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IN THE SUPREME COURT OF FLORIDA

DARRYL LEWIS DAVIS,

Petitioner, CASE NO.: SC16-1738

vs.

STATE OF FLORIDA, L.T. Case No.: 5D15-2507

Respondent.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from the District Court of Appeal,
Fifth District, State of Florida

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INTRODUCTION

The issue before the Court is to determine the proper remedy when an appellate court finds the challenged conviction is not legally supported by the charged offense and the evidence adduced at trial. Mr. Davis submits this Court should adopt the holdings of *Deleon v. State*, 66 So. 3d 391 (Fla. 2d DCA 2011) and *Starling v. State*, 152 So. 3d 868 (Fla. 1st DCA 2014). In both cases, the appellate courts directed the trial courts to enter a judgment in accordance with the offense charged and the evidence adduced at trial when the conviction was not legally supported by either. This is the opposite holding of the case at bar.

Here, the Fifth District reduced the charged offense to a lesser included offense not supported by the charging document nor the evidence adduced at trial. Specifically, Mr. Davis was convicted of robbery with a deadly weapon, but the court held that no deadly weapon, or any other weapon, was found in Mr. Davis's possession at the time of the crime; however, it directed the lower court to enter a judgment for robbery with a weapon. The Fifth District erred in directing the lower court to enter a judgment that is legally inconsistent with the charging document and evidenced from trial. Therefore, Mr. Davis requests this Court quash the Fifth District's decision for the limited purpose of directing it to enter judgment of simple robbery rather than robbery with a weapon and adopt the holdings of *Deleon* and *Starling*.

PRELIMINARY STATEMENT

Petitioner, DARRYL LEWIS DAVIS, the Appellant in the Fifth District and the defendant in the trial court, will be referenced in this brief as Petitioner or by his proper name. Respondent, the State of Florida, the Appellee in the Fifth District Court of Appeal, and the prosecution authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. References to the Appendix are cited as "Pet.'s App." followed by the applicable Roman numeral.

STATEMENT OF THE CASE AND FACTS

I. Facts and proceedings in this case.

The State charged Mr. Davis by information with one count of robbery with a firearm in violation of sections 812.13(2)(a) and 775.087(2), Florida Statutes. Pet.'s App. I. Specifically, the information alleged Mr. Davis committed the offense of robbery as defined by statute while he "did actually possess and carry a firearm." *Id.* The sole object alleged to have been in Mr. Davis's possession during the time of the robbery was a firearm. Following a trial, the court instructed the jury it could find Mr. Davis guilty of one of the following offenses:

- Guilty of Robbery with a Firearm, as charged in the Information;
- Guilty of the lesser included offense of Robbery with a Deadly Weapon;
- Guilty of the lesser included offense of Robbery with a Weapon;

- Guilty of the lesser included offense of Robbery; or
- Guilty of the lesser included offense of Petit Theft.

Pet.'s App. II.

A special verdict form was also submitted to the jury. Pet.'s App. III. The special verdict form provided the jury the option of deciding whether Mr. Davis did "carry, display, use or possess a firearm in the commission of the offense" or whether he "did not". *Id.*

Mr. Davis was acquitted of the charged offense of robbery with a firearm, but found guilty of robbery with a deadly weapon. Pet.'s App. II. The jury also returned the special verdict finding Petitioner "did not carry, display, use or possess a firearm in the commission of the offense." Pet.'s App. III. Mr. Davis was sentenced to life in the Florida Department of Corrections. He filed a timely appeal before the Fifth District.

On appeal, appointed counsel filed a brief in accordance with *Anders v. California*, 366 U.S. 738 (1967). His direct appeal was *per curiam* affirmed on January 2, 2004. *Davis v. State*, 861 So. 2d 1169 (Fla. 5th DCA 2003). Mr. Davis subsequently filed a timely motion for postconviction relief claiming both trial counsel and appellate counsel were ineffective that were also denied.

