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 INITIAL 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

Sigler, along with his co-defendant, Christopher Michelson, were charged by indictment first degree felony murder with the underlying felony being escape (R 1-2).[1] Beginning November 8, 1999 through November 17, 1999, both he and Michelson were tried before a jury (T 1-2185). The two men were found guilty of the lesser offense of second degree murder (R 106; T 2175).

On December 13, 1999, Sigler was sentenced to serve life, with a minimum mandatory term of 15 years, in State prison as a habitual violent felony offender (R 119-124). Sigler appealed his conviction and sentence to the Fourth District Court of Appeal (R 125). On appeal, Sigler argued, *inter alia*, there was insufficient evidence to support the conviction for second degree murder. On December 5, 2001, a panel of the Fourth District Court of Appeal reversed Sigler's conviction for lack of sufficient evidence. The Court remanded for entry of a conviction for the lesser offense of third degree felony murder, with the underlying felony being harboring an escaped prisoner. Sigler I.[2]

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[1]Michelson was also charged with a separate count of vehicular homicide.

[2]Michelson's conviction was likewise reversed and remanded for the same reasons. *See*, Michelson v. State, 805 So.2d 983 (Fla. 4th DCA 2001)

After the lower court issued its opinion, Sigler filed a motion for rehearing and certification wherein he argued for the first time that the entry of a conviction for the lesser offense of third degree felony murder pursuant to s. 924. 34 violates the Jury Clauses of the Sixth Amendment as well as Art. I, § 16, Fla. Const. The State responded that this argument is improper as it was never raised in his initial brief. In the alternative, the State maintained the argument is without merit. The Court denied the motion for rehearing and certification.

Sigler then petitioned this Court for discretionary review of the lower court's decision. He raised, *inter alia* the same argument that was in his motion for rehearing and added that the Court's decision also violates Apprendi v. New Jersey, 530 U.S. 466 (2000)(Table). This Court denied his petition for discretionary review. Sigler v. State, 823 So.2d 126 (Fla. 2002). Meanwhile, the mandate from the Fourth District Court of Appeal issued on March 1, 2002 (2R 6-11). On remand, Sigler filed in the trial court a motion to dismiss and discharge in which he re-argued that the entry of a conviction pursuant to the Court's March 1st mandate violates the Jury Clause of the Sixth Amendment (2R 20-26). The State responded that the motion was not appropriate (2T 1-5). The trial court denied the motion and, in accordance with the lower court's mandate, adjudicated Sigler guilty of third-degree felony murder and re-sentenced him to serve thirty years with a ten-year minimum mandatory as a habitual

violent felony offender (2R 33-9).

On appeal to the Fourth District Court of Appeal, Sigler argued the conviction and sentence for third degree felony murder violated his right to a jury trial. The Fourth District Court of Appeal agreed and reversed the conviction and sentence and remanded for a new trial . Sigler v. State, 881 So.2d 14 (Fla. 4th DCA 2004)("Sigler II").[3] The State filed a motion for rehearing/rehearing en banc, which was denied on September 17, 2004. Sigler filed a notice of cross appeal. This brief follows.

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[3]Michelson also appealed his conviction and re-sentence stemming from his direct appeal. Michelson v. State, Case No.: 4D02-4810. He has raised the same argument as Sigler. As of the writing of this brief, Michelson's direct appeal from his re-sentencing is still pending in the Fourth District Court of Appeal.

STATEMENT OF THE FACTS

The pertinent facts of this case may be briefly stated as follows: Sigler and Michelson were inmates at the Everglades C.I. in Miami-Dade County. Michelson had already been released. Sigler continued to serve out his sentence on an unrelated robbery conviction. Sigler, with the aid of Michelson, Sigler's mother and three others, devised and successfully carried out a scheme for Sigler's escape from the prison facility (T 1458). A couple of days before the escape, Michelson arranged to have his sister's boyfriend, Beaston, steal a semi-tractor (T 1801). On the day of the escape, Michelson drove the truck through the prison's fences (T 1586; 1261). He got out of the truck and fired two shots in the direction of a prison guard (T 1262; 1268). Sigler then ran to the truck where he was given a shotgun (T 1588; 1268). Michelson and Sigler then fled from the prison area down an access road to an awaiting getaway car driven by Sigler's mother (T 1268; 1588). Everyone except Michelson and Sigler were apprehended that day (T 1156). The two men changed vehicles and left the area (T 1591; 1810). The two men spent the night in a Lake Worth motel (T 1444).

