IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Appellant/Cross-Apellee,	)	
	)	
vs.	)	CASE NO. 04-1934
	)	
JAY JUNIOR SIGLER,	)	
	)	
Appellee/Cross-Appellant.	)	
	)	
	)	

ANSWER BRIEF & CROSS-INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT

On Appeal from the District Court of Appeal, Fourth District, State of Florida.

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

PAUL E. PETILLO
Assistant Public Defender
Florida Bar No. 508438

Attorney for Jay Junior Sigler

TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES/ CHAPTER LAWS

FLORIDA RULES OF APPELLATE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In this brief, appellee/cross-appellant, Jay Junior Sigler, will be referred to as ASigler,@ and appellant/cross-appellee, State of Florida, will be referred to as State. Moreover, the State=s method for citing the appellate record will be used. *See Appellant/Cross-Appellee=s Initial Brief*, at p. 1.

STATEMENT OF THE CASE

Pursuant to Fla. R. App. P. 9.210(c), appellee/cross-appellant Sigler omits the *Statement of the Case*.

STATEMENT OF THE FACTS

Sigler will rely on the State=s *Statement of the Facts*, but adds the following facts omitted from the State=s rendition:

After the crash, Sigler and co-defendant Michelson were taken to the police department and each gave taped statements (T 1441-1479 (Michelson); 1480-1491 (Sigler)). Regarding the crash, Michelson stated that he saw the deputy behind him and that when the deputy went out of his jurisdiction he Agot scared and ran a stop sign and hit another car@ (T 1447; 1477-1478). Michelson was asked whether he was trying to run away from the police when the accident occurred (T 1447). He answered: AYeah, because I don=t want go to the back in jail [sic]. I=ve been in jail seems like all my life. And then I finally got out. I don=t want to go back@ (T 1447).

Sigler told the detective that on the way to visit Michelson=s relative, they realized there was an officer behind them (T 1482). When they crossed the drawbridge, they saw more officers; Michelson Awhipped a [u-turn] and he wouldn=t let off the gas and then we were going through some stop signs...@ (T 1483). Sigler said he wanted Michelson to stop, that A[t]here was no way going anywhere@ (T 1486). Sigler told the detective: AI asked him, you know, give up, you know, I said just stop the car and he kept on mumbling, you know, he didn=t know what he wanted to do@ (T 1483).

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

The United States Supreme Court has made it clear that a A judge=s authority to sentence derives wholly from the jury=s verdict,@ *Blakely v. Washington*, 124 S.Ct. 2531, 2539 (2004), yet Sigler has been convicted and sentenced to 30 years in state prison for an offense he neither pled guilty to nor was found guilty of. The district court correctly held that ' 924.34, Fla. Stat., which purports to authorize this, is unconstitutional in violation of Sigler=s right to jury trial.

POINT ON CROSS-APPEAL

The district court concluded that Sigler, the escaped prisoner, could be guilty as a principal of harboring an escaped prisoner (i.e., himself). This is contrary to the limitation on accomplice liability for crimes so defined that participation by another is inevitably incident to its commission, i.e., crimes that by definition must be committed by two people, for example, adultery, bribery, sale of contraband, etc. The district court=s decision is also contrary to the rule established by this Court in *Staten v. State*, 519 So.2d 622 (Fla. 1988), that a perpetrator of a felony cannot be guilty of the post-crime aid offense of accessory after the fact. Harboring an escaped prisoner is simply a specific form of accessory after the fact. Accordingly, the escaped prisoner cannot be guilty of the post-crime aid offense of harboring an escaped prisoner. The appropriate remedy in this case is discharge.

POINT ON APPEAL

WHETHER THE DISTRICT COURT CORRECTLY HELD THAT ' 924.34, FLA. STAT. (1997), IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE?

Procedural History

Sigler was indicted and tried for the crime of first-degree felony murder, the state charging that the homicide was committed while Sigler was engaged in an escape (R 1-2).[1] He was tried by jury and convicted of second-degree (depraved mind) murder as a lesser-included offense (R 3-4).

Sigler appealed the judgment and sentence to the Fourth District Court of Appeal. He argued that the evidence of second-degree murder was legally insufficient for two reasons: 1) there was no evidence of ill will, hatred, spite, or an evil intent, an essential element of second-degree murder, *see Duckett v. State*, 686 So.2d 662 (Fla. 2d DCA 1996); *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, 2) there was no evidence that Sigler, as a passenger in the automobile that killed the victim, was criminally liable (for either second-degree murder or the lesser offense of manslaughter) as a principal for the acts of the driver.[2]

---

[1] Before trial, Sigler moved to dismiss the indictment on the ground that the underlying felony of escape was completed for purposes of the felony murder rule when Mr. Palmer was killed (R 35-40, T 1-22). The trial court denied the motion (R 54-57). Sigler's motion for judgment of acquittal on the same ground was also denied (T 1824-25, 1840, 1848). Although the trial court erred in denying these motions, *see State v. Williams*, 776 So.2d 1066 (Fla. 4th DCA 2001); *Lester v. State*, 737 So.2d 1149 (Fla. 2d DCA 1999), the issue became moot when the jury convicted Sigler of the lesser offense of second-degree murder.