On July 14, 2015, Davis filed a common law petition for writ of habeas corpus pursuant to Florida Rule of Appellate Procedure 9.100 and 9.030(b)(3). In this

petition, Mr. Davis alleged he was entitled to relief because he was erroneously convicted of an uncharged crime. Specifically, he alleged that he was charged by information with robbery with a firearm and not robbery with a deadly weapon. Further, he alleged that the evidence presented at trial was that he was armed with a firearm, and no other deadly weapon was alleged. Mr. Davis argued the State's failure to charge in the information that he committed the offense of robbery with a deadly weapon, and the jury's special finding that he did not possess a firearm, foreclosed a conviction for robbery with a deadly weapon. He requested the Fifth District grant his petition and remand to the trial court to enter a judgment and sentence for simple robbery.

On July 15, 2016, the Fifth District granted Mr. Davis's petition. In its entirety, the opinion states the following:

> Darryl Lewis Davis petitions this court for writ of habeas corpus regarding his convictions and life sentences in two cases. Davis was charged in both cases with robbery with a firearm. Neither the informations nor the evidence presented in Davis's trials alleged that he used any weapon other than a firearm. Separate juries found Davis guilty of robbery with a deadly weapon but made special findings that he did not possess a firearm during the commission of the crimes.
>
> We hold that it was error to list robbery with a deadly weapon as a lesser-included offense on the verdict forms in these cases. *See Growden v. State,* 372 So.2d 930, 931 (Fla.1979); *Stephens v. State,* 396 So.2d 741, 742 (Fla. 5th DCA 1981); *Deleon v. State,* 66 So.3d 391, 394–95 (Fla. 2d DCA 2011). Furthermore, the verdicts and special findings were inconsistent. *See Starling v. State,* 152 So.3d 868, 868 (Fla. 1st DCA 2014); *Nettles v. State,* 112 So.3d 782, 783 (Fla. 1st

> DCA 2013). Failure to correct Davis's convictions, which resulted in consecutive life sentences, would constitute a manifest injustice.
>
> Accordingly, we grant Davis's petitions for writ of habeas corpus and remand for entry of corrected judgments that adjudicate him guilty of robbery with a weapon and resentencing according to a revised Criminal Punishment Code scoresheet.

Davis v. State, 197 So. 3d 615, 616 (Fla. 5th DCA 2016).

Importantly, although it held that "[n]either the informations nor the evidence presented in Davis's trials alleged that he used any weapon other than a firearm …", it remanded to the trial court with direction to enter an adjudication of guilty of robbery with a weapon rather than simple robbery. Mr. Davis filed a timely Motion for Rehearing, Clarification, or Certification to address this issue.

In that motion, Mr. Davis requested the Fifth District clarify the portion of its decision reducing his conviction to robbery with a weapon rather than just robbery. Alternatively, Mr. Davis requested certification with the First District's decision in *Starling v. State*, 152 So. 3d 868 (Fla. 1st DCA 2014). The Fifth District denied his motion and Mr. Davis timely filed his notice to invoke this Court's discretionary jurisdiction requesting this Court accept jurisdiction because the Fifth District's decision was in express and direct conflict with *Starling v. State*, 152 So. 3d 868 (Fla. 1st DCA 2014) and *Deleon v. State*, 66 So. 3d 391 (Fla. 2d DCA 2011). This Court accepted jurisdiction and this brief follows.

II. Facts and Proceedings in *Deleon* and *Starling*.

a. *Deleon v. State*, 66 So. 3d 391 (Fla. 2d DCA 2011)

In *Deleon*, the State charged defendant by information with carjacking with a firearm. 66 So. 3d at 391. The jury was instructed it could find the defendant guilty of carjacking with a deadly weapon as a lesser included offense. *Id.* The jury returned a verdict of carjacking with a deadly weapon; however, it also found that he did not possess a firearm during the commission of the offense. *Id.* Importantly, the State did not charge the offense of carjacking with a deadly weapon in its information and solely alleged he possessed or carried a firearm during the commission of the offense. *Id.*

On appeal before the Second District, the defendant argued, "the trial court erred in instructing the jury on the offense of carjacking with a deadly weapon because the specific offense of carjacking with a deadly weapon was not charged in the information and because it is not a lesser-included offense of carjacking with a firearm." *Id.* at 393. He alleged this was fundamental error and he was convicted of uncharged crime.

