for judgment of acquittal, appellate courts apply a de novo standard of review. *See Pagan v. State*, 830 So.2d 792, 803 (Fla.2002). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Simmons v. State*, 934 So.2d 1100, 1111 (Fla. 2006) (quoting *Bradley v. State*, 787 So.2d 732, 738 (Fla.2001)). *See also Jackson v. State*, 25 So. 3d 518, 531 (Fla. 2009).

SUMMARY OF ARGUMENT

In Florida, a person commits criminal mischief if he or she willfully and maliciously injures or damages property belonging to another. *See* § 806.13, Fla. Stat. (2006). The amount of damage to the property determines the degree of the crime. The state is required to prove the value of the amount of damages in a felony criminal mischief case beyond a reasonable doubt. This proof cannot be left to the jurors' inference or conjecture, nor can it be based on their individual life experiences. In this case, the Third District relied on a life-experience exception—"[i]t has been said that 'a trial court may conclude 'that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met"—to find that "that based on common experience, the jury could reasonably conclude that the cost of repair or replacement easily exceeded $250 per door or $1000 in the aggregate." *Marrero*, 22 So. 3d at 823.

This Court should reject the application of a life-experience exception to the requirement that the state must prove the essential element of the amount of damage greater than $1000 to prove felony criminal mischief. Importantly, this exception, first formulated in *Jackson*, relies on a minimum value provision within the theft statute, and no corresponding provision is within the criminal mischief statute. Additionally,

the *Jackson* court's formulation of this exception is not supported by the plain language of the theft statute's minimum value provision.

This life-experience exception is also contrary to well-established law. A fact-finder's guesstimate at a minimum value, when the state has submitted no proof of value, is in direct contravention of a defendant's constitutional right to have the state prove its case beyond a reasonable doubt—without inference or conjecture. This exception is also in conflict with the well-established law that rough estimates and the mere proof of the nature of an item are insufficient to prove the value levels necessary for felony-grade offenses.

Additionally, a fact-finder's guesstimate cannot be valid as there is no showing that it is competent—that is that the fact-finder has personal knowledge or special knowledge based on skill, experience, or training regarding their individual opinion of value. This is especially true in this case where the jurors were asked to presume the cost of repair or replacement for four tall hurricane-impact glass entrance doors, one with automated handicap access. The cost of repair or replacement of these doors is not within the realm of common general knowledge or personal experience.

ARGUMENT

THE STATE IS REQUIRED TO PROVE THE VALUE OF THE AMOUNT OF DAMAGE IN A FELONY CRIMINAL MISCHIEF CASE BEYOND A REASONABLE DOUBT; THIS PROOF CANNOT BE LEFT TO THE JURORS' INFERENCE OR CONJECTURE, NOR CAN IT BE BASED ON THEIR INDIVIDUAL LIFE EXPERIENCES.

In Florida, a person commits criminal mischief "if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including , but not limited to, the placement of graffiti thereon or other acts of vandalism." *See* § 806.13, Fla. Stat. (2006). The value of the amount of damage to the property determines the degree of the crime. *See id*. If the damage is greater than $1,000, it is a third degree felony; if the damage is between $200 and $1000, it is a first degree misdemeanor; and if the damage is less than $200, it is a second degree misdemeanor. *See id.*

"It is academic and a well established principle of criminal law that the burden of proof is on the State of Florida to establish every essential or material allegation of the information beyond a reasonable doubt before a verdict of guilty is established." *Rivers v. State*, 192 So. 190 (Fla. 1939). When the value of property or the amount of damage determines the degree of a crime, it is imperative for the state to prove this

amount. *See Carnley v. State*, 89 So. 808 (Fla. 1921); *Negron v. State*, 306 So. 2d 104 (Fla. 1975), *receded from on other grounds by Butterworth v. Fleuellen*, 389 So. 2d 968 (Fla. 1980). The state's proof must be based on conclusive evidence; it cannot be left to inference or conjecture. *See Carnley*, 89 So. 808 (Fla. 1921); *Negron*, 306 So. 2d 104 (Fla. 1975).

