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IN THE SUPREME COURT OF FLORIDA

DARRYL LEWIS DAVIS,

Petitioner, CASE NO.: SC16-1738

vs.

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF

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

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PRELIMINARY STATEMENT

Petitioner, DARRYL LEWIS DAVIS, the Petitioner 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 records will be cited as follows: (R. 100), with 100 referring to the page number. References to Petitioner's initial brief will be cited as "IB" followed by the page number. References to the Respondent's answer brief will be cited as "RAB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

The Fifth District held that "[n]either the informations *nor the evidence presented in Davis's trials* alleged that he used any weapon other than a firearm." *Davis v. State*, 197 So. 3d 615, 616 (Fla. 5th DCA 2016) (emphasis added). The evidence and testimony presented only supported the argument that Mr. Davis was in possession of a firearm during the commission of the crime. [R. 47-49; 50-52; 75-76; 82; 91; 97; 122-124] All the State's witnesses' testimony (law enforcement and victims) testified that Mr. Davis possessed a firearm during the robberies. *Id.* However, the jury rejected that testimony. The jury returned a verdict that Mr. Davis committed the robberies while possessing a deadly weapon. [R. 17-18] However, robbery while possessing a "deadly weapon" was not charged in the information. [R.

16] The alleged firearm was not entered into evidence, nor was the alleged object used in any other way than how a firearm would be used when committing a robbery. Mr. Davis's use of the alleged firearm was to point it at the victim and demand money. [R. 47-55]

On review before the Fifth District, the Court agreed with Mr. Davis's arguments that he could not be convicted of robbery with a deadly weapon because did not possess a deadly weapon based on the trial testimony and evidence. [R. 3-19**]** However, inexplicably, the Fifth District Court of Appeal, after finding no evidence of a firearm or deadly weapon, it directed the lower court to adjudicate Petitioner for robbery with a weapon. *Davis*, 197 So. 3d at 616. This reduction of his sentence, without a reduction to simple robbery, creates the conflict before this Court for its resolution between the First District's *Starling v. State*, 152 So. 3d 868, 868 (Fla. 1st DCA 2014), and the Second District's *Deleon v. State*, 66 So. 3d 391, 394-95 (Fla. 2d DCA 2011). In both cases, the district courts held that held it was error to fail to reduce a defendant's sentence in a similar factual scenario to the charged offense without possessing a deadly weapon or weapon. *Deleon*, 66 So. 3d at 395; *Starling*, 152 So. 3d at 868. Based on these facts, and the legal issue presented, this Court accepted review to resolve the conflict.

SUMMARY OF REPLY ARGUMENT

The Respondent does not actually dispute the Petitioner's proposed resolution of the conflict at issue, or propose an alternative resolution to this conflict. Rather, the Respondent requests this Court discharge jurisdiction and seeks to attack Petitioner's position based on non-conflict issues. Based on Respondent's answer brief, it appears the parties agree how this conflict should be resolved. Appellate courts should reduce a judgment and sentence in accordance with the charging document, evidence adduced at trial, and jury verdict when the verdict when needed. This case is simply a reaffirmation of section 923.34, Florida Statutes.

The facts presented by the State in its answer brief do not alter the Fifth District's correct review of the trial transcript and the applicable law. Rather, these facts demonstrate the basis to reverse the Fifth District's decision. The jury rejected that Mr. Davis possessed a firearm at the time he committed the alleged robbery. No other deadly weapon, or weapon, was alleged to be in his possession at the time, and the alleged object in his hands does not fit the statutory basis for either a weapon or deadly weapon. The only legal adjudication is robbery.

The Respondent's arguments against Petitioner's arguments are without merit. First, the Court should retain jurisdiction because these cases are in conflict. Second, the non-conflict issues raised do not need to be resolved to resolve the conflict at issue. Therefore, this Court should reverse the Fifth District's decision in

part, and remand with instructions for the Fifth District to direct the trial court to enter a judgment for robbery and resentencing according to a revised Criminal Punishment Code scoresheet.

REPLY ARGUMENT

A. Jurisdiction

I. The Respondent's arguments for this Court to discharge jurisdiction are without merit and this Court should retain jurisdiction.

This Court properly exercised its discretionary review jurisdiction because an express and direct conflict on the same issue of law exists between this case and two other district courts of appeal. Fla. Const. Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). Respondent requests this Court exercise its discretion and discharge jurisdiction for two reasons; however, these arguments are without merit.