The Second District held the trial court committed fundamental error when it allowed the erroneous jury instruction. The court held that the offense of carjacking with a deadly weapon was not charged in the information and therefore the defendant could not be convicted of an uncharged crime. *Id.* at 394 (citing with discussion

Jaimes v. State, 51 So.3d 445, 447 (Fla.2010) and *Sanders v. State*, 959 So.2d 1232, 1234 (Fla. 2d DCA 2007)). Additionally the court held that carjacking with a deadly weapon was neither a necessary or permissive lesser included offense of carjacking with a firearm. *Id.* (citing *State v. Paul*, 934 So.2d 1167, 1175 (Fla. 2006); *State v. Weller*, 590 So.2d 923, 925 n. 2 (Fla.1991).

In reversing the conviction and remanding with direction to impose a judgment of simple carjacking, the Second District Court of Appeal stated the following:

> the trial court committed fundamental error in instructing the jury on an offense—carjacking with a deadly weapon—that was not charged in the information. The improper instruction clearly had an effect on the jury's verdict as evidenced by the special verdict form finding him guilty of carjacking with a deadly weapon. Not only was the jury instructed on a theory of the offense that was not charged in the information, but the jury was instructed on a theory of the offense that was unsupported by the evidence; the victim testified that Deleon carried a gun, and there was no evidence that he carried any other weapon during the commission of the offense.

Deleon, 66 So. 3d at 394 (footnote omitted).

The Second District reversed and remanded for the trial court to enter a judgment and sentence for simple carjacking because that conviction was "properly alleged in the information and proved by the State." *Id.* at 395 (citing *Jaimes*, 51 So.3d at 452 (reversing and remanding with directions for the trial court to enter a judgment for the lesser-included offense of simple battery because the elements of simple battery were charged and proven at trial)).

b. *Starling v. State*, 152 So. 3d 868 (Fla. 1st DCA 2014).

In *Starling*, the defendant was charged with robbery with a firearm. 152 So. 3d at 868. He was convicted as charged; however, the jury returned a special verdict form finding that he did not actually possess a firearm during the commission of the offense. *Id.* The trial court subsequently reduced his conviction from robbery with a firearm to the lesser included offense of robbery with a weapon. *Id.* He appealed his conviction of robbery with a weapon arguing the verdict and his conviction were legally inconsistent. *Id.* On appeal, the court stated that the trial court's

> inclination to reduce the offense was correct. The problem is, however, that the *only* weapon referenced in the record as being involved in the crime was the firearm allegedly wielded by Appellant, which the jury affirmatively concluded Appellant did not possess. We cannot reconcile Appellant's reduced conviction for robbery with a weapon with the jury's specific finding that he did not possess the only weapon referenced in the record.

Starling, 152 So. 3d at 868–69 (emphasis maintained).

The court found this was a circumstance that raised a "true" inconsistent verdict, and it remanded the case to the trial court to reduce the defendant's conviction from robbery with a weapon to simple robbery for resentencing. *Id.* at 869.

SUMMARY OF ARGUMENT

The issue before the Court is whether the Fifth District erred by not remanding to the trial court with direction to enter a corrected judgment of simple robbery rather than robbery with a weapon. Petitioner submits that the Fifth District erred in not reducing his conviction to robbery. Broadly, the issue before the Court beyond whether the Fifth District erred is whether an appellate court should reduce a conviction not supported by the charging document or the evidence adduced at trial to a judgment in accordance the charging document and the evidence presented at trial; or in the alternative, and what occurred in this case, whether an appellate court can reduce a judgment to an uncharged crime that is not supported by the charging document or the evidence. Mr. Davis submits the First and Second District decisions of *Deleon* and *Starling* have correctly decided this issue and request the court adopt their holdings.

The holdings of *Deleon* and *Starling* are in direct and express conflict with the Fifth District's decision at bar. In both the First and the Second District Courts' decisions, the appellate courts held the charging documents and evidence adduced at trial did not comport with the judgment entered. The appellate court's remanded with direction to enter judgments that aligned with the charging document and the evidence presented at trial. The Fifth District in the case did not. Petitioner submits

that both *Deleon* and *Starling* represent the correct holding that this Court should adopt both for several reasons.

First, due process requires that a defendant may not be convicted of an uncharged crime. In Florida, the State's charging document limits the types of offenses a defendant may be convicted of and the elements that must be proven at trial. *Deleon* and *Starling* are in accord with these principles, while the case at bar is not.