[2] Because Sigler objected to the lesser-included charge of second-degree murder, he was not precluded from challenging his conviction. In *State v. Espinosa*, 686 So.2d 1345 (Fla. 1996), this Court held that a defendant waives his constitutional right to have the State prove each element beyond a reasonable doubt when the defendant requests a lesser offense for which the evidence is insufficient. In order to challenge the sufficiency

The district court agreed with Sigler=s argument that there was insufficient evidence of ill will, hatred, spite, or an evil intent to sustain his second-degree murder conviction. *See Sigler v. State*, 805 So.2d 32 (Fla. 4th DCA 2002), *rev. denied*, 823 So.2d 126 (Fla.2002)(*Sigler I*). Given that ruling, the district court concluded that it was unnecessary to address Sigler=s argument that he was not criminally liable for the acts of the driver under a principal theory:

> Since appellant was neither the driver, owner, nor in control of the car which crashed into and killed the victim, his criminal liability, if any, normally would have to be established under a principal theory. In this case, however, we need not decide whether appellant, a passenger, could be convicted as principal because there is no evidence of Aill will, hatred, spite or evil intent@ directed at the victim.

Sigler I, 805 So.2d at 34.

---

of the evidence in that situation, the defendant must show that the evidence is insufficient to prove the charged offense as well. *Espinosa*, 686 So.2d at 1348-49. Here, however, no such waiver occurred. At trial, Sigler objected to the lesser offenses on the ground that the evidence did not support them (T 1919, 1922-25, 2147-48, 2156, 2158, 2165, 2168-70). Accordingly, on appeal Sigler did not need to show that the evidence was insufficient to support first-degree felony murder (although he could have, *see* note 1, *supra*).

The district court found, however, that the evidence did support Sigler=s guilt of harboring an escaped prisoner (i.e., himself) and, thus, of third-degree felony murder, a permissive lesser-included offense. *Sigler I*, 805 So.2d at 35-36. The district court did not address whether Sigler could be held criminally liable for manslaughter (under a principal theory), a necessarily lesser-included offense.[3] Pursuant to ' 924.34, Fla. Stat. (1997), the statute that authorizes an appellate court to order a conviction on a lesser offense, and *I.T. v. State*, 694 So.2d 720 (Fla. 1997), which interpreted that authorization to include permissive lesser-included offenses, the district court ordered that judgment and sentence be entered for third-degree felony murder.

On remand, defense counsel objected to the trial court=s entry of judgment and sentence for third-degree felony murder and moved for discharge (2R 20-26; 2T 3, 41). Defense counsel argued that Sigler=s conviction for second-degree murder did not require the jury to determine whether Sigler committed the offense of harboring an escaped prisoner, the underlying felony for a third-degree murder conviction; rather, the district court alone made that finding (2R 20-26). Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Franks v. Alford*, 820 F.2d 345 (10th Cir. 1987), defense counsel asserted that entry of judgment and sentence for third-degree felony murder would violate Sigler=s

[3] Both third-degree felony murder and manslaughter are second-degree felonies, punishable by 15 years in state prison. *See* '' 782.04(2)&(4), 775.082(3)(c), Fla. Stat. (1997).

constitutional right to trial by jury (2R 20-26). The trial court overruled the objection and entered judgment and sentence for third-degree felony murder (2T 3).

Sigler appealed the third-degree felony murder judgment and sentence (2R 49). On appeal, the district court ruled that its previous decision was erroneous. *Sigler v. State*, 881 So.2d 14 (Fla. 4th DCA 2004)(*Sigler II*). The district court agreed with Sigler=s argument that the jury=s second-degree murder verdict did not include a finding that Sigler committed the offense of harboring an escaped prisoner, the underlying felony for Sigler=s third-degree felony murder conviction. *Sigler II*, 881 So.2d at 17. The district court also agreed that a panel of appellate judges was not a Aconstitutionally acceptable substitute@ for a jury determination of that issue. *Id*. at 18. Citing *Apprendi supra*, and *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the district court concluded that ' 924.34, Fla. Stat. (1997), as interpreted in *I.T.*, *supra*, was unconstitutional as applied to Sigler:

> We think [*Apprendi* and *Blakely*] make it clear beyond any doubt that section 924.34 as interpreted in *I.T.* is contrary to the Sixth Amendment when the previous jury determination cannot be deemed to have necessarily found defendant guilty as to every element of the permissive lesser included offense. That means that as for this circumstance we are expressly holding the statute invalid under the United States Constitution.

