IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-2321

SANTO HERNANDEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Santo Hernandez, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" designates the record on appeal; the symbol "T" refers to the transcript of the trial proceedings.

STATEMENT OF THE CASE AND FACTS

Santo Hernandez was charged by indictment with two counts of first degree felony murder.[1] The State alleged specifically that the homicides occurred while Mr. Hernandez was committing the offense of trafficking in cocaine.

On December 12, 2002, police were called to a burning truck in Hialeah which was parked on the street. Inside the passenger compartment, the charred remains of two individuals were discovered.[2] The bodies, which were wrapped in comforters, had multiple gunshot wounds.[3] Coroner Dr. Emma Lew responded to the scene and inspected the cadavers.[4] The victims were identified as George Collazo (Collazo) and Michel Aleman (Aleman).[5] An autopsy revealed that the victims had been killed before their bodies were incinerated.[6]

Detective Lionel Garcia, of the City of Hialeah Police Department, obtained the victims' cellular telephone records and noticed that Mr. Hernandez had called

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[1]R. 25-27.

[2]T. 483-86.

[3]T. 486-88.

[4]T. 736-37.

[5]T. 489.

[6]T. 738-41, 745-46.

Collazo several times that morning.[7]

The detectives also linked some of the calls to Collazo's cell phone to the residence of Vicky Rodriguez (Vicky), who was the defendant's girlfriend.[8] Vicky eventually came to the police station and consented to a search of her home. There, police found a shell casing behind an entertainment center in the living room.[9]

Vicky testified at trial that she was romantically involved with the defendant and they had a child together.[10] When she arrived home on the date of the incident, she observed a bullet hole in the front door and one of the sliding glass doors was broken.[11] Vicky asked Mr. Hernandez, who was living with her at the time, what had happened. He said that someone had driven by and shot at the house. He also said that he fell and broke the sliding glass door.[12] Vicky did not believe him and threw him out of her house. Mr. Hernandez left the residence that night.

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[7]T. 496-502.

[8]T. 543.

[9]T. 549.

[10]T. 506-07.

[11]T. 508-10.

[12]T. 511.

Vicky also identified the comforters in which the victims were wrapped as being the same ones that were missing from her home.[13] The day after the defendant moved out, she questioned him about the comforters and he said that he had thrown them away.[14]

At some point, the defendant asked Vicky to bring him a package from the townhouse which was inside a white box. When she opened the box she found counterfeit powdered cocaine and flushed it down the toilet.[15]

After his arrest, Mr. Hernandez gave a tape recorded statement to the police. Mr. Hernandez indicated that he and Collazo had been friends since they were both teenagers and he knew that Collazo occasionally sold cocaine.[16] Mr. Hernandez maintained that he had never been involved in drug dealing with either Collazo or Ricky Valle (Valle) in the past.[17] One day, Valle asked Mr. Hernandez to introduce him to Collazo because Valle needed a drug supplier. The defendant agreed to

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[13]T. 514-16.

[14]T. 516-17.

[15]T. 512-14.

[16]R. 467-68.

[17]R. 468.

help him.[18] Valle and Collazo eventually met and agreed to transact a quantity of cocaine which was unknown to Mr. Hernandez because the defendant was not a party to the negotiations, or the agreement. According to the defendant, he was merely a "middleman."

Mr. Hernandez also allowed Collazo and Valle to conduct their drug transaction at Vicky's townhouse. On the morning of the purported sale, Valle was the first to arrive. When he entered the two-story residence he was holding a bag, the contents of which are unknown. Valle said that he needed to go upstairs but did not explain why.[19] Shortly thereafter, Collazo and Aleman arrived. Collazo was carrying a box that measured three feet by two feet, the contents of which are also unknown.[20] While the defendant was having a conversation with the victims, Valle walked down the stairs wearing black gloves and then started firing a gun (which may have had a silencer).[21] He murdered both victims and then ordered Mr. Hernandez to help him clean up.[22] Mr. Hernandez said that he helped Valle dispose

[18]R. 469.

[19]R. 472.

[20]R. 474.

[21]R. 475-76.

[22]R. 477.

of the bodies because Valle threatened him and his family.[23] After the homicides, Valle left with the mystery box.[24]

A few days later, Vicky mentioned to the defendant that she had found some white powder that looked like cocaine.[25] Mr. Hernandez said that it was some fake cocaine that Collazo had given him a long time ago and asked her to flush it down the toilet.[26]

During questioning, the detective asked Mr. Hernandez how much cocaine was going to be transacted and the defendant answered that the deal involved about $30,000. There was no evidence, however, concerning the market value of cocaine and the defendant did not indicate a specific quantity of the drug.