Second, robbery with a weapon is not a necessary or permissive lesser included offense in this case. Mr. Davis was charged solely with robbery with a firearm but he was acquitted of carrying a firearm during the commission of the offense. The Fifth District reduced his sentence to robbery with a weapon even though the court sentences early said no other weapon was charged or presented as evidence during the trial. The Fifth District's holding on this point is in direct conflict with the Second District's holding in *Deleon*.

Third, there was a true inconsistent verdict in this case, requiring the appellate court to reduce the judgment to simple robbery. Where there is a true inconsistent verdict, the acquittal of an essential element limits the types of lesser included offenses available to be imposed on a defendant. In this case, because Mr. Davis was acquitted of carrying a firearm, and the appellate court found no other weapon was used, the only lesser included offense available was simple robbery.

Based on the foregoing, this Court should quash the decision of the Fifth District and remand with direction that the Fifth District to reduce Mr. Davis's judgment to simple robbery.

ARGUMENT

Issue presented.

I. WHETHER THE FIFTH DISTRICT ERRED WHEN IT REMANDED PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS DIRECTION THE TRIAL COURT TO ADJUDICATE HIM GUILTY OF ROBBERY WITH A WEAPON RATHER THAN SIMPLE ROBBERY?

Preliminary matters.

i. Jurisdiction. This Court has jurisdiction because it may resolve a manifest injustice and because it exercised its right to discretionary review to resolve an express and direct conflict. *Miller v. State*, 988 So. 2d 138, 139 (Fla.1st DCA 2008); Art. V. (b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(2)(A)(iv).

Fundamental errors are subject to correction at any time, on direct appeal, by post-conviction proceedings or by extraordinary remedy. *Akins v. State*, 462 So.2d 1161, 1165-1166 (Fla. 5th DCA 1984). Fundamental error and a manifest injustice result when a defendant is convicted of an offense for which the defendant could not have been convicted as a matter of law. *Miller*, 988 So. 2d at 139.

This Court accepted discretionary jurisdiction to review this decision because it expressly and directly conflicts with *Starling v. State*, 152 So. 3d 868 (Fla. 1st

DCA 2014) and *Deleon v. State*, 66 So. 3d 391 (Fla. 2d DCA 2011), decisions of other district courts of appeal on the same point of law. Art. V. (b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(2)(A)(iv).

ii. Standard of review. An inconsistent verdict claim presents a pure question of law and is reviewed *de novo*. *Brown v. State,* 959 So. 2d 218, 220 (Fla. 2007).

Merits.

I. THE FIFTH DISTRICT ERRED WHEN IT HELD PETITIONER'S CONVICTION AND SENTENCE SHOULD BE REDUCED FROM ROBBERY WITH A DEADLY WEAPON TO ROBBERY WITH A WEAPON, INSTEAD OF SIMPLE ROBBERY, BECAUSE THE INFORMATION ONLY ALLEGED THAT PETITIONER CARRIED A FIREARM DURING THE COMMISSION OF THE ROBBERY AND THE JURY RETURNED A VERDICT THAT PETITIONER DID NOT CARRY A FIREARM, AND NO OTHER REFERENCE TO A DEADLY WEAPON OR WEAPON WAS MADE IN THE INFORMATION OR ADDUCED AT TRIAL

1. Due Process principles and the State's charging document preclude Mr. Davis from receiving a conviction for robbery with a weapon as a lesser included offense in this case.

To ensure a defendant knows the factual and legal basis for an offense, the State's charging document in the form of an information "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fla. R. Crim. P. 3.140(b). For an information to be valid the State must "allege each of the essential elements of a crime," *State v. Dye*, 346 So.2d 538, 541 (Fla. 1977), and these statutory elements cannot be inferred. *See State v. Von Deck*, 607 So. 2d 1388, 1389 (Fla. 1992). These allegations are necessary to "fairly apprise a defendant of the offenses which he or she is charged." *Leeman v. State*, 357 So. 2d 703 (Fla. 1978). Failure to fully apprise a defendant of the charges against him, or

convicting a defendant of an uncharged crime, is a violation of due process. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010).

A violation of this prohibition constitute fundamental error and results in a manifest injustice. *Ray v. State*, 403 So. 2d 956, 959–60 (Fla. 1981); *Silverstein v. State*, 985 So. 2d 635 (Fla. 4th DCA 2008) (a manifest injustice includes convicting a defendant "for an offense for which he could not have been convicted."); *Miller v. State*, 988 So. 2d 138, 139 (Fla. 1st DCA 2008). Based on these principles, in Florida, it is well established that "[a] conviction on a charge not contained in the information is a due process violation." *Keels v. State*, 792 So. 2d 1249, 1249 (Fla. 2d DCA 2001).