The following day, Michelson and Sigler were spotted by a Broward County Sheriff's Deputy driving southbound on A1A in Pompano Beach (T 854; 857). Michelson was driving (T 1447; 1477-78). The deputy followed the vehicle and at

some point, he attempted to pull the vehicle over but it sped away at a high rate of speed (T 858; 864-65). Ultimately, the vehicle collided into the one being driven by the victim, Dennis Palmer (T 875). Mr. Palmer died at the scene as a result of the crash (T 989-990; 1131). Over defense objection on unrelated grounds, the trial court instructed the jury on the lesser offenses of second degree murder and third degree felony murder with the underlying felony being harboring an escaped prisoner (T 1919; 1922-25; 2147-48). In the first appeal, Sigler had argued *inter alia* that there was insufficient evidence to support his second-degree murder conviction. He acknowledged that "Section 924.34, Fla. Stat. (1997) authorizes an appellate court to order that a conviction be reduced to a category one necessarily lesser-included offense or category two permissive lesser-included offense. I.T. v. State, 694 So.2d 720 (Fla. 1997)." In the second appeal, Sigler acknowledged that the issue presented had already been rejected in Sigler I and was thus law of the case.

SUMMARY OF THE ARGUMENT

The decision of the fourth district court of appeal is erroneous since adherence to Sigler I would not be a manifest injustice. The lower court concluded that to adhere to its earlier decision in Sigler I would be a manifest injustice since that case applied s. 924.34 which the court opined violates Sigler's right to a jury trial as guaranteed by the Sixth Amendment. The State respectfully submits this is error. Contrary to the finding of the lower court, the conviction for third degree felony murder would not be in conflict with the jury's finding that Sigler is not guilty of the charged offense. There is nothing in the record that indicates Sigler's jury did not consider the lesser offense. Also, the lower court misconstrued the decisions of the United States Supreme Court in Apprendi and Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 2531 (2004). Unlike those cases, s. 924.34 does not authorize a court to increase a defendant's sentence. Finally, even if this Court were to conclude Sigler's conviction for third degree felony murder could not stand, a new trial is unnecessary, since the Jury necessarily would have had to find that Sigler is guilty of the necessary lesser included offense of manslaughter by culpable negligence. Thus, this Court could constitutionally remand this case for imposition of a conviction for that offense.

ARGUMENT

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

Sigler argued below for the fourth time that his conviction for third degree felony murder violates the Jury Clauses of the Sixth Amendment and Art. I, §§ 16 and 22, Fla. Const. [4] The State responded that this argument, having previously been raised in Sigler I is barred under the doctrine of law of the case. The Court below correctly recognized that Sigler's argument would be barred under the law the case doctrine unless he can demonstrate that reliance on the previous decision in Sigler I would result in manifest injustice. Sigler II (citing Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980); Zolache v. State, 687 So.2d 298, 299 (Fla. 4th DCA 1997)). The Fourth District Court of Appeal concluded that in this case, reliance on that court's previous decision would result in a "manifest injustice." Sigler II. The State respectfully submits this is error.

The general rule of course is that all points of law previously decided by a

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[4]The first time Sigler raised his constitutional argument was in his motion for rehearing in Sigler I. Next, he raised it again in his jurisdictional brief on petition for review in this Court. Sigler v. State, 823 So.2d 126 (Fla. 2002). He raised it a third time before the trial court in his motion to dismiss (2R 20-26). Finally, he raised it below on appeal in Sigler II.

majority of the court become law of the case and thus, cannot be re-litigated. Greene; Wallace v. P.L. Dodge Memorial Hospital, 399 So.2d 114, 115-16 (Fla. 3d DCA 1981). Where however reliance upon that previous decision would result in a "manifest injustice," the points of law raised and previously considered may be reconsidered. Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994), cert. denied, 516 U.S. 830 (1995); State v. Stabile, 443 So.2d 398, 400 (Fla. 4th DCA 1984); *see also* Perez v. State, 767 So.2d 609 (Fla. 3d DCA 2000); Smith v. State, 669 So.2d 1133, 1134 (Fla. 3d DCA 1996); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984); see also U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983) (holding that doctrine of law of the case is limited to rulings on questions of law actually presented and considered on former appeal); Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965) (noting that "an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons--and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule"); 3 Florida Jury. 2d, Appellate Review § 445; Isom v. State, 800 So.2d 292 (Fla. 3rd DCA 2001); Fraley v. State, 28 Fla. L. Weekly D1756 (3d DCA July 30, 2003).