Cesar Morales (Morales), a jailhouse informant, testified for the State. During his incarceration with the defendant, Mr. Hernandez once asked him whether a fire would eliminate fingerprints.[27] Over a period of time, the defendant told Morales about the homicides. Morales gave three different versions of the

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[23]R. 479.

[24]R. 482.

[25]R. 495.

[26]*Id.*

[27]T. 626.

defendant's admissions. First, he said that the defendant claimed that he had arranged a bogus drug sale to lure Collazo to the house in order to rob him. The defendant manufactured ten kilograms of imitation cocaine which he intended to sell to Collazo for about $230,000.[28] When Collazo and Aleman arrived at the townhouse, the defendant gave them a sample of the cocaine and then went upstairs to get a gun. He returned with a .22 caliber handgun with a silencer and shot both victims.[29] At that point, he noticed that Valle was getting nervous. The defendant threatened Valle that if he backed out, he would kill him.[30] According to the second version, when the defendant learned that Valle had blamed him for the murders, he told Morales that he would accuse Valle of the homicides.[31] The third version of the defendant's story was that he had been hired by a gang called "Casa Romeau" and was paid $300,000 to assassinate Collazo.[32]

At the close of the State's case, the defense moved for a judgment of acquittal on the grounds that the State had not established the underlying felony, *viz*.

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[28]T. 628.

[29]T. 629.

[30]*Id.*

[31]T. 630.

[32]T. 669.

trafficking in cocaine, which was the basis for the charge of first degree felony murder.[33] The court denied the motion.[34]

The jury returned a verdict finding the defendant guilty of first degree felony murder without a firearm on both counts of the indictment.[35] The defendant later filed a motion for a judgment of acquittal notwithstanding the verdict.[36] The motion argued, *inter alia*, that the evidence was legally insufficient to establish the predicate offense of trafficking in cocaine thus vitiating the first degree felony murder convictions.

The court denied the motion and sentenced Mr. Hernandez to a term of natural life in prison.[37]

Mr. Hernandez appealed his conviction and sentence to the Third District Court of Appeal. The main issue on appeal was whether the State had presented sufficient evidence to establish the quantity of cocaine in order to meet the threshold requirement for the underlying felony of trafficking in cocaine. The court

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[33]T. 753-57.

[34]T. 759.

[35]R. 543-44; T. 873.

[36]R. 569-96.

[37]R. 847-48; 859-61.

affirmed the conviction for felony murder. *Hernandez v. State*, 994 So. 2d 488 (Fla. 3d DCA 2008). The court relied on two alternative rationales to justify its conclusion that there was sufficient evidence presented by the State from which a jury could infer that the parties contemplated a sale of 28 grams or more of cocaine. First, the court reasoned that the defendant admitted that the deal involved $30,000 and it was common knowledge that the price of 28 grams of cocaine was less than $30,000. *Id.* at 490, n. 4. Secondly, the defendant confided in the jailhouse informant, Morales, that "the transaction was for 10,000 grams and for a price of $220,000 to $230,000." *Id.* at 490. The court held that this evidence would also support a jury determination that Mr. Hernandez was engaged in drug trafficking. *Id.*

A notice invoking this Court's discretionary jurisdiction based on direct conflict with *Williams v. State*, 592 So. 2d 737 (Fla. 1st DCA 1992), was filed on December 4, 2008.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erroneously held in this case that the threshold amount of cocaine required for trafficking could be established circumstantially from the purported price, without more. In this case, the circumstantial evidence of the amount involved in the sale failed to exclude every reasonable hypothesis of innocence and thus cannot sustain the underlying felony. In order to infer a trafficking amount, the lower court impermissibly stacked inferences based, in part, on the varied and questionable testimony of a jailhouse informant. Since trafficking in cocaine was the underlying felony of the two counts of first degree felony murder, the defendant's convictions for first degree murder must be reversed.

This Court must not direct the entry of a judgment for third degree felony murder because third degree felony murder is a permissive lesser offense and thus contains at least one statutory element not included in the greater offense.

ARGUMENT

WHERE THE STATE RELIED ON CIRCUMSTANTIAL EVIDENCE TO ESTABLISH A TRAFFICKING AMOUNT OF COCAINE THE EVIDENCE WAS INSUFFICIENT BECAUSE IT FAILED TO EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

In the case at bar, there was no direct evidence of a specific amount of cocaine contemplated by the parties involved in the transaction. The State's case for trafficking (or attempted trafficking) in cocaine, therefore, rested on circumstantial evidence. The lower court improperly and selectively stacked inferences to construct an alternative theory of guilt. The court also ignored the circumstantial nature of the State's proof and applied an erroneous legal standard in its analysis.

A. The evidence was legally insufficient to sustain a conviction for first degree felony murder because the State did not establish the quantity of cocaine which the parties intended to transact and thus failed to prove the underlying felony of trafficking, or attempted trafficking, in cocaine.

