IN THE SUPREME COURT OF FLORIDA
(Lower Court Case No.: 4D02-4799)

CASE NO. SC04-1934

STATE OF FLORIDA,

Appellant/Cross-Appellee

vs.

JAY JUNIOR SIGLER,

Appellee/Cross-Appellant

****

APPELLANT/CROSS-APPELLEE'S REPLY BRIEF & CROSS ANSWER BRIEF ON THE MERITS

On appeal from the
District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

The Appellant/Cross-Appellee was the Prosecution and Appellee/Cross-Appellant was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellant/Cross-Appellee may also be referred to as the State and Appellee/Cross-Appellant may also be referred to as "Sigler." In this brief, the following symbols will be used:

"R" will be used to denote the record on appeal from the trial proceedings.

"T" will be used to denote the transcript of the pretrial, trial, sentencing proceedings;

"2R" will be used to denote the record on appeal from the re-sentencing and motion proceedings held on November 4, and 6, 2002, pursuant to the mandate of the Fourth District Court of Appeal in Sigler v. State, 805 So.2d 32 (Fla. 4th DCA 2002)("Sigler I").

"2T" will be used to denote the transcript of the re-sentencing and motion proceedings held on November 4, and 6, 2002, pursuant to the mandate of the Fourth District Court of Appeal in Sigler I.

STATEMENT OF THE CASE AND FACTS

Te State will rely upon the Statement of Case and Facts in its initial brief as well as those facts set forth in the argument portion of this brief, which are necessary to resolve the legal issue presented upon appeal.

SUMMARY OF THE ARGUMENT

Reply Argument on Appeal. The State relies upon the Summary of the Argument contained in its Initial Brief.

Argument on Cross-Appeal. Sigler could legally be retried for third-degree felony murder under a principal theory. This Court should decline to exercise its jurisdiction to review this claim as it was never raised in the lower courts in the instant proceeding. In addition, the claim was fully litigated in Sigler I and thus, that decision constitutes the law of case precluding review in this proceeding. Assuming *arguendo* the Court decides to reach the merits of the claim, the State submits it is without merit. As the Fourth District found in Sigler I, given the facts of this case, Sigler could legally be tried and convicted under a principal theory of third-degree felony murder in furtherance of harboring an escaped prisoner. The record demonstrates that Sigler actively participated in and aided Michelson in the commission of the offense of harboring. In addition, the lower court's decision does not conflict with Staten v. State, 519 So.2d 622 (Fla. 1988). Finally, even assuming *arguendo* Sigler cannot be convicted for third-degree felony murder, he may be convicted for manslaughter by culpable negligence under a principal theory. Thus, he is not entitled to a discharge.

REPLY ARGUMENT ON APPEAL

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS ERRONEOUS SINCE ADHERENCE TO *SIGLER I* WOULD NOT BE A MANIFEST INJUSTICE.

Sigler responds to the State's argument by asserting an entirely new claim that s. 924.34 amounts to an unconstitutional infringement on this Court's rule-making authority (AB 9-10). This claim was not raised in any of the lower courts, and thus, this Court should decline to address it now in this appeal. In any event, Section 924.34 is not unconstitutional because that statute does not "purport to govern the right to appeal," as Sigler suggests. *See*, Vic Potamkin Chevrolet, Inc v. Bloom, 386 So.2d 286, 289 (Fla. 3d DCA 1980); In Re Wartman's Estate, 128 So.2d 600 (Fla. 1961).

To be sure, s. 924.34 deals with the limited situation of how to dispose of a case on appeal after it is determined there is insufficient evidence to support the lower court's judgment. In other words, s. 924.34 simply is a codification of the long-standing inherent general authority of an appellate court to modify a judgment or decree of an inferior one as justice demands. This concept was recognized in Austin v. United States, 382 F.2d 129, 140-2 (D.C. Cir. 1967)(construing 28 U.S.C. § 2106 and pursuant therewith, remanding defendant's murder conviction and directing that one be entered for the lesser offense of second-degree murder). Thus, Sigler's claim

that s. 924.34 is an unconstitutional infringement on this Court's rule-making authority is simply without merit.