Sigler II, 881 So.2d at 20.

The State has appealed to this Court pursuant to art. V, ' 3(b)(1), Fla. Const., and

Fla R. App. P. 9.030(a)(1)(A)(ii).[4] Sigler cross-appeals pursuant to Fla R. App. P. 9.110(a)(1) & (g). The district court=s holding that ' 924.34, Fla. Stat., is unconstitutional as applied in this case is correct and should be affirmed.[5]

Section 924.34, Fla. Stat.

Section 924.34, Fla. Stat., provides:

> **924.34 When evidence sustains only conviction of lesser offense.**BWhen 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 offense 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.

[4] This Court has held that it has appellate jurisdiction over district court decisions declaring a state statute unconstitutional as applied. *See L.M. Duncan & Sons, Inc. v. City of Clearwater*, 478 So.2d 816 (Fla. 1985); *Universal Engineering Corp. v. Perez*, 451 So.2d 463 (Fla. 1984).

[5] Because the constitutionality of a statute is a question of law, the standard of review is *de novo*. *See City of Jacksonville v. Cook*, 765 So.2d 289, 291 (Fla. 1st DCA 2000).

This statute is derived from ' 310 of the Criminal Procedure Act of 1939, *see* Ch. 19554, ' 310, Laws of Fla. (1939), and it received its present form (except for gender neutrality) in 1970. *See* Ch. 70-339, ' 161, at 1070, Laws of Fla. As a preliminary matter, this statute is clearly a rule of (appellate) court procedure. *See generally State v. Garcia*, 229 So. 2d 236 (Fla. 1969); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65-66 (Fla. 1972)(Adkins, J., concurring)(discussing difference between substantive and procedural). Under art. V ' 2(a), Fla. Const., this Court has the exclusive authority to Aadopt rules for the practice and procedure in all courts....@ Any attempt to create rules of practice and procedure on the part of the legislative branch is a violation of the separation of powers doctrine. Art. II, ' 3, Fla. Const.; *Allen v. Butterworth*, 756 So.2d 52, 64 (Fla. 2000). Although ' 924.34, Fla. Stat., was adopted by implication by Fla. R. App. P. 1.4 (1962),[6] appellate rule 1.4 Ahas not been carried forth under the current Florida Rules of Appellate Procedure.@ *Vic Potamkin Chevrolet, Inc. v. Bloom*, 386 So.2d 286, 289 (Fla. 3d DCA 1980). AConsequently, all statutes that purport to govern the right to appeal are now inoperative.@ *Id*. citing *In re Wartman=s Estate*, 128 So.2d 600 (Fla. 1961). Accordingly, ' 924.34, Fla. Stat., is an unconstitutional infringement on this Court=s rule-making authority. Although this Court could breathe life into ' 924.34, Fla. Stat., by adopting it as a rule of appellate procedure, *see State v.*

[6] Rule 1.4 provided: AFrom their effective date . . . these rules shall supersede all conflicting rules and statutes. All statutes not superseded hereby or in conflict herewith shall remain in effect as rules promulgated by the Supreme Court.@ *See Warren v. State*, 174 So.2d 429, 431 (Fla. 1st DCA 1965).

Smith, 260 So.2d 489 (Fla. 1972), it should be stressed that the statute itself Bsince it is a procedural rule Bis not entitled to the deference normally accorded

statutes that are within the Legislature=s authority to pass. In any event, this Court should not adopt the statute as interpreted in *I.T.* and applied in *Sigler I* because it is an unconstitutional infringement on the right to jury trial.

Right to Jury Trial

The Sixth Amendment of the United States Constitution provides: AIn all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....@ Article III, ' 2, cl. 3, of the Constitution provides: AThe Trial of all Crimes, except in Cases of Impeachment, shall be by Jury....@ Justice Scalia has noted that the jury trial guarantee is Athe only one to appear in both the body of the Constitution and the Bill of Rights[.]@ *Neder v.. United States*, 527 U.S. 1, 30 (1999)(Scalia, J., dissenting). This right to a jury trial in serious criminal cases is a fundamental right and is applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

In addition to the federal constitution, art. I, ' 16(a), Fla. Const., provides: AIn all criminal prosecutions the accused ... shall have the right ... to have a speedy and public trial by impartial jury....@ And art. I, ' 22, Fla. Const., provides: AThe right of trial by jury shall be secure to all and remain inviolate.@ Justice Shaw observed in *Bottoson v. Moore*, 833 So.2d 693, 714 (Fla. 2002)(Shaw, J., concurring in result only), that the principle that

the right to trial by jury shall Aremain inviolate@ has been enshrined in every Florida Constitution since 1838.