In *Carnley*, this Court considered whether the state presented sufficient evidence that the defendant committed the theft of property (hogs) greater than $20. At trial, evidence was presented that 3 hogs were taken and that the hogs were about 100 pounds. There was also evidence regarding the per pound market value of the hogs. However, it was unclear from the evidence whether the hogs weighed 100 pounds collectively or individually; only if the hogs weighed 100 pounds individually would their value have exceeded $20.

In deciding whether there was sufficient evidence of theft of property greater than $20, this Court reiterated that "[t]o establish guilt upon this charge proof beyond a reasonable doubt that the property stolen was of the value of $20 or more is required." *Carnley*, 89 So. at 808. It then noted that it could be inferred that the witness meant that each individual hog weighed 100 pounds. This Court, however, rejected the establishment of proof beyond a reasonable doubt based upon this inference and found

that the evidence only supported a finding of petty larceny, not larceny greater than $20. Specifically, this Court held: "But essential elements of a crime cannot be left to inference or conjecture. The accused is presumed innocent, and every essential element of the crime must be proved as alleged. This is especially true in this class of cases, where the grade of the offense depends upon the value of the property stolen." *See id.* (citations omitted). *See also Bornstein v. State*, 54 So. 2d 519, 520 (Fla. 1951) (state's evidence that the two doors stolen were worth "customarily more" than the then threshold for grand larceny was insufficient to establish grand larceny); *Crawford v. State*, 96 So. 837 (Fla. 1923) (state's evidence regarding the value of a hog was of an "inconclusive nature" and therefore insufficient to establish embezzlement of property valued $50 or more).

In *Negron*, this Court again reiterated: "The state had the burden to establish the offense charged beyond and to the exclusion of every reasonable doubt, not just inferentially. Moreover, it must clearly prove the degree of the crime." *Negron*, 306 So. 2d at 107-108 (emphasis added). In *Negron*, the question presented was whether the defendant committed grand larceny in an amount greater than $100, or petty larceny. The only evidence presented at trial was that the articles stolen from a store had a wholesale price of $96.70. There was no evidence regarding their market or retail

value. This Court reduced the charge to petty larceny as "[t]he stolen articles had 'some value' but there is not sufficient evidence of the items' market value or retail value at the time of the theft." *Id.* at 108.

Generally, evidence of value is sufficient if the following two-pronged test is satisfied. First, it must be shown that the person testifying is competent to testify as to value, and second, if competent, it must be shown that the person provides sufficient testimony of value. *See Gilbert v. State*, 817 So. 2d 980, 982 (Fla. 4th DCA 2002). Regarding the second prong, as discussed above, evidence of value may not be based on inconclusive proof, inference, or conjecture. Mere proof of the nature of the stolen property is also insufficient to prove value. *See Randolph v. State*, 608 So. 2d 573, 574 (Fla. 5th DCA 1992) (the only evidence presented of the stolen items was photographs of a few items of kitchenware, primarily dishes and two clocks).[3] Additionally, evidence is insufficient to prove value, when the value is roughly estimated and no

[3] *See also J.O. v. State*, 552 So.2d 1167 (Fla. 3rd DCA 1989) (victim's description of stolen video equipment as "practically brand new" insufficient to prove value of more than $300); *Sori v. State*, 477 So.2d 49 (Fla. 2d DCA 1985) (evidence of nature of stolen items insufficient to establish value for purpose of grand theft conviction); *Evans v. State*, 452 So. 2d 1040 (Fla. 2d DCA 1984) (evidence of $50 average retail value of 20 plus stolen coats insufficient to establish that 3 stolen coats exceeded grand theft value in excess of $100); *Jones v. State*, 408 So.2d 690 (Fla. 2d DCA 1982) (grand theft conviction vacated where no independent proof of value, even though stolen item introduced into evidence at trial).

other proof is presented. *See Gilbert*, 817 So. 2d at 982 (witness only testified regarding the property's rough and approximate value).[4]

Regarding the first prong, the person testifying must be competent to testify regarding value. "[A]n owner of property is generally presumed competent to testify as to its value . . . The apparent rationale for this rule is that an owner necessarily knows something about the quality, cost, and condition of his property." *Taylor v. State*, 425 So. 2d 1191, 1192 (Fla. 1st DCA 1983) (internal citations omitted). "Of course, mere ownership of property does not automatically qualify an owner to testify as to his property's value . . . The witness must be shown to have personal knowledge of the property . . . ." *Id.* (internal citations omitted). *See also S.M.M. v. State*, 569 So. 2d 1339 (Fla. 1st DCA 1990) (same).