In accord with these bedrock constitutional principles, it is a well-established rule that "[w]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged[.]" *Long v. State*, 92 So. 2d 259, 260 (Fla. 1957). Since its inception, "Florida courts have consistently applied this rule[.]" *Morgan v. State*, 146 So. 3d 508, 512 (Fla. 5th DCA 2014) (citing *Deleon v. State*, 66 So. 3d 391, 393 (Fla. 2d DCA 2011); *Brown v. State*, 41 So. 3d 259, 262 (Fla. 4th DCA 2010); *Diaz v. State*, 38 So. 3d 791, 792 (Fla. 4th DCA 2010); *Trahan v. State*, 913 So. 2d 729, 730 (Fla. 5th DCA 2005); *D.R. v. State*, 790 So. 2d 1242, 1244–45 (Fla. 5th DCA 2001); *Zwick v. State*, 730 So. 2d 759, 760 (Fla. 5th DCA 1999)). As stated further by the Fifth District, "[A] criminal

defendant is entitled to a trial on the charges contained in the information and may not be prosecuted for uncharged offenses, even if they are of the same general character or constitute alternative ways of committing the charged offense." *Morgan*, 146 So. 3d at 512 (citations omitted).

Here, Mr. Davis was charged solely with robbery with a firearm. Pet.'s App. I. Due process and the State's charging document limit it from seeking a punishment outside of that offense, or the applicable lesser included offenses available based on the evidence adduced at trial.. Fla. R. Crim. P. 3.140(b); *Miller*, 988 So. 2d at 139; *Keels*, 792 So. 2d at 1249. He was acquitted of robbery with a firearm, Pet.'s App. II and III, and therefore, he could only be convicted of a permissible lesser included offense due to this acquittal. To ensure due process, and to facilitate procedural safeguards, limiting an appellate court to directing entry of a judgment in accord with the charging document is critical. In both *Deleon* and *Starling*, one of the critical concerns was a determination of what the State alleged in the charging document and a limitation on the State for what conviction it could seek based on the charging document. *Supra* Statement of the Case and Facts, II, at 6-8.

Therefore, to ensure a defendant is fully apprised of the allegations against him or her, and the State cannot convict a defendant for an uncharged crime, an appellate court should only be able to direct a judgement for a lesser included offense

based on the charged offense, and the specific factual allegations alleged in the charging document.

2. Based on the statutory definitions of "firearm" and "weapon", and the lesser included offense for robbery with a firearm, robbery with a weapon is not an applicable lesser included offense in this case.

(i) Statutory definitions

The robbery statute, section 812.13, provides various degrees of proof and punishments based on whether an accused carried or possessed a firearm, deadly weapon, or weapon. *See* §§ 812.13(a)-(c), Fla. Stat. Each subsection demonstrates the same general character of the offense of robbery but are different crime altogether. A robbery committed while in possession of a firearm or other deadly weapon is a first degree felony punishable by life. § 812.13(2)(a), Fla. Stat. Alternatively, committing a robbery with a weapon, while also a first degree felony, is punishable by up to thirty years imprisonment. § 812.13(2)(b), Fla. Stat. Finally, a robbery where the defendant neither carried a firearm, deadly weapon, nor other weapon is a second degree felony punishable by up to fifteen years imprisonment. § 812.13(2)(c), Fla. Stat. Based on sections 812.13(a)-(c), there is a clear difference in the burden of proof, degree of the offense, and thus punishment, based upon whether a defendant was in possession of a firearm, deadly weapon, or weapon. *Id.* The

factual and legal distinction between these offenses is further evidenced by this Court's jurisprudence.