Florida=s commitment to preserving the right to trial by jury was expressed by this Court in *Blair v. State*, 698 So.2d 1210 (Fla. 1997):

> In Florida, we also have always considered the right to jury trial an indispensable component of our system of justice. In addition to the federal constitutional mandate, our state constitution=s Declaration of Rights expressly provides that the Aright of trial by jury shall be secure to all and remain inviolate.@ Art. I, ' 22, Fla. Const. Similarly, this Court has acknowledged that Aa defendant=s right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution.@ *State v. Griffith*, 561 So.2d 528, 530 (Fla.1990); *see also Floyd v. State*, 90 So.2d 105, 106 (Fla.1956) (stating that Aright of an accused to trial by jury is one of the most fundamental rights guaranteed by our system of government@).

Blair, 698 So.2d at 1213 (footnote omitted).

Recently, in *Apprendi* and *Blakely* the United States Supreme Court curbed judicial encroachment on the jury=s power to decide criminal cases. Justice Scalia in *Blakely* stressed that the right to jury trial is Ano mere procedural formality, but a fundamental reservation of power in our constitutional structure.@ *Blakely*, 124 S.Ct. at 2538-39. Thus, the right to jury trial is not just the right enjoyed by any particular defendant (although that is important); it is also the Apeople=s@ right of control over the judiciary: AJust as suffrage ensures the people=s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.@ *Blakely*, 124 S.Ct. at 2539. Therefore, in *Apprendi* and *Blakely*, the Court held that trial judges

do not have the power to decide whether there is sufficient evidence of an offense element (disguised in *Apprendi* and *Blakely* as Asentencing factors@). That power is reserved for the jury.

Applying *Apprendi* and *Blakely* to this Case

As the district court correctly noted, not all of the statutory elements of third-degree felony murder are subsumed within the greater offense of second-degree murder, and, in fact, each crime has an element the other does not.[7] *Sigler II*, 881 So.2d at 17. Third-degree felony murder requires an underlying felony (in this case, harboring an escaped prisoner), while second-degree murder requires that the killing be done with a depraved mind. Accordingly, Sigler=s conviction for second-degree murder did not require the jury to determine beyond a reasonable doubt that he committed the predicate offense of harboring an escaped prisoner.

[7] Third-degree felony murder is the Aunlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than [those enumerated for first-degree felony murder]....@). ' 782.04(4), Fla. Stat. (1997). Second-degree (depraved mind) murder is the Aunlawful killing of a human being when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual....@ ' 782.04(2), Fla. Stat. (1997).

The panel of appellate judges in *Sigler I* found that there was sufficient evidence of harboring an escaped prisoner to support a conviction for third-degree felony murder, but Sigler=s jury did not make that finding. In short, Sigler was convicted of third-degree felony murder *by the district court of appeal and not by a jury*. Pursuant to *Apprendi* and *Blakely*, this was a finding that the district court did not have the power to make.

Apprendi=s application to this situation was recognized by the Michigan Supreme Court in *People v. Bearss*, 463 Mich. 623, 625 N.W.2d 10 (2001). In *Bearss*, the Michigan Court of Appeals reversed the defendant=s conviction due to insufficient evidence and remanded for imposition of a lesser offense (called a Acognate offense@ in Michigan) that did not include all the elements of the offense found by the jury. The defendant appealed and the Michigan Supreme Court reversed.

Citing *Apprendi*, the Michigan Supreme Court recognized that a defendant=s Sixth and Fourteenth Amendment jury trial right is violated when an appellate court, after determining that the evidence is legally insufficient, remands for imposition of a lesser offense unless the jury, by its verdict, found all the elements of that offense: ATo permit appellate courts to direct a conviction on cognate offenses is to invite violations of the right to a jury determination of every element of the crime charged.@ *Bearss*, 625 N.W.2d at 16. Therefore, the Court unanimously held that if an appellate court determines that insufficient evidence was presented to support a conviction, Ait may not direct a conviction on a cognate offense unless (1) there was sufficient evidence to support a conviction of the lesser offense and (2) the appellate court can unequivocally

state that the jury=s verdict must have included a specific finding of every element necessary to support a conviction of the cognate offense.@ *Id*. A case that predated *Apprendi* and *Blakely* also recognized that an appellate remand may compromise a defendant=s jury trial right. In *Franks v. Alford*, 820 F.2d 345 (10th Cir. 1987), defendant Franks was convicted in state court of first-degree felony murder. On direct appeal, the Oklahoma Court of Criminal Appeals reversed the felony murder conviction on the ground that the evidence was insufficient. *Id*. at 346. The court held, however, that the evidence supported Franks= guilt of second-degree (depraved mind) murder, and it ordered that judgment and sentence be entered for that offense. *Id*. Franks argued that Athe Court of Criminal Appeals in essence convicted him of second degree murder on appeal and thereby denied him his constitutional right to have a jury assess his guilt of second degree murder.@ *Id*. The Tenth Circuit Court of Appeals agreed and reversed.