In more complex value determinations, the evidence of value must be provided by expert opinion testimony. *See Wingfield v. State*, 751 So. 2d 134 (Fla. 2d DCA

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[4] *See also Jones v. State*, 958 So. 2d 585, 586 (Fla. 2d DCA 2007) (witness's best guess as to the value of the stolen property insufficient); *Sellers v. State*, 838 So. 2d 661 (Fla. 1st DCA 2003) (witness's testimony that the items were probably a certain amount was insufficient); *I.T. v. State*, 796 So. 2d 1220, 1222 (Fla. 4th DCA 2001) (witness's testimony that two of the three items are probably worth two or three hundred dollars and a third item was worth at least that much insufficient); *Toler v. State*, 779 So. 2d 594 (Fla. 2d DCA 2001) (owner's testimony that property was 'roughly' in excess of $300 insufficient).

2000). In *Wingfield*, the defendant was charged with felony criminal mischief for ramming his pick-up truck into a police cruiser. A police officer and an accident reconstruction specialist related that more than $1500 damage was caused to the police cruiser. The defendant argued that these witnesses were not qualified to offer opinion testimony regarding the amount of damages. The Second District agreed and held: "an opinion assessing a monetary figure for damage to a vehicle after an accident requires special knowledge, skill, experience, or training. Hence, the State must qualify the police officer, the accident reconstruction specialist, or some other witness as such an expert." *Wingfield,* 751 So. 2d at 136. The Second District reduced the charge to second degree misdemeanor criminal mischief as there was no testimony from a qualified witness regarding the actual amount of damages.

In its decision below, the Third District Court of Appeal correctly recognized that "[i]f there is no competent evidence of value [in a criminal mischief case], then the conviction must be for the lowest level of offense, a misdemeanor of the second degree . . . ." *Marrero*, 22 So. 3d at 823. It then found that "[a]s a general rule, it will be necessary for the State to present evidence of the cost of repair or replacement in a criminal mischief case, if the State wishes to convict the defendant of mischief exceeding either the $200 or $1000 threshold. *See id.* § 806.13(1)(b)2., 3." *Marrero*,

22 So. 3d at 823. The Third District further acknowledged that the state did not present any evidence of the cost of repair or replacement of the four doors.

The Third District, however, then explained that contrary to this general rule "[i]t has been said that 'a trial court may conclude 'that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met . . . .' " *T.B.S. v. State*, 935 So. 2d 98, 99 (Fla. 2d DCA 2006) (quoting *A.D. v. State*, 866 So. 2d 752, 753 (Fla. 2d DCA 2004)); *S.P. v. State*, 884 So. 2d 136, 138 (Fla. 2d DCA 2004); *Clark v. State*, 746 So. 2d 1237, 1241 (Fla. 1st DCA 1999)." *Marrero*, 22 So. 3d at 823. Applying a life-experience exception, the Third District held:

> In this case the jury had a videotape of the collision which destroyed four extremely tall impact-resistant doors, including one door with a special mechanism for handicapped entry. We agree with the trial court that based on common experience, the jury could reasonably conclude that the cost of repair or replacement easily exceeded $250 per door or $1000 in the aggregate.

Marrero, 22 So. 3d at 823.

