IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC08-2321**
Lower Tribunal Case No. 3D07-715

SANTO HERNANDEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The opinion below accurately and succinctly set forth the facts pertinent to the only issue now before the Court as follows:

> According to Hernandez's pretrial statement [a tape of which was played for the jury], his longtime friend George Collazo asked Hernandez to see if he could find someone interested in buying some cocaine from Collazo. Hernandez suggested the name of co-defendant Ricky Valle, because Hernandez had heard that Valle dealt in that business in the past. Two or three weeks later, Collazo asked Hernandez if he could use Hernandez's townhome in Hialeah for Collazo's business with Valle.
>
> The morning of the "transaction," Hernandez called Valle to see if everything was okay. Hernandez said that he was "like the middleman." No one else was present in the townhome. Valle showed up first, and Hernandez let him into the home. Valle brought in a bag and went upstairs, according to Hernandez.
>
> Hernandez recalled that the deal was to be a $30,000 sale of drugs by Collazo to Valle. Collazo and Michel Aleman arrived at the townhome. Collazo was carrying a box about two feet high, talking on a cellphone as he came through the door. Hernandez said that almost immediately after that, he saw Valle, gloved and with a gun in his hand, come from behind Collazo and Aleman and shoot each of them. . . . According to Hernandez, Valle left the townhome with the box that had been brought to the "transaction" by Collazo.

Hernandez v. State, 994 So. 2d 488, 489 (Fla. 3d DCA 2008)(footnote omitted). The district court concluded that the jurors "could fairly conclude that a box [of that size] would not be used to transport slightly less than an ounce of cocaine. *Id*.

The district court noted that a slightly different account from other testimony at trial still left the same material conclusion:

> According to Hernandez's girlfriend, Hernandez was sufficiently concerned about the "package" that remained in the townhome to want her to remove it. Whether it was real or fake cocaine, the jury could have concluded that Hernandez thought it was the $30,000 worth of cocaine brought to him by Collazo. The jury could have concluded that such a transaction involves an ounce or more [from knowledge of other cases and news accounts that the price of an ounce of cocaine was (in 2002) and is far less than $30,000].

Hernandez, 994 So. 2d at 490.

The district court also noted that another differing account from yet another witness at trial nevertheless supported a conclusion that Hernandez was engaged in attempted trafficking:

> A jailhouse informant, Cesar Morales, also testified for the prosecution. Morales testified that Hernandez admitted that on the day of the murders, Hernandez planned to give the victims 10 kilos [about 22 pounds] of fake cocaine for $220,000 to $230,000. In this account by Morales, Collazo discovered that the "cocaine" was fake and Hernandez, not Valle, fired the shots that killed the victims.

Hernandez, 994 So. 2d at 490. The district court concluded its reasoning on this issue by noting that, "[f]or his part, Hernandez has not shown a reasonable doubt that the transactions described by the witnesses were for less than 28 grams. *Id*. (*citing*, *Madruga v. State*, 434 So. 2d 331 (Fla. 3d DCA 1983)).

Defendant now argues that the Third District's opinion conflicts with *Williams v. State*, 592 So. 2d 737 (Fla. 1st DCA 1992).

SUMMARY OF THE ARGUMENT

The instant case is factually distinct from *Williams v. State*, 592 So. 2d, 737 (Fla. 1st DCA 1992), in that there is no reasonable inference that can be drawn here that supports a quantity of cocaine less than the minimum required to support a charge of trafficking, whereas in *Williams*, there was at least one circumstantial inference, not to mention direct evidence, that the amount both intended and actually delivered was less than the minimum required to establish trafficking.

Moreover, the instant case squarely follows the law and reasoning of this Court's opinion in *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), which itself distinguished *Williams* on similar grounds.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *Williams v. State*, 592 So.2d 737 (Fla. 1st DCA 1992).

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also*, Art. V, § 3(b)(3) - (4), Fla. Const. This Court's discretionary review is limited to the facts contained within the four-corners of the lower court decision. *See*, *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). "[J]urisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." *Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975).

Defendant argues that *Williams v. State*, 592 So. 2d 737 (Fla. 1st DCA 1992), conflicts with the Third District's opinion affirming his jury conviction, *Hernandez v. State*, 994 So. 2d 488 (Fla. 3d DCA 2008). In *Williams*, the First District concluded that circumstantial and direct evidence was insufficient to support a charge of trafficking in cocaine. *Id*. 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*. Unlike in *Williams*, no direct evidence of a lesser quantity was ever produced.

The standard applied in *Williams* was that "a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." 592 So. 2d 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. In fact, every reasonable inference from any of the testimony heard by the jury led to the uncontroverted conclusion that the amount involved was for more than 28 grams – 48 to 350 times more.

This Court's opinion in *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), distinguished *Williams* in a similar fashion. In *Brooks*, independent testimony established that "jugglers" or rocks of crack cocaine traded in one–gram increments. *Id*. 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.

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should decline to accept the instant case for review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 6th day of January, 2008 to Manuel Alvarez, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 NW 14th St., Miami, FL 33125.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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