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IN THE SUPREME COURT OF THE STATE OF FLORIDA

DARRYL LEWIS DAVIS,

Petitioner,

v.

Case No. SC17-1738
5th DCA No. 5D15-2507

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with one count of robbery with a firearm. (R. 16).

Petitioner's trial commenced on September 26, 2002. (R. 32). Betty Lovejoy testified that on August 26, 2001, she was working as a cashier at an ABC Liquor store when a man robbed her at gun-point. (R. 47-48). The gun "looked like a .9mm." (R. 49). It was a "square type black gun with silver on it." (R. 49). Surveillance photographs and a videotape from inside the store were admitted into evidence. (R. 50-52).

Sergeant Elwin Rollins of the Orange County Sheriff's Office testified that he came into contact with Petitioner on September 13, 2001. (R. 75-76). Petitioner looked like the robber Sergeant Rollins had seen in the surveillance photos from the ABC robbery. (R. 75-76). Sergeant Rollins testified that, based on what he observed in the photographs from inside the ABC store, and his personal experience, he believed the gun used by the robber to be a .9mm Smith & Wesson handgun. (R. 82). Corporal Hinkey of the Orlando County Sheriff's Office also testified that he believed the weapon used in the robbery to be a .9mm Smith & Wesson, based on his view of the photographs. (R. 91, 97).

On cross-examination, defense counsel elicited from Sergeant Rollins that Petitioner had in his possession a replica Smith & Wesson .357 Magnum revolver,

which was actually a Daisy BB gun. (R. 84). A .9mm handgun was never recovered in connection with the ABC robbery. (R. 84, 97).

When asked about the proposed jury instructions and verdict form, defense counsel indicated that he had no objections except to the instructions on reputation "and things like that." (R. 106-107).

During closing, defense counsel repeatedly questioned whether the gun used in the robbery was a real firearm, pointing out that the only testimony the jury heard about any weapon was the pellet gun recovered from Petitioner, which did not appear to be the weapon used in the robbery. (R. 110, 113-114). Defense counsel later emphasized that the realistic looking replica .357 Magnum found on Petitioner was evidence that "things that look like a real gun can turn out not to be a real gun." (R. 133-131).

The State argued that Sergeant Rollins and Corporal Hinkey, both experienced law enforcement officers, each identified the weapon seen in the ABC surveillance photos as a .9mm Smith & Wesson handgun. (R. 122-124).

The jury was instructed that a firearm is "any weapon, including a starter gun, which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive." (R. 135). The jury was further instructed that a weapon is a deadly weapon "if it is used or threatened to be used in a way likely to produce death or great bodily harm." (R. 136). Finally, the jury was instructed that a weapon

is "any object that could be used to cause death or inflict a serious bodily harm." (R. 136).

The verdict form submitted to the jury included lesser-included offenses of robbery with a deadly weapon, robbery with a weapon, robbery, and petit theft. (R. 17). Petitioner was convicted of robbery with a deadly weapon. (R. 17). The jury also made a special finding that Petitioner did not carry, display, use or possess a firearm in the commission of the offense. (R. 18). Petitioner was sentenced to life in prison on May 14, 2003. (R. 4).

Petitioner's conviction and sentence was affirmed on direct appeal. See Davis v. State, 848 So. 2d 337 (Fla. 5th DCA 2003). The summary denial of Petitioner's motion for post-conviction relief was affirmed by the Fifth District on October 18, 2005. (5D05-2792).

Petitioner filed a petition for writ of habeas corpus in the Fifth District Court of Appeal on July 7, 2015.[1] (5D15-2507) (R. 3-12). On February 17, 2016, the Fifth District issued an order causing case number 5D15-2507 to travel together with case number 5D15-2509, wherein Petitioner filed a petition for writ of habeas corpus raising the same arguments in connection with a separate robbery case for which he

[1] References to the date of *pro se* filings will refer to the date Petitioner provided the document to his correctional institution for mailing, pursuant to Florida Rule of Appellate Procedure 9.420, also known as the "mailbox rule."

was also convicted of robbery with a deadly weapon.[2] (R. 166). On July 15, 2016, the Fifth District Court of Appeal issued an opinion granting the petitions. See Davis v. State, 197 So. 3d 615 (Fla. 5th DCA 2016); (R. 165-166). The court held that it was error to list robbery with a deadly weapon as a lesser-included offense on the verdict form, and that the verdicts and special findings were inconsistent. (R. 166). The court ordered that the two cases be remanded for entry of corrected judgments adjudicating Petitioner guilty of robbery with a weapon, and resentencing him under a revised Criminal Punishment Scoresheet. (R. 166). Petitioner's motion for rehearing, clarification, or certification was denied on August 16, 2016. (R. 167-170; 174).