As discussed in *Clark*, which the Third District cited in its opinion below, a life-experience exception to the rule requiring proof of value beyond a reasonable doubt originated in theft cases, specifically in the Second District's decision in *Jackson v. State*, 413 So. 2d 112 (Fla. 2d DCA 1982). In *Jackson*, the defendant was charged

with first degree grand theft for stealing a 37-foot operable sailboat. There was no non-hearsay testimony regarding the market value of the sailboat. The *Jackson* court noted that the Legislature amended the theft statute, Section 812.012(9), in 1977 to include the provision that "[i]f the exact value of the property cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, you must find the value is less than $100."[5] The *Jackson* court concluded that this provision does not necessarily mean that a jury can rely on its general knowledge, "[i]t does appear, however, that it may be utilized where, though no direct evidence of value is presented, there is a value which by the very nature of the stolen property itself is indicative of an incontrovertible minimum value." *Jackson*, 413 So. 2d at 114.

The Second District in *Jackson* vacated the jury's verdict of grand theft greater than $20,000 holding:

> We are not prepared to approve of a jury going so far as to find a minimum value of that amount on the basis of the evidence before it in this case, however, we find it would have been proper for the jury to return a verdict of guilt of grand theft in the second degree, i.e., property of the value of $100 or more. We think reasonable persons could not doubt that the value of the sailboat as described to the jury was $100 or more.

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[5] No similar provision exists in the criminal mischief statute. *See* § 806.13, Fla. Stat. (2006).

Id. *Jackson* limited its holding to those "rare instances when the minimum value is undisputable and the jury cannot ascertain a specific value from the evidence or lack of evidence before it." *Id*. at 112.

The *Jackson* court's formulation of this exception is not supported by the plain language of the theft statute's minimum value provision. The minimum value provision states: "[i]f the exact value of the property cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, you must find the value is less than $100." § 812.012(10)(b), Fla. Stat. (2006). This provision provides an exception only if an "exact value" cannot be "ascertained."

Contrary to the *Jackson* court's conclusion, this provision does not provide an exception when the state fails to produce evidence of value. First, there must be a showing that the "exact value" cannot be "ascertained." Without a showing that the exact value cannot be satisfactorily ascertained, this provision cannot be applied. *See A.D. v. State*, 30 So. 3d 676 (Fla. 3d DCA 2010) (use of replacement cost to determine value is not appropriate under the theft statute unless the state first presents evidence that the market value could not be satisfactorily ascertained) *citing Robinson v. State*, 686 So. 2d 1370 (Fla. 5th DCA 1997) (same). Second, there must be some substantive proof of a minimum value. A fact-finder cannot just guess as to the amount of this

minimum value. An example of when this provision may be applicable would be the theft of or damage to a rare work of art. In this situation, the state would first show that due to the work of art's rareness an exact value cannot be ascertained. Next, the state would present the testimony of an art appraiser or an auction house representative to provide the minimum value of the art work.

Since *Jackson*, many district courts of appeal decisions have cited to this life-experience exception in both the context of grand theft and criminal mischief cases. In the grand theft context, some of these cases have applied this exception. The application or non-application of this exception, however, leads to inconsistent decisions.[6] For example, both *K.W. v. State*, 983 So. 2d 173 (Fla. 2d DCA 2008) and *Smith v. State*, 955 So. 2d 1227 (Fla. 5th DCA 2007) involved the theft of electronic items purchased within six months of the theft. In *K.W.*, a cell phone was stolen. The victim's mother testified that she paid $450 for the phone three months before it was stolen, and when it was stolen it was in brand new condition. The Second District

[6] *Compare Sylvester v. State*, 766 So. 2d 1223 (Fla. 5th DCA 2000) (court found based on the number of items stolen, their newness and their individual prices the fact that the items stolen had a combined value in excess of $300 was "so obvious as to defy contradiction") *with D.H. v. State*, 864 So. 2d 488 (Fla. 2d DCA 2004) (court rejected the state's argument that the sheer number and type of items indicated a value greater than $300).

found sufficient evidence of fair market value and citing to *Jackson* noted: "the minimum value" of the phone was "so obvious as to defy contradiction" and "reasonable persons could not doubt that the value of the phone was at least $100."