The Tenth Circuit noted that second-degree murder is not a necessarily lesser-included offense of first-degree felony murder. *Franks*, 820 F.2d at 347. Thus, the jury, when it found Franks guilty of first-degree felony murder, did not also find him guilty beyond a reasonable doubt of all of the elements of second-degree murder (and, in particular, the Adepraved mind@ element). The Tenth Circuit Court of Appeals held that it was unconstitutional in violation of the Sixth Amendment for the appellate court to make that finding:

> As we have noted, Franks= conviction for felony murder did not require the jury to determine beyond a reasonable doubt whether the act causing the death evinced a

> depraved mind, as required for the second degree murder conviction imposed by the Court of Criminal Appeals. The appellate court=s determination of this issue is not a constitutionally acceptable substitute. *See Cabana [v. Bullock]*, 106 S.Ct. at 696. Because Franks was denied his right under the Sixth and Fourteenth Amendments to have his guilt determined by a jury, his conviction is constitutionally infirm.

Franks v. Alford, 820 F.2d at 347.

Here, Sigler=s conviction for second-degree (depraved mind) murder did not require the jury to determine beyond a reasonable doubt that Sigler committed the offense of harboring an escaped prisoner, as required for the third-degree murder conviction imposed by the district court. The district court found that Sigler committed this underlying felony (and, thus, that he committed the offense of third-degree felony murder). But, as the Tenth Circuit stated: AThe appellate court=s determination of this issue is not a constitutionally acceptable substitute.@ *Id.* Indeed, if, under *Apprendi* and *Blakely*, the jury must find all facts (other than a prior conviction) that enhance a sentence beyond the statutory maximum,[8] then it naturally follows that the jury must find the very ingredients of the offense for which judgment was entered, in this case, the underlying felony for third-degree felony murder.

The State argues that *Franks* is distinguishable because the trial court in that case instructed the jury that if it found Franks guilty of first-degree murder, it should not

[8] *See e.g. Arrowwood v. State*, 843 So.2d 940 (Fla. 1st DCA 2003)(victim injury points); *Mathew v. State*, 837 So.2d 1167 (Fla. 4th DCA 2003)(domestic violence multiplier); *Amos v. State*, 833 So.2d 841 (Fla. 4th DCA 2003)(great bodily harm).

consider the offense of second-degree murder. *Id*. at 347. However, this fact was not the Atouchstone@ of the decision, as the State claims. The operative fact in *Franks*, and it is the common thread that binds together *Bearrs*, *Apprendi*, *Blakely*, and this case, is that Franks=s jury did not find all of the elements of the crime for which he was convicted and sentenced. This violates the jury clause because, as *Blakely* made clear, Athe judge=s authority to sentence derives wholly from the jury=s verdict.@ *Blakely*, 124 S.Ct. at 2539. A jury=s ability to Aconsider@ a lesser offense is not enough to impose judgment and sentence for that offense; the jury=s verdict must include a finding of all of the elements of that offense.

Neder, Schirro, and Cotton

The State relies on a trio of cases to argue that the district court erred in finding a Amanifest injustice@ that warranted relaxing the law of the case doctrine.[9] But the contrast between those cases and this one demonstrates the correctness of the district court=s decision. In all three of the State=s cited cases, the defendants had a trial where they could contest the elements of the crimes with which they were charged. As explained below,

[9] It should be noted that the State has not articulated the standard of review that this Court should apply in reviewing a district court of appeal=s decision to relax the law of the case doctrine. *See* Fla. R. App. P. 9.210(b)(5). Some decisions are within the inherent discretion of the district courts. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So.2d 986, 989 (Fla. 2004)(decision whether to issue written opinion). Because an appellate court=s decision to reconsider of a point of law previously decided is a matter of grace and not right, *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965), that is a decision that rests largely within the discretion of the appellate court. Therefore, a high degree of deference to that discretionary decision should be paid. Moreover, whether the district court in this case erred or abused its discretion in reconsidering a point of law previously

Sigler has not had that opportunity; he has been convicted and sentenced to 30 years in state prison for a crime he neither pled guilty to nor was found guilty of.