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court on September 12, 2016. In his initial brief on jurisdiction, Petitioner argued that the Fifth District's opinion conflicted with the First District's decision in Starling v. State, 152 So. 3d 868 (Fla. 1st DCA 2014), and the Second District's decision in Deleon v. State, 66 So. 3d 391 (Fla. 2d DCA 2011). The State responded that, not only was the Fifth District's decision in Davis not in conflict with Deleon and Starling, it in fact relied on Deleon and Starling to grant Petitioner relief. Therefore,

[2] A motion to have the instant case travel together with case number SC16-1739, has been filed simultaneously with this brief.

argued the State, jurisdiction should have been denied. This Court accepted jurisdiction on March 20, 2017.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erred in deciding Petitioner's 2015 petition for writ of habeas corpus on the merits, since the issues raised could have been raised on direct appeal after his 2003 sentencing, or in his motion for post-conviction relief filed under Florida Rule of Criminal Procedure 3.850.

Further, the Fifth District Court of Appeal erred in finding that the general and specific jury instructions were legally inconsistent, and that manifest injustice occurred in connection with the verdict form. Deleon v. State, 66 So. 3d 391 (Fla. 2d DCA 2011), and Starling v. State, 152 So. 3d 868 (Fla. 1st DCA 2014), upon which the Fifth relied, are wrongly decided. The Fifth District erred in reducing Petitioner's conviction for robbery with a deadly weapon.

Finally, assuming *arguendo*, that the District Court properly reduced Petitioner's conviction, Petitioner's conviction for robbery with a weapon should stand and should not be further reduced to simple robbery. Stanley v. State, 757 So.2d 1275 (Fla. 4th DCA 2000), relied upon by Petitioner, conflicts with the reasoning of this Court's decision in Reddick v. State, 394 So. 2d 417 (Fla. 1981).

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN GRANTING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS.

Petitioner argues that the Fifth District Court of Appeal erred in ordering the trial court to enter an adjudication of guilt for robbery with a weapon. He asserts that the conviction is not supported by the charging document or the evidence adduced at trial, and that the District Court should therefore have directed the trial court to enter a conviction for simple robbery. Respondent responds that the District Court erred both in finding that the general and special jury verdicts were legally inconsistent, and in ordering the trial court to enter an adjudication of guilt to the reduced charge of robbery with a weapon. Petitioner's conviction for robbery with a deadly weapon should be reinstated. However, assuming *arguendo* that the District Court properly reduced Petitioner's conviction for robbery with a deadly weapon, his conviction for robbery with a weapon should stand.

Procedural Bars

The Fifth District Court of Appeal erred by considering Petitioner's habeas corpus petition on the merits since it raised issues not reviewable by habeas petition. Although Petitioner attempted to frame the issue raised in his petition as one involving a due process violation, in essence, his argument was simply that robbery with a deadly weapon should not have been listed as a lesser-included offense on the

verdict form and/or that inconsistent verdicts were rendered. However, complaints regarding the lesser included offenses reflected on the verdict form and claims of inconsistent verdicts are not reviewable via a petition for writ of habeas corpus, since both of these issues are properly raised on direct appeal and/or via a motion for post-conviction relief. See Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) ("[H]abeas corpus is not to be used for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in" prior post-conviction filings…"); State v. Jimenez, 542 So. 2d 430, 431 (Fla. 3d DCA 1983) (to preserve the issue of a legally inconsistent jury verdict for appellate review, it must be raised either before the jury is discharged, or through a post-trial motion for judgment of acquittal notwithstanding the verdict); Whyte v. State, 881 So. 2d 1183 (Fla. 5th DCA 2004) (defendant failed to preserve for review an erroneously given instruction on a lesser-included offense by objecting to the jury instructions or the verdict form). Therefore, the Fifth District should not have considered the merits of these claims.