The evidence was legally insufficient to establish felony murder based on trafficking in cocaine as the underlying felony because the State failed to prove that Mr. Hernandez was attempting to sell, purchase, manufacture, deliver or possess 28 or more grams of cocaine at the time of the homicides.

The offense of trafficking in cocaine is defined as follows:

> [a]ny person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, . . .but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine."

§893.135(b)(1), FLA. STAT. (2005). To establish trafficking in cocaine, then, the State must prove that the defendant purchased, or attempted to purchase, 28 or more grams of actual cocaine. The requisite weight may be proved in two ways: the prosecution can present evidence of intent to purchase or possess 28 or more grams, *cf. Spera v. State,* 656 So. 2d 550 (Fla. 2d DCA 1995) (conspiracy to traffic requires agreement as to requisite amount); or, the State could show that the cocaine in question actually weighed 28 or more grams. *See Williams v. State*, 592 So. 2d 737 (Fla. 1st DCA 1992) (to support trafficking conviction, State must prove amount was 28 grams or more).

In *Williams*, 592 So. 2d 737, the court found that the evidence was insufficient to sustain a conviction for either trafficking in cocaine, or conspiracy to traffic, because there was no proof as to the specific amount of cocaine that the defendant had agreed to sell an undercover police officer. The defendant only agreed to participate in a "big deal." *Id.* at 739. Similarly, in *Spivey v. State,* 731 So. 2d 61 (Fla. 3d DCA 1999), the court held that the evidence was insufficient to

sustain a conviction for conspiracy to traffic in cocaine because there was no evidence of the specific amount that the co-conspirators intended to sell. *See also, Rodriguez v. State*, 719 So. 2d 1215, 1217 (Fla. 2d DCA 1998) (evidence must show that parties specifically agreed to transact a trafficking amount of cocaine to sustain a conviction for conspiracy to traffic).

The appellate court erroneously relied on *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), to justify its determination that there was sufficient circumstantial evidence to establish a trafficking amount of cocaine. This Court held in *Brooks*, 762 So. 2d at 893-94, that the nature of an illegal substance could be established by circumstantial evidence. In *Brooks*, a street-level crack dealer was allowed to offer an opinion that a sandwich bag, which was the subject of a robbery-homicide, contained a trafficking amount of crack cocaine. The witness testified that the defendants drove to the victim's house, from where the witness sold crack, and asked to purchase fifty rocks. The witness obtained a sandwich bag from the victim containing fifty rocks, which he personally inspected. The witness was intimately aware of the nature the bag's contents because he had sold crack supplied by the victim for two years and had sold crack earlier in the evening, which was also supplied by the victim. This Court held as follows:

In the present case, the State presented evidence that (1) Michael

> Johnson was an experienced crack cocaine dealer, having sold that drug almost every day for approximately two years; (2) Johnson never sold bad, defective, or fake crack; (3) Johnson obtained the sandwich bag which contained the substance from his long-time friend and associate, Darryl Jenkins, who was a crack cocaine user and dealer who did not sell bad, defective, or fake crack; (4) Johnson had sold drugs earlier that evening; (5) Jacqueline Thompson, who brought Brooks and Brown to the location for the purchase of rocks of crack cocaine, regularly purchased that substance from Johnson at the Jenkins home; and (6) Johnson had an opportunity to examine and inspect the rocky substance contained in the sandwich bag that he obtained from Darryl Jenkins. Under these circumstances, we find that the trial court did not clearly err in allowing Michael Johnson to express his opinion, in the form of expert testimony, that the sandwich bag contained crack cocaine.

Brooks, 762 So. 2d 879, 893-94 (citation omitted). This Court further found that the witness was qualified to opine as to the approximate weight of the rocks in the sandwich bag.

The case *sub judice* is clearly distinguishable from *Brooks*. The evidence at trial showed that Mr. Hernandez introduced Valle to Collazo so that Valle and Collazo could *independently* arrange a drug transaction. As Mr. Hernandez told the detective, he was only a middleman and he was not privy to the negotiations, nor did he enter into an agreement to purchase or sell a specific amount of narcotics. His role was simply to facilitate the relationship between Valle and Collazo. The defendant eventually allowed the parties to consummate the sale at his girlfriend's residence, where Collazo was supposedly the seller and Valle the buyer. There

was no evidence whatsoever concerning the amount of narcotics that Valle and Collazo were going transact, nor were the drugs ever found and weighed.

The weight of the cocaine involved in the purported sale was derived conjecturally from its price. The appellate court treated the notion that $30,000 represented more than twenty-eight grams of cocaine as a matter of common knowledge and implied that such knowledge could be imputed to a jury.