In *Neder v. United States*, 527 U.S. 1 (1999), the defendant was convicted of filing a tax return Awhich he [did] not believe to be true and correct as to every material matter.@ *Neder*, 527 U.S. at 16. The trial court erred in failing to submit to the jury the issue of materiality and deciding that issue itself. The Supreme Court held that the error was subject to the federal harmless error test because the materiality element was uncontested and supported by overwhelming evidence (Neder failed to report $5 million in income on his tax return) such that no Arational jury would have found the defendant guilty absent the error[.]@ *Id*. at 16-17.

In *Schirro v. Summerlin*, 124 S.Ct. 2519 (2004), the Court held that its decision in *Ring v. Arizona*, 536 U.S. 584 (2002), would not apply retroactively to cases that were already final on direct review. In that case, the aggravating factors that authorized the death penalty were determined by Schirro=s trial judge and not by the jury. Long after Schirro=s direct appeal was final, the Supreme Court held in *Ring* that the Sixth Amendment required that aggravating factors authorizing the death penalty be decided by the jury and not by the trial judge. Applying the retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that this new procedural rule would not be applied retroactively to Schirro=s case because judicial (as opposed to jury) fact-finding does not

---

decided by it is beyond the scope of this Court=s basis for jurisdiction.

A*seriously* diminish[ ] accuracy as to produce an impermissibly large risk of injustice.@ *Schirro*, 124 S.Ct. at 2525 (emphasis in original; internal quotations omitted).

In *United States v. Cotton*, 535 U.S. 62 (2002), the Court held that failure to charge in the indictment the element of drug quantity was not plain or fundamental error where the evidence of quantity was overwhelming and was found by the judge at sentencing.

The error that occurred hereBthe *Sigler I* panel=s finding of an element the jury did notBdoes not fit into the framework of these cases. The defendants in *Neder*, *Schirro*, and *Cotton*, all had the opportunity to contest the elements of their respective offenses before a trier-of-fact. Sigler, however, has not yet had that opportunity. Sigler was convicted of third-degree felony murder by the district court of appeal and not by a jury *or* judge.

Needless to say, an appellate court, unlike a trial judge, is not a competent trier-of-fact. Appellate judges do not have the opportunity to view a witness=s demeanor; appellate judges have only the cold record, which is no substitute for live testimony. As Judge Frank of the Second Circuit Court of Appeals stated: AThe liar=s story may seem uncontradicted to one who merely reads it, yet it may be >contradicted= in the trial court by his manner, his intonations, his grimaces, his gestures, and the likeBall matters which >cold print does not preserve= and which constitute >lost evidence= so far as an upper court is concerned....@ *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949)(footnotes omitted). Thus, Judge Frank concluded: AThe best and

most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.@ *Id*. Indeed, an important principle of appellate review**B**the deference given to a trial court=s factual findings**B**is premised on the trial court=s superior position **A**to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.@ *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976).

In *Sigler I* a panel of appellate judges did act as the fact-finder and found an element the jury did not. From reading the appellate record, a three-member panel of appellate judges found that there was sufficient evidence of the underlying offense of harboring an escaped prisoner (and thus of third-degree felony murder) even though Sigler=s jury never made that finding. In *Pratt v. State*, 668 So.2d 1007 (Fla. 1st DCA 1996), *decision approved, State v. Pratt*, 682 So.2d 1096 (Fla.1996), the First District Court of Appeal recognized the incongruity of appellate fact-finding:

> Were we to adopt the state=s position and direct entry of judgment for attempted manslaughter (an intent crime) pursuant to section 924.34, we necessarily would be acting as the fact-finder and would have to assume the presence of the requisite intent. Such a result would encroach impermissibly upon the province of the jury. We conclude that the appellant would be effectively denied his constitutional right to trial by a jury if we, sitting in an appellate capacity, were to presume a finding of intent that the jury itself did not have to make.

Pratt, 668 So.2d at 1009.

Not only did the *Sigler I* panel make a finding that it did not have the *power* to make under our constitutions, it made a finding it was not *competent* to make. In sum,

the district court did not err or abuse its discretion in relaxing the law of the case doctrine in a case where the defendant was convicted and sentenced to 30 years in state prison for an offense he neither pled guilty to nor was found guilty of.