Generally, a claim that a defendant has been convicted of a crime not alleged can be reviewed through a petition for writ of habeas corpus. See e.g. State v. Gray, 435 So. 2d 816 (Fla. 1983) (the failure of an accusatory instrument to charge a crime is a defect that can be raised at any time). However, Petitioner's assertion that the State charged him with robbery using a firearm, but not with robbery using a "deadly

weapon," and that he was therefore convicted of a crime not alleged, was wholly without merit on its face. This is because a firearm is, by definition, a deadly weapon. Miller v. State, 613 So. 2d 530, 531 (Fla. 3d DCA 1993). Here, the information alleged that Petitioner committed robbery with a firearm, (which is a deadly weapon), the State presented video and photographic evidence supporting its theory that Petitioner committed the robbery with a firearm, (which is a deadly weapon), and the victim testified that Petitioner robbed her with a firearm, (which is a deadly weapon). Further, the information cited section 812.13(2)(a), Florida Statutes, which reads, "If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment." § 812.13(2)(a), Fla. Stat. (2001). Thus, it is plain that Petitioner was not convicted of a crime not alleged, and his habeas petition was merely an attempt to re-argue issues that were or could have been raised in the trial court. Therefore, the District Court erred in reaching the merits of Petitioner's petition.

Inconsistent Verdicts

The District Court also erred in finding that the jury rendered inconsistent verdicts in this case. As a general rule, inconsistent jury verdicts are permitted in Florida. State v. Powell, 674 So. 2d 731, 732-33 (Fla. 1996) (citing Eaton v. State, 438 So. 2d 822 (Fla. 1983)). Inconsistent verdicts are allowed because jury verdicts

can be the result of lenity and therefore do not always speak to the guilt or innocence of the defendant. Id. "Inconsistent verdicts may arise from a jury's exercise of its 'inherent authority to acquit' a defendant even if the facts support a conviction." Flores v. State, 974 So. 2d 556, 557 (Fla. 5th DCA 2008) (citing State v. Connelly, 748 So. 2d 248, 252 (Fla. 1999)).

This Court has recognized just one exception to the general rule allowing inconsistent verdicts. "This exception, referred to as the 'true' inconsistent verdict exception, comes into play when verdicts against one defendant on legally interlocking charges are truly inconsistent." Powell, 674 So. 2d at 733. "[T]rue inconsistent verdicts are 'those in which an acquittal on one count negates a necessary element for conviction on another count.'" Brown v. State, 959 So. 2d 218, 218 (Fla. 2007) (quoting Gonzalez v. State, 440 So. 2d 514 (Fla. 4th DCA 2006)). "In fact, the only cases which reverse a conviction on the ground it is inconsistent with another not-guilty verdict returned by the same jury, deal with refusals of the jury to convict on a felony, which is the essential element of another count being tried." State v. Perez, 718 So. 2d 912, 915 (Fla. 5th DCA 1998). Here, the Fifth District Court of Appeal erred in finding that the jury rendered a true inconsistent verdict because, not only was the verdict not legally inconsistent, it was not even logically inconsistent. The jury found by their general verdict that the weapon used by Petitioner to commit the robbery was a deadly weapon other than a

firearm, and thus, not surprisingly, also found by their special verdict that the deadly weapon in question was not a firearm. These two findings are perfectly consistent.

At trial, there was a dispute as to whether the object carried by Petitioner during the robbery was a firearm. The weapon in question was never recovered, but defense counsel used the fact that a BB gun replica of a different kind of firearm was found in Petitioner's possession to argue convincingly that objects that are not firearms can look very much like firearms, and that the State was unable to demonstrate that a real firearm was used in this case. On the other hand, both the victim and two law enforcement officers testified that the object used in the robbery appeared to be a .9mm semi-automatic handgun. This testimony from Ms. Lovejoy and the two officers would have been sufficient to sustain a conviction for robbery with a firearm. See e.g. Akins v. State, 838 So. 2d 637, 639 (Fla. 5th DCA 2003) (the victim's testimony that she thought the weapon was a sawed-off shotgun, coupled with the defendant's nonverbal implication that we would use it against the victim, sufficed to support a finding that Akins possessed a firearm during the robbery). However, presumably because the discovery of a replica firearm in Petitioner's possession created a question in the mind of the jury as to whether the weapon used in the robbery constituted a "firearm" as defined in the jury instructions, they found Petitioner guilty of robbery with a deadly weapon, and did not make a special finding that Petitioner possessed a firearm. There is nothing