In *Smith*, the item stolen was a computer approximately 6 months old that was purchased for $1200 and was in working order when it was returned. The state argued: "[w]hile it is true that computer equipment can become obsolete very quickly . . . given the fact that the computer was still in working condition and only about six months old, the jury could use their common sense and determine that its value was in excess of $300.00." *Smith*, 955 So. 2d at 1229. Yet, the appellate court rejected this argument finding no competent evidence of fair market value. In so doing, the court aptly pointed out: "The evidentiary issues giving rise to this appeal are basic ones. The State Attorney might consider relying less on intuition and more on training." *Smith*, 955 So. 2d at 1229 & n.2.

The minimum value provision contained in the theft statute, and relied on by *Jackson* in formulating a life-experience exception, is absent from the criminal mischief statute. *See* § 806.13 (Fla. 2006). Therefore, even if a life-experience exception is applicable to theft cases, it should not be applicable to criminal mischief cases. Other than the Third District in its decision below, this exception has never

previously been applied in the criminal mischief context. Several decisions, *Clark*, *A.D.*, *S.P.*, and *T.B.S.*, have referenced the *Jackson* exception without applying it, and other cases, *Miller* and *Wingfield*, have found insufficient evidence of the value of damage amounts without referencing *Jackson*. None of the facts in these cases are materially distinguishable from the facts in this case.

In *Clark*, the defendant was charged with third-degree felony mischief for crashing his car into another vehicle. The First District recognized that in theft cases value may be so self-evident as to defy contradiction, but it refused to apply this exception as the testimony and photographs presented only related to the damage of the vehicle, not the amount of the damage. As there was no evidence regarding the amount of damage the First District reduced the charge to second degree misdemeanor criminal mischief.

In *A.D.*, the Second District quoted *Clark* as it relates to a life-experience exception, but it did not apply the exception. A.D. was charged with felony criminal mischief for damaging a vacant rental home. The state presented photographs and testimony regarding the extent of the damages, and some testimony regarding the monetary value of the damage, but there was no testimony that the amount of the damages exceeded $1000. The Second District reduced the charge to misdemeanor

criminal mischief.

In *S.P.*, the juvenile was charged with felony criminal mischief for vandalizing a car by running a screwdriver along the hood and fender gouging the paint. The victim and a police officer testified that the car sustained substantial damage and photographs of the damage were admitted into evidence. The only non-hearsay testimony regarding the amount of the damage was for an amount less than $1000. Again, as in *A.D.*, the Second District cited *Clark* as it relates to a life-experience exception, but it did not apply this exception, instead it reduced the charge to misdemeanor criminal mischief.

In *T.B.S.*, a juvenile was charged with felony criminal mischief for smashing in five car windows, including the windshield and the back window. A description and photographs of the damage were admitted into evidence, but the only evidence of the monetary value of the damage amount was the victim's hearsay testimony. While citing *A.D.*, *S.P.*, and *Clark*, the Second District held "[t]he trial court articulated no life experience or other basis that would constitute sufficient evidence to support its finding that the damage to the victim's car exceeded $1000." *T.B.S.*, 935 So. 2d at 99. The court found only sufficient evidence of first degree criminal mischief. In *Miller*, the defendant was found guilty of felony mischief for kicking out the rear window of a police vehicle. The evidence only included a description of the damage to the window.

As there was no testimony regarding the monetary value of this damage, the First District reduced the conviction to second degree misdemeanor mischief. *See Miller*, 667 So. 2d at 329 citing *R.A.P. v. State*, 575 So. 2d 277, 279 (Fla. 1st DCA 1991).

In *Wingfield*, the defendant was charged with felony criminal mischief for ramming his pick-up truck into a police cruiser. A police officer and an accident reconstruction specialist related that more than $1500 damage was caused to the police cruiser. The Second District found that these witnesses were not qualified to offer opinion testimony regarding the amount of damages, and it reduced the felony charge to second degree misdemeanor mischief as there was no testimony from a qualified witness regarding the actual amount of damages. *See Wingfield*, 751 So. 2d at 136.

The facts in *Clark*, *T.B.S.*, *Miller*, and *Wingfield* are directly on point with the facts in this case. In these cases, the state introduced testimony and evidence regarding the extent of the damages. But in none of the cases, did the state introduce any qualified testimony or evidence regarding the amount of the damages. Similarly, in this case, the state only presented testimony and a videotape related to the extent of the damage to the entrance doors; it never presented any evidence regarding the value of the amount of damage. The cases of *A.D.* and *S.P.* are also materially indistinguishable from the case below; in those cases, while the state presented some evidence regarding

the amount of damages, this evidence did not show that the amount of damages was greater than $1000.