Sigler attempts to distinguish Neder v. United States, 527 U.S. 1 (1999), Schirro v. Summerlin, 124 S.Ct. 2519 (2004) and United States v. Cotton, 535 U.S. 62 (2002) by arguing that he has not had an opportunity to a jury trial at which he could contest the elements of third-degree felony murder (AB 18). The State disagrees. Sigler did have a jury trial at which evidence was presented which would support a conviction for third-degree felony murder. In addition, as argued more fully in the initial brief, the trial court instructed the jury on the elements of the offense. Thus, the State submits Sigler had a fair opportunity to contest the elements of third-degree felony murder at his jury trial. It follows that Neder, Summerlin and Cotton control to the extent that adhering to the Sigler I would not be a manifest injustice. Lastly, Sigler argues that the State waived its right to argue that his case may be remanded for entry of a conviction for manslaughter (AB 21-2). The State disagrees. In the initial brief, the State argued that since there is no dispute that in finding Sigler guilty of second-degree murder, the jury necessarily would had to have found all of the elements of the crime of manslaughter by culpable negligence. It support of this, the State cited Ellison v. State, 547 So.2d 1003 (Fla. 1st DCA 1989), aff'd in part, quashed in part, 561 So.2d 576 (Fla. 1990) and argued that the remanding for entry of a conviction for

manslaughter would not violate the Jury Clause (IB 23-4). Further, since the jury found Sigler guilty of second degree murder under a principal theory, logic and common sense dictates that it necessarily found Sigler culpable under s. 777.011 for manslaughter. Thus, contrary to Sigler's claim, the State did not waive this claim.

Sigler maintains that the evidence shows that he did not participate in the murder and this is unrebutted (AB 22-3). The State disagrees. In Michel v. State, 752 So.2d 6 (Fla. 5th DCA 2000), the Court found that "[e]vidence that Michel had procured Joseph's aid in driving his truck to Miami, while he was sitting in the passenger seat, appears sufficient to sustain his conviction for principal in the first degree to vehicular homicide, under section 777.011, Florida Statutes (1995)...." Michel, supra., 752 So.2d at 11.

In the case *sub judice*, Sigler likewise procured Michelson's aid in escaping from prison and more importantly aided Michelson in alluding apprehension so that he could remain out. Indeed, he maintains that he was simply an innocent passenger at the mercy of Michelson. However, as argued more fully in the next point, Sigler's claim fails to take into consideration the entire circumstances leading up to the victim's death. When all of those facts and circumstances are considered, it becomes abundantly clear that Sigler's involvement in circumstances leading up to the victim's death amounted to far more. Thus, contrary to his claim, the State submits Sigler can

be adjudicated for manslaughter under a principal theory and the evidence supports same. Based on this as well as the argument in the initial brief, the State submits this Court should quash the lower court's decision and affirm the conviction for third-degree felony murder or, alternatively, direct that one be entered for manslaughter by culpable negligence.

ARGUMENT ON CROSS-APPEAL

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT SIGLER CAN BE RETRIED FOR THIRD-DEGREE FELONY MURDER UNDER A PRINCIPAL THEORY? (Restated).

For the first time in this proceeding, Sigler argues that the Fourth District erroneous held that he could be found guilty of harboring an escaped prisoner under a principal theory. As a result, Sigler seeks an order discharging him from the charge. The State disagrees and submits as an initial matter, this Court should decline to exercise its jurisdiction to review the newly-raised claim. In his motion to dismiss and discharge filed in the trial court, Sigler did not raise this claim. Rather, he merely argued that the Fourth District's mandate in Sigler I violates the Jury Clause of the Sixth Amendment (2R 20-26).[1]

Nor for that matter did he raise this claim below in the Fourth District. To be sure, Sigler makes no mention whatsoever in his brief that he should be discharged because he could not legally be convicted of harboring an escaped prisoner. To be sure, his only claim in this proceeding is that adherence to the Court's decision in Sigler I would be a manifest injustice because it would violate his right to a jury trial.

[1]A review of his motion reveals that Sigler only argued that there was no evidence to support a conviction for third-degree felony murder on the theory that he voluntarily withdrew from the commission of the offense (R 25, ¶ 8.). This claim is far different than the one being asserted here: that he *legally* cannot be convicted for harboring an escaped prisoner under a principal theory.

To this end, the State would point out that Sigler did not seek a discharge. Rather, he sought a new trial on the charge of third degree felony murder in furtherance of harboring an escaped prisoner.