erroneous about this, since a jury can conclude that a weapon is dangerous or deadly if it is implied by the defendant's words or actions. Santiago v. State, 900 So. 2d 710, 711 (Fla. 3d DCA 2005). See also Holley v. State, 877 So. 2d 893, 896-97 (Fla. 1st DCA 2004) (explaining that a deadly weapon is an object used *or threatened to be used* during a crime in such a way that it would be likely to cause death or great bodily harm); Fletcher v. State, 472 So. 2d 537, 539 (Fla. 5th DCA 1985) (affirming a conviction for attempted robbery with a weapon, where defendant placed a cold, hard object against the victim's throat and said it was a razor blade); T.T. v. State, 459 So. 2d 471, 472 (Fla. 1st DCA 2014) (holding that the evidence was sufficient to support a finding of use of a firearm during the robbery where the victims testified that the defendant had an object that appeared to be a gun and told the victim that he would "blow their brains out" if they did not give him the money).

Here, there is no question that Petitioner threatened to use the object in his hand in such a way that it would be likely to cause death or great bodily harm. The object looked exactly like a firearm, Petitioner pulled it out and pointed it at Ms. Ms. Lovejoy, and demanded money from her. Thus, there was ample evidence presented to support Petitioner's conviction for robbery with a deadly weapon.

Nevertheless, the Fifth District held that the jury's verdict was inconsistent based on the argument that Petitioner was charged with using a firearm and no other type of weapon in the robbery, and since the jury did not find that Petitioner used a

firearm, the jury could not have found that he used a deadly weapon. This conclusion ignores the evidence at trial, which was that there was a legitimate dispute as to whether the object used in the robbery was an actual firearm. It also ignores the Fifth's own prior precedent.

In Reeder v. State, 399 So. 2d 445 (Fla. 5th DCA 1981), the Fifth District Court of Appeal rejected an argument that the verdicts were inconsistent under similar circumstances. Reeder was charged with aggravated assault with a deadly weapon, "to wit: a pistol." Id. at 446. The jury found Reeder guilty of aggravated assault as charged, but also made a finding that Reeder did not use a firearm during the commission of the offense. Id. In affirming Reeder's conviction, the Fifth explained that the jury's seemingly inconsistent verdict could have been attributed to various factors, including the possibility that the State failed to prove beyond a reasonable doubt that the pistol met the statutory definition of "firearm," but that it most likely represented a simple "jury pardon." Id. at 446. The court found that there was substantial competent evidence to support the verdict, and that the superfluous finding of fact regarding the firearm did not impeach or invalidate the truth of the verdict. The court also noted that Reeder made no objection to the form of the verdict before submission to the jury, or before the jury was discharged. Id.

In Petitioner's case, as in Reeder, the jury did not need to find that Petitioner possessed a weapon that fit the statutory definition of "firearm" in order to convict

him of the crime of "robbery with a firearm or other deadly weapon," and the jury's failure to find that a firearm was used most likely represented an exercise of lenity. Also as in Reeder, Petitioner made no objections to the form of the verdict in the trial court, (nor indeed on direct appeal or in post-conviction proceedings for that matter), and therefore waived the matter for further review. Thus, the District Court erred both in finding that the jury in Petitioner's case rendered fatally inconsistent verdicts, and in granting relief based on this claim more than a decade after Petitioner's conviction became final.

