IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2390

DCA NO. 3D08-188

LEONARDO MARRERO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

Petitioner, Leonardo Marrero, seeks discretionary review of a decision of the Third District Court of Appeal that expressly conflicts with cases of this Court and other district courts of appeal. The symbol "A." refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner, Leonardo Marrero, was charged and convicted of felony criminal mischief in violation of Section 806.13, Florida Statutes. *See* § 806.13(1)(b)3, Fla. Stat. (2006). (A. 2). On appeal, Mr. Marrero challenged the legal sufficiency of the evidence to establish that the damage threshold was $1000 or greater, when there was no evidence presented regarding the cost of repair or replacement of the four glass entrance-doors damaged in the incident.

The incident took place after Mr. Marrero sustained gambling losses at the Miccosukee Casino. (A. 2). After leaving the casino, he drove his Ford F150 pickup truck into an entrance at casino. (A. 2). "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." (A. 2).

In its decision, the Third District Court of Appeal recognized that "[i]f 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). It also recognized 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." (A. 3). The court further acknowledged that the state did not present any evidence of the cost of repair or replacement of the four doors. (A. 3). The Third District 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)." (A. 3-4).

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." (A. 4).

SUMMARY OF ARGUMENT

In its decision below, the Third District applied a "life-experience" exception to the general rule that it is 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 $1000 threshold. This "life-experience" exception is contrary to well-established law which requires the state to prove its allegations beyond a reasonable doubt. *See Carnley* and *Negron*. The state's proof must be based on evidence; it cannot be left to inference or conjecture. *See Id.* The Third District's decision also conflicts with *Miller* and *Wingfield* which both hold that the evidence is insufficient in felony criminal mischief cases to prove a damage threshold greater than $1000 when the state does not produce any evidence regarding the monetary value of damages. It is also contrary with *Wingfield* and *T.B.S.'s* requirement that determinations in assessing monetary figures for damage require special skill, experience, or training. Finally, its decision additionally conflicts with *T.B.S.*, *A.D.*, *S.P.*, and *Clark*, as the facts below are not materially distinguishable from the facts in these cases.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY CONFLICTS WITH *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); *MILLER V. STATE*, 667 So. 2d 325 (FLA. 1ST DCA 1995); *WINGFIELD V. STATE*, 751 So. 2d 134 (FLA. 2D DCA 2000); AND *T.B.S. V. STATE*, 935 So. 2d 98 (FLA. 2D DCA 2006).

In its decision below, the Third District Court of Appeal applied a "life-experience" exception to the general rule that it is 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. This "life-experience" exception is contrary to the criminal mischief statute, Section 806.13, Florida Statutes, and it is contrary to well-established law which requires the state to prove its allegations beyond a reasonable doubt. The state's proof must be based on evidence; it cannot be left to inference or conjecture. *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).

In *Carnley*, this Court considered the case of 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, then denied the existence 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) (emphasis added).

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.

The Third District's finding that based on common experience the jury could conclude that the monetary value of damage exceeds a $1000 threshold is in direct contravention of *Carnley* and *Negron* which both hold that the state has the burden to establish the monetary value of damage beyond and to the exclusion of all reasonable doubt, and that this proof cannot be based on inference or conjecture. The Third District's decision also conflicts with *Miller v. State*, 667 So. 2d 325 (Fla. 1st DCA 1995) and *Wingfield v. State*, 751 So. 2d 134 (Fla. 2d DCA 2000) which both hold that the evidence is insufficient in felony criminal mischief cases to prove a damage threshold greater than $1000 when the state does not produce any evidence regarding the monetary value of damages.

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 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. The Third District's application of a "life-experience" exception to proving the monetary value of damages is also contrary to *Wingfield's* requirement that opinion testimony for assessing a monetary figure for damage to a vehicle

following an accident requires special skill, experience, or training.

In its opinion, the Third District cites to several cases in support of its statement "[i]t has been said that a trial court may conclude that certain repairs are so self-evident that the fact-finder could concluded based on life experience that the statutory damage threshold has been met. . . ." *See Marrero v. State*, 34 Fla. L. Weekly D2457 (Fla. 3d DCA November 25, 2009) (internal quotations omitted) *citing T.B.S.*; *A.D.*; *S.P.*; and *Clark.* These cases all recognize this statement regarding a "life-experience" exception, however, none of them apply this exception.[1]

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

[1] This statement originated 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 following provision "[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." Based on this amendment, the 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 indicate of an incontrovertible minimum value." *Jackson*, 413 So. 2d at 114. No similar provision exists in the criminal mischief statute. *See* § 806.13, Fla. Stat. (2006).

cases value may be so self-evident as to defy contradiction, but it did not apply this exception as the testimony and photographs presented only related to the damage of the vehicle, not the amount of the damage. In *A.D.*, the Second District quoted *Clark*, but it did not apply this exception to the juvenile who was charged with felony criminal mischief for damaging a vacant rental home. In *A.D.*, there were photographs and testimony regarding the extent of the damages, and there was some testimony regarding the monetary value of the damage, but there was no testimony that the amount of the damages exceeded $1000. 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. There was no non-hearsay testimony regarding the amount of the damage. Again, as in *S.P.*, the Second District recognized but did not apply the *Clark* exception finding that there was only sufficient evidence that the damages exceeded $200, not $1000.

Finally, 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.* and *S.P.*, and *Clark*, the Second District court 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.

The non-application of this "life-experience" exception in *T.B.S.*; *A.D.*; *S.P.*; and *Clark* also conflicts with the Third District's decision below as the facts in *T.B.S.*; *A.D.*; *S.P.*; and *Clark* are not materially distinguishable from the facts below. Additionally, as in *T.B.S.*, in the case below, there was no evidence that the fact finders (the jurors) had life-experience or any other basis that would constitute sufficient evidence to support a monetary value finding in excess of $1000.

CONCLUSION

In light of the foregoing argument that the Third District's decision below expressly conflicts with decisions of the this Court and other district courts of appeal, Mr. Marrero respectfully requests that this Court exercise its jurisdiction, under Article V, Section 3(b)(3), Florida Constitution, to resolve this conflict.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via U.S. mail to Lunar Claire Alvey, Attorney for the Respondent, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this ___ day of January, 2010.

BY:_____
SHANNON P. MCKENNA
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

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

BY:_____
SHANNON P. MCKENNA
Assistant Public Defender

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