The State acknowledges the well-settled principle that "once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case." Sullivan v. Sapp, 866 So.2d 28, 34 (Fla. 2004)(citing Westerheide v. State, 831 So.2d 93, 105 (Fla. 2002). However, the State would also point out the equally settled rule that whether to extend jurisdiction is purely discretionary and "should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." Savoie v. State, 422 So.2d 308, 312 (Fla. 1982). At bar, it is beyond dispute that this claim was not properly briefed and/or argued in the lower courts.

Further, the claims does not encopass the holding of the lower court and is beyond the scope of the narrow constituional issue presented in this appeal- i.e. . Whether adherence to the decision in Sigler I would be a manifest injustice in that doing so would violate Sigler's right to a jury trial. There is nothing in the opinion addressing the argument raised on cross appeal. Thus, this Court should exercise its discretion and decline to address the claim.. *See*, State v. Evans, 770 So.2d 1174, 1177, fn. 4 (Fla. 2000)(As a general rule, this Court should decline to address claims

which extend beyond the constitutional issue presented on appeal).

Lastly, the State would argued that this issue was squarely raised and decided in Sigler I and thus, constitutes the law of the case. *See*, Department of Transportation v. Juliano, 801 So.2d 101 (Fla. 2001). In Sigler I, the Court adressed the issue:

> Without question [the co-defendant] could be convicted of third-degree felony murder committed in furtherance of the crime of harboring an escaped prisoner, i.e., appellant. The issue for us is whether appellant, the escapee, can be guilty of concealing, assisting or giving aid to an escaped prisoner, i.e., himself. While appellant labels it "absurd" to hold that an escaped prisoner is liable as a principal on the theory that he allowed himself to be harbored, concealed or maintained, we are not prepared to dismiss the concept so lightly. It seems to us that it is not so much a legal issue of whether an escapee can or cannot harbor himself, but rather is a factual issue determined by the discrete facts in each case.

Sigler v. State 805 So.2d 32, 35 (Fla. 4th DCA 2001).

The Court then went on to hold that Sigler could legally be convicted of third-degree felony murder under a principal theory. Id. This Court declined review of Sigler I. Sigler v. State, 835 So.2d 269 (Fla. 2002)(Table). As this demonstrates, the issue raised in this cross-appeal was already fully litigated. Consequently, it is now the law of the case. *See*, Id.; Goodman v. Olsen, 365 So.2d 393 (Fla. 3d DCA 1978); Russell v. Florida Ranch Lands, Inc., 441 So.2d 190 (Fla. 5th DCA 1983).

Merits. Should this Honorable Court decide to address claim raised in the

cross-appeal, the State submits it is without merit. As in Sigler I, Sigler argues that, as an escaped prisoner, he cannot be guilty as a principal to his own harboring (AB 26). The State disagrees. A defendant may be liable as an accomplice if (1) he had a conscious intent that the criminal act be done and (2) he did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually commit the crime. Section 777.011, Fla. Stat. (2000); *see also*, Arroyo v. State, 705 So.2d 54 (Fla. 4th DCA 1997). As Professor LaFave explains:

> Such terms as 'advise', 'command,' 'counsel,' 'encourage,' 'induce,' and 'procure' suggest that one may become an accomplice without actually rendering physical aid to the endeavor... one may become an accomplice by acting to induce another through threats or promises or by words or gestures of encouragement. The encouragement may come long before the time the crime was committed...
>
> In many cases the facts will make it clear that the accessory actually intended to promote the criminal venture, in the sense that he was personally interested in its success...
>
> [G]iving assistance or encouragement to one it is known will thereby engage in conduct dangerous to life should suffice for accomplice liability...
>
> The established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided....

W. LaFave & A. Scott, Handbook on Criminal Law 502-16 (West 1972)(f.n.o.)(e.s.).

In the case *sub judice*, Sigler rendered aid and encouragment to Michelson in the latter's act of breaking Sigler out of prison. More importantly, well after the escape, Sigler's continued to render aid and encouragement to Michelson's efforts to harbor Sigler and keep him from going back to prison right up to the point of the victim's death. When all of the facts including the months leading up to the escape and events that followed, it becomes abundantly clear, as the Fourth District found in Sigler I, that Sigler's involvement in the victim's death is far more extensive than Sigler will admit. *See*, A.B.G. v. State, 586 So.2d 445, 447 (Fla. 1st DCA 1991), dism., 605 So.2d 1261 (Fla. 1992)(fact-finder may consider totality of facts and circumstances when determining the extent of defendant's participation in the crime).

