IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:09-2390

LEONARDO MARRERO,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 305.545.1928

ROBERT KALTER
Assistant Public Defender
Florida Bar No. 260711

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

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 12

CONCLUSION 13

CERTIFICATES 14

TABLE OF CITATIONS

Davis v. State
569 So.2d 131 (1st Cir. La. App. 1990) 5

Jackson v. State
413 So.2d 112 (Fla. 2d DCA 1982) 1,2,4,8,9,11,12

People v. Garcia,
29 A.D. 3d 255 (N.Y. A.D. 1st. Dept. 2006) 7

People v. Tassone
241 N.E. 2d 419 (Ill. 1968) 8

People v. Hoppe,
184 A.D. 2d 582 (N.Y. A.D. 2d Dep. 1992) 6,7

Scottzanger v. State
35 Fla. L. Weekly D1964 (Fla. 4th DCA 2010)..9,10,11

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.

The issue this Court must resolve is whether the Third District Court of Appeal erred in affirming the trial judge's decision to deny defendant's motion for judgment of acquittal as to the crime of criminal mischief in excess of one thousand dollars despite the fact that the state failed to introduce any evidence as to the value of the property that was damaged. In reaching its conclusion that the state did not have to introduce any evidence of value, the Third District Court of Appeal relied upon a decision from the Second District Court of Appeal in *Jackson v. State*, 413 So.2d 112 (Fla. 2d DCA 1982), wherein the court held that in rare cases where the minimum value of an item is undisputed a judgment of acquittal is not required even when the state fails to introduce any evidence of value.

Appellant in its initial brief argued the following:

(1) This Court should reject the life experience exception created by the Second District in *Jackson* since the court misinterpreted section 812.012(10)(b).

(2) The life experience exception created by the Second District should be overruled by this Court since this exception is contrary to one of the most basic concepts of our

criminal justice system which is that the state must prove every element of a crime beyond a reasonable doubt.

(3) Even if this Court upholds the life experience exception created by the Second District, this exception should be limited to grand theft cases and not applied to criminal mischief cases since the *Jackson* court, in creating the life experience exception, specifically relied upon a statutory provision contained in the grand theft statute which is not present in the criminal mischief statute.

(4) Finally, even if this Court were to apply the life experience exception to criminal mischief cases, the trial judge erred in applying the exception in this case since the minimum value of the hurricane glass damaged in this case was not so obvious so as to defy contradiction.

In response the state argued in its brief that:

(1) Appellant has not preserved this issue for appellate review;

(2) This Court should uphold the life experience exception created in *Jackson* and

(3) The life experience exception that was created in the *Jackson* case should apply to criminal mischief cases and more specifically, should be applied in this case since the minimum value of the broken hurricane glass was obviously over $1000.00.

1. This issue has been preserved.

In its brief the state argues that the issue raised before this Court has not been properly preserved since defense counsel did not object to the jury instruction given to the

jury when they asked how they should resolve the value issue in the case despite the fact that the state failed to introduce any evidence as to the value of the property damaged. The state's preservation argument is without merit. The issue before this Court is not whether the trial judge gave the jury an improper jury instruction when they asked how to resolve the value issue but instead, whether the trial judge erred in denying appellant's motion for judgment of acquittal based upon the argument that the state failed to prove the property damaged had a value in excess of $1000.00. A review of the record will establish that this issue was clearly preserved.

At the conclusion of the state's case defense counsel argued that a judgment of acquittal as to criminal mischief in the amount in excess of $1000.00 had to be granted since the state failed to introduce any evidence as to the value of the merchandise that was damaged. (T. 238, 246). The trial judge, after hearing argument of counsel, indicated he was concerned with the fact that the state failed to introduce any evidence as to value and reserved his ruling on the motion for judgment of acquittal. (T. 243). After the defense rested appellant renewed his motion for judgment of acquittal. (T. 246-7). Once again the court reserved his ruling on the motion and submitted the case to the jury. (T. 247). After deliberations the jury convicted defendant of felony criminal mischief at which time the court denied appellant's motion for judgement of acquittal. (T. 300-1). The trial court was still concerned about the state's failure to prove value and requested that the parties brief the issue before sentencing. In the written response defense counsel once again

argued the trial judge had to reduce the criminal mischief to a misdemeanor since the state failed to introduce any evidence to establish that the value of the property damaged was in excess of $1000.00. The court rejected defense counsel's argument. On direct appeal to the Third District Court of Appeal appellant once again argued that there was insufficient evidence to convict defendant of felony criminal mischief.

Therefore, it is clear that defense counsel made the exact same argument in the trial court that was made to the Third District Court of Appeal and now to this Court, which is that without one iota of evidence as to the value of the merchandise that was damaged, it was impossible for the state to establish that defendant committed criminal mischief which resulted in damages in excess of $1000.00. Therefore, this Court should reject the state's argument that the issue before this Court was not preserved for appellate review.