Manslaughter

The State argues that the appropriate remedy is to remand for entry of judgment and sentence for manslaughter, a necessarily lesser included offense. However, this would require this Court to address the issue raised but not reached by the district court of appeal in *Sigler I*: whether Sigler, as a passenger in the automobile, could be criminally liable as a principal for the acts of the driver. The State=s brief contains no analysis of this issue. Accordingly, this Court should deem the argument abandoned. *See Chamberlain v. State*, 881 So.2d 1087, 1103 (Fla. 2004)(issues raised in appellate brief that contain no argument are deemed abandoned); *Shere v. State*, 742 So.2d 215, 217 n. 6 (Fla.1999) (same). *See also Henderson v. State*, 569 So.2d 925, 927 (Fla. 1st DCA 1990)(court declines to address issue that was perfunctorily argued in brief).

Moreover, the argument has no merit. As explained at great length in the Initial and Reply Briefs in *Sigler I*,[10] Sigler, as a passenger in the automobile, could not be held criminally liable for the acts of co-defendant Michelson (either murder or manslaughter) under a principal theory. AGenerally, such liability arises when the owner or person in control of a motor vehicle puts it in the immediate control of a careless and reckless

[10] The lion=s share of the briefs in *Sigler I* was devoted to this issue. The State filed the *Sigler I* briefs as supplemental record in *Sigler II*. See Exhibit A-1, Initial Brief

driver, remains in [or on] the vehicle and permits the driver, without protest, to so recklessly operate the vehicle as to cause the death of another.@ *Michel v. State*, 752 So.2d 6, 11 (Fla. 5th DCA 2000), *rev. denied* 766 So.2d 222 (Fla. 2000), *quoting State v. Travis*, 497 N.W.2d 905, 907 (Iowa App. 1993). As explained in the briefs in *Sigler I*, Sigler was neither the driver, owner, nor person in control of the automobile; nor did Sigler permit Athe driver, without protest, to so recklessly operate the vehicle as to cause the death of another.@ *Michel*, *supra*. In addition, Sigler did not encourage or incite Michelson to drive recklessly, and, in fact, he protested when he did so.[11] Accordingly, Sigler could not be guilty of manslaughter under a principal theory.

Conclusion

The district court correctly concluded that ' 924.34, Fla. Stat., is unconstitutional as applied in this case. The *Sigler I* panel=s direction to the lower court to enter judgment and sentence for third-degree felony murder violated Sigler=s constitutional right to trial by

---

at pp. 18-25; Reply Brief at pp. 2-7.

[11] Sigler stated to police that he told Michelson to pull over as A[t]here was no way going anywhere.@ (T 1486.) Sigler=s statement must be accepted as true as there was no evidence contradicting it. *See Mayo v. State*, 71 So.2d 899 (Fla.1954)(a defendant=s version of a homicide cannot be ignored where there is absence of other evidence legally sufficient to contradict his explanation); *Getsie v. State*, 193 So.2d 679 (Fla. 4th DCA 1966), *cert. denied* 201 So.2d 464 (Fla. 1967) (same); *Evans v. State*, 643 So.2d 1204, 1206 (Fla. 1st DCA 1994), *rev. denied*, 652 So.2d 818 (Fla.1995)(defendant=s statement to police must be accepted as true where it was reasonable, unrebutted, and unimpeached). *See also Fiske v. State*, 366 So.2d 423, 424 (Fla.1978)(even if a defendant=s statement to law enforcement agents Ais ambiguous and susceptible of innocent explanation as well as being indicative of criminal knowledge,@ such ambiguity must be resolved in favor of the accused).

jury protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, '' 16 & 22, of the Florida Constitution.

POINT ON CROSS-APPEAL

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT AN ESCAPED PRISONER CAN BE GUILTY OF HARBORING AN ESCAPED PRISONER UNDER A PRINCIPAL THEORY, AND, THUS, OF THIRD-DEGREE FELONY MURDER?

The district court held that Sigler, the escaped prisoner, can be guilty of harboring or aiding an escaped prisoner under a principal theory. This was error.[12]

The district court=s decision that Sigler, the escaped prisoner, can be guilty as a principal, or aider and abettor, of harboring an escaped prisoner (i.e., himself) is contrary to the limitation on accomplice liability for crimes Aso defined that participation by another is inevitably incident to its commission,@ i.e., crimes that by definition must be committed by two people, for example, adultery, bribery, sale of contraband, etc. *See* 2 W. LaFave & A. Scott, *Substantive Criminal Law* ' 13.3(e) (2d ed. 2003)

When a Acrime is so defined that participation by another is necessary to its commission, that other participant is not an aider and abettor.@ *United States v. Southard,* 700 F.2d 1, 20 (1st Cir.1983), *cert. denied,* 464 U.S. 823 (1983). A[B]y specifying the kind of individual who is to be found guilty when participating in a transaction necessarily

[12] An appellate court usually reviews the issue of criminal liability in the context of a trial court=s denial of a motion for judgment of acquittal, the standard of review of which is *de novo*. *State v. Williams*, 742 So.2d 509 (Fla. 1st DCA 1999). The same standard of review should be applied here.

