IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2390
L.T. CASE NO. 3D08-188

LEONARDO MARRERO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The Respondent, the State of Florida, was the Appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Petitioner was the Appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The Symbol "A." refers to Petitioner's Appendix which was attached to his jurisdictional brief, and consisted of a conformed copy of the district court's opinion.

STATEMENT OF CASE AND FACTS

The relevant facts stated in the Third District Court of Appeal's slip opinion Marrero v. State, 22 So. 3d 822 (Fla. 3d DCA November 25, 2009), are as follows:

> This is an appeal of a conviction for criminal mischief. The question is whether the evidence was legally sufficient to establish that the damage was $1000 or greater. See § 806.13 (1)(b)3., Fla. Stat. (2006). We affirm.
>
> After gambling losses, defendant-appellant Marrero drove his Ford F150 pickup truck into an entrance at the Miccosukee Casino. The entrance consisted of four impact-resistant glass doors, sixteen or seventeen feet tall, each framed in special aluminum materials. One of these was a door with an automated entry system for the handicapped. The doors had been operational prior to the crash, but were destroyed, and had to be replaced. In addition, a patron of the casino was injured.

The State charged the defendant with criminal mischief. The offense is a third-degree felony if the damage is $1000 or greater. For this crime, the amount of damage is measured by the cost of repair or cost of replacement.[1] [2](A. 2). If there is no competent evidence of value, then the conviction must be for the lowest level of offense, a misdemeanor of the second degree. See id. § 806.13(1)(b)1. (A. 2-3).

In this case the State did not present any evidence of the cost of repair or replacement of the four doors. The defense moved for a judgment of acquittal on that count, which was denied. The defendant was convicted as charged, and has appealed.

As 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. (A. 3).

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[1] The statute provides, in part:

> **806.13 Criminal mischief; penalties; penalty for minor.—**
>
> (1)(a) A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto.
>
> (b)1. If the damage to such property is $200 or less, it is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
>
> 2. If the damage to such property is greater than $200 but less than $1,000, it is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> 3. if the damage is $1,000 or greater or if there is interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which costs $1,000 or more in labor and supplies to restore, it is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[2] By contrast, under the theft statute, the general rule is that value means fair market value at the time of theft. Bloodsaw v. State, 994 So. 2d 378, 379 (Fla. 3d DCA 2008).

> It 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 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). (A. 3-4).
>
> In this case the jury had a videotape of the collusion 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. We therefore affirm the conviction and the restitution order. (A. 4, footnote 3 omitted).

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District Court's opinion does not conflict with Carnley v. State, 89 So. 808 (Fla. 1921); Negron v. State, 306 So. 2d 104 (Fla. 1975); Miller v. State, 667 So. 2d 325 (Fla. 1st DCA 1995); Wingfield v. State, 751 So. 2d 134 (Fla. 2d DCA 2000); or T.B.S. v. State, 935 So. 2d 98 (Fla. 2d DCA 2006), or any case of this Court or of any other district court in Florida. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner contends that this Court should invoke its discretionary review power to review the Third District Court of Appeal's decision in the instant case. Petitioner claims that the Third District erred by failing to apply the standard contained in Carnley, Negron, Miller, Wingfield and T.B.S, supra.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. As this Court explained in The Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So.2d at 288. This Court noted it lacked jurisdiction to review district court opinions that fail to expressly address a question of law. Id. Further, this Court lacks jurisdiction over district court opinions that contain only citation to other case law unless the case cited as controlling authority is pending before this Court, or has been reversed or receded by this Court, or explicitly notes a contrary holding of another district court or this Court. 530 So.2d at 288 n.3, citing, Jollie v. State, 405 So.2d 418 (Fla. 1981).

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which **expressly and directly conflicts** with a decision of another district court of appeal or of the Supreme Court on the **same question of law.** Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). (Emphasis added). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id. at 830 (citing to Jenkins v. State, 385 So. 2d 1356 (Fla.1980)). Accord Dept. of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (the court rejected "inherent" or "implied" conflicts).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Petitioner's claim, the decision below is not in direct or express conflict with "Florida Supreme Court precedent," or any decision from this Court or any other district court on the same question of law.