1. Respondent's first ground for discharge is because the Fifth District relied on *Deleon* and *Starling* in its opinion; however, this is not a basis to discharge jurisdiction.

Respondent first argued (as it did in its jurisdictional brief) that this Court should discharge its jurisdiction because the Fifth District relied on *Starling* and *Deleon* to grant Petitioner's relief; therefore, conflict jurisdiction does not exist. [RAB. 4]. However, the Fifth District's reliance on these cases for its decision to

grant Petitioner relief cannot be a basis to discharge jurisdiction, particularly because the Fifth District misinterpreted these opinions.

The "concern in cases based on conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985). Therefore, relying on another district court's holding, and then coming to the opposite conclusion, is the exact reason conflict jurisdiction exists is to remedy this incongruity among district courts on the same rule of law. *See The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova. L. Rev. 431, 516 (2005) (explaining that "holding conflict" exists when "[t]he majority opinion below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court"). Therefore, this argument should not be a basis to discharge jurisdiction.

2. Respondent's second ground for discharge is that *Deleon* and *Starling* are distinguishable from *Davis* on factual and procedural grounds; however, this is not a basis for discharging jurisdiction because the cases share the same legal issue and the controlling facts are the same or closely similar.

Conflict jurisdiction arises from cases sharing the same legal issue and have same the controlling facts are that are the same or substantially similar. *See Ford Motor Co. v. Kirkis*, 401 So. 2d 1341, 1342 (Fla. 1981) ("legal principles which the court applied supplies a sufficient bases for a petition for conflict review."); *see also*

Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992) ("Because the court below in the instant case reached the opposite result on controlling facts which [were substantially] identical, … we conclude that a conflict of decisions existed that warranted accepting jurisdiction."). These arguments too are without merit.

The Respondent attempts to distinguish *Startling* solely on factual grounds because there was allegedly no factual dispute over whether the defendant used a firearm, and the jury returned a verdict finding the defendant guilty of robbery with a firearm, but also found he did not possess a firearm. [RAB. 15-16] The Respondent argued no conflict exists in *Deleon* because the procedural posture of the cases are different. In *Deleon*, trial counsel preserved the issues for appeal, whereas Mr. Davis's counsel did not. [RAB. 18-20][1] These arguments fail to appreciate both the legal issue in conflict as well as the factual similarities between the controlling facts of these cases.

First, there is no dispute the legal issue in conflict is the same in each case. Specifically, in all three cases there was no evidence of a firearm, deadly weapon, or weapon. In *Starling* and *Deleon*, the district courts held the judgment should be reduced to the unarmed version of the offense, *Deleon*, 66 So. 3d at 395; *Starling*, 152 So. 3d at 868, in *Davis*, the Fifth District reduced the judgment to include the

[1] Respondent also argues that *Deleon* is wrongly decided, however, this does not relate to the conflict arguments. [RAB 18-20].

offense with a weapon. 197 So. 3d at 616. These are opposite holdings of the same legal issue. *See The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova. L. Rev. at 516 (2005) (holding conflict discussed). Because the same legal issue arises in each case, discharge is inappropriate.

Second, the controlling facts are the same or substantially similar. *See Crossley*, 596 So. 2d at 449. *Davis*, *Deleon*, and *Starling* are based on the same controlling facts because: (1) the State specifically charged the defendants with an exact offense with no alternative; (2) the jury returned a verdict finding that the defendant did not commit the offense as charged; (3) the court reduced the charge to a lesser offense that the appellate court later found was not reduced low enough based on the evidence offered at trial. *Deleon*, 66 So. 3d at 395; *Starling*, 152 So. 3d at 868; *Davis*, 197 So. 3d at 616. These same controlling facts properly establish conflict jurisdiction. The difference rests in how low the charge should be reduced, *i.e.* armed or unarmed. Based on the foregoing, jurisdiction should be maintained.

B. Merits

I. This Court should resolve the conflict issue raised between *Deleon*, *Starling* and this case by adopting the holdings of *Deleon* and *Starling* and affirming the Fifth District's opinion in part and reversing in part.