> Trial judges at the criminal court, prosecutors, defense lawyers — and probably even many jurors — know from other cases and news accounts that the price of an ounce of cocaine was (in 2002) and is far less than $30,000. The "price for quantity" data, though best known by criminals, is also publicized by law enforcement as one metric regarding the efforts to cut the supply chain. The State could have established street values rather easily. The State's evidence, however, included other facts sufficient to allow the jury to conclude that the quantity was 28 grams or more.

Hernandez v. State,994 So. 2d 488, 490, n. 4 (Fla. 3d DCA 2008). Significantly, the lower court noted that "[t]he State *could have* established street values rather easily." The salient point, however, is that the State did not establish the street value of cocaine. In the absence of expert testimony regarding the market

value of cocaine in South Florida at the time of the incident, it was impossible for a jury to rationally infer a trafficking amount solely from Mr. Hernandez's statement that he believed the deal involved $30,000.

B. <u>The appellate court improperly relied on an alternative theory of guilt in order to extrapolate a trafficking amount of cocaine.</u>

The appellate court based its determination that the transaction involved a trafficking amount of cocaine on the testimony of a jailhouse informant, despite the fact that the informant testified about inconsistent versions of the events, which had been allegedly related to him by Mr. Hernandez.

The informant claimed that Mr. Hernandez had confided in him that he had manufactured ten kilograms of fake cocaine in order to lure Collazo to the house and that the deal was for about $230,000.[38] According to the second story, the defendant was allegedly paid $300,000 by a gang to murder Collazo.[39]

The appellate court reasoned that the informant's account about the ten kilogram deal was enough to show that Mr. Hernandez was engaged in attempted cocaine trafficking. *Hernandez,* 994 So. 2d at 490. There is no justification for adopting this version of the informant's account as sufficiently credible to exclude

[38]T. 628.

[39]T. 669.

every reasonable hypothesis of innocence. The appellate court inappropriately substituted itself for the jury and selected the version of the informant's story which supported a trafficking amount.[40]

The evidence for cocaine trafficking was based on circumstantial evidence. However, the evidence was insufficient because it failed to exclude the reasonable hypotheses of innocence that the deal was for less than twenty-eight grams. It was improper for the appellate court to stack inferences in order to satisfy this element of the crime.

> "Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.' Similarly ... we [have] held that ' *the circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences.*' Suspicions alone cannot satisfy the State's

[40]In the context of the harmless error analysis, this Court has repeatedly cautioned that the reviewing court must not "substitute itself for the jury." *See State v. DiGuilio,* 491 So. 2d 1129, 1135-39 (Fla. 1986).

> burden of proving guilt beyond a reasonable doubt, and the expansive inferences required to justify the verdict in this case are indeed improper."

Ballard v. State, 923 So. 2d 475, 482 (Fla. 2006) (quoting *Davis v. State*, 90 So. 2d 629, 631-32 (Fla. 1956)) (emphasis added).

Mr. Hernandez's convictions for felony murder, therefore, should have been overturned because the most essential element of trafficking in cocaine, the amount of cocaine, was not proven beyond a reasonable doubt. Because the State failed to prove the underlying felony, the convictions for first degree felony murder must be reversed.

C. This Court must not direct the entry of a judgment for third degree felony murder.

Although the defense attorneys argued below that the evidence supported convictions only for the lesser offense of third degree felony murder[41, 42] this Court should not direct the entry of a judgment for third degree felony murder under section 924.34, Florida Statutes (2009).

This Court held in *Sigler v. State*, 967 So. 2d 835 (Fla. 2007), that section

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[41]R. 578-83.

[42]T. 788-91. The defense agreed to have the third degree felony murder instruction read to the jury.

924.34 is applied unconstitutionally when the appellate court orders the entry of a judgment for a lesser included offense where the jury had not found all of the elements of the lesser offense.

Third degree felony murder is a *permissive* lesser included offense of first degree murder. *See Green v. State*, 475 So. 2d 235 (Fla. 1985). A permissive lesser included offense, by definition, contains at least one statutory element not included in the greater offense. *See Carrin v. State,* 980 So. 2d 604 (Fla. 1st DCA 2008); *Brumit v. State,* 971 So. 2d 205, 208 (Fla. 4th DCA 2007); *Nurse v. State*, 658 So. 2d 1074, 1077 (Fla. 3d DCA 1995). Therefore, it would be a denial of Mr. Hernandez's federal constitutional right to a trial by jury to enter a judgment of guilt against him where a jury has not found each and every element of the lesser offense.

CONCLUSION

Based on the foregoing arguments and authorities cited, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal and remand this case with instructions that the defendant's convictions for first degree felony murder be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this 5th day of October, 2009.

BY:_____
MANUEL ALVAREZ

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY:_____
MANUEL ALVAREZ