More recently, the First District addressed a similar factual scenario in State v. McGhee, 174 So. 3d 470 (Fla. 1st DCA 2015). In McGhee, the court concluded that the defendant was properly convicted of aggravated assault with a deadly weapon even though the jury made a special finding that the defendant did not actually possess a firearm. Id. at 471. The evidence showed that the defendant threatened the victim with an old black gun or something resembling a gun, and during closing, defense counsel questioned the victim's testimony about seeing a firearm, as opposed to some other object. Id. The State also acknowledged the dispute over the nature of the weapon, arguing, "No matter what it was, he was certainly using it in a way to threaten to make it look like a real firearm." Id. at 472. In reversing the trial court's decision to reduce McGhee's conviction from aggravated assault with a deadly weapon to simple assault, the District Court pointed

out that a "deadly weapon" need not be a firearm, but is simply an object used or threatened to be used in a way likely to produce death or great bodily harm. Id. at 417-72. The court further held, "There is nothing inconsistent about the jury's verdict. Apparently, it determined that the firearm-looking weapon used by Mr. McGhee to commit the offense was not actually a firearm, a finding well within the scope of the parties' arguments about the disputed weapon." Id. at 472. The court found important that the nature of the weapon was in dispute, and that, although the jury was given the option of convicting McGhee only of simple assault, it chose to convict him of aggravated assault. Id.

Petitioner's case is on all fours with McGhee. Although Petitioner was charged with robbery with a firearm, the evidence at trial left room for a finding that Petitioner had used or threatened to use an object that looked like a firearm in a way likely to cause death or great bodily harm. Further, the jury was given the option of convicting Petitioner of robbery with a weapon or simple robbery, but chose not to.

The Fifth District incorrectly relied on Starling v. State, 152 So. 3d 868 (Fla. 1st DCA 2014), in granting Petitioner's petition for writ of habeas corpus, because it is easily distinguished from the instant case. Further, since Starling is distinguishable, no conflict exists, and Respondent thus respectfully maintains that this Court is without jurisdiction to consider the merits of Petitioner's case based on an alleged conflict with Starling.

In Starling, the defendant was charged with and convicted of robbery with a firearm, but the jury made a separate finding that Starling did not "actually possess a firearm" during the commission of the offense. Starling 152 So. 2d at 868. The district court held that this represented a true inconsistent verdict, and that, furthermore, Starling's conviction should be reduced to simple robbery, since the only weapon referenced in the record was the firearm with which Starling was convicted of committing the robbery. Id. However, unlike Petitioner's case, there is no indication in Starling that there was a dispute about whether the weapon used was a firearm, and in fact, the jury convicted Starling of robbery *with a firearm*. Further, the Starling jury found both that the defendant did and did not use a firearm. Here, by contrast, there was a dispute as to the nature of the weapon, and the jury did not convict Petitioner of robbery *with a firearm*. Instead, the jury in Petitioner's case found that he used or threatened to use a deadly weapon that was not a firearm. These facts distinguish Petitioner's case from that of Starling.

Since under the facts of Petitioner's case the jury's findings were not inconsistent, the District Court erred in reducing Petitioner's conviction to robbery with a weapon on that basis.

Lesser Included Charges

In addition to finding that the jury rendered a truly inconsistent verdict, the district court held that it was error for the trial court to list robbery with a deadly

weapon as a lesser-included offense on the verdict form, and used this as a basis to reduce Petitioner's conviction to robbery with a weapon. First, as argued above, the Fifth District erred by considering Petitioner's complaint about the verdict form on the merits, since such a claim is not properly reviewed by habeas petition. Mills, 574 So. 2d at 65 ("[H]abeas corpus is not to be used for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in prior post-conviction filings…"). Further, the Fifth's conclusion ignores the fact that "a firearm is, by definition, a deadly weapon." Miller, 613 So. 2d at 531. See also Hosnedl v. State, 126 So. 3d 400, 404 (Fla. 4th DCA 2013) (finding that although a knife is not necessarily a deadly weapon, a firearm is).

Petitioner was charged with robbery with a firearm, and it is clear that a firearm is a deadly weapon. He therefore should not be heard to complain that the charging information did not adequately inform him of the accusation, or that he was found guilty of something other than the crime with which he was charged. While Petitioner's argument might have had some merit if the evidence at trial was that he used a knife or some other object bearing no resemblance to a firearm to commit the robbery, that is not what occurred here. The State charged Petitioner with using a firearm to commit a robbery and attempted to obtain a conviction for using a firearm to commit a robbery. Thus, although "robbery with a deadly

weapon," may have been mischaracterized as a lesser-included offense, when, in reality, according to the language of section 812.13(2)(a), a firearm is simply one type of deadly weapon that can be used to commit the crime of armed robbery, the jury's verdict was supported by both the charging information and the evidence presented at trial. Further, as in McGhee, the jury was presented the opportunity to find Petitioner guilty of other lesser-included offenses, including robbery with a weapon, and simple robbery.