Indeed, the record demonstrates that these two men concocted some ten months in advance of the instant crime an elaborate scheme to break Sigler out of prison (T 1486). That Sigler's desperate resolve to remain out of prison is evidenced by the testimony of a fellow inmate that approximately two- to three weeks prior to the break, he overheard Sigler say that he wanted to get away from prison because he was in fear for his life (T 1511; 1512). Michelson claimed that he also was afraid for

Sigler's life (T 1604). Further, the tape-recorded telephone calls speak volumes of Sigler's extensive and intricate involvement leading up to the victim's death. First, Sigler initiated numerous calls to Michelson in the days immediately preceding the escape. During those calls, the two men discussed the details of their plan (T 1696-1794). At one point, Michelson tells Sigler:

> No matter what it takes I will do it. You hear me? I hear you. Jay, I promise... Jay, Jay, listen. Hear me? I promise you tomorrow will be the end of it. No matter what it takes. All costs. No matter what I have to do I will make sure it's done....

(T 1777)(e.s.).

Based on this, Michelson made his objective crystal clear that he would "at all costs" do whatever it takes to get Sigler out of prison and keep him out. Perhaps most telling of all is a telephone call in which Sigler tells Michelson, "I'm never going back no matter when I get out of here. I'm never going back. You hear me..." (T 1789). The State submits that based on this, a reasonable jury could find that Sigler and Michelson were two desperate men, one who was bent on doing "whatever it takes," and "at all costs," to help his friend to escape, and the other vowing "never to go back" to prison. Based on this, Sigler could legally be convicted of third-degree felony murder in furtherance of harboring himself, under a principal theory.

In addition to his statements, there is also legally sufficient evidence that shows

that Sigler's actions amounted to aiding and abetting in his own harboring after the escape. On the day of the escape, Sigler took hold of the shotgun and fired it at a corrections officer (T 1291). Further, he pointed it at an INS agent (T 1147). Finally, after the victim's death, Michelson told the police that, after seeing the extensive media accounts on television the night before, he encouraged Sigler to surrender (T 1445). Despite Michelson's urging however, Sigler declined to surrender to the police claiming as a reson that "it's one of those things that you procrastinate with" (T 1493). The reality however is that Sigler had no intention of ever surrendering to law enforcement without a fight.

Indeed, on the day of the homicide, rather than surrender to the police, as Michelson had urged they do, Sigler and Michelson embarked from the hotel heading back in the direction from whence they came knowing full well that they were being sought by the police. The tragic events that followed should come as no surprise to anyone, including Sigler. Thus, it is beyond dispute that Michelson, with Sigler's aid and enouragement, did everything in his power to elude the police so that Sigler would not have to go back to prison.

The Fourth District in Sigler I appropriately summed up Sigler's complicity:

> Here, [Sigler] was not simply an escapee who, having

> gained temporary freedom from lawful confinement, sought and found some aid or concealment. [Sigler's] escape was the result of an elaborate scheme, planned over a period of many months, which clearly contemplated aid and concealment once he was outside the prison confinement. His was the starring role, and the entire scenario was planned and carried out exclusively for his benefit. Staying out of prison was just as imperative as getting out. To suggest that he was simply along for the ride, with no involvement in efforts to keep him from being apprehended by the authorities, is contrary to both the evidence and common sense. Under the facts presented here, we can see no reason why [Sigler], albeit an escapee, is any less a principal in his own harboring than are those with whom he jointly participated--all were in a common criminal scheme seeking to elude the authorities. The evidence supports a finding that [he] was a perpetrator of this underlying felony and, thus, a principal in the homicide committed to further the common criminal design....

805 So.2d at 36.

As this Court has stated:

> Felons ... are generally responsible for the acts of their co-felons. As perpetrators of an underlying felony, co-felons are principals in any homicide committed to further or prosecute the initial common criminal design. "One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime."