2. The living experience exception created by the Second District Court of Appeal in *Jackson v. State*, *supra* should be overruled.

In its brief the state relies upon several out-of-court decisions to attempt to convince this Court to accept the Second District Court of Appeal's conclusion that in rare circumstances, a juror's life experiences can be used as a substitute for evidence concerning value as long as the minimum value of the item is undisputable and, the jury could not ascertain a specific value from the evidence or lack of evidence. A review of these cases will establish that the majority of these cases do not support the proposition that a jury can find that the damage committed in a criminal mischief case was in excess

of $1000.00 dollars without introducing **any** evidence concerning the value of the item that was damaged.

In *Davis v. State*, 569 So.2d 131 (1st Cir. La. App. 1990), the defendant was charged with theft of a trailer axle valued at $100.00 or more but less than $500.00. In *Davis*, the defendant raised two issues on appeal. First, he argued that the trial judge erred in instructing the jury that they could use their common sense when determining value, which is not the issue in this case. Secondly, *Davis* argued that there was insufficient evidence to convict him of theft over $100.00, which is the same issue in this case. In *Davis*, the court held there was sufficient evidence for the jury to find that the theft of the axel was in excess of $100.00. In reaching this conclusion the court relied upon the testimony of both the victim and his wife who specifically gave an opinion as to the value of the axel. This is evidenced by the following holding in *Davis*:

> Herein, the victim, a welder by trade, who also brokered junk and salvage, testified that he had a contract with a woman which required that he build a small utility trailer and install an axle thereon in exchange for two used axles and $240.00. The victim further testified that he received information which led him to believe that defendant stole one of those axles and, therefore, he contacted the authorities. Indeed, defendant does not dispute the fact that he stole the axle. The victim also stated that he sold other axles similar to the one in question for approximately $100.00, but that they could have brought a price as high as $200.00. He stated that the reason he sold the axles in question for approximately $100.00 was that he acquired the axles at a bargain rate and that almost any amount of money received by him from the sale thereof would be pure profit.

The court went on to state:

> Herein, the victim testified that a fair value for the stolen axle would have

> been $200.00 due to the fact that it was equipped with electric brakes and other special features. Because of the victim's occupation, there was no reason to discount this testimony. Also, defendant's wife indicated that defendant sold axles similar to the one in question for approximately $150.00.

Therefore, based upon the testimony of both the victim and his wife, the court concluded that there was sufficient evidence of value so that a reasonable juror could have concluded that the axel was worth over $100.00 but less than $500.00. The facts in this case are clearly distinguishable from the facts in *Davis* since in this case, there was no evidence of value introduced by the state.

Similarly in *People v. Hoppe,* 184 A.D. 2d 582 (N.Y. A.D. 2d Dep 1992), the defendant was convicted of criminal mischief in the second degree which required the state to prove that the damages were in excess of $1500.00. The defendant contended on appeal that the evidence at trial was legally insufficient to establish that the damage to the property exceeded $1500.00 despite the fact the victim testified that the costs to repair the damaged property was $4500.00. In *Hoppe,* the appellate court held that the victim's testimony concerning value, standing alone, was insufficient and after reviewing a photograph of the damages the court concluded that the damages exceeded $250.00 which was the statutory amount required to convict for criminal mischief in the third degree. Once again the facts in *Hoppe* are distinguishable from the facts in this case since, in *Hoppe,* there was testimony that the cost of repairs was $4500.00 which far exceeded the $250.00 minimum required for a criminal mischief conviction in the third

degree.

In *People v. Garcia,* 29 A.D. 3d 255 (N.Y. A.D. 1st. Dept. 2006), the defendant was charged with criminal mischief in the second degree which required that the state prove the damages exceed $1500.00. At the trial the state introduced evidence that the damaged television cost $1700.00. The trial court reduced the criminal mischief to second degree criminal mischief since the testimony was insufficient to establish that the damage to the property exceeded $1500.00 but was sufficient to establish that the damage exceeded $250.00. In reaching this conclusion the trial judge relied upon pictures of the damaged property and the victim's testimony that the television that was damaged cost $1700.00. In affirming the trial judge's ruling the appellate court concluded that based upon the pictures of the damaged property and the victim's testimony as to the value of the television, it would have been reasonable for the jury to conclude that the damages exceeded $250.00. Once again the one major difference between the *Garcia* case and this case is that in this case, there was **no** evidence whatsoever as to what the hurricane windows cost or what it would cost to replace them.

The only out-of-state case that even remotely supports the state's position that the jury was allowed to conclude that the value of the hurricane glass was in excess of $1000.00, despite the fact that the state failed to produce any evidence as to the value of the hurricane glass is the case of *People v. Tassone*, 241 N.E. 2d 419 (Ill. 1968), a case which was cited by the Second District in *Jackson.* In *Tassone,* the defendant was

charged with grand theft of a tractor trailer. Pursuant to the Illinois grand theft statute the state was required to prove that the tractor trailer was worth more than $150.00. The appellate court concluded that even though there was no direct proof that the tractor trailer was worth $150.00 the trial judge, who was the trier of fact in the non jury trial, had the right to use his common sense in concluding that the tractor trailer was worth more than $150.00.