Deleon v. State, 66 So. 3d 391 (Fla. 2d DCA 2011), is factually distinguishable from Petitioner's case. Respondent therefore respectfully reasserts its position that this Court is without jurisdiction to consider the merits of this case based on an alleged conflict with Deleon.

In Deleon, the defendant was charged with carjacking with a firearm. Id. at 392. Over objection from the defense, the jury was instructed on carjacking with a deadly weapon as a lesser-included offense. Id. at 393. After trial, Deleon filed a motion for new trial, arguing that the jury was improperly instructed on carjacking with a deadly weapon because the element of deadly weapon was not charged in the information and because it is not a lesser-included offense of carjacking with a firearm. Id. The Second District agreed, holding that the jury had been instructed on a theory of the offense that was not charged in the information and was unsupported by the evidence, and that the error was "compounded when the jury was

incorrectly instructed that carjacking with a deadly weapon is a lesser-included offense of carjacking with a firearm." Id. at 394-95.

First, Deleon is readily distinguished by the fact that Deleon preserved his objection to the jury instructions and verdict form. By contrast, trial counsel in Petitioner's case agreed to the verdict form presented to the jury, waiving the issue for appellate review. See e.g. Whyte, 881 So. 2d at 1183 (defendant failed to preserve for review an erroneously given instruction on a lesser-included offense by objecting to the jury instructions or the verdict form). Further, while Deleon immediately raised this issue in a motion for new trial, Petitioner waited for over a decade to bring this issue to the attention of the courts, failing to previously raise it on direct appeal or in Rule 3.850 proceedings. It is also distinguishable because in Deleon, "there was no evidence that [the defendant] carried any other weapon during the commission of the offense." Deleon, 66 So. 3d at 394. Here, as argued above, evidence was presented that the jury could have relied on to find that the object that appeared to be a firearm did not actually meet the definition of a firearm, making Petitioner's case not like Deleon, but like McGhee.

Moreover, Deleon**Error! Bookmark not defined.** is wrongly decided because the robbery statute, unlike the sexual battery statute or the aggravated battery statute, is not an alternative conduct statute. Rather, the findings regarding a weapon under the robbery statute are aggravating factors purely for sentencing

enhancement. See Sanders v. State, 944 So. 2d 203, 207 n3 (Fla. 2006). Deleon misreads the language of the statute to imply that the State must choose between alleging a firearm and some other type of deadly weapon. However, a plain reading of the language of the statute "firearm or other deadly weapon" does not exclude a firearm from the category of deadly weapon. It simply singles out firearm from the list of "other deadly weapons." § 812.13(2)(a), Fla. Stat. Otherwise, to charge as an alternative where the selection of one necessarily precludes the other, the language would have said "firearm or *a* deadly weapon." As previously argued, had the State proven an unalleged knife was used or threatened as the basis for a deadly weapon, instead of an object that was used or threatened to be used as a firearm, Appellant's argument would have had merit.

An instructive case is the Fourth District Court of Appeal's decision in James v. State, 150 So. 3d 864 (Fla. 4th DCA 2014). In James, the defendant was charged with carjacking with a firearm and robbery with a firearm. At the charge conference, James told the court that he did not want the jury instructed on lesser-included offenses, and the State agreed. Id. at 865. The court eliminated the lesser-included offenses from the verdict form, but the jury returned the verdict form with the word "firearm" crossed out and initialed, finding the defendant guilty of carjacking and robbery without a firearm. Id. at 865-66. After the jury was discharged, James commented to the judge that the issue was that he did not go to trial for carjacking

and robbery, seemingly making a similar argument to that made by Deleon and by Petitioner – that he was convicted of something he was not tried for, despite the evidentiary support for the conviction. The District Court found the issue unpreserved for appellate review since James did not object before the jury was discharged, and also found James' argument to be without merit. Id. at 866. The court held, "We are also persuaded by the fact that the only difference in the charged crime and the jury's finding of guilt is the absence of a firearm. Use of a firearm is an enhancement of the underlying crime, not a completely different offense." Id. The court continued, "We agree with the trial court that this verdict reflected a jury pardon. We cannot say that such a pardon constituted fundamental error." Id. at 866-67.