Lovette v. State, 636 So.2d 1304, 1306 (Fla.1994)(c.o.).[2] Based on this, the State submits given the facts and circumstances in this case, Sigler's conviction for third-degree felony murder in furtherance of his own harboring is legally sustainable.

Sigler argues that he cannot legally be guilty as a principal to harboring an escaped prisoner because that offense is such that "participation by another is inevitably incident to its commission" (AB 24).[3] The State disagrees. A principal in the first degree is defined as follows:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or

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[2]It is noteworthy that the jury was read the instruction on independent acts (T 2131; R 91). *See*, Lovette, 636 So.2d at 1306 (restating the general principle that 'an act in which a defendant does not participate and which is 'outside of and foreign to, the common design' of the original felonious collaboration may not be used to implicate the nonparticipant in the act"). Obviously, the jury considered the argument Sigler raises in this cross appeal and rejected it.

[3]In support of this claim, Sigler relies on United States v. Southard, 700 F.2d 1, 20 (1st Cir.), cert. den., 464 U.S. 823 (1983)(AB 24). In Southard, the Court discussed the three exceptions to the rule that aiding and abetting goes hand-in-hand with the commission of a substantive crime. The first exception is that the victim of a crime cannot be charged as an accomplice. The second involves criminal statutes enacted to protect a certain class of persons thought to be in need of special protection. The third, which is asserted here and in Southard, applies to crimes which are "so defined that participation by another is necessary to its commission." Id. at 19-20.

> she is or is not actually or constructively present at the commission of such offense.

§ 777.011, Fla. Stat. (1997)(e.s.).

What the highlighted language of the statute suggests is that the Legislature undoubtably intended s. 777.011 to apply to every criminal offense committed against the State, including but not limited to § 944.46, Fla. Stat. Thus, Sigler's argument that as a matter of law he cannot be guilty of third-degree felony murder in furtherance of harboring an escaped prisoner under a principal theory would run directly contrary to the statute. Further, the offense of harboring an escaped prisoner as set forth in s. 944.46 is unlike the offenses highlighted in the cases cited by Sigler. That section states:

> Whoever harbors, conceals, maintains, or assists, or gives any other aid to any prisoner after his or her escape from any state correctional institution, knowing that he or she is an escaped prisoner, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 944.46, Fla. Stat.

As argued here and as recognized by the Fourth District in Sigler I, Sigler was not merely an escapee who did nothing to assist Michelson in harboring, concealing, maintaining, assisting, or giving aid to him. On the contrary, his involvement in his own harboring is extensive. Indeed, in United States v. Southard, 700 F.2d 1, 20 (1st

Cir. 1983), the defendants were charged among other as aiders and abettors with violating federal gambling statutes. One of the defendants, Southard, argued that he could not be charged with committing the substantive gambling violation and aiding and abetting. His claim, like Sigler's, is that the substantive charge by its own terms seeks only to punish those "engaged in the business of betting or wagering," and not a "mere bettor." Id. at 20.

The First Circuit rejected this claim reasoning that the evidence suggested that Southard and the others were not "mere bettors," who did nothing to assist the principal in carrying on a gambling activity:

> The flaw in this argument is that it assumes that the other participant is only a bettor... who does nothing to assist the principal in carrying on his gambling activities. The question, as the district court recognized, is not whether a mere bettor can be prosecuted as an aider and abettor, but whether a person not "in the business of betting or wagering" can be found guilty of assisting one who is. We think it clear that he can.

Id. (f.n.o.).

The same may be said here. Sigler characterizes himself as a mere "escapee" who did nothing to assist Michelson in his concealment. Yet, the evidence shows that Sigler assisted Michelson in the latter's act of harboring the former. Thus, just as in Southard, Sigler may be convicted of third-degree felony murder in furtherance of

harboring under a principal theory. Sigler would have this Court hold that under no circumstances could an escapee ever be liable as an accomplice to that escapee's own harboring. That this proposition is without merit becomes even more apparent when one considers the following hypothetical case: A and B plan A's escape from prison. To facilitate his concealment and prevent apprehension, A furnishes to B, A's ATM card with access to A's bank account as well as the keys to A's house. After the escape is completed, B obtains food and other necessary provisions for A while A remains secreted inside his house. Applying Sigler's argument to this example, A could not be liable as an accomplice for harboring himself simply because A is the escapee, even though A clearly rendered aid to B in order to facilitate A's harboring. The State submits the Legislature clearly did not intend such an absurd result in enacting either sections 944.46 or 777.011.