None of the cases upon which Petitioner relies establishes express or direct conflict with the Third District's opinion in this case. Each case cited has its own unique and distinctive facts, as does the instant case. Thus, the self-evident nature (or non-self-evident nature) of extensive damage can not be compared from one

case to the next given the given the differences and complexity in the properties damaged and the extent of the damage from one case to the next. Simply because it is not self-evident that the property damage does not exceed $1,000 in one case does not in and of itself establish conflict with another case where, due to its distinctive facts, the extent of the damage is self-evident.

In the decision below, the Third District Court specifically held that: "*It 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 . . . .'*" (A. 3-4) (citations omitted) (emphasis added). The Third District further held that as the jury viewed a videotape of the collusion which destroyed the doors and thus, could reasonably conclude that the cost of repair or replacement easily exceeded $250 per door or $1000 in the aggregate. (A. 4). This statement does not contradict the this Honorable Court's holding in Carnley as the item this Court was seeking to value was livestock, specifically hogs. The weight and value accorded to livestock cannot be equated to sixteen to seventeen foot aluminum framed, impact-resistant glass doors, with an automated entry for the handicapped. The jury had this information and additionally watched the doors break on the videotape when the truck crashed through them. The Third District's decision does not conflict with this Honorable Court's opinion in Negron as the items being valued in that case fell under the theft

statute and in its opinion the Third Stated that, "By contrast, under the theft statute, the general rule is that value means fair market value at the time of the theft." (A. 3, FN 2, citation omitted). This Honorable Court specifically held in Negron that "Proof of the element of value is essential to a conviction for grand larcey…" Negron at 108. Carnley also falls under the theft statute. Fair market value was not at issue in the instant case.

Miller can be distinguished from the instant case in that the First District held that no evidence was introduced at trial concerning the amount of damage appellant caused when he kicked out the rear window of the patrol car. Miller at 329. In the case at bar, as stated the in the Third District's opinion, the record reflects the dimensions of the doors, that there was a handicapped entrance that had an electronic mechanism and what the doors were made of. Additionally, the jury viewed the videotape of how much of the doors was destroyed by the impact.

Wingfield can be distinguished from the instant case in that it involves damage to a vehicle. In Wingfield, the Second District held that the State failed to show that the police officers had any particular knowledge of their police cruiser or the cost of the repair of the police cruiser. The Second specifically held that "an opinion assessing a monetary figure for damage to a *vehicle* after an accident requires special knowledge, skill, experience or training." Wingfield at 136

(emphasis added). This opinion appears to have only been specifically directed to damage on vehicles.

In T.B.S. Second District stated that, "The trial court articulated no life experience or other basis that would constitute sufficient evidence to support the finding that the damage to the victim's car exceeded $1000." T.B.S. at 99. In the instant case the Third District stated that, "In this case the jury had a videotape of the collusion 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." (A. 4). Therefore, based upon the Third District's opinion, the record appears to reflect that the jury was presented with sufficient evidence in the form of the videotape of the damage as it occurred, the dimensions of the doors, a special aspect of the doors, and what the doors were made of.

Thus, the Third District's opinion in the instant case does not expressly and directly conflict with this Honorable Court's opinions in Negron or Carnley, the First District's opinion in Miller, or the Second District's opinions in T.B.S. or Wingfield, another district court of appeal or of the Supreme Court on the same question of law. Therefore, the Third District Court's opinion does not

give rise to any express conflict and this petition to invoke discretionary review must be denied.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court reject discretionary jurisdiction in this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON JURISDICTION was mailed this 28th day of January, 2010 to **Shannon P. McKenna**, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this Brief of Respondent on Jurisdiction comply with Florida Rules of Appellate Procedure requirements in that Times New Roman 14-point was utilized.

_____

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