Petitioner argued that the only issue on appeal, and the only issue in conflict, was whether the appellate court properly remanded with directing the lower court to enter an adjudication for robbery with a weapon. [IB 13-23] Petitioner argued the

Fifth District erred because it found that "[n]either the informations nor the evidence presented in Davis's trials alleged that he used any weapon other than a firearm … [and separate juries] made special findings that he did not possess a firearm during the commission of the crimes." *Davis*, 197 So. 3d at 616.

In relying on *Deleon* and *Starling*, Petitioner argued the correct holding was that he should be adjudicated guilty of robbery and resentenced accordingly. The Respondent never directly argued that this resolution of the conflict was incorrect. Rather, the Respondent's arguments attempted to relitigate non-conflict issues related to Mr. Davis's underlying petition and the Fifth District's decision to address the issues on the merits in the first place. However, Petitioner submits, these issues are not what is in conflict; rather, what is conflict is the appropriate resolution when an appellate court determines the charging document and the testimony and evidence adduced at trial do not support a judgment and sentence. [IB 13-23] Petitioner submits that its proposed resolution is in accord with precedent, due process, and fundamental fairness. [IB 13-16]

Beyond the non-conflict issues raised by Respondent, there does not appear to be any real dispute between the parties. This is evidence by the fact that Respondent cites section 923.34, Florida Statutes as a resolution if the Fifth District did not error in reducing to robbery with a weapon. [RAB. 22-23]; § 923.34, Fla. Stat. ("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.") If the Fifth District did error by not reducing the sentence enough (as Petitioner submits) then this statute and Respondent's reasoning equally applies to a reduction of an adjudication to simple robbery. Therefore, this Court should adopt the holdings of *Deleon* and *Starling*, requiring an appellate court to reduce a defendant's sentence in accordance with the charging document, the evidence adduced at trial and the verdict form.

Based on the Fifth District's own holding, and as discussed more fully below, the charging document, the evidence and testimony adduced at trial, and based on the definitions of firearm, deadly weapon, and weapon, this Court should reverse the Fifth District's decision in part. Petitioner respectfully requests this Court remand to the Fifth District directing it to remand to the trial court with instruction to adjudicate defendant guilty of robbery and for resentencing in accordance with the revised Criminal Punishment Code scoresheet. § 813.12(c), Fla. Stat.

If the Court seeks to address any of the non-conflict issues raised by Respondent, these issues are without merit regarding the relief sought by Petitioner, as detailed more fully below.

II. The Court does not need to address or resolve the non-conflict issues raised by Respondent; however, if it addresses any of these issues, each is without merit and does not resolve the conflict at issue.

The Respondent raised four non-conflict arguments for this Court's consideration. However, none of these issues are directly relevant or applicable to the conflict and are not dispositive of this Court's ability to resolve the legal issue before it. Therefore, Petitioner requests this Court resolve the sole issue in conflict and not address the other issues. However, if this Court chooses to address these issues, Petitioner submits that none of these issues are dispositive of the conflict at issue and Petitioner's case should be resolved by reversing the Fifth District's decision in part. This Court should affirm the Fifth District's decision to grant Petitioner's petition for writ of habeas corpus but reverse with direction to enter a judgment for robbery rather than robbery with a weapon.

1. The alleged procedural bars identified by Respondent are overcome by the manifest injustice that result if the claims are not addressed.

Respondent argues the Fifth District erred by considering Petitioner's claims because the claims are procedurally barred. [RAB 7-9] Even if these claims are generally barred, this is not dispositive of the case. An appellate court's consideration of a claim procedurally barred is a "matter of grace" and will not preclude consideration of a claim when a "a strict and rigid adherence" to procedural rules will result in a manifest injustice. *See Strazzulla v. Hendrick*, 177 So. 2d 1, 4

(Fla. 1965). As such, procedural bars are not dispositive of a claim where not considering the claim will result in a manifest injustice. *See State v. McBride*, 848 So. 2d 287, 291-292 (Fla. 2003).

A manifest injustice results when a defendant is convicted "for an offense for which he could not have been convicted." *Miller v. State*, 988 So. 2d 138, 139 (Fla.1st DCA 2008) (citing *Silverstein v. State*, 985 So. 2d 635 (Fla. 4th DCA 2008) (appellant entering a plea to a crime that could not have occurred as a matter of law is a manifest injustice). Additionally a manifest injustice occurs where a general procedural bar could result in a "harsher sentence for the defendant." *Green v. State*, 813 So. 2d 184, 185 (Fla. 2d DCA 2002) (citations omitted); *see also Zolache v. State*, 687 So. 2d 298, 300 (Fla. 4th DCA 1997) (finding a manifest injustice and stating that "[s]ince it would be fundamentally unfair to require Appellant to serve a sentence in excess of that which is legally authorized, we must correct our earlier ruling.")

