IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC08-2321**

SANTO HERNANDEZ,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
CASE NUMBER 3D07-715

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State accepts, without adopting, the Defendant's Statement of the Case and Facts, noting only that pertinent supplemental facts are contained in the Argument presented herein.

SUMMARY OF THE ARGUMENT

The decision below properly found that there was sufficient evidence presented to show a transaction for an amount of cocaine in excess of the twenty-eight gram minimum for a conviction of trafficking. This evidence was in part established by evidence of the purchase price and inferential value determined by, *inter alia*, Defendant's own assertions. The court below correctly noted that no reasonable hypothesis contradicting this element of the offense was presented at trial or on appeal. As such, the predicate offense for the felony murder conviction was proven by competent, substantial evidence, and properly affirmed.

Defendant also argues that, should this Court find that the amount of the transaction was not proven, that a directed judgment for a lesser-included offense cannot be entered. This Court should decline to reach this issue because it is not within the conflict presented in the Petition. However, this Court's precedent also does not preclude a directed judgment as the necessary facts were found by the jury to support either permissive or necessarily lesser-included offenses.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE UNDERLYING OFFENSE OF TRAFFICKING IN COCAINE IN THE FELONY MURDER CONVICTION.

a. Standard of Review

"As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the [decision]." *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)(*quoting*, *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)). A special standard of review does apply when the evidence is wholly circumstantial: the evidence must be reviewed in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. *Crain v. State*, 894 So. 2d 59, 71 (Fla. 2004)(*citing*, *State v. Law*, 559 So. 2d 187, 189 (Fla. 1989)). The only element of the conviction that rests upon circumstantial evidence is whether the quantity is sufficient to support trafficking under *§ 893.135(b)(1), Florida Statutes*.

b. Proof that Defendant intended to traffic in more than twenty-eight grams of cocaine was adequately provided by testimony regarding price and value and the physical circumstances of the transaction.

Defendant argues that the district court's opinion in this case conflicts with *Williams v. State*, 592 So. 2d 737 (Fla. 1st DCA 1992), and relies erroneously on *Brooks v. State*, 762 So. 2d 879 (Fla. 2000). *See*, *Hernandez v. State*, 994 So. 2d 488 (Fla. 3d DCA 2008). To the contrary, *Williams* can be distinguished on the facts, and *Brooks* is cited only for the narrow principle that the offense of attempted trafficking does not require "proof that the substance involved is actually cocaine." *Id*. at 490. This principle is not contested in Defendant's instant petition. All that is contested is whether a sufficient quantity was established to prove the underlying felony of trafficking in cocaine under *section § 893.135(b)(1), Florida Statutes*. The district court applied common sense and ordinary mathematics to the evidence adduced at trial to find that Defendant had engaged in attempted trafficking, and cited its decision in *Madruga v. State*, 434 So. 2d 331 (Fla. 3d DCA 1983), for the principle that Defendant failed to make any showing that the amount involved was less than 28 grams. *Id*.

The relevant evidence came from both the direct evidence of Defendant's own sworn statement to police and the corroborating evidence of the phone calls that occurred between Defendant and the victim, George Collazo. Defendant stated to the police that Ricky Valle and Mr. Collazo were introduced to each other

by Defendant so that Mr. Valle could buy cocaine from Mr. Collazo. (R. 468-69). Defendant set up the transaction so that it would occur at the house where he was living with his girlfriend, Vicky Rodriguez. In Defendant's own words, he visited Mr. Collazo at the latter's place of business prior to the planned transaction and placed several calls to both Mr. Collazo and Mr. Valle as a middleman in the transaction. (R. 471-72).

The statement about the calls being placed was amply confirmed by the cell phone records admitted into evidence at trial, which showed that Defendant placed seven calls to Mr. Collazo between 8:54 a.m. and 11:26 a.m. on the morning of the transaction. (T. 501-02). Mr. Collazo placed six calls to Defendant between 9:58 a.m. and 11:56 a.m. that morning. (T. 500-01). This shows that Defendant was an essential part of, and a principal to the planned transaction.