involving one or more other persons, [the legislature] must not have intended to include the participation by others in the offense as a crime. This exception applies even though the statute was not intended to protect the other participants.@ *Id.* *See also Cota v. State*, 191 Ariz. 380, 956 P.2d 507 (Ariz. 1998); *United States v. Shear,* 962 F.2d 488, 493 (5th Cir.1992); *United States v. Pino-Perez,* 870 F.2d 1230, 1231-1232 (7th Cir.1989), *cert. denied*, 493 U.S. 901 (1989). Professor LaFave describes this exception to accomplice liability as follows:

> There are ... some exceptions to the general principle that a person who assists or encourages a crime is also guilty as an accomplice....
>
> Another exception is where the crime is so defined that participation by another is inevitably incident to its commission. It is justified on the ground that the legislature, by specifying the kind of individual who was guilty when involved in a transaction necessarily involving two or more parties, must have intended to leave the participation by the others unpunished.... Thus, under this exception one having intercourse with a prostitute is not liable as a party to the crime of prostitution, a purchaser is not a party to the crime of illegal sale, an unmarried man is not guilty as a party to the crime of adultery where the legislature has only specified punishment for the married participant, and a female welfare recipient is not guilty as a party to a male=s offense of receiving subsistence from such a person.

2 W. LaFave & A. Scott, *Substantive Criminal Law* ' 13.3(e) at 369-71 (2d ed. 2003) (citations omitted) (emphasis added). Other commentators agree: AA bribe-giver and a bribe-receiver are not regarded as accomplices of each other. Likewise a suborner of perjury and the person suborned are not accomplices. A purchaser of liquor is not regarded as an accomplice of the person charged with selling such liquor; nor is a

purchaser of narcotics an accomplice of the person charged with selling such narcotics.@ 1 C. Torcia, *Wharton's Criminal Law,* ' 38 at 252-253 (15th ed. 1993) (citations omitted).

Harboring an escaped prisoner is an example of a crime that is so defined that participation by another is inevitably incident to its commission. In every harboring case there will inevitably be a harboror and a harboree (the escaped prisoner). The harboror is criminally liable for harboring an escaped prisoner, and the harboree is criminally liable for escape. Thus, the escaped prisoner cannot be an accomplice to his own harboring.

The district=s court=s decision is also contrary to this Court=s decision in *Staten v. State,* 519 So.2d 622 (Fla. 1988), where this court held that being a principal offender of any crime and being an accessory after the fact to the same crime are mutually exclusive. For this proposition, this court cited, among other treatises, LaFave and Scott=s chapter on Alimits of accomplice liability@ for Apost-crime aid@ offenses. *Staten*, 519 So.2d at 625 (citing 2 W. LaFave & A. Scott, *Substantive Criminal Law* ' 6.9, at 169 (1986)). This court stated: AWhether stated as an essential element of the crime or merely as a black-letter rule, commentators agree that a principal cannot also become an accessory after the fact by his or her subsequent acts.@ *Id*. at 625 (citations omitted).

Harboring an escaped prisoner is simply a specific form of the post-crime aid offense of accessory after the fact.[13] Both crimes involve rendering post-crime aid to

[13] The statutes are similarly worded. The harboring statute, ' 944.46, Fla. Stat., punishes one who Aharbors, 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....@ Section 777.03(1)(a), Fla. Stat., defines an accessory

another person who has committed a crime. Just as the perpetrator of a felony cannot be guilty of the post-crime aid offense of accessory after the fact, the escaped prisoner cannot be guilty of the post-crime aid offense of harboring an escaped prisoner. The district court=s decision to the contrary conflicts with *Staten*.

The district court erred in concluding that Sigler could be guilty of harboring an escaped prisoner, and thus of third-degree felony murder. The appropriate remedy is discharge.

---

after the fact as A[a]ny 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....@

CONCLUSION

This Court should affirm the district=s court=s decision finding ' 924.34, Fla. Stat., unconstitutional as applied in this case. Based on the argument contained in the *Point on Cross-Appeal*, this Court should remand with directions to discharge Sigler.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

PAUL E. PETILLO
Assistant Public Defender
Florida Bar No. 508438

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been furnished to August Bonavita, Assistant Attorney General, 1515 North Flagler, 9th Floor, West Palm Beach, Florida 33401, by courier this _____ day of November, 2004.

_____
Attorney for Jay Junior Sigler

CERTIFICATE OF FONT COMPLIANCE

Counsel certifies that this brief was prepared with Times New Roman 14-point font.

_____
Attorney for Jay Junior Sigler