In section 812.13, the terms "firearm", "deadly weapon," and "weapon" are not defined. However, this Court has stated that, "[a]lthough section 812.13 fails to define the terms 'firearm' and 'weapon,' the definitions for these terms contained in the Florida Standard Jury Instructions are a correct statement of the law[.]" *Dale v. State*, 703 So. 2d 1045, 1046 (Fla. 1997). The Florida Jury Instructions rely on section 790.001, Florida Statutes to define "weapon" and "firearm". *See* §§ 790.001(6) ("firearm" definition) and 790.001(13) ("weapon" definition). Specifically, a "firearm" is defined as "any weapon … designed to, or may readily be converted to expel a projectile by the action of an explosive …" § 790.001(6), Fla. Stat. Alternatively, a "weapon" is defined as "any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon *except a firearm* or a common pocketknife, plastic knife, or blunt-bladed table knife." § 790.001(13), Fla. Stat. (emphasis added). Thus, importantly, there is a statutory distinction, and thus a clear difference, between a firearm and weapon (whether deadly or not). *See Stanley v. State*, 757 So. 2d 1275, 1276 (Fla. 4th DCA 2000) ("It is clear, therefore, that if the *statutory* definitions of 'weapons' and 'firearms' are used, Stanley cannot be convicted of robbery with a weapon, when he possessed a firearm, because the statutory definition of weapon excludes firearms.")

(emphasis maintained). The issue regarding an absence of proof for an alleged firearm, in relation to a conviction of a perceived lesser included offense of carrying a deadly weapon, was discussed at length in *Deleon*.

In *Deleon*, the defendant was charged with carjacking with a firearm, but convicted of carjacking with a deadly weapon. This offense was not charged in the State's information. In reversing the conviction and remanding with direction to impose a judgment of simple carjacking, the Second District Court of Appeal stated the following:

> the trial court committed fundamental error in instructing the jury on an offense—carjacking with a deadly weapon—that was not charged in the information. The improper instruction clearly had an effect on the jury's verdict as evidenced by the special verdict form finding him guilty of carjacking with a deadly weapon. Not only was the jury instructed on a theory of the offense that was not charged in the information, but the jury was instructed on a theory of the offense that was unsupported by the evidence; the victim testified that Deleon carried a gun, and there was no evidence that he carried any other weapon during the commission of the offense.

Deleon, 66 So. 3d at 394 (footnote omitted).

Because the jury acquitted the defendant of possessing the only weapon charged the court ordered his conviction reduced to simple carjacking. *Id.* at 395.

Here, the Fifth District, similar to the Second District in *Deleon*, held it was error to list the offense of robbery with a deadly weapon as a lesser-included offense on the verdict form because the information limited the charged offense to carrying a firearm during the commission of the crime. *Davis*, 197 So. 3d at 616. However,

unlike *Deleon*, the Fifth District inexplicably directed a judgment of robbery with a weapon, after it previously held the information and evidence presented failed to offer any evidence other than a firearm was used during the commission of the crime, and more importantly, the jury made a special finding that Petitioner did not possess a firearm. Pet.'s App. I-III; *Davis*, 197 So. 3d at 616 ("Neither the informations nor the evidence presented in Davis's trials alleged that he used any weapon other than a firearm.").This result is logically inconsistent with its prior finding just a few short paragraphs before. Based on the foregoing, the Fifth District erred and reversal is appropriate. The need for reversal is further demonstrated through an examination of determining what constitutes a lesser included offense, and how robbery with a weapon cannot be a lesser included offense in this case.

(ii) Lesser Included Offenses

There are two types of "lesser-included" offenses, a necessary lesser-included offense and a permissive lesser included offense, which are "determined based on the elements of the offenses, not on the penalties attached." *Carle v. State*, 983 So. 2d 693, 695 (Fla. 1st DCA 2008); *Deleon*, 66 So. 3d at 395. ("An offense is a proper lesser-included offense if it meets the definition of a necessary or permissive lesser-included offense, even if it does not result in a lesser degree or penalty than the main charged offense."). First, a "necessarily" or "necessary" lesser-included offense are those offenses "in which the elements of the lesser offense are always subsumed

within the greater, without regard to the charging document or evidence at trial". *State v. Paul*, 934 So. 2d 1167, 1175 (Fla. 2006) (quoting *State v. Florida*, 894 So. 2d 941, 947 (Fla. 2005), *receded from on other grounds by, Valdes v. State*, 3 So. 3d 1067 (Fla. 2009)). Second, a "permissive" lesser-included offense exists when "on the face of the statutes, the two offenses appear to be separate[] but the facts alleged in the accusatory pleadings are such that the lesser offense cannot help but be perpetrated once the greater offense has been." *State v. Weller*, 590 So. 2d 923, 925 n. 2 (Fla. 1991).