By Defendant's own statement, Mr. Valle was supposed to be paying thirty thousand dollars ($30,000) in the transaction. (R. 472). When Mr. Valle arrived at the house, Defendant stated that he was carrying a bag. *Id*. Defendant stated that when Mr. Collazo arrived, he was carrying a box that was "about 3, 2 feet" in size. (R. 474). This is entirely consistent with Defendant's previous statement that Mr. Valle was the buyer and Mr. Collazo was the seller. The clear inference is that Defendant's intent was for Mr. Valle to bring thirty thousand dollars, which Defendant presumed and intended that Mr. Valle have with him in the bag, and

that Mr. Collazo bring thirty thousand dollars worth of cocaine, which Defendant presumed and intended that Mr. Collazo have with him in the box he was carrying. No other reasonable inference can be drawn that would successfully bring the parties together that morning. If either Mr. Collazo or Mr. Valle had reneged on the bargain, that would be beyond the knowledge and intent of Defendant prior to the meeting. Because Defendant was the means of communication between Mr. Collazo and Mr. Valle, he had to assume that he knew what each party intended individually, and because he made the overt act of communicating each party's intention to the other party, he shared in that intent and acted as a principal in the crime of attempted trafficking in cocaine. *See*, *Brooks*, *supra*.

Though not presented here, Defendant argued below that there was conflicting evidence suggesting that the substance involved might or might not have been counterfeit. Defendant himself stated to police that there was a box of counterfeit cocaine that Ms. Rodriguez found in a drawer in their bedroom after the incident. (R. 495). He said that he told her to flush it down the toilet because it was no good. *Id*. He also stated that he had received the counterfeit cocaine from Mr. Collazo a long time before the incident and that Mr. Collazo had told him it was not real but asked him to keep it at his house. *Id*. Ms. Rodriguez testified that Defendant had called after he moved out and told her about a package that he wanted her to bring to him. (T. 512). She described it variously as "just a white

box," and "a package, a white package." (T. 512, 513). She testified: "It was cocaine. It was not real. It was fake." (T. 514). However, she also testified "he didn't say it was fake." *Id*. She got rid of it by flushing it down the toilet. (T. 513).

Mr. Morales testified that Defendant told him several different stories during the time they were in jail together: "He would come and give me a story and then he would do another one, give me another one, and I wrote them down." (T. 626). In one story, "he had manufactured 10 kilos of false or fake cocaine and had them ready to deliver to Collazo." (T. 628). This story obviously conflicts with the statement Defendant gave to police because in that statement Mr. Collazo was the seller, not the buyer. (R. 473). Mr. Morales testified that Defendant told him that when Mr. Collazo arrived, Defendant asked him if he had brought the money and Mr. Collazo said he had. (T. 628). Mr. Morales testified that Defendant had told him the amount was approximately $220,000 to $230,000. *Id*. This amount also conflicts with the amount involved according to Defendant's statement to police, which was $30,000. (R. 472).

Under *Brown*, "all conflicts in the evidence and all reasonable inferences therefrom [must be] resolved in favor of the verdict on appeal." 959 So. 2d at 149. The verdict establishes that the jury found that it was Defendant's intent to traffic in cocaine, meaning in an amount greater than 28 grams. Although the jury was

entitled to discount the statements Defendant made to a fellow inmate as braggadocio,[1] the statements establish an important fact: that Defendant believed it was reasonable to engage in a drug transaction where 10 kilos of cocaine were exchanged for $220,000 to $230,000. Because the jury was only required to determine Defendant's intent in order to find him guilty of attempted trafficking in cocaine, it does not matter whether such a purchase price is objectively valid. The jury was entitled to apply Defendant's own statement of value to his statement to police that the transaction was to be for $30,000 worth of cocaine. Simple math shows that, applying Defendant's own valuation, $30,000 would purchase at least 1,300 grams of cocaine, more than forty-six times the twenty-eight gram minimum amount necessary to establish felony trafficking in cocaine under *§ 893.135(b)(1), Florida Statutes*.

Defendant now complains that this alternative evidence of the value of the

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[1] Mr. Morales testified on cross-examination that Defendant had also stated that he had collected $300,000 from a group called Casa Romero for a contract killing on the two individuals, (T. 669); that his brother had soon after bought a boat, chains and watches after recovering the gun and money from the attic of a Peruvian woman, or alternatively from Ms. Rodriguez' attic, presumably where it had been secreted by Defendant, (T. 670, 673); that Defendant had purchased a ranch in Broward County and put it in his aunt's name, (T. 674); that Defendant had just purchased a 2002 Acura car, (T. 676); that Defendant had purchased a tractor-trailer and put it in his father's name, *Id*.; and that Defendant's brother was currently looking for a ranch in Peru, presumably to be paid for with Defendant's money, *Id*.

cocaine in this transaction was treated by the district court as an alternative theory of guilt that may or may not have been found by the jury. However, the issue was whether the amount of cocaine was sufficient to establish trafficking, not which of Defendant's stories, if either, was selected as true by the jury. The district court explicitly held: "The jury could have concluded that such a transaction involves an ounce or more." *Hernandez*, 994 So. 2d at 490. In addition, the court noted that other facts supported such a conclusion, for example because twenty-eight grams of cocaine, roughly an ounce, was hardly an amount that would be carried in a box that was two or three feet in size, as Defendant stated that Mr. Collazo was carrying. (R. 474). Such an amount would be easily carried in one's pocket and could not possibly command a $30,000 purchase price.