Initially, it should be noted that in Sigler I, Sigler acknowledged that s. 924.34 authorizes an appellate court to order that a conviction be reduced to a category one

necessarily lesser-included offense or category two permissive lesser-included offense. *See also*, I.T. v. State, 694 So.2d 720 (Fla. 1997). He then went on to argue, albeit unsuccessfully there was insufficient evidence to support his conviction for the lesser offense of the third degree felony murder. For the reasons that will be discussed more fully, the State submits the lower court incorrectly determined that reliance on its previous decision in Sigler I would result in a manifest injustice.

In Sigler I, the Fourth District Court of Appeal held that the evidence was insufficient to support Sigler's conviction for second-degree murder. However, that court concluded that there was sufficient evidence to support his conviction as a principal for third-degree felony murder, with the underlying felony being harboring an escaped prisoner-i.e. Sigler. Having found the evidence to be insufficient to support the second-degree murder conviction, the Fourth District Court of Appeal relied on s. 924.34,[5] as well as this Court's decision in I.T. and remanded the case for entry of

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[5]Section 924.34, Florida Statutes states:

> 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 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.

a conviction for this lesser offense. Sigler I.

In Sigler II, another panel of the court agreed with Sigler and determined that reliance on the decision in Sigler I would be a manifest injustice because the application of s. 924.34 in that case would be unconstitutional. The lower court reasoned that this true because an appellate court (as opposed to a jury) determined Sigler's guilt as to the underlying felony of harboring an escaped prisoner. The lower court further opined that Sigler's third-degree felony murder conviction could conflict with the jury's finding him not guilty on the charge of first-degree felony murder:

> We ourselves now take notice that the jury actually exonerated defendant of the charge of first degree felony murder--which, like third degree felony murder, required proof of an underlying felony. Because the verdict in this case is general, we have no way of ascertaining which element of first degree felony murder was not proved beyond a reasonable doubt. To give the jury determination its appropriate effect, we should necessarily indulge the assumption that the jury could well have based its decision on the failure of the evidence to prove an underlying felony. Hence, a conviction for third degree felony murder may actually conflict with that precise finding by the jury.

The State respectfully submits this analysis is flawed. Indeed, Sigler's conviction would not conflict with the jury's finding. This is true since the underlying

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Further, this Court in I.T. held that this section applies to permissive lesser offenses as well.

felony for the charged offense is escape[6], whereas the underlying one for third degree felony murder is harboring an escaped prisoner[7]. The State submits these two underlying felonies are entirely different crimes. To be sure, it is entirely plausible that the jury determined that because Sigler and Michelson had reached a safe harbor- i.e. the motel, the crime of escape was completed, and the homicide which occurred the day after, was not in furtherance of that offense. [8] However, this would not be inconsistent with a conviction for third-degree felony murder since there is competent substantial evidence that the death of the victim occurred while Michelson and Sigler were in the commission of the crime of harboring an escaped prisoner. It follows that there is no conflict between the verdict and the third-degree felony murder conviction.

In addition to this, the lower court, citing Pratt v. State, 668 So.2d 1007 (Fla. 1st DCA), approved, 682 So.2d 1096 (Fla. 1996), reasoned that Sigler I cannot survive because there was no jury determination beyond a reasonable doubt as to each element of third degree felony murder, and thus, Sigler cannot be convicted of that offense. The State respectfully disagrees and submits the lower court's reliance on

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[6]§ 944.40, Fla. Stat. (1997)

[7]§ 944.46, Fla. Stat. (1997).

[8]The State points out that Sigler argued this to the jury (T 2018; 2028; 2108-9; 2115).

Pratt is misplaced for two reasons. The State submits that Pratt and as well as this Court's decision in State v. Gray, 654 So.2d 552, 553-54 (Fla. 1995)(holding that offense of attempted second degree murder is no longer a crime in Florida), have nothing to do with the decision rendered in Sigler I. Indeed, in Pratt the defendant was charged with attempted second-degree murder with a weapon, but was convicted of attempted third-degree felony murder. Id. The First District reversed the defendant's conviction because at that time, the defendant had been convicted of a non-existent crime. 668 So.2d at 1007.