Likewise, the other cases cited by Sigler are distinguishable and do not support his claim. In Cota v. State, 956 P.2d 507 (Ariz 1998), the Arizona Supreme Court held that the defendant, a purchaser, could not be charged as an accomplice to the sale of marijuana to himself by the seller. The Court explained:

> While [the seller] and Cota's separate acts were part of a single transaction, they did not aid each other in committing their separate crimes. Cota's act of receiving was the converse of [the seller's] act. The receipt was not in aid of the transfer, but instead was the separate crime of

> possession. Accordingly, we hold that a recipient of a transfer of marijuana cannot be guilty of unlawful transfer to himself or herself either under the transfer statute or through accomplice liability.

Id. at 383.

Unlike the defendant in Cota, Sigler *did aid* Michelson in furtherance of harboring himself and that aid did directly benefitted Sigler. His participation in his own harboring cannot be construed simply as the "converse" of Michelson's acts. Thus, Cota is distinguishable. Also, United States v. Shear, 962 F.2d 488 (5th Cir. 1992) is likewise distinguishable. In Shear, the Court found that the nature of the OSHA statute at issue showed that Congress intended to leave unpunished the defendant, an employee of a company, who simply aids and abets the violations of the OSHA regulations committed by the defendant's employer. As stated, the Legislature did not intend to limit the applicability of s 777.011 liability.

As the Fifth Circuit in United States v. Pino-Perez, 870 F.2d 1230, 1235 explained in upholding the defendant's conviction for violating the federal drug "kingpin" statute as an aider and abettor:

> We and other courts have endorsed Judge Learned Hand's definition of aiding and abetting, which requires that the alleged aider and abettor "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

870 F.2d at 1235 (c.o.). At bar, there is competent substantial evidence from which a reasonable jury could find that Sigler likewise "associated himself with the" harboring, that he "participated in it as something that he wish[ed] to bring about, [and] that he [sought] by his action to make it succeed." It follows that the cases cited by Sigler do not support his claim that he legally cannot be convicted for third-degree felony murder in furtherance of harboring under a principal theory.

Sigler's further argues for the very first time that the lower court's decision is in conflict with Staten. The State disagrees. Staten held that a defendant cannot be convicted as both a principal *and* an accessory after the fact based on the same criminal act.[4]. Unlike the defendant in Staten, Sigler does not stand convicted of *both* felony murder in furtherance of harboring *and* the separate offense of accessory after the fact based on the same criminal act. Nor, under the facts of this case could he be. Section 777.03(1)(a) would come into play in a situation where Sigler, knowing

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[4]Liability as an accessory after the fact is defined in § 777.03(1)(a), Fla. Stat. as follows:

> Any person [other than enumerated relatives] who maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that the offender had committed a felony or been accessory thereto before the fact, with intent that the offender avoids or escapes detection, arrest, trial or punishment, is an accessory after the fact.

Michelson had committed a felony, renders some sort of aid after the commission of that felony with the intent that Michelson avoids or escapes detection, arrest, trial or punishment for that felony.

Sigler and Michelson were both apprehended immediately after the crash. That essentially completed a s. 944.46 offense. Once arrested, Sigler had no opportunity to render further aid Michelson in the latter's commission of the underlying felony of harboring an escaped prisoner. Thus, s. 777.03(1)(a) has no application here. It follows that the lower court's decision does not conflict with Staten. Finally, as argued more fully in the State's initial brief, even assuming *arguendo* the Court finds as a matter of law, Sigler cannot, as a principal, be convicted of third-degree felony murder in furtherance of his harboring, the State submits he is not entitled to a discharge. Rather, this Court could remand with instructions that a conviction for manslaughter by culpable negligence be entered. Based on this, the State submits Sigler is not entitled to a discharge.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to QUASH the lower court's decision and REMAND to re-instate the conviction for third-degree felony murder or, a conviction for manslaughter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Initial Brief on the Merits" has been furnished by Courier to: PAUL E. PETILLO, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL, this ___ day of January, 2005.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certified that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, this _____ day of January, 2005.

_____
AUGUST A. BONAVITA
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