The Third District acknowledged in its decision below that the state did not present any evidence of the value of the amount of damages; it only presented evidence of the extent of damages. *See Marrero*, 22 So. 3d at 823. Yet, in contrast to the criminal mischief decisions discussed above, the Third District relied on a life-experience exception—'[i]t has been said that 'a trial court may conclude 'that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met—to find that "that based on common experience, the jury could reasonably conclude that the cost of repair or replacement easily exceeded $250 per door or $1000 in the aggregate." *Marrero*, 22 So. 3d at 823.

This Court should reject the application of a life-experience exception to the requirement that the state must prove the essential element of amount of damage greater than $1000 to prove felony criminal mischief. Importantly, this exception, first formulated in *Jackson*, relies on a minimum value provision within the theft statute, and no corresponding provision is within the criminal mischief statute. Additionally, as discussed above, the *Jackson* court's formulation of this exception is not supported by the plain language of the theft statute's minimum value provision. The minimum

value provision states: "[i]f the exact value of the property cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, you must find the value is less than $100." § 812.012(10)(b), Fla. Stat. (2006). This provisions requires that first, there must be a showing that the "exact value" cannot be "ascertained." Second, there must be some substantive proof of a minimum value.

A life-experience exception is also contrary to well-established law. A fact-finder's guesstimate at a minimum value, when the state has submitted no proof of value, is in direct contravention of a defendant's constitutional right to have the state prove its case beyond a reasonable doubt—without inference or conjecture. *See Carnley*; *Negron*. This exception is also in conflict with the well-established law that rough estimates and the mere proof of the nature of an item are insufficient to prove the value levels necessary for felony-grade offenses. *See e.g.*, *Gilbert*, 817 So. 2d at 982; *Randolph*, 608 So. 2d at 574. Additionally, a fact-finder's guesstimate cannot be valid as there is no showing that it is competent—that is that the fact-finder has personal knowledge or special knowledge based on skill, experience, or training regarding their individual opinion of value. Further, the fact-finder's determination simply relies on his or her individual life experiences, which will likely vary greatly

amongst six different jurors. This allows the fact-finders to determine their verdict based on evidence that was not presented at trial, which in turn violates a defendant's right of confrontation.

In this case, the jurors were asked to presume the cost of repair or replacement for four tall hurricane-impact glass entrance doors, one with automated handicap access. The cost of repair or replacement of these doors is not within the realm of common general knowledge or personal experience. In fact, not even the facilities director at the casino knew the costs associated with similar panes of glass. (T. 198). With its questions to the court ("Can we enter a verdict for count one without rendering an opinion on the value of the property?" and "Was there testimony about the amount of damage to the property?" (R. 37-38)), the jury evinced its inability, in the absence of any evidence, to determine the value of the amount of damage. The trial court instructed the jury that it must make a determination regarding value and that: "If the exact value of the property damage cannot be ascertained you should attempt to determine a minimum value. If you cannot determine the minimum value, then you must find the value is less than two hundred dollars." (T. 292-294). Given the complete absence of any evidence of monetary value, the jury was left with nothing but speculation regarding an essential element of the charged offense.

This Court should reverse Mr. Marrero's adjudication for felony criminal mischief. The state is required to prove the value of the amount of damage in a felony criminal mischief case beyond a reasonable doubt. This proof cannot be left to the jurors' inference or conjecture, nor can it be based on their individual life experiences.

CONCLUSION

As the state failed to produce any evidence regarding the value of the actual amount of damages, Mr. Marrero cannot be found guilty of felony criminal mischief. His adjudication should be reduced to second degree misdemeanor criminal mischief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida this ____ day of June, 2010.

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

By: _____
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IN THE SUREME COURT OF FLORIDA

CASE NO. SC09-2390

LEONARDO MARRERO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
DIRECT CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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