The court was then confronted with issue of a remedy on remand. Pratt argued that he was entitled to a discharge or, alternatively, entry of a judgment for aggravated battery, a Category 2 permissively included lesser offense of the charged offense. Id. at 1008. The State on the other hand argued that, pursuant to s. 924.34, Pratt should be adjudicated and sentenced for attempted manslaughter, a Category 1 necessarily included lesser offense of the charged crime. Pratt, 668 So.2d at 1008. The Court rejected the State's argument and concluded that s. 924.34 was inapplicable since the defendant's conviction was "'not being vacated due to insufficiency of evidence' as specified literally in section 924.34."

Therefore, in Pratt, it is clear that the issue was whether it was proper for the district court to use s. 924.34 as a basis to remand the case back to the trial court for

an entry of judgment to a lesser offense of a nonexistent crime. To the contrary, Sigler was convicted of second degree murder. Thus, there is no issue as to whether it was proper for the appellate court to rely upon s. 924.34 in directing the trial court to enter a judgment for the lesser offense of third degree felony murder. The issue the court in Sigler I was faced with was whether the evidence adduced at trial was sufficient to support the conviction for second degree murder. The court held that it was not and remanded it back for judgment on the lesser charge upon the authority of s. 924.34 and I.T. It follows that Pratt is distinguishable on this basis alone.

Second, Pratt is distinguishable for yet another reason. In that case, the record was clear that the jury necessarily found that the defendant did not have the requisite intent required to sustain a conviction for attempted manslaughter. Id. This is so because it found the defendant guilty of attempted third-degree felony murder which does not contain the element of intent. Id. Thus, the Court concluded:

> 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.

Id. at 1009.

The State submits the facts at bar are quite different. Indeed, there is no indication in the record that the jury did not *consider* whether Sigler was guilty of third-degree felony murder in furtherance of the crime of harboring an escaped prisoner. To be sure, the jury was given this charge, *inter alia*, to consider (T 2117). Further, the evidence in the record supports the conviction for third degree felony murder. Thus, the Court in Sigler I did not direct that a conviction be entered for a crime which the jury did not necessarily consider and which is not supported by the record.

The lower court also relies on Franks v. Alford, 820 F.2d 345 (10th Cir. 1987) to support its conclusion that Sigler's conviction violates his right to a jury trial. However, the State submits Franks is distinguishable as well. In Franks, the Tenth Circuit held that the defendant's right to a jury trial was violated because on direct appeal, the state appellate court (as opposed to the defendant's jury) having found the evidence to be insufficient to support the conviction on the greater charge of first degree felony murder, directed that a conviction be entered for the lesser charge of second degree murder.

The Franks Court noted that crime of second degree murder required proof of an element, i.e. the defendant's mental state, that first degree felony murder did not.

Id. More importantly however, it found that the defendant's jury never had the opportunity to pass upon this element, because the trial court judge instructed the jury that if it found the defendant guilty of first degree murder, it should not consider the offense of second degree murder. Id. at 347(emphasis in original).

At bar, the trial judge in this case did no such thing (T 2116-43). Indeed, the trial court merely advised the jury that if it decided that the primary charge, first degree felony murder, had not been proven, the jury would next need to decide if Sigler was guilty of any lesser included crimes, including third degree felony murder (SR, Tr. 2117)(e.s.). In addition, the trial judge reviewed the verdict form, including the "*possible*" verdicts, and instructed the jury to select one (T 2139-40). Thus, although the jury was instructed that they may only return with 1 verdict, there was no admonition by the trial court, as was the case in Franks, that the jury should not consider whether Sigler was guilty of any of the lesser charges, including third degree murder. The State submits this was the touchstone underlying the holding in Franks, Thus, Franks also is distinguishable.

Similarly the State submits the lower court misconstrued the holdings in Apprendi and Blakely. In those cases, the Sixth Amendment violation arose because the trial court (as opposed to a jury) made factual findings which resulted in an *increase* in the defendants' sentences beyond the prescribed statutory penalties. In

Apprendi, the defendant pled guilty to, *inter alia*, a second-degree felony, which ordinarily carries a prescribed statutory sentence of between 5 and 10 years. However, the trial judge made a factual finding by a preponderance of the evidence that the defendant in committing the offense "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." As a result of this finding, the trial court imposed an "enhanced" or upward departure sentence of 12 years, thus exceeding the statutory sentence range for the offense the defendant had pled to. 530 U.S. at 468-71.