In this case, Petitioner's two consecutive life sentences were vacated and the Fifth District held he was eligible for resentencing. *Davis*, 197 So. 3d at 616; § 812.13(2)(b), Fla. Stat. Petitioner requested the Fifth District grant his petition and reduce his sentence to robbery, a second degree felony, with a maximum exposure of fifteen (15) years. § 812.13(2)(c), Fla. Stat. Based on its judicial "grace," *Strazzula*, the Fifth District found that allowing these uncorrected claims to stand,

and Petitioner's life sentence to stand, would result in a manifest injustice. *Davis*. Importantly, in its answer brief, Respondent never argued that the claims did not in fact rise to the level of a manifest injustice. Therefore, this Court should not consider this issue, but if it does, Respondent's argument that these claims are barred and the Fifth District erred by considering these issues should not be a basis for reversing the Fifth District's decision to grant Petitioner's petition for writ of habeas corpus.

2. A true inconsistent verdict occurred in this case.

The Fifth District held the "verdicts and special findings were inconsistent." *Davis*, 197 So. 3d at 616 (citing *Starling*, 152 So. 3d at 868; *Nettles*, 112 So. 3d 782, 783 (Fla. 1st DCA 2013)). Petitioner argued the Fifth District was correct. [IB 21-23] Respondent argues that the Fifth District "erred in finding that the jury rendered inconsistent verdicts." [RAB. 9-10] Respondents several arguments for this point can all be summed up in its position that testimony and evidence can support a conviction for robbery with a firearm, deadly weapon, or weapon if implied by the defendant's words or actions, and the witnesses' opinions. Respondent seems to propose that this is the case, regardless of whether the alleged object was entered into evidence. However, this argument fails to appreciate the statutory limitations placed on these terms, [IB 16-21], as well as the reality of the evidence presented in these trials, and the jury's special verdict.

As stated in Petitioner's initial briefs, "[i]n section 812.13, the terms 'firearm,' 'deadly weapon,' and 'weapon' are not defined." [IB. 17] This Court has previously stated, "the definitions of these terms contained in the Florida Standard Jury Instructions are correct statements of the law." *Dale v. State*, 703 So. 2d 1045, 1046 (Fla. 1997). These jury instructions rely on the statutory definitions for "firearms" and "weapon". *See* §§ 790.001(6) (firearm), 790.001(13) (weapon). And, although not explicitly defined by statute, the standard robbery jury instruction defines a "deadly weapon." Fla. Stand. Jur. Instru. § 15.1.

In section 790.001(13), Florida Statutes, a "weapon" is many things, "except a firearm[.]" § 790.001(13), Fla. Stat. Additionally, a "deadly weapon" is, "A weapon … used or threatened to be used in a way likely to produce death or great bodily harm." Fla. Stand. Jur. Instru. § 15.1 Thus, importantly, "if the statutory definitions of 'weapons' and 'firearms' are used, [defendants] cannot be convicted of robbery with a weapon, when [a defendant] possessed a firearm, because the statutory definition of weapon excludes firearms." *Stanley v. State*, 757 So. 2d 1275, 1276 (Fla. 4th DCA 2000); *see Baldwin v. State*, 857 So. 2d 249, 252 (Fla. 2d DCA 2003) ("Throughout chapter 790, the legislature repeatedly treats firearms and weapons as distinct from one another … Thus, both the definitions contained in section 790.001 and the overall statutory scheme of chapter 790 lead to the

conclusion that for the purposes of that chapter, a firearm is neither a 'weapon' nor a 'concealed weapon.'").