Although the courts of this state have not previously examined the use of price and value testimony to establish the element of quantity, New York's highest court has written with common sense concerning the weight element of a trafficking offense: "Often there will be evidence from which ***the requisite knowledge may be deduced***, such as negotiations concerning weight, potency or ***price***. *People v. Sanchez*, 652 N.E.2d 925, 928 (N.Y. 1995)(*quotations omitted, emphasis added*). The *Sanchez* opinion specifically noted: "[w]here there is evidence of the price paid for a quantity of drugs, then there is evidence defendant knew its weight, since value is based on weight." *Id*. at 929. In *Sanchez*, the court

actually reviewed the convictions of two similarly situated defendants, finding the evidence sufficient for the conviction of Defendant Sanchez, where the evidence suggested "more than twice the threshold amount," but not sufficient for Defendant Garcia "because the amount possessed was so close to the statutory limit." *Id*. Here, the valuation using Defendant's own price data, as noted above, yields an amount far above the threshold. This, among other facts, serves to distinguish *Williams*, as well.

In *Williams*, the First District concluded that circumstantial and direct evidence was insufficient to support a charge of trafficking in cocaine. 592 So. 2d at 739. The circumstantial evidence was conflicting, with a confidential source stating that an undercover officer was supposed to pay $2,000 for two ounces of cocaine. *Id*. at 738. The officer herself testified that her understanding was "that the transaction would involve one ounce of cocaine for $1,300." *Id*. The officer also admitted that she was only "provided with $1,000 for the cocaine purchase." *Id*. When the seller showed up, he showed the officer "a slab of crack cocaine purportedly worth $600." *Id*. This amount would logically be less than the one ounce predicate for the charge of trafficking. "When the officer received the cocaine from appellant, she remarked that it seemed a 'little shy of an ounce,' whereupon appellant remarked that he could get more later." *Id*. Direct evidence established that the actual amount of cocaine transacted turned out to be

approximately seventeen grams, substantially less than the twenty-eight grams, or just under an ounce, necessary to establish trafficking. *Id*.

The facts here are factually distinct on several points. First, the circumstantial evidence in this case, though just as conflicting in its versions, if not more so, than that in *Williams*, never varied from the implication that substantially more than one ounce or twenty-eight grams was involved in the transaction. Using the price in *Williams* as a comparison, Defendant's statement to police suggested a transaction of $30,000, which would work out to thirty times the minimum quantity necessary to establish trafficking. *Hernandez*, 994 So. 2d at 489. Defendant's statement to another prisoner indicated a quantity of 10,000 grams, or more than 350 times the predicate amount. *Id*. at 490. Moreover, the value of the 10,000 grams was related to the jury as being at least $220,000, leading to the logical inference that the 28 gram predicate amount would sell for at least $616, meaning that the account that only involved a $30,000 sale would still be for a quantity of more than 48 times the predicate amount. *Id*.

The court in *Williams* found that the "state presented no evidence that appellant contemplated a transaction involving an ounce or more of cocaine." 592 So. 2d at 739. The standard applied in *Williams* was that "a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *Id.* at 738 (*citing*, *State v. Law*, 559 So. 2d 187 (Fla. 1989)).

Applying that standard to the instant evidence, as the Third District properly did, showed no "reasonable doubt that the transactions described by the witnesses were for less than 28 grams." *Hernandez*, 994 So. 2d at 490. Unlike in *Williams*, no direct evidence of a lesser quantity was ever produced by either the State or Defendant. In fact, every reasonable inference from any of the testimony heard by the jury led to the conclusion that the amount involved was for more than 28 grams – 48 to 350 times more. No suggestion to the contrary was ever argued at trial.

Although not relied upon by the court below, this Court's opinion in *Brooks*, distinguished *Williams* in a similar fashion. In *Brooks*, independent testimony established that "jugglers" or rocks of crack cocaine traded in one–gram increments. 762 So. 2d at 898. Testimony further established that the defendants sought to buy fifty "jugglers" but ultimately only purchased thirty rocks. *Id*. The Court found "that this evidence was sufficient to establish that Brooks intended to obtain a specific amount of crack cocaine--28 or more grams--that was above the requisite amount to prove trafficking, and we therefore determine that there is competent, substantial evidence to support a jury verdict finding Brooks guilty of first-degree felony murder with attempted trafficking in cocaine as the underlying offense. *Id*. (footnote omitted). No greater logic is required to find that there was sufficient evidence to support the conviction here, and this Court should find that the opinion in *Hernandez* comports with the law set forth and applied in *Brooks*,

and that *Williams* is factually distinct and therefore not in conflict.

c. This Court should decline to reach the issue of a directed judgment, though its precedent suggests that one may properly be entered if the Court determines that the trafficking amount is not proven.