Similarly, in Blakely the defendant pled guilty to kidnaping which carried a maximum guideline sentence of 53 months. However at sentencing, the trial court made a factual finding that the defendant acted with "deliberate cruelty," and under the State sentencing law, imposed an upward departure sentence of 90 months, which exceeded the maximum guideline sentence of 53 months by almost 70% Id. at 2534. The Supreme Court held this increase violated the defendant's Sixth Amendment right to a trial by jury. The Court stated, "this case requires us to apply the rule we expressed in [Apprendi]: 'Other than the fact of a prior conviction, any fact *that increases the penalty for a crime beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.'" 124 S.Ct at 2536 (e.s.).

At bar, s. 923.34 and I.T. only authorize a district court to direct the trial court

to enter a conviction for a *lesser* offense. Unlike Apprendi and Blakely, neither s. 924.34 nor I.T. permit a court to make findings of fact the effect of which would enhance a defendant's sentence. To be sure, the Court in Sigler I did not *increase* Sigler's sentence. Rather, after finding the evidence to be insufficient to sustain the second-degree murder conviction, the court in Sigler I remanded the case for entry of a conviction for the lesser offense of third-degree felony murder. To be sure, second-degree murder is a first degree felony, which carries a maximum sentence of up to life. § 782.04(2), Fla. Stat. (1997). Sigler was originally sentenced on that conviction to serve life in State prison with a fifteen-year minimum mandatory term as a habitual violent felony offender (R 5).

On the other hand, third-degree felony murder is a second degree felony. § 782.04(4), Fla. Stat. (1997). On remand, Sigler's life sentence was vacated and he was re-sentenced as a habitual violent felony offender to serve thirty (30) years, with a ten-year (10) minimum mandatory term (2T 33-4; 2R 33-9). Thus, the effect of Sigler I and s. 924.34 is that Sigler's sentence was significantly *reduced*. It follows that Apprendi and Blakely have no application to the case at bar and therefore, should not be construed to hold s. 924.34 and I.T. unconstitutional. This is especially true when one considers that in Apprendi, the New Jersey statute at issue there removed altogether from the jury's consideration the task of determining a factual issue as to

whether the crime committed was motivated by bias or race, and assigned the role to the trial judge using a lesser standard of proof, all to be used to enhance the defendant's sentence above the statutory maximum. Id. at 468-69. At bar, the charge and evidence in support of Sigler's third-degree felony murder conviction was submitted to Sigler's jury with the instruction that any finding of guilt must be unanimous and beyond a reasonable doubt. Consequently, the lower court's reliance on Apprendi and Blakely for the proposition that s. 924.34 is unconstitutional is misplaced.

Also, the State submits that reliance on Sigler I would not result in a manifest injustice for the reason that the constitutional error alleged has been held to be subject to harmless error. In Neder v. United States, 527 U.S. 1 (1999), the Supreme Court held it was error for the trial court to make a finding on an essential element of the charged offense rather than submitting it to the jury. Id. at 4. Nonetheless, the Court held such an error is subject to a harmless error analysis under Chapman v. California, 386 U.S. 18 (1967). 527 U.S. at 4. The Court explained:

> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Our decision in Johnson v. United States, [520 U.S. 461 (1997)], is instructive. Johnson was a perjury prosecution in which, as here, the element of

> materiality was decided by the judge rather than submitted to the jury. The defendant failed to object at trial, and we thus reviewed her claim for "plain error." Although reserving the question whether the omission of an element ipso facto "affects substantial rights," id. at 468-469, we concluded that the error did not warrant correction in light of the "'overwhelming'" and "uncontroverted" evidence supporting materiality, id. at 470. Based on this evidence, we explained, the error did not "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" Ibid. (quoting United States v. Olano, 507 U.S. 725, 736, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)).

527 U.S. at 9 (emphasis in original).

Likewise, in United States v. Cotton, 535 U.S. 625 (2002), the Supreme Court held that where a defendant fails to raise an Apprendi claim that the indictment fails to allege a fact that enhances the statutory maximum, the forfeited claim does not satisfy the "plain-error" standard that would justify vacation of the conviction on appeal. As it did in Johnson, the Court reasoned that an unpreserved Apprendi claim is one that does "not seriously affect the fairness, integrity, or public reputation of judicial proceedings." 535 U.S. at 632-3. To be sure, the Court recognized the "important role of a petit jury" in a criminal trial. Nonetheless, the Court found that such a "constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." 535 U.S. at 634.