Here, based on a plain reading of the statutes, a firearm cannot be a "weapon". § 790.001, Fla. Stat. Equally, nor can an alleged firearm, without more than simple statements that it "looked" like a firearm, be a "deadly weapon" because it is first and foremost "*a weapon* … used or threatened to be used[.]"Fla. Stand Jur. Instruc. § 15.1 (emphasis added) An object purported to be a firearm, and found not to be firearm, can only be a deadly weapon if the jury has the opportunity to evaluate the object when it is admitted into evidence. *See Santiago v. State*, 900 So. 2d 710, 711 (Fla. 3d DCA 2005) ("However, if the weapon is not introduced at trial where it may be inspected and tested by the jury or if the evidence introduced is that the gun was *inoperable*, then a finding that the weapon is a deadly weapon will not be sustained.") (emphasis maintained).

As such, the fact no other deadly weapon or weapon was alleged in the information limits the finding that Petitioner possessed any other object sufficient to sustain a conviction that Petitioner possessed a deadly weapon or weapon. This does not mean a firearm can never be a deadly weapon, because an alleged firearm that was used in some other way, or examined by the jury can be a basis for a finding that the object was a deadly weapon or weapon. *See Santiago*, 900 So. 2d at 711.

In the case at bar, where the jury rejected the testimony and evidence that Petitioner possessed a firearm, [R. 17-18], and there was no other evidence he carried anything else, Petitioner cannot be guilty of robbery with a deadly weapon or weapon as a matter of law. Therefore, a true inconsistent verdict occurred in this case because the jury's verdict and special jury finding negates the essential elements of deadly weapon and weapon. [IB 21-23] ("A true inconsistent verdict occurs when a "not-guilty finding on one count negates an element on another count that is necessary for conviction.") (citing *Nettles*, 112 So. 3d at 783).

Respondent argues that the testimony from the witnesses was sufficient to sustain a conviction for robbery with a firearm but it clearly was not since the jury found it was insufficient. [R. 17] Further, any alleged dispute regarding whether the object was a firearm or something else, like a BB Gun or replica, demonstrates the importance the information in this case, and similar cases, to fully apprise a defendant of the allegations a defendant faces. *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977). This is so because the information in this case only charged that Petitioner possessed a firearm which clearly affected the trial counsel's strategy in defending this case, and demonstrate why Petitioner was convicted of a crime he was not charged with as a matter of law. *Long v. State*, 92 So. 2d 259, 260 (Fla. 1957) ("Where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged[.]").

Additionally, Respondent relies on relies on *Reeder* and *McGhee* to argue this was not an inconsistent verdict. However, this reliance is misplaced. In both cases, the defendant was charged with aggravated assault, which does not require the State to prove the defendant possessed a deadly weapon to sustain a conviction. *See* § 784.021, Fla. Stat. Additionally, in *McGhee*, the defendant was placed on notice by the charging document that he could be convicted for something other than possessing a firearm. *McGhee*, 174 So. 3d at 471 (the defendant was charged "*by information* with aggravated assault, among other things, arising from an altercation in which he allegedly threatened the victim with an old, *black gun, or something black resembling a gun*.") (emphasis added). Therefore, these cases are distinguishable and not controlling.

Lastly, Respondent argues 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 because the jury's failure to find that a firearm was used most likely represented an exercise of lenity. [RAB. 13-14] Even it was a sign of lenity, this is now a true inconsistent verdict and the defendant cannot be convicted of the offense and sentenced to a life.

3. The parties agree the trial court's inclusion of robbery with a deadly weapon as a lesser included offense was error.

The Fifth District held "it was error to list robbery with a deadly weapon as a lesser-included offense on the verdict forms in these cases." *Davis*, 66 So. 3d at 394-395 (citing *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, 394-395 (Fla. 2d DCA 2011)). Petitioner agreed with the Fifth District, arguing that based on the two types of lesser included offenses, *i.e.*, necessary and permissive, neither allowed for robbery with a deadly weapon to be considered as a lesser included offense in this case. [IB. 19-21]. The Respondent's arguments seem to concede the Fifth District was correct. [RAB. 18] ("'robbery with a deadly weapon,' *may have been mischaracterized as a lesser-included offense*[.]") (emphasis added). However, Respondent goes on to make several arguments that do not have any direct connection with whether this was in fact an error for this instruction to be included for the jury's consideration, and several arguments that it previously raised.[2] Based on Petitioner's arguments within his initial briefs, [IB 19-21], and

[2] The arguments are: (1) this issue is procedurally barred; [RAB. 17], (2) "the Fifth's conclusion ignores the fact that 'a firearm is, by definition, a deadly weapon." [RAB. 17] (citing *Miller*, 613 So. 2d at 531). However, again, this quote is misleading, because *Miller* actually says that "[a] firearm is, by definition, a deadly weapon *which fires projectiles likely to cause death or great bodily harm; whenever it is fired in the vicinity of human beings*[.]" *Miller*, 613 So. 2 at 531; (3) Petitioner cannot complain that he was not placed on notice because "according to the language of

Respondent's implicit concession of error, [RAB 18], this Court need not address this issue to resolve the conflict. If it does choose to address this issue, this Court should hold the Fifth District correctly decided it was error for the trial court to include the instruction of robbery with a deadly weapon as a lesser included offense.