Defendant also argues that if this Court should find that there was insufficient evidence to establish the amount of cocaine necessary for a conviction of trafficking, this Court's decision in *State v. Sigler*, 967 So. 2d 835 (Fla. 2007) precludes the entry of a judgment for third degree felony murder. The State agrees that this Court should not enter such a judgment, but not for the reasons asserted by Defendant.

First, the issue of lesser-included offenses is beyond the scope of the conflict asserted, and was not addressed by the district court in the opinion below. *See, e.g.*, *Asbell v. State*, 715 So. 2d 258 (Fla. 1998)(declining to review second point on review as beyond the scope of conflict issue). This Court has stated: "While we have the authority to entertain issues ancillary to those in a certified case, we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case." *Trushin v. State*, 425 So. 2d 1126 (Fla. 1982)(*citation omitted*).

If the Court decides to address this issue, one must begin with the principle that *Sigler* does not preclude entry of a judgment for a permissive lesser-included

offense where the jury has made requisite findings of fact regarding each element of the lesser offense. 967 So. 2d at 845. In *Sigler*, this Court examined whether the district court could direct a judgment for third-degree murder under *section 924.34, Florida Statutes*. This Court stated: "In order for the district court to direct the trial court to enter judgment for third-degree murder, there must be a finding of a felony." *Id*. at 844.

The only issue now before this Court regarding the underlying felony is whether there was sufficient evidence to establish that Defendant was trafficking in Cocaine in an amount greater than twenty-eight grams. If this Court decides that the amount was not sufficiently proven, this leaves undisturbed the jury's finding that Defendant was involved in a transaction for what would then be an undetermined amount of cocaine. *See, e.g.*, *Ross v. State*, 528 So. 2d 1237 (Fla. 3d DCA 1988), *review denied*, 537 So. 2d 569 (trial court directed to reduce trafficking conviction to simple possession where amount of cocaine in excess of 28 grams not established). Under any circumstance, such a conviction would be a felony. *See*, § 893.13(1)(a)1, Fla. Stat. (2007)(possession with intent to sell, manufacture or deliver a schedule II controlled substance is a felony of the second degree); § 893.03(2)(a)4, Fla. Stat. (2007)(cocaine is Schedule II controlled substance); *and* § 777.04(4)(d)1, Fla. Stat. (2007)(conviction for attempt to commit a second degree felony is classified as a third degree felony). Under *Sigler*, it

would thus be permissible for the district court to direct the trial court to enter a conviction for murder in the third degree on these facts. *See*, § 782.04(4), Fla. Stat. (2007).

It would also be permissible, under *Sigler*, for the district court to direct the entry of a conviction for either second-degree (depraved mind) murder or manslaughter, because each of these offenses is a necessarily included lesser offense of first-degree felony murder. 967 So. 2d at 844 ("an appellate court cannot direct a judgment for a ***permissive*** lesser-included offense if the jury verdict did not necessarily include a finding on every element of that offense")(*emphasis added*); *see also, In re Standard Jury Instructions in Criminal Cases*, 543 So. 2d 1205, 1233 (1990); *and*, *Scurry v. State*, 521 So. 2d 1077, 1077 (Fla. 1988)("second-degree murder is a ***necessarily*** lesser included offense of first-degree felony murder")(*emphasis added*).[2]

Therefore, although the State strongly urges the Court to affirm the decision below, it respectfully argues in the alternative that the case could be remanded to

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[2] A variation of this argument is currently before this Court in *Coicou v. State*, SC04-637, where the State notes that under the doctrine of felony murder in Florida, the malice implied by the commission of the underlying felony is transferred by legal presumption to the homicide. *See*, *e.g.*, *Adams v. State*, 341 So. 2d 765, 767-768 (Fla. 1976)("Under the felony murder rule, . . . malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device").

the district court for further proceedings on the possibility of a directed judgment if this Court holds that there was not sufficient evidence of an amount of cocaine required to support a trafficking charge. If the Court decides both of these matters against the State, the State would ask for a directed judgment of second-degree (depraved mind) murder, or third-degree felony murder, or manslaughter, in descending order of preference, with the appropriate *de novo* factual finding.

CONCLUSION

Based upon the arguments and authorities cited herein, the State of Florida respectfully requests this Court approve the decision below and affirm the felony murder conviction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of the Respondent on the Merits was mailed this 30th day of November, 2009, to Manuel Alvarez, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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