It follows that if both Neder and Cotton stand for the proposition that

erroneously submitting an element of crime charged to the trial court, rather than a defendant's jury, as was the case in Neder, or that failing to allege a fact in the charging document that enhances the statutory maximum, as was issue in Cotton do not "seriously affect the fairness, integrity or public reputation of judicial proceedings,"then it would logically follow that the lower court's reliance on the decision in Sigler I cannot result in a manifest injustice. Indeed, just as in Neder and Cotton for that matter, at bar there was "overwhelming" and "uncontroverted" evidence to support a conviction of third degree felony murder.

This conclusion is further underscored by the reasoning in Schriro v. Summerlin, ___ U.S. ___, 124 S.Ct. 2519 (2004), which held that its decision in Ring v. Arizona, 536 U.S. 584 (2002)(extending the rule announced in Apprendi to death sentences) announced a rule that was procedural (vs. substantive) and was thus, not entitled to retroactive application under Teague v. Lane, 489 U.S. 288 (1989). 124 S.Ct. at 2523. The Court characterized the rules announced in Ring and Apprendi as being among the class of "prototypical procedural rules," which are undeserving of retroactive application. 124 S.Ct. at 2523; *see also*, DeStafano v. Woods, 392 U.S. 631 (1968)(refusing to give retroactive effect to Duncan v. Louisiana, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States).

In DeStefano, the Court reasoned that:

> [A]lthough 'the right to jury trial generally tends to prevent arbitrariness and repression[,] ... '[w]e would not assert ... that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'' 392 U.S., at 633-634, 88 S.Ct. 2093 (quoting Duncan, supra, at 158, 88 S.Ct. 1444). We concluded that '[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.' 392 U.S., at 634, 88 S.Ct. 2093.

124 S.Ct. at 2525.

Extending the reasoning in DeStefano to the its finding the rule announced in Ring and Apprendi is procedural, the Court in Schriro concluded, "If under DeStefano a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be. 124 S.Ct. at 2526. Thus, since Schriro makes it clear that the rule announced in Apprendi and Ring is procedural and not subject to retroactive application, the State submits the lower court's holding that reliance on the decision Sigler I would be a "manifest injustice" is error.

Moreover, the decision of the lower court held s. 924.34 unconstitutional as applied to Sigler in this case. This decision if upheld will have far-reaching

consequences on all criminal trials in this State. Indeed, a fair reading of the decision below suggests that where on appeal a defendant, like Sigler, argues that the evidence is insufficient to support the conviction, an appellate court could constitutionally apply s. 924.34 and direct the trial court to enter of a conviction for a lesser offense only if it is clear that the defendant's jury determines beyond a reasonable doubt that defendant is indeed guilty of that lesser offense. The problem with this is that jury in a criminal case will necessarily have to make special findings for every lesser offense, in addition to the those charged. This is especially true for a case where there are numerous charges and each charge itself has numerous lesser offenses. In such a case, the result would lead to confusion and extremely long periods of deliberation.

Remedy on Remand. Lastly, the Fourth District reversed Sigler's conviction and remanded for a new trial. The State submits even if this Court determines that Sigler's third-degree murder conviction cannot withstand constitutional scrutiny, a new trial is unnecessary. Instead, this Court could remand the case for entry of a conviction for manslaughter by culpable negligence, § 782.07, Fla. Stat. (1997). This is true 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. *See*, Ellison v. State, 547 So.2d 1003 (Fla. 1st

DCA 1989), aff'd in part, quashed in part, 561 So.2d 576 (Fla. 1990). Hence, there would be no Jury Clause violation. Also, by doing this, this Court would avoid the necessity of having to pass upon the constitutionality of s. 924.34. *See*, State v. Jefferson, 758 So.2d 661, 664 (Fla.2000)("Wherever possible, statutes should be construed in such a manner so as to avoid an unconstitutional result."); *See, e.g.*, State v. Mitro, 700 So.2d 643, 645 (Fla.1997); Walker v. Bentley, 678 So.2d 1265, 1267 (Fla.1996); State v. Stalder, 630 So.2d 1072, 1076 (Fla.1994); Gray v. Central Fla. Lumber Co., 104 Fla. 446, 451, 140 So. 320, 323 (1932). Based on this, even if this Court were to agree that Sigler's third-degree murder conviction cannot withstand constitutional scrutiny, the case should then be remanded for entry of a conviction of manslaughter by culpable negligence.

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 for further proceedings

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 October, 2004.

/s/__________________________
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 October, 2004.

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