4. The Fifth District's order requiring a judgment for robbery with a weapon should be affirmed in part and reversed in part.

Respondent argues that, even if the Fifth District was correct that robbery with a deadly weapon cannot stand as a conviction, that Petitioner's "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." [RAB. 22] Based on this assertion, Respondent argues that *Stanley* cannot be reconciled with this Court's holding in *Reddick v. State*, 394 So. 2d 417 (Fla. 1981) and *Grant v. State*, 189 So. 3d 878 (Fla.

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section 812.13(2)(a), a firearm is simply one type of deadly weapon that can be used to commit the armed robbery[.]" [RAB. 18] While making this argument, the Respondent actually concedes that listing this as a lesser included offense may be "mischaracterized." [RAB. 18]; (4) Respondent asserts that *Deleon* is factually distinguishable, and therefore, this Court should discharge jurisdiction. [RAB. 18] Again, this has nothing to do with whether it was error to include this jury instruction, and as noted above, this is not a basis to discharge jurisdiction; (5) Respondent argues that *Deleon* is wrongly decided because "the robbery statute … is not an alternative conduct statute." [RAB. 20] This argument is irrelevant and has nothing to do with the conflict to be resolved, nor the fact robbery with a deadly weapon was included as a lesser included offense in this case.

4th DCA 2016) when viewed in light of the statutory directive that an appellate court should reduce a charge to a lesser included offense supported by the evidence at trial. *See Statute.* However, this precedent has no bearing on the conflict to be resolved.

This precedent is not controlling on this Court's decision in this case because it is factually and legally distinguishable from any of the issues raised. The issue in both *Reddick* and *Grant* regarding the issue of jury pardons, and whether the trial court erred by not granting the defendant's request for a jury instruction of a proposed lesser included offense. *Reddick*, 394 So. 2d at 417-18; *Grant*, 189 So. 3d at 881. Specifically, the reason lesser included offense instructions should be given when requested is to allow a jury the power to pardon a defendant of the charged offense for a lesser offense. *See Sanders v. State*, 846 So. 2d 953, 957 (Fla. 2006) ("We have recognized the possibility of jury pardons in holding that '[t]he failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible.'") (quoting *Reddick*, 394 So. 2d at 418); *see also State v. Wimberly*, 498 So. 2d 929, 932 (Fla. 1986) ("The requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'"). Here, there was not an explicit request or denial.

The giving of these instructions does not mean that a defendant may receive a lesser offense for robbery with a weapon if the jury acquits a defendant of robbery

with a firearm. This is the case, particularly when there is no evidence to support a conviction for robbery with a deadly weapon. Nor does it mean the statutory definition of firearm and weapon are reconcilable. *See Baldwin*, 857 So. 2d at 252. Rather, it just means that when a defendant requests the next lesser included offense he should receive that instruction because of the power of the jury to pardon. *Sanders*, 946 So. 2d at 959 ("As noted above, despite their suspect pedigree, jury pardons have become a recognized part of the system; so much so that, in direct appeals, "[t]he failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is *per se* reversible.") (quoting *Reddick*, 394 So. 2d at 418). Therefore, based on the foregoing, this Court should disregard these arguments.

CONCLUSION

This Court should reverse the Fifth District's decision in part, and remand with instructions to enter a judgment for simple robbery and resentencing according to a revised Criminal Punishment Code scoresheet for an adjudication of robbery pursuant to section 812.13(2)(c), Florida Statutes.

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 to Assistant Attorney General Andrea K. Totten at andrea.totten@myfloridalegal.com and the Office of the Attorney General at crimapptlh@myfloridalegal.com on this 24th day of July 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

/s/ Rocco J. Carbone, III
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