Here, as in James, the defendant waived any objections to the verdict form by failing to raise this issue in the trial court. Further, he was not convicted of a crime with which he was not charged or one that was not proven at trial. Petitioner was charged with using a firearm, a type of deadly weapon, and the State presented evidence that Petitioner used a firearm or an object that looked like a firearm and was threatened to be used in a manner likely to cause death or great bodily injury. The jury's verdict reflects that it either believed that what appeared to be a firearm was not actually a firearm, but was an object threatened to be used as a deadly weapon, or that it chose to pardon Petitioner as to the firearm, which was relevant

not to whether Petitioner committed the crime, but to whether he qualified for enhanced sentencing. See § 775.087(2)(a), Fla. Stat. (2017). Under these facts, the Fifth District erred in holding that manifest injustice occurred.

The Fifth District's Order Requiring a Judgment for Robbery with a Weapon

Although Respondent maintains that the Fifth District Court of Appeal erred in finding that Petitioner's conviction for robbery with a deadly weapon could not stand, if it is assumed, *arguendo*, that Petitioner was improperly convicted of robbery with a deadly weapon, his conviction for robbery with a weapon is well-supported by both the charging information and the evidence presented at trial, and his argument that his conviction should be further reduced to simple robbery is without merit.

Section 923.34, Florida Statutes, states that "When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense." § 924. 34, Fla. Stat. (2017). See also State v. Sigler, 907 So. 2d 835, 844 (Fla. 2007) ("[W]hen all of the elements of a lesser offense have been determined by the jury, section 924.34 is a valid exercise

of the legislative prerogative allowing appellate courts to direct a judgment for such an offense.”).

Appellant relies on Stanley v. State, 757 So. 2d 1275 (Fla. 4th DCA 2000), for the proposition that a defendant cannot be convicted of robbery with a weapon when the evidence at trial was that the defendant committed the robbery with a firearm, since the statutory definition of weapon excludes firearm.

Stanley cannot be reconciled with this Court’s decision in Reddick, which held that the Fifth District erred in affirming the defendant’s conviction for robbery with a firearm after the trial court refused to instruct the jury on the necessarily-included lesser offense of robbery with a weapon, “because there is no evidence to support it, it was either a firearm or it wasn’t.” Reddick v. State, 394 So. 2d 417, 417 (Fla. 1981). Reddick remanded the cause for a new trial, explaining that failure to instruct on the next immediate lesser included offense constitutes error that is *per se* reversible. Id. at 418. It follows that, if it is *per se* reversible error when a defendant is charged with robbery with a firearm to fail to instruct the jury on the charge of robbery with a weapon, it cannot be reversible error for the jury to convict the defendant of robbery with a weapon even though the evidence at trial suggested that the weapon used was a firearm. See also Grant v. State, 189 So. 3d 878 (Fla. 4th DCA 2016) (trial court erred in failing to instruct the jury on attempted robbery with a weapon as a lesser-included offense to attempted armed robbery with a

firearm). It likewise cannot be error for the appellate court, pursuant to section 923.34, Florida Statutes, to enter a judgment of conviction for the lesser-included charge of robbery with a weapon when the jury could itself have convicted Petitioner of the same charge. Thus, based on this Court's reasoning in Reddick, there exists no basis for further reducing Petitioner's conviction to simple robbery.

CONCLUSION

WHEREFORE, based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court reverse the decision of the Fifth District Court of Appeal in Davis, and disapprove Deleon and Starling, or in the alternative, affirm Petitioner's conviction for robbery with weapon, while disapproving Stanley.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished via electronic mail to counsel for Appellant, Rocco J. Carbone, III, 135 Jenkins St., Ste. 105B #171, St. Augustine, FL 32086, at rocco@rjc3law.com, on June 29, 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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