Generally, robbery with a weapon is a lesser included offense of robbery with a firearm where the information limits the charged offense to a firearm, and the jury and appellate court find there was no evidence presented during the trial that a defendant carried a firearm during the robbery. However, that is not the case here.

Robbery with a weapon is not a necessary or permissive included offense in this case. First, it is not a necessary lesser included offense to robbery with a firearm because robbery with a weapon is not always subsumed within robbery with a firearm, regardless of the charging document or evidence at trial since a weapon may be any of the above listed items "except a firearm". § 790.001(13). Additionally, here, the jury found there was no firearm, Pet.'s App. III, and the Fifth District found there was no other evidence presented that another weapon existed. Therefore robbery with a weapon cannot be a necessary lesser included offense in this case.

Second, robbery with a weapon in this case cannot be a permissive lesser-included offense of robbery with a firearm. The facts alleged in the information cannot be perpetrated once the greater offense has been since Mr. Davis was acquitted of the charged offense, and no other weapon was alleged to have been in his possession but the firearm. *See Weller*, 590 So. 2d at 925 n. 2. For the foregoing reasons, this Court should reverse the Fifth District's decision.

3. A true inconsistent verdict resulted in this case and eliminated the possibility for Davis to be convicted of robbery with a weapon.

Generally, inconsistent jury verdicts are permitted because such verdicts may be the result of lenity. *See Conrad v. State*, 977 So. 2d 766 (Fla. 5th DCA 2008). These verdicts may arise from a jury's exercise of its "inherent authority to acquit" regardless of the facts supporting a conviction. *State v. Connelly*, 748 So. 2d 248, 252 (Fla. 1999). However, this Court has recognized one exception which is known as a "true" inconsistent verdict. *Id.* at 768. A true inconsistent verdict occurs when a "not-guilty finding on one count negates an element on another count that is necessary for conviction." *Nettles v. State*, 112 So. 3d 782, 783 (Fla. 1st DCA 2013) (quoting *Shavers v. State*, 86 So.3d 1218, 1221 (Fla. 2d DCA 2012)); *Starling*, 152 So. 3d at 868–69.

In *Starling*, the defendant appealed his conviction of robbery with a weapon because the verdict was legally inconsistent. *Id.* The defendant was charged and

found guilty of robbery with a firearm but the jury made a separate finding that he did not "actually possess a firearm" during the crime. Recognizing this inconsistency, the trial court reduced the conviction to the lesser included offense of robbery with a weapon. On appeal before the First District, and relying on *Nettles*, 112 So. 3d at 782, (the same case the Fifth District relied upon in the case at bar) the First District stated that,

> This inclination to reduce the offense was correct. The problem is, however, that the *only* weapon referenced in the record as being involved in the crime was the firearm allegedly wielded by Appellant, which the jury affirmatively concluded Appellant did not possess. We cannot reconcile Appellant's reduced conviction for robbery with a weapon with the jury's specific finding that he did not possess the only weapon referenced in the record.

Starling, 152 So. 3d at 868–69.

The First District held that because this was a true inconsistent verdict it remanded the case to the trial court to reduce the defendant's conviction from robbery with a weapon to simple robbery. *Id.*

Similar to *Starling*, and as held by the Fifth District in the case at bar, the acquittal regarding the robbery with a firearm conviction resulted in an inconsistent verdict. However, again, inexplicably, the Fifth District did not reduce the judgment to a lesser included offense that was in accordance with the charging document or the evidence adduced at trial. *Starling*, like *Deleon*, reached the correct holding, and

this Court should adopt both holdings and reverse and remand the Fifth District's decision.

CONCLUSION

Petitioner requests this Court reverse the decision of the Fifth District and remand with direction that the court enter a correct judgment and impose a sentence of simple robbery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 11th day of May 2017.

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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IN THE SUPREME COURT OF FLORIDA

DARRYL LEWIS DAVIS,

Petitioner, CASE NO.: SC16-1738

vs.

STATE OF FLORIDA, L.T. Case No.: 5D15-2507

Respondent.

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APPENDIX INDEX

I. Information

II. Verdict Form

III. Special Findings as to Firearm

IV. Judgment

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