It is appellant's position that the facts in this case are not comparable to the facts in both *Jackson* and *Tassone*. In *Tassone,* the court concluded that common sense was sufficient to establish that a tractor trailer cost more than $150.00 and in *Jackson,* the court recognized that it was common knowledge that a new yacht costs more than $100.00. Whereas it can be safely assumed that most jurors would know that a tractor trailer costs more than $150.00 and a yacht costs more than $100.00, the same is not true as to whether most jurors would know how much money hurricane resistant glass would costs. In *Jackson,* the court recognized that the life experience exception should be applied in **rare** circumstances wherein it is undisputed that the jury would know the minimum value of the item that was stolen. It is appellant's position that this case is not that rare case and the life experience exception should not be applied to this case.

More importantly, however, appellant would reiterate and rely upon the arguments made in its initial brief which is that this Court should overrule the life experience exception created by the *Jackson* court since rather than have appellate courts

engage in speculation as to whether the case before it is the **rare** case that allows the jury to make value determinations without evidence, the simpler and fairer rule would be to require the state in all cases to prove with competent evidence the value of the damaged property if the state wants to punish the defendant based upon the value of the property.

A review of a recent decision entered by the Fourth District Court of Appeal in *Scottzanger v. State*, 35 Fla. L. Weekly D1964 (Fla. 4th DCA 2010), will illustrate why this Court should overrule the life experience exception created in the *Jackson* case so as to avoid inconsistent decisions from the trial and appellate courts to when the state should be excused from introducing evidence as to the value of property damaged when the state charges a defendant with criminal mischief in excess of $1000.00. In *Scottzanger*, the defendant, as a result of starting a fire in a shopping plaza, was charged with seven counts of criminal mischief in excess of $1000.00. At the conclusion of the state's case the trial judge reduced five of the counts to misdemeanors. The court denied the judgment of acquittal as to two of the felony criminal mischiefs counts. On appeal the state conceded that one of the criminal mischief counts should be vacated since the state failed to prove the business alleged in that count was damaged by the fire.

The issue the Fourth District Court of Appeal had to decide as to the last count of criminal mischief was the exact same issue the Third District Court of Appeal had to decide in this case. In *Scottzanger*, the state introduced evidence that defendant started a fire that caused damage to a medical supply store. At the trial the state conceded that

they failed to establish the value or the cost of damages that resulted from the fire inside the medical supply store but instead, relied upon the description of the damage which was presented to the jury. In ruling that without evidence of value the jury could not legally convict defendant of criminal mischief in excess of $1000.00, the Fourth District recognized that in criminal mischief in excess of $1000.00, an essential element of the crime is the amount of damage in value or cost to the property damaged. The court went on to hold that a description of the damage to the store and contents contained within the store was not a substitute for the value of or cost of the property damaged and that "without evidence of cost, value or amount of damage, the charge of criminal mischief in excess of $1000.00 was not sufficiently proved."

The facts in *Scottzanger* and the facts in this case are extremely similar. In *Scottzanger*, the state introduced evidence that as result of a fire a medical supply store was damaged. Rather than introduce evidence of the value of the damage the state relied exclusively on the description of the damage to prove that the damage was in excess of $1000.00. In this case the state introduced evidence that as a result of defendant's actions, four hurricane resistant windows were damaged. Similar to the state in *Scottzanger*, the state in this case rather than introduce evidence of the value of the glass instead, relied upon pictures and descriptions of the glass to establish that the value was over $1000.00. Despite the similarity of the cases two District Court of Appeals came to opposite conclusions. The Fourth District in *Scottzanger* refused to allow the jury to

speculate as to whether the fire caused more than $1000.00 worth of damage to the medical supply store and, therefore, reduced the criminal mischief charge to a misdemeanor. The Third District in this case relying upon the life experience exception allowed a jury to speculate as to whether the damage to the hurricane glass was over $1000.00 and refused to reduce the criminal mischief charge to a misdemeanor despite the state's failure to introduce any evidence as to the value or cost of the damaged glass.

In order to avoid these inequitable inconsistencies in the future, this Court should overrule the life experience exception created by the *Jackson* court and specifically hold that in order for the state to convict a defendant of criminal mischief in excess of $1000.00, the state must introduce evidence to establish the amount of damage in value or cost to the property damaged.

3. Even if this Court upholds the living experience exception it should not apply to criminal mischief cases.

Appellant would rely upon the argument in its initial brief as to why the living experience exception created in the *Jackson* case should not be applied to criminal mischief cases.

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,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125

BY:____________________________
ROBERT KALTER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of September, 2010.

____
ROBERT KALTER
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.

____
ROBERT KALTER
Assistant Public Defender